SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2017 0009

FOOD AND BEVERAGE AUSTRALIA LIMITED — First Applicant

and

TOTAL BEVERAGE AUSTRALIA PTY LTD — Second Applicant

v

GREGORY STUART ANDREWS (AS LIQUIDATOR OF HOLT NORMAN & CO PTY LTD (IN LIQUIDATION)) — First Respondent

and

HOLT NORMAN & CO PTY LTD (IN LIQUIDATION) — Second Respondent

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JUDGES:	REDLICH, SANTAMARIA and McLEISH JJA
WHERE HELD:	MELBOURNE
DATES OF HEARING:	16 June and 18 July 2017
DATE OF JUDGMENT:	21 September 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 258
JUDGMENT APPEALED FROM:	*Andrews v Corporate Link Australia Pty Ltd* (Unreported, Supreme Court of Victoria, Randall AsJ, 15 December 2016)

CONTRACT – Action for debt – Debtor alleging oral agreement to discharge debt and substitute loan to related corporation – Subsequent bank transactions of debtor and related corporation consistent with alleged agreement – Conflicting oral evidence – Findings adverse to credit of participants in conversation – Finding parties did not reach agreement – Appellate review of findings of fact – *Fox v Percy* (2003) 214 CLR 118; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679, applied – Appeal dismissed.

COURTS AND JUDGES – Reasons – Failure to make findings of fact – Delay between hearing of evidence and delivery of reasons for judgment – Whether reasons adequate – *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17; *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317; *Hunter v Transport Accident Commission* [2005] VSCA 1, referred to – Appeal dismissed.

EVIDENCE – Rule in *Browne v Dunn* (1894) 6 R 97 – Note of witness not referring to agreement alleged by witness to have been made three days earlier – Finding adverse to witness in respect of omission – Omission not put to witness in cross-examination – Note put into evidence by witness – Rule in *Browne v Dunn* not infringed – No denial of procedural fairness – *Philippiadis v Transport Accident Commission* (2016) 74 MVR 289, followed.

APPEARANCES:	Counsel	Solicitors
For the Applicants	16 June 2017: Mr I Robertson SC with Mr M Burnett 18 July 2017: Mr I Robertson SC with Mr N Marshall	Georgiadis Lawyers
For the Respondents	16 June 2017: Mr M J Galvin QC with Ms N L Papaleo 18 July 2017: Mr M J Galvin QC with Ms R G Morison	Foster Nicholson Jones Lawyers

REDLICH JA
SANTAMARIA JA
McLEISH JA:

1 This application for leave to appeal concerns a claim made for payment of commission fees. The applicants, who were defendants at trial, unsuccessfully contended that the amount claimed had already been paid by the first applicant to the second respondent and then lent back to the second applicant on terms that the money was not repayable until a bank loan had been discharged. An associate judge rejected that defence and entered judgment against the first applicant. The applicants seek to appeal on the basis that the associate judge gave insufficient reasons for his decision and that the conclusion was wrong in any event.

2 For the reasons that follow, leave to appeal should be granted but the appeal should be dismissed.

Factual background

3 The case involves the participants in a managed investment scheme for the growing of cherries in Tasmania, known as the Tasmanian Premium Cherries Project ('the Project'). The applicants and the second respondent were some of the principal participants in the Project.

4 The first applicant, Food and Beverage Australia Ltd ('FABAL'), was the responsible entity for the Project. The second applicant, Total Beverage Australia Pty Ltd ('TBA'), was available, under the product disclosure statement issued in respect of the Project (the 'PDS'), to provide finance to investors in the Project on application. FABAL and TBA are related entities: each is wholly owned by The FABAL Group Pty Ltd. Christopher Day was, at all relevant times, a director of both FABAL and TBA.

5 The first respondent is the liquidator of the second respondent, Holt Norman & Co Pty Ltd ('HNC'). HNC's task was to introduce investors to the Project, for

which it was to be paid a commission. Peter Holt was its director at all relevant times. He was also the director of Corporate Link Australia Pty Ltd ('CLA') until his bankruptcy in 2011. CLA was the trustee of the PR Holt Family Trust. After HNC went into liquidation the first respondent commenced the proceeding in the Trial Division from which the proposed appeal is brought.

6 PJ Nash Pty Ltd, trading as Westmores, ('Westmores') was to market and distribute the cherries produced pursuant to the Project. Phillip Nash is the sole director of Westmores. Robin Westmore is Westmores' general manager.

7 On 9 October 2007, FABAL, HNC and Westmores executed the 'MIS Development Agreement'. Under that agreement, FABAL, as the responsible entity, was entitled to pay HNC 8 per cent commission on investments received. This entitlement was repeated in the PDS.[1] Although previously contested, the parties now accept that this 'entitlement' was in fact an obligation.

8 Under the PDS, each investor came under an obligation to pay $26,504 for each interest purchased, payable in four tranches. The first tranche initially required each investor to pay $9,504 per interest on or before 31 May 2008, although the date was later extended.[2]

9 Ultimately, 406 interests in the Project were sold to investors pursuant to the terms of the PDS. Of those, 391 were purchased by clients of HNC. The payments for those 391 interests were to be borrowed by the investors as envisaged by the PDS, whether from TBA or an independent lending institution. It would therefore be necessary for TBA or the independent lending institution to pay FABAL, as the responsible entity, the first tranche of fees in respect of those 391 interests, on behalf of the investors.

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1 *Andrews v Corporate Link Australia Pty Ltd* (Unreported, Supreme Court of Victoria, Randall AsJ, 15 December 2016) [10] ('Reasons'). The reasons provided to the Court are designated [2016] VSC 788, but that citation refers to another decision. The reasons do not appear to be published on the internet.

2 Reasons [48].

10 However, by the end of May 2008 funding had not been secured for the first tranche. FABAL's preferred option before that time was for an independent financial institution to provide funding directly to the investors. To that end, Holt had begun to negotiate with possible financiers, including Green Seed Finance ('Greenseeds') and Momentum Finance, to provide the necessary funds to HNC's clients investing in the Project. Another alternative was that the Bank of South Australia ('Bank SA'), with which FABAL and TBA banked at the time, would lend to the investors. Day's evidence was that he thought Holt was pursuing this possibility during May 2008.[3]

11 In late May 2008, according to Day's evidence, the possibility of Bank SA lending to TBA, rather than directly to investors, was raised between Day, Holt and Bank SA. TBA would then use the Bank SA funds to lend to the investors. TBA had a pre-existing facility with Bank SA, but that facility was insufficient to cover the required outlay of $3,716,064 (391 interests multiplied by the first tranche payment of $9,504).

12 Day approached Bank SA to seek an increased limit on TBA's borrowings in order to fund the first tranche of fees. As at 31 May 2008, the date that payment for the first tranche was initially due, Bank SA's facility to TBA had not been extended.[4]

13 The parties are generally in agreement that, at that point, FABAL was or would soon be liable to pay HNC $865,000 in commissions and to pay Westmores $435,000 for start-up expenses and fees related to the Project.

14 During June 2008, there was a series of meetings between Day, Holt and Nash in which they discussed what should be done in order to ensure that the Project was able to commence by 30 June 2008. In particular, they discussed what they needed to do to ensure that TBA was able to provide finance to the investors.

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3 Holt denied that he had sought funding for the investors, rather than for FABAL or TBA, but it is implicit in the Reasons that the associate judge rejected this evidence: [60].

4 Reasons [58].

15 On 3 June 2008, a meeting took place at the RACV Club in Melbourne between Day, Holt, Nash, Bill Norman[5] and Westmore. Day gave evidence that, at this meeting, he said words to the effect 'we're all going to have to leave funds in the project until it is refinanced'.[6] Day said that, in response, Holt or Nash said words to the effect: 'We have to get the project away. We've got to do it.'[7]

16 Holt recalled attending the meeting at the RACV Club but denied that Day had said the words he attributed to himself at that meeting or that Holt had responded in the manner set out above. On Holt's account, the discussion about leaving funds in the Project took place at a subsequent meeting in June 2008. However, Westmore was not involved in the later meeting and his evidence supported that of Day.

17 The associate judge accepted Day's evidence. He held that there was general agreement that Holt and Nash would leave the commissions and expenses owed to HNC and Westmores respectively 'in FABAL'. He held that the reference to the Project being 'refinanced' could only have meant the financing that might be sourced from a funder such as Bank SA or Greenseeds.[8]

18 On 4 June 2008, Rob Cope of Bank SA sent Day an email regarding the 'possible funding of investments in the cherry project' and stating that 'any facilities provid[ed] direct to investors or through TBA' would need to be based on 'previously advised criteria'. It is clear that, at this time, the prospects of finance either for the investors or for TBA were still being explored.

19 Day gave evidence that, by 13 June 2008, all the investors signed up by Holt had entered into agreements with TBA for the funding of their first tranche

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5 Norman was, by the time Holt Norman went into liquidation, no longer involved in the company. Holt's evidence was that Norman left Holt Norman without warning in July 2009. Norman was not called to give evidence.

6 Reasons [61]–[62].

7 Ibid [62].

8 Ibid [63].

payments. Although the associate judge did not make a finding as to this evidence, it seems not to have been in issue. The result was that TBA required additional funds in order to be able to make the loans.

20 On 13 June 2008, there were two important meetings in Adelaide: one between Day, Holt and Nash[9] and a later one between Day, Holt and Bank SA representatives.

21 Day gave evidence that on 13 June 2008 he, Holt and Nash discussed making further financial contributions to the Project. Day said that he told the others that, unless they all made further contributions, the Project would 'fall over' as TBA would be unable to provide finance to investors to pay the first tranche of fees.[10] He said that he told Holt and Nash that they should all go to Cope and tell him that they were willing to contribute $1.4 million.

22 Day alleged that, at the meeting, he told Holt and Nash that the sums FABAL owed to HNC and Westmores would be lent to TBA to be repaid 'when the Greenseeds money comes in and the TBA loan to Bank SA is repaid in full'. Day also alleged he told the others that FABAL would not pay HNC and Westmores directly, but would 'send the money straight to TBA out of its bank account and directly into TBA's account'.[11] Day alleged that Holt and Nash agreed with these proposals.

23 Day therefore alleged that, at the meeting on 13 June 2008, FABAL, TBA, HNC and Westmores entered into an oral agreement whereby:

(a) FABAL would pay commission of $865,000 to HNC and the sum of $435,000 to Westmores;

(b) HNC and Westmores would then lend those amounts to TBA;

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9 Nash attended by telephone.

10 Reasons [66].

11 Day's witness statement, extracted in Reasons [67]. The proposal to 'send the money straight to TBA' involved both FABAL satisfying the payment of commission to HNC and fees to Westmores, and those parties lending corresponding funds to TBA.

(c) as a result, the obligations on the part of FABAL to pay HNC and Westmores those sums would be discharged;

(d) FABAL was not to pay HNC and Westmores directly but to send the money to TBA so that TBA could pay the fees due in the first tranche on behalf of investors; and

(e) the loans to TBA by HNC and Westmores would be repaid only once TBA had repaid Bank SA in full.

24 Day also gave evidence that, after the meeting, he understood that Holt and HNC would support the raising of capital for the Project, which included guaranteeing the loans made by TBA to investors. Holt denied that he had agreed to do so and it was common ground that, when a guarantee and indemnity agreement dated 18 June 2008 was put to him on 20 June 2008, he refused to sign it.

25 Holt's evidence of this conversation was quite different to that of Day. He said that Day had said words to the effect that the Project was having trouble securing a loan from Bank SA and that the only way to obtain funding was for HNC and Westmores to allow the sums owed to each of them to be retained by FABAL as a temporary loan earning interest. On Holt's account, Day said that retaining these funds would assist in persuading Bank SA to advance funds sufficient to cover the first tranche of fees, and that the funds would be repayable on an 'at call' basis. Holt said that both he and Nash assented to this approach.

26 Nash's evidence accorded generally with that of Holt. He said that Day had said, at one of the meetings in June 2008, that HNC, Westmores and FABAL needed to leave money in the FABAL group in order to bolster the FABAL group's balance sheet to enable it to borrow funds from Bank SA. Nash said that he said to Day that he was willing to defer payment of the $435,000 to which Westmores was entitled provided that it was repayable on an 'at call' basis and that Holt said words to like effect concerning the sum owed to HNC. He said that Day accepted this and confirmed that the sums owed to HNC and Westmores would remain within the

FABAL group temporarily so that Bank SA would be more comfortable with the gearing of the FABAL group.[12]

27 Each of Holt and Nash denied that they knew, as of 13 June 2008, that Bank SA would not lend TBA funds sufficient to cover all of the first tranche fees in respect of 391 interests in the Project. Holt's evidence was that in mid June 2008, Day informed him that it was likely that funding would be available from Bank SA. Day denied saying this. He said that, after meetings with Bank SA on 13 and 16 June 2008, he thought that it was likely that Bank SA would fund the first tranche provided that FABAL, HNC and Westmores gave 'support to the project' and that he would have communicated this to Holt and Nash.

28 Holt's evidence was that the proposed guarantee and indemnity agreement Day sent to him on 20 June 2008 confirmed what he had been told by Day, namely that Bank SA agreed to fund the full amount of the tranche one fees. The draft guarantee recited that Bank SA had agreed to lend to TBA the full amount of the tranche one fees, and further recited that Holt and HNC had agreed to guarantee the performance of the investors in respect of each interest in the Project for which TBA would finance the first tranche payment.

29 Each of Holt and Nash denied agreeing to the liabilities of FABAL being extinguished and replaced by loans by HNC and Westmores, respectively, to TBA. They also denied that they agreed to the loans being repayable only once TBA had repaid its loan with Bank SA. Holt denied that he knew about or distinguished the respective roles of FABAL and TBA within the FABAL group.

30 Day denied agreeing to loans in the terms alleged by Holt and Nash.

31 The associate judge rejected Day's account of this conversation. His reasons for doing so are the principal focus of the proposed appeal.

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12 Reasons [64]. The Reasons treat Nash's evidence as referring to the meeting of 3 June 2008. Nash's witness statement refers only to a discussion in June 2008.

32 At the second alleged meeting on 13 June 2008, between Day, Holt and Bank SA representatives, there was discussion concerning the proposed provision by Bank SA of further funding for the Project.

33 Day said that the purpose of this meeting was to obtain approval to extend TBA's facilities for the purpose of financing the investors' tranche one fees. Day took notes at the meeting. By reference to those notes, he recalled that Holt made a statement to the effect that he and HNC would 'support the raising of all capital for the Project. This is around $11m. We will sign new agreements'. Day said he took this to be a reference to some form of guarantee that any increased loan by Bank SA to fund TBA to lend to investors introduced by Holt would be repaid.

34 Holt denied that he said such words at the meeting.

35 Day said that he spoke to Cope on 16 June 2008. He took notes of that conversation. He said that Cope said that Bank SA was willing to increase the facility to $2.7 million but that Holt and Nash would need to provide 'additional support'. Day said that he said words to the effect that Holt 'and others' would put in $1 million, in accordance with an agreement between him and Holt. He said that after this conversation with Cope, he held the view that Bank SA would approve the loan for the tranche one fees, provided that Holt and Nash gave 'support' to the Project.

36 Holt said that on 16 or 17 June 2008 he spoke to Day about his progress with Bank SA. On Holt's account, Day said that he was confident that Bank SA would advance funds sufficient to cover the first tranche fees for all 391 interests.

37 On 18 June 2008, Bank SA extended its loan facility with TBA to $2.7 million (an increase of $580,000).[13]

38 On 23 June 2008, Day compiled a TBA loan summary which included loans from 'Holt, FABAL and Westmores' totalling $1,980,550 ('Loan Summary').

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13 Ibid [77]–[78]. The date is erroneously referred to as 28 June 2008 in the Reasons.

39 On 26 June 2008, $2,162,093 was drawn down on the Bank SA loan and credited to a TBA account. The same day, TBA transferred to FABAL $2,158,240 (on behalf of investors). The following day, 27 June 2008, FABAL transferred $435,000 (representing the sum it owed to Westmores) and $865,000 (representing the sum it owed to HNC), together with another lesser amount, to TBA. On the same day, TBA transferred back the total of those amounts, $1,397,920, to FABAL.

40 On 27 June 2008, the shareholders of TBA met and approved the loan from Bank SA. The minutes of that meeting also referred to borrowings by TBA from HNC and Westmores and the subordination of all TBA loans to the Bank SA loan. The minutes recited that Holt, Norman, Nash and Westmore had all agreed that HNC and Westmores respectively would not call upon their loans until the entire Bank SA loan was repaid. No representatives of HNC or Westmores were a party to the meeting or these minutes.

41 The balance sheet of TBA as at 30 June 2008 set out TBA's liabilities to Bank SA, and loans from 'Holt' and Westmores in the amounts of $865,000 and $435,000 respectively.[14] Again, no representatives of HNC or Westmores were a party to this document.

42 In October 2010 Holt sought to have the sum of $865,000 recognised as an amount payable to CLA rather than HNC. On 21 December 2012, CLA served a creditor's statutory demand for that amount on TBA. TBA succeeded in having the statutory demand set aside in the Supreme Court of South Australia. In that proceeding, TBA asserted that the amount was not due to CLA, but rather to HNC. It also contended that HNC had agreed that the amount was not payable until TBA's indebtedness to Bank SA was fully discharged. Holt gave evidence in that proceeding, supported by Nash, that he had agreed in June 2008 to let TBA keep the funds otherwise payable by FABAL/TBA as a temporary loan 'at call'.[15]

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14 Ibid [95].

15 Ibid [151]–[152].

43 In other documents, both Holt and Nash later described TBA as owing them the relevant funds. These documents, and the matters described at [38]–[42] above, which the applicants submitted were not addressed by the associate judge, are the subject of proposed ground 6.

Procedural history

44 By their second amended statement of claim, the plaintiffs (the present respondents) sought recovery of $865,055, comprised of commissions of $751,555, marketing fees of $111,000 and development costs of $2,500. The claim was made primarily against FABAL, alternatively against TBA in the event that FABAL's obligation to pay the three amounts had been 'novated or otherwise transferred' to TBA (on the basis that the amounts would then remain presently due and payable by TBA).

45 By their amended defence, the applicants said that, by reason of the alleged agreement between FABAL, TBA and HNC,[16] FABAL had discharged its obligation to pay HNC and any obligation to pay HNC was that of TBA, which was required to repay HNC only once it had repaid its loan from Bank SA.

46 Following a six-day trial at which Day, Holt, Nash and Westmore gave evidence, the associate judge found, as we have said, that the agreement alleged by the applicants had not been established. As a consequence, he ordered that FABAL pay HNC $865,000 together with interest from 11 June 2014 and that FABAL and TBA pay HNC's costs of the proceeding.

47 This finding is the subject of the proposed appeal.

48 Although six separate grounds of appeal are advanced (as set out later in these reasons), the applicants rely on ground 2 as the 'umbrella' ground: that the

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16 The defence referred to a related company, Holt Norman Ashman Baker Pty Ltd. Holt's evidence was that the MIS Development Agreement erroneously listed the ACN of that company instead of the ACN of Holt Norman, and that at all times he was acting on behalf of Holt Norman. Ultimately, the applicants did not press the point.

associate judge erred in finding that the alleged agreement did not exist. The gist of the applicants' case is that the associate judge failed to make critical findings of fact regarding the agreement they allege arose on 13 June 2008, and so erred in finding that the agreement did not exist. To this end, they submitted that the associate judge erred in rejecting Day's evidence as to the substance and effect of the meeting held on 13 June 2008 (ground 1(1)).

49 Further, the applicants submitted that the associate judge erred in failing to provide adequate reasons for his decision (ground 1(2)). The applicants relied on the detail in grounds 3, 4, 5 and 6 to support the more general grounds 1 and 2.

50 The respondents submitted that the finding of the associate judge that the alleged agreement of 13 June 2008 was not made was correct and that his reasoning was adequate to support that finding.

51 The respondents also filed a notice of contention, seeking to have the finding affirmed on a number of grounds related to the assessment of Day's credit.

52 Counsel for the applicants indicated that, if the applicants were successful in the appeal, two avenues were available. First, this Court could review all the evidence and reach its own conclusion that the alleged agreement was made. Alternatively, the applicants submitted that if the Court found itself unable to substitute its own conclusion, the matter should be remitted to the Trial Division.

53 The respondents also submitted that if any of the proposed grounds were made out the Court could reach its own conclusion. They submitted that the associate judge did not rely, and was not required to rely, on the witnesses' oral evidence. Rather, they submitted, he relied on the documentary evidence, and the lack of documents one would expect to see if Day's evidence was correct. The respondents submitted that this Court could weigh up the evidence and draw the same conclusion as the associate judge.

The reasons of the associate judge

54 It is convenient to outline the associate judge's reasons before turning to the proposed grounds of appeal.

55 After summarising the parties' cases, the associate judge gave his assessment of the witnesses:[17]

> **Holt**
>
> I have concluded that Holt was an unreliable witness. Holt was involved in several schemes and was bankrupted with millions owed. There was evidence which demonstrated that he sought to circumvent the liquidation of HNC by seeking to divert funds into CLA. He only made concessions on cross-examination when he was taken to what was set out in his witness statement. I determined that like Day, he reconstructed. I have disregarded his evidence to a large degree.
>
> **Nash**
>
> Nash was a person who I described as 'getting his hands dirty' rather than dealing with financial matters. I determine that he was a frank and truthful witness. However, he had his own disputes with FABAL or the FABAL Group. The evidence demonstrated that he was willing to support Holt whenever he could. Nash conceded that he had no real recollection of the matters set out in his witness statement and conceded that the words used therein were, to a large degree, constructed by the legal practitioners. Further, he was willing to assist the resisting of the application to set aside the statutory demand in South Australia which is inconsistent with what was put forward. Nash and Holt's affairs were linked to a degree. Holt was Nash's accountant for a period. Nash and Holt were the original shareholders in [the company that owned the land on which the cherries were to be grown ('ACL')] at 50% each. Nash still maintains a shareholding of 25% which is valuable and would be enhanced by the project being successful.
>
> **Westmore**
>
> I was impressed with Robin Westmore as a witness. He was frank in his responses, did not reconstruct and was willing to concede when he did not have a clear recollection of any particular discussion or event. His recollection of a June 2008 conversation was critical.
>
> **Day**
>
> Mr Galvin QC sought that I determine that Day's [sic] was dishonest and that I should reject his evidence. Mr Galvin QC relied upon the way the drawdown from the funds available from Bank SA was treated. He also relied upon representations made to Bank SA with respect to the funds

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17 Reasons [33]–[36].

> available or committed to the Project. I decline to reject Day's evidence in its entirety as Mr Galvin QC urged me to do. However, it is clear that the drawdown of Bank SA funds and the treatment thereafter was consistent with how Day wished to treat the arrangement between the parties rather than necessarily be reflective of the arrangement between the parties. Further, I did not view the representations to Bank SA as being necessarily dishonest and it is certainly not my role in this proceeding to make any determination or to come to any conclusion about the same. Most of his evidence was a reconstruction to be consistent with the TBA book entries. Further, his evidence was a reconstruction or a take on the meaning of words in documents which he sought to attribute to the words. The representations may not have been entirely accurate but of more concern to me was that the Bank SA representations reflected how Day gave his evidence. Day described himself as a good note taker. When a transaction of significance had occurred, he would keep a note of it somewhere. He said he was careful to seek to obtain documentation of a guarantee and indemnity yet the very transaction at the heart of this proceeding was not formally documented by an agreement with HNC or even by correspondence. Further, Day was resolute in the way that he gave his evidence. He declined to make any concession whatsoever, even when the result of the treatment of the drawdown funds was put to him. It is clear that Day's view of the world was to him the only view of the world. However, that said, Day was the driving force in seeking to establish and maintain the Project. By June of 2008 there had been a general downturn in the economy and it was difficult to obtain investors willing to become growers. The PDS had to be extended twice as the requisite number of interests had not been taken up on each of the first cut-off dates. It is understandable, in those circumstances why the representations to Bank SA were made and why he may have been concerned to shift the liability for the payment of the HNC commission from FABAL to TBA.

56 The associate judge then outlined the genesis of the Project, set out certain provisions of the MIS Development Agreement and described the progress of the Project up to the end of May 2008.[18] He then turned to address the meeting at the RACV Club on 3 June 2008, which he described as 'important' because it '[set] out the parameters of what was to happen to the commissions earned by HNC'.[19]

57 The associate judge noted Day's evidence that he said words to the effect that 'we're all going to have to leave funds in the Project until it is refinanced' and that, on Day's account, either Holt or Nash responded by saying words to the effect that 'We have to get the Project away. We've got to do it'.[20] He observed that Holt

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18 Ibid [37]–[60].

19 Ibid [62].

20 Ibid [61]–[62].

denied Day's account but that Westmore said 'it wouldn't surprise me if words to that effect were used'.[21]

58 The associate judge accepted Day's account, but found that the parties to the conversation did nothing more than acquiesce to leaving their entitlements 'in FABAL'.[22] He accepted Day's evidence in this respect because Westmore generally agreed with Day's version of events, albeit that Holt did not.[23] He also stated that the reference to 'refinancing' could only have meant 'anticipated financing' (meaning the financing anticipated to be coming from one of the possible funders, such as Bank SA or Greenseeds), given that at the time neither FABAL nor TBA had secured any funding and that there were insufficient funds available to pay commissions, fees or any other liabilities.[24]

59 The associate judge then pointed out that Nash 'agreed with the substance of the conversation but went further'.[25] Nash said that Day said it was necessary to bolster the FABAL group's balance sheet so that Bank SA would be comfortable lending money to the group.[26] Nash's evidence was that he said he would allow the FABAL group to delay payment of the $435,000 owed to Westmores on the basis that it would be repayable on an 'at call' basis, so that Bank SA would be more comfortable with the group's gearing, and that he recalled Holt saying words to the same effect.[27] The associate judge did not make any explicit finding in relation to this evidence, but it plainly confirmed Day's account, which he accepted.

60 Next, the associate judge dealt with the meeting of 13 June 2008 between Day,

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21 Ibid [62].

22 Ibid [63].

23 Ibid.

24 Ibid.

25 The associate judge indicated, without explicitly finding, that Nash's evidence of a June conversation referred to this particular meeting.

26 Reasons [64].

27 Ibid.

Holt and Nash.[28] He said:[29]

> Prior to the bank meeting on 13 June 2008, Day set out that he had a meeting with Holt and Nash, who attended by telephone. He referred to Holt's continuing support. He then set out that he said the words to the effect:
>
> > Unless we all make some further contribution, the project will fall over as TBA will not be able to get funding from Bank SA to fund [investors] for their Tranche one fees that are due in the project. ... we must go to Rob Cope and say that we will contribute $1.4 million ... I am not going to put at risk TBA unless everyone agrees to share the risk. The risk has to be the same as the reward of the 40:40:20 split of ACL.
>
> Critically, Day set out at paragraph 91 of his witness statement regarding what constituted the agreement that FABAL would pay the commission and other amounts due to TBA unable [sic] to repay until the Bank SA loan was repaid in full. He set out the following:
>
> > your reimbursements will be paid to you and you have agreed to lend it to TBA. ... FABAL will leave all of its recovered fees and revenue share on deposit with Bank SA to collateralise the TBA loan ... TBA will [pay] you interest on the outstanding amounts at the same rate that the Bank is charging TBA ... you will get paid when the Greenseeds money comes in and the TBA loan to Bank SA is repaid in full .... FABAL will not pay you directly but will send the money straight to TBA out of its bank account and directly into TBA's account because that is the only way I can be certain that the money will be there when the Bank SA loan is drawndown and I need to pay FABAL the [investors'] first Tranche.
>
> Day contends that Holt and Nash both effectively agreed with those propositions.

61 Presumably on the basis of his findings as to the reliability of their evidence, the associate judge did not refer to the evidence of Holt or Nash, in which each of them rejected Day's account of this conversation. Nor did he indicate whether he accepted evidence given by Holt to the effect that Day told him in mid-June 2008 that it was likely that Bank SA would fund TBA to make the first tranche payments.

62 Instead, the associate judge went on to outline Day's evidence as to the meeting with Bank SA on 13 June 2008:[30]

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28 It is convenient to describe this as a meeting notwithstanding that Day said that Nash took part by telephone and Nash recalled only a 'discussion'.

29 Reasons [66]–[68].

30 Ibid [69]–[71] (citations omitted).

Day attended a meeting of Bank SA on 13 June 2008 joined by Phil White, Holt, Mary Cheng and Kevin Moodley all from Bank SA. Cope was unable to attend. Day completed a note of the meeting. The note sets out:

> FABAL/TBA meeting re. funding for TCP.
>
> Peter Holt – reviewed the project and his structure with his client.
>
> ...
>
> Background to clients and who they are. Peter and Norm will support the raising of all capital for TCP. This is around $11m. Will sign new agreement.

Day said his understanding was that Holt would guarantee any increased loan given by Bank SA to TBA to fund [investors] introduced by Holt.

There is no mention of any agreement as propounded by Day. The new agreement could have referred to the guarantee and indemnity put to Holt soon after that date.

63 The associate judge then rejected Day's evidence of the 13 June 2008 conversation with Holt and Nash 'in its entirety'. The reasons given for this rejection of Day's evidence, which form the basis for a number of the grounds of appeal, were as follows:[31]

(a) there had been no previous agreement to lend the sums to TBA and, further, Day does not contend that there had been an earlier agreement to do so;

(b) this conversation was said to have occurred prior to the meeting with the Bank on the same day, yet the propositions put forward in the alleged conversations were not related to Bank SA;

(c) as at 13 June 2008, Day did not know what Bank SA intended. Given cross-collateralisation of previous facilities, there was no imperative that funds be transferred to TBA;

(d) given the nature of the obligations of FABAL and TBA as set out in the PDS, there was no imperative to transfer funds to TBA either actually or notionally;

(e) Day was careful and it was his usual practice to document agreements of significance. No documentation reflecting that agreement was proffered to HNC or Westmores in June 2008, shortly thereafter or at all;

(f) in accordance with Day's practice to document agreement[s], he instructed Kieran to prepare and proffer the guarantee and

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31 Ibid [72]–[73].

indemnity. It is inescapable that the support referred to by Day at that time was a reference to guarantee the performance of the [investors] rather than the agreement referred to in the previous paragraph;

(g) the proposition put forward is illogical. Replacing Bank SA with Greenseeds, another external funder, would not have altered TBA's position save if Greenseeds discharged the liability and lent directly to the [investors]. That is not a circumstance contemplated by the PDS;

(h) that agreement is not consistent with subsequent responses given to Robin Westmore;

(i) that agreement is not consistent with subsequent communications to Holt;

(j) the agreement contended for by Day only seems to have support to justify the way the drawdown from Bank SA was treated by Day.

Further:

- Day gave evidence that TBA had limited cash of its own and no assets;
- given that TBA was a member of the FABAL group and, as it had little cash or [net] assets, it almost goes without saying that Bank SA would have considered its relationship with the group, FABAL's balance sheet and FABAL's past performance as a [responsible entity] in determining whether to advance funds to TBA. At that time, TBA, quarantined from the other members of the FABAL group, would not have been able to put a strong business case;
- it must have been contemplated by Day that FABAL would continue to provide the offset or add to the same. In any event, that happened;
- Robin Westmore said that he chased Day to obtain clarification about whether there were prospects for Westmores to receive payment. Day responded that there was no money there to be paid and when there was money there, something could be done about it. Robin Westmore rejected the proposition that Day had said to him the money would be returned 'when [the] Bank SA loan was repaid'.

64 Next, the associate judge stated that cl 15.2 of the MIS Development Agreement required that a written agreement be executed if the rights it created were to be amended or varied, and noted that no submission had been made as to why he should accept an oral agreement as altering those rights.[32]

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32 Ibid [74]. The Reasons refer to cl 13.2, but this numbering reflects an apparent error within the MIS Development Agreement.

65 The associate judge concluded that the round robin of transactions that occurred between FABAL and TBA on 26 and 27 June 2008 was:[33]

> intended by TBA and FABAL to demonstrate in each account that after receipt of funds from TBA, FABAL wished to discharge its liabilities to Westmores and HNC by repaying the sum back to TBA. The sum is then returned to FABAL by TBA as FABAL, as the [responsible entity], was required to meet the costs for developing the project and for its ongoing management.

66 The associate judge concluded that TBA never raised more than $2,158,240 (the amount TBA transferred to FABAL on 26 June 2008) to fund investor interests in the Project, and that no more than that amount was actually required to advance the Project at that stage.[34]

67 In respect of the TBA Loan Summary dated 23 June 2008, the associate judge said that it contained nothing reflective of the alleged agreement between Holt, Nash and Day and there was no reason to read it as being referable only to TBA. He said that the document merely recorded liabilities of and projections for the Project and did not 'attribute any particular entity as owing any particular amount to TBA'.[35] It was significant that it failed clearly to set out what Day had contended occurred in respect of the June agreement.

68 The associate judge determined that, subject to the question when the HNC commissions amount was repayable 'the only subsisting agreement between HNC and FABAL or TBA or acquiescence by HNC was that the commissions payable to HNC were to be "left in"'.[36] He then looked at the question when the amount was repayable and found that 'the obligation of FABAL to pay the commissions to HNC was not deferred by the agreement or acquiescence to leave the funds in and the same are due and payable'.[37]

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33 Ibid [89].

34 Ibid [92].

35 Ibid [98].

36 Ibid [123].

37 Ibid [126].

69 The associate judge then examined a series of subsequent events and communications involving the parties.[38] In the course of doing so, he made several observations as to the evidence not supporting the subordination aspect of the alleged agreement. Finally, he considered and rejected the claim of Holt that CLA and not HNC was entitled to the funds.[39]

The application for leave to appeal

70 The applicants' 'umbrella' ground of appeal is their contention that the associate judge erred in finding that the alleged agreement of 13 June 2008 had not been made (ground 2).

71 Additionally, they contended that the associate judge erred in rejecting Day's evidence regarding that agreement, and erred by failing to provide adequate reasons for that rejection (ground 1). As already mentioned, the applicants also relied on a number of more detailed grounds (3, 4, 5 and 6) to support their contentions in grounds 1 and 2.

72 The applicants' proposed grounds of appeal, as amended, are as follows:[40]

> 1. The learned Trial Judge erred in law in that he:
>
> (1) rejected the evidence of Mr Day as to the substance and effect of the meeting held on 13 June 2008; and
>
> (2) failed to provide adequate reasons for the rejection of the evidence of Mr Day as to the substance and effect of the meeting held on 13 June 2008 in circumstances where:
>
> a. he did not prefer or accept the evidence of the other participants to the meeting, Mr Holt of [HNC] and Mr Nash of [Westmores];
>
> b. he did not address in his Reasons documentary evidence and financial records of [Westmores] and [CLA] that supported the existence of a loan from HNC and [Westmores] to [TBA] and hence the

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38 Ibid [101]ff.

39 Ibid [127]–[130], [138].

40 Cross-references to the Reasons have been omitted.

discharge of the liability of [FABAL] to pay commissions to HNC.

2. The learned Trial Judge erred in finding that the liability of FABAL to pay commissions to HNC had not been discharged as a result of the agreement reached on 13 June 2008 and replaced by a loan by HNC to TBA, such loan to be repaid when the loan from Bank SA to TBA was repaid.

3. In making the finding referred in ground 2, the learned Trial Judge erred by taking into account irrelevant matters:

   a. that the MIS Development Agreement could not be amended unless executed by the parties;

   b. there had been no previous agreement to lend the sums to TBA;

   c. the proffered guarantee and indemnity;

   d. that TBA required the support of FABAL to obtain the loan from Bank SA.

4. In making the finding referred to in ground 2, the learned Trial Judge erred in fact in making the findings set out below in that such findings were contrary to the undisputed evidence:

   aa. the propositions put forward in the alleged conversations with the Bank SA officers on 13 June 2008 were not related to Bank SA;

   a. given cross collateralisation of previous facilities, there was no imperative to transfer funds to TBA either actually or notionally;

   b. given the nature of obligations of the [applicants] as set out in the [PDS], there was no imperative to transfer funds to TBA ...;

   c. that it was intended that Bank SA would be replaced with Greenseeds and therefore TBA's position would not have been altered when it was intended that Greenseeds would replace TBA;

   d. the agreement was not consistent with the subsequent response given to Mr Westmore;

   e. the agreement was not consistent with subsequent responses given to Mr Holt;

   f. the agreement only benefitted [FABAL];

   g. that no more than $2,158,240 was required to progress the project;

h. the TBA Loan Summary dated 23 June 2008 did not provide advice as to the state of the loans made by HNC and [Westmores] to TBA;

i. the agreement on 3 June 2008 to leave the money in the project until refinanced was a reference to the 'anticipated financing';

j. that it was an extraordinary statement by Mr Day that until TBA gained approval from Bank SA for the increased funding, it was unlikely that the project would proceed.

5. In making the finding referred to in ground 2, the learned Trial Judge erred in taking into account and making findings concerning a meeting between Mr Day of [FABAL] and TBA and Mr Cope of Bank SA when such findings were not put to Mr Day in cross examination.

6. In making the finding referred to in ground 2, the learned Trial Judge erred in fact by failing to take into account and give due weight to:

a. the financial records of [Westmores] that recorded a liability of TBA to [Westmores] by way of loan in the sum of $435,000;

b. the threatening by [Westmores] to issue a statutory demand against TBA as per the loan summary;

c. the financial records of [CLA] that record a liability of TBA to CLA by way of loan;

d. the acts of Holt in perusing the liability of $865,000 from TBA;

e. the acts of Nash in supporting Holt and CLA recover, in statutory demand proceedings, the $865,000 from TBA.

Overview of the parties' positions

73 The applicants contended that the commercial context as at May and June 2008 was crucial to understanding the need for the alleged agreement. They set out that context in their written submissions as follows:

> The PDS provided that the Responsible Entity (RE) received a minimum subscription (of 150 interests) before the Project could commence. Initially this was to be achieved by 31 May 2008. The payment for a single interest was $26,504 (inclusive of GST), payable in four tranches, the first one on the 31 May 2008. The first tranche for a single interest was $9,504 (inclusive of GST). The purchase of an interest potentially provided an investor (grower) with a tax benefit in accordance with an ATO Product Ruling obtained by FABAL (as the RE). That benefit of the Ruling was only available if the grower elected to obtain funding for the interest through TBA. A private ruling could be sought if funding was sought from an external lender. The PDS provided a non-exclusive option for the grower to seek finance from TBA in accordance with a Term Loan Agreement. FABAL, (as the RE) had an

> absolute and unfettered discretion to refuse to accept an application for an interest by a grower. Further, FABAL (as the RE) was not obliged to accept any application for funding by a Terms Loan Agreement (TLA) and TBA was not obliged to accept any application for funding. It follows that (at least in a practical sense) TBA needed to be in funds to advance funds to growers. If, as the Judge found, TBA had insufficient funds in May 2008 to fund the minimum subscription of growers, then it was not in a position to loan funds to those potential growers. In that event, the Project could not have proceeded and HNC would be paid no commission and Westmores would not have been refunded the agreed set-up expenses.

74 The applicants submitted that the associate judge failed to properly appreciate this context, in particular, the need for TBA to be the party that raised the funds necessary to finance investor payments for tranche one of the Project, without which the Project could not proceed. A core plank of the applicants' submissions was that:

> [T]he Project could not have commenced but for HNC and Westmore[s] providing the funds discharging the FABAL debt to TBA .... If the FABAL debt funds could not be used by TBA, then that sum required funding by someone other than HNC and Westmores. As at 30 June 2008, those funds were not otherwise available.

75 The applicants submitted that the associate judge was wrong to find that no more than $2,158,240 (approximately the amount TBA raised from Bank SA) was required to fund the Project as at 30 June 2008,[41] because at that date 391 interests required funding for the first tranche. For each of those interests, $9,504 was required from TBA to fund the first tranche – a total of $3,716,064.

76 The implication of the applicants' submissions is that, as a result of the HNC and Westmores loans made pursuant to the alleged agreement, TBA was able to raise a total of approximately $3.55 million necessary in order to fund the investors' first tranche payments. The $3.55 million total comprised the $2,158,240 that TBA had raised from Bank SA, the $865,000 loan from HNC (paid to TBA by FABAL in discharge of FABAL's liability to HNC for Project commissions), the $435,000 loan from Westmores (paid to TBA by FABAL in discharge of FABAL's liability to Westmores for Project expenses), and an additional $97,920 that TBA had raised

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41 By then the minimum subscription date had been extended to 30 May 2009.

from its own sources.[42]

77 The applicants submitted that the round robin of transactions described in [39] above (and at [84] of the Reasons) gave effect to the alleged agreement, so that TBA was able to raise the requisite first tranche funds. There was no impropriety in those transactions, which went in part to satisfying the obligations of HNC and Westmores for which the PDS provided.

78 The respondents denied the existence of the alleged agreement of 13 June 2008 and denied that HNC and Westmores agreed to make any contribution to investor funding. It was not in issue that as of late May 2008, it was planned that TBA would finance the investors and therefore needed to be in sufficient funds to do so. The respondents also accepted that Holt and Nash were aware of TBA's potential difficulty in securing funding in respect of the first tranche payments. However, they submitted that HNC and Westmores, through Holt and Nash, agreed only to 'leave' their respective entitlements 'in' the Project, that is, that they agreed to a temporary deferral of the payment of their respective entitlements in order to bolster FABAL's balance sheet and thereby assist negotiations with Bank SA for additional finance.

79 The respondents denied that Holt knew, as of the date of the alleged agreement, that the Bank SA finance would not cover the full amount required to fund the investors' tranche one payments. As a result, Holt had no reason to believe that the HNC and Westmores amounts were required to top up the Bank SA loan to TBA rather than merely to assist in securing it, and therefore had no reason to enter the alleged agreement to lend money to TBA.

80 The respondents further submitted that the round robin of transactions demonstrated that TBA did not raise $3.55 million at all but, at most, about $2.2 million:

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42 The discrepancy between the $3.55 million figure and the total required funds of $3,716,064 appears to be attributable to GST considerations. Nothing turned on the difference as the matter was argued in this Court.

- On 26 June 2008, TBA drew down $2,162,093 on its Bank SA facility. From that amount, $2,158,240 was paid to FABAL.

- On 26 June 2008, prior to this payment from TBA, FABAL's bank account was overdrawn.

- On 27 June 2008, FABAL transferred, separately, $435,000 and $865,000 to TBA.

- On 27 June 2008, TBA transferred $1,397,920 to FABAL.

81 The respondents submitted that, since FABAL had no funds prior to TBA's transfer of $2,158,240 to it on 26 June 2008, the sums of $435,000 and $865,000 that FABAL transferred to TBA were paid out of that amount. It was common ground that the amount of $1,397,920 transferred by TBA on 27 June 2008 included the sums of $435,000 and $865,000 that FABAL had transferred to it the same day. The respondents therefore submitted that only $97,920 of this second transfer from TBA to FABAL was additional to the $2,158,240 paid to FABAL a day earlier.[43] Therefore, they submitted, a total of only approximately $2.2 million was actually raised.

82 In other words, the respondents submitted that these transactions showed that:

> the $435,000 and $865,000 amounts were paid *from* the Bank SA funds, not *in addition* to them. The transfer of the sums of $435,000 and $865,000 from the FABAL account to the TBA account on 27 June 2008 gave the appearance of contributions or loans by HNC and Westmores in addition to the bank funding. However, the reality is that those amounts came out of the bank funds.

83 The respondents submitted that, since TBA only ever had $2.2 million available to fund the investors' tranche one fees and since the Project went ahead anyway, it could not have been true (practically speaking) that TBA required $3.7 million for the Project to proceed. They therefore submitted that the applicants'

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[43] The additional $97,920 was available because, immediately prior to the drawdown on 26 June 2008, the TBA account had a credit balance of $74,255.47, and an additional amount of $39,250.73 had been deposited into the account on 27 June 2008 from some other source.

contention regarding the context of the alleged agreement – that the Project could not possibly have proceeded without the entire $3.7 million being raised – was false.

84 In this context, the respondents submitted (by way of notice of contention) that a statement Day made to Bank SA to the effect that the funding comprised the $2.1 million loan from the bank to TBA *plus* loans from other parties (being the alleged loans from HNC and Westmore) was false and should have gone to an assessment of his credit.[44]

85 Further, they submitted (again by way of notice of contention) that representations made by Day to Holt to the effect that Bank SA had agreed to fund the entire amount required for the tranche one fees were incorrect and this too should have gone to an assessment of his credit.[45] The respondents submitted that Day's representations to this effect lent weight to Holt's position that he had understood that the payment of commissions to HNC was meant to be only temporarily deferred in order to bolster FABAL's bank statement and therefore to assist TBA in securing the full amount of funding from Bank SA.

86 The respondents submitted that, since no additional cash was raised via the round robin transactions, the purpose of those transactions could not have been to give effect to the alleged agreement. Rather, they submitted, the purpose of the round robin transactions, particularly the transfers by FABAL to TBA of the sums of $865,000 and $435,000 representing the HNC commissions and Westmores expenses, were made for the purpose of representing to Bank SA that FABAL had obtained additional support from HNC and Westmores as the bank had stipulated on 16 June.[46]

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44 This statement was made in an email dated 12 March 2009: see [216] below.

45 These representations were alleged to have been made both orally by Day to Holt in around mid-June 2008, and by way of the recitals in the guarantee and indemnity Day asked Holt to execute on 20 June 2008: see [28] above and [220] below.

46 See [35] above.

87 The respondents submitted that, since no additional cash was raised via the round robin transactions, the alleged agreement would not have benefited the parties any more than simply leaving the HNC commissions and Westmores expenses in the Project.

88 Before turning to the specific grounds, it is convenient to make some general observations about the above submissions. First, the applicants correctly point out that the reasons of the associate judge do not address the need for TBA, rather than FABAL, to be the provider of funds to investors. Moneys simply left 'in FABAL' could not be made available to investors, both because that would be inconsistent with FABAL's role as responsible entity and because it would have meant investors were not able to take advantage of the Product Ruling.

89 Secondly, however, a review of the trial reveals that it was never in doubt that TBA, rather than FABAL, needed to fund the investors. The Product Ruling explained why, to a certain extent, but by 13 June 2008 it was no longer of specific importance because (for whatever reasons) the investors had signed up for loans from TBA in any event. The larger question was where TBA was to obtain the funds necessary to fund the first tranche. That directs attention to the efforts being made to obtain funds for that purpose from external funders, especially Bank SA.

90 It follows, thirdly, that the need for TBA to raise an amount corresponding to the HNC and Westmores moneys depended on the prospects of obtaining those moneys from other sources. The parties' understandings as to those prospects were an important consideration in that regard.

91 These issues are developed further in the context of the individual grounds advanced by the applicants.

Appeals against findings of fact

92 The law governing the appellate review of findings of fact made at trial was

recently set out by the High Court in *Robinson Helicopter Co Inc v McDermott*:[47]

> A court of appeal conducting an appeal by way of rehearing is bound to conduct a 'real review'[48] of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings.[49] But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony',[50] or they are 'glaringly improbable' or 'contrary to compelling inferences'.[51]

93 In conducting the 'real review' required of it, this Court must bear in mind that it has not seen or heard the witnesses and must respect the advantages that this gave the trial judge. However, the Court cannot rely on this consideration as a basis for avoiding conducting the necessary review. As the majority explained in *Fox v Percy*:[52]

> Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'. In *Warren v Coombes*,[53] the majority of this Court reiterated the rule that:
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> > [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, once having reached its own conclusion, will not shrink from giving effect to it.

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47 (2016) 90 ALJR 679, 686–7 [43] ('*Robinson Helicopter*').

48 *Fox v Percy* (2003) 214 CLR 118, 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ).

49 *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479–81 (Deane and Dawson JJ); *Fox v Percy* (2003) 214 CLR 118, 128 [29] (Gleeson CJ, Gummow and Kirby JJ); *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 381 [76] (Heydon, Crennan and Bell JJ) ('*Miller & Associates Insurance Broking*').

50 *Fox v Percy* (2003) 214 CLR 118, 128 [28] (Gleeson CJ, Gummow and Kirby JJ).

51 Ibid 128 [29] (Gleeson CJ, Gummow and Kirby JJ). See also *Miller & Associates Insurance Broking* (2010) 241 CLR 357, 381 [76] (Heydon, Crennan and Bell JJ).

52 (2003) 214 CLR 118, 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ) (citations omitted).

53 (1979) 142 CLR 531, 551 (Gibbs ACJ, Jacobs and Murphy JJ).

94 The majority continued:[54]

> the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.
>
> ... In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable' or 'contrary to compelling inferences' in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.

95 It is necessary to bear these principles in mind when evaluating the submissions made by the parties in the present case. As the grounds of appeal reveal, the argument proceeded by taking issue with a series of specific aspects of the reasons of the associate judge. However, the fundamental question is whether, having conducted a 'real review' of the trial, we are satisfied that the associate judge's finding that the alleged agreement of 13 June 2008 was not established, or any other significant finding of fact, has been demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or to be 'glaringly improbable' or 'contrary to compelling inferences'.

96 It is now convenient to set out the parties' arguments on the specific grounds of appeal. At the risk of some confusion, the grounds will be evaluated in the order they were argued by the parties, which substantially reflected the logical flow of the argument, rather than in the order they are numbered.

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54 *Fox v Percy* (2003) 214 CLR 118, 128 [28]–[29] (Gleeson CJ, Gummow and Kirby JJ) (citations omitted).

The parties' submissions on the proposed grounds of appeal

Specific submissions regarding context of 13 June 2008 meeting

97 The applicants made submissions under nine paragraphs within their proposed grounds of appeal which concerned aspects of the associate judge's reasons in relation to the matters described above as the 'context' for the 13 June 2008 meeting. Although the issues overlap, it is necessary to go through these submissions in turn.

Ground 4(j)

98 The applicants first submitted that, given the context in which the alleged agreement was made (in which it was TBA that needed to obtain funds with which to finance investors), the associate judge was incorrect to find it 'extraordinary' that Day stated: 'until TBA gained approval from Bank SA for the increased funding, it was unlikely that the project would proceed'.[55]

99 The respondents submitted that the associate judge was not commenting on the truth of the statement, which was common ground, but simply pointing out that it was 'extraordinary' that Day might state that the project might not proceed despite the FABAL group having already told the public, via the PDS, that TBA would provide the required funding.

100 The impugned statement was made in passing, rather than in the associate judge's reasons for rejecting Day's evidence as to the 13 June 2008 conversation, and it does not matter which interpretation of the statement is correct. However, it was common ground that TBA needed to fund the investors. If the applicants' interpretation of the statement is correct, the associate judge was inexplicably defying that common ground. As explained later in these reasons, the associate judge was aware that the investors needed to be funded by TBA; he should not be thought to have been stating that this was 'extraordinary'. The respondents'

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55 Reasons [53].

understanding of the sentence is to be preferred.

Ground 4(g)

101 Next, the associate judge found that TBA had never raised any more than $2,158,240 (the amount TBA transferred to FABAL on 26 June 2008) to fund the investor interests in the Project.[56] The applicants submitted that the associate judge erred in this finding. As already explained, they submitted that, as at 30 June 2008, TBA was required to pay some $3.7 million to FABAL in order for the Project to proceed, representing the first tranche of payments by the 391 investors of $9,504 each.

102 The applicants pointed to the fact that TBA did not transfer to FABAL on 26 June 2008 only the $2,158,240 it had raised, but also transferred to FABAL an additional sum of $1.39 million a day later. That additional $1.39 million meant that a total of some $3.55 million was transferred from TBA to FABAL. Moreover, the applicants submitted that the reason TBA was able to transfer the extra $1.39 million to FABAL was because FABAL had transferred to it the sums of $435,000 (representing FABAL's liability to Westmores) and $865,000 (representing FABAL's liability to HNC) earlier the same day.

103 The respondents did not contest the fact that TBA, as the financier of 391 interests in the Project, was required under the PDS to pay some $3.7 million to FABAL in order for the Project to proceed.

104 The respondents submitted, however, that TBA did not provide any cash to FABAL for the Project except for the Bank SA funds. They submitted that the round robin of transactions demonstrated that no more than some $2.2 million in cash was ever raised by TBA, and transferred to FABAL for the commencement of the Project, because the additional $1.39 million transferred to FABAL on 27 June 2008 was in fact funded from the Bank SA cash it had sent to FABAL the day before. The

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56 Ibid [92].

respondents therefore submitted that the associate judge was correct to find that only $2,158,240 was ever raised for the Project.[57]

105 It is true that the round robin transactions lend support to the respondent's argument that the associate judge was correct to conclude that only $2,158,240 was ever raised, in a practical sense. But this was not critical. A significant portion of the money needed to fund the first tranche was required in order to meet the obligations of FABAL to HNC and Westmores. The fact that those moneys were being left 'in' the Project meant that cash did not need to be raised for that purpose. The finding of the associate judge merely acknowledges that the Project did proceed despite the fact that FABAL received only $2,158,240 by way of cash from TBA. He observed, immediately after the statement which the applicants challenge in this part of the appeal, that Holt and Nash had already acquiesced in leaving the sums due to HNC and Westmore 'in' the Project.[58]

106 As the applicants pointed out, funds may be advanced by way of book entries rather than by cash.[59] The applicants are correct that, in an accounting sense, TBA did transfer to FABAL some $3.55 million, pursuant to the round robin of transactions. But it is not clear that the associate judge approached the evidence of the round robin in any way inconsistently with the applicants' submissions. The associate judge recognised that the round robin would have had the effect, notionally at least, of giving effect to the alleged agreement. The associate judge also correctly observed that the more important question was whether the round robin transactions were done with the authority of HNC and Westmores.[60]

107 In the end, nothing turns on this ground of appeal because the associate judge

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57 The discrepancy, between the amount of approximately $2.2 million the respondents acknowledge to have been raised and the amount of $2,158,240 the associate judge found to have been raised, relates to an additional amount of $97,920 explained in n 43 above.

58 Reasons [92].

59 *Re York Street Mezzanine Pty Ltd (in liq)* (2007) 162 FCR 358, 366 [26], citing, among other authorities, *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471.

60 Reasons [89]–[91].

plainly understood the transactions that had occurred and addressed the correct question.

Ground 3(d)

108 The applicants then submitted that the associate judge failed to understand the context of the alleged agreement, in particular the need for TBA to obtain sufficient funds to advance the funds to the investors in order for the Project to proceed.

109 The associate judge found: (a) that Day gave evidence that TBA had limited cash of its own and no assets; (b) that therefore Bank SA would have considered the financial position of the FABAL group as a whole in determining whether to advance funds to TBA; and (c) that Day must have contemplated that FABAL would continue to provide or add security for the loan to TBA by way of an offset.[61] The applicants submitted that, while true, these findings do not support the conclusion that Day's version of the 13 June 2008 meeting should be rejected. They submitted that the findings are either irrelevant or support the applicants' case that TBA's shortage of funds drove the need for the alleged agreement.

110 As above, the respondents did not contest the fact that TBA, as the financier of 391 interests in the Project, was required to pay some $3.7 million to FABAL in order for the Project to proceed. However, the respondents denied that, at the time of the alleged agreement, Holt was aware that that there would be a shortfall in TBA's funding from Bank SA. Moreover, there was no suggestion that Day knew that either.

111 The respondents submitted that the point the associate judge was making in respect of these findings was that, given the relationship between FABAL and TBA, there was a logical basis for an arrangement to leave the sums owed by FABAL to HNC and Westmores with FABAL — namely, to bolster FABAL's financial position

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61 Ibid [73].

in order to persuade Bank SA to extend its loan facility with TBA so as to fund the full amount of the first tranche fees to FABAL. The respondents therefore submitted that these findings were relevant to the reasoning of the associate judge.

112 The associate judge's findings are introduced by the word 'Further', indicating that they are an amplification of the reasons for rejecting Day's evidence. They are reasons why, if the purpose of the alleged agreement was simply to assist in raising funds from Bank SA, there was no reason for doing anything more than leaving the funds in FABAL, because moving the obligation to repay to TBA would have no impact on the prospects of achieving that purpose. But Day's evidence was that the purpose of the agreement went beyond assisting in raising funds from Bank SA, and extended to contributing to the amount TBA needed to lend the first tranche moneys to investors. To that extent, the associate judge's reasons might be thought to miss the point.

113 It is true that if, as the respondents submit, Holt and Nash were not aware of the prospect that there would be a funding shortfall, and believed that Bank SA would lend all the required funds, there was no reason from their point of view why the HNC and Westmores moneys needed to be held by TBA. If so, the rationale for the agreement would have been as the associate judge appears to have assumed and his observations as to the inefficacy of the loan to TBA would have had force. But the associate judge did not make any finding as to what Holt or Nash believed in that regard. He rejected Holt as unreliable and disregarded his evidence 'to a large degree'. He found that Nash, while frank and truthful, had little real recollection of relevant matters and was willing to support Holt 'whenever he could'. It therefore cannot be assumed that the associate judge proceeded upon an understanding that Holt and Nash thought that the full amount needed to fund the first tranche was likely to be raised from Bank SA.

114 On the other hand, it would be wrong to read the relevant passage of the judge's reasons in isolation. Although the judge did not find that Holt or Nash had no reason to believe TBA would need to lend moneys obtained from a source other

than Bank SA, he did find that Day and, by inference, Holt and Nash, did not know what decision the bank would make regarding funding. It is necessary to return to this finding below. If there were grounds for concern that Bank SA might advance only some of the funds required to fund the first tranche, this would alter the complexion of the conversation of 13 June 2008 and the reasons of the associate judge challenged under this ground would be confirmed not to respond sufficiently to the situation with which the parties were presented. But if there was no such concern at this point, the associate judge's observations would bear directly on the likelihood of the alleged agreement having been made.

115 The result is that the observations of the associate judge that are challenged under this ground are pertinent reasons for rejecting the suggestion that it was known as at 13 June 2008 that the moneys in question needed to be held by TBA in order to supplement the funds to be raised from Bank SA. The observations were not advanced as stand-alone reasons for rejecting Day's evidence and need to be read with the reasons for that conclusion as a whole. As will appear below, the associate judge correctly found that the parties did not know at the time of the alleged agreement what course Bank SA would take.[62] In the light of that finding, this ground is not sustained.

Grounds 4(a) and (b)

116 Fourthly, the applicants submitted that, as a result of the associate judge's failure to appreciate the need for TBA itself to source funds in order to proceed with the Project, and the fact that as of 13 June 2008 funding for the first tranche had not yet been secured, his conclusion that there was no imperative that funds be transferred to TBA was also incorrect.[63] They submitted that for FABAL, rather than TBA, to lend the money to the investors would be inconsistent with the terms of the PDS (by which investors could only pay the tranche one fees themselves or by

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62 See [120]–[121] below.

63 Reasons [72](c)–(d).

borrowing from TBA or a financial institution), and would prevent the investors from qualifying for the tax benefit under the Product Ruling.

117 The respondents submitted that no suggestion was ever made that FABAL was to loan funds directly to the investors. They submitted that at the time of the alleged agreement, and up until at least 20 June 2008, Holt was under the impression that Bank SA would provide TBA with sufficient funding to cover the full amount of the first tranche fees.

118 The respondents further contended that the applicants' submissions were misconceived, given that there were no additional funds transferred to TBA from FABAL: the sums alleged to be additional funds sourced from the HNC commissions and Westmores expenses were taken from the Bank SA funds rather than being additional to those funds.

119 This last submission turns again on the absence of cash proceeds with which HNC and Westmores could lend money to TBA, whereas the applicants contended that the funds were in TBA's hands by means of book entries. The associate judge recognised that the round robin transactions were intended to effect payments of some $3.55 million from TBA to FABAL. The submission should be rejected.

120 The associate judge's finding that there was no imperative that funds be transferred to TBA is consistent with his finding that, as of 13 June 2008, Day did not know what Bank SA would decide to do with respect to extending its facility to TBA. It is also consistent with the evidence of Holt (and Nash) that they, too, were not aware that the Bank SA funding would be short of the full amount of the first tranche fees. If the parties' understanding was that Bank SA was likely to fund the full amount, then it would be correct to say that there was no imperative for FABAL to transfer the HNC and Westmores sums to TBA under the alleged agreement. There would still have been a reason to leave those sums in FABAL in order to strengthen its position, but transferring them to TBA would have had no effect on the group's financial position as a whole, from the perspective of Bank SA, in

deciding whether to lend TBA additional funds.

121 As noted earlier, the associate judge made no finding that the parties believed that Bank SA was likely to fund the full amount required. However, he did find that Day (and by implication Holt and Nash) did not know on 13 June 2008 what Bank SA intended.[64] It follows from that finding that the parties at that time lacked an imperative to transfer funds to TBA. Until it was known that Bank SA was not prepared to fund the full amount of the first tranche, there was no imperative to have additional funds available to TBA for lending to investors. The associate judge was correct so to conclude.

122 These grounds should also be rejected.

Ground 3(a)

123 The applicants then submitted that the associate judge's finding that the MIS Development Agreement could not be amended other than in writing executed by the parties was irrelevant.[65] They submitted that the MIS Development Agreement dealt with FABAL's obligations to HNC and Westmores. The purpose of the alleged agreement was for HNC and Westmores to provide TBA with funds payable to them by FABAL in accordance with those obligations. The applicants submitted that the alleged agreement did not amend FABAL's obligations under the MIS Development Agreement, but provided an arrangement whereby FABAL discharged those obligations.

124 The respondents denied that this finding by the associate judge had any bearing on his decision. However, they did not seek to support his reasoning in this respect. They were right not to do so. The applicants' argument was not that the obligations to make payments for which the MIS Development Agreement provided were amended, but that they were discharged and new obligations substituted.

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64 Ibid [72](c).

65 Ibid [44], [47], [74].

125 It is harder to tell what role the impugned observation played in the associate judge's reasoning. It appears almost as an aside. It stands alone from the other reasoning and was evidently not determinative. In the end, the relevance of the error established under this ground can only be determined in the context of evaluating the reasons as a whole, to which it will be necessary to return.

Ground 4(f)

126 Next, the applicants submitted that the associate judge's misunderstanding of the context in which funds had to be transferred to TBA also led to an error in his finding that the alleged agreement was of benefit only to the applicants.[66] They submitted that the alleged agreement was for the benefit of HNC and Westmores, and for Holt and Nash too, because if the Project succeeded the shares in ACL (the company that owned the land on which the cherries were to be grown and in which they held substantial interests) would be worth a considerable amount.

127 The respondents contended that the associate judge had not found that the alleged agreement was of benefit only to the applicants. He had correctly stated that 'the agreement contended for by Day only seems to have support to justify the way the drawdown from Bank SA was treated by Day'.[67] The respondents submitted that this was correct. Further, they said that the applicants' submissions on this point were misconceived as they relied on the idea that the alleged agreement would have provided the Project with additional funds, whereas in fact no additional funds were raised. As a result, they submitted, the alleged agreement would not have been for the benefit of HNC and Westmores because it would not have had any effect on the Project beyond the effect of simply leaving the funds in the Project, which, in Holt and Nash's view, would by then have done the job of securing the necessary funding for the Project to proceed.

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66 The applicants cite Reasons [72](j), where the associate judge states 'the agreement contended for by Day only seems to have support to justify the way the drawdown from Bank SA was treated by Day'.

67 Reasons [72](j).

128 The applicants' arguments should be rejected. The finding in question does not imply that nobody but the applicants stood to benefit from the alleged agreement. There is no doubt that each of Day, Holt and Nash had an interest in the Project proceeding. Rather, the finding states that, as between the parties' versions of how they thought their agreement enabled the Project to proceed, there was no support for the existence of the alleged agreement other than to justify Day's subsequent financial transactions. This finding sits comfortably with the finding that the position of Bank SA was unknown on 13 June 2008. Unless it was shown that, at that time, Day, Holt and Nash contemplated that Bank SA would fund less than the full amount of the tranche one payments there was no benefit to the parties in lending money to TBA that would not be achieved simply by leaving the HNC and Westmores moneys in FABAL.

Ground 3(b)

129 Seventhly, the applicants submitted that the associate judge's finding that there had been no previous agreements to lend sums from HNC or Westmores to TBA was irrelevant.[68] The applicants submitted that the need for TBA to obtain funds from HNC and Westmores did not arise until it looked as if Bank SA would not increase TBA's loan facility to fund the first tranche payments; there would have been no need for any such agreements before then.[69]

130 The respondents submitted that no suggestion was made to the associate judge to attribute significance to the absence of an earlier agreement. They submitted that this finding was not essential to the ultimate decision reached.

131 The finding that there had been no previous agreement by HNC or Westmores to lend sums to TBA was consistent with the associate judge's conclusion that there was no 'imperative' for this to happen – there had been no occasion for

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68 Ibid [72](a).

69 By implication, the applicants submitted that it had become clear by 13 June 2008 that Bank SA might not lend the full amount required for the first tranche. As discussed above, the associate judge did not accept that this was the case.

such loans in the past and none had arisen by 13 June 2008. Viewed in that light, it was not irrelevant for the associate judge to point out the apparent novelty of the alleged agreement. This ground is not made out.

Ground 4(c)

132 The applicants next submitted that the associate judge was incorrect to find that the alleged agreement was 'illogical' and to find that it included Greenseeds replacing Bank SA so that TBA's position remained unaltered.[70] The applicants submitted that the alleged agreement was the only way discussed by the parties that enabled the Project to proceed, given the need for TBA to obtain funds from HNC and Westmores. The applicants submitted that the proposal was for Greenseeds to finance the investors directly for the first and subsequent tranches. The investors would then repay their tranche one loans to TBA. TBA would pay Bank SA, thus triggering the liability of TBA to repay the loan to HNC and Westmores.

133 The respondents submitted that, again, the alleged agreement was not the only way for the Project to proceed. They further submitted that it was the associate judge's finding that Day's assertion — that HNC and Westmores would get paid when the Greenseeds money came in — was illogical. They submitted that the assertion was rightly described as illogical since the replacement of Bank SA with another external funder would have made no difference to the financial position of TBA. The respondents further submitted that this finding was not essential to the ultimate decision in any event.

134 The associate judge found that: 'Replacing Bank SA with Greenseeds, another external funder, would not have altered TBA's position save if Greenseeds discharged the liability and lent directly to the growers. That is not a circumstance contemplated by the PDS'.[71] Since that was not contemplated, deferring payment until Greenseeds provided finance meant Greenseeds simply replacing Bank SA.

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70 Reasons [72](g).

71 Ibid.

There was no reason why TBA would be in any stronger position as a result of that change. So reasoning, the associate judge said that the suggested subordination was illogical.

135 This part of the reasoning goes to the subordination aspect of the alleged agreement. The applicants are correct that the fact that subsequent funding for investors was not contemplated by the PDS does not preclude it being offered. To that extent, the associate judge appears to have misconceived what was proposed and his criticism of the alleged agreement as 'illogical' was misplaced. However, the broader point is that bringing in a third party funder in place of Bank SA, even if that funder provided the finance directly to the investors, did not provide a logical reason for the alleged subordination. The associate judge was correct in that respect and this ground is not made out.

Ground 4(i)

136 Finally, the applicants submitted that the associate judge was incorrect to find that the word 'refinanced' in Day's words to the effect 'we are all going to have to leave funds in the project until it is refinanced' was a reference to 'anticipated finance'. The associate judge found:[72]

> At that time, neither FABAL nor TBA had secured any funding from any source. On an ordinary construction of the words used, the reference to 'refinancing' in that context could only have meant the 'anticipated financing' from sources which might be secured such as Bank SA, Greenseeds or other funder ...

137 The applicants submitted that there was no evidence for that construction of 'refinanced', and that it reflected a misunderstanding about the proposed roles of Bank SA and Greenseeds on the part of the associate judge (discussed at [132] above), whereby the funding of the investors by Greenseeds would allow TBA to repay the Bank SA debt.

138 The respondents submitted that even if Day's reference to 'refinance' had

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72 Ibid [63].

meant funds to be sourced from Greenseeds to discharge the liability to Bank SA, that would not add credibility to his assertion that the alleged agreement had been made. They further submitted that this finding of the associate judge was not essential to the ultimate decision below.

139 The associate judge accepted that Day had referred to the Project being 'refinanced' at a meeting at the RACV Club on 3 June 2008.[73] At that point, no funding had yet been secured for the tranche one fees. Given the lack of certainty regarding the financing of the Project as of 3 June 2008, it was open to the associate judge to find that Day's reference to refinancing was to the anticipated financing of the first tranche he and Holt were in the process of attempting to obtain, whether that was through Bank SA, Greenseeds or another funder.

140 This is consistent with the associate judge's finding that, as of the date of the alleged agreement, there was no certainty regarding the possibility of Greenseeds financing the investors directly.

141 As above, it is not clear that anything turns on this point. This ground adds nothing to the issue whether the impugned findings should be set aside.

Specific submissions as to events after 13 June 2008 meeting

142 The next set of submissions relates to five elements of the grounds concerning events after the 13 June 2008 meeting.

Ground 4(aa)

143 The applicants submitted that the associate judge was incorrect to find that propositions put forward in the conversations on 13 June 2008, as alleged by Day, were not 'related to' Bank SA.[74] The applicants submitted that the associate judge must have been referring to Day's propositions regarding the meeting between Day,

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73 Ibid.

74 Ibid [72](b).

Holt and Nash, as set out in his reasons,[75] which clearly referred to the need to get funding from Bank SA for TBA.

144 The respondents, however, submitted that the words 'related to' meant 'told to', that is, the associate judge found that Day's version of the alleged agreement was not relayed to the Bank SA officers at Day's meeting with them on 13 June 2008. The respondents submitted that the judge clearly reasoned that, if the alleged agreement had been made just prior to the Bank SA meeting, the Bank SA officers would have been told about it. The respondents further submitted that this finding was not essential to the ultimate finding of the associate judge.

145 The respondents' interpretation of the associate judge's reasons is to be preferred. Moreover, the fact that Day did not convey to the Bank SA representatives the substance of what was said to have been agreed at the meeting earlier that day was relevant to determining whether the agreement had in fact been made. There is no substance in this ground.

Ground 3(c)

146 Secondly, the associate judge referred to a note Day had made regarding the Bank SA meeting he attended on 13 June 2008, which said: 'Peter and Norm will support the raising of all capital for [the Project]. ... Will sign new agreement'. The associate judge found that the 'new agreement' referred to in the note was the guarantee and indemnity Day later asked Holt to sign.[76] The applicants submitted that this finding regarding the proffered guarantee and indemnity was irrelevant to his assessment of Day's evidence about what was said at the 13 June 2008 meeting regarding the alleged agreement, because it was not inconsistent with the existence of the alleged agreement.

147 The respondents submitted that the note self-evidently said nothing that

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75 Ibid [66]-[67].

76 Ibid [72](f).

objectively went to the existence of the alleged agreement, and that any interpretation of this note by Day would have been a subsequent construction. They submitted that the associate judge found that it was a reference to the proffered guarantee and indemnity and was correct to reject Day's evidence because it did not record the alleged agreement. The respondents further submitted in their notice of contention (discussed below) that the associate judge should have gone further and deemed the terms of the guarantee to be evidence of Day's preparedness to lie.

148 The applicants' argument under this ground should be rejected. The substance of the associate judge's conclusion was that Day's note of the Bank SA meeting omitted reference to the alleged agreement. The conclusion that the 'new agreement' referred to the proposed guarantee and indemnity was well justified, given that the note referred to 'all' the capital for the Project, not just the first tranche, and it had not been suggested that the alleged agreement made earlier in the day had been intended to be reduced to writing.

Ground 4(e)

149 Next, the applicants submitted that the associate judge erred in finding that the responses given by Day to Holt after 13 June 2008 were inconsistent with the alleged agreement.[77] The applicants submitted that the associate judge did not identify the facts on which he relied in making that finding. The applicants suggested that the finding may have been based on the 'Loan Summary', a document on TBA letterhead dated 23 June 2008 that recorded loans from Holt, FABAL and Westmores, which the applicants submitted supported Day's evidence (see further, [154]–[156] below).

150 The applicants further submitted that there were no other possible communications from Day to Holt which could have founded the associate judge's finding that such communications were inconsistent with the alleged agreement.

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77 Ibid [72](i).

151 The respondents criticised the remainder of the applicants' grounds in this context on the footing that the post-contractual evidence, even if consistent with the existence of the alleged agreement, did not help to establish that Day's version of what took place on 13 June 2008 should be accepted. Day's evidence was attacked in this regard on the basis that he had perpetuated the misrepresentation that $3.5 million had in fact been raised.

152 It appears that the associate judge's conclusion as to inconsistency with the alleged agreement was directed to Day's representations to Holt, made subsequent to the alleged agreement, to the effect that all the money necessary for the first tranche had been raised from Bank SA. If so, the inconsistency arguably falls away when regard is had to the fact that only $2.1 million actually needed to be, and was, raised. However, the associate judge was implicitly finding that Day later told Holt that Bank SA had provided all the funds for the first tranche, without the need for other sources of funding. Such a representation would have been inconsistent with any need for TBA to borrow from HNC and Westmores. On this understanding of the reasons, this ground is not made out.

153 To the extent that Day may have suggested to Holt that more than $2.1 million had been raised, this goes to Day's credit. This matter is revisited in the notice of contention.

Ground 4(h)

154 Fourthly, in regard to the Loan Summary, the applicants submitted that the associate judge erred in finding that it did not provide advice as to the state of the loans made by HNC and Westmores to TBA, but was instead a briefing note for what was sought to be achieved.[78] This was partly on the basis that the document contained forward projections, a review of financing and references to fees generated or to be generated from the Project. The applicants submitted that the document nonetheless recorded loans from Holt, FABAL and Westmores in the sum of

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78 Ibid [97]–[99].

$1,980,550 (and showed how that sum was made up), that the numbers corresponded to the amount of the FABAL debt and the increased term deposit provided by FABAL to Bank SA, and that the document was an iterative statement of 'TBA Loans', depending on the number of interests subscribed.

155 The respondents contended that all the submissions by the applicants in respect of Day's subsequent communications to Westmore and Holt were attempts to misdirect the Court's attention from the surrounding circumstances of the 13 June 2008 meeting. They submitted, as indicated above, that the relevant issue is the substance of the evidence given by Day regarding the 13 June 2008 meeting, and that post-event factors arguably consistent with his version do not prove that either he, Holt or Nash said the words he attributed to them.

156 The associate judge's observations in this regard are difficult to follow. Albeit that the Loan Summary contained the forward-looking elements that he mentioned, it also appeared to record indebtedness consistent with the alleged agreement. On the other hand, this was a document produced by TBA and the weight to be attached to it was limited. As the associate judge recognised, the existence of such a document said nothing as to whether the agreement alleged to have been made on 13 June 2008 was in fact made, rather than whether Day just proceeded as if it had been, irrespective of what actually happened. It was open to the associate judge to view the relevance of the document as he did. In the end, nothing turns on this ground.

Ground 4(d)

157 Finally, the applicants submitted that the associate judge was incorrect to find that the responses given by Day to Westmore after 13 June 2008 were inconsistent with the alleged agreement.[79] The applicants submitted that the associate judge did not identify the facts on which he relied in making that finding, other than stating:[80]

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79 Ibid [72](h), [73] (dot point 4).

80 Ibid [73] (dot point 4).

> Robin Westmore said that he chased Day to obtain clarification about whether there were prospects for Westmores to receive payment. Day responded that there was no money there to be paid and when there was money there, something could be done about it.

158 The applicants submitted that nothing in that statement was necessarily inconsistent with the alleged agreement.

159 The applicants submitted that the associate judge may have been referring to a series of emails in finding that the responses given by Day to Westmore after 13 June 2008 were inconsistent with the alleged agreement.[81] However, they submitted that Day's position in those emails ('we will not be able to release loans to either Holt or Westmore if the loans remain')[82] was consistent with the alleged agreement and therefore they did not support the associate judge's finding that Day responded inconsistently with the alleged agreement.

160 The respondents did not specifically address this ground.

161 This aspect of the applicants' argument under this ground should be rejected. The associate judge explained his reliance on the emails. First, he referred to an email of 19 September 2008 from Day to Westmore that stated: 'we will not be able to release loans to either Holt or Westmore if the loans [to investors] remain. This means FABAL will also have its security deposit locked away'. The associate judge found that this did not amount to a clear statement by Day that the amount due to HNC was subordinated to Bank SA or that it was a loan to TBA rather than to FABAL. That was plainly so. Even if not inconsistent in terms, the statement did not support the alleged agreement.

162 The associate judge also referred to an email from Westmore of 23 June 2008, in which Westmore asked Day when initial setup contributions would be reimbursed. The associate judge found that Day did not respond to this email, although it would have been easy to do so and so 'disabuse [Westmore] of the notion

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81 Ibid [107]-[111].

82 Ibid [107].

that the setup contributions would be reimbursed at an early stage'.[83] Again, whether or not aptly described as 'inconsistent', this conduct did not lend support to the existence of the alleged agreement.

163 The applicants made further submissions under this ground, relying on the following finding of the associate judge, albeit that it concerned a statement made by Westmore rather than by Day:[84]

> Robin Westmore rejected the proposition that Day had said to him the money would be returned 'when [the] Bank SA loan was repaid'.

164 The applicants submitted that the characterisation of Westmore's response as a 'rejection' is misleading, even on the assumption that the associate judge preferred Westmore's evidence to Day's. They submitted that the evidence of Westmore was that Day's response to his request for money: 'was along the lines of, "There's no money. You can't have it. You'll get your money when we get ours" type scenario'; and that Westmore said: 'Mr Day's attitude in general terms was that, as I say, "You can get your money when we get ours" type scenario'. The applicants submitted that even if this was construed as a rejection by Westmore of Day's proposition, the rejection goes only to the subordination aspect of the alleged agreement.

165 Again, the respondents did not specifically address this argument.

166 The answers of Westmore are open to different interpretations. It is not at all clear that his evidence was contrary to the alleged agreement. In any event, since Westmore was not a party to the 13 June 2008 meeting, any such inconsistency could have limited weight at best.

167 Nonetheless, to the extent that this ground alleges that the associate judge was incorrect to find that the evidence of Westmore was contrary to the alleged agreement, this ground is made out.

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83 Ibid [111].

84 Ibid [73] (dot point 4).

Submissions as to matters not put to Day – ground 5

168 The associate judge found it significant that a note of Day's, made at a meeting with Cope of Bank SA on 16 June 2008, did not purport to record the alleged agreement.[85] The applicants submitted that the rule in *Browne v Dunn*[86] applied, such that the associate judge erred in drawing an adverse inference against Day without the inference having been put to Day in cross-examination.[87]

169 The respondents denied that the associate judge drew any inference from the note; he merely stated what was in it. In any event, the evidence was of marginal if any relevance because it was only post-contractual conduct of Day which could not be evidence against the respondents. No point would have been served in putting the associate judge's suggested conclusion to Day because no other witness was present at the meeting and so nobody could have contradicted Day's account.

170 The note contained a statement to the effect that Holt and others would 'put in' $1 million plus GST. The associate judge was correct to observe that the note did not refer to the alleged agreement said to have been struck three days earlier. It is likely that the associate judge, having noted this difference, took it into account in rejecting Day's evidence. It is not explicit in the reasons that he did so, but since the observation comes immediately after the dot point paragraphs explaining why Day's evidence as to the 13 June 2008 meeting was rejected in its entirety, it is clear enough that the associate judge regarded this as a relevant matter in reaching that conclusion.

171 The rule in *Browne v Dunn* generally requires a party to give appropriate notice to the other party, and that party's witnesses, of any imputation intended to be made against them about their conduct relevant to the case or their credit.[88] It

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85 Ibid [75]–[76].

86 (1893) 6 R 67.

87 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 387–8 [69]–[73] (Heydon, Crennan and Bell JJ) ('*Kuhl*'); *Bale v Mills* (2011) 81 NSWLR 498, 515–6 [63]–[67].

88 *MWJ v The Queen* (2005) 222 ALR 436, 448 [38] (Gummow, Kirby and Callinan JJ) ('*MWJ*').

applies also to require a party to put to a witness any material upon which the party proposes to rely to contradict the evidence of that witness.[89] A corollary of the rule is that judges should generally not make adverse findings about a party or witness where the rule has not been followed.[90]

172 But even if the associate judge is considered to have made a finding adverse to the credit of Day on the basis of the 16 June 2008 note, it does not necessarily follow that a breach of the rule in *Browne v Dunn* occurred. The evidence of the conversation of 16 June 2008, and the note, formed part of the applicants' evidence in chief. The absence of reference in the 16 June 2008 note to the alleged agreement of 13 June 2008 was a feature of Day's own evidence, which it was open to him to explain. The relevant events, and Day's credit in relation to them, were at the heart of the matters in contest at the trial. In these circumstances, it is difficult to see that any unfairness was occasioned by the associate judge's reliance on the fact that the note did not refer to the alleged agreement, in the absence of any explanation of that circumstance on Day's part.[91] To the contrary, the note was advanced as evidence by Day himself and the associate judge was entitled to treat it as tending against acceptance of his evidence about the 13 June 2008 meeting.

173 For these reasons, the rule in *Browne v Dunn* was not breached by the manner in which the associate judge approached Day's evidence and ground 5 should be rejected. We would add that, even if (contrary to our view) the rule in *Browne v Dunn* was attracted and not complied with, we would not regard the failure to put the relevant inference to Day as bearing on the associate judge's ultimate conclusion in any meaningful way.[92] The matter played at best a peripheral part in his

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89 *Reza v Summerhill Orchards Ltd* (2013) 37 VR 204, 212 [45]; *Philippiadis v Transport Accident Commission* (2016) 74 MVR 289, 308 [82] ('*Philippiadis*').

90 *MWJ* (2005) 222 ALR 436, 448 [39] (Gummow, Kirby and Callinan JJ); *Kuhl* (2011) 243 CLR 361, 387–8 [69]–[73], 389 [75] (Heydon, Crennan and Bell JJ); *Bale v Mills* (2011) 81 NSWLR 498, 515 [63]–[64].

91 *Philippiadis* (2016) 74 MVR 289, 309–11 [88]–[91], [95]–[99]; *WAQ v Di Pino* [2012] QCA 283 [32]; *Watkins v Valley View Poultry Pty Ltd* [1995] NSWCA 496.

92 *MWJ* (2005) 222 ALR 436, 448 [39] (Gummow, Kirby and Callinan JJ); *Philippiadis* (2016) 74 MVR 289, 308 [86]; *Broughton v B&B Group Investments Pty Ltd* [2017] VSCA 227 [110].

reasoning, which was based on the whole of the evidence as already explained. For that reason also, we reject ground 5.

174 It follows that, to the extent that this ground embodied an argument that procedural fairness was denied to the applicants, we reject that claim also. The risk that a finding adverse to Day's credit would be made necessarily inhered in the issues to be decided, such that it was not necessary for the matter to be drawn further to the applicants' attention.[93]

Submissions as to matters not dealt with by associate judge – ground 6

175 The applicants' next ground of appeal rests on the submission that the associate judge failed to consider or give due weight to certain evidence that supported the existence of the alleged agreement on the terms alleged by Day.

176 In support of this ground, the applicants pointed to documents originating from Westmores, Holt and TBA.

177 In respect of documents of Westmores (grounds 6(a) and 6(b)), the applicants relied on a balance sheet of Westmores as at 30 June 2014, prepared by or on the instructions of Westmores, which they submitted included an assertion that TBA owed it money. The applicants submitted that this was strong evidence of a loan to TBA. The applicants further submitted that the associate judge did not take into account the fact that Westmores threatened TBA with statutory demand proceedings in 2012 in respect of the amount in question.

178 In relation to Holt, a balance sheet of CLA as trustee for the PR Holt Family Trust as to 30 June 2011 recorded as an asset a loan to TBA in respect of both 2010 and 2011 (ground 6(c)). Further, Holt had attempted to enforce a statutory demand against TBA,[94] and a letter of 18 June 2013 written on Holt's instructions on behalf of

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93 *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492, 500 [22] (Chernov JA), quoting *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 121 [101] (McHugh J).

94 Reasons [159]–[160].

CLA to the liquidators of HNC expressly referred to a loan of commissions payable to HNC with respect to the Project. The letter described the commission funds as having been 'allowed to be kept by FABAL/TBA by way of a temporary "at call" loan by CLA to FABAL/TBA' but sought, for the avoidance of doubt, an assignment of the debt from HNC to CLA. The applicants submitted that these were strong evidence of Holt's knowledge that there was a loan from HNC to TBA (grounds 6(d) and 6(e)).

179 TBA's documentary evidence was not mentioned in the proposed grounds, but the respondents raised no objection to it being dealt with under proposed ground 6. It included the Loan Summary dated 23 June 2008, financial documents from the period ending 30 June 2008 onward, and minutes of meetings. The applicants submitted that the financial documents reflected transactions consistent with Day's version of the alleged agreement, and that the minutes referred to loans to TBA from Holt (HNC) and Nash (Westmores) and recognised the subordination of those loans.

180 The applicants submitted that this evidence showed knowledge by both Holt and Nash of the existence of loans from HNC and Westmores, respectively, to TBA. As well as challenging the associate judge's failure to deal with the above evidence under proposed ground 6, the applicants submitted that the alleged deficiencies in the associate judge's approach contributed to his dismissing of Day's evidence (ground 1(1)) and his finding that the alleged agreement did not exist (ground 2).

181 The respondents submitted that the associate judge was not required to deal with all the financial and other documents of HNC, Westmores and TBA. First, they submitted, the Holt documents evidenced only an ex post facto acknowledgment of a loan, at best, rather than the alleged agreement. The issue was the alleged agreement said to have arisen at the meeting of 13 June 2008, and the documents in question, even where arguably consistent with Day's version, did not prove that he, Holt or Nash said the words he attributed to them. Secondly, the associate judge did turn his mind to many of the documents. Thirdly, he correctly determined that he

did not have to deal with all the documents.

182 In any event, the respondents invited this Court to form the view that the documents relied on by the applicants were, at best, neutral and, at worst, intended to deceive. In particular:

- the Westmores balance sheet covered the period from 2008–2013 and the loan to TBA was recorded only from 2011: the year in which the dispute between the parties arose;
- the Holt documents were created for the purpose of defeating creditors: what the associate judge during the trial called a 'contrivance';
- the Loan Summary described a security deposit given by FABAL to Bank SA as a loan in the same way that the amounts to HNC and Westmores were described as a loan — there was no more a loan by HNC and Westmores than there was a loan by FABAL. The respondents submitted that this was merely an accounting treatment used to signify a debt, rather than evidencing a loan agreement; and
- the TBA documents were not audited.

183 This proposed ground of appeal alleges that the associate judge 'erred in fact by failing to take into account and give due weight to' the matters identified. In fact, the associate judge did take account of many of the documents in question.

184 Taking them in order, first, he does not appear to have taken account of the Westmores documents. But as the respondents submitted, that evidence is equivocal. It suggests a loan since 2011 and the absence of any such loan before that time. The fact that Westmores subsequently threatened to issue a letter of demand consistent with its financial records does not add to this evidence. Moreover, the treatment by Westmores of the amount owing to it is not an admission on the part of HNC, and only has indirect relevance to the proper identification of the arrangement between HNC and FABAL or TBA.

185 Secondly, the judge dealt with most of the Holt documents.[95] Taken together, the documents revealed that Holt sought to have CLA, rather than HNC, recognised as the creditor in respect of the commission moneys, but the letter to the liquidators was again equivocal as to the identity of the debtor ('FABAL/TBA'). The associate judge regarded Holt as an unreliable witness who sought to circumvent the liquidation of HNC by seeking to divert funds into CLA.[96] It is true that the associate judge did not deal directly with the fact that the statutory demand was addressed to TBA and not FABAL, but the letter to the liquidators undermined the force of that consideration. Again, the associate judge did not allude to the CLA balance sheet disclosing the debt of TBA, but the same observation applies.

186 The documents of Holt were also to be discounted by reason of the fact that the apparent source of the idea that the debtor was TBA, rather than FABAL, was Day himself. After Holt asked Day in August 2010 to recognise the amount owing in the accounts of FABAL, and to describe it as a loan owing to CLA, Day responded that the loan was owed by TBA. The associate judge referred to the latter correspondence.[97] Holt said that he did not take particular notice of the fact that Day described the debt as owed by TBA, because he was 'not knowledgeable about which specific entity in the FABAL group owed the debt'. That is consistent with the letter to the liquidators adopting an equivocal position on the point. But the documents attributing the debt to TBA, including the statutory demand, appear to have proceeded on the basis of Day's advice to that effect.

187 As far as the TBA documents are concerned, the associate judge described the Loan Summary,[98] the financial documents[99] and the minutes.[100] He was clearly cognisant of the fact that, not long after the date of the alleged agreement, Day

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95 Ibid [144]–[160].

96 Ibid [33].

97 Ibid [127]–[130].

98 Ibid [96]–[100].

99 Ibid [95].

100 Ibid [93]–[94], [116]–[117].

caused TBA to produce a range of documents describing TBA as owing the relevant sums to HNC and Westmores. However, as he observed in another context, the real question was whether that was because the alleged agreement had in fact been made.[101] The associate judge also considered that the documents were more revealing for failing to evidence any such agreement. Leaving aside the particular criticisms made of his treatment of the Loan Summary, dealt with under proposed ground 4(h) above,[102] it cannot be said that any of the TBA documents clearly evidenced the alleged agreement, rather than Day's reconstruction of the steps that were required in order to leave the moneys owed by FABAL to HNC and Westmores 'in' the Project.

188 For these reasons, proposed ground 6 fails.

Rejection of Day's evidence – ground 1(1)

189 The applicants submitted that the associate judge erred in law in rejecting Day's evidence as to the substance and effect of the meeting held on 13 June 2008, for the reasons set out in grounds 3, 4, 5 and 6 discussed above.

190 Leaving aside for present purposes the question of the overall adequacy of the associate judge's reasons (ground (1(2)) and the notice of contention, the applicants have established the following errors in the reasons of the associate judge:

(a) misplaced reliance on the requirement for amendments to the MIS Development Agreement to be in writing (ground 3(a));[103] and

(b) treating Westmore's evidence after the alleged agreement as inconsistent with that agreement (an aspect of ground 4(d)).[104]

191 As explained earlier, the critical question in resolving what effect the above

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101 Ibid [89].

102 See [154]–[156] above.

103 See [123]–[125] above.

104 See [163]–[167] above.

errors have is whether upon a 'real review' of the trial, we are satisfied that the associate judge's finding that the alleged agreement of 13 June 2008 was not established, or any other significant finding of fact, has been demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or to be 'glaringly improbable' or 'contrary to compelling inferences'.[105]

192 The first step in applying this test is to identify the finding under challenge. This is more difficult in the present case because the applicants contend that critical findings were not made at all. But some things are clear. First, the associate judge rejected Day's account of the critical 13 June 2008 meeting in its entirety.[106] Secondly, he rejected the proposition that the commissions were lent to TBA to be repaid only once the Bank SA liability was cleared.[107] At least, therefore, the associate judge ultimately found that the applicants had not established the alleged agreement. It is harder to say that he found affirmatively that the agreement was not made, but nothing turns on that for present purposes.

193 It is therefore convenient to begin by considering the effect of the identified errors on the ultimate finding. Notwithstanding the errors the applicants have established in the reasons of the associate judge, they have shown nothing in the nature of 'incontrovertible facts or uncontested testimony' demonstrating that this finding is wrong. Certainly, the round robin of transactions was important because it showed how the alleged agreement, rather than a mere deferral of FABAL's existing obligations, made commercial sense once it was clear that Bank SA would fund only a portion of the first tranche fees TBA was required to raise. But that only became clear on 16 June 2008, before the round robin of transactions. The commercial reality was not known to the parties as at 13 June 2008. These facts are at least equally consistent with Day unilaterally taking steps to arrange the accounts so that they reflected the position which it subsequently transpired needed to have been

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105 See [95] above.

106 Reasons [72].

107 Ibid [123]-[126].

achieved, but had not been, by agreement. In that regard, the absence of any written record of the alleged agreement, notwithstanding Day's regular practice of reducing important conversations to writing, is significant.

194 The matters that have been established do not, by themselves, go to the heart of the finding. Each of them concerns a relatively minor aspect of the associate judge's reasoning. So, the fact that the alleged agreement could, contrary to the associate judge's view, have been made consistently with the MIS Development Agreement does not show that it was in fact made. The fact that Westmore's evidence relating to the period after the alleged agreement could be seen to be consistent, at least to some extent, with the alleged agreement also does not establish that the finding was wrong.

195 Nor can it be said that the errors identified, when taken as a whole, constitute incontrovertible facts demonstrating that the 13 June 2008 agreement was not made, or evidence making it glaringly improbable or contrary to compelling inferences that it was not made.

196 The associate judge was entitled to reject Day's evidence of the 13 June 2008 meeting. The applicants have not pointed to anything that makes that finding demonstrably wrong or glaringly improbable. To the contrary, it is consistent with the evidence that the need to make up a shortfall left by Bank SA was not known on 13 June 2008 and that nothing was documented as to the alleged agreement until after that need subsequently arose. It follows that ground 1(1) is not made out. It also follows that the 'umbrella' ground 2 must fail.

Adequacy of the associate judge's reasons – ground 1(2)

197 The applicants submitted that the associate judge was required to explain whose evidence he accepted over Day's, and why he had done so, as well as to articulate the grounds on which his decision rested, and that he failed to do so. They

submitted that the failure to provide adequate reasons is an error of law.[108] They further submitted that where there is a real conflict in the evidence, it is necessary for a trial judge to engage with the cases presented by each party and to refer to evidence which goes to the core of the case.[109] Otherwise, the evidence has been rejected without reason or not properly considered.[110]

198 The applicants submitted that the associate judge's failure to give adequate reasons was particularly relevant given the very long delay between hearing (completed on 1 July 2015) and the delivery of judgment (15 December 2016). Relying on *Expectation Pty Ltd v PRD Realty Pty Ltd*,[111] they submitted that the delay weakened the associate judge's advantage so that his findings of fact must be looked at with special care.

199 The applicants submitted that, despite the meeting held on 13 June 2008 being fundamental to determining whether the alleged agreement existed, the associate judge failed to acknowledge that or to make any finding of fact about it, save that he found by implication that it took place, that Nash, Holt and Day were parties to it, and that he rejected Day's evidence about the conversation at the meeting in its entirety.

200 The applicants further submitted that no findings of fact were made regarding: Day's statement relating to uncontroversial facts about the meeting's occurrence; Holt's evidence of a discussion in 'late June' at which he agreed to the HNC commission being 'deferred'; the anomaly between Holt's and Day's evidence of the timing of the meeting or discussion (which made Holt's evidence difficult to

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108 *Hettiarachci v Royal Automobile Club of Victoria (RACV) Limited* [2016] VSC 97 [33] ('*Hettiarachci*').

109 *Bradley v Matloob* (2015) 72 MVR 194, 199 [17] (Leeming JA); *Hettiarachci* [2016] VSC 97 [50].

110 *Hettiarachci* [2016] VSC 97 [50]. The applicants also referred to *R & D Vodusek Pty Ltd (trading as Vodusek Meats) v Evans* [2007] VSCA 53 ('*Vodusek Meats*').

111 (2004) 140 FCR 17, 32–3 [69]–[70] ('*Expectation*'); see also *Monie v Commonwealth* (2005) 63 NSWLR 729; *Bulsey v Queensland* [2015] QCA 187 [60] (Fraser JA).

assess as against Day's); or whether the associate judge accepted the correctness of Holt's or Nash's evidence of the meeting or discussion over Day's.

201 It was submitted that the associate judge's failure to state whose evidence he had accepted over Day's was particularly troubling in light of statements in his reasons that he had found Holt to be an unreliable witness and had disregarded his evidence to a large degree, and that he had found Nash to have had no real recollection of the matters in his statement.

202 The respondents submitted that, in the present case, documentary evidence and the commercial reality of the situation were central to the reasoning of the associate judge. This distinguished the present case from those relied on by the applicants, which all concerned personal injuries and in which the accuracy of the claimant's account and the opinions of medical practitioners based on that account were of central importance.[112] The authorities cited by the applicants showed that reasons need to be given only as far as is necessary to indicate to the parties why the decision was made.

203 The respondents further submitted that, although the reasons of the associate judge could have been expressed more comprehensively, it was sufficiently clear from those reasons that he was not satisfied that the applicants had discharged their onus of proving the alleged agreement. It was not necessary for him to make findings of credit, as the onus was on the plaintiffs to prove the alleged agreement. It was clear from the decision below that the associate judge relied on documentary evidence and Day's lack of credibility in finding that the plaintiffs did not meet that burden.

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112 *Hettiarachci* [2016] VSC 97 [34]–[35], citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 ('*Soulemezis*'); *Vodusek Meats* [2007] VSCA 53.

204 This Court recently observed that the provision of a court's reasons for judgment serves at least four purposes:[113]

(a) the reasons enable the parties to see the extent to which their respective arguments have been understood and addressed, and to perceive the basis for the court's decision;

(b) the giving of reasons enhances judicial accountability, both in the case itself and more widely;

(c) the publication of reasons enables practitioners, legislators and members of the public to ascertain the state of the law and the basis upon which like cases will probably be decided in the future; and

(d) reasons enable an appellate court to determine whether the decision was affected by appealable error.

205 In *Franklin v Ubaldi Foods Pty Ltd* Ashley JA, with whom Warren CJ and Nettle JA agreed, stated:[114]

> Reasons must be such as reveal — although in a particular case it may be by necessary inference — the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect, they will not enable the losing party to know why the case was lost, they will tend to frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error of law.[115]

206 In *Hunter v Transport Accident Commission*[116] Nettle JA stated that the reasons should:

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113 *Di Benedetto v Kilton Grange Pty Ltd* [2017] VSCA 119 [93], citing *Soulemezis* (1987) 10 NSWLR 247, 279 (McHugh JA); *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430, 441 (Meagher JA); *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* (2001) 4 VR 28, 35–6 [18]. See also *Assad v Eliana Construction & Developing Group Pty Ltd* [2015] VSCA 53 [30]–[34] and the cases there cited.

114 [2005] VSCA 317 [38] (citations omitted).

115 See also, eg, *Church v Echuca Regional Health* (2008) 20 VR 566, 584 [90]; *Transport Accident Commission v Kamel* [2011] VSCA 110 [70]–[71]; *ACN 005 565 926 Pty Ltd v Snibson* [2012] VSCA 31 [78]–[80].

116 (2005) 43 MVR 130.

> deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those finding are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion.[117]

207 If the reasons are deficient, such that steps in the reasoning process are not revealed, an appellate court will ordinarily be driven to conclude that there is a substantial risk that the fact-finding task miscarried.[118]

208 In this context, mention should be made of the applicants' observation regarding the length of time between the trial and the judgment (nearly 18 months). We were not told the reason for this delay and do not speculate about it, but it is apparent that the passing of time may have contributed to some difficulties with the judgment. Delay in giving judgment can weaken the usual advantage which a trial judge has over an appellate court in evaluating the credit of witnesses, and this must be taken into account on appeal.[119] That problem may be alleviated where the judge has demonstrated in the reasons that the delay did not weaken the trial judge's advantage (for example, by explaining that contemporaneous notes were relied upon).[120] This may well require the trial judge to deal with the evidence, and especially matters of credit, more extensively than would otherwise be the case.[121]

209 The problems associated with delay go further. The Full Court of the Federal Court explained in *Expectation*:[122]

> The problem is not restricted to fading memory. A judge who comes to make an inordinately delayed decision will inevitably be subjected to great pressure to complete and publish the judgment. A conscientious judge could not but feel that pressure. It is almost inevitable that there will also be some

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117 Ibid 136–7 [21] (Batt and Vincent JJA agreeing) (citations omitted).

118 *Assad v Eliana Construction & Developing Group Pty Ltd* [2015] VSCA 53 [38], citing *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 [56]–[66].

119 *Expectation* (2004) 140 FCR 17, 32–3 [70]; *Monie v Commonwealth* (2005) 63 NSWLR 729, 742 [43(5)]; *Winky Pop Pty Ltd v Mobil Refining Australia Pty Ltd* [2016] VSCA 187 [148]; *Stevens v Spotless Management Services Pty Ltd* [2016] VSCA 299 [89]–[90].

120 *Expectation* (2004) 140 FCR 17, 33 [72]–[73].

121 *R v Maxwell* (1998) 217 ALR 452, 463 [25]; *ACN 074 971 109 v National Mutual Life Association of Australasia Ltd* [2006] VSC 507 [21]–[22].

122 *Expectation* (2004) 140 FCR 17, 33 [74].

> form of external pressure — whether from the parties, the management of the Court, the press or parliamentarians. That pressure could well unconsciously affect the process of decision-making and the process of giving reasons for decision. The decision that is easiest to make and express will have great psychological attraction. As was recently said by the Western Australian Court of Appeal in *Mount Lawley Pty Ltd v Western Australian Planning Commission* [(2004) 29 WAR 273], in the course of a valuable review of the significance of delay in the delivery of judgments (at [31]):
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> > ... a long delay can give rise to disquiet ... because of the suspicion, on the part of the losing party, that the task may have become too much for the trial Judge and that he or she had been unable, in the end, to grapple adequately with the issues.

210 Notwithstanding these dangers, delay itself is not a ground of appeal. The ground of appeal is the error, or the infirmity of the decision, to which the delay may have contributed.[123]

211 The focus of the applicants' complaint lies in the associate judge's treatment of the evidence about the 13 June 2008 meeting. There is some force in their criticism. While the associate judge rejected Day's evidence of the conversation in its entirety, he did not accept the evidence of any other person who attended the meeting. He rejected the evidence of the participants regarding the meeting, without differentiation. There was therefore no finding as to what was said or done at the meeting or even as to whether there was a meeting. But it is implicit in the reasons that the associate judge accepted at least that some conversation took place. This is difficult to square with the sweeping conclusions about the evidence of the participants.

212 Part of the difficulty in identifying what findings the associate judge made regarding the evidence surrounding the alleged agreement is that the reasons record much evidence without making clear whether or not that evidence is accepted. It is not easy to infer acceptance of any particular piece of evidence because adverse observations have been made as to the reliability of all the witnesses (with the comparatively minor exception of Westmore). It is unfortunate that no express

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123 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 474 [5] (Gleeson CJ).

finding was made, in particular, as to what Holt and Nash had been told about the state of discussions with Bank SA.

213 On the other hand, the reasons make clear the grounds on which the associate judge rejected the evidence of Day regarding the alleged agreement. Even though aspects of the reasons in that regard are open to different interpretations, the reasons have served the purpose of enabling the Court to conduct the appeal. They explain the basis upon which the associate judge reached his decision to reject Day's evidence, even though criticisms can validly be made of that reasoning. This was the critical issue in the proceeding, once the evidence of Holt in particular had been found unsatisfactory. In particular, it was clear that the associate judge found that the parties on 13 June 2008 did not know that there would be a funding shortfall which TBA would be required to fill. He considered that, without that knowledge, there was no imperative for TBA to borrow from HNC and Westmores, as well as Bank SA. Moreover, Day did not document any such loan (at least not until after Bank SA had only partly funded the first tranche). In the circumstances, the reasons have met their essential purposes and this ground of appeal should not be upheld.

214 The usual dangers associated with delay have not affected the outcome of the present appeal because the associate judge's assessment of the credit of Day, Holt and Nash as witnesses, based on the manner in which they gave their testimony rather than analysis of their evidence by reference to other evidence, was not in issue. However, the lack of explicit findings about what was said and done on 13 June 2008 may be attributable to the delay in this case.[124]

The parties' submissions on the notice of contention

215 The respondents sought to sustain the associate judge's conclusion awarding judgment against FABAL by pointing to a series of grounds upon which they

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124 Delay might also explain the omission to publish the reasons on the internet and the error in their media neutral citation (see n 1 above) and the fact, upon which the applicants relied, that the reasons commence with the word 'DRAFT'. None of these things, of course, demonstrates error in the decision or the reasons.

submitted that the credit of Day was damaged, and by pointing to suggested breaches of the rule in *Jones v Dunkel*.[125] In light of the conclusion on the appeal, and for other reasons that will become clear, it is convenient to deal with these arguments comparatively briefly.

216 The respondents submitted that only $580,000 of the $2.7 million Bank SA facility was made available to TBA to fund lending to investors in the Project, the remainder being provided to assist investors in a number of vineyard schemes of the FABAL group unrelated to the Project. Given also that TBA never raised more than about $2.2 million in cash to fund the Project, the respondents contended that the associate judge erred in failing to find that the following statement by Day, in a memorandum to Cope of Bank SA in March 2009, was untrue: 'TBA funded $3.5 million (tranche 1) to investors in [the Project] in June 2008 ... by a combination of Bank SA and other loans'. It was submitted that the associate judge erred in failing to take into account the untruthfulness of the statement in the memorandum to Cope in assessing Day's credit.

217 The applicants took issue with the respondents' interpretation of the Bank SA letter of offer to TBA of 18 June 2008, which they said acknowledged the Project as a legitimate use for the entire facility and not only to the extent of $580,000. They submitted that Day's memorandum to Cope was correct. Even if it were untrue, it would not follow that Day's evidence about the alleged agreement was false.

218 Next, the respondents submitted that the associate judge erred in failing to infer, under the rule in *Jones v Dunkel*, that evidence by Cope about the funding arrangements would not have assisted the applicants, and that evidence of the Bank SA officers who attended the meeting with Day and Holt on 13 June 2008 would not have assisted the applicants as to what transpired at that meeting.[126]

219 The applicants contended that these submissions of the respondents were

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125 (1959) 101 CLR 298, 320.

126 Ibid.

based on an incorrect understanding of the extent of the Bank SA facility and the amount raised by TBA. Further, there was no fact in issue that Cope would have been required to explain or contradict, nor was there any evidence in issue for the Bank SA officers to contradict.

220 The respondents then submitted that the associate judge erred in failing to find that the terms of the guarantee and indemnity proffered by Day to Holt were inconsistent with the alleged agreement because they recited a loan by Bank SA of the entirety of the funds required to fund the tranche one payments of those investors requiring finance from TBA.[127] He also erred in failing to infer under the rule in *Jones v Dunkel* that evidence by Peter Kerin of TBA, who Day alleged was responsible for the guarantee's incorrect reference to the full advance, would not have assisted the applicants.[128] Further, the associate judge erred in failing to take these matters into account in assessing Day's credit.

221 The applicants accepted that the proffered guarantee was inconsistent with the alleged agreement because it referred to Bank SA advancing the full amount of the tranche one payments to TBA. However, they submitted that this was a mistake conceded by Day and for which the associate judge found Day responsible and, as such, shed no light on Day's credit. Since Day accepted this mistake, there was no evidence in issue for Kerin to contradict and the matter of who was responsible for the mistake was irrelevant. In any event, the associate judge had taken the terms of the guarantee into account, and found that it was not inconsistent with FABAL's obligation to pay HNC commissions.

222 It may be observed that, because the associate judge proceeded on the basis that the participants on 13 June 2008 did not yet know the outcome of the discussions with Bank SA, it was unnecessary to go further and decide whether Holt or Nash had been affirmatively misled regarding those discussions. It is only if that approach

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127 Reasons [102]–[103].

128 (1959) 101 CLR 298, 320.

to the associate judge's reasons had not been accepted that the above issues would need to be determined.

223 The short answer is that, even if all the matters advanced by the respondents were to be accepted, they would all be ingredients in a much wider factual matrix as to which there is multiple conflicting evidence. If the appeal had been upheld, the resolution of the case would require findings as to the credit of the participants in the relevant meeting, viewed in the light of the surrounding context and the documentary evidence. This Court would not have been in a position to substitute its own findings for those of the associate judge and so could not have sustained his decision on the above grounds.

Conclusion

224 Leave to appeal should be granted but the appeal must be dismissed.
