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IN THE HIGH COURT OF AUSTRALIA

RIDGWELL

V.

SOMMERS AND OTHERS

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on FRIDAY, 13th JUNE, 1952.

J. J Gourley, Govt. Print., Melb.

C.7163/51

RIDGWELL

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O R D E R

Appeal allowed with costs, including any reserved costs. Decree of Supreme Court of 21st September 1951 set aside. In lieu thereof order that the claims in the suit to which such decree relates be dismissed with costs. Liberty to apply to this Court with respect to the form of order or otherwise.

RIDGWELL

v.

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JUDGMENT

DIXON C.J.
WILLIAMS J.

RIDGWELL

V.

SOMMERS & ORS.

JUDGMENT

DIXON C.J.
WILLIAMS J.

This is an appeal by the defendant Mrs. Ridgwell from a decree made by the Supreme Court of New South Wales in its equitable jurisdiction (Roper C.J. in Eq.) declaring, as the plaintiff claims, that the plaintiff and the appellant are entitled in equal shares and have been so entitled since the date of incorporation of Ridgwells (Campsie) Ltd. (now Ridgwells (Campsie) Pty. Ltd.) to all shares in that company and to all rights of the subscribers to the memorandum of association of that company to have the shares therein issued and allotted to them and to all rights in respect of these shares and to consequential relief. The appellant claims that she is entitled to the whole of these shares and rights. The company which carries on the business of manufacturing and selling ladies frocks at Campsie and Parramatta is, of course, a separate entity and in law the owner of the business. But, as will appear, it has never really functioned as a company. No shares have ever been allotted. There are simply eight signatories to the memorandum of association for one share each. One signatory, Ernest Arthur Marsh, is a co-defendant with the appellant. He is her brother and has sworn in his statement of defence that he has no beneficial interest in this embryo share and that he has at all times held it on trust for his sister. He did not give evidence at the hearing and the contest throughout has been between the appellant and the plaintiff respondent. She claims to be beneficially entitled to the rights of the subscribers in all eight shares, while he claims to be beneficially entitled to half of these rights. In substance the dispute is whether the

appellant owns the business carried on by the company or whether it belongs to her and the plaintiff in equal shares.

The question at issue is one of fact. An appellant who seeks on appeal to reverse a finding of fact in the Court below undertakes a heavy onus to satisfy an appellate Court that the decision below is wrong, the nature of which has been discussed in several cases in this Court and in the House of Lords. It will be sufficient to mention two cases in this Court, Dearman v. Dearman, 7 C.L.R. 549, and the Commissioner of Taxation v. Clarke, 40 C.L.R. 246, and two recent cases in the House of Lords, Powell v. Streatham Manor Nursing Home, 1935 A.C. 243, and Watt or Thomas v. Thomas, 1947 A.C. 484. It is clear that an appellate Court has a right and a duty to examine the facts for itself but that at the same time it should not overrule a finding of fact of the trial judge which depends entirely upon his estimate of the credibility of the witnesses unless it is convinced that his finding is wrong. In Dearman's Case, supra, at p. 553, Griffith C.J. pointed out that an appellate Court may review such a finding with greater freedom where the judge has found in favour of the party on whom the burden of proof lies than where there has been a finding in favour of the party upon whom the burden of proof does not lie. In Watt's Case at pp. 487 and 488 Lord Thankerton stated three propositions which received the specific approval of Lord Macmillan and Lord Simonds, and then added on the latter page "It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

The present case has features which place the appellate Court in a more favourable position than usual to review the findings of the Court below. For one thing His Honour has found, to use his own words, that neither the appellant nor the plaintiff are witnesses whose credit gives any real assurance that either of them has been wholly frank and truthful. The onus is on the plaintiff to establish that he is entitled to a half share in

the business, and a plaintiff whose evidence is so distrusted undertakes a heavy burden. In view of His Honour's adverse estimate of the credibility of both the principal witnesses, the case is one of those cases which must be resolved chiefly from an examination of the documents and facts as to which there can be no real dispute and the inferences to be drawn from the documents and those facts. To this extent at least a Court of appeal is in a not unfavourable position to exercise its own judgment.

His Honour's reasons contain a helpful summary of these principal documents and facts and it will be unnecessary to cover the whole of this ground again. It will be sufficient to concentrate upon those parts of the evidence from which we feel compelled to draw inferences which differ from those of His Honour, and which lead us with great respect to the conviction that his final decision in favour of the plaintiff cannot be justified and that this is a case in which the appellate Court should substitute its own decision for his.

The appellant's husband died about March 1933. For ten years prior to his death they had been engaged in carrying on the business of manufacturing and selling ladies frocks, principally at Campsie and Parramatta but also elsewhere. Thereafter she carried on the business on her own account. The plaintiff is a solicitor who has been practising on his own account since 1932. He had met Mr. and Mrs. Ridgwell in the former's lifetime. After Ridgwell's death the plaintiff's friendship with the respondent soon ripened and after eighteen months she became his mistress. This liaison continued until they quarrelled about November 1948. Naturally he soon came to take a keen personal interest in the appellant's business affairs. In 1934 one branch of the business was being carried on in George Street, Sydney. This shop was not paying and the plaintiff, upon hearing that a lease could be acquired of premises in Market Street, suggested to the appellant that she should open a shop there instead. He succeeded in obtaining a lease of the premises for ten years at £55 a week and a

company, Ridgwells Ltd., was incorporated on 10th February 1934, so that it could become the lessee and there would be no personal liability for the rent. The lease required the lessee to build a new shop front. It was also necessary to install new interior fittings suitable for the business. The whole of the expense of doing this work, amounting to about £600, was borne by the appellant. The plaintiff's story is that he first suggested to the appellant that he should pay for the work and sub-lease the shop to her for a term of from three to five years at £65 a week but that later it was agreed that she should do the work and pay £55 a week. The plaintiff also said that it was agreed that if the business was a success he was to receive £2,000. If it failed, the lease was to revert to him. This was denied by the appellant. The landlord allowed thirteen weeks to complete the rebuilding before the rent commenced to be payable. No shares in the company were ever issued. There were the usual seven signatories to the memorandum of association for one share each consisting of the appellant and six other persons, mostly her associates, and these shares were treated as though they had been allotted, and blank transfers were signed by the signatories and retained by the plaintiff. No written agreement for a lease and no lease was ever entered into between the company and the appellant. The rent was met by the appellant paying the company £55 a week and the company paying the landlord.

The shop was not a success, and by October 1935 the appellant was in serious financial difficulties. On 21st October 1935 she executed a deed of arrangement under the Bankruptcy Act 1924-1933 Part 12, assigning her estate to trustees for the benefit of her creditors. She shut down the Market Street business, and removed the interior fittings and stock to Campsie. She owned the freehold of the land at Campsie on which there were erected three shops and other premises. One shop and part of these premises were occupied by her for her Campsie business and the rest of the premises was let. She also had a lease of the shop at Parramatta.

The plaintiff went to a great deal of trouble to save the shops at Campsie and Parramatta. He arranged with the trade creditors that they would accept eight shillings in the pound of the amount of their debts, six shillings in cash and two shillings in four instalments secured by promissory notes which he endorsed, and that upon payment of the cash the creditors would authorise the trustees of the deed to sell the assigned assets to a new company, Ridgwells (Campsie) Ltd., which was incorporated on 23rd October 1935. This company became a proprietary company in the following year. He arranged with the creditors other than the trade creditors that their debts should be postponed and settled in various ways. He arranged for the sale of the lease of the Market Street shop, the net proceeds of sale being about £1,600. He arranged that the new company should give an equitable mortgage over its assets to the E. S. & A. Bank to secure its overdraft at the bank and to secure a guarantee for £800 of moneys advanced to himself and one H. B. Smith, a friend and financial adviser of the appellant, £770 of which was used to pay the trade creditors. He also guaranteed the new company's account for £500.

His Honour was of opinion that as between the appellant and the plaintiff the lease, pursuant to the agreement already mentioned, became the property of the plaintiff when the Market Street business failed, so that £1,600 of his moneys, that is practically half the sum required to pay the trade creditors, was used to repurchase the appellant's business, and that the use of his money for this purpose, coupled with the other financial obligations he assumed, provided strong corroboration in the plaintiff's favour of an agreement that he should have a half share in the new business. He said "My view is that if the plaintiff was or if, as between the plaintiff and the defendant, the plaintiff was regarded as being entitled to the lease of the Market Street premises, then there is no doubt that when the

company was first formed it was formed on the basis of an equal sharing between these two parties. I say that because the effect would be that £1,600 of the plaintiff's money went into this company, and that in addition to that he incurred all the obligations to which I have previously referred and these facts together with the part which he took in the formation of the company all form, to my mind, very strong corroboration of the story which he tells as to the interests which were to be taken in it".

If the facts referred to by His Honour were the whole of the facts, and the parties were at arms length so that the disposal of the lease was an ordinary business deal, it would be impossible to disturb His Honour's finding.

But they are not the whole of the facts, the intimate friendship existing between the appellant and the plaintiff affords an adequate explanation of his exertions on her behalf, and there are later documents which tell strongly in the appellant's favour and are utterly opposed to the truth of the plaintiff's evidence. It was the appellant who incurred the whole of the expenditure in altering the shop. It was she who provided the rent. The whole of the plaintiff's contribution was the information that the property was to let. If it had been a business deal between parties at arms length there would surely have been some agreement as to when the £2,000 was to become payable. All the probabilities seem to point to the lease having been acquired for the benefit of the appellant's business and to its having been sold so that this business could be resuscitated. It was the lease and not the plaintiff which contributed £1,600 for this purpose. The statement of affairs disclosed an unascertained interest in Ridgwells Ltd. valued at nil. The trustees of the deed appear to have known of the lease and of its sale, but it would not have been easy in law for them to have got in the proceeds of sale seeing that the lessee was a company and the appellant was apparently at

most a weekly sub-tenant of the company. Probably the trustees did not worry because the trade creditors were evidently not anxious to put the appellant out of business. They wanted to retain her custom, and they were content to take eight shillings in the pound and reassign all her assets to the new company. If they were prepared to forego their rights to realize all her other assets, they would not want to deprive her of any interest she had in the lease.

After the reassignment, Ridgwells (Campsie) Ltd. continued to carry on the business previously carried on by the appellant at Campsie and Parramatta. The freehold at Campsie remained in the name of the appellant as trustee for the company. The plaintiff received weekly reports of the progress of the business from 14th December 1935 to 13th June 1936. No real inference in favour of the plaintiff that he had a half share in the business can be gathered from this circumstance. He was a guarantor of the business for £500 and moneys advanced to H. B. Smith and himself by the bank had been used to pay the creditors. He had also signed promissory notes in favour of the creditors. He was materially interested in the progress of the business. The appellant drew a salary as manager. The profits were retained and used in the business. No shares of the company were ever allotted. There were eight signatories to the memorandum of association, the plaintiff and six other persons associated with him and Marsh a brother of the appellant. The plaintiff obtained blank transfers from the other signatories except Marsh and made annual returns showing that the issued capital of the company was seven shares held as to one share by Marsh and the other six by the signatories other than himself. Apparently he had forgotten that he had signed the memorandum of association for one share.

On 3rd May 1938 the plaintiff executed a document which purports to be a deed poll in the following terms:

"KNOW ALL MEN BY THESE PRESENTS that I FRANCIS JOSEPH SOMMERS of Sydney Solicitor send greetings WHEREAS a Company incorporated and registered as Ridgwells (Campsie) Pty. Limited is trading at Campsie and Parramatta respectively AND WHEREAS the assets of such Company comprise the Freehold of premises at Campsie and the Leasehold of the premises at Parramatta and Stock Plant Furniture Fittings and goodwill of the business carried on therein AND WHEREAS the issued capital of such Company comprises seven one pound shares one of which is held in the name of Ernest Marsh and the six remaining shares in the name of myself AND WHEREAS the share of the said Ernest Marsh is held in trust for me absolutely AND WHEREAS I am desirous of acknowledging that the shares so held by me or in trust for me are held by me on behalf of Gladys Mildred Ridgwell NOW THESE PRESENTS WITNESSETH that I FRANCIS JOSEPH SOMMERS do hereby declare and acknowledge that all issued shares in Ridgwells (Campsie) Pty. Limited held in my name or in trust for me at the date hereof are now held by me in trust for Gladys Mildred Ridgwell absolutely.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 3rd day of May One thousand nine hundred and thirty-eight.

SIGNED SEALED AND DELIVERED by the said FRANCIS JOSEPH SOMMERS in the presence of) FRANK J. SOMMERS

A.E. OBERG
Articled Clerk with
F.J. Sommers
Solicitor
Sydney."

The words "3rd" and "of May" in the date are written in pencil. He handed this document to the appellant and it remained in her possession thereafter. This document is on its face completely opposed to the plaintiff's story. His attempted explanation of its purpose lacks conviction. He knew that the appellant might still have sought to anticipate his cross-examination and explain it and its origin in his evidence in chief. He said he had handed it to the appellant about 1940 so that she could make use of it in the event of his death while incurring the grave danger of travelling by car between Sydney and Brisbane on the business of a Queensland company, Icicle Pty. Ltd. But the document when produced turned out to be dated two years earlier, and the company was not incorporated until 22nd November 1938, that is six months after its date. Later he tried to advance the link

with these dangerous journeys by saying that he had made at least one visit to Queensland before the company was incorporated. Previously he had said that he had made four or five visits before he gave the appellant the document.

His Honour said "The document is a curious one. In a sense it may be said to be inconsistent with the defendant's claim in this suit, because her claim is that from the time that this company was formed she was beneficially entitled to all the shares in it, whereas the document appears to be declaring a trust in respect of the shares, which was then to come into effect for the first time. It may, however, be susceptible of being read as merely evidentiary of an existing trust, and it is in that way that the defendant has relied upon it in this suit. The plaintiff's evidence as to the Queensland business was somewhat shaken or weakened, I thought, by the fact that when he was first examined on this document by his own counsel, he had the impression that it had been executed about 1939 or 1940, and he associated it with a business called 'Icicle Pty. Limited' in which he was interested, and put its preparation and signing at a time when he was engaged frequently on trips to Queensland. It subsequently appeared that the document bore the date 3rd May, 1938, and that the company, Icicle Pty. Limited, was not in fact incorporated until six months after that date. But he adhered to his story that it was prepared in association with the business of Icicle Pty. Limited, and that he had commenced or had made at least one trip to Queensland some time before that company was incorporated".

In our opinion the plaintiff's explanation was more than "somewhat shaken or weakened" by his mistake about the dates. It was shattered. Some parts of the document invoke comment. It recites that the share in the name of Ernest Marsh is held in trust for the plaintiff while Marsh in his statement of defence asserts that it was always held in trust for the appellant. But the ultimate trust is the same. In a later

document it will be seen that the plaintiff, probably with the connivance of the appellant, told the Commissioner of Taxation that this share was the property of Marsh. It states that the shares are now held in trust and these words are appropriate to the creation of a new title which the appellant does not set up. But they are susceptible of being read as evidentiary of an existing trust and that is all the appellant claims. It is quite clear that the whole tenour of the document definitely supports the appellant's case and throws the gravest suspicion on the plaintiff's story. To be a true document, on his evidence, it should have stated that the shares were held in trust for the appellant and himself in equal shares and not held in trust for the appellant absolutely. If his evidence is true the document must have been deliberately fabricated to avoid death duties. It is impossible to accept the evidence of the plaintiff that the document was handed to the appellant as an escrow. It quite fails to establish that the document was not intended to have an immediate operation.

The next transaction of importance is the sale of the Campsie freehold. It was contracted to be sold on 1st May 1941. The contract provided that Ridgwells (Campsie) Ltd. should receive from the purchaser a lease of the shop and premises in which its business was carried on. The purchase price was £12,500, £500 to be paid to the agents as a deposit on the signing of the contract, and £12,000 to be discharged by the purchaser taking over the first and second mortgages on the property totalling £8,000 and by paying the balance in cash. We know that the cash balance was £3,906.19. 1, and that a cheque for this sum was received by the plaintiff from the purchaser's solicitors on 26th May 1941 and paid into the plaintiff's trust account on the same day. According to the plaintiff the balance of the deposit received from the agents after satisfying their commission was £225 and this is presumably the cheque which was paid into his

trust account on 17th July 1941.

The respondent gave the appellant an acknowledgment in writing dated 2nd June that he held on her behalf the sum of £2,500. It is in the following terms:

"133 Pitt Street,
SYDNEY

MRS. G. M. RIDGWELL
86 Orpington St.,
Ashfield.

This is to acknowledge that I hold on your behalf the sum of two thousand five hundred pounds (£2,500. 0. 0)

DATED this second day of June 1941.

FRANK J. SOMMERS "

This is an important document. His Honour said "There is a document - the first of the documents to which I refer - dated the 2nd June, 1941, and therefore very shortly after the settlement of the Beamish Street sale, which states that the plaintiff holds the sum of £2,500 on behalf of the defendant. It is an acknowledgment of a debt to that extent. The document is, in my opinion, a very puzzling one on the evidence. It was originally suggested by the plaintiff, when he was confronted with it, that it was an acknowledgment of the fact that he held a substantial part of the proceeds of the sale of the Campsie property. How the sum of £2,500 is related to the proceeds of the sale of the Campsie property is something which I have been unable to fathom. There appears to me to be no relationship between the figures involved in the sale of the Campsie property and in the indebtedness of the company to these people, or in the reductions which have been effected in the bank overdraft, to account for a round sum of £2,500 as being part and parcel of that sale. The plaintiff, at a subsequent time in his evidence, furnished a curious explanation of the document. He said that it was not executed or not drawn up and signed on the 2nd June,

1941, but rather that it was prepared and signed in 1943, and that it was prepared to furnish evidence, if it was required, to the Income Tax Commissioner in connection with a statement of assets and liabilities which Mrs. Ridgwell, the defendant, was required to furnish to the Commissioner in 1943, and which was in fact furnished in 1944. There is a correspondence between the amount of £2,500 mentioned in the document and a particular asset shown in the statement of assets and liabilities, and it is, I think, at all events possible that the defendant's second version of how this document came into existence was the correct one. At all events, although it has been debated from both sides at considerable length, all I can say as to it is that I do not understand what the £2,500 represented, and that it does not appear, at all events, with any reasonable certainty, that it was necessarily related to the sale of the Campsie property".

This is an important passage in His Honour's judgment because he had previously said that at one stage during the hearing of the case he had formed a strong impression that the real question of fact might well be solved by a consideration of what had been done with the money derived by the company in its trading and in the realisation of its assets but this line of inquiry had, on the evidence, proved to his mind quite inconclusive. Accordingly it would seem that His Honour would probably have dismissed the suit if he had been satisfied that the document related to the proceeds of sale of the Campsie property. It is therefore unfortunate that the reconciliation suggested to us of this sum of £2,500 with the proceeds of sale of the Campsie property was not proffered to His Honour. The document is dated after the £3,906 had been paid into the trust account but before the receipt of the £225. The balance sheet of the company as at 30th June 1940 showed among the liabilities a mortgage to Haigh £600. This was discharged out of the proceeds of sale. The balance sheet also showed unsecured loans

to the company by the plaintiff of £450 and the appellant of £343. The mortgage to Haigh and these unsecured debts disappeared in the balance sheet of 30th June 1941. These three debts total £1,393, and if this sum is deducted from £3,906 it leaves £2,513. Perhaps the mortgage to Haigh had been reduced between 30th June 1940 and May 1941 by £80 which would convert the £2,513 into £2,593, but the correspondence of the two sums would still be close. The proceeds of sale were strictly the property of the company but the plaintiff and the appellant would feel no difficulty in treating them as the property of one or both of them. If this document was signed by the plaintiff on the date it bears and relates to the proceeds of sale of the Campsie property, it supplies cogent evidence that as between the parties the business really belonged to her. The plaintiff's changes of front in his evidence about the disposal of these proceeds can only be described as remarkable. In his evidence in chief he said that after discharging the Haigh mortgage, they were paid into the banking account of the company. Later he said that if he received them it was paid to Campsie. But it is clear that the proceeds were paid into his trust account and not paid to the company. Finally, in his evidence in reply, he said he always had large sums of cash in his possession and that he had given the appellant sums in cash equal to the proceeds which she had used to make purchases of stock for the business. An attempt was made to corroborate this final version by showing that the value of stock shown in the balance sheet for 30th June 1942 had increased from £2,550, the figure shown in the previous balance sheet, to £4,166, but the attempt miscarried because there was a mistake of £1,000 and the figure should have been £3,166. It may be correct that there was some adjustment by which the £2,500 actually or notionally reached the company. The company's overdraft with the bank was discharged by a deposit of £921 on 8th May 1941. This was before the proceeds of sale were

received but after the date of the contract, and this payment may have been connected with the sale. The balance sheet of the company as at 30th June 1941 shows as an asset an advance of £1,583 to the appellant and if these two sums are added together they total £2,504. This would be a natural use of the money if the proceeds of sale were the property of the appellant whereas, if they were joint property, the advance should have been to them both. None of these figures have been sufficiently elucidated to place much reliance upon them. But all the probabilities suggest that the document was signed on the day it bears date. That date is so soon after the receipt of the proceeds of sale by the plaintiff that there is a natural connection between the preparation of the document and their receipt. The Campsie business was not in a sufficiently prosperous condition to advance the sum of £1,583 to the appellant. It seems to be clear that, apart from the possible advance deposit of £921, no sums in respect of the sale were ever paid into the company's bank account. The £1,583 must be at most a book entry to account for an advance by the company to the appellant of moneys it never received, and the only moneys that technically belonged to it which it did not receive, so far as the evidence goes, were the proceeds of sale in question.

The reasoning which led His Honour to discard the document was, we venture to think, unsound. He said it was not proved with any reasonable certainty that it was necessarily related to the sale of the Campsie property. But surely the onus lay on the plaintiff to satisfy His Honour that it did not relate to this sale. He had at first admitted that it could have done so and, in the statement of assets and liabilities to which His Honour refers, of which the plaintiff was the principal author, there is a note in the plaintiff's handwriting attributing this very sum to "Sale of Campsie". We venture to think that the evidence as a whole quite fails to satisfy this onus. In our

opinion the whole of its trend is towards a finding that the document was signed on its proper date and relates to these proceeds of sale. The "curious afterthought" to which His Honour refers, is, if true, an admission by the plaintiff that this is another document fabricated, and in this case ante dated, to mislead the Commissioner of Taxation who was making some inconveninet inquiries to which we shall briefly refer at a later stage. The document is addressed to the appellant at 86 Orpington Street, Ashfield. This was a property the appellant owned in June 1941 but did not own in 1943. So even the address was faked to give it verisimilitude.

Perhaps a few words should be said about the Haigh mortgage. In 1937 the amount owing to Haigh was about £1,800. The plaintiff succeeded in purchasing the debt from Haigh for £900. He arranged with the company that he should be paid interest estimated on a capital sum of £1,800, that the £900 should be paid off by monthly instalments of £10, and that subject to these conditions he should give the company the benefit of the £900 reduction in capital which he had effected. This transaction does not appear to us to throw any real light on the truth of either story. It provided for repayment to the plaintiff of the whole of his capital with a high rate of interest on the outstanding balance. It was a transaction which might have been entered into whether the plaintiff owned a half share in the business or not.

The next important document is a document signed by the respondent on 7th March 1944. It states that six shares in Ridgwells (Campsie) Ltd. are held by the plaintiff in trust for the appellant and that one share is held by Marsh in his own right. This document was given to the accountants of the company so that they might answer a letter from the Commissioner of Taxation dated 20th January 1944 asking them inter alia to furnish a list of shareholders of the company as at 30th June 1943 showing

full names, addresses, number of shares held by each and paid up value of each share, and to state if known or ascertainable whether the shares were held by the shareholders in their own right or as nominees, and if the latter to state on whose behalf such shares were held and in what proportions. Admittedly the statement in this letter that Marsh held one share in his own right is false. It is another document, fabricated at least to that extent by the plaintiff, to mislead the Commissioner of Taxation and/would be completely misleading if he owned a half share in the business. As a counterpart to this document, the plaintiff, in a statement to the Commissioner of Taxation of his own assets and liabilities for the years 1936 to 1950,/which includes a period after the quarrel, did not disclose any interest in the business in suit. These documents on their face also strongly corroborate the appellant's case and are strongly opposed to the plaintiff's story.

There is one further document which has already been mentioned and that is a statement of the appellant's assets and liabilities as at 30th June 1936 to 1943 inclusive prepared by the accountant on information supplied to him by the appellant and the plaintiff to satisfy a further request for information from the Commissioner of Taxation. This document shows the appellant as the owner of six shares in Ridgwells (Campsie) Ltd. in each of these years. His Honour said that this document contains false statements to the knowledge of both parties. This may be true. Its only importance in the case is that it is still another document, if the plaintiff's story is true, fabricated for a dishonest purpose.

There is a lot of evidence of other ventures in which the appellant and the plaintiff engaged during their liaison, sometimes on the basis of one-quarter and three-quarters and at other times on half shares, but they do not appear to us to throw any real light on the ownership of the business in dispute and we shall not discuss them in detail. The ventures were either in

the purchase of land and the building and sale of flats or in the purchase and carrying on and subsequent resale of leases of licensed premises. The plaintiff said that he gave the appellant a one-fourth interest in the profits of the first form of ventures. She said that the proceeds of sale of the Campsie land were used to purchase this interest. As we have said, the plaintiff at first swore that these proceeds were never in his possession. But it is clear that they were paid into his trust account and were used to a considerable extent to finance these ventures. This evidence would also seem to corroborate the appellant's story that the proceeds of sale were treated as hers and used to purchase a one-fourth share in these ventures.

In the light of all this documentary evidence to the contrary it was not, in our opinion, fairly open to His Honour affirmatively to find that the plaintiff was entitled to a half share in the business. The foundation of His Honour's decision is his finding that the proceeds of sale of the Market Street lease were the property of the plaintiff and were used to purchase a half share in the business. This finding really rests on the plaintiff's evidence without any satisfactory corroboration. The only satisfactory corroboration would be the clear evidence of some trustworthy witness or some explicit document. But there is no such corroboration. The evidence of the witnesses called by the plaintiff is quite equivocal and the documents as a whole strongly contradict him. Nothing the plaintiff said could by itself carry conviction. He is by his own admission unscrupulous and dishonest. His story is, on the whole of the evidence, glaringly improbable, s.s. Hontestroon 1927 A.C. 37 at p. 50.

In our opinion the appeal should be allowed with costs, the decree below set aside, and in lieu thereof a decree made dismissing the suit with costs.

RIDGWELL

V.

SOMMERS & ORS.

JUDGMENT

MCTIERNAN J.

RIDGWELL

V.

SOMMERS & ORS.

JUDGMENT MCTIERNAN J.

The claim made by F. J. Sommers, the plaintiff in the suit, was that he and the appellant, Mrs. Ridgwell, were equally entitled to the shares in Ridgwells (Campsie) Pty. Limited. The company was incorporated in October 1935: it subsequently became a proprietary company. Sommers claimed that their interests in the company were equal since its incorporation. He founded the claim upon an oral agreement which he made with Mrs. Ridgwell immediately before he formed the company. Sommers said in his evidence that they agreed that they would have equal interests in the company. His was the only evidence to prove that they expressly agreed upon this condition. His Honour found that the agreement contained this condition, consequently he made a decree upholding Sommers' claim.

The issued capital of the company consisted of eight shares. Sommers held the legal title to seven of the shares. Mrs. Ridgwell's brother, Ernest Marsh, held one share in his own name. The profits of the company were never distributed.

Mrs. Ridgwell's evidence, if worthy of belief, would prove that under the agreement she was entitled to the whole beneficial interest in the company.

At the time the agreement was made Mrs. Ridgwell was or about to be the plaintiff's mistress and subsequently they lived together amicably. Their illicit relations did not cease until 1948 and then there were disputes between them as to the division of assets accumulated in speculations in which they had been co-adventurers.

Roper C.J. in Equity, who tried the suit, expressed the opinion, in his reasons for judgment, that both parties were dishonest and untruthful persons. The perusal of the evidence shows that His Honour's opinion is beyond any doubt right. Mrs. Ridgwell's evidence is irreconcilable with some documents which are unassailable. However her counsel made no attempt to

rehabilitate her credit. The aspersions upon Sommer's credit were completely justified by the contradictions in his evidence, his apparent readiness to change a story when it proved to be adverse to his case and to change it into a version of a transaction which suited his case. He said that the documents signed by himself, which in terms refuted his case, were not to be taken at their face value or were false, and, as to some of them, designed to hoodwink the Revenue Authorities who were investigating Mrs. Ridgwell's and his own financial affairs. These admissions were very destructive of his credit as a witness. It is a question whether the documents or his evidence should be suspected of falsity. The proof of Sommers' case requires that the strong proof afforded of his adversary's case by these documents should be displaced. There was really nothing in rebuttal except the very admissions of deceitful conduct which left him without credit as a witness.

It is not beyond the proper discretion of the Court in an appeal upon a question of fact to decide whether Sommers' evidence was sufficient to displace the adverse effect which the documents had on his case. In my opinion his evidence failed to do so. This view does not involve the rejection of His Honour's opinion as to the credibility of either party. On the contrary it depends upon His Honour's estimation of Sommers' credit. Further, the view that Sommers did not meet the evidentiary force of the documents does not involve the acceptance of any of Mrs. Ridgwell's evidence. There is a patent inconsistency in Sommers' case. On the one hand there are these documents, the work of his own hands, and on the other his oral evidence which the documents in terms refute. The reconciliation of the documents with his evidence of the terms of his agreement with Mrs. Ridgwell has no other basis than his own evidence: that is a very weak basis.

It is the duty of a Court of Appeal, where the question for its decision is one of fact, to consider the evidence for itself and give the judgment upon the issue which the Court

thinks right. The Court, of course, should not reverse a finding of fact unless it is satisfied that it is clearly wrong. Proceeding upon those principles, I should set aside the finding that Sommers stipulated for a half interest in the company and Mrs. Ridgwell agreed.

The learned primary judge was of the opinion that Sommers' evidence as to the agreement was corroborated decisively by a number of undisputed facts and by other facts which the learned judge found. For that reason, as I understand the judgment, the determination of the issue went in Sommers' favour. The undisputed facts were mainly Sommers' part in the formation of the company, his entering into obligations of a financial nature on its behalf, his payment of money in order to launch the company in business, and his deep interest in its affairs. The facts found were that Mrs. Ridgwell regarded the lease of the premises in Market Street and the proceeds of the sale of the lease as belonging in fact to Sommers. The net proceeds were £1,600. This was part of the moneys paid by the company to the trustee of Mrs. Ridgwell's Deed of Arrangement in order to buy back her assets. With some hesitation, His Honour found that Sommers made unsecured loans, £1,200 altogether, to Mrs. Ridgwell before she signed the deed. Conceding that Sommers did all these things, they tend, no doubt, to support his evidence as to the stipulation for a half interest in the company. But, even if their understanding were that under this corporate form she should resume business entirely for her own benefit,- in other words be the sole beneficial owner of the shares - their relations do not allow of ruling out the probability that Sommers would have provided finance and entered into financial obligations in order to launch her again in business. It seems to me that the facts upon which His Honour relied as corroboration of Sommers' evidence of the agreement are, to a degree, equivocal. The intimate relationship and manner of life of the parties cannot be left out of account in weighing the

probative force of those facts. Did Sommers really stipulate for a half interest in Mrs. Ridgwell's own business? Upon His Honour's findings, the substantial part of the monetary contribution which he made to enable her to have a fresh start in business was £1,600; the net proceeds of the lease of the premises where her business in Market Street had been conducted. To Sommers, this amount of money was a windfall and he was apparently a man of means. The failure of her business was the occasion of his realising this amount for the lease. Sommers had imposed upon her the burden of the terms upon which the lease was offered to him. She was obliged by the lease to spend a substantial amount in reconstruction. This expenditure no doubt aggravated her financial difficulties. If Sommers' story of his arrangement with Mrs. Ridgwell about the lease is true, it turned out quickly to be a lucky speculation for him but an unlucky one for her. Would he not have thought, when their relations were friendly, that it was fair to apply this windfall of £1,600 to set her up again in business: and it was clearly in his own interest that she should resume business at the earliest possible time.

One of the documents to which reference has been made is a declaration of trust which is dated 3rd May 1938. This is in the form of a deed but without a seal. This document is signed by Sommers and witnessed by a clerk in his office. Sommers is a solicitor and the document was prepared either by him or his clerk. It recites that the issued capital of the company, wrongly stated to be seven shares - it was eight shares - was as to one share held in the name of Ernest Marsh and as to the other six shares in Sommers' name; that Marsh held the share in trust for Sommers absolutely: that Sommers is desirous of acknowledging that the seven shares are held by him on behalf of Mrs. Ridgwell. The operative clause of the document states that Sommers thereby declares and acknowledges that "all issued shares in Ridgwell's (Campsie) Pty. Limited held in my name or in trust for me at the

date hereof are now held by me in trust for Gladys Mildred Ridgwell absolutely". In the suit Sommers' case was that Marsh held the share on trust for Sommers and Mrs. Ridgwell. The document purports to set out the existing position of the shares. It does not say that Sommers held them in trust for himself and Mrs. Ridgwell equally. The document is inconsistent with Sommers' claim that up to the date of the institution of the suit he and Mrs. Ridgwell were equally entitled to the shares. Sommers' evidence was that the document was intended to be operative only in the event of his death, and the risk of a fatal accident on the roads, against which he said it was to provide, having passed, he asked Mrs. Ridgwell to destroy the document. It was produced by her at the hearing of the suit. Even if the document was intended to come into operation only after his death, it is consistent with the terms of the document that it was an acknowledgment that from the beginning of the company Sommers held the shares in trust for her. It is strange if Sommers' case is correct that the recitals in the deed do not correspond with it: the object of the deed was to place on record what their respective interests were for the protection of Mrs. Ridgwell.

The next document is the memorandum made by Sommers about 9th March 1944. It records that six £1 shares in the company are held by Sommers in trust for Mrs. Ridgwell and that one share is held by Marsh in his own right. This document was prepared in order to answer inquiries made by the Commissioner of Taxation about the company. Sommers met this document by saying that it gave a false account of the ownership of the shares. The onus was upon him to demonstrate its falsity and I am unable to find that he properly discharged it.

The third document is dated 2nd June 1941. Sommers also prepared this document. He thereby acknowledged that he held on Mrs. Ridgwell's behalf the sum of £2,500. At first he said that these moneys were part of the surplus after mortgages were discharged

of the proceeds of the land at Campsie owned by the company. The amount was more than half of the surplus. There was an issue at the trial whether Mrs. Ridgwell received the surplus. The destination of these moneys would go far to prove whether their interests in the company were equal. But Sommers changed his evidence and said the document was false and was really given to Mrs. Ridgwell to enable her to mislead the Commissioner of Taxation. At the hearing an attempt was made to trace the surplus of the proceeds of sale through accounts. The learned trial judge said he was unable to fathom this document. It seems to me that the onus was upon Sommers to displace by clear and satisfactory evidence the first account which he gave of the document, especially as the account told against his case. In my opinion Sommers failed to do so.

Upon the whole of the evidence, I am of the opinion the finding in favour of Sommers that he and Mrs. Ridgwell made an agreement that each of them would take a half interest in Ridgwells (Campsie) Pty. Limited should not be sustained. I should allow the appeal.