

O N A P P E A L
FROM THE FULL COURT OF THE
SUPREME COURT OF QUEENSLAND

B E T W E E N :

JAMES JOSEPH WATSON and PAULINE
ELAINE WATSON

(Defendants)
Appellants

10

- and -

GLEN ROBERT PHIPPS

(Plaintiff)
Respondent

CASE FOR THE APPELLANTS

RECORD

This Case is divided into Parts as follows:-

Part A - Introduction (Paragraphs 1 - 14)

Part B - The Reasons for Judgment of Shepherdson J.
(Paragraphs 15 - 26)

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Part C - The Reasons for Judgment of the Members of
the Full Court (Paragraphs 27 - 38)

Part D - Appellants' Submissions (Paragraphs 39 - 47)

Part E - Appellants' Submissions (Paragraphs 48 - 62)

Part F - Reasons (Paragraph 63)

PART A - INTRODUCTION

1. This is an appeal from a judgment dated the 21st December, 1984 of the Full Court of Queensland (Kneipp, Kelly and Carter JJ.) upholding an appeal from a judgment dated the 19th of August, 1983 of the Supreme Court of Queensland (Shepherdson J.) dismissing a suit for rectification and specific performance brought by the respondent against the appellants. p.182 p.155
- 10 2. The central issue in this appeal concerns the extent to which a Court of Appeal may review findings of fact of a Trial Judge based on the credibility of witnesses before him.
3. The appellants purchased a farm property at Fernvale, Queensland from one Fryberg in 1974. There was money owing on a second mortgage to Fryberg in respect of purchase monies outstanding. p.79(52) p.79(60)
- 20 4. Financial difficulties had been encountered by the appellants in the running of the farm in early 1977 and consideration had been given to selling the whole farm property. p.84(18) p.84(14)
5. In mid December 1977 the male appellant was approached by the respondent regarding a proposal for the appellants to sell to the respondent 30 acres of the property together with leasing the balance of the property. p.84(33) p.84(52)
- 30 6. There were a number of meetings between the parties at which terms of the contract and lease were discussed. A contract of sale was executed by the respondent and the appellants and a lease agreement was executed on the 1st of February, 1978. pp.86(10, 30) 88(20-30), 89(30-60), 90(1-40). pp.192-194 pp.198-206.
7. A further lease agreement was executed by the parties on the 7th April, 1978. For the purposes of this appeal, it is common ground that both lease documents are identical. p.213-220
8. Unless otherwise specified in these submissions, any reference to the lease agreement will be a reference to the later document i.e. 7th April, 1978. The lease agreement contained the following clause:- p.213-220
- 40 "3. And it is hereby mutually agreed by and between the parties hereto as follows -
- (a) At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent to one thousand dollars (\$1,000-00) per acre." p.216(2)
9. That Clause is the genesis to the litigation.

10. The respondent claimed that the Clause bestowed on him an option to purchase the land demised by the lease and sought to exercise that option by a letter dated the 5th of February, 1982. In a letter (17th February, 1982) the solicitors for the appellants refuted the claim of the respondent as to the existence, in the lease agreement, of an option to purchase.

p.226

p.237

10 11. The following events of significance, after a consideration of the facts in the action, were found by Shepherdson J. to have occurred on or about the dates specified, namely:-

<u>Date</u>	<u>Event</u>	
December 1977	Fryberg demanding unpaid balance of mortgage monies	p.150(54)
Mid December 1977	Male appellant visited respondent's house and satisfied himself as to value of house for part payment purposes under contract of sale.	p.135(1-10)
20 19.12.77	By letter, Solicitors for appellants wrote to Solicitors for respondent enclosing contract of sale for signature and further indicating they understood from their clients' instructions that respondent will have the option to purchase certain other lands during currency of a lease yet to be prepared and such option shall be contained in the lease.	p.135(20-40)
30	Meeting of respondent, respondent's mother, male appellant and Mr. Palfrey (solicitor) in office of Richard Zande & Associates) (Solicitors for the appellants).	pp.135(60), 136(1-4).
6.1.78	Appellants signed contract for sale to respondent of the 30 acres forming top portion of Fernvale farm; contract expressly provided that it was subject to the appellant's granting to the respondent a lease for 5 years over approximately 78 acres adjoining the property the subject of the contract.	p.136(8-24)
40		
25.1.78	Richard Zande and Associates writes to the Solicitors for the respondent enclosing respondent's copy of relevant Contract of Sale together with a draft lease for perusal.	p.136(26-44)

- 27.1.78 Respondent and male appellant attended meeting of Board of Directors of Queensland Farmers Co-Operative Association Limited p.136(56)
- 10 1.2.78 Richard Zande and Associates write to Dale and Fallu, Solicitors for respondent, advising that they return the lease intriplicate duly executed by appellants and requiring the respondent to execute the document and return it to them for payment of stamp duty and registration. p.137(1-10)
- 9.2.78 Dale and Fallu write to Richard Zande enclosing copy of lease in triplicate duly signed by respondent. p.137(12-24)
- Such letter appears to have been signed by a Mr. Bloxsum.
- 20 12. A Writ of Summons in this action had been filed on the 19th November, 1981. Subsequently a Statement of Claim was delivered claiming that the lease agreement was drawn up and signed under a mutual mistake. On the first day of trial the respondent was given leave to amend his claim so as to allege that if there was no prior oral agreement it was the common intention of the respondent and the appellants continuing up to the time of execution of the lease that a term conferring an option be included in the lease. pp.2-4 p.10(49) p.4(31-42)
- 30 13. The respondent further sought specific performance of the lease as rectified. In their defence the appellants denied that there had been an oral agreement conferring on the respondent an option to purchase. Laches on the part of the respondent was also raised in the defence p.5(43-44) p.7(41) p.8(18-32)
14. The action came on for hearing before Shepherdson J. on July 26th and 27th, 1983. A total of 8 witnesses including the appellants and the respondent gave oral testimony over the two days of the trial. p.13-128
- PART B - THE REASONS FOR JUDGMENT OF SHEPHERDSON J.
- 40 15. Shepherdson J. delivered judgment on August 19th, 1983. He observed that there were serious issues of credibility. Although finding that the exact chronology of events in the case including meetings between the parties was difficult and impossible to piece together accurately, he held that important events occurred in a sequence which has already been traversed in Part A of this submission. p.134(50-55)

16. A letter (7th April, 1978) from the solicitors for the respondent to the solicitors for the appellant enclosing copies of the lease was sufficiently significant for the learned Judge to pause and observe that it indicated that the solicitors for the respondent had been through the lease, apparently with some care. p.225 p.139(19-22)
- 10 17. A Mr. Palfrey was described as being a major witness in the plaintiff's case. He had been the employed solicitor who acted for the appellants in the transaction with the respondent. p.139(30) p.45(13-15)
18. The learned Judge observed that Palfrey had little recollection of his dealings with the appellants and his testimony was based on his memory being refreshed from contemporaneous notes. p.140(51-55) p.141(1)
19. He considered that Palfrey was easily suggestible in evidence and that all of the evidence of Mr. Palfrey was present reconstruction based on notes and other documents. p.142(17-20)
- 20 20. The learned Judge then found the following matters important enough to specifically highlight:-
- (a) No evidence given as to the circumstances under which the respondent signed each lease; p.143(1-20)
- (b) No complaint by respondent's solicitors in their letter of 7th April, 1978 that Clause 3(a) did not express the agreement of the parties; p.143(21-29)
- (c) The absence from the witness box of Mr. Bloxson who had originally given advice to the respondent as to the obtaining of an option. p.143(50-58)
- 30 21. These highlighted matters were mentioned by the learned Judge because of the onus of proof lying on a plaintiff who seeks rectification upon the ground of mistake. p.144(12-14)
22. The learned Judge formed an unfavourable impression of a Mr. Zabel which led to the rejection of his evidence. p.147(36), (12)
- 40 23. The learned Judge then referred to a series of events commencing in late 1979 which in his view reflected favourably on the general credibility of the appellants. In late 1979 the appellants bought some 25 acres of land adjoining the 30 acres on which was erected the house and dairy which had been purchased by the respondent. The male respondent gave evidence (which was accepted by the Judge) that it was the respondent's intention to build on this block and develop it in order that he and his family could return to it and use it as a p.151(10)

dairy farm in conjunction with the river flat area. p.151(20)
As to this purchase, the Judge held that the following
views were open:-

(a) It was inconsistent with the appellants having
given an option to purchase to the respondent; p.152(38)

10 (b) It was unlikely that the appellants would buy
25 acres so close to the river flat lands unless
it was believed that at the expiration of the
5 year term the land would revert to them but
even if the respondent did offer to buy it at
\$1,000 per acre the respondent would reject
it. p.152(40-50)

20 24. The alternative to these views was that the
appellants knowing that Clause 3(a) contained an error
and with knowledge of that error decided neverthe-
less to buy the 25 acres hoping that if the matter
of the option came to Court they would succeed. p.152(50)
The learned Judge held that having seen both appellants
in the witness box he was quite unable to accept that
alternative view, for to accept it would mean that
the appellants, especially the male appellant was a
devious and cunning person - he was unable to
accept this view of the appellants. p.153(1-5)

25. Another possible reason which was available for
consideration was that 25 acres was purchased for
the appellants simply to live there irrespective of
the river flat area and as to that, the Judge held it
did not hold any weight. p.153(10)

30 26. It is submitted that after considering the
onus of proof which lay upon the respondent,
Shepherdson J. came to his decision after making the
following findings:- p.149(8)

(a) A major witness for the respondent was Mr.
Palfrey. His evidence was not accepted on the
following grounds -

(i) He was easily suggestible in evidence; p.142(16)

40 (ii) When he used the word "option" in his
notes and correspondence in late 1977,
he did not intend to convey the meaning
which he attributed to that term at the
trial; pp.142(10) &
145(10)

(iii) Absence of evidence as to how the lease was
drawn up by an inexperienced solicitor; and

(iv) His evidence in general failed to satisfy
that the male appellant told Palfrey that
he had agreed to give the respondent the
option;

- (b) The witness Mr. Zabel -
- (i) Attempted in the witness box to help the plaintiff as much as he could - embellishing the contents of minutes by mentioning a price; and p.147(20)
 - (ii) Did not impress as a person on whose evidence the Judge could safely rely; p.147(24)
- (c) Doubts about the respondent and his wife whilst they gave evidence; p.149(14)
- 10 (d) Preference for the appellants' version of what was said at the vital conversation at the side gate of the dairy:- p.148(52)
- (i) After taking into account the criticisms made of the male appellants' performance in the witness box; and pp.149(4) & 152(24-32)
 - (ii) After considering all the evidence in the case; p.149(12)
- (e) On the whole of the evidence the respondent failed to satisfy that an oral agreement on which he relied was made by the appellants; 20 p.153(24-26)
- (f) On the evidence the respondent failed to satisfy that there was a common intention of the parties continuing up to the execution of the lease; p.153(30-40)
- (g) On the whole of the evidence there was no mutual mistake and that Clause 3(a) represented what agreement or arrangement was made between the parties at the side gate to the dairy. p.153(42-48)

PART C - THE REASONS FOR JUDGMENT OF THE MEMBERS OF
THE FULL COURT

30 REASONS OF KNEIPP AND KELLY JJ.

27. The decision of Kelly J. (with whom Kneipp J. agreed) commenced by referring to the essential pleadings and the various findings of Shepherdson J. pp.159-169

28. The learned Judge then discussed the basis on which the Full Court was entitled to interfere with the findings of fact made by the Trial Judge. A review of the authorities included Knoo Sit Hon v Lim Theam Tong (1912) A.C. 323; Paterson v Paterson (1953) 89 C.L.R. 212; Watt or Thomas v Thomas (1947) A.C. 404; and Riebe v Riebe (1957) 98 C.L.R. 212; and Queensland Mines Ltd. v Hudson (1978) 52 A.L.J.R. 399 (P.C.) p.167-169

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29. Kelly J. after considering those authorities reached the conclusion that despite the disadvantage suffered by the Full Court in not having seen and heard the witnesses, the case was one in which they

were justified in going behind the findings. He set out the reasons why this course should be adopted:- p.169(50)

(a) There was no reason to suppose that in using the word "option" in the letter of 19th December, 1977 Mr. Palfrey although a Solicitor of no great experience intended to use the word in a sense other than as a legally enforceable option; p.169(52-60)

10 (b) There was no proper basis for rejecting the accuracy of the statement in the Minutes of the Meeting of the Board of Directors of Queensland Farmers Co-Operative Association Limited recording the male appellant's statement regarding an option to purchase; p.170(10-18)

(c) The rejection of the evidence of Mr. Zabel was adversely influenced by the fact that Mr. Zabel waved and smiled to the respondent in a friendly gesture; p.170(30)

20 (d) It could not be said that Mr. Zabel was embellishing the contents of minutes by recalling a figure of \$1,000 an acre as being mentioned; p.170(40)

(e) The fact that in the Minutes a document was described as a lease agreement which was then obviously not executed, was not a matter that called for any explanation; p.170(50)

(f) The learned Judge was unduly concerned by the absence of evidence, on certain matters, particularly, the relevance of the evidence of Mr. Bloxsom. p.171(1)

30 30. In relation to the matters which the trial Judge found of assistance in clarifying the issues of credibility in favour of the appellants (whilst certainly consistent with the appellants not having given an option) could not be regarded as providing a real indication that this was the case; both matters related to a time after the oral agreement was made and were only two further pieces of evidence which must be weighed with the other evidence. p.171(20-26)

40 31. After an extensive citation from the recent decision of the High Court in Pukallus v Cameron (1982) 56 A.L.J.R. 906 (dealing with the principles which govern rectification of a contract) Kelly J. found that on the whole of the evidence there was a concluded antecedent contract between the respondent and the appellants. p.173(32-40)

32. He further held that when proper regard was had to the documentary evidence there was convincing proof

of a concluded antecedent contract in clear and precise terms. p.173(42)

10 33. In dealing with the letter of the 7th April, 1978 which accompanied the return of the lease from the respondent's solicitors to the appellants' solicitors, Kelly J. held that the absence of any complaint in the letter that Clause 3(a) did not express the true agreement of the parties was not to be taken as indicating the contrary, namely that the Clause did express the true agreement - the letter in his view was simply silent on the matter. p.174(1-10)

34. As to the part played by Mr. Palfrey, he commented that Mr. Palfrey failed to draw Clause 3(a) in a form which gave effect to his instructions and nothing was done by the respondent's solicitors after perusal of the lease to draw the attention of the appellants' Solicitors to the form of the Clause. p.174(20-28)

REASONS OF CARTER J.

20 35. Carter J. delivered a separate Judgment in which he agreed with that delivered by Kelly J.

36. There was, however, an addition on several matters. p.175(28-30)
He held that the contemporaneous documents being those written by Palfrey and the Minutes of the Meeting of the Association of 27th January, 1978 for the reasons given by Kelly J. were support only for a finding that the agreement was for an option. p.176(28-38)

37. Carter J. then moved on to comment on the evidence given by the witness Zabel and of the minutes (Exhibit 15):- pp.209-212

30 (a) Accepting that the male appellant was unable to swear that he had not used the word "option" when informing the meeting of the agreement between himself and the respondent, he could see no sound basis for the rejection of the evidence that the Minutes correctly recorded the effect of what the male appellant said; p.176(50)

40 (b) The Minutes of the next meeting of the Board of Directors held on 9th February, 1968 recorded that at a later meeting the Minutes of the Meeting of the 22nd February, 1978 were signed as a correct record of the business transacted at the earlier meeting; that fact provided additional independent support for the evidence of Zabel; p.176(56-58) p.177(2-8)

(c) The finding that the male appellant did not tell the Board that he had given the respondent an

option, was one which could not have been made having regard to the contemporaneous record made in the Minutes; p.177(8-12)

10 (d) The rejection at the trial of the evidence of Zabel was based on two factors, namely the friendly gesture of Zabel towards the respondent and the embellishment of the evidence by the mention of the price of \$1,000 per acre. The latter could not be said to be an embellishment as it was common ground according to Carter J. that \$1,000 an acre was the price mentioned and it was the price recorded in Clause 3(a); p.177(22-30)
p.177(30-50)

20 (e) As to the gesture by Zabel towards the respondent the trial Judge should have informed Counsel so that Zabel could have been examined and cross-examined in relation to it and further that Counsel could have then addressed the learned Judge on the effect of the making of the gesture; it was a fair inference that Zabel was a dairy farmer; p.178(10-30)
p.178(50)

(f) After a review of a number of permutations of how there could have been prior meetings between the respondent and Zabel, the learned Judge then concluded that the trial Judge could not properly have formed a view of the witness based on the fact of the gesture alone; the gesture should not have formed the basis for an adverse finding. p.179(1-24)
p.179(40-50)

30 38. On the question of the observation concerning the absence of Bloxsom from the witness box by the trial Judge, Carter J. commented:- p.179(54)

(a) There was an assumption that Bloxsom, who was unqualified, would have noticed the deficiency in Clause 3(a), whilst the trial Judge had not been prepared to accept that the qualified Palfrey used the term "option" in the relevant letter as a reference to a legally enforceable option; p.180(32-40)

40 (b) Palfrey gave evidence against the appellants although he was called by the respondent. The advisers of the respondent might well have decided not to call Bloxsom, 'if at all, only to explain why the respondent had later said what he had said to the male appellant at the dairy gate"; p.180(50-60)

(c) Bloxsom's evidence as to what he understood Clause 3(a) to mean (assuming he read it) could hardly have been of assistance. p.181(1-8)

PART D - APPELLANTS' SUBMISSIONS

THE CENTRAL ISSUE - AUTHORITIES

39. There was no disagreement between the Trial Judge and the Appellate Court as to the correct standard of proof to be applied in a rectification suit. Shepherdson J. relied directly on the decision of the Court of Appeal in Joscelyne v Nissen & Anor. (1970) 2 Q.B. 86. Kelly J. observed that the principles to be applied in a case of rectification were those set out in the decision of the High Court in Pukallus v Cameron (1982) 56 A.L.J.R. 906 which cited with approval the authority of Joscelyne v Nissen. p.144(20)
- 10
40. Central to the approach of any appellate tribunal to the findings of Shepherdson J. is a consideration of those authorities which permit an appellate tribunal to interfere with the findings of fact made by a Trial Judge based upon the credibility of witnesses. p.171(40)
41. Lord Scarman observed in Maynard v West Midlands Regional Health Authority (1985) 1 All E.R. 635 (H.L.) at 637:-
- 20
- "But the limitations on an appellate Court's ability to review findings of fact are severe, and well established."
42. The established principles on the relative credibility of witnesses were first laid down by the Privy Council in Khoo Sit Hoh v Lim Thean Tong (1912) A.C. 323 where Lord Robson said at p.325:-
- 30
- "In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts to deal with at later stages on the case."
43. In S.S. Honte-Strom v S.S. Sager-Porack (1927) A.C. 47 Lord Sumner at 47 said:-
- 40
- "The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question when a witness has been cross-examined to credit or has been pronounced by the Judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone."
44. The fact that a Judge, who has heard and seen witnesses, has reached a conclusion as to the weight of

their evidence, whether or not there is a comment on their credibility, is entitled to great respect. See Lord Scarman delivering the judgment of the Board in Shyben A. Madi & Anor. v C.L. Carayol (1981) T.R. 23, 24D(PC).

45. In the High Court of Australia, Griffiths C.J. in delivering the judgment of the Court in Dearman v Dearman (1908) 7 C.L.R. 549 at 553 had this to say:-

10 "Now it is well settled that upon an appeal from a Judge of first instance who had the advantage of hearing the witnesses especially in a case where there is a conflict of evidence, the Court of Appeal cannot reverse its decision on questions of fact unless it sees that the decision is manifestly wrong. There is, perhaps a distinction between a case where the Judge has found in favour of a plaintiff, or the party upon whom the onus of proof lies, and a case where he has found in favour of the other party. If the Judge has found in favour of the party upon whom the burden of proof lies the Court of Appeal may review the case with greater freedom, for 20 instance, in the case of an application to enter a non-suit on the ground that, though there was some scintilla of evidence, there was nothing upon which reasonable men ought to act. But if the tribunal of first instance, having seen and heard the witnesses, comes to a conclusion in favour of the party upon whom the burden of proof does not lie, it is almost helpless to try to induce a Court of Appeal to interfere with that finding unless it has clearly proceeded upon a wrong principle."

30 See also Stein v The Ship "Kathy K" (1976) 2 S.C.R. 802, 808 (Can.)

46. As to the effect which the consideration of a document by a Trial Judge has on these general principles see Tay Kheng Hong v Heap Moh Steam Ship Co. Ltd. (1964) 30 M.L.J. 87 where at p.93 Lord Guest in delivering the judgment of the Board considered that documents which were relied upon by the Court of Appeal were considered as affording some support to the respondent's case but by no means were inconsistent with a contract having been made in accordance with 40 the argument of the appellants.

47. In the oft-quoted decision of Powell and Wife v Streatham Manor Nursing Home (1935) A.C. 243 it was observed by Lord Sankey L.C. at p.247 that a Court while naturally attaching great importance to a letter written by a witness which appeared to contradict evidence which he subsequently gives, must always take into consideration the witness' explanation of such

letter and, weigh it carefully. Further than that an omission to state something in a letter may be as weighty as a statement which contradicts something to which the witness subsequently deposes. In Whitehouse Hotels Pty. Ltd. v Lido Savoy Pty. Ltd. (1975) 49 A.L.J.R. 93 Barwick C.J. at 96 said:-

10 "His Honour had written communications between the parties as well as the probability of the matter to assist him in deciding that question. No ground is shown for disturbing his finding founded as it was to the greater part on his observation and estimation of witnesses called before him. Accordingly, I am of opinion that there is no reason to disturb the verdict".

PART E - APPELLANTS' SUBMISSIONS

ARGUMENT

20 48. At the trial of the action, the respondent took on the onerous task of convincing the trial Judge that either there was a common intention for, or that there was a prior agreement for an option to purchase. If the respondent failed to establish either of those elements then he did not displace the hypothesis arising from execution of the agreement for lease, namely, that it is the true agreement of the parties. See Maralinga Pty. Ltd. v Major Enterprises Pty. Ltd. (1973) 128 C.L.R. 336 at 351. p.130(25-60)

49. It is respectfully submitted that the respondent did not displace the hypothesis for the following reasons:-

- 30 (a) The clear and well reasoned findings of the trial Judge, Shepherdson J., as to the credibility of the essential witnesses - the male appellant, the respondent and Mr. Palfrey;
- (b) The absence of convincing proof lying on the shoulders of the respondent as to the necessary elements in his case (Joscelyne v Nissan & Anor.);
- (c) The final conclusion being found in favour of the party upon whom the burden of proof did not lie, namely the appellant (Dearman v Dearman).

40 50. Where there was a conflict of evidence, the Trial Judge not only found in favour of the appellants but gave strong and compelling reasons for his reasons in arriving at those conclusions. This was done notwithstanding an obvious conflict at one stage of the male appellant's evidence which the trial Judge in his advantageous position nevertheless held was not fatal to the vital issue, namely what was the oral agreement reached at the side gate to the dairy. p.152(30)

51. The majority of the reasons delivered by Carter J. in the Full Court dealt with the treatment given by the Trial Judge to the witness Zabel. It might be respectfully observed that the approach by Carter J. to the finding of the Trial Judge was determined by the friendly gesture episode of Zabel towards the respondent. It might be said that in going into the detailed reasons which he did the Trial Judge gave the matter more prominence than it deserved. In the trial, Shepherdson J. was performing the dual function of a Judge and jury. A jury is entitled to take account of the whole of the circumstances surrounding the giving of testimony by a witness in the Courtroom; the demeanour of a witness may always be considered in an estimation of his credibility and demeanour. See Wigmore on Evidence, Vol.IIIA at 783. pp.175-181 p.147(10-20)

52. Carter J. further considered that there was no warrant for criticism of Zabel's mention of a price of \$1,000 per acre. In that connection it might be observed that Zabel was giving evidence some 5 years after the alleged conversation. Little or no reliance can be placed on memory in respect of an event which took place years ago unless it was aided by some contemporaneous or nearly contemporaneous event. See Craine v Australian Deposit and Mortgage Bank Ltd. (1912) 15 C.L.R. 389 at 391.

53. As to the absence of Mr. Bloxsom from the witness box it is respectfully submitted that the trial Judge properly dealt with the matter. Bloxsom's evidence surely was germane to a point of importance; he was the author of Exhibit 8, the all important letter from the solicitor's for the respondent to the solicitors for the appellants. He could well have assisted the respondent in discharging the burden of introducing evidence of an appropriate continuing common intention; his absence surely led the trial Judge to make the appropriate observation. See Jones v Dunkel (1954) 101 C.L.R. 298 and Brandt v Mingot (1977) 51 A.L.J.R. 207.

54. The judgment of Kneipp and Kelly JJ. depended on four main bases, namely:-

- (a) The approach of the Trial Judge to the credibility of Palfrey and Zabel;
- (b) The rejection by the Trial Judge of the accuracy of the Minutes;
- (c) The undue concern at the absence of evidence particularly that of Mr. Bloxsom;

(d) The failure of the Trial Judge to give sufficient weight to the evidence provided by contemporaneous documents.

55. Dealing with (a):-

(a) The evidence of Mr. Palfrey and Mr. Zabel depended for its assessment on the demeanour of the witnesses and how their evidence "stood up" against that of the evidence accepted in respect of the male appellant;

10 (b) In his peculiarly advantageous position the Trial Judge was constrained to reject the import of the evidence of both witnesses and, notwithstanding the effect which "contemporaneous documents" might have, the Trial Judge was entitled to consider the superior finding on credibility as having the ultimate effect, see Tay Kheng Hong v Heap Moh Steamship Co. Ltd.

20 56. Dealing with (b) it must be respectfully said that any effect which the Minutes would have was peripheral to the major issue of credibility of the respondent as it related to the vital conversation in early December. No mention of an amount of money appears in the Minutes.

57. Dealing with (c) the absence of witnesses has already been dealt with in regard to the review of the judgment of Carter J.

30 58. Dealing with (d) the only contemporaneous documents from which the judgment draws comfort is that of the letter of the 19th December, 1977, the notes of Mr. Palfrey and the Minutes of the Meeting of the Board of Directors. As to these matters it should be said:-

40 (a) Mr. Palfrey was unable to give any explanation as to how he came to use the word "option" in the letter of the 19th December, 1977 - he did not know whether the expression had come from the respondent or indeed the respondent's mother. It could hardly be said to bind the appellant. The very passive form of expression namely "it is understood" is indicative of a tentative approach and is not expressed in a manner which could be binding upon the client;

(b) To the contrary, the letter of 7th April, 1978 p.225 indicates clearly that the lease had been perused by the respondent; the lease document in truth was word for word (in respect of the vital Clause 3(a)) with the lease which

was submitted on February 1978. If there was a mistake then it was at the hands of the respondent or his solicitor and should not be to the account of the appellants. See Barrow v Isaacs and Son (1891) 1 Q.B. 417. Indeed it has been held that a solicitor is to be regarded as the alter ego of the client and the rights of another party to a transaction cannot be made to depend upon the diligence or lack of diligence exhibited by the solicitor in his dealings with his client. See Sargent v A.S.L. Developments Ltd. (1974) 131 C.L.R. 634 at 659.

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59. On an appeal from a Judge alone a Court of Appeal is in as good a position as the Trial Judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the Trial Judge. See Warren v Coombes & Anor. (1978-79) 142 C.L.R. 531; Benmax v Austin Motor Co. Ltd. (1955) A.C. 370.

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60. The only evidence which qualifies for such an evaluation was:-

(a) The letter of 9th December, 1977. The Full Court was entitled to draw its own inference as to what Mr. Palfrey meant by the use of the word "option" therein; it took advantage of this opportunity and came to a finding which was adverse to the conclusion of the Trial Judge;

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(b) The single page handwritten notes of Mr. Palfrey (Exhibit 13) containing the word "option"; the Full Court did not avail itself of the opportunity of drawing any inference from this "contemporaneous document". pp.255, 141

61. At the end of the day, a close examination of the decision of the Full Court shows on the one hand:-

(a) A strong unchallenged finding of the Trial Judge on the acceptance of the male appellant's evidence; and

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(b) A non-critical conclusion as to the doubts expressed by the Trial Judge on the evidence of the respondent and his wife; p.165(42-50)

On the other hand there is:-

(c) The inference to be drawn from the use of the word "option" by Mr. Palfrey in the letter of 19th December, 1977; and p.169(52-60)

(d) At best, an assumption that the evidence of Mr. Zabel should be accepted in its entirety. p.170(30-40)

62. The conclusions which may be derived from (c) and (d) can in no way be equated with the conclusions which may be derived from (a) and (b); in applying the test of convincing proof in clear and precise terms as postulated by their Honours following upon their examination of the relevant authorities, the decision of the Trial Judge has not been shown to be in error. p.171(20-28)

10 63. The appellants respectfully submit that the judgment of the Full Court of the Supreme Court of Queensland was wrong and ought to be reversed, and this appeal ought to be allowed with costs for the following (among others).

REASONS

- (1) BECAUSE the respondent failed to satisfy as to the existence of either a common intention for, or a prior agreement to, an option to purchase the appellants' land during the subsistence of the lease or at the expiration thereof at the price of \$1,000 per acre.
- 20 (2) BECAUSE the respondent could not properly satisfy an appellate tribunal that the findings of the Trial Judge as to credibility of witnesses should be reviewed.
- (3) BECAUSE on the relevant standard of proof, the evidence showed that there was no common intention or prior agreement for an option to purchase the appellants' land during the subsistence of the lease or at the expiration thereof at the price of \$1,000 per acre.
- 30 (4) BECAUSE the Full Court of Queensland erred in giving undue prominence to the observations made by the Trial Judge during the giving of evidence by the witness Zabel.
- (5) BECAUSE the decision of the Trial Judge was right.


W.T. McMILLAN

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE FULL COURT OF THE SUPREME
COURT OF QUEENSLAND

BETWEEN

JAMES JOSEPH WATSON and PAULINE
ELAINE WATSON

Appellants

- and -

GLEN ROBERT PHIPPS

Respondent

CASE FOR THE APPELLANTS

COWARD CHANCE,
Royex House,
Aldermanbury Square,
LONDON, EC2V 7LD

Solicitors for the Appellants