SUPREME COURT OF QUEENSLAND

CITATION:	*Kelly & Anor v Slade & Anor* [2018] QCA 197
PARTIES:	**GORDON JAMES KELLY** (first appellant) **KATHLEEN MARY KELLY** (second appellant) **v** **VICKI LEE SLADE** (first respondent) **DANNY ALEXANDER SLADE** (second respondent)
FILE NO/S:	Appeal No 191 of 2018 DC No 1634 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 288
DELIVERED ON:	28 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2018
JUDGES:	Sofronoff P and Morrison JA and Atkinson J
ORDERS:	**1. Appeal allowed.** **2. The Orders made on 7 December 2017 dismissing the plaintiffs' claim and 5 March 2018 as to costs are set aside.** **3. A retrial is ordered.** **4. The costs of the first trial are reserved to the trial judge hearing the retrial.** **5. The respondents are to pay the costs of the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTION OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – NECESSITY FOR FINDING TO BE CLEARLY WRONG – where the appellants commenced proceedings to recover money which they said was agreed to be paid by the respondents in consideration of the transfer of the appellants' interests in certain farm land – where in the course of discussions regarding the transfer, two documents were drawn up in lieu of a properly executed contract – where

the learned primary judge made findings about the credibility of the witnesses but did so with reference to only part of the evidence – where the learned primary judge failed to take into account the two contemporary documents when testing the veracity of the witnesses – where this failure resulted in the learned primary judge making erroneous findings not supported by the evidence – whether a retrial should be ordered

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Guirguis Pty Ltd v Michel's Patisserie System Pty Ltd [2018] 1 Qd R 132; [2017] QCA 83, cited

COUNSEL: A N Skoien with H J Knowlman for the appellants
A B Fraser for the respondents

SOLICITORS: Blue Ocean Law Group for the appellants
BR Solicitors for the respondents

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and the orders his Honour proposes.

[2] **MORRISON JA:** The appellants[1] commenced proceedings to recover money which they said was agreed to be paid by the respondents[2] in consideration of the transfer of the appellants' interests in certain farm land at Kingaroy.[3]

[3] In its essentials the claim was that the respondents had agreed to pay Kathleen Kelly $260,000 for her one third interest, and Gordon Kelly $240,000 for his one third interest. Gordon Kelly's money was to be paid thus: $20,000 at settlement, and the balance in two years; in the meantime no interest would accrue of the balance, and Gordon Kelly would be able to continue to reside on the farm.

[4] At settlement Kathleen Kelly was paid her $260,000 and Gordon Kelly was paid his $20,000. The balance was not paid, the Slades disputing that it was ever agreed.

[5] The relief sought at trial was payment of the balance to Gordon Kelly. Kathleen Kelly was a party to the proceedings because she was a party to the agreement.

[6] After a trial the claim was dismissed on the basis that Gordon and Kathleen Kelly had failed to prove that there was a binding agreement whereby the appellants were to pay Gordon Kelly $240,000 for his interest in the land.[4]

[7] That decision is challenged on a variety of grounds which include that the learned trial judge erred:

(a) in the way his Honour assessed the evidence and made findings of fact;

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1 Gordon Kelly and his mother, Kathleen Kelly.
2 Gordon's daughter, Vicki Slade and her husband Danny Slade.
3 In these reasons it is convenient to refer to the appellants by their names and the respondents as Mr and Mrs Slade, in each case so as to distinguish them. That accords with the Reasons of the learned trial judge.
4 *Kelly & Anor v Slade & Anor* [2017] QDC 288. (**Reasons below**)

(b) in construing contemporaneous documentary evidence executed by the Slades or their solicitors;

(c) in failing to properly deal with the contemporaneous documentary evidence executed by the Slades or their solicitors; and

(d) in thereby rejecting the evidence of Gordon and Kathleen Kelly and preferring the evidence of Mr and Mrs Slade.

Some background

[8] The following is taken from the Reasons below.[5] It gives general background to the parties and how their interest in the land came about.

[9] Gordon Kelly and his wife had four children: Wayne, Graeme, Vicki (Mrs Slade) and Lisa. In about 1994, Gordon Kelly and his wife acquired the farm property. He was reliant on his wife to manage their business affairs. Gordon Kelly's wife died in 2007 at which time he discovered that he was in financial trouble of which he had been previously unaware.

[10] His son Graeme had become the owner of a half interest in the farm in 2006, and had let the mortgage repayments fall into arrears. As well, Gordon Kelly found he had significant personal debts. His mother, Kathleen Kelly, agreed to assist, buying Graeme's half interest in 2007 for $260,000. There was disputed evidence at the trial about how that sum was apportioned, Mrs Slade saying she had been told by both Gordon and Kathleen that $160,000 was for the half share and $100,000 was an advance on Gordon Kelly's inheritance to permit him to clear his debts.

[11] Kathleen Kelly moved in with Gordon Kelly in September 2007 and they continued to reside together until November 2010, when Kathleen Kelly moved out. During that period Mrs Slade provided a lot of support to Gordon Kelly, who had little experience in handling his domestic or financial affairs.

[12] Gordon Kelly intended to keep the farm until he died, and that Mrs Slade should have it after he and Kathleen Kelly died.

[13] In April 2010 Gordon Kelly and Kathleen Kelly transferred a one-third interest to Mrs Slade for no monetary consideration. Gordon Kelly's intention was that it would serve to protect the farm from any demands made by his sons if he died.

[14] In September 2010 discussions started about the sale of the whole farm to the Slades. Whilst there was considerable dispute[6] in the evidence at trial about the conversations leading to the eventual transfer of the land to the Slades, both versions had the Slades agreeing to pay:

(a) $260,000 to Kathleen Kelly for her share; and

(b) $20,000 to Gordon Kelly at settlement.

[15] The Slades sought finance from the Heritage Building Society which approved a loan of $306,000 in mid-November 2010. That approval required a capital reduction of $55,000 within six months to be paid from the sale of the Slades'

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5 Paragraphs [7]-[23].

6 Between the Kellys on the one hand and the Slades on the other.

existing home, and the provision of an executed contract of sale. No executed contract of sale was given to the Heritage Building Society, and instead it received Exhibit 4, which was prepared by Mrs Slade and executed by the Slades and Gordon Kelly.

[16] About the time that finance was approved, Kathleen Kelly moved out to live with another son, leaving Gordon Kelly in sole occupation.

[17] A Form 1 transfer form was executed identifying the consideration for the transfer as $500,000.[7]

[18] The $260,000 was paid to Kathleen Kelly, and the $20,000 was paid to Gordon Kelly. Gordon Kelly remained on the farm until September 2012 when he moved to Darwin. In 2014 he demanded the balance, and when it was not forthcoming, he commenced proceedings.

Some features of the trial

[19] Neither side adhered to their pleaded case. The evidence given was not consistent with the pleaded case of either side, though the divergences were greater on the Slades' side. However, there were no objections to that, and the case was argued on the evidence as it finally fell out.[8]

[20] That said, submissions were made as to what the learned trial judge should make of certain parts of the Slades' pleading, including the nature of parts abandoned by amendment.[9] One such part was the agreement that the Slades would pay $18,189.86 towards Gordon Kelly's credit card debt.[10] As it transpired, those debts were from several years before the agreement to transfer the farm. Another was the abandoned assertion that part of the agreement was that the Slades would pay the nursing home bond should Gordon Kelly be required to go into care.[11]

Approach of the learned trial judge

[21] The learned trial judge set out the competing versions of the evidence.[12] It was not said on the appeal that his Honour did so inaccurately, as far as it went.

[22] His Honour split the conversations into compartments, according to when they were said to have occurred on Gordon Kelly's evidence. Thus:

(a) "the first Gordon conversation" was the first time that he said he spoke to Mrs Slade about the sale of the farm, in the absence of Kathleen Kelly and Mr Slade; he offered to sell at $500,000 and she went off to get finance;[13]

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7 The circumstances in which that was executed was disputed at trial.

8 Reasons below, [25]-[31].

9 Some of these are evident from the amendments to the Slades' pleading, set out in paragraph [27] of the Reasons below.

10 Defence paragraph 6(d)(i): Reasons below [27].

11 Defence paragraph 6(d)(v): Reasons below [27].

12 Reasons below [33]-[42] for Gordon Kelly; [43]-[49] for Kathleen Kelly; [50]-[71] for Mrs Slade; and [72]-[85] for Mr Slade.

13 Reasons below [36].

(b) the "second Gordon conversation" was again in the absence of the others, when Mrs Slade told him they could not get finance for $500,000, and Gordon Kelly agreed to wait two years for the balance of his share;[14] and

(c) the "third Gordon conversation" was again in the absence of the others, when Mrs Slade offered $40,000 so he could start "moving on".[15]

[23] His Honour did the same for the evidence of Kathleen Kelly, identifying the "first Kathleen conversation" and the "second Kathleen conversation".[16]

[24] His Honour then summarised Mrs Slade's evidence, noting these features:

(a) when Mrs Slade received her one-third share it was so that she was on the title and could prevent her brothers from giving Kathleen Kelly difficulties in the event that Gordon Kelly died;[17]

(b) late one night Gordon Kelly told her that Kathleen Kelly wanted her money out of the farm, including the $100,000 that she had previously given to him; he asked the Slades to buy Kathleen Kelly's share; when Mrs Slade spoke to Mr Slade about what had been said, Mr Slade said he would only consider it if they acquired the whole farm, not just a share of it; the next day Kathleen Kelly also told Mrs Slade that she wanted her money (including the $100,000) back;[18]

(c) she got an estimated value from an agent, at $500,000;[19] and

(d) the Slades made a finance application to the Heritage Building Society, seeking $396,900;[20] then, having agreed the $20,000 figure with Gordon Kelly, she advised Heritage and the finance was approved at $306,000.[21]

[25] The learned trial judge touched upon what Mrs Slade's evidence was as to Exhibits 4 and 14.[22] I shall return to that shortly.

[26] Mr Slade's evidence was noted. He recalled being told by Mrs Slade, after he got home from night shift, that she had a conversation with Gordon Kelly about whether the Slades would help buy the farm so Kathleen Kelly could get out. He told Mrs Slade that he would only be interested in acquiring the entire farm, not a share. He recalled the estimate of value at $500,000.

[27] Mr Slade recalled two conversations after finance had been approved. In the first he told Gordon Kelly and Kathleen Kelly (in the presence of Mrs Slade) that Kathleen Kelly would receive her $260,000 and that Gordon Kelly could stay on the farm. In the second, just with Mrs Slade and Gordon Kelly, he told Gordon Kelly that he would receive his $20,000 and could stay on.[23]

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14 Reasons below [37].
15 Reasons below [38].
16 Reasons below [47]-[49].
17 Reasons below [51].
18 Reasons below [52]-[54].
19 Reasons below [56].
20 Reasons below [59].
21 Reasons below [60].
22 Reasons below [65]-[67].
23 Reasons below [80]-[81].

[28] The only other witness was a Mr Parker from the Heritage Building Society. He was not involved in the approval process, and simply gave evidence of visiting the farm and being told by the Slades what they intended. He had nothing worthwhile to add.[24]

[29] The officer at the Heritage Building Society with whom Mrs Slade dealt was not called to give evidence.

Exhibits 4 and 14

[30] The learned trial judge set out what Mrs Slade said about Exhibits 4 and 14. Before considering what his Honour said, it is useful to set out the terms of those Exhibits.

[31] Exhibit 4 was handwritten by Mrs Slade and signed by each of herself, Mr Slade and Gordon Kelly. It was addressed to "Heritage Building Society, Attention Gerald White". It said:[25]

> "I (Danny and Vicki Slade) have purchased the farm at 99 Borcharts Road Kingaroy, for agreed price of $500,000.00.
>
> A sum of $260,000.00 is to be paid to Kathleen Mary Kelly for her share.
>
> A sum of $240,000.00 is to be paid to Gordon James Kelly for his share. But under an agreement between Gordon Danny and myself Dad (Gordon) is to be paid $20 000.00 on settlement date.
>
> This written [agreement] has been agreed between all parties (Gordon Danny and I).
>
> On settlement a sum of
>
> $260,000.00 to be paid to Kathleen Kelly.
>
> $20,000.00 to be paid to Gordon Kelly.
>
> Danny Slade Vicki Slade Gordon Kelly"

[32] The evidence was that Mrs Slade faxed Exhibit 4 to Mr White on 21 December 2010. He was not called to give evidence. The obvious party to call him was the Slades. No explanation was given for their failure to do so.

[33] Exhibit 14 was a letter from the Slades' solicitor to the Heritage Building Society. It was dated 22 December 2010, before settlement of the transfer of the farm. It was sent to the Heritage Building Society the day after Exhibit 4 was sent. It read:

> "We refer to the above matter and instruct that we act for Vicki & Danny Slade in regards to the transfer of property owned by Vicki Slade, Gordon Kelly and Kathleen Kelly.
>
> We confirm that Kathleen Kelly has agreed to sell her share of the property to Vicki & Danny Slade in exchange for payment of $260,000.00.
>
> We confirm that Gordon Kelly has agreed to sell his share of the property to Vicki & Danny Slade in exchange for payment of

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24 Reasons below [86].

25 The signatures appeared under each name at the bottom.

> $240,000.00 which sum will be paid to him upon the terms of an agreement to be made up between those parties."

[34] The learned trial judge summarised what Mrs Slade said about how it was that she came to write and sign Exhibit 4:[26]

> "[65] She also gave evidence about Exhibit 4. On 21 December 2010, Heritage was preparing to settle the Transfer and loan. On that day she received an email from Wayne Bradford of Heritage seeking disbursement instructions. She responded with instructions that $260,000 be paid to Mrs Kelly's account, $20,000 to Mr Kelly's account and the balance of the loan ($26,663.29) to the Slades' own account (**Exhibit 21**).
>
> [66] She gave evidence that after sending these details, she was contacted by Gerald White of Heritage who told her that her disbursement instructions were inadequate for Heritage's needs. Her recollection was that he said that the figure needed to come up to the consideration of $500,000. She said he told her "*the previous piece of paper was just not good enough. They could use it for the account details, but it was not …able to be used as what they wanted it for*". She says that "*I do remember in the conversation it didn't matter what details. It was just that 260 was to Nana, another amount of 240, which happens to be dad's share, along with an agreement that we had with Danny, Vicki and Gordon. But the figure had to come up to 500,000*"."

[35] The Exhibit 21 referred to in that passage was a document prepared by Mrs Slade and emailed to Wayne Bradford at the Heritage Building Society. Mr Bradford was not called to give evidence. The document read:

> "To Wayne
>
> I Danny Slade and Vicki Slade would like Heritage Building Society desburse of funds into My Dads and My Nana's Account from the approved loan.
>
> An amount of $260,000.00 (Two hundred and sixty thousand dollars only) to be paid into-
>
> Kathleen Mary Kelly
>
> ANZ
>
> Kingaroy Branch
>
> BSB: 014-683
>
> Account No: 5188-95478
>
> An amount ($20,000.00 (Twenty thousand only) to be paid into-
>
> Gordon James Kelly
>
> ANZ

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26 Reasons below [65]-[66]; internal footnotes omitted.

Kingaroy Branch

BSB: 041-630

Account No: 5047-66261

The remaining funds $26,663.29 less fees are to be paid into Danny and Vicki Slades chq Account.

Regards

Danny Slade".

[36] Mr Slade gave little evidence about Exhibit 4. His evidence generally was that his wife made the arrangements and he responded to that. As to Exhibit 4 the learned trial judge summarised his evidence:[27]

> "[83] Mr Slade also dealt with Exhibit 4. He accepted that he signed the document. He recalled signing the instructions for disbursement of funds referred to in paragraph [65] above. He said that after that, his wife told him that Heritage required more information than just the disbursement information. That was the reason he signed the document."

[37] Gordon Kelly's evidence about Exhibit 4 was short. It was summarised this way by the learned trial judge:[28]

> "[41] When shown this document, he stated that he had not seen it before "all this started" (presumably referring to the proceedings). The contrary was not suggested to him in cross examination. He accepted however that his signature appeared on it and that it reflected the agreement he contended for except his recollection was that Mrs Slade had offered to pay $40,000 at settlement, not $20,000."

Dealing with credit and reliability of witnesses

[38] The learned trial judge then made general observations about the witnesses. He found that Gordon Kelly, Kathleen Kelly and Mrs Slade were unreliable historians.[29]

[39] His Honour found that Gordon Kelly was vague, his evidence lacked context and content, and he was prepared to adopt things as correct when he evidently did not understand them.[30] Kathleen Kelly was unreliable because she was determined in her views, whether they were right or not, but her confidence was misplaced because evidence was mistaken or implausible.[31]

[40] The learned trial judge found that Mrs Slade's evidence was "not compelling", frequently vague, non-responsive and she had a tendency to recount impressions rather than the facts. His Honour described her evidence as that it "was not such as to give me confidence as to its reliability". In two specific respects he found that

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27 Reasons below [83]; the reference to the document in paragraph [65] is to Exhibit 21.
28 Reasons below [41].
29 Reasons below [97].
30 Reasons below [98].
31 Reasons below [99].

she was "decisively shown to have given unreliable evidence". They were: (i) that evidence of her payments for Gordon's benefit were exaggerated and unreliable, and (ii) the note of the credit card debts totalling $18,189.86 related to debts from 2008, and that allegation was abandoned at trial.[32]

[41] The learned trial judge found that Mr Slade was forthright and reliable, but "he has conducted this case based on his trust in his wife's instructions".[33]

Analysis of the issues

[42] The learned trial judge then turned to an analysis of the issues, starting with the "key conversations relied on by the plaintiffs".[34] His Honour then analysed the evidence under various categories such as:

(a) the circumstances of Kathleen Kelly's buy-in;[35]

(b) the genesis of the transfer and the first Gordon conversation;[36]

(c) the second Gordon conversation, including the dealings with Heritage;[37]

(d) the third Gordon conversation;[38] and

(e) the second Kathleen conversation and the circumstances of the signing of the transfer.[39]

[43] At the end of that exercise the learned trial judge gave a "summary on the plaintiff's positive case":[40]

> "[171] For these reasons, I am not persuaded that the plaintiffs have established an agreement by the Slades with the Kellys which included a term that the Slades pay $240,000 to Mr Kelly for his one-third share of the Farm. There are however some other matters which should be considered, some of which favour the Slades' version, and others of which favour the Kellys' version."

[44] Having reached that conclusion the learned trial judge then turned to the other matters referred to in that paragraph. His Honour examined: (i) "why would the defendants pay full price?"; (ii) the terms of the Transfer and Stamp Duty declaration; (iii) the alleged consistency of the plaintiffs' case; and (iv) the alleged listing of the farm in August 2012.

[45] Having done that the learned trial judge turned to Exhibits 4 and 14.[41] Relevant features of his Honour's approach to their analysis are:

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32 Reasons below [101]-[104]. The $18,189.86 was in Exhibit 7, and pleaded in the defence at original paragraph 6(d)(v): see paragraph [20] above.
33 Reasons below [105]-[106].
34 Reasons below [111].
35 Reasons below [112]-[118].
36 Reasons below [119]-[134].
37 Reasons below [135]-[151].
38 Reasons below [152]-[156].
39 Reasons below [157]-[170].
40 Reasons below [171].
41 Reasons below [193]-[209].

(a) his Honour categorized them as "post-contractual documents and their preparation and adoption by the parties comprises post-contractual conduct"; therefore they were to be dealt with as "potential admissions, rather than evidence from which an informal agreement on particular terms is to be inferred";[42] and

(b) his Honour then examined Exhibit 4, paragraph by paragraph, to see what parts "favour[ed] the plaintiffs" as an admission.

[46] The learned trial judge concluded that the first sentence of the third paragraph, which read "A sum of $240,000.00 is to be paid to Gordon James Kelly for his share", was accepted to be literally false on the plaintiffs' case.[43]

[47] The learned trial judge's analysis of Exhibit 4, and whether it could be characterised as "an admission by each of the Slades that they had promised to pay Gordon Kelly $240,000 for his one-third share",[44] was then expressed in these terms:[45]

> "[203] This requires a careful consideration of the context and purpose for which the document was produced. In that regard, I find as follows.
>
> (a) **First**, the document was not voluntarily produced by Mrs Slade for the purpose of documenting her agreement with her father. Rather it was produced in a hurry on the eve of the Transfer to satisfy the demands of Heritage.
>
> (b) **Second**, Mrs Slade was told by someone at Heritage that they needed a document which dealt with the whole of the consideration. Further, while it seems likely to me that Mrs Slade was told such a document was required so that Heritage had a copy of the contract (as contemplated by the letter of offer at paragraph 10, point 5) I do not think Mrs Slade had a mature understanding of what that meant as a matter of law. She struck me as being fairly unsophisticated. Paragraph 4, for example, fails to identify Mrs Kelly as a party to the written agreement. Further despite the involvement of the Slades' solicitors in sending Exhibit 14, it was not suggested to Mrs Slade that she sought or received any legal advice about the terms of that document or Exhibit 4.
>
> (c) **Third**, I find that the document was prepared in haste.
>
> (d) **Fourth**, while the Slades were cross examined critically about the fact that the document deceived Heritage, I do not accept that it reflects dishonesty. The document was said by Mrs Slade to be something Heritage needed to complete the Transfer. It did not affect how the loan

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42 Reasons below [194]-[196].
43 Reasons below [200] and [204].
44 Reasons below [202].
45 Reasons below [203]-[209].

> funds were disbursed. Nor was there any evidence that the text of the agreement was apt to otherwise obtain any benefit for the Slades to the detriment of Heritage or anyone else.
>
> [204] Given those matters, and notwithstanding his concession in cross examination that the first sentence of paragraph 3 was literally false on his case, I accept Mr Slade's evidence that he never said to Mr Kelly that he would pay him $240,000 for his share. It was evident from Mr Slade's evidence that he left the formalities of this deal to his wife. I infer that he signed it because she asked him to do so.
>
> [205] That leaves Mrs Slade. The plaintiffs undoubtedly would contend that despite all of the above, the fact that she wrote the first sentence in paragraph 3 is an admission which sustains the plaintiffs' case. I disagree.
>
> [206] **First**, while the wording seems to support the plaintiffs, I do not consider it unequivocally does so. I note that following the first sentence comes the word "BUT" in capitals. It is open to read paragraph 3 as communicating that even though $240,000 is agreed to be paid, in fact only $20,000 will be paid. This is particularly so given my findings as to the time pressure under which the document was produced and lack of sophistication of Mrs Slade.
>
> [207] **Second**, Mrs Slade says she put that sentence in so that the total matched the consideration, as Heritage demanded, and that it would have been too complicated to put in the whole story. Although I generally have reservations about the reliability of Mrs Slade's evidence, I accept that evidence. I do so because of the matters of context identified above but also because of the findings made in the course of these reasons, particularly as to the key conversations relied upon by the plaintiffs.
>
> [208] Bearing those matters in mind, I do not think the first or fourth paragraphs take the matter any further. The first paragraph is explicable as a shorthand way of describing the transaction. The fourth is consistent with the inclusion of words required by Heritage but not fully understood by Mrs Slade or intended by Mrs Slade, to comprise a binding and precise statement of an agreement with her father.
>
> [209] Given those conclusions, Exhibit 14 does not take matters much further for the plaintiffs as an admission supporting their case."

[48] That led to the finding that "the plaintiffs have not made out that there was a binding agreement by the defendants to pay $240,000 to Gordon Kelly for Gordon Kelly's one-third share in the Farm".[46]

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46 Reasons below, [214].

Discussion

[49] Because of the way the appeal was conducted it is not necessary to set out the competing submissions. The central point concerned the construction and true significance of Exhibits 4 and 14.

[50] On the appeal particular emphasis was laid on the way in which the learned trial judge took into account Exhibits 4 and 14, which were created contemporaneously with the transaction. As mentioned above Exhibit 4 was a handwritten document called a "written agreement", created by Mrs Slade, and signed by Mr and Mrs Slade and Gordon Kelly. Exhibit 14 was a letter from the solicitor acting for Mr and Mrs Slade to their bank, confirming that Gordon Kelly had "agreed to sell his share of the property to Vicki & Danny Slade in exchange for payment of $240,000 …".

[51] The case was one where, on the findings by the learned trial judge, the witnesses who were centrally involved in the conversations concerning the sale, Gordon Kelly and Mrs Slade, were found to be unreliable in one way or another. Those findings are summarised in paragraphs [38] to [40] above.

[52] That being the case one would normally expect to find that the contemporaneous documents would assume particular significance in the assessment of the credibility and reliability of the competing versions. That did not happen here. The competing versions were summarised, and what each of them said about Exhibit 4 and what the Slades said about Exhibit 14 was recorded, but when the learned trial judge made findings about the credibility and reliability of the witnesses those Exhibits did not feature in the analysis at all.

[53] Then, when his Honour turned to an analysis of the "key conversations", once again Exhibits 4 and 14 did not feature. That is difficult to understand given the findings made about the "first Gordon conversation" and the "second Gordon conversation", where Mrs Slade's evidence was preferred to find that any conversation about a sale price of $500,000 was so general as to "not give rise to any agreement by Mrs Slade to buy the plaintiffs' interests for that sum",[47] and Mr Slade's evidence was preferred to find that there was no discussion of paying $240,000 to Gordon Kelly.[48]

[54] Further, given that a Transfer was signed listing the consideration as $500,000, Exhibit 4 and 14 assumed a greater significance in terms of the possibility that they were contemporaneous memoranda recording the agreement between the parties.

[55] The learned trial judge made no analysis of Exhibits 4 and 14 before reaching his conclusion, in paragraph [171] of the Reasons below, that the plaintiffs had failed to establish their case: see paragraph [43] above.

[56] In my respectful view, the significance of those Exhibits was self-evident. They were created by Mrs Slade on 21 and 22 December 2010, prior to settlement. In a case where there was no properly executed contract[49] and competing versions as to what was said, the contemporaneous documents would normally have been critical to the consideration of acceptance or otherwise of the evidence.

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47 Reasons below [133].

48 Reasons below [145].

49 Contrary to what the Heritage Building Society had requested as part of their approval of the loan to the Slades: AB 384, Special Condition 10, paragraph 5.

[57] In my view, the terms of Exhibit 4 compels that conclusion:[50]

(a) it commences by recording that the Slades "have purchased" the land "for **an agreed price** of $500,000";

(b) it records that "**$240,000 is to be paid** to Gordon James Kelly **for his share**";

(c) it then notes that on settlement only $20,000 will be paid to Gordon Kelly; the plain inference is that this is part of what he is otherwise to be paid "for his share"; it could hardly be suggested that the $20,000 was "for his share"; and Exhibit 14 supports that inference; and

(d) it then says "this written agreement has been agreed between all parties", naming the Slades and Gordon Kelly.

[58] When one examines Exhibit 21 in the light of Mrs Slade's evidence, the significance of Exhibit 4 becomes clearer. The Heritage asked for disbursement details. Mrs Slade responded with Exhibit 21, which simply listed that $260,000 was to go to Kathleen Kelly, $20,000 was to go to Gordon Kelly, and the balance ($26,663.29) to the Slades. After that Mr White of the Heritage called to say that Exhibit 21 was inadequate and that the figure "had to come up to $500,000". Perhaps the reason for that was because the Form 1 Transfer had already been provided, recording the consideration of $500,000. Mr White was not called to give evidence. However, whatever the explanation, nothing in what Heritage asked for could be seen to be a request for a false statement of the obligations between the parties.

[59] In the face of that Mrs Slade created Exhibit 4 and gave instructions to her solicitors which are reflected in Exhibit 14. Each of those documents records that there was an agreement with Gordon Kelly that he be paid $240,000 for his share. Mr and Mrs Slade signed Exhibit 4 before it was sent to Heritage. Plainly the inference is that they intended Heritage to believe it truthfully recorded the agreement for the farm. The same is the case with Exhibit 14, which confirms that Gordon Kelly "has agreed to sell his share … for payment of $240,000", but that payment is to be regulated by "the terms of an agreement to be made up between those parties".

[60] One difficulty with the learned judge's treatment of Exhibits 4 and 14 is that his Honour seems to have examined them only from the point of view as to whether they constituted an admission, and not their worth as contemporaneous memoranda going to credibility and reliability: see paragraph [47] above. The necessity to do so has been well accepted and was recently reaffirmed by this Court in *Guirguis Pty Ltd v Michel's Patisserie System Pty Ltd*:[51]

> "[50] Most experienced judges subscribe to the view expressed by Goff LJ in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* that it is essential 'when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities'. Goff LJ was referring to cases of fraud, but the

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50 Emphasis added.

51 [2018] 1 Qd R 132; [2017] QCA 83 at [50]-[51]; internal citations omitted.

statement is of general application. As Goff LJ observed in the same passage:

> 'It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.'

[51] This is not a recent revelation. About 60 years earlier, for example, Atkin LJ, after observing that 'an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour', confirmed that trial judges were encouraged 'to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events'. The primary judge's failure to consider and make findings about many aspects of the evidence, including evidence relevant to causation, deprived his Honour of those important tools for judging the credibility and reliability of the contentious oral evidence."

[61] There are other difficulties with the findings as to Exhibit 4.

[62] First, the learned trial judge found that it was "not voluntarily produced".[52] There is no basis that I can discern for that finding. True it is that Heritage said that Exhibit 21 was not sufficient, but that does not mean that Exhibit 4 was compelled, or that it does not accurately record what is in it.

[63] Secondly, the finding that it was "produced in a hurry" or "haste"[53] does not find support in the evidence. The speed with which it was produced certainly was slow enough to be able to get all three persons to sign it.

[64] Thirdly, the finding that Mrs Slade did not have a mature understanding "of what it meant as a matter of law" is puzzling. Nothing said by Mrs Slade suggested that. Further, Mrs Slade had been assisting with Gordon Kelly's finances for some years, had taken a transfer of a one-third share for reasons she fully understood, and negotiated with Heritage over the finance. There was no evident lack of sophistication. The additional reason given for that finding is that the fourth paragraph of Exhibit 4 does not record Kathleen Kelly as a party. But on the Slades' evidence Kathleen Kelly had already left the farm once finance was approved, by mid-November.[54] That paragraph is really directed at the fact that Gordon Kelly agreed to take $240,000 payable only as to $20,000 on settlement. Kathleen Kelly was not a necessary party to that agreement.

[65] Fourthly, the finding in the same paragraph of the Reasons below, that Mrs Slade did not seek or receive legal advice about Exhibit 4 is equally puzzling. I am unable to discern why that consideration was relevant to any issue in the case.

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52 Reasons below [203](a).
53 Reasons below [203](a) and (c).
54 Reasons below [127]; see [62]-[63], [163]-[166].

[66] Fifthly, the learned trial judge found that the word "BUT" was used in capitals in the third paragraph and that was part of his Honour's reasoning that "while the wording seems to support the plaintiffs, **I do not consider it unequivocally does so**".[55] His Honour went on to conclude that the use of that word in capitals meant it was open to read that paragraph as meaning that Gordon Kelly was only to get $20,000 in total. However, the word is not in capitals at all. When the balance of Exhibit 4 is considered the word commences a new sentence and reads "But". His Honour's reasoning is, in my respectful view, erroneous.

[67] Sixthly, when the learned trial judge accepted Mrs Slade's evidence as to why she wrote the sentence commencing with the word "But", his Honour relied upon his findings otherwise as to the "key conversations". As mentioned above the analysis of the "key conversations" was carried out without regard to Exhibits 4 and 14. Therefore the support derived from those findings is doubtful.

[68] Seventhly, the learned trial judge disposed of the first and fourth paragraphs of Exhibit 4 as not taking the matter further. His Honour said that the first paragraph was "explicable as a shorthand way of describing the transaction".[56] The first paragraph reads "I (Danny and Vicki Slade) have purchased the farm … for agreed price of $500,000.00". In other words the sale price was $500,000. That is only right if the plaintiffs' case was correct, so that sentence added much, particularly as there was no document tendered that said that the consideration was merely $260,000 for Kathleen, $20,000 for Gordon and an amount for the Slades.

[69] The fourth paragraph ("This written agreement has been agreed between all parties") seems likely to refer to Exhibit 14, and cannot be read in isolation. Part of what that paragraph says was agreed is that "A sum of $240,000 is to be paid to Gordon James Kelly for his share". I have difficulty with the proposition that that sentence was something not fully understood by Mrs Slade, when it is expressed in plain language.

[70] Lastly, based on those erroneous findings the learned trial judge dismissed Exhibit 14 saying that it "does not take matters much further".

[71] In my respectful view, looking at the Reasons below overall it appears to be the case that that the learned trial judge did not give any consideration to Exhibits 4 and 14, and the Form 1 Transfer, as being contemporaneous evidence of the price to be paid to Gordon Kelly. The evidence given by the Slades was contrary to those documents yet their impact on their credit and reliability was not brought to bear.

[72] It is true that appellate courts are reluctant to interfere with decisions of a trial court that involve findings of credit.[57] However, here the learned trial judge's approach to the evidence was flawed in the ways explored above. In my view, it comes within that category of case recognised in *Fox v Percy*, as being where the court has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence:[58]

> "[66] Mason CJ, Deane, Dawson and Gaudron JJ, the other members of the Court, agreed with my judgment. *Abalos* was applied in

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55 Reasons below [205]-[206]; emphasis added.
56 Reasons below [208].
57 *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22.
58 *Fox v Percy* at [66]; internal citations omitted.

Devries v Australian National Railways Commission where Brennan and Gaudron JJ and I 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. 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' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'.""

[73] That conclusion means that the findings below cannot be sustained and the judgment must be set aside. It is not necessary to canvass any further grounds or contentions on the appeal.

Disposition of the appeal

[74] However, setting aside the judgment below does not necessarily lead to judgment being entered for the plaintiffs.

[75] I do not consider this Court is in a position to enter upon findings even with the benefit of the proper construction of the documents such as Exhibits 4 and 14. Drawing inferences from the documents cannot occur in a vacuum. This Court has not seen any of the witnesses and since the documents are relevant to their credibility and reliability the task is not one that can be done short of a trial.

[76] The limitations on an appellate court where findings of fact are based on credit are well recognised. Cases such as *Warren v Coombes*[59] proceed on the basis that appellate courts are in just as good a position as the trial court to draw inferences from facts but only where the facts are admitted or found, and not disputed. As was said in *Fox v Percy*:[60]

> "[87] There is nothing in *Warren v Coombes* that is inconsistent with *Abalos* or *Devries*. *Warren* decided only that 'whether the facts found do or do not give rise to the inference that a party was negligent' is not a matter that 'should be treated as peculiarly within the province of the trial judge'. In earlier cases, Barwick CJ and Windeyer J had suggested that the findings of trial judges were entitled to special deference, even when the findings were based on inferences drawn from facts found or admitted. *Warren* denied that proposition. In a joint judgment, Gibbs A-CJ, Jacobs and Murphy JJ said:
>
> > 'Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge *to decide on the proper inference to be drawn from facts which are undisputed*

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59 (1979) 142 CLR 531; (1979) HCA 9.

60 *Fox v Percy* at [87]; internal citations omitted.

> *or which, having been disputed, are established by the findings of the trial judge.*' (emphasis added)"

[77] Here the difficulties faced by the appellate court are compounded by the fact that the findings below were made without bringing to bear the very documents that would form part of the appellate court's consideration.

[78] Reluctantly I conclude that there should be a retrial. The respondents must pay the costs of the appeal, but the costs of the trial should await the outcome of the second trial.

[79] I propose the following orders:

1. Appeal allowed.
2. The Orders made on 7 December 2017 dismissing the plaintiffs' claim and 5 March 2018 as to costs are set aside.
3. A retrial is ordered.
4. The costs of the first trial are reserved to the trial judge hearing the retrial.
5. The respondents are to pay the costs of the appeal.

[80] **ATKINSON J:** I agree that the appeal should be allowed for the reasons given by Morrison JA and with the orders his Honour has proposed.