

HIGH COURT OF AUSTRALIA

GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

STATE RAIL AUTHORITY OF
NEW SOUTH WALES

APPELLANT

AND

EARTHLINE CONSTRUCTIONS
PTY LIMITED (In Liquidation)

FIRST RESPONDENT

NULINE CONSTRUCTIONS PTY LIMITED SECOND RESPONDENT

PHILLIP GEORGE DAVIES

THIRD RESPONDENT

IAN NEIL DAVIES

FOURTH RESPONDENT

GREGORY CHARLES DAVIES

FIFTH RESPONDENT

RONALD THOMAS CHILD

SIXTH RESPONDENT

DAVID BRIAN BELL

SEVENTH RESPONDENT

THE OFFICIAL TRUSTEE IN
BANKRUPTCY OF THE ESTATES
OF PHILLIP GEORGE DAVIES AND
IAN NEIL DAVIES

EIGHTH RESPONDENT

*State Rail Authority of New South Wales v Earthline Constructions Pty
Limited (In Liquidation) (S34-1998) [1999] HCA 3
9 February 1999*

ORDER

1. *Appeal allowed with costs.*
2. *Set aside Orders 1, 3, 4 and 5 of the Orders of the New South Wales Court of Appeal made on 20 December 1996. In place of those orders:*
 - (i) *allow the appeal to that court with costs;*

2.

- (ii) *set aside Orders 1, 2 and 3 of the Orders made by O’Keefe CJ Comm D on 13 February 1998;*
- (iii) *order a new trial save of the issues on which the State Rail Authority of New South Wales succeeded against Earthline Constructions Pty Limited (In Liquidation) in the proceedings before O’Keefe CJ Comm D;*
- (iv) *order that costs of the proceedings before O’Keefe CJ Comm D abide the outcome of the new trial referred to in par 2(iii) of this Order.*

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with A S Martin for the appellant (instructed by Clayton Utz)

R S Toner SC with M G Stubbs for the second, third, fourth and fifth respondents (instructed by Crichton-Browne Crossley)

No appearance for the first, sixth, seventh and eighth respondents

Notice: This copy of the Court’s Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

State Rail Authority of New South Wales v Earthline Constructions Pty Limited (In Liquidation) & Ors

Appeals – Circumstances in which appellate court will set aside credibility findings.

Appeals – Nature.

Words and phrases – "palpably misused his or her advantage".

1 GAUDRON, GUMMOW AND HAYNE JJ. This appeal is brought from the New South Wales Court of Appeal (Mahoney P, Meagher and Handley JJA) dismissing an appeal from O'Keefe CJ Comm D.

2 The litigation arose from claims by the appellant, the State Rail Authority of New South Wales ("SRA"), that it made payments to two of its contractors, Earthline Constructions Pty Limited ("Earthline") and Nuline Constructions Pty Limited ("Nuline"), by relying upon work dockets containing materially false entries. Earthline and Nuline were engaged by the SRA to supply plant to enable track repair and earthworks to be undertaken. In order to be paid, Earthline and Nuline submitted invoices to the SRA, based upon dockets they prepared and which were certified by representatives of the SRA. The parties involved in the alleged fraud were said to be not only Earthline, Nuline and the persons involved in the management and control of those companies but also persons engaged by the SRA to certify the accuracy of the dockets. The SRA largely failed at the trial and its appeal was dismissed.

3 In *Devries v Australian National Railways Commission*¹, Brennan, Gaudron and McHugh JJ observed:

"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 fact². 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'³ or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'⁴."

1 (1993) 177 CLR 472 at 479.

2 See *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

3 *S S Hontestroom v S S Sagaporack* [1927] AC 37 at 47.

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

Deane and Dawson JJ pointed out in the same decision that no short exhaustive formula, such as "glaringly improbable", meets every case⁵.

- 4 The gravamen of the appellant's complaint in this Court is the failure by the intermediate court of appeal to accept that the adverse finding by the trial judge with respect to the evidence of one of its witnesses attracted the application of the statement by Jacobs J in *Agbaba v Witter*⁶. His Honour gave, as an example where primary findings based on credibility of witnesses might be displaced, a case:

"where in a complex pattern of events incontrovertible evidence can only be fitted into the pattern if a different view of the credibility of a witness is taken by the court on appeal".

The appellant further complains that this other body of evidence, largely documentary evidence in character, itself provided an adequate support for its case but that hitherto such evidence has not received adequate judicial analysis.

The parties

- 5 By s 4 of the *Transport Administration Act* 1988 (NSW), the SRA is constituted a corporation and is classified for the purposes of any Act as "a statutory body representing the Crown". It follows from this provision that the SRA is an "authority" as defined in s 4(1) of the *Public Finance and Audit Act* 1983 (NSW) ("the Audit Act")⁷ and that s 13 of that statute applies to payments of its accounts. Section 13 states:

5 (1993) 177 CLR 472 at 480.

6 (1977) 51 ALJR 503 at 508; 14 ALR 187 at 196.

7 The term "authority" is defined in s 4(1) to mean:

- "(a) a Department within the meaning of section 4(1) of the *Public Service Act* 1979,
- (b) the School Education Teaching Service,
- (c) a statutory authority, or
- (d) a person, group of persons or body prescribed for the purposes of this definition".

In turn, the phrase "statutory authority" is defined in the same sub-section to mean:

(Footnote continues on next page)

3.

"An officer of an authority shall not authorise the payment of an account:

- (a) unless the account has been approved for payment by a person to whom the power to authorise the payment has been delegated under section 12(1), or
- (b) otherwise than in accordance with the Treasurer's directions."

6 Earthline, the first respondent, was incorporated on 14 August 1985 under the name of International Indent Pty Limited. It initially traded under the name of "Davies and Wearing Earthmoving & Haulage Contractors". On 30 May 1990, the company changed its name to Earthline and ceased to trade under the name of "Davies and Wearing Earthmoving & Haulage Contractors". Earthline is currently in the process of liquidation and submitted to any orders of this Court save as to costs.

7 Nuline, the second respondent, was incorporated on 1 November 1991.

8 At all material times, the directors of Earthline and Nuline were Mr Michael Bruce Wearing and Mrs Mary Andrews Davies. Mrs Davies is the mother of Messrs Phillip George, Ian Neil and Gregory Charles Davies, the third, fourth and fifth respondents in this Court respectively. At all material times, Messrs Phillip, Ian and Gregory Davies managed and controlled Earthline and Nuline, and caused the dockets prepared by the companies to be submitted to the SRA. Messrs Phillip and Ian Davies were declared bankrupt on 12 July 1989. The Official Trustee in Bankruptcy of their estates is the eighth respondent and submitted to any orders of this Court save as to costs.

9 Three of the persons engaged by the SRA to certify the dockets were Mr Ronald Thomas Child, Mr David Brian Bell and Mr Trevor Raymond Greber. Messrs Child and Bell are the sixth and seventh respondents in this Court, although they did not enter appearances. An application for special leave to appeal in respect of Mr Greber was not pursued and thus he is not a respondent to the appeal in this Court.

"(a) a statutory body representing the Crown, or

(b) a person, group of persons or body (whether or not being a statutory body representing the Crown) to which Division 3 of Part 3 applies".

Division 3 of Pt 3 is not relevant to this appeal.

The facts

10 In providing rail services within New South Wales, the SRA was required from time to time to undertake track repair and earthworks. In undertaking such work, the SRA hired plant and equipment from private contractors. Earthline and Nuline were two private contractors who hired plant and equipment to the SRA.

11 The private contractors employed operators to operate the hired plant and equipment. In turn, the SRA engaged site supervisors and engineers to supervise the work undertaken by the private contractors and their employees.

12 At the material times, the SRA had adopted procedures for the hiring of plant from, the supervision of, and the making of payments to, private contractors. A SRA engineer initially assessed what plant was required for a particular site. The engineer then completed a document seeking approval for the hiring of the plant. After approval, a document entitled a "Local Purchase Order" was prepared and submitted to the private contractor. It would seem that a component of the Local Purchase Order was a document entitled "Hire of Plant Specification Details". The relevant clauses of this document are:

"1. The Contractor shall supply the plant listed in the Instruction to quote.

2. The Contractor shall undertake the following:-

1. To deliver the plant in good working order and maintain it in that condition at his own expense.
2. To fit suitable and efficient lights to the plant at his own expense when notified that the plant is required for shift work.
3. To provide a competent driver or drivers to operate the plant and pay all wages, overtime, camping allowances and travelling expenses of the driver and of any other personnel necessary for the efficient operation of the plant.
4. To supply at his own expense all fuel, oil, grease and spare parts and anything necessary for the continuous and satisfactory operation of the plant.
5. So to manage the plant that it will be ready to commence operations at the time when other works start on the job.
6. To work the plant continuously as required during the period of hire.

5.

7. To carry out all repairs to the plant of whatever description expeditiously and at his own expense. As far as practicable all adjustments and repairs shall be carried out on wet days or outside normal working hours. Tools and equipment to carry out necessary repairs shall be provided by the Contractor.
8. To provide all replacements of cutting blades, [tyres], wire ropes, etc.
9. To ensure that when unattended the plant is in a safe condition and not liable to be or to become a safety hazard.

3. *Payment shall be as follows:*

3.1 *When the plant is in operation – "A" Rate*

Single shift work will be paid for at the hourly rate of the offer on the basis of up to eight hours per day for a five day week.

All fractions of an hour worked will be paid for in proportion to the hourly hire rates to the nearest 1/6th of an hour.

All time worked in excess of the hours specified above for each normal working day and all time worked during other days or on Public Holidays will be paid for at the hourly rate as specified plus an amount based on the time so worked equal to the difference between the normal wages rate and the overtime or holiday rate whichever is applicable as prescribed by the Industrial Award governing the employment of the Plant Operator or Operators.

3.2 *When the plant is rendered idle due to wet weather or for reasons outside the [SRA's] control or during tea breaks for which the Operator is entitled to payment under the Award governing his employment or when the plant is being transported between jobs other than under its own power – "B" Rate*

Payment will be made at the hourly rate of the offer for idle periods for the time the plant is so rendered idle. Fractions of an hour shall be paid for in proportion to the hourly idle rate to the nearest 1/6th of an hour.

4. When the plant is transferred from one job to another, both of which are under the control of the [SRA], in addition to the cost of transport, the [SRA] will pay hire at the "B" rate as specified in Clause 4 unless the

6.

plant is transferred under its own power, in which case the "A" rate will apply.

5. Payment for hire will not be made for any period the plant is rendered idle due to breakdown or for reasons within the Contractor's control. If the idle period for minor adjustments is less than one-third of an hour per day or shift, there shall be no variation in the applicable rate.
6. This specification is to be read in conjunction with the General Conditions for the Hire of Plant overleaf." (emphasis added)

The General Conditions for the Hire of Plant included:

"10. Any change of operator shall be immediately notified to the Engineer by the Contractor.

11. The Contractor and/or his operator shall furnish such records relating to the operation of the plant as required by the Engineer.

...

14. Payment for hire will be on a monthly basis except for jobs of short duration, which will be paid for on completion of the work performed by the relevant Plant."

13 Earthline and Nuline entered into Local Purchase Orders with the SRA in terms which incorporated or otherwise adopted the form of this document. The hired plant – consisting of dozers, excavators, rollers, graders, tipper trucks and like machinery – was used at various SRA sites throughout New South Wales, including a number of sites in the Hunter Valley area and a site referred to as the "Hospital site". The "A" Rate and the "B" Rate for Earthline and Nuline apparently were the same.

14 In order to obtain payment for the plant hired to the SRA, Earthline and Nuline completed a work docket. Each docket identified the client (SRA), the site, the day and date on which the plant was hired, the type of plant hired and its plant number, the location at which the plant was used, the type of work in which the plant was involved and the starting and finishing times for the plant hired. An individual docket number was printed on each docket and provision was made for the signature of the plant operator and a representative of the client. The dockets were printed in a book of 50 and a separate book was used for each item of plant.

15 The dockets were filled in on behalf of Earthline or Nuline by a secretary or stenographer. A site supervisor or engineer engaged by the SRA then certified the

7.

accuracy of contents of the dockets. Messrs Child, Bell and Greber were three persons engaged by the SRA whose duties, among other things, were to check and certify the accuracy of the dockets prepared by Earthline and Nuline.

16 The dockets, when completed and certified, were grouped together and submitted by Earthline or Nuline to the SRA by way of an invoice. Each invoice indicated the plant used, the date of use, the docket number, the hours of use, the hourly rate for the plant and the total payment sought. Upon an invoice being prepared by an Earthline or Nuline secretary, it was checked by one of the Messrs Davies.

17 Earthline or Nuline then forwarded the invoice, together with the constituent dockets, to the regional office of the SRA. An engineer within the divisional engineers' office of the SRA checked the entries on the invoice and dockets against the Local Purchase Order and certified that the invoice was correct in accordance with s 13 of the Audit Act. The engineer submitted the invoice, the dockets and the Local Purchase Order to the regional accounts department for payment. After a prescribed taxation payment was deducted, the regional accounts department drew a cheque payable to Earthline or Nuline and forwarded it to the company by mail.

18 Over the period from late-1989 to mid-1992, Earthline and Nuline submitted in excess of 17,000 dockets to the SRA and received payments totalling \$8,103,559.25. As a result of investigations into the payments made to Earthline and Nuline, the SRA claimed that some \$2,765,002 had been paid in error. It is these alleged erroneous payments which are the subject of this litigation.

The claims

19 The SRA commenced an action against Earthline and Nuline in the Commercial Division of the Supreme Court of New South Wales alleging that the companies were paid for certain plant which, although claimed in dockets to have been hired to it at specified dates and times, was not in fact so supplied. The SRA asserted that the dockets provided by Earthline and Nuline contained materially false entries concerning the hire of the plant and that, as a result of such false entries, it was induced to make payments to the private contractors.

20 The SRA joined Messrs Child, Bell and Greber, alleging that they wrongfully, and in breach of their fiduciary duties owed to SRA, certified the dockets which contained materially false entries. The SRA further joined Messrs Phillip, Ian and Gregory Davies for their alleged involvement in the submission of the dockets by Earthline and Nuline to the SRA and their alleged assistance in the breach of fiduciary duties by Messrs Child, Bell and Greber.

Declarations, orders to account, damages and equitable compensation were sought against all of the defendants.

21 The SRA contended that the fraudulent claims fell into a number of categories. It alleged that 1,038 dockets had fictitious operator names ("the fictitious operator name claims"), 2,264 dockets identified Earthline employees who did not in fact operate the nominated plant ("the non-machine operator claims") and 429 dockets concerned plant which did not exist ("the fictitious plant number claims"). The SRA also asserted that 227 dockets involved an operator allegedly operating more than one machine at the same time at different locations ("the duplicate operator–different location claims"), 107 dockets concerned an operator allegedly operating more than one machine at the same time but at the one location ("the duplicate operator–same location claims"), 41 dockets related to the one machine being operated at different locations at the same time ("the duplicate plant numbers–different location claims") and 15 dockets involved the one machine being operated by two operators at the same time and at the same location ("the duplicate plant numbers–same location claims"). Finally, the SRA contended that 94 dockets were in respect of plant that was under repair at the nominated times ("the plant under repair claims"). The claims involved payments totalling \$2,765,002 made by the SRA to Earthline and Nuline on the basis of 4,215 dockets. In this Court, the SRA confirmed that its case was that no alleged fraudulent claim fell into more than one of the above categories.

22 Earthline and Nuline filed cross-claims against the SRA seeking damages totalling \$537,358. The cross-claim of Earthline related to invoices submitted to, but allegedly not paid by, the SRA. The cross-claim of Nuline concerned a security deposit lodged with, but allegedly not refunded by, the SRA and three invoices submitted to, but allegedly not paid by, the SRA.

The evidence

23 In order to make out its case, the SRA relied primarily upon the evidence of three former employees of Earthline – Mrs Page, Mrs Meek and Ms Packham – as well as extensive documentary evidence. Evidence concerning the procedures within the SRA, together with the roles of Messrs Child, Bell and Greber, was provided by Mr Vincent, who was employed by the SRA as an investigator.

The evidence of Mrs Page

24 Mrs Page was the principal witness upon whom the SRA relied. She was employed by Earthline from April 1989 to September 1990 as a site secretary to complete, amongst other things, some of the dockets the company submitted to the SRA. Mrs Page swore two affidavits in the proceedings, the first on 14 October 1992 and the second on 12 August 1993. The first affidavit addressed a range of matters and included:

"9. ... Soon after my arrival [Phillip] Davies took me into the site office and showed me the plant hire docket books which were currently in use. We then had a conversation to the following effect:

Davies said: 'These are the docket books. Just fill them out the way they've been done previously.'

...

I said: 'What hours do I put down?'

Davies said: 'Unless I let you know otherwise, just leave the hours at 6.00 to 6.30.'

...

28. I specifically recall whilst I was working as site secretary at the Hospital site, on a date which I can now not presently recall, Davies attended the site office and handed to me a piece of paper with his handwriting on it. He then said to me words to the effect: 'Write up a book with all these machines in it.' The piece of paper contained information as to site locations, the nature of work and the type of machines to be inserted on the docket. The list contained machines to be written up as sub-contractor machines. I recall this list contained approximately 6 rigid tippers, a dozer and a grader. A conversation then continued to the following effect:

I said: 'What are these machines about?'

Davies said: 'They're dummy machines.'

I said: 'Who am I going to put on these machines?'

Davies said: 'Anyone.'

I then filled in and completed docket forms in accordance with the details contained in this list. I made up false names and signed these names on the dockets as operators of the machines. Upon completing the dockets I then discarded the handwritten list given to me by Davies.

...

30. Whilst I was at the Hospital site and at other sites Davies telephoned me and gave me information concerning the completion of dockets. On these occasions he said to me words to the effect: 'I need you to write up some more docket books for the subbies'. By reference to 'the subbies' I understood Davies to be referring to sub-contractor machines ... He then said to me words to the effect: 'Use a plant number being the next number in the plant number series of items of plant actually in existence'. I recall on ... occasion he said to me words to the effect: 'Write up a book for grader No 42'. I was aware at the time that there was not in existence a grader with that number. I then filled in [and] completed the plant hire docket books for the sub-contractor machines at the request of Davies.

...

33. Whilst I was at the Hospital site the officers of the SRA that attended for the purpose of signing the dockets were Bell, Mr Peters and Mr Trevor Greber ('Greber'). From my recollection Bell did not attend the Kyogle site office every day to sign the plant hire docket books and attended the office quite irregularly. I observed Bell sign the plant hire docket books of [Earthline]. He signed the docket books with such speed as he turned the pages that he was not in fact checking whether the details inserted on those dockets were true or correct. On other occasions Bell very rarely looked at or checked any of the entries contained on the dockets before signing. On one occasion Bell said words to the effect: 'I'm not going to be around for a while. I'll sign these now.' He then signed dockets in 7 or 8 docket books which had no entries contained on them. I observed there were other occasions upon which Bell signed the dockets that had not been completed in any respect.
34. When Greber signed the dockets that I submitted to him he did not look at the entries contained on the dockets before signing.

...

11.

48. Exhibited to me at the time of swearing this Affidavit and marked 'DMP1' are true copies of plant hire dockets completed by myself. Excluding the signature appearing in the space provided by the clients' signature, I have completed these dockets in every respect. The operators' signatures on those dockets are signed by myself as 'T Arthur'. I say that the name T Arthur is a false name I chose to insert on those dockets and is not a person known to myself. To my knowledge there was no person known by the name of T Arthur that worked for [Earthline]. I say that I created this false name and signed it on the dockets in order to complete the plant hire dockets in accordance with the request issued to me by Davies.
49. Exhibited to me at the time of swearing this Affidavit and marked 'DMP2' are true copies of [Earthline's] plant hire dockets completed by myself. Except for the signature appearing in the space provided for the clients' signature, I have completed these dockets in every respect. The operators' signature appearing on those dockets is 'R Adams'. I have a specific recollection of selecting that name to insert on those dockets as I knew a Rachel Adams who was a girlfriend of one of [Earthline's] operators. To my knowledge Rachel Adams worked as a site secretary on occasion for [Earthline] when I was on leave and detailed Davies' car on occasion. I say that Rachel Adams did not operate any earthmoving equipment for [Earthline]. I inserted the signature of R Adams in order to complete the plant hire dockets in accordance with the request of Davies.
50. Exhibited to me at the time of swearing this Affidavit and marked 'DMP3' are true copies of [Earthline's] plant hire dockets completed by myself. Except for the signature appearing in the space provided for the clients' signature, I have completed these dockets in every respect. The operators' signature which I inserted on the dockets is that of 'P Goldspring'. To my knowledge P Goldspring did work for [Earthline] as a driver of a Mack truck low loader used to relocate [Earthline's] machinery from site to site. The dockets in respect of the Mack truck loader were completed by Maitland. I say that I inserted the signature of P Goldspring in order to complete the plant hire dockets in accordance with the request of Davies."

The first affidavit identified nine other names which Mrs Page stated she had inserted on the dockets in circumstances similar to those outlined in par 48. The first affidavit also specified 17 additional names which Mrs Page stated she had inserted on the dockets in a manner similar to that contained in par 49. The first affidavit further identified four other names which Mrs Page stated she had inserted on the dockets in circumstances similar to those outlined in par 50.

25 Significantly, Mrs Page was not cross-examined upon her allegations contained in pars 9, 33, 34, 48, 49 and 50 of the first affidavit.

26 Mrs Page was, however, cross-examined at great length upon some of the dockets which were exhibited to her first affidavit. She conceded that, despite inaccuracies concerning the operator names, the plant mentioned in 236 of the impugned dockets was in fact used at the specified times and that a roller "was" at sites identified in 237 dockets at the nominated times. Mrs Page also conceded that she had "assumed" that a grader mentioned in 21 dockets had done real work. She further conceded a dozer mentioned in one docket "possibly" did work, a loader in 47 dockets "may" have been working or "could have been" working and that she "did not know" whether an excavator in a series of dockets was working.

27 Upon the SRA commencing the proceedings, it entered into a deed of release with Mrs Page by which it released and indemnified Mrs Page from all liabilities connected with or incidental to the proceedings. This deed of release was received in evidence.

The evidence of Mrs Meek

28 The SRA also relied upon the evidence of Mrs Meek, employed as a secretary for Earthline in the period September 1989 to December 1991 and who, among other things, completed invoices submitted to the SRA. Mrs Meek swore two affidavits in the proceedings, the first dated 26 July 1993 and the second dated 12 August 1993. The first affidavit contained the following:

"4. ... Upon the completion of the invoicing, I was required to hand the invoices to Mr Ian Davies so they could be checked prior to the invoice being forwarded to the client. Annexed hereto and marked with the letter 'A' is a true copy of a manual invoice of Earthline completed by myself. ...

...

8. I say that in early 1991 I observed Mr Greg Davies in his office completing the plant hire dockets of Earthline in every respect excluding the space provided for the client's signature. I observed Mr Greg Davies writing up these dockets when I had occasion to go into his office to ask him a question. I observed Mr Greg Davies completing the plant hire docket books of Earthline approximately once or twice a month. ... The dockets Mr Greg Davies wrote up related to sites in the Hunter Valley. ...

...

13.

10. In June 1991, Mr Ian Davies hired an office worker by the name of Ms Katrine Packham ('Ms Packham'). ... I say that I observed Ms Packham completing plant hire docket books in Mr Philip [sic] Davies office for a couple of hours almost every day of the week for a period of six months. I recall on occasions observing Ms Packham signing the plant hire dockets in the space for the operator's signature.
11. I recall when undertaking the invoicing observing an occasional docket not having an operator's signature on it. When I noticed this omission I would take the docket either to Mr Ian Davies, Mr Philip [sic] Davies or Mr Greg Davies and seek their advice as to how to rectify the problem. I recall being directed by Mr Ian Davies and Mr Philip [sic] Davies upon making such enquiries for myself to sign the space for the operator's signature. I do not presently recall the details of these conversations however [I] recall that I was told to sign someone's name from the payroll. I further say that I recall when I enquired of Mr Greg Davies as to how to rectify such omissions that he would sign in the space for the operator's signature himself in my presence.
12. ... During the period of my employment with Earthline I did not observe an operator attend the offices of Earthline and sign a plant hire docket. I do recall however Mr Patrick Fardon an Earthline Site Foreman attended Earthline's office on a regular basis to complete the docket books for the sites he worked at. Excluding Mr Fardon's dockets I do not recall observing any other Earthline Site Foreman or operator completing plant hire docket books."

The second affidavit added:

- "8. I refer to paragraph 11 of my earlier Affidavit and say that on approximately half a dozen occasions I observed a docket not having an operator's signature. On these occasions I took the docket to either Mr Ian Davies, Mr Phillip Davies or Mr Greg Davies and said to them words to the effect:

I said:

'This docket has not got a signature on it. What do I do?'

If Mr Ian or Phillip Davies was present one of them said words to the effect:

Ian or Phillip Davies:

'You sign it yourself and use a name of someone you know to be on the pay roll.'

If only Mr Greg Davies was present he signed the docket himself in front of me. I carried out the directions of Mr Ian or Phil Davies.

9. I refer to paragraph 12 of my earlier Affidavit and say that all of my invoicing was checked by either Phil, Ian or Greg Davies before they were forwarded to the SRA."

Mrs Meek was not cross-examined on the portions of her first and second affidavits outlined above.

The evidence of Ms Packham

- 29 A third person upon whom the SRA relied was Ms Packham, a part-time employee of Earthline in the period June 1991 to November 1991. Like Mrs Page and Mrs Meek, Ms Packham swore two affidavits in the proceedings. The first, sworn on 26 July 1993, contained the following:

- "7. The procedure I adopted to complete the docket books was to fill out all docket books for a particular machine as recorded on the handwritten sheets of paper provided to me. Once I had filled in all dockets for a particular machine for the period stated on the sheets of paper, I would then move to the next docket book for the next machine and likewise complete all details for the required period. ...

...

9. On a few occasions when completing the plant hire docket books, I noticed that some of the dockets I had written out were duplicated in that the machine was supposedly working at two different sites on the same day for the same period of time. I recall the first time I noticed the apparent duplication being concerned that I had made an error. I went to [Ian] Davies' office and had a conversation with him in words to the following effect:-

I said: 'I was just writing out this docket and I noticed that I had written out a docket for the same machine for the same hours

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at a different site for the same day. I must have made a mistake.'

Davies: 'No, its right don't worry about it.'

I recall Davies attempted at that time to provide some explanation for the apparent duplication however I cannot presently recall what he said.

10. I recall one day when I was completing docket books Davies approached me with a docket book and pointed to the space on the docket for the operator's signature and said words to the following effect:-

Davies: 'Katrine, could you just sign this for me'.

I recall signing my own name on this occasion, on approximately 10 dockets contained in the book Davies handed to me. I further recall other occasions where Davies would direct me to sign someone else's name in the space for the operator's signature. I do not presently recall the names I was directed to sign. I say that Davies requested me to sign the operator's signature on only three or four occasions during my employment with Earthline. I further recall observing Mrs Rhonda Meek signing docket books in the space for the operator's signature.

...

12. I say that Mr Child attended the offices of Earthline each week for two or three weeks in a row, usually on a Friday. ... Mr Child would sit across from me in the office and sign the plant hire docket books I had completed in the space for the client's signature. I say that from my observations as to the speed with which he signed the docket books, that he did not check the details contained therein. I further say that when Mr Child attended Earthline's offices to sign docket books that he was in attendance for a [sic] average of three hours each time. During those three hours Mr Child would almost exclusively be signing docket books. I recall on a number of occasions when completing plant hire docket books, the signature of Mr Child appeared on dockets which had yet to be written out in any respect."

Ms Packham swore a second affidavit on 12 August 1993 which added:

- "3. I refer to paragraph 10 of my earlier affidavit and say that on about two or three occasions Mr Ian Davies came up to me and said words to the effect:

Ian Davies: 'Can you sign these dockets that haven't been signed?'

He was indicating that I sign the operator's signature on the dockets. He then said words to the effect:

Ian Davies: 'Sign (he mentioned a name which I can no longer recall) name.'

I did as he directed and signed on each occasion ten dockets using different names."

Ms Packham was asked only one question in cross-examination. It did not address the matters contained in the portions of her first and second affidavits outlined above.

30 Mrs Page, Mrs Meek and Ms Packham also alleged in their respective affidavits that Messrs Phillip and Ian Davies had spoken to them concerning the giving of evidence. By way of example, Mrs Page stated that Mr Phillip Davies had informed her:

"If they ask you to go to court just tell them you don't want to go. I've been trying to keep everybody out of court, everybody that I can keep out. I've been trying to keep them out."

Mrs Meek stated that Mr Phillip Davies had said to her:

"If you have to get in the witness stand they will give you a very hard time",
and that Mr Ian Davies had said:

"If you go to court they will get stuck into you. It will be very hard for you."

Other evidence

31 The SRA also tendered wage records and related documents of Earthline and Nuline. The related documents comprised a list of names of employees of Earthline, their occupations and the dates of their commencement and termination of employment.

32 The SRA engaged Coopers & Lybrand, accountants, to analyse the dockets submitted by Earthline and Nuline. Coopers & Lybrand prepared two reports. These reports, by way of annexures, indicated the dockets alleged to support, among other claims, the fictitious operator name claims, the fictitious plant number claims, the duplicate operator–different location claims and the duplicate operator–

same location claims. The reports, together with annexures, were received in evidence.

- 33 Significantly, Earthline and Nuline called no evidence to answer the claims of the SRA or to support their cross-claims. The solicitor for Earthline, Nuline and Messrs Davies, however, swore an affidavit on 1 September 1993 indicating that a police task force was investigating allegations of fraud, said to have been perpetrated by Earthline and Messrs Davies on the SRA, with a view to prosecution.

The judgment of the trial judge

- 34 On 14 September 1994, the trial judge delivered his reasons for judgment. The reasons comprised some 145 pages. His Honour rejected the majority of the claims made by the SRA – the fictitious operator name claims, the non-machine operator claims, the fictitious plant number claims, the duplicate operator–different location claims and the duplicate operator–same location claims. However, the trial judge accepted the duplicate plant numbers–different location claims, the duplicate plant numbers–same location claims and the plant under repair claims⁸.

The findings concerning the SRA procedures

- 35 His Honour initially considered the system operating within the SRA for the payment of invoices submitted by Earthline and Nuline. The trial judge concluded:

"I am satisfied that it was not a requirement of the SRA as at February, 1990 or at any time thereafter during the relevant period, that the name and personal or expressly authorised signature of the plant operator be included in each work docket. I am further satisfied that the non inclusion of such information had no effect upon payment by SRA to its contractors in respect of plant hire and that inclusion was not a prerequisite of payment."

This passage indicates that the trial judge saw as a relevant issue whether the signature of an operator on a docket was essential to payment of an invoice by the SRA. However, the case propounded by the SRA was that a large number of operators identified on the dockets, by way of signature, did not operate the plant. The SRA sought to establish its case by showing that some of the operators identified on the dockets did not work for Earthline or Nuline at all or, whilst employed by the companies, did not operate the plant to which the docket related.

8 It is these claims which O'Keefe CJ Comm D accepted which, for the reasons outlined later, are excepted from the new trial.

Accordingly, the relevant issue was not the presence or absence of a signature on the docket but rather whether the operator identified on the docket did in fact operate the plant. As will be seen below, the identification of the incorrect issue by the trial judge influenced his conclusions on the fictitious operator name claims and the non-machine operator claims.

- 36 His Honour next considered the roles of Messrs Child, Bell and Greber. The trial judge was critical of the decision of the SRA to rely on the evidence of Mr Vincent to establish the functions undertaken by these three defendants rather than to seek to lead evidence from a person with more direct knowledge of the matter. His Honour remarked:

"I do not wish to be unduly critical of Mr Vincent, but in the main his evidence cannot be characterised as primary evidence. The decision to seek to prove systems through him was no doubt a decision made by others, one would assume for good reason. However, that decision and that mode of proof leave an unsatisfactory situation in a number of respects, especially where the onus of proof is on the SRA."

The reason for the criticism of the lack of primary evidence concerning the procedures utilised by the SRA for payment of contractors, as well as the roles of Messrs Child, Bell and Greber within those procedures, is not clear. There would seem to have been no dispute at trial as to the duties of Messrs Child, Bell and Greber and, in particular, their function in certifying the dockets prepared by Earthline and Nuline. Moreover, whilst Earthline and Nuline objected to certain portions of Mr Vincent's affidavit, they did not make complaint about his evidence concerning the functions of Messrs Child, Bell and Greber. Earthline and Nuline also did not cross-examine Mr Vincent on this aspect of his affidavit evidence. Thus, the evidence of Mr Vincent on the functions of Messrs Child, Bell and Greber was unchallenged and there was no adequate basis to conclude that the situation was "unsatisfactory".

The findings concerning credibility

- 37 The trial judge then reviewed the allegations made against Messrs Child, Bell and Greber. In so doing, his Honour evaluated the evidence given by Mrs Page and Ms Packham and rejected significant parts thereof. The trial judge did not make an express finding concerning the evidence of Mrs Meek.

- 38 At a general level, his Honour stated in relation to Mrs Page:

"Whilst the material included in her affidavit gives the appearance of being quite unequivocal, this appearance did not survive her cross-examination. I do not accept significant parts of her evidence. It was internally inconsistent

in a number of respects. She was argumentative at times, evasive at others. She did not present well in the witness box. On a number of occasions I formed the view that the evidence she gave was made up on the spot to get her out of what she perceived to be a problem. Frequently she paused for periods, some of which were extended, and appeared to be casting around for an answer which she regarded as suitable rather than addressing the question directly. Although it was not put to her in cross-examination I could not help but feel that she had some animus towards the Davies. However I do not base my assessment of her on this nor on the fact that her services with Earthline were terminated by Earthline. Specific respects in which I reject her evidence emerge in the course of this judgment as do some instances of matters relating to her credit of the kind referred to above. However those instances are by no means exhaustive."

39 As explained earlier in these reasons, Mrs Page conceded in cross-examination that some of the dockets which she identified in her affidavit as containing false entries were in fact used at the times specified in those dockets. Yet, significantly, key components of her evidence withstood cross-examination, including those portions of her affidavits relating to fictitious operator name claims or non-machine operator claims.

40 Documentary evidence also supported a number of the allegations made by Mrs Page in her affidavits. The wage records and related documents for Earthline and Nuline were received in evidence and did not contain details relating to a number of persons identified in the dockets as operators. By way of example, Mrs Page alleged in par 48 of her affidavit that "T Arthur" was a false name she chose to insert on the dockets and was not, to her knowledge, a person who worked for Earthline. The wage records and related documents for Earthline did not include a person by the name of "T Arthur".

41 Moreover, significant portions of Mrs Page's affidavits were corroborated by the unchallenged evidence of Mrs Meek and Ms Packham, particularly the evidence of Ms Packham concerning the one machine operating at different locations at the same time.

42 In chief, Mrs Page was asked questions designed to assist the admission of certain portions of her affidavit evidence. Such questions filled three pages of transcript. Mrs Page was then cross-examined, completing some 200 pages of transcript, and re-examined, filling 14 pages of transcript. In light of Mrs Page's evidence substantially withstanding cross-examination, as well as the corroborating documentary and affidavit evidence, the rejection, as his Honour put it, of "significant parts of her evidence" is surprising.

- 43 The trial judge also took into account the deed of release between Mrs Page and the SRA in evaluating her evidence. His Honour added:

"It is not without significance that Mrs Page seems to have believed that she had an indemnity in return for giving evidence for the SRA against the defendants (T 80-82). As Exhibit S shows that indemnity relates only to civil claims which may have been made against her by the SRA. And it is only in respect of such claims that she has a release. However in her mind by giving evidence she was, in my opinion, protecting herself from any claims or prosecution to which she might have been subject. Whilst that may not explain in whole her evidence it is in my opinion an additional factor to be taken into account in assessing her evidence and the weight to be given to it."

This conclusion on the veracity of Mrs Page may have been based upon her appearance whilst providing oral evidence. Yet, Mrs Page misunderstood the effect of the release, believing that it would provide her with indemnity from both civil and criminal proceedings. Accordingly, she may have been more inclined to tell the truth rather than to seek to protect herself from future liability. This suggests that the adverse "significance" which the trial judge attached to the matter was misplaced.

- 44 The trial judge analysed the evidence given by Ms Packham. In the context of her evidence concerning the visits by Mr Child to Earthline to sign dockets, the trial judge stated:

"This contrast between that part of her affidavit concerning the frequency and duration of attendance by Mr Child at the Earthline office for the purpose of signing work dockets and that part which refers to the speed at which Mr Child is said to have signed the dockets, leaves me with a sense of unease about accepting her evidence as precise. In my opinion it is more probable that, whilst on some occasions there may have been some speed and absence of checking, it is not established to my satisfaction that this was the invariable practice or even the predominant practice. Absence of cross-examination does not assist SRA in relation to this conclusion. Nor does her evidence or any other evidence establish which of the work dockets now claimed to relate to work which was not done, were signed by Mr Child in the manner which she describes."

This feeling of "unease" is surprising in light of the failure by Earthline, Nuline and Messrs Davies to object to the relevant portions of Ms Packham's affidavit and the lack of cross-examination of her on those portions. Additionally, no evidence was called by any of the respondents to contradict Ms Packham, especially evidence from Mr Child as to his practice in certifying the dockets. Moreover, Mrs Page gave evidence as to the speed by which dockets were certified and the

absence of thorough checking by persons engaged by the SRA. This evidence lends support to Ms Packham's claims that Mr Child signed the dockets in a quick fashion.

The findings concerning the claims

45 His Honour next reviewed the evidence concerning each category of the claims which were alleged to contain materially false entries. The trial judge first examined the fictitious operator name claims and the non-machine operator claims and concluded:

"Insofar as operators are concerned ie categories (a) [fictitious operator name claims] and (b) [non-machine operator claims] the assumptions include that the name and signature of the operator of a particular machine at a particular site on a particular day for the hours set out in the relevant docket is a matter essential for the certifying officer of the SRA to satisfy himself about and a matter which, if inaccurate or omitted, should result in non payment for the hours included in such docket even though the work referred to in the docket was in fact carried out. For reasons which I have already detailed I reject this proposition. Not only am I not satisfied that the identity and or signature of the operator was essential to proper certification and payment but I am satisfied that the true situation was that what mattered and what was being certified for and paid was the fact that a machine of a given designation or description and hence an agreed hourly rate performed work for the number of hours shown in the day docket."

The conclusion in this passage, which was repeated later in his reasons, indicates a key basis upon which the trial judge rejected the fictitious operator name claims and the non-machine operator claims. (The other key basis was his rejection of the evidence of Mrs Page.) As explained earlier in these reasons, however, the real issue was not the presence or absence of a signature but rather the actual operation of the plant by the person identified in the docket.

46 In relation to certain items of plant, the trial judge concluded that they were being operated at the times and locations specified in the dockets. His Honour relied upon the concessions made by Mrs Page in cross-examination that some dockets relating to the fictitious operator name claims and the non-machine operator claims concerned plant that was actually used or which she "assumed" to have been used. These concessions concerned approximately 550 of the 2,264 dockets which comprised the non-machine operator claims. From this foothold, the trial judge proceeded to reject all of the non-machine operator claims. Importantly, his Honour failed to consider whether the plant identified in dockets which was not the subject of cross-examination, and which comprised the majority of the non-machine operator claims, was used for the hours specified.

47 In terms of the fictitious plant number claims, his Honour found that six of the 13 plant alleged to be fictitious were in fact real. This finding was based on the six items being included in a list of plant received in evidence. The trial judge, though, proceeded to examine the evidence relating to each of the alleged fictitious plant in detail. In relation to machine No 59, a machine which was found not to be real by reference to the list of plant, his Honour remarked:

"In addition M Goldspring is not the only driver of vehicle No 59 shown on the relevant work dockets. Messrs Jenkins, Dickenson and Marsden are also shown on the work dockets as operators of this machine at times when Mrs Page was not performing clerical duties for Earthline. Messrs Marsden and Dickenson appear in Earthline's employment records. The designation of their employment is as operator. Mr Jenkins does not appear in the employment records of Earthline, but he is shown to have driven the vehicle on only two occasions in early April 1990. The possibility of casual employment for this purpose cannot be excluded and no explanation has been given by the employee who completed such work dockets as to the circumstances in which Mr Jenkins' name was included on them."

The trial judge thus relied upon dockets identifying three other employees of Earthline – Messrs Jenkins, Dickenson and Marsden – in assessing whether machine No 59 was fictitious. However, it is important to observe that the evidence of Mrs Page that the name of Mr Jenkins was fictitious withstood cross-examination and was not contradicted by any of the respondents. Indeed, it would have been relatively easy for the respondents to establish that Mr Jenkins was a real person and an employee of Earthline by calling him as a witness and asking questions directed to such issues. Moreover, an inference that his evidence would not have assisted the respondents can be drawn from his absence as a witness in such circumstances⁹. An explanation for his absence was not provided. Additionally, the trial judge appears to have proceeded in error by referring to Messrs Dickenson and Marsden as operators of machine No 59. The dockets in evidence show that Messrs Dickenson and Marsden were operators of machine No 60, as opposed to machine No 59.

48 In any event, the list of plant tendered in evidence did not include a reference to a machine No 59. In the circumstances of this case, the strong inference is that the plant was fictitious.

49 The reference to the possibility of Mr Jenkins being a casual employee, despite the absence of his name on the wage records and related documents, is also suggestive of the application of the criminal, as opposed to the civil, standard of

9 *Jones v Dunkel* (1959) 101 CLR 298 at 308.

proof. Whilst it is true that a finding of fraud in a civil case should not be lightly made¹⁰, this does not entail that the criminal standard applies. The basic point is that it was not the task of the appellant to exclude every reasonable hypothesis but rather to establish its case on the balance of probabilities.

50 His Honour evaluated the evidence of Mrs Page in par 28 of her first affidavit concerning the alleged creation of dockets for sub-contractor machines. The trial judge stated:

"I do not accept [Mrs Page's] evidence in this regard, indeed in a number of critical respects. But even if what she deposes to in paragraph 28 of her affidavit were to be accepted there are still problems for SRA. I shall return to these later when I examine the dockets relating to sub-contractor machines. In addition no docket book has been pointed out whether completed during the period she was at the Hospital site or otherwise in which there are nine (9) or so sub-contractor machines ie the six rigid tippers, the dozer and grader recorded, as she deposes."

Notwithstanding the statement in the last sentence, the docket books relating to the sub-contractor machines were in evidence (by way of exhibits to Mrs Page's first affidavit), as were the reports by Coopers & Lybrand which identified, in summary form, the 429 dockets comprising the fictitious plant number claims (by way of an annexure to the reports identifying the impugned dockets by docket number). The factual foundation for the conclusion falls away.

51 The trial judge then examined the duplicate operator–different location claims and the duplicate operator–same location claims. His Honour stated:

"All of the persons referred to in the dockets gathered together in these categories were actual employees of Earthline. None of the work dockets involves any duplication of plant ... Only 81 of the 227 work dockets included in category (d) [the duplicate operator–different location claims] (35%) relate to a period in which Mrs Page was carrying out office duties for Earthline. Only some 30% of the work dockets referred to in category (e) [duplicate operator–same location claims] were completed during a period when Mrs Page was performing clerical duties for Earthline. Upon examination it is apparent that in a number of instances there is in fact no duplication involved. Some of the work dockets were certified by employees of SRA other than [Messrs Child, Bell and Greber]. Messrs Graham, Harkin, Ralston, Fardon, [Owen], Macrae, Kennedy and Howard are such or some of

10 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; 110 ALR 449 at 450.

such officers. Against none of them is any adverse suggestion made. None was called to explain the circumstances."

The emphasis, however, upon the percentage of dockets prepared at times when Mrs Page was performing clerical duties for Earthline is largely immaterial. The claims in these two categories were based upon duplicity. Such duplicity was clearly ascertainable by comparing two dockets and determining whether the same operator was stated to be using different machines at the one time. This comparison was made easier by the fact that an annexure to the Coopers & Lybrand report outlined, in table format, the dockets which were said to be duplicated. The acceptance into evidence of these reports, and the reliance upon them by the appellant, was appropriate given the large number of impugned dockets¹¹. Unfortunately, the finding by the trial judge that there were a number of instances of non-duplication is not explained by reference to the dockets. Thus it is difficult to review this finding.

52 The passage set out above also indicates that the trial judge rejected a number of the claims within this category on the basis that the impugned dockets were certified by representatives of the SRA other than Messrs Child, Bell and Greber. Yet, in accepting the duplicate plant numbers—different location claims and the duplicate plant numbers—same location claims, due to the existence of duplicity on the face of the dockets, his Honour was not concerned that a number of such dockets were certified by persons other than Messrs Child, Bell and Greber. An inconsistency of approach to determining the claims is thus apparent.

53 Finally, in light of the lack of evidence led by Earthline and Nuline, the trial judge dismissed the cross-claims.

The supplementary decision of the trial judge

54 On 10 October 1994, the trial judge published his reasons for judgment concerning the amount of damages to which the SRA was entitled against Earthline flowing from the duplicate plant numbers—different location claims, the duplicate plant numbers—same location claims and the plant under repair claims. Those damages, which included interest up to and including 10 October 1994, were calculated as \$146,587.63. The reasons for judgment of the same date also addressed the issue of costs, with the trial judge deciding that the SRA would be entitled to 20 percent of its costs, to be paid by Earthline, on a party-party basis.

11 See *Potts v Miller* (1940) 64 CLR 282 at 292, 303; *Re Montecatini's Patent* (1973) 47 ALJR 161 at 169.

The appeal to the Court of Appeal

55 The SRA appealed to the Court of Appeal on two principal grounds. First, it challenged the approach of the trial judge in rejecting the evidence of Mrs Page and, secondly, it submitted that the documentary evidence, standing alone, established that the impugned claims were false.

56 Section 75A of the *Supreme Court Act* 1970 (NSW) applied to the appeal. Sub-sections (5), (6) and (10) thereof state:

"(5) Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing.

(6) The Court shall have the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning –

(a) amendment,

(b) the drawing of inferences and the making of findings of fact, and

(c) the assessment of damages and other money sums.

...

(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires."

57 On 20 December 1996, the Court of Appeal dismissed the appeal with costs. Mahoney P, with whom Meagher JA agreed, summarised the case put forward by the SRA in the following terms:

"The contention of SRA was essentially that the claims for payment made by the companies which SRA impugned were false in that the work for which payment was claimed was not done. The basis of the falsity ... was not the same throughout; the companies, SRA claimed, composed and filed with it claims that were inaccurate in various ways. However, the thrust of the matter, as contended by SRA, was that the work for which payment was claimed was not done."

This summary implies that the issue in the proceedings was whether work was performed. It is clear, however, that the work, in the sense of track repairs and earthworks, was undertaken by Earthline and Nuline for the SRA. The crucial

issue was whether certain plant was used by Earthline and Nuline in undertaking such work, the quantum of use being determinative of the amount of remuneration properly due from the SRA to Earthline and Nuline.

- 58 Mahoney P first addressed the ground of appeal concerning the rejection by the trial judge of the evidence of Mrs Page. The President referred to authorities such as *Abalos v Australian Postal Commission*¹² and *Devries v Australian National Railways Commission*¹³ before concluding that he was not satisfied that the trial judge had misused his position of advantage in assessing the credibility of Mrs Page. Mahoney P stated:

"I shall not repeat the detailed analyses of the evidence made in this regard by the trial judge. It is sufficient that I record that, in general, I agree that in at least a number of respects the analyses which he made and the comparisons between her evidence and the documents provide adequate reasons for rejecting the evidence of Mrs Page. If there were errors of detail in what the [trial] judge did, I think that they do not falsify the general conclusions at which he arrived: there were instances enough to justify his conclusions as to her credibility. I do not think that this Court on appeal should set aside the conclusion which in this regard the [trial] judge reached."

His Honour said that, were Mrs Page's evidence to be put aside to the extent that the trial judge did so, the substantial basis of the claims of the SRA was removed. The President added:

"The evidence that was given by Mrs Page suggesting, for example, that she had had deliberate and detailed instructions from officers of the companies in respect of the falsification of claims and that there was misconduct or negligence of the officers on site employed [sic] by SRA of the kind and extent she suggested is not in my opinion acceptable."

This rejection of Mrs Page's evidence must be considered against the background of a failure by the respondents to object to her evidence on the instructions provided by Messrs Davies and the lack of cross-examination on the same matter. The uncontradicted and unchallenged evidence of Mrs Meek and Ms Packham on the instructions provided by Messrs Davies to them is also of considerable significance.

12 (1990) 171 CLR 167.

13 (1993) 177 CLR 472.

59 On the ground of appeal concerning the sufficiency of the documentary evidence, the President agreed with the approach of the trial judge to analysing such evidence and the doubts he had concerning such evidence. Mahoney P concluded:

"It is no disrespect to the industry of counsel that I do not repeat the analyses contained in the judgment ... Notwithstanding the submissions that have been made, I am in general agreement with the way in which the [trial] judge dealt with the details as he there set them forth. ... There are enough matters of substance supporting the [trial] judge[']s analysis of the documents and the use of them in the exhibits to warrant the conclusion that they should not satisfy the court of the falsity of the claims impugned.

...

Having attempted my own analysis of the exhibits and checked again the portions of them to which the judge referred, I am not convinced that I should draw the inferences as to the falsity of the claims which SRA has suggested."

It will be apparent from the observations earlier in these reasons that the acceptance by the President of the reasons of the trial judge was misplaced.

60 The third member of the Court of Appeal, Handley JA, agreed with the conclusions of Mahoney P concerning the rejection by the trial judge of the evidence of Mrs Page. On the issue of the sufficiency of the documentary evidence, Handley JA stated:

"The first difficulty is that the [SRA] failed to call any of its own employees who had, or should have had, knowledge of the facts. The second difficulty is that the [SRA] failed to make out a *prima facie* case that particular payments, other than those for which it recovered, had been paid by mistake for work that had not been done. There was evidence which was more than sufficient to excite the suspicion of the Court, but no *prima facie* case in relation to any other particular payments. Moreover there was no *prima facie* case that the contractors had charged the [SRA] and been paid for more work than they had truly performed so as to entitle it to recover a proportion of its payments on a global basis, assuming that such a course was open to it as a matter of law."

The criticism of the lack of primary evidence of the procedures adopted by the SRA has been addressed earlier in these reasons. The conclusions concerning the absence of a *prima facie* case makes no allowance for the weight of much of the documentary evidence, particularly the corroborating affidavits of Mrs Meek and Ms Packham, the wage records and related documents supporting the fictitious operator name claims, the list of plant in relation to the fictitious plant number claims (at least for machine No 59) and the duplicity on the face of the dockets with respect of the duplicate operator–different location claims and the duplicate operator–same location claims. Furthermore, Earthline and Nuline led no evidence other than the affidavit sworn by their solicitor, to which reference is made earlier in these reasons.

The appeal to this Court

61 By grant of special leave, the SRA appeals to this Court on a single ground:

"The Court [of Appeal] erred in failing to hold that the trial judge was not entitled to reject the evidence of the principal witnesses called by the SRA in circumstances where their evidence was inherently probable, had not been denied or answered in evidence by the respondents, had not been directly challenged in cross-examination by the respondents and had been substantially corroborated by the respondents' own documents."

62 The SRA contends that the trial judge was in error in three respects. First, the trial judge failed to give sufficient attention to all the evidence of the case,

especially that of Mrs Meek and Ms Packham, as well as the extensive documentary evidence, in evaluating the evidence of Mrs Page. Secondly, the trial judge applied the incorrect standard of proof in analysing the evidence led by the SRA. And thirdly, the trial judge misdirected himself as to the relevant issue concerning the certification of the dockets. For the reasons outlined above when reviewing the judgments of the trial judge and the Court of Appeal, the SRA has established each of these grounds.

63 It is true that the trial judge, in determining whether to accept the evidence of Mrs Page, was heavily swayed by his impression of her whilst giving oral evidence. However, this circumstance does not preclude a court of appeal from concluding that, in light of other evidence, a primary judge had too fragile a base to support a finding that a witness was unreliable.¹⁴ The documentary evidence in this case, comprising unchallenged affidavit material of Mrs Meek and Ms Packham, the wage records and related documents of Earthline and Nuline, the list of plant (at least in relation to machine No 59) and the analysis of Coopers & Lybrand (in respect of the duplicity claims), provides significant support to the allegations made by Mrs Page.

64 As Kirby J and Callinan J point out in their reasons for judgment, these were matters to which weight was not given either by the trial judge or the Court of Appeal. The substance of the matter is that there has not yet been a determination of the SRA's case upon a consideration of the real strength of the body of evidence it presented. There must be a new trial at which this consideration will be undertaken.

Orders

65 The appeal should be allowed with costs. Orders 1, 3, 4 and 5 of the Orders of the Court of Appeal dated 20 December 1996 should be set aside and, in place thereof, it should be ordered that the appeal to that Court be allowed with costs, Orders 1, 2 and 3 of the Orders of O'Keefe CJ Comm D made on 13 February 1998 be set aside and there be a new trial on all issues except those on which the SRA was successful against Earthline before O'Keefe CJ Comm D.

14 *Apand Pty Ltd v The Kettle Chip Company Pty Ltd* (1994) 52 FCR 474 at 496-497. See also *Voulis v Kozary* (1975) 50 ALJR 59; 7 ALR 126; *Chambers v Jobling* (1986) 7 NSWLR 1.

- 66 The costs of the proceedings before O'Keefe CJ Comm D should abide the outcome of the new trial.
- 67 Order 2 of the Orders of the Court of Appeal, which relates to the dissolution of a *Mareva* injunction in favour of the SRA, was not the subject of submissions to this Court. Any application to reinstate such relief should be made to the Supreme Court.

68 KIRBY J. In *Ahmedi v Ahmedi*¹⁵, in the New South Wales Court of Appeal, I remarked:

"If the mere incantation of *Abalos v Australian Postal Commission*¹⁶, is henceforth to deprive this Court of the power and duty of review of factual conclusions, a great deal of injustice will be uncorrected and the clearly expressed will of Parliament, defining the jurisdiction of this Court, will be frustrated. I do not believe that that is what *Abalos* or any other judicial authority does provide or could provide."

69 This appeal, from orders of the New South Wales Court of Appeal¹⁷, challenges the dismissal by that Court of an appeal from a decision given by O'Keefe CJ Comm D in the Supreme Court of New South Wales. Substantially, the appeal required the re-examination of a large amount of factual evidence. It is unusual for this Court to provide special leave in a case involving no suggested point of legal controversy or principle. It is also unusual for this Court to disturb conclusions of fact which have been reached at first instance and confirmed in the primary appeal, although it has occasionally done so¹⁸.

70 Despite the unpromising features of the matter, it is clear enough that special leave was granted because of a concern that an injustice had been done to the appellant¹⁹. This concern arose when the decision of the primary judge, affirmed on appeal, was compared with apparently reliable and incontrovertible documentary evidence, a significant amount of uncontested oral testimony and the absence of relevant testimony from the respondent parties to refute or meet the significant case presented against them. Standing in the way of intervention by this Court, it was suggested, was its own instruction in *Abalos v Australian Postal Commission*²⁰. The Court was warned that any retreat from that instruction would

15 (1991) 23 NSWLR 288 at 291.

16 (1990) 171 CLR 167.

17 *State Rail Authority of New South Wales v Earthline Constructions Pty Limited & Ors* unreported, New South Wales Court of Appeal, 20 December 1996 (Mahoney P, Meagher and Handley JJA).

18 See eg *Voulis v Kozary* (1975) 180 CLR 177 at 192 per Jacobs J. Another illustration is *Warren v Coombes* (1979) 142 CLR 531.

19 cf *Judiciary Act* 1903 (Cth), s 35A(b).

20 (1990) 171 CLR 167.

make a rod for its own back and, by inference, for other appellate courts sheltered from unpromising appeals by the *Abalos* line of authority²¹.

- 71 In my opinion the appeal should be allowed. My reasoning runs along the same general lines as that of Callinan J. Although, in the Court of Appeal Mahoney P expressly invoked *Abalos*²², Meagher JA agreed with him and Handley JA did likewise (adding some reasons of his own), this was not an appeal in which the principles stated in *Abalos* governed the proper appellate analysis to the point of relieving the Court of Appeal of its statutory function²³. Although the appellant's counsel disdained any suggestion that new principles were required to guide appellate courts in the performance of their functions in cases such as this, the appeal illustrates the danger of attaching too much significance to the words of restraint expressed in *Abalos* and allowing those words to deflect the appellate court from its duty. If this decision has importance beyond the correction of a perceived injustice in a particular matter, it is as it permits this Court to reaffirm the true principles which govern appellate courts in deciding appeals in civil matters brought from orders made by a judge sitting without a jury.

Appellate review of facts: history

- 72 Appeal is an invention of statute²⁴. At common law there was no room for appeal on questions of fact. There, the resolution of disputed facts was, in virtually every case, the province of the jury²⁵. So far as the writ of error was concerned,

21 *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

22 *State Rail Authority of New South Wales v Earthline Constructions Pty Limited & Ors* unreported, New South Wales Court of Appeal, 20 December 1996 at 7.

23 *Supreme Court Act* 1970 (NSW), s 75A(5).

24 *Attorney-General v Sillem* (1864) 10 HLC 704 at 720-721 [11 ER 1200 at 1207-1208]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108; *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225; *Grierson v The King* (1938) 60 CLR 431 at 436; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 202; *Gipp v The Queen* (1998) 72 ALJR 1012 at 1035; 155 ALR 15 at 46; *Merribee Pastoral v ANZ Banking Group Ltd* (1998) 72 ALJR 1055 at 1060; 155 ALR 1 at 7-8; *CDJ v VAJ* (1998) 72 ALJR 1548 at 1562; 157 ALR 686 at 705-706; *Fleming v The Queen* (1998) 73 ALJR 1 at 6; 158 ALR 379 at 385.

25 There was a practice in Chancery, before the enactment of legislation in the mid-nineteenth century, to send issues of disputed legal rights, titles and interests to the common law courts to be tried before a jury by way of special case: *First Report of* (Footnote continues on next page)

which preceded appeal, it did not invite, or permit, review of the facts²⁶. In *R v Earl of Banbury*²⁷, Lord Holt CJ expressed the attitude which prevailed:

"[A]ll causes generally consist more of matters of fact, than of law, and it is beneath the dignity of their Lordships, to be troubled with matters of fact".

- 73 When, in the nineteenth century, in England, a facility of appeal was provided by Act of Parliament, first in Chancery²⁸ and then more generally²⁹, there were probably still some judges (there may be some today) who regarded the injustices that can occur from erroneous factual determinations as beneath their dignity. Certainly, such errors do not typically present the kind of controversies, analytical and conceptual, which are congenial to most trained lawyers. So when the obligation of deciding appeals from the decisions of single judges in civil causes was imposed by statute, it was natural enough that the early appellate judges should look to the only precedents on offer. In the case of the English Court of Appeal, this involved reaching back to the jurisprudence in Chancery appeals. These, in

the Commissioners into the Process, Practice, and System of Pleading in the Court of Chancery, (1852) at 10, reprinted in British Parliamentary Papers, *Legal Administration, General*, vol 8, "Court of Chancery" at 54.

- 26 Story, *Commentaries on the Constitution of the United States*, 1st ed (1833), vol 3, §1756.
- 27 (1694) *Skinner* 517 at 523 [90 ER 231 at 235]. See *Paterson v Paterson* (1953) 89 CLR 212 at 219; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 277 per McHugh JA.
- 28 In 1621, in *Bourchier's Case* (Hale, *Jurisdiction of the House of Lords* at 195) an "appeal" from the decision of the Chancellor to the House of Lords was attempted but the House of Lords refused review for want of jurisdiction except in cases of bribery or corruption of the Chancellor. For a time, after the Restoration, the House of Lords exercised an appellate jurisdiction from the Chancellor. See eg *Shirley v Fagg* (1675) 6 ST 1122. However, this was much criticised for want of suitable expertise in their Lordships. See Potter, *An Historical Introduction to English Law and its Institutions*, 3rd ed (1948) at 173-175. In 1851, by 14 & 15 Vict c 83, the Court of Appeal in Chancery was created. It was later absorbed in the Court of Appeal established by the *Judicature Act* 1873 (UK). By rr 50 and 52 in the Schedule to the *Judicature Act* it was provided that all appeals to the Court of Appeal should be by way of rehearing. These provisions were widely copied, including, eventually, in New South Wales.
- 29 *Judicature Act* 1873 (UK), Pt II. The Act formed a Supreme Court of two Divisions: the Court of Appeal and the High Court of Justice. See *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 143-145.

turn, had derived guidance from Admiralty cases heard before the Privy Council³⁰. In these, the Board had warned, often in the context of conflicting oral evidence about ship collisions, of the need to respect the conclusion of the trial judge in reviewing the evidence, and to acknowledge the advantages which that judge enjoyed from his opportunity to see witnesses and observe their demeanour. According to this line of authority, the appellate court's intervention was to be confined to cases where the examination of the record of testimony led the appellate court to a feeling of "extreme and overwhelming pressure" to substitute their conclusion for that reached at trial³¹.

74 Here, then, in the earliest days of the elucidation of the judicial role in civil appeals were the seeds of the controversy which has persisted for 150 years. Appellate judges must necessarily perform their statutory function. They must rehear the matter and form their own conclusions on the evidence recorded at the trial. Rising to their duty, they must condescend to a re-examination of the facts, if their statutory charter so requires or permits. Yet that re-examination obliges appellate judges to take into account, and give full weight to, the advantages which the trial judge had and which, in the nature of their different functions and purpose, they may not have.

75 These principles were stated and re-stated several times in the decisions of the English Court of Appeal between the date of its establishment in 1875 and the establishment of this Court³². In the earliest days of this Court it was unsurprising that the Justices, themselves then answerable to the Privy Council, should have adopted and applied a like approach to the problem, and expressed it in identical language. In *Paterson v Paterson*³³, Dixon CJ and Kitto J suggested that the "earliest occasion on which this Court dealt with the matter was probably in *Dearman v Dearman*³⁴". Certainly that was one of the first cases. In it the Court restored the orders of a trial judge who had declined to act on the evidence of witnesses who testified to adultery. However, the first case actually arose in the first year of the operation of this Court, a matter remarked upon by Priestley JA in

30 See eg *The "Julia"* (1860) 14 Moore 210 [15 ER 284]; *The "Alice"* (1868) LR 2 PC 245; cf *Scott v Pauly* (1917) 24 CLR 274 at 279 per Isaacs J.

31 Discussion in *The Glannibanta* (1876) 1 PD 283 at 287.

32 See eg *Robertson v Robertson* (1881) 6 PD 119 at 121; *Bigsby v Dickinson* (1876) 4 Ch D 24 at 28-29; *Coghlan v Cumberland* [1898] 1 Ch 704. See also *Montgomerie & Co Limited v Wallace-James* [1904] AC 73; *Nocton v Ashburton (Lord)* [1914] AC 932 at 945.

33 (1953) 89 CLR 212 at 220.

34 (1908) 7 CLR 549.

*Moran v McMahon*³⁵. The decision is *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)*³⁶. The passage in question appears in the reasons given for the Court by Griffith CJ. He said³⁷:

"Now, although when a cause has been heard by a Judge on *vivâ voce* evidence, a Court of appeal is naturally reluctant to differ from him on a question of fact, yet the Court must bear in mind that it is required to re-hear the cause, and to form its own conclusions upon the evidence. (See *Coghlan v Cumberland*³⁸). The difficulty which the Court of appeal feels is greater when there is a conflict of evidence, or when the weight to be attached to uncontradicted testimony depends to some extent upon the demeanor of witnesses, than when the facts are not contradicted, and the main question is as to the proper inference to be drawn from them, or when the case is substantially one of circumstantial evidence."

76 The decision in *Coghlan v Cumberland*, which was approved and applied by this Court in *McLaughlin*, examined the dilemmas which have faced appellate judges in Australia and elsewhere ever since the statutory facility of appeal was introduced. How can they reconcile the obligation to conduct an appeal by way of rehearing on the facts as well as on the law, whilst respecting the advantages enjoyed by the trial judge which the appellate court can never wholly recapture? In *Coghlan*, the English Court of Appeal had said³⁹:

"It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

35 (1985) 3 NSWLR 700 at 715.

36 (1904) 1 CLR 243.

37 (1904) 1 CLR 243 at 277.

38 [1898] 1 Ch 704.

39 [1898] 1 Ch 704 at 705.

The approach adopted in these words was applied in many later decisions of this Court⁴⁰.

77 More recently, it has become common to cite the well-known passage in Lord Sumner's speech in *SS Hontestroom v SS Sagaporack*⁴¹. But that speech did not, in my respectful opinion, add anything of substance to what had been said 30 years earlier in *Coghlan*. Nor for that matter to what had been said by Griffith CJ in *McLaughlin*. All that was added was the somewhat unfortunate reference (as it seems to me) to the consideration of whether "it can be shown that [the trial judge] has failed to use or has palpably misused his advantage"⁴². These words carry the flavour of judicial misconduct which is rarely shown, or even suggested⁴³. How one distinguishes an alleged judicial "misuse" of advantage which is "palpable" from one which exists but is not "palpable" has never been clear to me. Nor is it clear why misuse must be "palpable" but the failure to use the advantage given to the judge need not be "palpable". Lord Sumner's formula is, in my respectful opinion, flawed. It may lead appellate courts to an assumption about the burden of demonstrating error that is unduly onerous: warranted neither by the statutory formulae applicable to such cases nor by the notion of "appeal" itself.

78 It was natural, after *McLaughlin*, that the problem would quickly return to the Court for this is the question which stands at the threshold of the consideration of most civil appeals. Return it did in *Dearman v Dearman*⁴⁴. There, Isaacs J offered the first of what would become several examinations by him of the appellate function. With a nod to the early Privy Council opinions and the decisions of the English Court of Appeal, Isaacs J gave voice to the apparently competing requirement falling on the appellate court: the first is "the primary duty, and in fact the whole duty, of every Court of Appeal [which] is to give the judgment which in its opinion ought to have been given in the first instance."⁴⁵

40 See eg *Federal Gold Mine Ltd v Ennor* (1910) 13 CLR 276 at 279, 284; *Craine v Australian Deposit and Mortgage Bank Ltd* (1912) 15 CLR 389 at 399; *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199 at 207. Other cases are collected by Asprey JA in *Ravagnani v Hollywood Sands Pty Ltd* [1972] 1 NSWLR 362 at 367-368.

41 [1927] AC 37 at 47.

42 [1927] AC 37 at 47.

43 cf *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 92 per Meagher JA.

44 (1908) 7 CLR 549.

45 (1908) 7 CLR 549 at 561. See also *Scott v Pauly* (1917) 24 CLR 274 at 278-281; *London Bank of Australia Ltd v Kendall* (1920) 28 CLR 401 at 406-407; cf *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

The second is to observe the "natural limitations" which exist in the case of any appellate court⁴⁶. It is to accept that the trial judge might have found significance in "[a] look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence" which cannot be attributed to the witness "in the mere reproduction in type"⁴⁷. Isaacs J accepted that, in some cases, the effect of "unrecorded material" would be "very small, indeed insignificant, and utterly outweighed by other circumstances"⁴⁸. An appellate court was not excused from the task of "weighing conflicting evidence and drawing its own inferences and conclusions"⁴⁹. However, it would always "bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect"⁵⁰. Most of the problems which have repeatedly presented themselves in the 90 years since *Dearman* was written are reflected in the reasons given in that case.

- 79 There is no point in reviewing the many decisions after *Dearman* and before the *Abalos* trilogy⁵¹. A description of the first 50 years of this Court's decisions on the matter was offered by Dixon CJ and Kitto J in *Paterson v Paterson*⁵². That examination included, after *Dearman*, reference to *Craine v Australian Deposit and Mortgage Bank Ltd*⁵³, *Perpetual Executors and Trustees Association of Australia v Wright*⁵⁴, *Scott v Pauly*⁵⁵, *Federal Commissioner of Taxation v Clarke*⁵⁶, and *Webb v Bloch*⁵⁷. There were doubtless many other cases. The

46 (1908) 7 CLR 549 at 561. See also *Scott v Pauly* (1917) 24 CLR 274 at 278-281.

47 (1908) 7 CLR 549 at 561.

48 (1908) 7 CLR 549 at 561-562.

49 (1908) 7 CLR 549 at 564 citing *The Glannibanta* (1876) 1 PD 283 at 287.

50 (1908) 7 CLR 549 at 564.

51 *Abalos* (1990) 171 CLR 167; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

52 (1953) 89 CLR 212.

53 (1912) 15 CLR 389.

54 (1917) 23 CLR 185 at 190-191.

55 (1917) 24 CLR 274 at 278-281.

56 (1927) 40 CLR 246 at 262-266.

57 (1928) 41 CLR 331 at 356.

reason for such a multitude of dicta was explained in *Paterson v Paterson*⁵⁸ by Dixon CJ and Kitto J:

"In the course of our work we are constantly reminded by counsel of the particular aspect of such a matter emphasized by one or other of the cases which have more recently dealt with the duty of a court of appeal when reviewing findings of fact. Some of the earlier judicial statements seem to have fallen from the honoured place they once held in the armoury of respondents in this court."

80 The same words might be repeated nearly half a century later. In that interval, further cases dealing with the problem of the duty and limitations of appellate review have regularly presented themselves for decision. They have included *Whiteley Muir and Zwanenberg Limited v Kerr*⁵⁹, *Voulis v Kozary*⁶⁰, *Taylor v Johnson*⁶¹, *Brunskill v Sovereign Marine & General Insurance*⁶² and *Baumgartner v Baumgartner*⁶³ and many others.

Emphasis on the duty of appellate review and its constraints

81 Despite the fact that it is difficult to discern in the more recent decisions anything that was not first said long ago⁶⁴, appellants and respondents before Australian appellate courts, looking for nuances to support, or to resist, intervention have laid emphasis upon selected passages in the reasons of this Court. Taken out of context, those passages might seem to point in opposite directions - some laying emphasis upon the requirements of the appellate duty to correct trial judges who are not infallible; others stressing the obligations of appellate restraint out of recognition of the advantages, expressed or necessarily inferred, which the trial judge enjoys and which the appellate court does not.

58 (1953) 89 CLR 212 at 219.

59 (1966) 39 ALJR 505.

60 (1975) 180 CLR 177.

61 (1983) 151 CLR 422.

62 (1985) 59 ALJR 842; 62 ALR 53.

63 (1987) 164 CLR 137.

64 cf *Paterson v Paterson* (1953) 89 CLR 212 at 224 where Dixon CJ and Kitto J said that the cases contained "such variety of detailed expression but with such identity of substance".

82 In the first category of cases may perhaps be seen the Court's decisions in *Voulis v Kozary*⁶⁵ but especially in *Warren v Coombes*⁶⁶. The latter decision was significant in the history of appellate review. There, the Court voiced its disapproval of principles supporting the very high measure of appellate restraint expressed by Barwick CJ in *Whiteley Muir and Zwanenberg Limited v Kerr*⁶⁷ and repeated by him, with the support of Windeyer J, in *Da Costa v Cockburn Salvage & Trading Pty Ltd*⁶⁸ and in *Edwards v Noble*⁶⁹. In those cases, Barwick CJ's view was that, even where an appellate court was authorised to substitute its view of the facts for that reached by the trial judge, there being no relevant restraint of witness credibility or demeanour, it should not do so if the findings made by the trial judge were "reasonably open on the evidence"⁷⁰. This view had been rejected at the time by Walsh J⁷¹. In *Warren v Coombes*⁷², it was firmly rejected by this Court. Barwick CJ's approach was described as representing a departure from the "traditional view"⁷³. The latter was established not only by the authority of this Court, in cases such as *Paterson v Paterson*⁷⁴, but also by the English courts, including the House of Lords⁷⁵. The "traditional" view was stated thus⁷⁶:

"[I]n 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 or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but,

65 (1975) 180 CLR 177.

66 (1979) 142 CLR 531.

67 (1966) 39 ALJR 505 at 506; *Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29 at 31; 140 ALR 227 at 229-230.

68 (1970) 124 CLR 192 at 199, 207-208.

69 (1971) 125 CLR 296 at 307.

70 *Edwards v Noble* (1971) 125 CLR 296 at 304.

71 *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 217.

72 (1979) 142 CLR 531 at 542-553.

73 *Warren v Coombes* (1979) 142 CLR 531 at 545.

74 (1953) 89 CLR 212.

75 *Benmax v Austin Motor Co Ltd* [1955] AC 370.

76 *Warren v Coombes* (1979) 142 CLR 531 at 551.

once having reached its own conclusion, will not shrink from giving effect to it. These principles, we venture to think, are not only sound in law, but beneficial in their operation."

83 Although this excursus to eradicate a "heresy"⁷⁷ left to one side the problem presented to an appellate court where facts were disputed but unresolved by express judicial evaluation, the tonic administered by *Warren v Coombes* redirected appellate courts in Australia to their duty to reach and give effect to their own conclusions. That duty is founded in their enabling statutes. Once the supposed principles advocated by Barwick CJ were despatched, the cases in this Court and in other Australian appellate courts proceeded in the way required by authority stretching back to *McLaughlin*⁷⁸ in this country and *Coghlan*⁷⁹ in England.

84 Then, in 1990, came the decision in *Abalos*⁸⁰. In truth, *Abalos* was preceded by *Jones v Hyde*⁸¹, which heralded much the same approach. It was followed by *Devries v Australian National Railways Commission*⁸² to similar effect. In this trilogy of cases, in each instance, the appeal was allowed, the orders of the appellate court set aside and the orders of the primary judge restored by the unanimous decision of this Court⁸³. The result of the trilogy has been that, in some circles, the mere mention of credibility findings or their possible relevance to the decision by the trial judge has been viewed as locking and barring the door to successful appellate reconsideration of the facts. That is not what was said by the Court in *Abalos* or in the accompanying decisions. If this appeal does nothing else, it should once again restore the understanding of this Court's authority, returning the understanding of it to the "traditional" view.

77 The word was attributed to Windeyer J. See *Warren v Coombes* (1979) 142 CLR 531 at 551-552.

78 (1904) 1 CLR 243.

79 [1898] 1 Ch 704.

80 (1990) 171 CLR 167.

81 (1989) 63 ALJR 349 at 351-352; 85 ALR 23 at 27-28.

82 (1993) 177 CLR 472 at 479, 482-483.

83 cf *Semanczuk v Semanczyk* [1955] SCR 658 at 667-668; *Bickley v Bickley and Blanchley* [1957] SCR 329 at 333 and *Maze v Empson* [1964] SCR 576 where the same development occurred in Canada 30 years earlier. Contrast *Demers v The Montreal Steam Laundry Company* (1897) 27 SCR 537 at 538-539 where, earlier, a rule of restraint was endorsed for the Supreme Court of Canada.

85 Properly analysed, there is little in the reasoning in the *Abalos* trilogy that was new. True, there is emphasis on the fact that, to enliven appellate restraint where issues of witness credibility may be involved, it is unnecessary for the trial judge to state expressly that his or her decision was dependent on credibility or demeanour considerations⁸⁴. True also, the trilogy of cases reminded appellate courts that there had to be real respect for the advantages of the trial judge in observing the witnesses give their evidence, as distinct from mere lip service⁸⁵. But there was nothing novel in either of these points. They had been said before, and often⁸⁶. If there was anything in the *Abalos* trilogy that was new, it was the reference in the reasons of McHugh J, who wrote for the Court, to the impact of the "subtle influence of demeanour" on the trial judge's determination when resolving a conflict of evidence between witnesses⁸⁷. This phrase was quickly picked up. It was described in appellate courts as something "which we are now instructed to presume"⁸⁸. It caused some appellate judges to doubt the authority of earlier decisions of this Court⁸⁹ and of their own courts⁹⁰ given before *Abalos*.

86 In saying that the impact of appearance or demeanour can be "subtle", McHugh J in *Abalos* was adding little to what Isaacs J had written 60 years earlier in *Dearman*. *Abalos* does not state a new principle of law. After more than a century of countless re-explorations of the point, it would have been difficult indeed to find anything new to say. *Abalos* and the cases which accompanied it are to be read as lying in the mainstream of the Court's "traditional" approach to the appellate function. To read more into them would be to risk returning the Court to a view of the appellate function, wholly subservient to the opinions and conclusions of the trial judge, which was expressed in the now discarded approach

84 *Jones v Hyde* (1989) 63 ALJR 349 at 351; 85 ALR 23 at 27; *Abalos* (1990) 171 CLR 167 at 179.

85 *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 482-483.

86 See eg *Perpetual Executors and Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185 at 190-191.

87 *Abalos* (1990) 171 CLR 167 at 179.

88 *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349 per Samuels JA.

89 *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 350 referring to *Voulis v Kozary* (1975) 180 CLR 177.

90 See *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 350 referring to *Chambers v Jobling* (1986) 7 NSWLR 1.

which Barwick CJ propounded, for a time successfully, in *Edwards v Noble*⁹¹ and other cases. There is no warrant for returning to that position. In my view, it should be firmly resisted. It cannot stand with the duty imposed on appellate courts by statute to make up their own mind⁹²; to conduct appeals on the facts by way of rehearing⁹³; to draw inferences from the facts for themselves; to give the judgment and make orders that should have been given at trial; and, in exceptional circumstances, even to admit fresh evidence into consideration⁹⁴.

Witness credibility: a changing context

87 Sometimes where principles have been accepted for a very long period, it is useful for a court such as this to re-examine them in the light of social and technological changes and changes which have occurred in the administration of justice since the rules were first expressed. As Sir Thomas Bingham MR observed in *R v Ministry of Defence, Ex parte Smith*⁹⁵: "A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z." We must ever be on our guard that we have not reached the new time without noticing it.

88 There have been many changes in the appellate function since the rules outlined above were first stated. The changes have included the following:

1. The acceptance of appeal as a regular and normal procedure of the administration of justice: affording an opportunity, usually one as of right, to have a judicial decision reviewed for error of fact as well as of law. When the facility of appeal was first provided by law, the primacy of the decision of the trial judge was reinforced not only by the novelty of the new right but by the survival, in most civil causes, of jury trial. In such circumstances, the language of the courts, emphasising the paramountcy of the trial judge, was natural to the judicial mind. It was not infrequently borrowed from supposed analogies to the deference to jury verdicts as resolving factual disputes in a

91 (1971) 125 CLR 296.

92 *Edwards v Noble* (1971) 125 CLR 296 at 318 per Walsh J.

93 *Coghlan* [1898] 1 Ch 704 at 705.

94 *New Brunswick Railway Co v British and French Trust Corporation* [1939] AC 1 at 32-33.

95 [1996] QB 517 at 554. See also *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304 at 340.

conclusive way⁹⁶. One hundred and fifty years later, the normality of appeal and its perceived utility as a check against error and consequent injustice, affords a new legal context in which to reconsider some of the early judicial language. I regard the suggestion that an appellant, in order to succeed, must show affirmatively that the trial judge "misused his advantage"⁹⁷ where the credibility of a witness has been in issue, as redolent of a time when appeal, particularly on factual determinations, was a novel phenomenon. At that time, appeal was still sometimes regarded, so far as it required the re-examination of facts, as

96 *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 207-208 per Windeyer J; cf *London Bank of Australia Ltd v Kendall* (1920) 28 CLR 401 at 407.

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

beneath judicial dignity⁹⁸. Such re-examination was a painful and uncongenial obligation. In the context of modern appellate rights, now so long established by statute, such attitudes can safely be consigned to the history books. Many injustices may lurk in factual mistakes - probably more than in errors of law.

2. Since the early days of appeal, the quality and detail of court records have greatly improved. Whereas initially some appeals had to be conducted on ambiguous or imperfect notes of a trial⁹⁹ (perhaps elaborated by judicial reports to the appellate court or the elucidation of counsel's recollections) this is not the case today. Shorthand reports of testimony have long been available to appellate courts¹⁰⁰. Nowadays virtually perfect transcripts of the evidence, exhibits and argument are available. Commentators predict that computer controlled colour videotapes of trials will soon be available to appellate judges to permit them, if they so decide, to see and hear trial testimony as it was given¹⁰¹. Notwithstanding the growing use of video recordings of trials in the United States resort to such records has not proved popular with appellate courts¹⁰². Federal courts in the United States have rejected it¹⁰³. Yet in one study of appeals in the State of Kentucky, it was found that appeals using video recordings were more likely to yield confirmation of trial outcomes than those based exclusively on written transcripts¹⁰⁴. Whilst such facilities were not available in the present appeal, the quality of the trial record was, as usual, extremely high. This fact contrasts significantly with the facilities typically available to appellate courts at the time that the principles were adopted which, ever since, have emphasised the primacy of the trial judge in the assessment of witness

98 Lord Holt CJ in *R v Earl of Banbury* (1694) Skinner 517 at 523 [90 ER 231 at 235].

99 cf *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323 at 325; *Paterson v Paterson* (1953) 89 CLR 212 at 221.

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

101 Kerans, *Standards of Review Employed by Appellate Courts*, (1994) at 24-25.

102 Perritt, "Video Depositions, Transcripts and Trials", (1994) 43 *Emory Law Journal* 1071 at 1078; Lederer, "Technology Comes to the Courtroom, and ...", (1994) 43 *Emory Law Journal* 1095 at 1111.

103 Lederer, "Technology Comes to the Courtroom, and ...", (1994) 43 *Emory Law Journal* 1095 at 1111-1112.

104 Maher, *Do Video Transcripts Affect the Scope of Appellate Review? An Evaluation in the Kentucky Court of Appeals*, (1990) cited in Lederer, "Technology Comes to the Courtroom, and ...", (1994) 43 *Emory Law Journal* 1095 at 1113.

credibility. Of course, it remains as true today as it was when first said that the subtle indications that can affect evaluations of credibility (appearances of bias or resentment, the hesitation of a witness in giving answers and body language)¹⁰⁵ will not necessarily appear in a printed transcript, unless the judge or a party asks that some matter be recorded. Yet virtually everything else will appear in the transcript, thereby isolating for evaluation the so-called "subtle influences" which printed transcripts alone, available to appellate courts, omit.

3. A further significant change is the increase in the number of civil trials conducted before judges sitting alone, the near elimination in most Australian jurisdictions of jury trials of civil causes, the large increase in the workload of judges and their obligation to provide adequate reasons for their decisions¹⁰⁶. These phenomena have resulted in pressures for case management and for the efficient disposal of litigation¹⁰⁷. Together, these developments have significantly altered the character of the civil trial in Australia. As appears from appeal papers, an increasing portion of evidence at first instance is now presented in documentary form. At trial, and on appeal, an increasing part of advocacy is conducted in the form of written submissions. In this context, both at the trial and at the first level of appeal, it is not at all difficult for slips to be made, evidence to be overlooked and important points of argument and submissions about the facts to be forgotten. It is to correct such errors that the statutory facility of appeal on issues of fact becomes increasingly important to the way that trials are now actually conducted in this country. The significance of oral testimony remains. But in many trials, it has an importance which has shrunk since the days when the rules of appellate restraint were first written. They were days when the common law tradition of the continuous oral trial, civil as well as criminal, followed by unlimited oral argument, held sway. No more.
4. There is a growing understanding, both by trial judges and appellate courts, of the fallibility of judicial evaluation of credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new. In *Societe D'Avances Commerciales (Societe Anonyme*

¹⁰⁵ See eg *Joyce v Yeomans* [1981] 1 WLR 549 at 556; [1981] 2 All ER 21 at 26-27; *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637 per Lord Scarman; [1985] 1 All ER 635 at 637.

¹⁰⁶ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 387-388.

¹⁰⁷ cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154, 172.

Egyptienne) v *Merchants' Marine Insurance Co (The "Palitana")*¹⁰⁸, Atkin LJ remarked 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." To some extent, the faith in the judicial power to discern credibility from appearances was probably, at first, a consideration which the judiciary assumed that it inherited from juries. It was natural enough that trial judges, accustomed to presiding over jury trials, would claim, and appellate judges would accord, the same "infallible" capacity to tell truth from falsehood as had historically been attributed to the jury. Nowadays, most judges are aware of the scientific studies which cast doubt on the correctness of this assumption¹⁰⁹. Lord Devlin in *The Judge*¹¹⁰ quoted with approval a remark of MacKenna J: "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability ... to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth." It was a becoming but entirely accurate modesty.

Apart from all else, demeanour is, in part, driven by culture. Studies suggest that evaluation of the evidence of women may sometimes be affected by stereotypes held by the decision-maker. This is doubtless also true in the case of evidence given by members of minority groups, whether racial, sexual or otherwise. Distaste or prejudice can cloud evaluation¹¹¹. Further, in a society such as Australia's, the capacity of the judiciary to respond to every cultural

¹⁰⁸ (1924) 20 LI L Rep 140 at 152.

¹⁰⁹ *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 per Samuels JA citing Re, "Oral v Written Evidence: The Myth of the 'Impressive Witness'", (1983) 57 *Australian Law Journal* 679; Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at pars 797-800. See also Wellborn, "Demeanor", (1991) 76 *Cornell Law Review* 1075; Ellard, "A Note on Lying and its Detection", (1996) 2 *The Judicial Review* 303; Giles, "The Assessment of Reliability and Credibility", (1996) 2 *The Judicial Review* 281; Stone, "Instant Lie Detection? Demeanour and Credibility in Criminal Trials", (1991) *Criminal Law Review* 821; Wells, "How adequate is human intuition for judging eyewitness testimony?" in Wells and Loftus (eds), *Eyewitness testimony*, (1984) 256 at 272. One particular consideration is the delay often involved in the requirement to recall events at a trial years later. See *Chambers v Jobling* (1986) 7 NSWLR 1 at 8; cf *Jones v The Queen* (1997) 191 CLR 439 at 467.

¹¹⁰ (1979) at 63.

¹¹¹ See Mahoney and Martin (eds), *Equality and Judicial Neutrality*, (1987).

variety of communication is limited¹¹². Fifty years ago, the Supreme Court of Canada¹¹³ wisely declined to offer guidelines about the kinds of demeanour that would afford reliable indicators of the trustworthiness of witnesses. The studies of experimental psychologists since that time have confirmed the danger of placing undue reliance upon appearances in evaluating credibility. Such studies were not available to the appellate courts when the rules of deference to the assessments of trial judges on questions of credibility were first written. They are available to us today. Although they have not yet resulted in a re-expression of the appellate approach (and by no means expel impressions about witnesses from the process of decision-making) the studies have two consequences. Trial judges should strive, so far as they can, to decide cases without undue reliance on such fallible considerations as their assessment of witness credibility. And appellate courts should refrain from needlessly expanding the categories of trial conclusions about the facts which are effectively unreviewable because of presumed or inferred credibility considerations.

5. In the future, technology may be developed which will assist courts in the conclusive determination of issues of witness credibility where these are disputed. In the United States of America, polygraphs are already in use in some jurisdictions¹¹⁴. In Australia, they have not been treated as sufficiently reliable for judicial use. Our courts must therefore continue to struggle with the aid of human estimation. Until the courts are afforded technological relief, they do well to realise the imperfections of the currently available tools of decision-making. They need to minimise, and not exaggerate, the role of the judicial assessment of credibility from appearances.

Witness credibility: the trial judge's real advantages

- 89 None of the foregoing considerations requires the abandonment of the respect which appellate courts, by present legal authority, must pay to the advantages enjoyed by the trial judge. Instead, they require renewed attention to precisely what the advantages are which the trial judge has over those enjoyed by the

112 This point has been made in Canada. See Kerans, *Standards of Review Employed by Appellate Courts*, (1994) at 87-88.

113 *White v The King* (1947) 89 CCC 148 at 151.

114 *Frye v United States* 293 F 1013 at 1014 (1923); *Aetna Insurance Company v Barnett Brothers Inc* 289 F 2d 30 (1961); *People v Monigan* 390 NE 2d 562 (1979); Furedy and Liss, "Countering Confessions Induced by the Polygraph: Of Confessionals and Psychological Rubber Hoses", (1986) 29 *Criminal Law Quarterly* 91; Magner, "Exclusion of Polygraph Evidence: Can It Be Justified?", (1988) 30 *Criminal Law Quarterly* 412.

appellate court, conducting a second look at the facts, usually with more opportunity to evaluate particular facts than is possible in the midst of a trial and with the appellate advantage of viewing such facts in the context of the record of the complete trial hearing.

90 The true advantages in fact-finding which the trial judge enjoys include the fact that the judge hears the evidence in its entirety whereas the appellate court is typically taken to selected passages, chosen by the parties so as to advance their respective arguments¹¹⁵. The trial judge hears and sees all of the evidence. The evidence is generally presented in a reasonably logical context. It unfolds, usually with a measure of chronological order, as it is given in testimony or tendered in documentary or electronic form. During the trial and adjournments, the judge has the opportunity to reflect on the evidence and to weigh particular elements against the rest of the evidence whilst the latter is still fresh in mind. A busy appellate court may not have the time or opportunity to read the entire transcript and all of the exhibits. As it seems to me, these are the real reasons for caution on the part of an appellate court where it inclines to conclusions on factual matters different from those reached by the trial judge¹¹⁶. These considerations acquire added force where, as in the present case, the trial was a very long one, the exhibits are most numerous, the issues are multiple and the oral and written submissions were detailed and protracted¹¹⁷. In such cases, the reasons given by the trial judge, however conscientious he or she may be, may omit attention to peripheral issues. They are designed to explain conclusions to which the judge has been driven by the overall impressions and considerations, some of which may, quite properly, not be expressly specified¹¹⁸.

91 All of the foregoing considerations leave to be weighed, in some cases at least, the impression which the trial judge holds of a particular witness, perhaps influenced by the witness's demeanour and the kinds of considerations commonly referred to such as hesitation or displays of partisanship not readily conveyed, or

115 *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210; *Jones v The Queen* (1997) 191 CLR 439 at 467.

116 *Galea v Galea* (1990) 19 NSWLR 263 at 265-266; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 483.

117 The trial extended over portions, at least, of 38 days. The transcript of evidence, including exhibits, comprised 10 volumes.

118 *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 385-386; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 260-261, 269-271, 280-281.

conveyed at all, by the printed record¹¹⁹. One can hold different views about whether such considerations should intrude in the assessment of qualified expert witnesses¹²⁰. One can strive to minimise resort to such considerations in the case of lay witnesses, out of recognition of the fallibility of human assessment of credibility from appearances. But because trials remain public procedures for the resolution of disputes, it is inescapable that, in some cases at least, credibility assessments will be required where there is no documentary, electronic or other incontrovertible evidence to resolve the conflict presented for decision. In such cases it will remain the fact that, try as it might, the appellate court cannot procure from the printed record exactly the same materials on which to base the judicial decision as the trial judge had.

- 92 This conclusion may, as I think, be true of a relatively limited class of case: basically those where the decision depends upon resolving a clash of critical oral testimony, oath against oath. But in such cases, because the appellate court cannot, in presently available records, recapture all of the information properly used to assist the trial judge's decision, the old strictures about that judge's advantage remain as relevant today as they were when first written more than a century ago. In such cases, the appellate court's rehearing must be conducted within a constraint which is set by the somewhat more restricted data available to it. This limitation is not confined to Anglo-Australian law. It is recognised in other countries of the common law¹²¹ and doubtless beyond.

When credibility findings do not bar the appeal

- 93 Yet even when the trial judge has expressed conclusions as to the credibility of a particular witness, that does not represent the end of analysis by the appellate court. It is only the beginning of a particular analysis which is then required. In many appeals, such a credibility finding will be far from conclusive of the proper

119 *Maynard v West Midland Area Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637.

120 *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 at 290-292; but see at 299-300. *Chambers v Jobling* (1986) 7 NSWLR 1 at 25-26; *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637; *Wilsher v Essex Area Health Authority* [1988] AC 1074 at 1091.

121 See for example *Stein v The Ship "Kathy K"* [1976] 2 SCR 802, applied *Lewis v Todd and McClure* [1980] 2 SCR 694 at 700; *Fletcher v Manitoba Public Insurance Co* [1990] 3 SCR 191; *Bank of India v J A H Chinoy* AIR (37) 1950 PC 90; *Mohanlal Jogannath v Kashiram Gokul* AIR (37) 1950 Nag 71; *United States v Gypsum Co* 333 US 364 (1948); *United States v Oregon Medical Society* 343 US 326 (1952); *United States v Singer Manufacturing Co* 374 US 174 (1963).

outcome of the entire trial, and hence of the appeal. Take the following instances which are by no means exhaustive:

1. In some cases the evidence of the witness, where credibility is in question, although relevant to the outcome of a trial, relates only to particular aspects of the parties' dispute and leaves untouched other evidence which requires separate evaluation with no obstacle of a credibility finding. In such cases, to avoid appellate reversal, the trial judge must demonstrate that such evaluation has occurred. It will be rare, in large and complex cases presenting multiple issues, for the entire decision to hang on the credibility of a single witness, although that can certainly happen. Where there is other evidence, unchallenged, unanswered, ostensibly reliable and supported by uncontested contemporaneous records, an adverse credibility finding in respect of one witness or more does not remove from consideration all of the other evidence. Nor can it relieve the trial judge, or the appellate court when required, of the duties of analysis and the provision of reasons to demonstrate and explain that such analysis has occurred¹²².
2. It may be possible to show, by reference to incontrovertible facts or uncontested testimony, that although the trial judge reached conclusions which were adverse to the credibility of an important, even crucial, witness, such conclusions are plainly wrong. For example, they may be based upon expressed or implied assumptions about the evidence (eg that witnesses are in conflict) which careful analysis of the record demonstrates to be incorrect¹²³.
3. It may also be possible to demonstrate that, although the trial judge reached conclusions adverse to the credibility of an important witness, this has been done on the basis of evidence which was wrongly admitted. Where such evidence has occasioned a substantial miscarriage of the trial it may be excluded and the foundation for the credibility finding may then be knocked away¹²⁴.
4. The reasons given by the trial judge for rejecting the evidence of a particular witness may go beyond a simple statement about the witness's appearance or demeanour. The additional reasons may demonstrate that the judge took into

¹²² *Gray v Motor Accident Commission* (1998) 73 ALJR 45 at 54, 65-67, 74; 158 ALR 485 at 497, 513-515, 525.

¹²³ *Voulis v Kozary* (1975) 180 CLR 177; *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349-350; *Gray v Motor Accident Commission* (1998) 73 ALJR 45 at 54, 65-67, 74; 158 ALR 485 at 497, 513-515, 525.

¹²⁴ cf *Paterson v Paterson* (1953) 89 CLR 212 at 224.

account irrelevant considerations or has not properly weighed all of the relevant considerations¹²⁵.

5. The circumstances in which evidence was procured on a critical point, pertinent to the credibility of a crucial witness, may be unsatisfactory. Those circumstances may undermine the acceptability of the judicial determination of the credibility of a crucial witness. They may authorise the appellate court to set that determination aside¹²⁶.
6. Conversely, in a particular case, a trial judge may make it plain that the conclusion reached does not depend upon credibility considerations or impressions about the demeanour of a witness but upon the judge's assessment of objective facts or inferences to be drawn from the facts as found. Ordinarily, the appellate court will then be in as good a position as the trial judge to make the assessment and draw the inferences. Care must be taken not to exaggerate the significance of such expressed conclusions. A failure specifically to mention a witness's appearance or demeanour does not necessarily exclude that consideration if it is deemed inherent in the conclusion which was reached. Similarly, the fact that a judge may not feel justified in condemning a witness as untruthful is not necessarily equivalent to an affirmative opinion by the judge that the witness has endeavoured to give truthful testimony¹²⁷.
7. There is also the case, as was accepted in the early Privy Council decisions, where, although a credibility finding has been made which represents an apparent obstacle to appellate review, it is so contrary to the "extreme and overwhelming pressure" resulting from the rest of the evidence¹²⁸, or is so "glaringly improbable"¹²⁹ or "contrary to the compelling inferences of the case", that it justifies and authorises appellate interference in the conclusion reached by the trial judge¹³⁰. In this, as in other areas, the law recognises

125 *Watt or Thomas v Thomas* [1947] AC 484 at 487; *Gray v Motor Accident Commission* (1998) 73 ALJR 45 at 54, 65-67, 74; 158 ALR 485 at 497, 513-515, 525.

126 *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 92.

127 *Taylor v Johnson* (1983) 151 CLR 422 at 436-437 per Dawson J.

128 *The Glannibanta* (1876) 1 PD 283 at 287; *Paterson v Paterson* (1953) 89 CLR 212 at 219.

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

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

imperfection of its processes and the need to avoid absolute and inflexible rules. It affords to the appellate court the power to intervene so as to prevent the risk of a serious injustice where this is clearly demonstrated¹³¹. Such jurisdiction, held in reserve, is exercised with a full appreciation of the elusiveness of certainty in any trial process; the value accorded to the interest of finality in litigation; and a realisation of the costs and other disadvantages inherent in appeal and retrial¹³². Full reasons must be given by the appellate court to demonstrate that, notwithstanding the credibility finding, the result of the trial is "palpably", "glaringly" or "compellingly" erroneous when viewed in the light of all of the evidence. If this Court considers that the circumstances are insufficiently exceptional, the reasons unpersuasive and the interference unwarranted, it may say so. It will then restore the trial judge's findings as, from time to time, it has done.

Conclusions

- 94 When the foregoing principles are applied to this case, it is clear, for the reasons which Callinan J has given, that this trial miscarried. Even if the trial judge considered (as he did) that Mrs Page was an unsatisfactory witness (biased against her former employers, evasive and self-protective in her oral testimony) that left a mass of documentary material supporting the appellant's claims which had to be dealt with in the judge's reasons in some satisfactory way before the appellant's claim could properly be dismissed as unproved. It also left the uncontradicted evidence of Mrs Meek and Ms Packham to be dealt with and explained in a way consistent with the ultimate conclusions. It left a mass of documentary evidence which, on its face, supported the testimony of the former employees. And it left unanswered the inferences available from the failure of the respondents to call Mr Ian Davies and Mr Phillip Davies to respond to, or explain, the former

¹³¹ cf *United States v Gypsum Co* 333 US 364 (1948). Other instances in Australian law include the power of Courts of Criminal Appeal to prevent miscarriages of justice (see *Gipp v The Queen* (1998) 72 ALJR 1012 at 1039-1040; 155 ALR 15 at 52-54) and the power of appellate courts to disturb the exercise of discretion for unidentified error ("It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance"): *House v The King* (1936) 55 CLR 499 at 505; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 174; cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42, 72. The case of "Wednesbury" unreasonableness may be another example of this consideration operating in the field of administrative law. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

¹³² *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 170-171.

employees' contentions that they had been instructed to act fraudulently and that Messrs Davies had then attempted to suborn them from giving their evidence at the trial. Although it is true that Mrs Page was clearly the central witness in the appellant's case at trial, she was by no means the sole witness. Because of the adverse credibility finding her evidence, as such, could be excised. But the real strength of the appellant's case remained. It lay in the documents. Without a satisfactory answer from the respondents, the documents demanded closer analysis than they received either at trial or in the Court of Appeal.

- 95 The reasoning of this Court in *Abalos*, and its reasons in the series of cases over nearly a century which I have reviewed, did not bar the Court of Appeal from performing the analysis which the appellant invited. On the contrary, those decisions required that the analysis be done. The result is that the appellant did not have the appeal in relation to the factual findings to which it was entitled under the *Supreme Court Act 1970* (NSW)¹³³. All parties agreed that, if this Court came to that conclusion, a retrial was inevitable.

Orders

- 96 I agree in the orders proposed by Gaudron, Gummow and Hayne JJ.

133 s 75A.

CALLINAN J.

Introduction

97 This is an appeal from the Court of Appeal of New South Wales in a commercial cause¹³⁴ which was heard at first instance by O'Keefe CJ Comm D.

98 The State Rail Authority of New South Wales ("SRA") brought proceedings against nine defendants in the Commercial Division of the Supreme Court of New South Wales. The first and second defendants were the contracting companies, Earthline Constructions Pty Limited and Nuline Constructions Pty Limited. I refer to these parties in this judgment as "Earthline" and "Nuline", or collectively, as "the respondent companies". The third, fourth and ninth defendants were Phillip and Ian Davies and the Official Trustee in Bankruptcy of their estates. Phillip and Ian Davies were directors of the companies and played a significant role in their operation. Mr Greg Davies, the fifth defendant, who was neither a shareholder nor a director of the companies was found by O'Keefe CJ Comm D not to have had any significant involvement in their operation. The other defendants, Messrs Child, Bell and Greber, had been employed by the appellant as on-site representatives.

99 The nine defendants were respondents to the appeal to the Court of Appeal. In this Court, proceedings against Mr Greber were not pursued. The second to fifth respondents appeared in person; the first and eighth respondents making submitting appearances only. Neither Mr Child nor Mr Bell appeared in the High Court.

100 The appellant claimed that Messrs Child, Bell and Greber acted in breach of their fiduciary duties to the appellant in preparing and forwarding false dockets to their employer which, to the knowledge of the respondent companies and Phillip and Ian Davies were false and formed the foundation for payments to the companies to which they were not entitled. Claims in fraud and conspiracy against the companies and the appellant's employees were not pressed at the trial.

101 The questions which the trial judge had to decide were essentially ones of fact but the nature of the answers to be given to them depended not only upon oral evidence but also upon a very large volume of documents, several examples of which it was necessary for this Court to consider.

134 *State Rail Authority of New South Wales v Earthline Constructions Pty Limited & Ors*, unreported, New South Wales Court of Appeal, 20 December 1996, Mahoney P, Meagher and Handley JJA.

Facts and proceedings in the courts below

102 The action arose out of a contract for the hire of plant and equipment by the appellant from the respondent companies for track repair and earthworks on railway lines in the north coast region of New South Wales as part of a programme of work to upgrade the safety of the lines. The period during which the contractual work was done was from about June 1989 to mid 1992. The appellant claimed that an amount of \$2,765,002.00 had been overpaid to the respondent companies which successively had provided the plant and equipment on the sites.

103 For each site, the appellant contracted with Earthline and subsequently Nuline to hire machinery (and operators thereof employed by the companies) to work at specified hourly rates. The rate differed depending upon the nature and type of machinery the subject of the hire contract.

104 Both respondent companies were controlled by Phillip Davies and his brother, Ian Davies.

105 The respondent companies prepared and completed work dockets. Each docket identified the relevant machine, recorded the day and date upon which the machine was said to have operated, provided a number identifying the machine, the job location, the type of work undertaken, the commencement and completion times of operation and the total hours worked by that machine for that day.

106 Each docket required the signature of the operator and of the appellant's representative. Earthline and Nuline would then submit the dockets to the appellant for payment.

107 The appellant had employed the respondents Messrs Child, Bell and Greber (the last of whom is not a party to this appeal) to check and certify the accuracy of the dockets of Earthline and Nuline relating to the work carried out by machines for the appellant. If satisfied about the accuracy of the entries on these dockets, they were to sign the dockets as the representatives of the appellant.

108 The respondents used a numbering system for each machine for the purpose of preparing the dockets and other accounting records.

109 Mrs Page was employed as a site secretary from about April 1989 to September 1990. It was part of her responsibilities to write up the docket books for machines working on a number of different sites. Each book consisted of 50 work dockets. Mrs Page wrote up docket books in accordance with hand written lists given to her by Phillip Davies. The lists contained details of the type of machines, their numbers and the sites upon which the machines had worked.

110 Initially, she was told to sign a number of dockets on behalf of the actual operators. Mrs Page's evidence was that she wrote up those dockets in accordance with the instructions given to her by Phillip Davies.

111 Mrs Page said that Phillip Davies also gave her lists which referred to machines which were "dummy machines" and instructed her to put the name of "anyone" as the operator on such a machine. She said that she filled in and completed the docket books in accordance with these instructions. She gave evidence that she invented names or used names of persons whom she had known in the past and signed them on the dockets as operators of the machines. This was an instruction repeated by Phillip Davies more than once.

112 Mrs Page said that she was also instructed by Phillip Davies to write up docket books for "dummy machines" by using the number next in the sequence to the last number of an existing machine.

113 Mrs Page gave evidence that she observed Mr Bell signing the docket books of Earthline so quickly that he could not check whether the details of the dockets were correct. On other occasions, she said, he rarely looked at or checked any of the entries contained in the dockets before signing. She said that when he was signing dockets, he kept his fingers on the page so as to obscure the entries in the body of each docket. This was a practice he adopted on most occasions. She said in her evidence that on one occasion he signed dockets in seven or eight docket books which contained no entries. She said that on other occasions she observed him signing blank dockets.

114 Mrs Meek also gave evidence. She too was a secretary employed by Earthline. Her engagement extended from September 1989 to December 1991. She observed on a number of occasions, that the dockets did not have an operator's signature. She swore that when she took those dockets to Ian Davies, he instructed her to sign the operator's signature herself which she did. When she took dockets to Mr Greg Davies, the fifth respondent, he signed the operator's signature in front of her. She also said that she observed Ms Packham, another employee of the respondents, signing dockets in the space for the operator's signature.

115 Ms Packham was a secretary employed by Earthline who was also required to write up dockets supplied to her by Ian Davies and Phillip Davies for machines working on various sites. She gave evidence that on a number of occasions, when completing the docket books, she noticed that some of the dockets she had written out were duplicated, in that the same machine was claimed to be working on two different sites for the same period. She raised this with Ian Davies. He told her that "it's right don't worry about it". She too had been requested by Ian Davies to sign her name in the space provided on the dockets for the operator's signature. On a number of occasions he requested her to sign someone else's name in that space.

116 Ms Packham gave evidence in relation to Mr Child's approach to certification. It was very similar in effect to that of Mrs Page. She observed him sign the documents with such speed that he too could not check the details contained on those dockets. She also said that on a number of occasions when completing the dockets books, the signature of Mr Child appeared on dockets which were otherwise blank.

117 Each of Mrs Meek and Ms Packham gave uncontradicted evidence of being subjected by the respondent companies' principals, Ian and Phillip Davies, to attempts to suborn them.

118 The appellant's claim was for a refund of payments made in respect of 4,215 dockets. The dockets may be divided into eight categories.

- (i) Fictitious operator names – these dockets recorded the machines as having been operated by persons who were either non-existent or had never worked for Earthline or Nuline.
- (ii) Employees not machine operators – these dockets recorded machines as having been operated by persons who, although employed by Earthline or Nuline, were not machine operators (or operators of those types of machines).
- (iii) Fictitious machines – these dockets recorded the operating of machines which never existed or never worked for Earthline or Nuline.
- (iv) Duplicate machine operators – different locations – these dockets recorded the same operator as having operated two machines at the same time at different locations.
- (v) Duplicate machine operators – same location – these dockets recorded the same operator as having operated two machines at the same time at the same location.
- (vi) Duplicate machines – different locations – these dockets recorded the same machine as operating in two places at the same time.
- (vii) Duplicate machines – same location – these dockets recorded the same machine as operating in the same place at the same time.
- (viii) Machines under repair – these dockets recorded the operating of machines which were under repair at the time.

119 Mrs Page's evidence was given by affidavit and orally. Before giving evidence she had been provided with an indemnity against civil proceedings by the

appellant which, she believed, probably mistakenly, protected her against criminal proceedings also.

120 Mrs Page's credit was attacked in cross-examination but her evidence on a number of important matters was not the subject of cross-examination:

- (a) evidence that Phillip Davies had originally instructed her to sign on the dockets the names of the "real operators";
- (b) evidence that she had been instructed by Phillip Davies to write up dockets for "dummy machines";
- (c) evidence that she wrote up the dockets in accordance with the instructions of Phillip Davies;
- (d) evidence that she invented false names and signed those names on dockets as operators of machines;
- (e) evidence that Mr Bell signed docket books with such speed that he did not check the details on them and very rarely checked or looked at any of the entries before signing;
- (f) evidence that Mr Bell signed docket books and dockets which were blank;
- (g) evidence that Mr Greber did not look at the entries contained on the dockets before signing;
- (h) evidence that on 15 May 1992, Phillip Davies attempted to suborn her.

121 The trial judge was highly critical of Mrs Page's evidence and substantially rejected it. His Honour said:

"I do not accept significant parts of her evidence. It was internally inconsistent in a number of respects. She was argumentative at times, evasive at others. She did not present well in the witness box. On a number of occasions I formed the view that the evidence she gave was made up on the spot to get her out of what she perceived to be a problem. Frequently she paused for periods, some of which were extended, and appeared to be casting around for an answer which she regarded as suitable rather than addressing the question directly."

122 Further criticisms which his Honour made of Mrs Page were that she had limited clerical skills and that she was inattentive in the course of her evidence. O'Keefe CJ Comm D also thought it significant that Mrs Page swore that she was

given an instruction by Phillip Davies regarding the recording on dockets of the spread of hours worked in April 1989 whereas the appellant's pleading alleged that plant and equipment were hired only from June 1989. His Honour's criticisms of Mrs Page continued, that her evidence as to other dates and periods was unreliable, that some of her evidence was too generalized to be persuasive, that she was vague about sites, and that her evidence was influenced by her desire to protect herself from claims and prosecution.

123 These criticisms culminated in this adverse finding against Mrs Page:

"This contrast between that part of her affidavit concerning the frequency and duration of attendance by Mr Child at the Earthline office for the purpose of signing work dockets and that part which refers to the speed at which Mr Child is said to have signed the dockets, leaves me with a sense of unease about accepting her evidence as precise. In my opinion it is more probable that, whilst on some occasions there may have been some speed and absence of checking, it is not established to my satisfaction that this was the invariable practice or even the predominant practice. Absence of cross-examination does not assist SRA in relation to this conclusion. Nor does her evidence or any other evidence establish which of the work dockets now claimed to relate to work which was not done, were signed by Mr Child in the manner which she describes."

124 No general findings of credibility were made about Mrs Meek in the same way as findings were made in respect of Ms Packham. With respect to the latter, his Honour said that her evidence, covering, and then incompletely only, some 22 weeks, was not sufficiently precise to identify the occasions upon which inaccurate or false dockets were completed. His Honour also said that upon an analysis which he made of the time available for the checking of dockets, he could not accept that Mr Child had signed dockets at the speed alleged by Ms Packham. Accordingly, his Honour said that he was left with a sense of unease about her evidence.

125 Each side in their submissions to the trial judge invited his Honour to draw inferences against the other by reason of the failure to call material witnesses¹³⁵. Neither of the Davies nor Messrs Child, Bell and Greber gave evidence. The appellant's evidence at the trial included two reports compiled by Mr Ampherlaw of Coopers & Lybrand, chartered accountants which analysed a total of 4,209 dockets (out of a total of some 17,000). The results of that analysis were as follows:

135 *Jones v Dunkel* (1959) 101 CLR 298.

RESULTS OF DATA INTERROGATION OBJECTIVES**Transactions Matched To Payment Records**

Objective	Trans'n Count	Gross Value \$
Fictitious Operator Names (Attachment A)	1038	610,747
Earthline Employees not Machine Operators (Attachment B)	2264	1,577,923
LESS:		
Docket Number 8730		(720)
Fictitious Plant Numbers (Attachment C)	426	256,497
LESS:		
Docket Number 23835	(3)	(540)
Docket Number 23836		(540)
Docket Number 14335		(750)
Duplicate Plant Operators – Different Location (Attachment D)	227	173,858
LESS:		
Docket Number 5443		60
Docket Number 23549		(75)
Docket Number 23979		(780)
Duplicate Plant Operators – Same Location (Attachment E)	107	69,493
Duplicate Plant Numbers – Different Location (Attachment F)	41	30,575
Duplicate Plant Numbers – Same Location (Attachment G)	15	10,420
Plant Under Repair (Attachment H)	94	35,489
TOTAL	4,209	2,761,657

126 Mr Ampherlaw had no personal knowledge of the matters with which he dealt in the reports and he had to rely for their compilation upon the accuracy of affidavits of the other witnesses for the appellant.

127 Those witnesses, in addition to Mrs Page, Ms Packham and Mrs Meek, were Mr Vincent, the Manager of the appellant's Internal Investigation Unit, and Mr Wolanin, an investigator employed by the New South Wales Independent Commission Against Corruption (ICAC) (whose evidence related to the obtaining of documentary evidence only). Mr Vincent in his evidence described the tendering process leading to the entry into the contracts and the appellant's internal

procedures for receiving, verifying and paying accounts. They were governed by, among other things, Administrative Practice directions and policies which were formulated and issued in compliance with s 13 of the *Public Finance and Audit Act* 1983 (NSW)¹³⁶. No other material witnesses were called by the appellant.

128 None of the respondents gave evidence and only one witness, Mr Gourlie, was called on their behalf. The substance of his evidence was that the matters the subject of these proceedings were under investigation by the ICAC. This provided, the respondents submitted, a sufficient explanation for the absence of the defendants from the witness box.

129 His Honour did not however regard the case as one to be resolved on the basis of inferences arising from failures, whether explained or otherwise, to give evidence by witnesses whose evidence might be thought to be likely to be material. It was, he held, for the appellant to prove its case on the balance of probabilities, albeit that the gravity of the allegations made against the respondents required that the Court not lightly conclude that a party had committed fraudulent or criminal conduct¹³⁷.

130 His Honour's ultimate conclusion was expressed in these terms:

"Ordinarily a conclusion that a particular act was done or that particular acts were done negligently may more readily be arrived at than a conclusion that such act or acts was or were done as part of a premeditated fraudulent scheme. In the present case a conclusion that the signing of work dockets by Messrs Greber, Child and Bell was done without such work dockets being adequately checked by them, whether because of pressure of work or laziness or incompetence, may more readily be arrived at than a conclusion that in signing such work dockets the employees in question engaged in a deliberate and systematic course of behaviour in concert with the other defendants, and such as was designed to benefit such other defendants."

131 In the result the trial judge dismissed all of the appellant's claims except for those claims which had been made in respect of machines recorded as working in

136 Section 13 reads:

"An officer of an authority shall not authorise the payment of an account:

- (a) unless the account has been approved for payment by a person to whom the power to authorise the payment has been delegated under section 12 (1), or
- (b) otherwise than in accordance with the Treasurer's directions."

137 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; 110 ALR 449.

two different locations on the same day, machines operated by different operators for the same hours on the same day, and machines claimed to have been working on dates and at times when they were under repair. In consequence judgment was given for the appellant against the first respondent (Earthline) in the sum of \$146,587.63.

- 132 In the Court of Appeal Mahoney P after referring to *Abalos v Australian Postal Commission*¹³⁸, *Devries v Australian National Railways Commission*¹³⁹ and *Voulis v Kozary*¹⁴⁰ discussed the evidence of Mrs Page¹⁴¹:

"SRA has submitted that O'Keefe CJ of CommD misused his advantage as trial judge. Its submissions in this regard were put by Mr Gyles QC with, and they had, some force. They were generally to the effect that some at least of the reasons that the judge gave for putting her evidence aside were wrong in fact; and that the judge failed to take sufficient account of the fact (as it was asserted to be) that there was in the documentary evidence such a substantial corroboration of Mrs Page's evidence that, notwithstanding what he had seen of her in giving evidence, the judge should have accepted her evidence, at least in relevant respects.

In determining whether and to what extent he should accept a witness as credible a judge must take into account the evidence of the witness and such other evidence before him as is relevant to the assessment of her credit. Conceptual difficulties are said sometimes to arise because, in determining the credibility of a witness, it may be necessary to determine first which of competing facts the judge accepts; but in making that determination, it may logically be necessary for him first to determine whether he accepts the witness as credible. Submissions in this regard were dealt with by this Court in *Fabre v Arenales*¹⁴². What will be sufficient in a particular case to warrant an appellate court putting aside a finding in respect of credibility, which is affected by demeanour, will depend on the circumstances of the case.

In considering, inter alia, what Mrs Page said about the claims and dockets, the judge considered allegations made by SRA and by her against certain of the persons employed by it to check the work done at various sites: these were Messrs Greber, Child and Bell. Suggestions were made that they

138 (1990) 171 CLR 167.

139 (1993) 177 CLR 472.

140 (1975) 180 CLR 177.

141 Unreported, 20 December 1996 at 7-8.

142 (1992) 27 NSWLR 437.

had failed properly to check the documents as they should have and were guilty of other and more serious misconduct. Mrs Page had claimed that, for example, Mr Greber, a site foreman, had 'never looked at any of the entries on the dockets before he signed them'. The judge, having examined the documentary evidence, and after detailing the documents with which Mr Greber was concerned ... concluded that Mr Greber may have been guilty of some laziness or incompetence but was not guilty of sustained misconduct of the kind that had been suggested against him by Mrs Page."

133 The conclusion of Mahoney P on the issue of the rejection by the trial judge of Mrs Page's evidence was as follows¹⁴³:

"Having regard to his Honour's detailed examination of what had been said in respect of Mr Greber, Mr Child and Mr Bell, insofar as it was said by Mrs Page, and to the detailed examination made by the judge of the documentary material, I am not satisfied that his Honour misused his position in arriving at his assessment of the credibility of Mrs Page."

134 The magnitude of the amount claimed and the period over which the payments were made loomed large in the reasoning of Mahoney P. His Honour thought, as did the trial judge, that had there been fraud or breach of duty on such a scale, it would surely have been detected by officials of the appellant well before the amount claimed, of \$2,765,002.00 had been paid out.

135 Meagher JA agreed with the reasons and conclusion of Mahoney P.

136 The reasons of the other member of the Court of Appeal, Handley JA, do not disclose any different an approach from that of Mahoney P. However his Honour did refer to some additional matters¹⁴⁴:

"The attempt to prove the Authority's claims from the contractor's documents, and by calling former employees of the contractors, substantially broke down for the reasons given by the judge. The Authority did not call any of its officers who had personal knowledge of the work being done by the contractors, or who had any responsibility for ordering or supervising that work. The only witness called who was an officer of the Authority was a Mr Peter Vincent, who had been employed since October 1990 in its Internal Audit and Investigation units."

137 There is one other passage in the reasons of Handley JA to which I will refer, as it is indicative of the direction in which their Honours in the courts below were

143 Unreported, 20 December 1996 at 9.

144 Unreported, 20 December 1996 at 4-5.

diverted and which the appellant submits, correctly in my opinion, was the wrong direction¹⁴⁵:

"Moreover there was no *prima facie* case that the contractors had charged the Authority and been paid for more work than they had truly performed so as to entitle it to recover a proportion of its payments on a global basis, assuming that such a course was open to it as a matter of law."

The appeal to the High Court

138 There is only one ground of appeal to this Court:

"The Court erred in failing to hold that the trial judge was not entitled to reject the evidence of the principal witnesses called by the SRA in circumstances where their evidence was inherently probable, had not been denied or answered in evidence by the respondents, had not been directly challenged in cross-examination by the respondents and had been substantially corroborated by the respondents' own documents."

139 In his submissions, Mr Jackson QC for the appellant did not suggest that any different principle from that stated by this Court in *Abalos v Australian Postal Commission*¹⁴⁶ needed to be developed or applied. The submission, in essence, is that notwithstanding the advantages that the trial judge had, because his Honour overlooked some important matters, especially the nature of the indisputably false documents, failed to give the significance to others that they plainly deserved, and because he did not give proper weight to the corroborative effect of the evidence of Mrs Page and Mrs Meek who were not relevantly cross-examined at all, and because he misconstrued the nature of the contract, his Honour fell into appellable error.

140 At the forefront of the appellant's case is the proposition that the claim was not made as a claim for overpayment, or payment for work not done. The contract in respect of which claims became payable was a contract for the hire of plant and equipment, not for the performance of any given quantity of work. The respondents admitted that the contract was a contract for the hire of equipment. The pleadings truly reflected the contract entered into by the parties and consisting of the tender documents, the specifications, and the standard form of contract. Some of the relevant contractual terms were as follows:

"2. The Contractor shall undertake the following:-

145 Unreported, 20 December 1996 at 12.

146 (1990) 171 CLR 167.

65.

1. To deliver the plant in good working order and maintain it in that condition at his own expense.

...

3. To provide a competent driver or drivers to operate the plant and pay all wages, overtime, camping allowances and travelling expenses of the driver and of any other personnel necessary for the efficient operation of the plant.

...

6. To work the plant continuously as required during the period of hire.

...

3. Payment shall be as follows:

- 3.1 When the plant is in operation – 'A' Rate

Single shift work will be paid for at the hourly rate of the offer on the basis of up to eight hours per day for a five day week.

All fractions of an hour worked will be paid for in proportion to the hourly hire rates to the nearest 1/6th of an hour.

All time worked in excess of the hours specified above for each normal working day and all time worked during other days or on Public Holidays will be paid for at the hourly rate as specified plus an amount based on the time so worked equal to the difference between the normal wages rate and the overtime or holiday rate whichever is applicable as prescribed by the Industrial Award governing the employment of the Plant Operator or Operators.

- 3.2 When the plant is rendered idle due to wet weather or for reasons outside the Authority's control or during tea breaks for which the Operator is entitled to payment under the Award governing his employment or when the plant is being transported between jobs other than under its own power – 'B' Rate

Payment will be made at the hourly rate of the offer for idle periods for the time the plant is so rendered idle. Fractions of an hour shall be paid for in proportion to the hourly idle rate to the nearest 1/6th of an hour."

141 A number of consequences flow from these provisions. Some of them were the subject of affidavit evidence by Mr Vincent:

"2. The standard accounting procedure followed by the SRA with respect to the processing and payment of invoices submitted by contractors in the Newcastle and Grafton Regions in the period June 1987 to in or about November 1991 was as follows:

- (a) invoices and supporting documentation were submitted by contractors to the particular Regional Division of the SRA responsible for contracting the particular contractor;
- (b) upon receipt of the invoice, the following was undertaken:
 - (i) the invoice was checked against the Local Purchase Order which ordered the performance of the work;
 - (ii) the invoice was certified in accordance with section 13 of the *Public Finance and Audit Act* 1983 as to the performance of the service the subject of the invoice;
 - (iii) the invoice was also certified in accordance with section 13 of the *Public Finance and Audit Act* 1983 as to the rates of charge. The rates of charge were checked with reference to the rates submitted by the First Defendant in the plant hire schedule for the relevant region;
 - (iv) the invoice was then checked and certified as to the calculations and additions contained therein.
- (c) calculations were then made as to the prescribed taxation deduction. This was a standard deduction formula. The prescribed taxation payment was then deducted from the value of the invoice to arrive at the total amount payable to the contractor;
- (d) a cheque was then drawn by the particular Regional Division of the SRA from its Advance Account and made payable to the particular contractor in respect of the invoice or invoices. If more than one invoice was processed for any particular contractor on one day, only one cheque was drawn from the Advance Account. The Advance Account was an account operated by the Regional Division for the purposes of local expenditure;
- (e) the Regional Division of the SRA then completed an Advance Account Recoupal Claim form and attached the invoices for which payment had been made. This form served 2 functions. Firstly, to

account to Head Office for payments made out of the Advance Account and secondly, to reimburse the Advance Account. Upon receipt of the Advance Account Recoupal Claim form, Head Office drew a cheque in the amount of the claim being made and paid that money directly into the Regional Division's Advance Account."

142 His evidence was that a different, decentralised but still highly structured procedure for the acceptance and payment of accounts was adopted after November 1991.

143 The significance of these matters is that it was not open to an employee of the appellant such as Messrs Child, Bell and Greber, or anyone else to make decisions of the kind that the respondents submitted were made, and not improperly so: that if they thought a certain quantity of work had been done, payment should be authorised and made as if a certain number of hours on a certain machine by a certain employee of the respondent companies had been worked.

144 The respondents submitted that cl 4.3.3 of the specification was to a different effect from the contractual provisions to which I have referred and justified payment on the basis of the quantity of work done. That clause was as follows:

"Develop your own system (or use a local standard system if your Field Controlling Officer wants it) for keeping accurate details of hours worked, 'A' and 'B' times, time machine was off-hired, etc, so that the invoice can be certified confidently and quickly. Use the contractor's daily work dockets, a diary, the Ganger's note book or other suitable system. You must keep these papers for at least 2 years in case the account is questioned."

145 I do not so read it. The reference to the keeping of "accurate details of hours worked, 'A' and 'B' times, time machine was off-hired, etc," is entirely consistent with the other contractual terms I have quoted.

146 Unfortunately both the trial judge and the Court of Appeal approached the matter upon the basis that the respondents invited this Court to adopt. The approach is exemplified by the statement by Handley JA that I have quoted in which his Honour thought it relevant and persuasive that there was no prima facie case that the contractors had been paid for more than they had truly performed. Once the falsity of the dockets and the improper process by which they were produced were deposed to by witnesses a prima facie case was plainly raised. The statement from the reasons of Handley JA that I have quoted also speaks of recovery of "a proportion of [the] payments on a global basis". That is not what the appellant claimed at all. The amount claimed represented the sum of a number of different amounts falling within different categories and in respect of which a prima facie case had been raised by the documentary evidence and the evidence of Mrs Page, Ms Packham and Mrs Meek.

147 The fact that no claim was made in terms by the appellant that a certain quantity of work had not been done does not assist the respondents. It was their obligation to ensure that all relevant details, as to time, place, and actual machinery worked were accurately recorded and notified as the basis of payment. The importance to the parties of the accuracy of this information was reinforced by the inclusion on the docket of a space for the signature of the employee operating each machine and the emphasis placed upon the need for a signature in that space. It is unthinkable that the principals of the respondent companies, and indeed the appellant's own employees, Messrs Child, Bell and Greber would not appreciate that the dockets were the foundation for payments which, being made off-site as they were, would be made on the faith of their accuracy and proper verification on site. This inference is, in my opinion, particularly in the absence of any evidence to contradict it, irresistible.

148 The respondents' case here, as it was in the Court of Appeal, is effectively that once the trial judge rejected Mrs Page, the appellant could not succeed because its case rested entirely on Mrs Page's evidence. That approach overlooks the evidence of Ms Packham and Mrs Meek which remained unchallenged in some critical respects.

149 Mrs Meek's evidence as follows was not only unchallenged but also uncontradicted and persuasive. Because she was not cross-examined on any relevant matters this Court is in as good a position to assess her evidence as the trial judge. Among other things she deposed as follows:

"8. I say that in early 1991 I observed Mr Greg Davies in his office completing the plant hire dockets of Earthline in every respect excluding the space provided for the client's signature. I observed Mr Greg Davies writing up these dockets when I had occasion to go into his office to ask him a question. I observed Mr Greg Davies completing the plant hire docket books of Earthline approximately once or twice a month. I recall in or around that time the only docket books we received from actual sites were from Mr Patrick Fardon at a site near Coffs Harbour. The dockets Mr Greg Davies wrote up related to sites in the Hunter Valley. I say this because I was required to examine those dockets for the purposes of invoicing and recognised Mr Greg Davies' handwriting on dockets relating to sites in the Hunter Valley.

9. In or about the same time that I observed Mr Greg Davies completing plant hire docket books, I further observed Mr Ron Child attend the offices of Earthline on average twice a month. On those occasions I observed Mr Child, usually sitting in Mr [Phillip] Davies' office signing all the docket books that Mr Greg Davies had completed. I say that prior to Mr Child attending the office for that purpose I had observed the docket books sitting in piles on Mr [Phillip] Davies' desk.

10. In June 1991, Mr Ian Davies hired an office worker by the name of Ms Katrine Packham ('Ms Packham'). I say that Ms Packham's main duties were to complete the plant hire docket books of Earthline. I say that I observed Ms Packham completing plant hire docket books in Mr [Phillip] Davies' office for a couple of hours almost every day of the week for a period of six months. I recall on occasions observing Ms Packham signing the plant hire dockets in the space for the operator's signature.
11. I recall when undertaking the invoicing observing an occasional docket not having an operator's signature on it. When I noticed this omission I would take the docket either to Mr Ian Davies, Mr [Phillip] Davies or Mr Greg Davies and seek their advice as to how to rectify the problem. I recall being directed by Mr Ian Davies and Mr [Phillip] Davies upon making such enquiries for myself to sign the space for the operator's signature. I do not presently recall the details of these conversations however recall that I was told to sign someone's name from the payroll. I further say that I recall when I enquired of Mr Greg Davies as to how to rectify such omissions that he would sign in the space for the operator's signature himself in my presence.
12. I say that from the time Mr Greg Davies commenced writing the plant hire dockets, the majority of the docket books remained in the offices of Earthline at Rutherford however occasionally I observed docket books were missing. I later observed those docket books had been returned. During the period of my employment with Earthline I did not observe an operator attend the offices of Earthline and sign a plant hire docket. I do recall however Mr Patrick Fardon an Earthline Site Foreman attended Earthline's office on a regular basis to complete the docket books for the sites he worked at. Excluding Mr Fardon's dockets I do not recall observing any other Earthline Site Foreman or operator completing plant hire docket books.
13. I was responsible throughout the course of my employment with Earthline for the calculation and payment of wages to its employees. I recall on a number of occasions complaining to Mrs Mary Davies as to the manner in which wages were calculated and paid. I say that the system involved the payment of all casuals at a flat rate per hour with no additional payment being made with respect to any overtime worked. If in fact a casual employee worked overtime I was then required to adjust the hours worked figures on their time sheet so that the hours worked equalled a payment as if overtime had been paid in accordance with the applicable award although payment was made for each hour worked at a flat hourly rate. This was achieved by reducing the number of hours worked as recorded on each individual employee's timesheet.

14. I recall when I commenced employment with Earthline and for a period of approximately three or four months Mr [Phillip] Davies ran a system whereby employees could elect not to receive their full wage for any particular pay period on the basis that a proportion of that wage would be recorded in a book kept by him and later be available for those employees to draw upon when required. In effect the system avoided the payment of tax as it reduced each employee's weekly wage with the payments recorded in the book later being received in a lump sum form. I say that whilst this system ceased to operate for casual employees of Earthline in or around early 1990, Mr Alan Sneddon, Mr Trevor Hall and Mr Paul Hedges remained on that system up until the time my employment with Earthline ceased in December 1991.

15. In or around late 1989 or early 1990 I recall, whilst sorting through mail I observed an account from Grace Bros Removalists in the sum of approximately \$1,500. I recall at that time having a conversation with Mr [Phillip] Davies in words to the following effect:-

I said: 'I have this invoice here from Grace Bros Removalists can you tell me what it is about'.

Davies: 'Oh, that's for David Bell we worked out its easier for the account to come through here and he can pay us back.'

I said: 'That's fine'."

150 In another affidavit sworn by Mrs Meek she said:

"3. In 1989 or 1990 either Mr Ian Davies or Mr Phillip Davies said to me words to the effect:

Ian or Phillip Davies: 'Invoice out machine 34 to Michael Gillart. The machine is owned by Ron Child.'

I did as I was directed. Some time later I had a conversation with Mrs Davies to the following effect:

I said: 'Who is Michael Gillart?'

Mrs Davies: 'That is Ron Child's son.'

...

7. I refer to paragraph 8 of my earlier Affidavit and say that after I observed Mr Greg Davies completing the Plant hire docket books of Earthline Greg Davies said to me words to the effect:

71.

Greg Davies: 'I have been writing so long I have writer's cramp.'

8. I refer to paragraph 11 of my earlier Affidavit and say that on approximately half a dozen occasions I observed a docket not having an operator's signature. On these occasions I took the docket to either Mr Ian Davies, Mr Phillip Davies or Mr Greg Davies and said to them words to the effect:

I said: 'This docket has not got a signature on it. What do I do?'

If Mr Ian or Phillip Davies was present one of them said words to the effect:

Ian or Phillip Davies: 'You sign it yourself and use a name of someone you know to be on the pay roll'.

If only Mr Greg Davies was present he signed the docket himself in front of me. I carried out the directions of Mr Ian or Phillip Davies.

...

11. I altered the hours on the time sheets in the following manner. If a worker worked 60 hours 20 of those hours were overtime. I altered his hours by indicating actual hours worked at normal time being 40 hours, 12 hours at time and a half, and one hour at double time. The result being that he received the same amount of money being 60 times \$13.20 so the actual hours I recorded that he had worked would be 53 hours not 60 hours. This system applied the whole time I worked there for every casual. Accordingly if you divided the gross wages by the hourly rate of \$13.20 or \$14.50 you would arrive at the hours the person actually worked. I had an exercise book that recorded all the actual hours the workers worked. I believed that this system was wrong however as I was an employee I carried out my instructions. I had a conversation with Mrs Davies about the system to the following effect:

I said: 'The way you are doing the wages is wrong. If someone doesn't like Phil they could dob him in and he could get into trouble.'

Mrs Davies: 'I agree.' "

151 Ms Packham's first affidavit contained these paragraphs:

- "9. On a few occasions when completing the plant hire docket books, I noticed that some of the dockets I had written out were duplicated in that the machine was supposedly working at two different sites on the

same day for the same period of time. I recall the first time I noticed the apparent duplication being concerned that I had made an error. I went to Davies' office and had a conversation with him in words to the following effect:-

I said: 'I was just writing out this docket and I noticed that I had written out a docket for the same machine for the same hours at a different site for the same day. I must have made a mistake.'

Davies: 'No, it's right don't worry about it.'

I recall Davies attempted at that time to provide some explanation for the apparent duplication however I cannot presently recall what he said.

10. I recall one day when I was completing docket books Davies approached me with a docket book and pointed to the space on the docket for the operator's signature and said words to the following effect:-

Davies: 'Katrine, could you just sign this for me.'

I recall signing my own name on this occasion, on approximately 10 dockets contained in the book Davies handed to me. I further recall other occasions where Davies would direct me to sign someone else's name in the space for the operator's signature. I do not presently recall the names I was directed to sign. I say that Davies requested me to sign the operator's signature on only three or four occasions during my employment with Earthline. I further recall observing Mrs Rhonda Meek signing docket books in the space for the operator's signature.

11. I recall on a few occasions Davies saying to me words to the following effect:-

Davies: 'Ronnie Childs is going to be in at the end of the week to sign the dockets so make sure they are up to date.'

By referring to 'Ronnie Childs', I understood Davies to be referring to Mr Ron Child.

12. I say that Mr Child attended the offices of Earthline each week for two or three weeks in a row, usually on a Friday. His attendance would be consistent for a few weeks and then he would not attend the offices for sometimes up to six weeks. I say that when my sole function with Earthline was to write up docket books, that Mr Child would sit across from me in the office and sign the plant hire docket books I had

completed in the space for the client's signature. I say that from my observations as to the speed with which he signed the docket books, that he did not check the details contained therein. I further say that when Mr Child attended Earthline's offices to sign docket books that he was in attendance for an average of three hours each time. During those three hours Mr Child would almost exclusively be signing docket books. I recall on a number of occasions when completing plant hire docket books, the signature of Mr Child appeared on dockets which had yet to be written out in any respect."

152

Her second affidavit was short and bears repeating in full:

- "1. I refer to paragraph 4 of my earlier affidavit sworn on 26 July 1993 ('my earlier affidavit') and say that in about July 1991 whilst I was working at Lot 1, Kyle Street, Rutherford I had a conversation with Mr Phillip Davies to the following effect:

I said: 'What do the numbers on the docket books relate to?'

Phillip Davies: 'Every machine has a number.'

I said: 'Which machine has what number?'

Phillip Davies: 'Dump trucks are numbered (he mentioned a range of numbers which I am now unable to recall) and excavators are numbered (he mentioned a different range of numbers which I am now unable to recall).'

2. In about August 1991 I had a conversation with Mr Phillip Davies whilst I was working at the offices at Lot 1, Kyle Street, Rutherford to the following effect:

I said: 'What does SUB mean?'

I was referring to the letters which I was required to write down next to plant No. on the dockets.

Phillip Davies: 'It is a subcontractor's machine.'

3. I refer to paragraph 10 of my earlier affidavit and say that on about two or three occasions Mr Ian Davies came up to me and said words to the effect:

Ian Davies: 'Can you sign these documents that haven't been signed?'

He was indicating that I sign the operator's signature on the dockets. He then said words to the effect:

Ian Davies: 'Sign (he mentioned a name which I can no longer recall) name.'

I did as he directed and signed on each occasion ten dockets using different names.

4. I refer to paragraph 11 of my earlier affidavit and say that on the occasions Mr Child attended the offices of Earthline ... [h]e made himself cups of coffee without asking. He walked around the office and made himself at home.
5. In mid-1993 I received a telephone call from Mr Ian Davies in which he said to me words to the effect:

Ian Davies: 'If you go to court we'll get stuck into you. We will be very hard on you.' "

153 Ms Packham's cross-examination consisted of only one question which she answered by confirming that she had never visited any of the work sites.

154 The evidence of Mrs Page was therefore corroborated in material particulars by Mrs Meek and Ms Packham. It was given further force by the respondents' decision not to cross-examine those corroborators, the failure of the respondents to call any evidence in refutation, and by the attempts at subornation by Messrs Davies, matters to which neither the trial judge nor the Court of Appeal accorded any weight.

155 Accordingly the submissions of the appellant that I have summarised earlier have been made out. That is enough to dispose of the appeal which must be allowed. All parties proceeded on the basis that if the appeal is allowed there must be a retrial.

156 I would order that the appeal be allowed with costs, that the respondents pay the appellant's costs of the appeal to the Court of Appeal and that the costs of the trial abide the outcome of the retrial.