

AUSTRALIA / JUDGMENT

Barel v Barel

[2026] NSWCA 179**COURT**

Court of Appeal

DECIDED

04 September 2026

BEFOREPayne JA at [1];
Mitchelmore JA at [174];
McHugh JA at [175]**CASE / FILE NUMBER**

2025/489414

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**Court of Appeal
Supreme Court
New South Wales****Medium Neutral Citation:** Barel v Barel [2026] NSWCA 179**Hearing dates:** 31 July 2026**Date of orders:** 4 September 2026**Decision date:** 04 September 2026**Before:** Payne JA at [1];
Mitchelmore JA at [174];
McHugh JA at [175]**Decision:** (1) Appeal dismissed.
(2) Appellants to pay the respondent's costs.**Catchwords:** APPEALS — from finding of fact — contracts — whether primary judge erred in finding existence of three wholly oral loan agreements — whether primary judge erred in finding loans were due and repayable on sale of a property — whether primary judge erred in failing to find allegation that loans were due and repayable on the sale of a property was a recent invention to avoid operation of Limitation Act 1969 (NSW)
APPEALS — from finding of fact — credibility of witnesses — where primary judge generally preferred the evidence of one witness over another**Legislation Cited:** District Court Act 1973 (NSW), s 127
Limitation Act 1969 (NSW), s 14
Uniform Civil Procedure Rules 2005 (NSW), rr 36.16(1), 36.16(3A)

Cases Cited:	Barel v Barel [2023] NSWDC 135 Barel v Barel [2024] NSWCA 257 Barel v Barel [2024] NSWDC 330 Barel v Barel [2025] NSWDC 571 Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153; [2001] NSWCA 61 Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 95; [2002] HCA 8 ET-China.com International Holdings Ltd v Cheung [2021] NSWCA 24 Evans v Braddock [2015] NSWSC 249 Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451 Lee v Lee (2019) 266 CLR 129; [2019] HCA 28 Lym International Pty Ltd v Marcolongo [2011] NSWCA 303 McGraddie v McGraddie [2013] 1 WLR 2477 Mt Pleasant Stud Farm Pty Ltd v McCormick [2022] NSWCA 191 R v E (1996) 39 NSWLR 450 Ridley v Whipp (1916) 22 CLR 381 Rosenberg v Percival (2001) 205 CLR 434; [2001] HCA 18 Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana") (1924) 20 LI L Rep 140 The Nominal Defendant v Cordin [2017] NSWCA 6 White Constructions Pty Ltd v PBS Holdings Pty Ltd [2020] NSWCA 277
Category:	Principal judgment
Parties:	Linda Barel (First Appellant) Linda Barel as representative of the estate of the late Raphael Barel (Second Appellant) Elie Barel (Respondent)
Representation:	
Counsel:	S Scott (Appellants) B Koch with A Berriman (Respondent)
Solicitors:	Diamond Conway Lawyers (Appellants) ESY Lawyers (Respondent)
File Number(s):	2025/489414
Publication restriction:	Nil. Decision under appeal
Court or tribunal:	District Court
Jurisdiction:	Civil
Citation:	Barel v Barel [2025] NSWDC 571
Date of Decision:	28 November 2025
Before:	Andronos SC DCJ

File Number(s): 2022/231245

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

This appeal challenged findings of fact about three alleged oral loan agreements. The applicants, Ms Linda Barel in her own capacity and as representative of the estate of the late Mr Raphael Barel respectively, unsuccessfully defended proceedings in the District Court commenced by the respondent, Mr Elie Barel. Elie is the brother of Raphael and brother-in-law of Linda. Elie claimed money owed by Linda and Raphael under three separate agreements.

Elie and Raphael had historically been parties to an Arrangement under which they lent money and provided services to each other. The lending under the Arrangement was usually conducted via the respective parties' family trusts. The amounts owed under the Arrangement were usually settled in a yearly accounting. The lending the subject of this case was argued by Elie to have comprised a series of distinct loans made subject to a term of repayment triggered by the sale of Linda and Raphael's property ("Dover Heights property").

In the District Court, the primary judge found that three separate conversations in February or March 2013, May or June 2014 and February 2015 occurred in which three distinct agreements were respectively formed (together, "the Agreements"), pursuant to which Elie would lend funds to Linda and Raphael, with repayment to be made on the sale of the Dover Heights property. The primary judge rejected Linda's evidence that the monies had been provided to settle outstanding debts owed by Elie to Linda.

The issues on appeal comprised challenges to the primary judge's findings that: (1) the three agreements existed as contended for by Elie; and (2) there existed a term of each of the agreements that repayment would be made upon the sale of the Dover Heights property. Instead, it was argued that such a term was an "invention" by Elie. The Court (Payne JA, Mitchelmore and McHugh JJA agreeing) held, dismissing the appeal:

(1) A fundamental hurdle to the acceptance of the appellants' case was that the appellants did not challenge any of the detailed credibility and reliability findings made by the primary judge. The accounts given by Linda and Elie were irreconcilable. The advantage enjoyed by the primary judge in deciding between those accounts was significant. [118]-[121]

(2) The primary judge's conclusions about purported pre-existing debts owed by Elie to the appellants (specifically, that the parties were "close to being square" at the commencement of the period when the Agreements were entered into) were not challenged. The primary judge's acceptance of Elie's account and the rejection of Linda's account about these matters was highly significant. This unchallenged factual background provided a poor foundation for the appellants' challenge to the primary judge's findings about the reliability of Linda's evidence concerning the later Agreements. [122]-[126]

As to the First, Second and Third Agreements (grounds 1 to 6):

(3) The reliance the appellants sought to place on the First and Second Schedules and two family trust tax returns assumed the reliability of those documents. The appellants did not challenge the findings made by the primary judge about the unreliability of those documents. These unchallenged facts made Elie's account much more likely than Linda's. The primary judge's conclusion that Elie's account accorded with the probabilities and the logic of events was compelling. No error was made by the primary judge in concluding that there was a First Agreement between Elie and Linda and Raphael as contended for by Elie, which would be repayable on sale of the Dover Heights property. The appellants' challenges to the primary judge's findings about the Second and Third Agreements fail for essentially the same reasons. [148]-[163]

As to the repayment terms (grounds 7 to 10):

(4) The primary judge saw the parties give evidence and accepted Elie's account about the Agreements. His Honour was plainly correct that the commercial reality was that, absent sale of the Dover Heights property, there was no other way the appellants could have repaid their commitments. These unchallenged findings about surrounding circumstances made it overwhelmingly likely that the Dover Heights property was the only opportunity, and thus the agreed occasion, for repayment of the commitments. [164]-[172]

JUDGMENT

PAYNE JA: This is an appeal from a decision of his Honour Andronos SC DCJ (the "primary judge") in *Barel v Barel* [2025] NSWDC 571. As the primary judge correctly observed, this dispute involves "[a] once close family relationship [which] has descended into bitterness and acrimony".

Although the issues in dispute at trial were wider, the remaining subject of the dispute is three loan agreements, each alleged to be wholly oral. The primary judge found that the agreements were entered into in conversations in February or March 2013, May or June 2014 and February 2015 respectively.

The respondent, Mr Elie Barel, is the brother-in-law of the first appellant, Ms Linda Barel. Ms Linda Barel had been married to the late Mr Raphael Barel, who passed away at an early stage in these proceedings. The second appellant is Ms Linda Barel as representative of the estate of the late Mr Raphael Barel. Of course, this means that, functionally, the guiding mind of both the first and second appellants is Ms Linda Barel. Without intending any disrespect, I will adopt the approach of the primary judge in referring to the parties by their first names.

Primary judgment

There is a reasonably lengthy procedural history in this matter. Proceedings have been on foot for almost four years and have resulted in three judgments of the District Court and now two of this Court.

On 5 August 2022, Elie commenced proceedings in the District Court initially seeking to recover \$137,822 allegedly lent to Raphael and Linda, pursuant to three oral agreements made in February or March 2013 (the “First Agreement”), May or June 2014 (the “Second Agreement”) and February 2015 (the “Third Agreement”) respectively (together, “the Agreements”). The sum initially sought also included the repayment of an alleged pre-existing debt in the sum of \$28,822 which Elie claimed was owed by Raphael and Linda prior to their entry into the Agreements.

On 6 January 2023, Elie sought default judgment against Linda and Raphael. On 8 January 2023, Raphael passed away. On 9 January, Elie obtained an order for default judgment against Raphael and Linda, and on 10 January, Elie swore an affidavit in support of a garnishee order. On 11 January, Raphael was buried. On the same day, Elie sought and obtained garnishee orders pursuant to which, on 18 January, \$173,727.29 was garnished from Linda and Raphael’s joint bank account.

On 14 April 2023, his Honour Russell SC DCJ heard a contested motion to set aside the default judgment. On 3 May 2023, his Honour set aside the default judgment, appointed Linda to represent Raphael’s estate, and ordered Elie to pay the garnisheed monies into court: *Barel v Barel* [2023] NSWDC 135. On 1 May 2024, Elie paid \$191,164.83 into court (comprising the principal sum of \$173,727.29 and interest).

On 29 August 2023, Elie filed an amended statement of claim in the District Court proceedings the subject of this appeal. The aggregate debt alleged by Elie was \$153,832.76.

On 17 May 2024, the appellants filed a notice of motion seeking an order that the whole of the funds paid into court, or such other amount as the court considered fit, be paid to Linda. On 21 June 2024, a contested hearing was heard on that application before his Honour Fitzsimmons SC DCJ. His Honour ordered \$80,000 be paid out to Linda. On 9 August 2024, Fitzsimmons SC DCJ dismissed a motion under rr 36.16(1) and 36.16(3A) of the Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”) seeking a variation of the 21 June 2024 orders: *Barel v Barel* [2024] NSWDC 330. That decision was the subject of an application for leave to appeal to this Court, which, on 30 October 2024, was dismissed with costs by Gleeson and McHugh JJA and Basten AJA: *Barel v Barel* [2024] NSWCA 257.

On 4, 5 and 6 September and 17 October 2024, the proceedings the subject of the current appeal were heard before the primary judge. On 6 September 2024, his Honour ordered a further \$8,000 be released from the monies paid into court to the appellants for the payment of counsel’s fees.

On 28 November 2025, his Honour delivered his decision and reasons.

Pleaded case

Elie alleged that from around March 2013 he had lent money to Linda and Raphael on the basis of the Agreements. Other than in respect of a sum of \$20,500, there was no dispute that from March 2013 Elie transferred monies, made payments or caused monies to be provided to Linda and Raphael in the sums alleged.

Elie's case was that it was a term of each Agreement that the funds advanced would be repaid by Raphael and Linda on the sale of their home in Dover Heights (the "Dover Heights property"). The Dover Heights property was sold in December 2017. Raphael and Linda denied that the payments made by Elie from March 2013 constituted loans, and denied that there was any pre-existing debt owed as at March 2013.

The primary judge summarised the issues before him as follows:

"(1) What, if anything, was said between Elie and Linda on the occasion of the creation of each of the alleged Agreements, in February-March 2013, May-June 2014 and February 2015.

- (2) Do those conversations establish Agreements enforceable by Elie against Linda and/or Raphael.
- (3) Was it a term of any of the Agreements so established that:
 - (a) Monies advanced under the Agreements would be repaid to Elie by Linda and Raphael on sale of the Dover Heights property; and
 - (b) Monies already then owing to Elie at the time of any of the Agreements, pursuant to an existing arrangement between himself and Raphael, would also be repaid to Elie by Linda and/or Raphael on sale of the Dover Heights property.
- (4) If any of the conversations referred to in (1) created a loan agreement, how much did Elie lend pursuant to each Agreement.
- (5) How much, if anything, was owed to Elie pursuant to the existing arrangement referred to in (3)(b) above."

Evidence at trial

Elie relied on affidavits sworn by him on 27 March 2023, 8 March 2024 and 8 August 2024 and accompanying exhibits, a small number of additional documents produced on subpoena from St George Bank and ING Bank, and inferences he submitted could be drawn from the appellants' lack of response to a Notice to Produce served on them.

Raphael and Linda relied on an affidavit sworn by Linda on 19 July 2024 and accompanying exhibits, and a bundle of bank statements from St George Bank.

Both Elie and Linda were extensively cross-examined.

Approach to fact-finding: documents, evidence of conversations and credit

The primary judge noted that, “[i]n these proceedings, the parties relied heavily on accounts of conversations and events which took place several years or, in some cases, decades ago.” His Honour set out the well-established principles relevant to assessing the reliability of witnesses’ evidence, given “the reliability of the witnesses’ evidence of conversations, and of their beliefs as to the state of the financial arrangements between them from time to time, was in issue”.

His Honour observed that demeanour was neither conclusive nor irrelevant on matters of credit, citing the comments of Atkin LJ in *Société d’Avances Commerciales (Société Anonyme Egyptienne) v Merchants’ Marine Insurance Co (The “Palitana”)* (1924) 20 LI L Rep 140 at 152; but his Honour nevertheless noted that in *McGraddie v McGraddie* [2013] 1 WLR 2477 at [28], the Supreme Court of the United Kingdom emphasised that, “[i]n a case where the court was faced with a stark choice between irreconcilable accounts, the credibility of the parties’ testimony was an issue of primary importance”. His Honour noted that similar observations had been made in *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [23] and *Rosenberg v Percival* (2001) 205 CLR 434; [2001] HCA 18 at [41] per McHugh J.

The primary judge also noted the comments of Bell P (Bathurst CJ and Leeming JA agreeing) in *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24 at [28], including that “[d]ocuments and events have to be understood in their context, and evidence of context will often be furnished by witnesses in their oral evidence.”

Witness credibility

The critical factual contest was between the accounts of Elie and Linda. The primary judge considered both Elie and Linda to be self-interested witnesses, and both “highly emotional and invested in the outcome of these proceedings”.

The primary judge largely rejected attacks on the credibility of Elie’s evidence, finding:

“[36] ... On the whole, I consider that Elie gave his evidence in a forthright and honest manner. His evidence was detailed and generally consistent. To his credit, he made some concessions. The value of those concessions was to some extent undermined, however, by his practice of excusing himself by blaming errors, inconsistencies or omissions on his inadequate English, his emotional state or his legal advisors. From time to time, his answers were non-responsive and self-serving. In answer to specific questions, he often simply restated the basis for his claim.”

The primary judge considered that Elie’s evidence ought “be accorded some considerable weight”. His Honour noted that Elie’s affidavit evidence was not undermined to any significant degree in cross-examination and “generally [accorded] with the logic of events”.

Concerning Linda's evidence, the primary judge recorded that her counsel "freely conceded" that Linda "harbours anger and resentment towards Elie". It was submitted that Elie's conduct was an explanation for Linda's admitted "argumentative and combative conduct" when giving evidence. The primary judge found, however, that it was "clear that Linda's evidence was frequently non-responsive".

The primary judge concluded that "[o]n the whole, ... Linda's evidence [was] less than wholly reliable."

The primary judge noted at several points that he preferred Elie's account to Linda's, including concerning Elie's account of the preparation of the First Schedule; the conversation between Elie and Linda which was said to have given rise to the First Agreement; and the alleged payment of \$10,000 in cash by Elie to Linda on 6 March 2013 pursuant to the First Agreement.

His Honour concluded as follows:

"[186] I have concluded that the Agreements were entered and performed on the basis that generally I have preferred Elie's account of disputed conversations over Linda's. Elie's account conforms more with the logic of events and the objective circumstances known to the parties at the time of each Agreement and the advances made under them. It was not undermined by evidence of subsequent events."

Relevant legal principles

The primary judge set out the legal principles relevant to whether the agreements had been formed and what their terms were, noting that the principles were not controversial (citing, for example, *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [93]-[96]; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 at [25]; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 at [25]; and *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303 at [143]).

Facts found by the primary judge

Elie and Raphael were brothers, and Linda was Raphael's wife. Linda and Raphael had three children: Caroline, Jonny and Renati. Elie conducted business as an electrician. From 1983, he did so through a company, relevantly known as Chit Chat Communications Pty Ltd ("CCC"). Raphael was the principal of an accountancy practice he founded. The practice was known as R Barel & Associates ("RBA") and, in 2000, became incorporated as R Barel & Co Pty Ltd ("RBC"). Raphael was a director and secretary of RBC until 1 July 2015. RBC was deregistered in early 2020.

Raphael and Linda were beneficiaries of a family trust known as the Barel Family Trust (the "BFT"), the corporate trustee of which was another entity controlled by Raphael and Linda called Pimtoka Pty Ltd ("Pimtoka"). Pimtoka was also the trustee of the Provident Fund, a self-managed superannuation fund. Pimtoka was deregistered in late 2021. From 1 July 2003, Elie's business, CCC, was the trustee of the Lily Settlement, a family trust of which Elie's family were beneficiaries.

Linda was employed by RBC as a bookkeeper from 2000 to December 2013. The primary judge considered she “clearly had a good, working knowledge of accounting practice, understood the nature of record keeping and was able to make decisions with respect to the keeping of accounts without instruction from Raphael.”

In September 2009, Raphael suffered a stroke. From about 2012, Raphael exhibited symptoms of dementia, and lost the ability to work, drive, or manage his affairs. By early 2013, Raphael was no longer working but came into RBC’s offices for physiotherapy and because he enjoyed the environment. From December 2013, Linda was Raphael’s full-time carer. From 2017, Linda looked after Raphael with the aid of full-time outside assistance. Following his discharge from hospital after a fall in June 2017, Raphael and Linda moved into a retirement village, where Raphael lived out the remainder of his life, and where Linda still lives.

The Arrangement

The primary judge accepted Elie’s evidence as to the existence and terms of an arrangement between him and Raphael, broadly described as follows (“the Arrangement”):

“[59] The key elements of the Arrangement, so described, were that services were provided without charge, monies were lent by one party to the other or were paid on account of liabilities to third parties (such as the Australian Taxation Office (ATO) or for trade disbursements) and those monies would be accounted for in a running account in a schedule maintained by Raphael and updated annually. The brothers, themselves, were parties and they would perform the services through corporate entities. At some point, it was contemplated, that there would be a final accounting, either through their retirement or because one of them would withdraw because of their marital circumstances.”

As the primary judge noted, a key element of the appellants’ defence was that “the whole of the financial relationship between the brothers was subsumed, from no later than 2003, in a relationship between the respective trusts, being [the] BFT and Lily Settlement.” The primary judge rejected this defence.

The primary judge found that Linda had not been personally involved in any of the communications between Elie and Raphael giving effect to the Arrangement, had not been a party to the conversations comprising individual transactions, and that there was no evidence that she was involved in transferring funds. His Honour found her role was “very limited and depended on communication of the position to her by Raphael”. The primary judge accepted that Elie and Raphael remained personally liable under the Arrangement because:

the Arrangement pre-dated the incorporation of CCC and RBC and the creation of Lily Settlement and the BFT. There was no contemporaneous evidence that Elie and Raphael were ever released from their obligations, and this would appear objectively unlikely, “given the informal nature of the relationship and the level of trust between the brothers”;

Raphael's schedules were not in evidence, and the appellants' contention relied heavily on the schedules and accounts prepared by Linda, but Linda conceded that the records she maintained were not conclusive of all the transfers and payments between Elie and Raphael and their respective entities; and

his Honour did not accept that the schedules created by Linda, even where corroborated by more contemporaneous records, were conclusive of the state of indebtedness under the Arrangement. The Arrangement was an "overarching agreement" that applied to all advances between the brothers and their entities, and observed that the schedules were not created to record those transactions, but that "[e]ach of the Schedules appears to have been created for a different purpose, which reflected Linda's incomplete understanding of the relationship between the entities for which she prepared accounts and which had to balance."

The Schedules

The primary judge considered each of the three schedules prepared by Linda ("the Schedules"), which purported to record the state of indebtedness between the parties or their associated interests.

The First Schedule

The first schedule ("First Schedule") was prepared by Linda and provided to Elie. The primary judge preferred Elie's account that Linda had given it to him in May 2015.

The primary judge set out nine aspects of the First Schedule which his Honour considered "notable", including that "[t]he total debt recorded as owing by Lily Settlement to Pimtoka as at 30 June 2013 was \$103,001.70":

"[69] ...

- (1) It purported to record a loan from 'RBC Group' to 'Chit Chat Group'. No such groups existed as legal or, so far as the evidence went, accounting entities.
- (2) It commenced in 1999 with debt from Chit Chat (CCC) to RBA carried forward in the sum of \$29,000 (this was recorded as \$29,500 in the Second Schedule). This preceded the incorporation of RBC. The first entries purport to record transactions between CCC and RBA.
- (3) In FY2003, a loan to 'Electrical & Energy' was transferred to CCC.
- (4) In FY2004, it records a change from 'Loan RBA & Chit Chat' to 'Loan RBC P/L & Lily Settlement'. A further subheading records 'Loan R.Barel Property and Lily Settlement [sic]', although it is not clear whether 'R.Barel Property' is a different entity to RBC.
- (5) From FY2005 to FY2011, transactions are recorded under the sub-heading 'Loan RBC & Lily Settlement'.

- (6) An entry following FY2011 records ‘Transfer from Loan with RBC to Loan PIMTOKA’.
- (7) From FY2012 to FY2013 (when the Schedule ends), transactions are recorded under the heading ‘Loan Lily Settlement & Loan PIMTOKA (Barel family Trust)’. Entries referring to existing loans by Pimtoka to Lily Settlement in FY2008 and FY2009 are also included in the aggregate debt recorded due by Lily Settlement to Pimtoka.
- (8) Payments by Elie totalling \$59,000 between 6 March 2013 and 10 April 2013, by way of cash payments by Elie or cheques to RBC, were recorded as repayments by Elie.
- (9) The total debt recorded as owing by Lily Settlement to Pimtoka as at 30 June 2013 was \$103,001.70.”

The Second Schedule

The second schedule (“Second Schedule”) had been provided by Linda to Elie in about June 2015. The primary judge noted that it largely mirrored the contents of the First Schedule, but that the Second Schedule: (1) was a new document in a different format; (2) recorded loans between Raphael, Linda and Elie personally; (3) recorded payments up to and including 26 March 2015; and (4) “[t]he net sum of payments recorded to have been made by Elie during this time was... \$126,007.14.”

The Third Schedule

Despite its annexure to Linda’s affidavit of 19 July 2024, Linda denied having ever seen the third schedule (“Third Schedule”) before. The primary judge described the Third Schedule as largely identical to the Second Schedule, though its heading (which was consistent with the footer and entries) referred to loans between corporate vehicles rather than the Barel family members personally.

Conclusions about the Schedules

The primary judge considered the Schedules “unreliable as records of the parties’ respective obligations under the Arrangement”.

His Honour considered that the accuracy of the First Schedule depended on communication by Raphael to Linda of all transactions between him and Elie. However, Linda admitted that there may have been transactions she was unaware of. The primary judge also noted that, in the preparation of this Schedule, Linda’s concern had been with the accounts of the relevant trusts. For that reason, she had excluded transactions which she considered did not fall within the trusts’ relationship, even if they accorded with the purpose of the Arrangement.

While the primary judge accepted Linda’s explanation that she had prepared the Second Schedule to explain her position to Elie in June 2015, his Honour considered that, given its contents depended on the accuracy of the First Schedule, it was “infected by the same errors and omissions”.

The primary judge did not rely on the Third Schedule; noting that it had been disowned by Linda in evidence.

Whether the Agreements included repayment of alleged pre-existing debt

As I have explained, the Schedules were premised on there being a total debt owing by Lily Settlement to Pimtoka as at 30 June 2013 of \$103,001.70. This is significant as it constitutes the vast bulk of the sum now outstanding as the subject of this appeal. As I will explain, however, no appeal was brought from the finding of the primary judge that there was no material indebtedness between the parties as at June 2013.

Elie had alleged four errors affecting the financial position between the parties described in the Schedules.

The first alleged error concerned the payment in 2000 of \$1,800 by Elie to Raphael for Telstra shares. Elie argued he had paid cash. The Schedule recorded that payment as outstanding. After highlighting the lack of evidence to corroborate Elie's claim, the primary judge found no error in the Schedules with respect to the non-payment for those shares.

The second error related to a credit to the Arrangement for electrical work done by Elie on RBC's Bondi Junction offices between December 2000 and February 2001. Elie argued that he incurred \$37,000 in expenses. The Schedule reflected only a credit of \$8,635.72 for expenses incurred. The primary judge found, again on the basis of a lack of evidence, that Elie had not demonstrated this error in the Schedules.

The third error alleged by Elie was a failure to record an alleged payment for the transfer to Linda of a one-third interest in a partnership that owned a retail shop in Hamilton, New South Wales ("the Newcastle shop") in 2004. The primary judge found that Elie had established that the Schedules contained an error in this respect, and that the appellants ought to have credited Elie with \$53,200.

The fourth error alleged by Elie was a failure to record a loan of \$100,000 to Raphael on 26 June 2009. The parties agreed that this transfer had been made. The dispute was that, while Elie said the payment was part of the Arrangement, Linda said that it was a gift in recognition of the accounting work Raphael had done for Elie over some 20 years. The primary judge set out the versions of the conversations for which each party contended, and any assistance which could be drawn from the Schedules. The primary judge rejected Linda's account as a "self-interested reconstruction" and found that the suggestion that Elie would decide to pay \$100,000 as a gift appeared both unlikely and out of character with the Arrangement. His Honour accepted Elie's evidence about the character of the payment.

Conclusion as to pre-existing debt

The primary judge, accounting for his acceptance of two of the four accounting errors in the Schedules alleged by Elie, found that the debt recorded in the First and Second Schedules should be adjusted by \$153,200 in Elie's favour. After this adjustment, the debt owed by Elie prior to the advances the subject of the Agreements was \$1,824.38. As his Honour put it, "[a]ccordingly, there was, objectively, no pre-existing debt. The parties were, in fact, close to being square."

First Agreement

Elie's evidence was that in about late February or early March 2013, he and Linda had a telephone call. In it, Elie said that Linda said words including words to the effect of, "Elie you must lend me \$70,000 immediately otherwise the bank will repossess the house and throw your brother and me into the street". The conversation continued:

"Elie: I am lending you the money. Please add all the amounts you owe me so you can repay me in full when you sell the house."

Linda: Yes, don't be silly. I'll pay you. I'm surprised you talk like that. That is why we are selling the house so we can clear our debts."

Linda denied that such a conversation took place. She said that she did not ask Elie to lend money to her or anyone else, and that at the time of the alleged conversation she had no intention to sell the Dover Heights property or undertake renovations. She denied saying she would repay the funds to Elie upon the sale of the Dover Heights property. Instead, Linda gave evidence that, as at 30 June 2012, she believed that CCC owed RBC over \$150,000, that she had a conversation with Raphael in which they agreed that Elie should repay some of it, and that she and Raphael then had a conversation with Elie communicating that wish to him and in which Elie agreed to begin repaying the amount. His Honour noted, however, that Linda had not identified the date and circumstances of that conversation in her evidence. His Honour noted that counsel for Elie had relied on that absence of information as relevant to the question of whose account was to be believed.

For reasons I will explain, his Honour rejected Linda's account and accepted Elie's account of the conversation.

Performance of the First Agreement

His Honour found that Elie did, in fact, advance \$63,800 to the appellants pursuant to the First Agreement, repayable on sale of the Dover Heights property.

The characterisation of each of the several payments that made up this total amount was disputed. His Honour set out his findings regarding each payment:

his Honour preferred the evidence of Elie that on 6 March 2013, Elie paid \$10,000 in cash to Linda. Linda had disputed the payment and denied having personally received it. Whoever received it, his Honour noted, there was no dispute that it was received. The payment was acknowledged in each of the Schedules;

on 27 March 2013, Elie gave the appellants a cheque made out to RBC in the sum of \$9,000. Linda denied that it was an advance and said instead it was a repayment of monies due under the Arrangement. Linda's account was not accepted. It was found to have been an advance under the First Agreement;

on 28 March 2013, Elie gave the appellants a cheque made out to RBC in the sum of \$5,000. This too was found to have been an advance under the First Agreement, for the same reasons as (2) above;

on 2 April 2013, Elie gave Linda a cheque for \$25,000 made out to Pimtoka. The primary judge found that Linda said to Elie when explaining the appellants' need for the money, "[h]ow do you think I manage to exist? I use whatever money I have to block holes. I take money from the business to exist then when I can I give money back to the business to keep it running. I do the same for the superfund. One day I lean to the right one day I lean to the left. I need to exist until I sell the house so I don't care from where the money comes." This conversation strengthened the primary judge's view that the appellants were struggling financially. The conversation also provided support for the finding that the Dover Heights property was the only realistic source of repayment of the loans being made by Elie. There was also evidence of what the primary judge found was a working out of accounts between Pimtoka and RBC in the amount of \$25,000 around the time of the transfer. This cheque was found to have been an advance pursuant to the First Agreement;

on 10 April 2013, Elie paid \$8,000 in cash to Linda. Linda did not deny that the payment had been received but said it was Raphael who had received it. In either event, the payment was found to have been an advance pursuant to the First Agreement;

a \$5,000 cash payment allegedly made by Elie to Linda on 12 April 2013 was not found to have been a payment under the First Agreement due to insufficient evidence;

a \$1,000 cash payment allegedly made by Elie to Linda on 18 April 2013 was not found to have been a payment under the First Agreement due to insufficient evidence;

a \$5,000 cash payment allegedly made by Elie to Linda on 26 April 2013 was not found to have been a payment under the First Agreement due to insufficient evidence;

a \$2,000 cash payment from Elie to Jonny (one of Linda and Raphael's children) on 2 April 2014, made at Linda's request, was recorded in the Schedules. It was found to have occurred and to have been an advance pursuant to the First Agreement; and

on 22 April 2014, Elie gave the appellants a cheque made out to RBC in the sum of \$4,800. Linda denied it was an advance and argued it was a repayment. The primary judge found it was an advance pursuant to the First Agreement.

It was additionally noted that, corroborating the above, an amount in the sum of \$63,800 (the total sum of the payments accepted to have been made pursuant to the First Agreement) had been recorded in each of the three Schedules.

Second Agreement

Elie gave evidence that the Second Agreement was entered into pursuant to an oral agreement by telephone in May or June 2014. Linda denied the conversation altogether. Elie said that Linda asked him for a \$50,000 loan, purportedly for home renovations that were costing more than expected and with repayment terms as follows: “I will repay you all the money back on the same day that I settle on the sale of the house.” Elie relied on the objective circumstances and contemporaneous documentary evidence to demonstrate the conversation occurred. The primary judge found:

“[134] By 1 June 2014, the balance of the defendants’ St George offset account was \$35,599.04 and their Portfolio loan had a debit balance of \$70,382.29. RBC continued to trade. As at June 2014, the cumulative net amount that had been advanced by the defendants to RBC since 1 January 2010 was \$70,000. The defendants continued to bear their own living expenses and to fund Jonny’s studies in Tasmania. Between March 2013 and April 2014, as I have found, they received \$63,800 from Elie. Their financial position was, if anything, worse than it was in February-May 2013.”

His Honour also concluded that the evidence did not establish that the appellants had a regular income from any other source. Around this time, the appellants refinanced their home loan. The loan was granted on 12 June 2014. His Honour noted that all but \$147,010 was used to retire the old home loan and other existing debts. The appellants argued that the balance was sufficient to cover the renovations of the Dover Heights property. The evidence included expenses related to the renovations, set out in Linda’s affidavit, which showed that \$84,673.55 was incurred between 18 September 2014 and 21 April 2015 and a further \$106,827.13 was incurred between October 2016 and July 2017.

His Honour found, even setting aside further funds drawn down in a subsequent refinancing, that the remainder from the refinanced home loan was not sufficient to pay the renovation expenses. It was additionally noted that the appellants’ ongoing living expenses were also drawn from that loan amount and that loan amount could not have been sufficient to fund both those costs and the renovation costs. His Honour listed examples of the additional expenses during the relevant time:

“[139] ... For example, interest payments from the account were, by 1 April 2015, \$48,849.72. Payments for various expenses incurred by, or for, Jonny were \$30,020. A payment of \$3,000 was made to Renati on 4 March 2015. Over the same period, some \$20,000 was transferred to RBC. The drawdown from the ING refinance would have been exhausted but for \$6,000 transferred from ‘Sydney CU’ and \$10,000 received from Elie on 25 and 26 March 2015. The living expenses of the defendants do not appear to have been paid directly from the ING account.”

His Honour concluded that the evidence established that, as at May to June 2014, the appellants were faced with the prospect of expensive renovations, poor income prospects and significant ongoing expenses in maintaining their own lives, their family’s expenses, and the business of RBC. It was found it would have been apparent at the time of the grant of the loan that by the time other debts were paid, after refinancing, the appellants had only \$180,000 to fund interest payments and all their other expenses. In these circumstances his Honour accepted Elie’s evidence as to the essential components of the conversation alleged to have occurred that formed the Second Agreement.

His Honour found that the Second Agreement provided that Elie would advance monies, up to \$50,000, to the appellants, and on the settlement of the sale of the Dover Heights property, all monies owed by the appellants, including those pursuant to the First Agreement, would be repaid.

Performance of the Second Agreement

There was no dispute that Elie transferred or caused to be transferred \$29,534.46 to the appellants for their benefit between 25 June 2014 and 19 August 2014. A minor dispute concerning \$650 was resolved in Elie’s favour, which the primary judge, on considering the evidence, found to be a loan and therefore incorporated it into the sum in the debt due under the Second Agreement.

Third Agreement

The primary judge accepted Elie’s evidence that he and Linda had a conversation in about mid-February 2015 in which Linda asked for any money Elie could spare on the basis that the money would be repaid on the sale of the Dover Heights property. This formed the Third Agreement. The primary judge found a total of \$10,500 was advanced to Linda under this Agreement.

Elie gave evidence of a conversation that took place at the Dover Heights property in about mid-February 2015. The substance of that conversation was that Linda was concerned about money, had attempted to borrow \$250,000 from her daughter Caroline, but Caroline had refused and Linda was attempting to seek Elie’s help in convincing Caroline to do so. About a week later, Elie said he and Linda had another conversation. They again discussed Caroline’s reluctance to lend funds to Linda and Raphael. It was during this conversation that Elie said that Linda asked for any money he could lend her to finish the property renovations and pay the bills. Linda denied saying she was in desperate need of help but conceded she may have said the renovations were more costly than expected.

The primary judge found that the objective circumstances supported Elie's account. The appellants, by the time of this conversation, had spent more on renovations, living expenses, and other costs than what they had borrowed from ING Bank on the refinancing of their property the previous year. A text message between Linda and Elie referred to a loan Caroline had promised. It should be noted that Caroline did eventually transfer \$250,000 to the appellants. The character and terms of that transfer were subsequently disputed and eventually Caroline and Linda agreed Linda would repay \$225,000 from the proceeds of sale of the unit in the retirement village where she resides, with a caveat protecting Caroline's interest.

The primary judge found it was clear that by February 2015 Linda had decided to sell the Dover Heights property imminently (as opposed to the testimony of Linda that the decision was only made in April 2015 after a real estate agent approached her). Text communications between Linda and Elie in early April made clear that at that time, the decision to sell the property had already been made.

Performance of the Third Agreement

The primary judge set out the instances of payment that Elie alleged he made to Linda and that formed Elie's performance under the Third Agreement:

two bank transfers of \$5,000 each were made by Elie on 25 and 26 March 2015. Linda admitted they had been made but argued they were not advances under the Third Agreement. The primary judge found that they were in fact payments made under the Third Agreement;

an additional \$3,000 cash payment to Linda on 25 February 2015 and \$6,000 on 3 April 2015. The primary judge found there was insufficient evidence of these payments and was not satisfied these payments were made;

a \$500 payment to the appellants' mortgage broker on 1 February 2015. The primary judge accepted this payment was made pursuant to the Third Agreement.

Subsequent conduct and communications

There was considerable evidence of communications between the parties occurring after the advances had been made. This evidence was admitted on the basis that subsequent conduct was relevant to the question of the existence, the terms, and the parties to the Agreements.

Ultimately, his Honour held that there was "very little" which could be inferred from that evidence about what had been agreed in the conversations that comprise the Agreements. His Honour stated that he had had "some regard" to subsequent conduct and communications but did not consider that they much affected the likelihood of each version of events in light of the objective circumstances.

Alleged "limitations problem"

Counsel for the appellants submitted that Elie's claim that the alleged loans would be repayable on the sale of the Dover Heights property was a "reconstruction" that emerged only after a potential limitation problem was identified. The appellants relied on the six-year limitation period for commencing proceedings contained in s 14 of the Limitation Act 1969 (NSW). The primary judge did not accept the appellants' submission, finding that, on the whole, Elie gave his evidence in a forthright and honest manner, and that his evidence was detailed and generally consistent.

Primary judge's conclusion and orders

Ultimately, the primary judge found Elie had established that each alleged oral loan agreement was indeed entered into between Elie and Linda, on behalf of Raphael and herself. His Honour found that the aggregate sum advanced by Elie to Linda and Raphael pursuant to those agreements was \$103,834.46. This sum comprised:

\$63,800 pursuant to the First Agreement;

\$29,534.46 pursuant to the Second Agreement; and

\$10,500 pursuant to the Third Agreement.

The primary judge found that the loan monies were repayable on the sale of the Dover Heights property.

In so finding, as set out at [27] above, his Honour concluded that the Agreements were entered into and performed on the basis that he generally preferred Elie's account of disputed conversations over Linda's. His Honour considered that Elie's account conformed more with the logic of events, the objective circumstances known to the parties at the time of the Agreements, and advances made under the Agreements. That account was not undermined by evidence of subsequent events.

His Honour determined that the remaining monies previously paid into court by Elie, together with any interest accrued thereon, should be released to Elie in satisfaction of his claim. His Honour concluded by making the following orders:

"[201] The orders of the Court are:

- (1) Direct the parties to liaise as to appropriate orders, giving effect to these reasons and on costs, and either notify my Associate by 5pm on 12 December 2025:
 - (a) of agreement, by providing Short Minutes of Order; or
 - (b) of disagreement, whereby the proceedings will be listed for further directions on Thursday, 18 December 2025 at 2pm before Andronos SC DCJ."

On 18 December 2025, his Honour provided a further judgment for a monetary amount:

“1. Judgment for the plaintiff against the first defendant and second defendant in the sum of \$153,191.26 which is comprised of the following amounts:

- (a) The principal sum of \$103,834.46; and
- (b) Interest of \$49,356.80 on the sum in order 1(a) above, pursuant to s 100 of the Civil Procedure Act 2005 calculated from 15 December 2017 to 29 November 2025.”

On 31 March 2026, his Honour gave effect to consent orders 1, 2, 5 and 6 provided by the parties:

“1. ORDERS that the first defendant and the second defendant (Defendants) pay the Plaintiff’s costs of the proceedings as agreed or assessed excluding the following:

- a) any costs in relation to the notice of motion to set aside default judgment filed by the Defendants on 16 February 2023.
 - b) any costs in relation to the notice of motion filed by the Plaintiff on 8 March 2024.
 - c) any costs in relation to the notice of motion filed by the defendants on 22 March 2024, noting that no order as to costs has been made in respect of this motion.
 - d) any costs in relation to the notice of motion filed by the Defendants on 17 May 2024.
2. ORDERS that there be no order as to costs in relation to the notice of motion filed by the Defendants on 22 March 2024.
- ...
5. DIRECTS the Plaintiff to provide the Defendants 3 days prior written notice of any enforcement steps the Plaintiff proposes to take against the Defendants in relation to the judgment of Andronos DCJ on 28 November 2025 or the orders of Andronos DCJ dated 18 December 2025.
6. DIRECTS that the Defendants have liberty to relist the matter on 3 days notice if the Plaintiff proposes to take any enforcement steps in accordance with order 5.”

Notice of appeal

On 17 December 2025, the appellants filed and served a notice of intention to appeal. On 27 February 2026, the appellants filed a notice of appeal from the whole of the decision below, brought under s 127 of the District Court Act 1973 (NSW).

The grounds of appeal were:

“1. The primary judge erred in finding in paragraph [127] that there was an oral agreement between Elie and Linda and Raphael, pursuant to which Elie would lend \$70,000 to Linda and Raphael, which would be repayable on sale of the Dover Heights property (First Agreement).

- 2. The primary judge should have found that:

-
- (a) the contemporaneous documentary evidence and factual context did not support a finding that Linda had orally agreed to the First Agreement; and
 - (b) there was no First Agreement.
 3. The primary judge erred in finding at paragraph [144] that a Second Agreement was entered into pursuant to which Elie would advance further monies, up to \$50,000, to the defendants and on settlement of sale of the Dover Heights property, all monies then owing by the defendants, including monies owed pursuant to the First Agreement, would be repaid to Elie.
 4. The primary judge should have found that:
 - (a) the contemporaneous documentary evidence and factual context did not support a finding that Linda had orally agreed to the Second Agreement; and,
 - (b) there was no Second Agreement.
 5. The primary judge erred in finding at paragraph [153] that Elie and Linda had a conversation in about February 2015 in which Linda asked Elie to lend Linda and Raphael whatever money he could spare on the basis that Linda and Raphael would repay Elie out of the proceeds of sale of the Dover Heights Property (Third Agreement).
 6. The primary judge should have found that:
 - (a) the contemporaneous documentary evidence and factual context did not support a finding that Linda had orally agreed to the Third Agreement; and
 - (b) there was no Third Agreement.
 7. The primary judge erred in finding at paragraphs [127], [144] and [153] that each of the alleged agreements referred to in grounds [1]-[6] above were repayable on the sale of the Dover Heights property (Repayment Term).
 8. The primary judge should have found that:
 - (a) the contemporaneous documentary evidence and factual context did not support a finding that Linda had agreed to the Repayment Term; and,
 - (b) there was no Repayment Term, but that Elie and Linda and Raphael had a running account and by the time Elie commenced these proceedings he was out of time to claim any debt which he alleged he was owed.
 9. The primary judge erred in failing to find at paragraph [184] that the allegation that the advances made by Elie to Linda and Raphael were loans, repayable on sale of the Dover Heights property, was only a recent invention.

10. The primary judge should have found that the allegation that the advances made by Elie to Linda and Raphael were loans, repayable on sale of the Dover Heights property, was a recent invention because it had not been referred to [in] any correspondence between Linda and Elie before 3 November 2020.”

Appellants’ submissions

The appellants submitted that the principal issue in the present appeal was whether the primary judge erred in finding that the parties entered into the First, Second and Third Agreements.

It was submitted that the findings of the primary judge were not capable of reconciliation with the available contemporaneous documentary evidence.

The submissions advanced by the appellants in support of their contention that the primary judge erred in finding that the parties entered into each of the three Agreements were similar in many respects. It was submitted that:

there was no other documentary or other evidence of the conversation advanced by the respondent other than his own affidavit evidence;

the respondent’s account was given several years after the fact and in the context of hostility and litigation between the parties; and

the contemporaneous documents (being Schedule 1, Schedule 2, and the BFT tax returns) aligned with Linda’s account.

First Agreement

The appellants submitted that the only evidence advanced by the respondent was affidavit evidence of a conversation which allegedly occurred between him and Linda in February to March 2013.

It was submitted that there was every reason for the primary judge to reject the respondent’s account. The evidence was given over nine years after the fact, in the context of hostility and litigation between the parties, and was not supported by any contemporaneous documentation.

The appellants submitted that three critical contemporaneous documents aligned with Linda’s account, being:

Schedule 1, recording loans between RBC and CCC;

Schedule 2, recording that Elie owed Linda and Raphael \$153,443.71 as at 30 June 2012; and

the 2013 tax return lodged by Pimtoka for the BFT which included a Pimtoka balance sheet as at 30 June 2013 and recorded that for the financial year ended 2012, the Lily Settlement owed the BFT \$153,443.71. The 2015 BFT tax return was also relied upon in the appellants’ oral submissions.

It was submitted that findings of fact based in part upon a trial judge's impressions of a witness or the credibility of his or her evidence are not beyond the reach of correction on appeal: *Fox v Percy* at [29] (Gleeson CJ, Gummow and Kirby JJ), nor are factual conclusions that were reached by inference: *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55] (Bell, Gageler, Nettle and Edelman JJ).

The appellants also relied on the comments of Davies J in *The Nominal Defendant v Cordin* [2017] NSWCA 6 at [165]-[167], in which it was said his Honour referred "with evident approval" to the comments of Hallen J in *Evans v Braddock* [2015] NSWSC 249 at [74], including that a court, in cases involving events which occurred long before the litigation, usually prefers to rely upon contemporaneous, or near contemporaneous, documents.

The appellants summarised the primary judge's finding as having been based on the following matters:

"(1) neither the respondent nor CCC was indebted to the [appellants] or any of their related entities;

- (2) the respondent would not have acquiesced to a demand to pay down the loan because when an allegation was made that he owed the [appellants] \$103,001.70 in May 2015, his response was swift and angry;*
- (3) Linda was concerned in 2013 with the [appellants'] financial outlook;*
- (4) the income position of the appellants was weak and the outlook for their accountancy practice poor;*
- (5) the appellants' outgoings had not reduced;*
- (6) the appellants had no other source of funds;*
- (7) the respondent and Linda had a further conversation in April 2013; and*
- (8) Linda had decided to renovate the Dover Heights Property."*

It was argued that matter (1) was "critical and infected the remainder of the primary judge's fact finding in relation to the alleged agreements". The appellants submitted that the schedules and the BFT 2013 tax return were contemporaneous documents which recorded Linda's state of mind, which was that Elie was indebted to her and Raphael in the sum of \$153,443.71 at or around February 2013.

The appellants noted the primary judge's unchallenged finding that the Schedules and the BFT 2013 tax return did not record the true state of indebtedness, but argued that this finding did not provide a basis for his Honour to find that Elie and Linda agreed in February or March 2013 that Elie would loan her \$70,000 and she would repay that loan on the sale of the Dover Heights property. The appellants submitted that "[t]he correctness or otherwise of the schedules and tax return is not to the point". What was important, so the argument went, was that those documents "provided the best evidence of Linda's state of mind in 2013 and corroborated her evidence that the respondent owed about \$150,000 at about this time".

In relation to matter (2), the appellants submitted that it did not provide a basis for the primary judge to find that Elie and Linda agreed in February or March 2013 that the respondent would loan her \$70,000 and she would repay that loan on the sale of the Dover Heights property. The appellants argued that the primary judge had “relied on inferences or supposition” about how Elie would have acted, which had no support in cross-examination or otherwise in the evidence.

The appellants submitted that matters (3) to (8) may be taken together, as they were all findings to the effect that Linda and Raphael “needed money”. It was argued that these did not “advance the analysis”, when other matters of context were considered. Schedule 1 and the BFT 2013 tax return, it was submitted, were “relatively contemporaneous” documents recording Linda’s own understanding that the Lily Settlement owed Pimtoka \$153,443.71 as at 30 June 2012, and \$103,001.70 as at 30 June 2013. The appellants argued that, even if it were accepted that Linda needed money in February or March 2013, there was no reason to assume that the amounts paid by Elie to Linda between 6 March and 10 April 2013 were advances, rather than repayments of an existing debt.

It was submitted that Schedule 1 recorded that between 6 March and 10 April 2013, Elie “repaid” \$59,000 reducing the debt from \$153,443.71 on 30 June 2012 to \$103,001.70 on 30 June 2013. The appellants submitted that it was “glaringly improbable” that Linda would have asked to borrow money from Elie if she thought that he owed her \$153,443.71. It was argued to be “equally glaringly improbable” that, having received the money, she would have recorded it as repayment of a debt owed to her and Raphael and subsequently lodged an incorrect or false financial statement with the Australian Taxation Office, if instead she had borrowed money from Elie intending to repay it.

It was submitted that there was therefore no reason not to accept Linda’s evidence that she asked Elie to repay the debt he owed, and that he did “repay” some of that money, which reduced his “debt” to the appellants.

Second Agreement

The appellants submitted that the only evidence of the relevant conversation was Elie’s own affidavit evidence, which the primary judge should have rejected, as it was given over eight years after the fact, in the context of hostility and litigation, and which was unsupported by contemporaneous documentation.

The appellants summarised the primary judge’s finding as having been based on the following:

“(1) the appellants’ financial position was worse;

- (2) the evidence did not establish any regular income from any other source;
- (3) the [appellants’] portfolio account had only \$35,000 in it which was hardly a substantial buffer;

- (4) the [appellants] refinanced their St George home loan with ING but the ING loan would not have been sufficient to pay for the renovation expenses and it was used to pay other expenses; and
- (5) in May-June 2014, the [appellants] were faced with the prospect of extensive renovations, poor income prospects and significant ongoing expenses.”

The appellants characterised all of these matters as findings that Linda and Raphael “needed money”. It was submitted that if matters of context were considered, these findings did not provide the primary judge with a basis to find the Second Agreement existed in the terms alleged by Elie.

It was submitted that Schedule 1, Schedule 2, and the 2013 and 2015 BFT tax returns, demonstrated that Linda considered that the Lily Settlement owed Pimtoka \$103,001.70 as at 30 June 2013, and \$42,097.24 as at 30 June 2014. The appellants highlighted that Schedule 2 recorded four entries between 22 April and 30 June 2014 as “Repayment of loan by Elie Barel to Linda and Raphael Barel”. It was argued that it was “glaringly improbable” that Linda would have recorded these as repayments if she had in fact borrowed the money intending to repay it.

The appellants submitted that the best evidence of Elie’s state of mind was Elie’s letter to Linda in May 2015. The appellants emphasised the following comments: “[t]herefore from the total amount is \$103,001.70 less \$8635.72 and \$1800 the amount I owe you is \$92,565.98... Money I paid you” and “[c]onclusion you owe me \$138,878... So dear Raphy Please stop telling our mother and Isaac that I owe you hundreds of thousands of dollars.” In the appellants’ submission, “[t]his document is an admission by the respondent that he did in fact owe Linda \$92,565.98 but claimed a set-off seemingly because of the various amounts and free services he had provided to her and Raphael over the years.”

The appellants submitted that there was no reason to assume that, because Linda and Raphael needed money, Linda borrowed funds from Elie. It was, so the argument went, “glaringly improbable” that Linda would have asked to borrow money from Elie if she thought he owed her \$103,001.70. It was submitted that there was no reason not to accept Linda’s evidence that she asked Elie to repay the alleged debt; that between 22 April and 30 June 2014 he repaid part of the “debt”; and his “debt” was correspondingly reduced (this was argued to have been recorded in Schedule 2 and in the BFT 2015 tax return).

Third Agreement

The appellants submitted that the only evidence advanced by Elie was affidavit evidence for which there was no associated documentary or other evidence. Linda denied that the relevant conversation took place. The appellants submitted the primary judge should have rejected Elie’s account given the time that had elapsed, the hostility between the parties, and the lack of supporting documentation.

The appellants summarised the primary judge’s finding as having been based on the following:

“(1) the defendants had spent more on renovations, living expenses and other costs than they had borrowed from ING the previous year;

- (2) their daughter Caroline had not yet advanced any money to them; and
- (3) Linda had decided to sell the Dover Heights property;”

The appellants submitted that these three matters together should be characterised as findings that Linda and Raphael “needed money”. It was submitted that once other contextual matters were considered, the above three findings did not provide a basis for the trial judge to find that in February 2015, Linda and Elie agreed that Elie would lend Linda whatever money he could spare on the basis that Linda and Raphael would repay him from the proceeds of sale of the Dover Heights property.

The appellants claimed that the contemporaneous documents recorded that Linda considered that Lily Settlement owed Pimtoka as at 30 June 2014, \$42,097.24, and that Schedule 2 recorded four entries between 30 June 2014 and 26 March 2015 as “Repayment of loan by Elie Barel to Linda and Raphael Barel”. The appellants argued there was no reason to assume Linda and Raphael needed money, that Elie paid them money, and that the monies were a loan from Elie to Linda repayable on the sale of the Dover Heights property. Again, it was submitted to be “glaringly improbable” that Linda would have asked to borrow from Elie if she thought that he owed her \$42,097.24.

The appellants submitted that there was no reason not to accept Linda’s evidence that she asked Elie to repay the allegedly existing debt; that between June 2014 and March 2015 he repaid part of the debt; and that that debt was correspondingly reduced (recorded by Linda in Schedule 2 and ultimately in the BFT 2015 tax return).

It was further argued that any suggestion that Linda had borrowed money which she intended to repay to Elie was “conspicuously absent” from the letter Elie sent to Linda months after the third agreement had allegedly been entered into. This letter was argued to be “highly probative corroborative post-contractual conduct”. The appellants argued that Elie understood, as at May 2015, that Linda regarded him as being in debt to her, and that he owed her at least \$92,565.98.

Subsequent conduct

The appellants submitted that the primary judge, despite a correct understanding of the relevant legal principles on the use of post-contractual conduct on determining relevant contract formation and terms, had failed to place weight on Elie’s failure to assert in subsequent correspondence (even after the Dover Heights property had been sold in December 2017) that Linda had agreed to repay him money, which was now due. Instead, Elie’s conduct was submitted to be “entirely consistent” with his May 2015 assertion of a set-off arising from historical transactions between him and Raphael.

The appellants also highlighted a letter from Elie to Linda; written after they had fallen out, in October 2018. Elie, it was observed, did not demand repayment of the monies under the alleged agreements or specify that those monies were repayable, even after the Dover Heights property had been sold. The appellants submitted that the same was true for the correspondence sent by Elie to Linda on 24 October 2018.

The appellants noted Elie's comments to Linda in June 2020 that he would accept \$60,000 "in lieu of over \$130,000 you owe me" and that he had in September 2020 engaged legal representation and demanded \$115,000. The appellants submitted, however, that it was not until 3 November 2020 (and after Elie had consulted lawyers) that he claimed that Linda owed him \$137,479 repayable on the sale of the Dover Heights property. From this, the appellants submitted that "[t]he Court would readily infer that the reason for this was that having consulted lawyers, the respondent was informed that his claim to the historical debt of \$130,000 was statute barred, unless there was a term that such debt would be repaid within the limitation period". The appellants submitted that Elie therefore ex post facto constructed the oral agreements that made the debts repayable on the sale of the Dover Heights property, which occurred in 2017.

Respondent's submissions

The respondent submitted that the primary judge preferred Elie's evidence at first instance, having regard to questions of credit and the objective contemporaneous evidence and because that evidence accorded with "the logic of events".

The respondent noted that the predominant basis on which the appellants brought this appeal was that the findings of the primary judge favouring the respondent's testimony were "so glaringly improbable" as to have been made in error. The respondent contended that the primary judge's findings were not so attended by error and the appeal should be dismissed as:

the primary judge's findings in relation to the reliability of the records of indebtedness maintained by Linda were not challenged and were, in any event, sound;

the approach sought by the appellants, namely, that this Court should consider certain contemporaneous documents (the records of indebtedness and a tax return) in isolation from all the surrounding objective circumstances, was inconsistent with established authority; and

any challenge to the existence of a term of the purported oral agreements that the loans became repayable upon the sale of the Dover Heights property must be rejected because "it is inconsistent with the totality of the objective background evidence, which supports the conclusion that the sale was the only prospective source of funds open to Linda to repay their commitments to Elie".

The respondent identified several facts that were unchallenged in this appeal. As to credit, the primary judge's unchallenged finding was that Linda was, overall, "less than wholly reliable". His Honour went on to make more specific findings on each of the alleged Agreements:

in relation to the First Agreement, the primary judge preferred the evidence of Elie and rejected Linda's account as inconsistent with the objective circumstances;

in relation to the Second Agreement, Linda's evidence was again found to be inconsistent with the documentary record, and Elie's evidence was preferred; and

in relation to the Third Agreement, Elie's evidence was preferred to Linda's.

The respondent further noted that no challenge was made to the findings of the primary judge in relation to the unreliability of the First and Second Schedules.

Consideration

This appeal challenges closely reasoned findings of fact about three alleged oral agreements. In order to impugn the factual findings which turned upon an experienced primary judge's close assessment of the reliability and credibility of critical witnesses after seeing and hearing them give evidence in the context of a lengthy trial, the significant constraints to appellate interference associated with *Fox v Percy* at [23]-[31] needed to be overcome.

The primary judge correctly acknowledged at the outset of his Honour's reasons that, as the parties relied heavily on testimony of the parties about conversations and events that had taken place several years or in some instances decades ago, the reliability of the parties would be an important consideration. His Honour noted that:

"[22] As a general proposition, all evidence, including documentary evidence, must be submitted to rational analysis, including with respect to the drawing of inferences, having regard to the whole of the evidence and the conduct of the trial: State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq) [1999] HCA 3 at [63], [94], [149] and [155]."

[23] Where determination of critical issues involves the evaluation of oral evidence and disputed events, the process of fact finding should be informed as far as possible "on the basis of contemporary materials, objectively established facts and the apparent logic of events": *Fox v Percy* (2003) 214 CLR 118 at [30]-[31]."

In *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2020] NSWCA 277 this Court (Bell P, Leeming and White JJA agreeing) said, in respect of a judicial finding preferring one account over another and whether that finding was "glaringly improbable" in circumstances where demeanour was a consideration alongside the evaluation of contemporaneous documents:

"[103] [a] heavy burden ... falls on an appellant met with adverse findings of fact. So much flows from decisions of the High Court, including Fox v Percy (2003) 214 CLR 118 at 126; [2003] HCA 22 at [28]-[29] (Fox v Percy); Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679; [2016] HCA 22 (Robinson Helicopter) and Lee v Lee (2019) 266 CLR 129; [2019] HCA 28 at [55]. In the latter case, the plurality said that:

‘Appellate restraint with respect to interference with a trial judge’s findings unless they are “glaringly improbable” or “contrary to compelling inferences” is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, “in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge”’. (footnotes omitted)

...

[107] Although the primary judge’s reasoning on this issue was somewhat terse, his Honour’s assessment was not one, in my view, based solely on objective circumstances or inferences drawn from those objective circumstances. The primary judge expressed himself in terms of ‘believing’ Mr Edwards: see at [90] above. He had before him two diametrically opposed accounts of events and came to a clear view, preferring one over the other, after extensive cross-examination of both witnesses.”

(Emphasis added.)

Considerations of context and tone in answering questions will invariably be important in a primary judge forming impressions of witnesses: *Mt Pleasant Stud Farm Pty Ltd v McCormick* [2022] NSWCA 191 at [58] (Kirk JA, Brereton and White JJA agreeing). Review of a transcript by an appellate court, however conscientious that review may be, is a different exercise from that experienced by the judge presiding over a trial where factual issues are hotly in contest. Such a “desktop” review will generally not pick up characteristics such as sarcasm, arrogance, humour or humility in a witness’ answers nor, as Kirk JA pointed out by way of example in *Mt Pleasant Stud Farm Pty Ltd v McCormick*, will it necessarily lead to an appreciation “that an answer was given angrily in response to some provocation, such that its significance is not what might appear from the page” nor reveal the fact of pauses in answers to questions and what may be discerned from such pauses. This will be a matter of context and may also be influenced by matters such as the tone of the cross-examination which will not always be apparent from the pages of the transcript. All of this is to reinforce the wisdom underpinning the need for caution against appellate intervention in respect of findings of fact reached after a contested hearing where there have been major clashes in the evidence.

First fundamental hurdle to the appellants’ case

In this case, his Honour clearly set out his reasons for making each finding of fact. His Honour clearly stated reasons why he preferred the evidence of Elie to that of Linda in most, but not all, respects. His Honour detailed why he harboured considerable reservations about the reliability of the evidence given by Linda. His Honour explained why he drew the inferences he did about the strained financial position of the appellants at the relevant times.

The appellants' principal challenge to the primary judge's fact finding was based on an analysis of three documents. For reasons I will explain, the primary judge dealt correctly with those documents. His Honour did not err in drawing the conclusions he did about the financial position of the parties based on all the evidence, and in applying that conclusion as one step in his decision-making process about the likelihood of the events that occurred during the contested period.

The first significant hurdle for the appellants' case is that they do not challenge any of the credibility or reliability findings made by the primary judge. The primary judge made several detailed findings about the credibility and reliability of the witnesses on each point of importance:

"[34] Both Elie and Linda were self-interested witnesses. It was clear from their demeanour that both Elie and Linda were highly emotional and invested in the outcome of these proceedings, to a degree that appeared to transcend the monetary value of the dispute..."

[36] ... On the whole, I consider that Elie gave his evidence in a forthright and honest manner. His evidence was detailed and generally consistent. To his credit, he made some concessions. The value of those concessions was to some extent undermined, however, by his practice of excusing himself by blaming errors, inconsistencies or omissions on his inadequate English, his emotional state or his legal advisors. From time to time, his answers were non-responsive and self-serving. In answer to specific questions, he often simply restated the basis for his claim.

[37] ... For reasons which are set out more fully below, even taking into account matters on which I have found his evidence to be unreliable, I consider that his evidence ought, nevertheless, be accorded some considerable weight. His affidavit evidence was not undermined to any significant degree in cross-examination and, as set out below, it generally accords with the logic of events.

...

[39] ... Linda appeared to be unfamiliar with the contents of her own affidavit. As addressed below, much of the hearing was occupied by the consideration of three schedules ... apparently prepared by Linda (or at her direction) and which purported to record the state of indebtedness between the parties. In cross-examination, Linda denied ever having seen the Third Schedule, which was exhibited to her affidavit and was relied on to identify the parties to the Arrangement ... and the state of indebtedness under it from time to time. The Third Schedule was not some minor data point of corroboration. I consider the point to be well taken and that the reliability of Linda's affidavit evidence was shaken by her denial of ever having seen, or considered, a document she had relied on in it.

[40] Further, Linda's affidavit evidence was contradicted, on occasion, by documents put to her in cross-examination, such as with respect to whether Elie had paid a mortgage broker's fee on behalf of her and Raphael in 2014. Linda's evidence was also speculative and propounded

explanations for discrepancies between the contemporaneous accounting material and evidence of transactions (such as with respect to the Newcastle shop) that had not been addressed in her affidavit evidence, notwithstanding their obvious importance. Similarly, the failure of the defendants - without satisfactory explanation - to produce documents in answer to a Notice to Produce, some of which were eventually produced, was also raised as a matter relevant to the assessment of the reliability of the preparation of Linda's affidavit evidence.

[41] On the whole, I consider Linda's evidence to be less than wholly reliable. In reaching this conclusion, I have had regard to specific instances, addressed below, where I have found her evidence to be implausible in respect of significant matters, contrary to the logic of events, contradicted by other evidence she has given, or contradicted by objective contemporaneous evidence."

This is a case in which the primary judge's impressions of the witnesses are critically important. The Agreements in question are wholly oral and turn on the interpretation and acceptance of the accounts given by either Linda or Elie. The advantage enjoyed by the primary judge in engaging in this task was significant. Those unchallenged findings of credibility and reliability pose an initial fundamental obstacle to acceptance of the appellants' case.

Second fundamental problem with the appellants' case

The second fundamental problem with the appellants' case is that they litigated the issues of amounts allegedly owing by Elie prior to the Agreements of \$100,000 and \$53,200 and they lost. No challenge is made to those findings. Once those unchallenged findings are properly taken into account, Linda's evidence about the state of indebtedness between the parties cannot be correct.

His Honour did not accept Linda's account about the \$100,000 amount, which he considered to be "a self-interested reconstruction". It will be recalled that Linda gave evidence that it was a gift and not part of the Arrangement. His Honour rejected Linda's evidence because:

the suggestion that Elie would pay \$100,000 as a gift for accounting services was "both unlikely and out of character with the Arrangement", as it had never been part of the Arrangement that accounting work would be paid for (just as electrical work performed by Elie was not paid for); and

the suggestion that the \$100,000 was a gift "[appeared] even less likely" in circumstances where the First and Second Schedules recorded that Elie was then in debt to Raphael and that debt was not then reduced in either Schedule at all. If Elie had made such a gratuitous payment, and Linda had known about it, it "[seemed] glaringly improbable that it would not have cleared that debt and put Elie into credit."

The primary judge considered separately whether he was persuaded by Elie's account. His Honour found that, by that point, the Arrangement had been in place for almost 30 years. At the time of the June 2009 payment, Elie was recorded as indebted to Raphael. In those

circumstances, “the most likely explanation for how the parties characterised the payment was as a loan within the parameters of the Arrangement. There is nothing in the context or the history of the parties’ relationship to suggest that it was a gift.” His Honour noted that, while he did not accept Elie’s evidence on every issue, he accepted Elie’s evidence on that issue.

The primary judge accepted that Elie advanced the sum of \$100,000 to Raphael in June 2009, and that this sum ought to have been taken into account in any accounting of the true state of indebtedness or otherwise between the parties as at March 2013.

The primary judge’s conclusions about the pre-existing \$100,000 loan (and the \$53,200 loan re the Newcastle shop) by Elie to the appellants were not challenged. The acceptance by the primary judge of Elie’s account and the rejection of Linda’s account about these matters is highly significant in this case. This unchallenged factual background provides a profoundly unpromising foundation for the appellants’ challenge to the primary judge’s findings about the reliability of Linda’s evidence concerning the later Agreements.

The critical documents relied upon by the appellants

As set out above, the primary judge carefully considered each alleged Agreement and each advance said to have been made under each Agreement in light of the contemporaneous documentary evidence and in the context of the evidence provided by Elie and Linda. His Honour preferred Elie’s account in many, but not all, respects. His Honour made findings that Linda was not a reliable witness. His Honour was well entitled to do so.

The essence of the appellants’ case is that there are three critical documents said to be inconsistent with the primary judge’s findings. I do not agree.

First document – the First Schedule

The primary judge found that the First Schedule was unreliable. It relied on communications from Raphael, who was a party to the Arrangement, to Linda, who was not. Raphael at the relevant time suffered from dementia. On the facts found by the primary judge, which are not challenged on the appeal, the First Schedule was completely unreliable. This is because, prior to its creation, as of March 2013, the true state of indebtedness between the parties was “close to being square”.

The appellants’ reliance upon the First Schedule thus fails at the outset. It purports to show an indebtedness between the parties which was litigated and found to be a false picture. No challenge was made to that finding. That alone is fatal to reliance upon the First Schedule as a contemporaneous document inconsistent with findings made by the primary judge.

To the extent that the appellants rely on the First Schedule as illustrating Linda’s state of mind, a number of observations should be made. First, Linda was plainly not aware of the true state of indebtedness between Elie and Raphael pursuant to the Arrangement. Secondly, Linda did know that the debt position as recorded on the First Schedule was incomplete. The primary judge’s

unchallenged finding was that Linda knew that the accounting documents, including the First Schedule, were “records of the state of indebtedness between the trusts and, as Linda acknowledged, there were private transactions of which she was unaware”. Thirdly, his Honour found:

“[197] I consider that when Linda recorded the advances by Elie to her and Raphael under the Agreements as adjusting liabilities between the trusts, she was not taking into account the whole of the relationship between the parties and did not correctly record the true position. She did not do so dishonestly, however, she knew that there were dimensions to the relationship of which she was unaware and she could not have believed that the Schedules she had prepared reflected the complete picture.”

No challenge is made to the finding that the First Schedule “did not correctly record the true position”. The First Schedule does not support a submission that any of his Honour’s findings were “glaringly improbable”.

The appellants also relied on a letter dated 31 May 2015 from Elie to Linda sent in response to the provision of the First Schedule.

Counsel for the applicants submitted both orally and in writing that the letter contained an “admission” as to the state of indebtedness of Elie to Linda at that time. The appellants submitted “[t]his document is an admission by the respondent that he did in fact owe Linda \$92,565.98 but claimed a set-off seemingly because of various amounts and free services he had provided to her and Raphael over the years.”

I reject the appellants’ submission. The letter contained no such admission. The letter, in terms, set out under the heading “Money I paid you” as the first two entries “2003 I transferred my share of new castle shop to you. Value \$40,000” and “26/6/2009 I gave Raphy cheque \$100,000”. These are the two payments the subject of unchallenged findings in Elie’s favour I have set out at [122]-[126] above. These payments are not asserted to be but are presented as an integral part of the Arrangement. The letter concludes “Conclusion you owe me 138,878” (emphasis in original).

The findings of the primary judge that the parties were not indebted to each other as at March 2013 were not challenged. The suggestion that the letter contains an admission to the contrary to those unchallenged findings must be rejected.

In any event, far from constituting an “admission” the letter concludes with an assertion that Elie is owed \$138,878, which is broadly consistent with Elie’s ultimate claim. The primary judge correctly identified this letter as reflective of Elie’s contemporaneous violent rejection of any suggestion that he owed the appellants money at this time. His Honour did not err in dealing with the letter as he did. This letter does not support a submission that any of his Honour’s findings were “glaringly improbable”.

Second document – the Second Schedule

The issues that infected the reliability of the First Schedule affected the Second Schedule, because the latter was reliant on the former in its preparation. No challenge was made to the finding that the First Schedule was unreliable. The Second Schedule suffers from the same faults as the First Schedule in that it relies on Linda's inaccurate second-hand knowledge of transactions. The findings of the primary judge as to the inaccuracy and unreliability of the Second Schedule were not challenged in this appeal.

The Second Schedule does not support a submission that any of his Honour's findings were "glaringly improbable".

Third document – 2013 Barel Family Trust Tax Return

The appellants' argument that the BFT Tax Return for 2013 ("2013 Tax Return") supported the alleged substantial indebtedness of the respondent to the appellants should be rejected. The tax return is inconsistent with the First and Second Schedules. It was appropriate for the primary judge to conclude that the tax return did not support any alleged indebtedness.

The tax return records "Other business income" in the amount of \$150,643. The current assets listed in the schedule to the tax return recorded a loan to Lily Settlement in the amount of \$153,443.71 for 2012, which had reduced to \$123,001.70 for 2013. This was inconsistent with the First Schedule which records the total owed by Lily Settlement to Pimtoka as \$103,001.70 as at 30 June 2013 and the Second Schedule, which provided that as at 30 June 2013 Elie owed \$101,024.38 to the appellants. The Third Schedule was said to record a different amount again.

Aside from these inconsistencies, on the unchallenged findings of the primary judge about the true state of indebtedness between the appellants and Elie in 2013, a 2013 tax return addressing purported indebtedness of one trustee to another trustee tells one nothing about the true amount owing by the appellants to Elie in 2013 (or vice versa).

At best for the appellants, what is recorded on this 2013 tax return goes to Linda's mental state. The problem with reliance upon this document in that regard is an unchallenged finding that Linda knew the First Schedule did not record all payments made by the respondent to her husband and she knew there were debits outside the trusts:

"[72] In my view, the Schedules are unreliable as records of the parties' respective obligations under the Arrangement. The First Schedule depended for its accuracy on communication by Raphael to Linda of all transactions between him and Elie. Linda knew that there may have been transactions of which she was unaware. Moreover, Linda's concern was the accounts of the trusts and, for this reason, excluded transactions which she considered did not fall within the trusts' relationship, even where she knew that they accorded with the purpose of the Arrangement."

[73] Linda said in cross-examination that she prepared the Second Schedule to explain her position to Elie in June 2015. This seems likely and it appears to update and reduce the debt she said she and Raphael were owed. However, its recording of the transactions depended on the accuracy of the First Schedule and it was therefore infected by the same errors and omissions.”

(Emphasis added.)

These findings are not challenged.

The same conclusions apply in relation to the appellants’ reliance on the 2015 BFT tax return. It shows, at best for the appellants purported indebtedness of one trustee to another trustee in 2014 and 2015.

The tax returns were prepared by Linda and, as far as the evidence goes, never seen by Elie. They relate only to the trusts and the unchallenged finding is that she knew there were debits outside the trusts. The tax return was not, as was alleged by the appellants, “independent of [Linda]” and not therefore, as advanced by the appellants, relevantly corroborative per *R v E* (1996) 39 NSWLR 450 at 457 per Sperling J (Handley JA and Abadee J agreeing) and *Ridley v Whipp* (1916) 22 CLR 381 at 392 (Isaacs J), 400 (Duffy and Rich JJ).

It follows that there was nothing “glaringly improbable” about the findings of the primary judge at all.

First, Second and Third Agreements (grounds 1 to 6)

The reliance the appellants sought to place on the First and Second Schedules and the 2013 tax return assumed the reliability of those documents and, critically, did not challenge the findings made by the primary judge about the unreliability of those documents.

The First Schedule did not reflect the state of mind of the first appellant in 2013 about the “true” state of indebtedness between the appellants and Elie as argued by the appellants. It was provided to the respondent only in 2015, and the evidence was silent as to when the document was created.

Moving from the provenance of the document to the hypothetical reception of such a document in 2013, the primary judge said that:

“[111] ... there would have been practically zero chance that Elie would have acquiesced to a demand to pay down the loan at that time. When an allegation that he owed the defendants \$103,001.70 was made in May 2015, his response was swift and angry. He refuted the claim and advanced a claim of his own. There is no reason to believe that he would not have reacted the same way had a conversation to that effect occurred in 2012 or 2013. Accordingly, I reject Linda’s account of the conversation.”

This passage must be read in the context of the primary judge weighing two opposing accounts of a conversation that took place in 2013 relating to the First Agreement. The background circumstances considered in his Honour’s process of reasoning were unchallenged. These

unchallenged facts made Elie's account much more likely than Linda's. I agree with the primary judge that on all of the evidence, Linda's version was a "reconstruction that is inconsistent with the objective circumstances, subsequent conduct of the parties and logic of events". In accepting this finding of the primary judge, I particularly take into account:

the unchallenged finding that at the time of making the First Agreement neither Elie nor CCC was indebted to Linda or Raphael or their related entities (that is, that Elie and Raphael "were close to being square");

the critical problem for the appellants' case that while a debt of over \$150,000 was recorded in the First and Second Schedules, on the primary judge's unchallenged findings those documents did not record the true state of indebtedness under the Arrangement; and

the primary judge's unchallenged finding that "there would have been practically zero chance that Elie would have acquiesced to a demand to pay down" any purported loan at that time. When Linda alleged, incorrectly on the unchallenged findings, that Elie owed Linda and Raphael \$103,001.70 in May 2015, Elie's response was "swift and angry". No challenge was made to the primary judge's finding that there was "no reason to believe that he would not have reacted the same way had a conversation to that effect occurred in 2012 or 2013".

The primary judge separately considered Elie's account. No challenge was made to the foundational facts which underlay his Honour's acceptance of Elie's account. No challenge was made to his Honour's conclusion that it was "highly likely that Linda, at least, was by February 2013, very concerned about the [appellants'] financial outlook", because:

the income position of the appellants looked very weak. The appellants' accountancy practice was their main source of income but from January 2010 to March 2013 it had become a net drain, requiring the appellants to provide it financial support in a sum of at least \$83,000;

the outlook of the accountancy practice was poor. At the relevant time Raphael had suffered a stroke and had started to show symptoms of dementia. Raphael's symptoms commenced in 2012, and by about the time of the First Agreement, Raphael's ability to work was compromised and this affected the accountancy practice;

the appellants' outgoings did not appear to have reduced; that is, the appellants continued to bear their ordinary living expenses and were at the time still financially supporting their son who was studying medicine in Tasmania;

the appellants had no other source of funds;

Linda in April 2013 told Elie (see [56(4)] above) that she used "whatever money I have to block holes. I take money from the business to exist then when I can I give money back to the business to keep it running. I do the same for the superfund. One day I lean to the right one day I lean to the left. I need to exist until I sell the house so I don't care from where the money comes" (emphasis added); and

Linda, at least, had decided by the end of 2012 to renovate the Dover Heights property. Linda admitted as much in cross-examination.

No challenge was made to his Honour's finding that evidence of renovations being started or contemplated, in the context of Raphael's declining health and their deteriorating financial outlook, provided contextual support that the conversation that created the First Agreement, in the terms described by Elie, occurred.

No error has been shown in the primary judge's conclusion that existing debts were not discussed or considered and that the relevant conversation related only to prospective advances by Elie. On that basis, the conclusion that the parties discussed the funds in terms of a loan by Elie, repayable on the sale of the Dover Heights property, is compelling.

No challenge was made to the finding that it would have been clear to the parties that the Dover Heights property would need to be sold, given the appellants' financial situation, and that the funds to repay Elie would come from that sale.

On the basis of these unchallenged findings the conclusion that Elie's account accorded with the probabilities and the logic of events was compelling. No error was made by the primary judge in concluding that there was a First Agreement between Elie and Linda and Raphael, pursuant to which Elie would lend \$70,000 to Linda and Raphael, which would be repayable on sale of the Dover Heights property.

The appellants' challenges to the primary judge's findings about the Second and Third Agreements fail for essentially the same reasons. In addition to all of the unchallenged findings which I have earlier set out, the primary judge identified the following objective circumstances as "obvious" and found that they would have been known and understood by the parties over the entire period from 2013 to 2015. His Honour was correct to do so. All of them told in favour of acceptance of Elie's evidence about the Second and Third Agreements:

the long-standing conduct of Elie and Raphael in financially assisting and doing business with each other, including but not limited to the Arrangement;

Raphael's dementia;

the poor prospects of RBC (being the only recurring source of income for Linda and Raphael disclosed on the evidence); and

the obvious requirement to renovate the Dover Heights property to realise the best return possible to obtain funds to purchase a new home and retire securely.

The critical unchallenged objective circumstance which overlay the whole relationship at the time of making the Agreements was that, as at February 2013, Elie owed a "very modest sum" to Raphael. This unchallenged finding is completely inconsistent with Linda's account that she and Raphael asked, and Elie agreed, to "pay back" a debt owed to them.

To the extent that the appellants sought to argue that Elie failed to dispute the Second Schedule and that this was evidence of the parties' subjective state of mind in 2015, I am unable to agree. The primary judge was correct that the communications relied upon by the appellants did not say "very much at all about what had been agreed". In reaching this conclusion, his Honour stated:

"[193] ... As was clear from the conduct of the hearing, and the course of communications between the parties from 2015, in particular, neither was very consistent in their characterisation of events or reliable in their recollection of what they believed at any point in time. ..."

His Honour noted that while he considered Linda did not correctly record the true position of the indebtedness between the parties in the Schedules, "[s]he did not do so dishonestly, however, she knew that there were dimensions to the relationship of which she was unaware and she could not have believed that the Schedules she had prepared reflected the complete picture."

His Honour concluded that the advances made by Elie from March 2013 were personal advances to Raphael and Linda, at the end of the Arrangement and in anticipation of the sale of the Dover Heights property.

No error has been shown in that conclusion.

Grounds 1 to 6 should be dismissed.

Repayment terms (grounds 7 to 10)

The appellants' contentions reduce to one that all three Agreements were never formed, that the repayment term was no part of any Agreement, and that it was only later formulated "as a device to subvert the operation of the Limitation Act 1969 (NSW)". This was, the appellants submitted, because there was no demand, in terms, for payment, particularly after the sale of the Dover Heights property in December 2017.

I do not accept the appellants' submissions.

Whilst I will not repeat all of the unchallenged findings made by the primary judge here, as I have set them out at [115]-[162] above, I nonetheless take them into account in concluding that his Honour was correct to accept Elie's evidence that the following conversations occurred:

Regarding the First Agreement:

"[106] According to Elie, the conversation continued:

'Elie: I am lending you the money. Please add all the amounts you owe me so you can repay me in full when you sell the house.

Linda: Yes, don't be silly. I'll pay you. I'm surprised you talk like that. That is why we are selling the house so we can clear our debts.'"

Regarding the Second Agreement:

“[131] Elie says the Second Agreement was entered orally by Linda in telephone conversations in May or June 2014. According to Elie, the conversation was to the following effect:

‘Linda: Elie I am in desperate need of help. Your stupid brother was never worried about his family. As an accountant he guided all his clients how make millions while he himself remained broke and poor.

Elie: Don’t say that Rafi was ever an idiot or poor. He sent the children to private schools. You own a 6-bedroom 4-bathroom massive nice house in Dover Heights. Rafi owns the office unencumbered valued over 2 and a half million dollars. There is always kosher food on the table. You have a comfortable standard of living.

Linda: Bull shit you don’t know anything about your brother. He was the black sheep of your family. Your mother only favoured Isaac and Danny. She treated Rafi like rubbish. Anyway, the renovations are costing me more than what I expected. I know you don’t have any money to help me but get it from your brothers. All I need is a \$50,000 loan urgently. Renati has been in touch with a real estate agent and we can get \$4,500,000 for the sale of the house. I will repay you all the money back on the same day that I settle on the sale of the house. Please talk to your brothers and remind them of everything Rafi did for them.

Elie: I will see what I can do.”

Regarding the Third Agreement:

“[147] About a week later, Elie says, he and Linda had another conversation. They discussed Caroline’s reluctance to lend funds to Linda and Raphael. It was in this conversation that Linda allegedly said words to the effect of:

‘Linda: Did you speak to Caroline about lending me and her father \$250,000?

[Elie]: Yes but she is reluctant to do that. I think the main obstacle is Jason. He seems adamant and against lending any money to you and Rafi or anyone else. I don’t think it’s personal.

‘Linda: Oh yes, it is personal. He hates me and Renati. Don’t worry leave it to Renati. She will convince Caroline to lend me the money. She won’t take no for an answer. She knows how to handle Caroline. In the meantime, please see if you can help with whatever money you can lend me. I want to finish the house, pay the bills and move on with our lives. As you can see Rafi’s condition is worsening. I need the house out of my head so I can concentrate on taking care of him. Don’t worry there is not much left to do. Renati has a few real estates on the line. Soon as we sell, I will pay you back your money’.

[Elie]: I will see what I can do to help you.”

In addition, Elie’s letters of 18 and 24 October 2018 and email of 29 June 2020 postdate the sale of the Dover Heights property and are consistent with his account of the Agreements.

The letter from Elie to Linda dated 18 October 2018, leaving aside the recitation of “bitterness and acrimony” described by the primary judge, says:

“...

Should the matter regress to that level you can be sure that:

A) I will also sue you for every cent that you owe me.(\$136,000)

B) Caroline will include in the litigation the \$50,000 you stole from her Superfund member account.

C) In the litigation we will also involve a criminal lawyer to direct the matter to prove amongst other things obtaining money by deception.

...

The ball is in your court. You have seven days to respond and give an undertaking.

After the seven days expire with no undertaking from you all offers will be withdrawn.

Elie Barel.”

(Emphasis added.)

The email from Elie to Linda dated 29 June 2020 provided, relevantly:

“....

Final attempt to resolve an unpleasant situation

From: Elie Barel (xxxx)

To: [Linda Barel] xxxx

Date: Monday, 29 June 2020, 12:14 pm AEST

Linda,

....

As for me, I will accept \$60,000 in lieu of over \$130,000 that you owe me.

Due to previous correspondence and an ample amount of time given to you in the past 2 years to reconsider your position, I can now only give you 72 hours to confirm that you agree to the above terms.

I have made an appointment with the lawyers for this Friday, July 3rd regarding the above matter. I suppose this is when the legal fees will begin to escalate.

The ball is in your court.

Elie Barel

...”

(Emphasis added.)

In any event, the primary judge saw the parties give evidence and accepted the account of the respondent about the Agreements. As to context, the primary judge summarised his findings thus:

“[149] The objective circumstances support Elie’s account. By this time, as set out above, the defendants had spent more on renovations, living expenses and other costs than they had borrowed from ING on the refinance of the Dover Heights property the previous year. The renovations were completed by about 21 April 2015.

[150] At the time, Caroline had not advanced to the defendants any money. Linda denied that she had ever asked for a loan from Caroline. However, as set out below, on 2 June 2015, Linda sent Elie a text message in which she referred to Caroline promising to lend the defendants money to tide them over. Caroline did transfer \$250,000 to the defendants, however, the character and terms of that transfer were disputed and eventually Caroline and Linda agreed that Linda would repay \$225,000 from the proceeds of sale of the unit at Mark Moran and a caveat would protect Caroline’s interest.

[151] Moreover, I consider it clear that, by February 2015, Linda had decided to sell the Dover Heights property imminently. Linda says that she had been approached by a real estate agent in February 2015 and, again, in April 2015 in relation to selling it and that her decision to list the Dover Heights property in April 2015 was in response to the second approach. This seems unlikely to have triggered the decision. It far more accords with the surrounding circumstances – including the renovations, the defendants’ need for funds, Raphael’s poor health – that the defendants had decided before then, of their own accord, to list the Dover Heights property for sale.

[152] Indeed, text communications between Linda and Elie on 9 April 2015 indicate that Linda sought Elie’s help in maintaining the Dover Heights property and its kitchen appliances. The decision to sell had clearly been made by then.”

His Honour was plainly correct that the commercial reality was that, absent sale of the Dover Heights property, there was no other way the appellants could have repaid their commitments. These unchallenged findings about surrounding circumstances made it overwhelmingly likely that the Dover Heights property was the only opportunity, and thus the agreed occasion, for repayment of the commitments.

Grounds 7 to 10 should be dismissed.

Conclusion and proposed orders

For the foregoing reasons I propose the following orders:

Appeal dismissed.

Appellants to pay the respondent's costs.

MITCHELMORE JA: I agree with Payne JA.

McHUGH JA: I agree with Payne JA.

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