

AUSTRALIA / JUDGMENT

Williams, William v Williams, William [2023] NSWDC 10

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District Court

New South Wales

Medium Neutral Citation: Williams, William v Williams, William [2023] NSWDC 10

Hearing dates: 2 and 3 November 2022

Written submissions filed 11, 18 and 25 November 2022

Date of orders: 6 February 2023

Decision date: 06 February 2023

Jurisdiction: Civil

Before: Andronos SC DCJ

Decision: (1) Judgment for the plaintiff in the sum of \$213,000.

(2) The defendant pay interest on the judgment sum in the amount of \$36,532.13.

(3) Stay orders (1) and (2) for 21 days.

Catchwords: RESTITUTION — Nature of restitutionary liability — Common counts — Money had and received to the use of the plaintiff – Onus of proof – Money paid to defendant at the plaintiff's direction – Where plaintiff requested repayment – Where defendant alleges gift

Legislation Cited: Australian Securities and Investments Act 2001 (Cth), s 12CB

Cases Cited: Australian Securities and Investments Commission (ASIC) v Kobelt (2019) 267 CLR 1

Blomley v Ryan (1956) 99 CLR 362

Bosanac v Commissioner of Taxation [2022] HCA 34

Briginshaw v Briginshaw (1938) 60 CLR 336 at 361

Coote v Kelly; Northram v Kelly [2016] NSWSC 1447

Coshott Family Pty Ltd v Lyons [2022] NSWCA 216

David Securities Pty Limited v Commonwealth Bank of Australia (1992) 175 CLR 353; [1992] HCA 4

Harsant v Blaine Macdonald & Co (1887) 56 LJQB 511

Helton v Allen (1940) 63 CLR 691 at 712

JZ Lee Interiors Pty Ltd v Smith [2015] VSC 693

Leary v Federal Commissioner of Taxation (1980) 32 ALR 221

Moses v Macfarlan (1760) 2 Burr 1005; (1760) 97 ER 676

Nguyen v Cosmopolitan Homes (NSW) Pty Ltd [2008] NSWCA 246

Nominal Defendant v Cordin [2017] NSWCA 6

Pape v Westacott [1894] 1 QB 272

Port of Melbourne Authority v Anshun (1981) 147 CLR 589; [1981] HCA 45

Reid v Bennett [1955] VLR 505

Roxborough v Rothmans of Pall Mall Australia Limited (2001) 208 CLR 516

Scott v Davis (2000) 204 CLR 333

Texts Cited: G E Dal Pont, Law of Agency (4th ed, 2020, LexisNexis)

K Mason, JW Carter and G J Tolhurst, Restitution Law in Australia (4th ed, 2021, LexisNexis)

Category: Principal judgment

Parties: William Owen Williams (plaintiff)

William Owen Williams (defendant)

Representation: Counsel:

Ms L Hulmes (plaintiff)

Solicitors:

Clayton Utz (plaintiff)

Defendant (self-represented)

File Number(s): 2021/00085057

Publication restriction: None

Judgment

1. The plaintiff is the defendant's father. The plaintiff acquired a work-related illness in 1994, as a result of which he is unable to engage in full-time employment. He received regular workers compensation payments, eventually backdated to the date of his injury in 1994. In April 2017 he brought a workers injury claim against his former employer, which was, in essence, a claim for past wages over and above the statutory workers compensation benefits he had received up until that time. The plaintiff is presently 69 years old.
2. On 25 January 2018, the plaintiff's workers injury claim was settled at mediation. The plaintiff attended that mediation together with his barrister, his solicitor, his son, William (the defendant), his son's partner, Kristal Mackey, and their toddler. In settlement of the workers injury proceedings, a confidential sum was paid into the plaintiff's solicitors' trust account. A sum of \$213,000 (the "Settlement Sum") was subsequently disbursed from the trust account to the defendant's account.
3. The plaintiff's claim is for money had and received by the defendant for the use of the plaintiff. He says the Settlement Sum belongs to him and its payment into the defendant's account was an expedient because the plaintiff did not, at the time, have a bank account that was solely his and he wished to effect the transfer of the Settlement Sum as soon as possible. He further says that the defendant held that money subject to an arrangement that it would be paid to the plaintiff as and when he required once he had opened a bank account in his own name.
4. A secondary purpose was that the defendant could use at least part of the Settlement Sum to buy a block of land and/or a transportable home or granny flat for the plaintiff with the balance to be held for, and ultimately paid to, the plaintiff. There is no dispute that the defendant has not paid that Sum to the plaintiff and did not use the Settlement Sum or any part of it to buy either a block of land or transportable home for the plaintiff. The plaintiff says he requested payment of the whole Settlement Sum from about April or May 2019.
5. The defendant was unrepresented at the hearing, but had instructed solicitors at an earlier stage of the litigation. When he had such representation, the defendant filed a defence in which he admitted that the Settlement Sum was paid into his account, but alleged that it had been gifted to him by the plaintiff. He further pleaded that he had paid \$70,000 to the plaintiff and had paid various of the plaintiff's expenses after the mediation, but did not plead it was part payment of the Settlement Sum.
6. The plaintiff relies on two affidavits affirmed by him, and a further two affidavits affirmed by Mr James McEnaney, his solicitor in the workers injury proceedings. The defendant did not comply with an order of the Judicial Registrar on 27 July 2022 that he serve his affidavits by 26 August 2022. Rather, he served two "responses" to the plaintiff's evidence in chief on 9 September 2022, to which the plaintiff and Mr McEnaney affirmed affidavits in response.

7. The form of the defendant's responses did not comply with the orders of the Judicial Registrar. Nevertheless, I did not treat the responses as inadmissible on that basis. As the defendant affirmed the truth of their contents, I admitted the responses into evidence, subject to specific objections, and allowed the defendant to be cross-examined on their contents. The plaintiff had, in any event, anticipated the reception of the responses into evidence by addressing them in his evidence in reply.
8. The defendant represented himself, appearing by audio-visual link. He briefly cross-examined the plaintiff and Mr McEnaney. He was in turn cross-examined by counsel for the plaintiff.

Issues

1. The principal issues for determination are:
 1. Whether the plaintiff has established that he is entitled to restitution in the sum of \$213,000 from the defendant, as money had and received by the defendant for the plaintiff's use;
 2. Whether the defendant has established that the sum of \$213,000 paid into his bank account on 5 April 2018 was a gift from the plaintiff to him.

Findings of fact

1. In 1994 the plaintiff was employed at Blaney Abattoirs Pty Ltd ("Blaney Abattoirs") in Blaney, New South Wales as a general labourer. He suffered a workplace injury, which resulted in him contracting Q Fever disease, and he could no longer work full-time. He eventually received workers compensation benefits from Blaney Abattoirs.
2. The workers compensation payments were initially paid into a joint Commonwealth Bank account held by the plaintiff and his then wife. They separated in or about 1995 or 1996, when the defendant was about 11 or 12 years old, and the plaintiff stopped using that account. The workers compensation payments were thereafter paid by cheque, which the plaintiff cashed at a local club to pay for living expenses. He also made a small amount of money from odd jobs. From about 1996 or 1997, the plaintiff operated a joint account with his nephew, Dean Smith, to pool resources and help each other if either of them needed additional money at any time. As the plaintiff recalls, his nephew always replenished the account whenever he made a withdrawal.
3. The plaintiff brought a workers injury claim against Blaney Abattoirs on or around 13 April 2017, seeking to recover unpaid past wages over and above the statutory rate of compensation. The workers injury damages claim went to mediation on 25 January 2018 at which the plaintiff was represented by Mr McEnaney, now of counsel but then a solicitor, and Mr Andrew Parker of counsel. The defendant, the defendant's partner, Kristal, and their 3-year-old son were also present.

4. The plaintiff does not appear to have had a home of his own for many years. He has mostly lived with relatives or in granny flats or caravans on other people's properties for reduced rent in exchange for undertaking basic caretaking responsibilities.
5. Prior to the mediation, the plaintiff and defendant had several conversations about the plaintiff's future. The plaintiff was considering using any settlement monies from his workers injury claim to move to a place of his own on the south coast of New South Wales. The defendant suggested to him that he instead move to Victoria to be close to the defendant and he would help the plaintiff locate a block of land on which to put a transportable home or shed in which he could live. The defendant also suggested an alternative arrangement for the defendant to buy a property and for the plaintiff to live with him and his family, either in the same house or in a granny flat or transportable home on the property. The plaintiff was undecided as at the date of the mediation. Over time the plaintiff came to reject the idea of living under the same roof as the defendant, but he remained open to living in a freestanding shed or granny flat on the same property.
6. The plaintiff understood, at the time, that any settlement reached at the mediation would disentitle him from receiving any further workers compensation benefits or payment for medical expenses resulting from his workplace injury. He believed that he would not be entitled to Centrelink benefits for a period. Both matters were discussed at the mediation in the presence of the defendant.
7. The mediation was successful and a Deed of Release, the terms of which are confidential, was executed. Mr McEnaney asked the plaintiff for his bank account details so the Settlement Sum, net of solicitors' costs and disbursements, could be transferred to him. There is a dispute as to what was said, and in whose presence, which is addressed below. There is no dispute, however, that Mr McEnaney was provided with the defendant's bank account details at the mediation and, on 5 April 2018, the sum of \$213,000, comprising the net Settlement Sum due to the plaintiff, was paid into the defendant's bank account.
8. Sometime in late 2017 or early 2018, the plaintiff and defendant had a discussion about a particular block of land that was for sale near the defendant's property at Longwood, Victoria. At the plaintiff's direction, the defendant asked the seller how much the seller wanted for the block, and was informed the sale price was \$80,000. The parties had previously discussed \$30,000 as the approximate cost of a block of land near the defendant's property. The defendant formed the view that the vendor wanted too much and he informed the plaintiff. The plaintiff speculated in his evidence that the defendant did not want to purchase a block for him, but the evidence does not make good this speculation.
9. In about August 2018, the defendant purchased a property at Flowerdale in Victoria, using at least \$100,000 of the Settlement Sum to do so. There is a dispute as to what was discussed between the parties with respect to the use of part of the Settlement Sum for that purchase, which is addressed below. The evidence did not establish how much of the Settlement Sum was used, what the purchase price of the Flowerdale property was or how the balance of the

Settlement Sum was spent. There is no dispute that the whole of the Settlement Sum has now been spent, although there is no evidence that the defendant was unable to pay an equivalent sum to the plaintiff in August 2018.

10. Between 2017 and 2019, the plaintiff drove to Victoria at least 15 times to drop off the majority of his belongings with the defendant in preparation for possibly moving to the area and to spend time with the defendant and his family.
11. On 3 April 2019, the plaintiff closed the bank account he operated with his nephew and opened a new bank account with Westpac solely in his own name. The amount standing to the credit of the plaintiff and Mr Smith in the joint account, \$372.13, was transferred to the plaintiff's new account. A week later, \$24,505.15 was deposited into that account being a payment on account of a Westpac life insurance policy, which appears to have been the plaintiff's main source of funds to live on over the next few months.
12. The plaintiff says, and the defendant denies, that in about April or May 2019 he visited the defendant and sought payment of the Settlement Sum. He further alleges that the defendant concocted a story about his business being under police investigation and his accounts being frozen as a device to avoid paying the Settlement Sum as demanded. Whether such a demand was made at this time and what the defendant said in response is also addressed below.
13. In about July 2019, the defendant travelled to the United Kingdom for about three weeks for a holiday. The plaintiff initially said that he was unaware that the defendant intended to do so, but later acknowledged that he was aware that the defendant had intended to take that trip. While he was away, the defendant was in communication with his aunt (the plaintiff's sister), Enfys Murray. The plaintiff had also been in contact with her during that period.
14. The plaintiff was upset that the defendant had gone overseas. He says it was because the defendant had begged off a call in June 2019 without calling him back and had gone away without yet paying over the Settlement Sum to him. He may have expected to stay with the defendant, at least for a time. In a Facebook message sent to the defendant on 25 June 2019, Ms Murray says:

"... Nothing for you to worry about here hun. I was worried about your dad. I am trying to get him to come stay with me .. but he is waiting for you to get home as he already gave notice at his place. Anyway I was just hoping to give him some good news as to your return. Please don't get me wrong ... he isn't winging [sic, whingeing] ... I'm just worried for his health." [emphasis added]

1. I accept this contemporaneous evidence as demonstrating that, at least as at late June 2019, the plaintiff had not yet become agitated or concerned about the defendant's whereabouts. This changed, however. In his affidavit evidence, the plaintiff says that he made two trips to Victoria "to look for answers from my son" and was unable to locate the defendant, at least on the first occasion.

2. Sometime before September 2019, the plaintiff applied for social security benefits. Certain documents necessary for his application were at the defendant's property and he travelled to Victoria to retrieve them in the first week of September 2019. The plaintiff says he found it difficult to reach the defendant so he contacted Kristal's mother and she contacted the defendant. The parties agree that the defendant texted the plaintiff on the afternoon of 4 September 2019 and invited the plaintiff to visit him at Flowerdale. The plaintiff says he attended the defendant's property the following day whereas the defendant says it was 60 to 90 minutes later, although nothing turns on that discrepancy.
3. The parties agreed that they had a heated exchange, but there is a dispute as to what occurred and was said, which is addressed below.
4. Shortly after the plaintiff's visit to the defendant in September 2019, he commenced steps to recover the Settlement Sum, first approaching Legal Aid NSW and then the NSW Police, and ultimately being put in touch with his current solicitors, who made a written demand for repayment of the Settlement Sum in July 2020.

Payments between the parties

1. There was evidence of a practice by which monies were transferred between the parties from time to time, although the amounts and characterisation of those transfers as gifts or loans was not agreed.
2. The plaintiff alleged that certain payments in August 2017 (\$16,000 and \$2,000) were loans. The defendant denied the sum of \$16,000 was a loan and says he repaid the payment of \$2,000 in September 2017. Given the plaintiff's practice of using cash to pay his living expenses, I accept that the defendant repaid this sum to the plaintiff as evidenced by cash withdrawals from his bank account on 18 September 2017. The defendant further says that he made cash payments to the plaintiff of between \$3,000 and \$10,000 on 6 different occasions and paid certain bills on the plaintiff's behalf, such as his car registration. In his evidence, he describes the payments as gifts. The plaintiff admits that, at his request, the defendant made payments to him of \$5,000, \$6,000 and \$3,950 prior to April 2019 to cover his living expenses. He says, however, that those payments did not represent part payment of the Settlement Sum and neither party understood them to be part payment at the time. He did not seek to explain why the defendant made those payments but simply accepted the benefit of them.
3. As there is no pleaded case concerning the characterisation of the payments, it is unnecessary in these proceedings to characterise them as loans or gifts or, indeed, to reach any conclusion about the amounts in issue. In his defence, the defendant refers to the payment of some \$70,000 to the plaintiff and that he paid certain of the plaintiff's bills, although there is no allegation that the payments were part payment of the Settlement Sum, form the basis of a set-off or were paid under a mistake. It may well be that the defendant has a hitherto unarticulated claim in respect of some of those payments but, as such a claim

was not pleaded, it would be unfair to the parties to seek to determine that as an issue in these proceedings. Subject to any estoppel in accordance with the principles of *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589; [1981] HCA 45, it may well be open to the defendant to bring such a claim. I express no view as to the availability or merit of any such claim.

Determination of disputed questions of fact

Matters in dispute

1. The key issue between the parties is, of course, what was the arrangement pursuant to which the Settlement Sum was deposited into the defendant's account in April 2018. The plaintiff says that the defendant was to hold the monies for the plaintiff, either to pay to him when he had opened a new bank account or to use to purchase a property or transportable home for the plaintiff's use, with the balance eventually to be paid over to him. The defendant says that Settlement Sum was a gift and, although he intended to use it for the benefit of the whole family, he was not obliged to use it in any particular way.
2. In determining this issue, it is necessary to assess the parties' evidence on a number of issues which bear on it directly or inferentially. If the plaintiff has established a cause of action, a collateral question arises as to when that cause of action was complete.
3. In order to determine the key issue, the following factual disputes must be resolved:
 1. What was said by the parties to each other at or around the time of the mediation on 25 January 2018, and what were the terms of the arrangement at the time the Settlement Sum was deposited into the defendant's account in April 2018.
 2. What was said by the parties to each other with respect to the purchase by the defendant of the property at Flowerdale. While not bearing directly on the principal issue in the proceedings, the plaintiff says the conduct of the parties corroborates the plaintiff's account of the arrangement between them.
 3. Whether the plaintiff sought payment from the defendant of the Settlement Sum and what was said between the parties in May 2019 and in September 2019. Otherwise, whether demand for payment of the Settlement Sum was made by the plaintiff prior to the written demand of July 2020.

Approach to assessment of witnesses' evidence

1. The plaintiff bears the onus of persuading the Court that each of the factual elements of his claim for money had and received is made out; the defendant bears the onus in respect of his defence that the Settlement Sum was deposited into his account as a gift from the plaintiff.

2. There are no contemporaneous or corroborative documents that refer to the terms of any arrangement between the parties with respect to the Settlement Sum. There is only limited corroboration of the plaintiff's evidence from Mr McEnaney, whose involvement in the matters in dispute was limited to a brief period during the mediation on 25 January 2018. The contemporaneous Facebook message communications between the defendant and Ms Murray shed some light on the relevant events during the course of 2019.

3. Where proof of a fact is required:

"the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality": *Helton v Allen* (1940) 63 CLR 691 at 712; *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

1. In *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 at [55], McDougall J summarised the position as follows:
 1. A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
 2. Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
 3. Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and
 4. A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.
1. Ordinarily, documentary evidence, both of a primary or secondary (contemporaneous or near contemporaneous) character, in particular if unguarded or neutral in origin, ordinarily will be attributed greater probative weight than viva voce evidence ventilating a recollection of conversation, conduct, observation or perception: *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246.
2. Counsel for the plaintiff referred the Court to *The Nominal Defendant v Cordin* [2017] NSWCA 6, in which Davies J referred to his earlier judgment of *Coote v Kelly*; *Northram v Kelly* [2016] NSWSC 1447, in which his Honour collected a number of authorities that provide assistance in dealing with credibility issues and the fallibility of human memory.
3. The approach of Davies J, which I respectfully adopt, is set out below:

[165] In *Coote v Kelly; Northam v Kelly* [2016] NSWSC 1447 I collected a number of authorities that have provided assistance in dealing with credibility issues and the fallibility of human memory. I recorded these authorities as follows:

[100] In *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 Lord Pearce discussed credibility. The first two matters he raised dealt with truthfulness, and he then went on to say (at 431):

Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

[101] In *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) Leggatt J said:

[15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

[17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or

traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

- [18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
- [19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
- [20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does or does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
- [21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when

all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

[22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

[102] In *Campbell v Campbell* [2015] NSWSC 784 Sackar J said:

[73] In *Watson v Foxman* (1995) 49 NSWLR 315 and 319, McLelland CJ in Eq made the following remarks:

...human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

[74] I made the following observations in *Craig v Silverbrook* [2013] NSWSC 1687 at [140]-[142]:

[140] Whilst a trial judge is entitled to make observations relating to the demeanour of certain witnesses, it is a notoriously crude and inaccurate methodology. Its defects have been exposed on numerous occasions.

[141] In that regard, I am of course mindful of the comments of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 (at [30]-[31]) when they remarked (citations omitted):

[30] It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. Thus, in 1924 Atkin LJ observed in *Societe d'Avances Commerciales (Societe Anonyme Egyptienne)*

v Merchants Marine Insurance Co (The "Palitana"):

"... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."

[31] Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility...

[142] In the recent decision of McGraddie v McGraddie and another [2013] UKSC 58; [2013] 1 WLR 2477, the UK Supreme Court emphasised that, especially in cases where a trial judge is faced with a stark choice between irreconcilable accounts, the credibility of the parties' testimony, and the trial judge's assessment of the character of witnesses and the manner in which the witnesses give evidence, is of primary importance. Those observations are particularly relevant to the present case. Similar observations have been made in Australian authorities (Fox v Percy at [23]; Rosenberg v Percival [2001] HCA 18; (2001) 205 CLR 434 at [41] per McHugh J and see generally comments in Ritchie's Uniform Civil Procedure NSW at SCA s 75A.20).

[75] In Camden v McKenzie [2008] 1 Qd R 39 at [34] Keane JA (as he then was) made the observation that "the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation." This remark was cited with approval by Leeming JA (with whom Barrett JA and Tobias AJA agreed) in New South Wales v Hunt (2014) 86 NSWLR 226 at [56].

[76] Hallen J recently set out the relevant principles in Evans and Braddock [2015] NSWSC 249 at [70]-[77]. After referring to Watson v Foxman, his Honour said:

[71] In that case, his Honour was talking of a cause of action founded on s 52 of the Trade Practices Act 1974 (Cth) or s 42 of the Fair Trading Act 1987 (NSW): see the discussion by McDougall J in Harbour Port Consulting v NSW Maritime [2011] NSWSC 813, at [10] - [18]. However, as McLelland CJ in Eq also pointed out, the views apply to all types of litigation.

[72] I also remember what was said by Emmett J (as his Honour then was) in Warner v Hung, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (No 2) [2011] FCA 1123; (2011) 297 ALR 56, at [48]:

"When proof of any fact is required, the Court must feel an actual persuasion of the occurrence or existence of that fact before it can be found. Mere mechanical comparison of probabilities, independent of any belief in reality, cannot justify the finding of a fact. Actual persuasion is achieved where the affirmative of an allegation is made out to the reasonable satisfaction of the

Court. However, reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding are considerations that must affect whether the fact has been proved to the reasonable satisfaction of the Court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences (see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2)."

[73] The credibility of a witness and his, or her, veracity may also be tested by reference to the objective facts proved independently of the evidence given, in particular by reference to the documents in the case, by paying particular regard to his, or her, motives, and to the overall probabilities: *Armagas Ltd v Mundogas S.A. (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, per Robert Goff LJ, at 57. Also see, *In the matter of Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547, per Black J, at [7].

[74] A court, in cases involving events which occurred long before the litigation, usually prefers to rely upon contemporaneous, or near contemporaneous, documents, which will often provide valuable and, usually, more revealing, information than what may be flawed attempts at recollection of those facts by persons with an interest in the outcome of the litigation: *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, per Jagot J, at [1247]. Greater weight is usually accorded to such documents, as often they provide a safer repository of reliable fact, particularly when it is clear that they have been prepared by a person with no reason to misstate those facts in the documents and where there is no suggestion that the documents are other than genuine: *Hughes v St Barbara Mines Ltd* [No 4] [2010] WASC 160, per Kenneth Martin J, at [157].

[75] ...

[76] The circumstances of this case, make what was written by Tamberlin J in *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd* (trading as Uncle Ben's of Australia) (Federal Court of Australia, Tamberlin J, 29 June 1995, unrep), at 122 - 123 (in a passage cited with approval by the High Court when it upheld his Honour's decision: *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* [1999] HCA 15; (1999) 161 ALR 599, at [15]) appropriate to remember:

"[Given the lapse of time] between the events and conversations raised in evidence and the hearing of the evidence before me, the only safe course is to place primary emphasis on the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence. In circumstances where the events took place so long ago, it must be an exceptional witness whose undocumented testimony can be unreservedly relied on. The witnesses in this case unfortunately did not come within that exceptional class. The discussions referred to in evidence were capable of bearing quite opposed meanings depending on subtle differences of nuance and emphasis, and a proper appreciation of the significance of those matters must necessarily be considerably diminished over such a long period of time."

[77] Finally, I should mention an article by the former Chief Judge at Common Law, P McClellan entitled "Who Is Telling the Truth? Psychology, Common Sense and the Law" (2006) 80 ALJ 655, in which he wrote, at 665, quoting a passage from the "Guidelines Relating to Recovered Memories" (2000) of the Australian Psychological Society:

"Memory is a constructive and reconstructive process. What is remembered about an event is shaped by how that event was experienced, by conditions prevailing during attempts to remember, and by events occurring between the experience and the attempted remembering. Memories can be altered, deleted and created by events that occur during and after the time of encoding, during the period of storage, and during any attempts at retrieval." (Emphasis added)

Arrangements made at the mediation with respect to the Settlement Sum

The plaintiff's evidence

1. The factual dispute between the parties concerning the events of 25 January 2018 concern the circumstances in which the plaintiff directed the Settlement Sum be paid into the defendant's account. Once agreement had been reached as to the terms of the settlement, the plaintiff says Mr McEnaney approached the plaintiff in relation to completing an "Authority to Transfer Funds" form, which would authorise the solicitors to transfer the Settlement Sum to the plaintiff after deducting their own costs.
2. Mr McEnaney asked the plaintiff if he had his bank information, to which he responded that he did not. Mr McEnaney then said, "That's alright, you can provide it later then," to which the plaintiff responded, "No that's okay, I can give you my son's account".
3. The plaintiff's evidence continued that he had a conversation to the following effect with the defendant:

Plaintiff: "Could I use your bank details, and then you can transfer it back to me once I open my own account?"

Defendant: "Yeah, no problem."

1. Either Mr McEnaney or the defendant then filled in the Transfer Authority using the defendant's bank details and the plaintiff signed the form.
2. Mr McEnaney's evidence corroborates the account of the plaintiff as set out at paragraph 42 above. Mr McEnaney, however, is silent with respect to the exchange alleged in paragraph 43. In his first affidavit, the plaintiff alleged that Mr McEnaney was present when the words at paragraph 43 were said. The defendant denied the statement was ever made and said that there were occasions when he and the plaintiff spoke during the mediation in the absence of Mr McEnaney. In his oral evidence, the plaintiff accepted that Mr McEnaney was not present during conversations concerning the Settlement Sum. In re-examination with reference to his affidavit, he reverted to his initial position.

3. Given that Mr McEnaney is silent on the question of whether these words were spoken, his presence would not materially advance the position of the plaintiff on the question of whether the words were spoken at all. I did form the view, however, that the plaintiff was at least to some extent suggestible and, while I do not consider him to be a dishonest witness, in light of the approach discussed by Davies J in *Nominal Defendant v Cordin*, I find that I must treat his uncorroborated evidence with care.

The defendant's evidence

1. The defendant agrees that at the mediation Mr McEnaney asked the plaintiff for his bank details and the plaintiff said that he did not have those details with him. The defendant's evidence diverges from the plaintiff's at that point. He says that he told Mr McEnaney that he had the details of the plaintiff's joint account with Mr Smith with him on his phone, which he says he had because he had from time to time used his phone to transfer funds to his father's joint bank account. The defendant's evidence is that the account was linked to the plaintiff's superannuation account, although nothing appears to turn on this detail. The plaintiff does not recall if that account was linked to his superannuation account, but denies ever having any conversation with the defendant to that effect.
2. Neither the plaintiff nor Mr McEnaney recalled the defendant offering the plaintiff's joint bank account details, although neither denies that the defendant did so.
3. The defendant denies that the plaintiff said the words at paragraph 43 above. He alleges a separate conversation with Mr McEnaney in which Mr McEnaney advised the plaintiff in the following terms:

"[W]illiam by giving this monies [sic] to you [sic] son by way of transfer you are relinquishing you [sic] right to the monies, do you understand?" or "once you give this by way of transfer to your son you will have no recourse to the monies".

1. According to the defendant, the plaintiff responded with "that's fine" or "that's ok".
2. Mr McEnaney denies ever having had a conversation to this effect. The plaintiff also denies it.
3. The defendant gave evidence as to further conversations either during a break in the mediation or just after it concluded when he and the plaintiff were outside the building having a cigarette. He says the plaintiff said words to the effect of "Son, I'm giving you the money because I will just waste it on junk and gambling".
4. He also gave the following evidence:

Q. Your position is that your father gave up more than \$200,000 in cash in order to receive an aged pension that would be paid weekly or fortnightly?

A. That's my belief, yes. In return I would purchase a house and look after him. That was the purpose of him relocating to Victoria.

Q. Can I ask you about that, because your evidence so far has been that your father agreed to give this money to you as a gift, but what you've just said to the Court is that he agreed to give the money to you in return for you purchasing a house.

A. It was my offer to help him, support him. I was buying a house to support him. That's all I've ever done is just try to help.

Q. Mr Williams, I put to you that there's a difference between somebody giving you money unconditionally so that you can do whatever you please with it, and giving you money on the basis that you will buy a house for them to live in. Do you agree that there's a difference between those two things?

A. There is a big difference.

Q. What you're saying to the Court now is that the basis on which you say the plaintiff gave you the money was so that you would buy a house for him to live in?

A. Incorrect.

Q. I'm sorry, I didn't hear your answer there?

A. Incorrect. I offered that I would be buying a house to help support him.

Q. That offer was made during the mediation?

A. After the mediation and many conversations after that prior to buying Flowerdale. There was never a he gives me the money and then I've got to buy a house to support him. It was he gave me the money, I said I'd look after him, give him somewhere to stay because he kept saying that he always had nowhere to live, he was always moving around or getting kicked out or couldn't afford it, so I said I will support you, I will look after you, give you a roof over your head to see your days out comfortably.

Q. But your evidence is that you didn't say any of those things about giving him a roof over his head at the mediation, they were discussed later; is that the position?

A. That was after the mediation, on the way out of the building, downstairs on the street, having a cigarette.

Q. During the mediation, though, whilst you were still at the mediation, your evidence is that at that point, the plaintiff offered to give you the money with nothing in return; is that correct?

A. That is - that is correct. On the basis that he would be able to claim the pension.

Assessment of the witnesses and evidence

1. In assessing the evidence, the only witness whose evidence I can accept without reservation is Mr McEnaney. Mr McEnaney denies the defendant's account at paragraphs 49 and 50 above. In the absence of a documentary record of such a conversation, signed by the plaintiff, such a conversation is inherently implausible.
2. Accordingly, I do not accept the defendant's evidence in that regard.
3. Both the plaintiff and defendant gave their evidence in a forthright manner and appeared to be doing their best to assist the Court. I make no findings on the basis of their demeanour. In the absence of corroboration, however, I have found it necessary to consider the evidence of each of them according to the approach set out in *Nominal Defendant v Cordin*. As indicated above, I found the plaintiff to be suggestible, which slightly devalues the worth of his affidavit evidence. Similarly, I do not regard the defendant's recollection to be reliable in light of his obvious interest in the outcome of the proceedings and the implausibility of his account of the conversation with Mr McEnaney above.
4. Overall, I prefer the plaintiff's account of the disputed conversations at the mediation. In my view, it is more conformable with the objective and agreed evidence that the plaintiff directed payment of the Settlement Sum into the defendant's account to be held until he opened his own bank account or otherwise directed the monies be applied to a property or home for himself.
5. While I accept the defendant is more likely to be correct as to having had the plaintiff's bank account details with him, I nevertheless accept that the plaintiff did not have an account that was solely his and did not want the money to be paid into the joint account he shared with Mr Smith.
6. I accept that the plaintiff said words to the effect that he was concerned that he would gamble or otherwise fritter the money away if he had immediate access to it. I accept that the Settlement Sum was a significant amount of money for him and he wished to use it wisely. It should be noted, however, that this purpose would equally be served by the plaintiff providing for the deposit of the Settlement Sum into the defendant's account and it being held on the plaintiff's behalf: this purpose is more consistent with the plaintiff retaining an interest in the Settlement Sum than the plaintiff gifting it to the defendant. The plaintiff wished to make provision for himself, not his son.
7. The defendant has alleged that the plaintiff was motivated to direct the deposit of the Settlement Sum into the defendant's account in order to conceal it from the social security authorities. The plaintiff denied being so motivated and it was not established that the sum of \$213,000 would have made any difference to his eligibility or that he believed that it would. I do not find that allegation is made out.

8. I find that the parties had at least one conversation – perhaps more – in the absence of Mr McEnaney on the day of the mediation. The parties discussed how the Settlement Sum would be used, in particular, that the plaintiff wished to use at least part of the Settlement Sum to buy a block of land and/or a transportable home where he could live near to the defendant. While the details were not discussed, there was a discussion as to how the Settlement Sum would be used for the plaintiff's benefit.
9. The defendant's evidence goes further, however. He alleges that the plaintiff expressly used words indicating an intention to gift the entire Settlement Sum to him unconditionally. I do not accept that the plaintiff used any such language. The defendant may well have subsequently formed the belief that he was entitled to treat the Settlement Sum as his own, but he has not established that the plaintiff ever said words indicating an intention to gift the Settlement Sum to him.
10. Ms Hulmes, for the plaintiff, made a number of submissions generally as to the credit of the defendant. While I agree that the defendant's evidence was not wholly reliable, there were occasions where I found his evidence more plausible and more conformable with objective or agreed facts than that of the plaintiff. I did not find him to be dishonest, although I found his recollection to be refracted through the prism of his own self-interest. The same may be said of the plaintiff. However, in respect of the critical question of the terms on which the plaintiff directed the payment of the Settlement Sum into the defendant's bank account, and the communication in respect thereof to the defendant, I have found that the plaintiff's evidence is more conformable with objective or agreed facts than that of the defendant. Where I have preferred his evidence, it is on this basis.
11. Finally, the plaintiff made a submission that the absence of Ms Mackey had not been explained and that the Court should therefore draw a *Jones v Dunkel* inference that her evidence would not have assisted the defendant. Ms Mackey and the defendant have broken up. In the circumstances, I consider that a sufficient explanation for the defendant not having called her to give evidence on his behalf.
12. I accept, therefore, that the plaintiff directed the Settlement Sum be paid by his solicitor into the defendant's bank account principally to be held by him until the plaintiff opened another bank account in his own name and directed the defendant to transfer the Settlement Sum to that account and that he told the defendant on 25 January 2018 that this was his intention. I also accept that the plaintiff intended for the Settlement Sum to be deposited into the defendant's bank account for the secondary purpose of some money being used to acquire a place for him to live and that this intention had been made clear to the defendant at or around the time of the mediation. I do not accept the defendant's account that the plaintiff said words to the effect that the Settlement Sum would be a gift to the defendant.

The purchase of the property at Flowerdale

1. The Settlement Sum was transferred from the solicitors' trust account to the defendant's bank account on 5 April 2018. By directing payment into an active bank account of the defendant, the plaintiff clearly intended that the Settlement Sum would be mixed with the defendant's own money and not held as a separate identifiable fund. There is no evidence as to the contents of the defendant's bank account at any particular time and, as indicated at paragraph 18 above, while there was evidence that the Settlement Sum has all been spent, there was no evidence that the defendant had put it beyond his capacity to pay a sum equivalent to the Settlement Sum to the plaintiff at the time of the purchase of the Flowerdale property. This is relevant to the question of when any cause of action arises.
2. In about August 2018, the defendant bought a house at Flowerdale, Victoria. The plaintiff says that the conduct of the defendant with respect to that purchase sheds light on the events of January 2018 because they evince an awareness on the defendant's part that the Settlement Sum had not been gifted to him. He also says that the use of the money in the defendant's account was contrary to the purpose for which the defendant held it, and, it may be inferred, that the cause of action was complete no later than that date. Because there was no evidence as to whether the defendant was, at that time, unable to pay an equivalent sum to the plaintiff and the Settlement Sum had been paid into an active account, I do not find that the use of part of the Settlement Sum at that time completes any cause of action that vests in the plaintiff.
3. As indicated above, the defendant agreed that he had used over \$100,000 of the Settlement Sum to fund the purchase of the Flowerdale property, but there was no evidence as to either how much was used or how much the property cost.

4. The plaintiff's evidence is that an exchange to the following effect took place:

Defendant: "We are buying a new house, the problem is we need money for a holding deposit for three months. Can I use the money for this holding deposit? The house would have a room for you."

Plaintiff: "Okay, you can use the money for a holding deposit for three months, but this is for your house not mine. You have to live in the house, not me, and I still need to find my own block."

1. The plaintiff gave evidence that he had already explained that he did not want to live under the same roof as his son. He did not make any enquiry as to the amount of the holding deposit. He says that he thought the money would only be used temporarily. There is no evidence that he ever enquired as to whether the amount of any deposit had ever been repaid into the defendant's bank account. There is no evidence that he ever made any further enquiries about acquiring a block of land or asked the defendant to make any such enquiries.

2. I do not find the plaintiff's account persuasive. In light of the absence of evidence of any further enquiries with respect to a block of his own, his account does not ring true.
3. The defendant denies that the conversation took place, but does appear to accept that there was a discussion about the funding of the Flowerdale purchase. In his written response, he says, "I said that we have found a house that would suit all of us it has a shed out the back that I can convert into a granny flat for you. Dad responded with its your monies do what you want. I said ok" [sic].
4. This account is also unpersuasive. There would be no reason for the plaintiff to raise the question of the use of the monies if the defendant had not raised the purchase of Flowerdale in the context of their use. Significantly, the defendant does not say that the plaintiff ever agreed with the proposal to move to the shed on the Flowerdale property, even after its proposed conversion to a granny flat.
5. On the whole, while I accept the funding of the purchase of the Flowerdale property was discussed, I do not accept either party's account of that discussion. While the plaintiff's account would have had some corroborative effect, I find that it does not affect my findings as to the terms of the arrangement between the parties concerning the Settlement Sum one way or the other.

The opening by the plaintiff of a new bank account and demands for return of the Settlement Sum

April – May 2019 alleged demand for payment

1. The plaintiff alleges that shortly after he opened a new bank account in April 2019, he visited the defendant in Victoria and handed him a form which showed where the Settlement Sum could be paid to him, saying words to the effect "you can transfer it there". He says that the defendant responded with a story about his business being under investigation by the Federal Police and his accounts being frozen.
2. The plaintiff does not recall what he said in response, stating that he was in disbelief. He says that he had a further phone call with his son after he returned to New South Wales in which the defendant again said that his business was under investigation and that he could not access his bank accounts.
3. The defendant denies that he ever made those statements, that his business was under investigation or that his accounts were frozen. He that denies the plaintiff sought the transfer of the Settlement Sum at that time.

4. I accept that the plaintiff did ask for payment of the Settlement Sum to him at about that time. While he had the benefit of the life insurance monies, which had been deposited into his account shortly after opening it, it seems on the basis of the bank statements in evidence that he was depleting the account at a rate of about \$1,000 per week and would likely need further funds within a few months.
5. I have more difficulty accepting the plaintiff's account of the defendant's response. In the absence of any corroborative or contemporaneous documentary evidence or extraneous circumstances that support the plaintiff's account, I am not satisfied that the defendant said the words attributed to him by the plaintiff at that time. Other than one or perhaps two conversations which do not appear to have advanced his understanding, the plaintiff appears not to have taken any steps to follow up the question of whether the defendant's accounts were frozen. Had the defendant proffered such a reason for not being able to pay the Settlement Sum over to him in April or May 2019, one would expect the issue to have remained alive, even if only to establish that the accounts were no longer frozen. There is no evidence that it ever was.

September 2019 visit

1. After the defendant returned from the United Kingdom, the plaintiff visited him at the Flowerdale property in Victoria. The plaintiff alleges, and the defendant denies, that the defendant had been avoiding the plaintiff's attempts to contact him. Both parties acknowledge that the plaintiff's visit of September 2019 was fraught.
2. The plaintiff says that the conversation became heated and that the defendant had accused him of threatening his family, initially only speaking to him through a five-foot Colorbond fence. The defendant says that it was the plaintiff who was agitated, blocking the driveway and threatening him with words to the effect of "don't think I would have any problems in taking you out". On both parties' account, matters cooled and they were able to have a conversation and assemble almost all of the materials sought by the plaintiff in support of his application for social security benefits referred to at paragraph 25 above.
3. Neither party proffered a satisfactory explanation for the animosity. The plaintiff says that it was because the defendant had been impossible to reach whereas the defendant says that if the plaintiff had tried unsuccessfully to reach him, it was because he had been in the United Kingdom without his phone and that he had only just returned. I do not accept that the defendant had only just returned – he had been back in Australia since sometime in July 2019. He also said that he had a new phone and new phone number, evidence that the plaintiff did not dispute, and on which he was not cross-examined. No evidence corroborated this allegation.
4. The plaintiff had a handwritten list of documents recorded on a Department of Human Services "With compliments" slip that he needed to obtain from amongst his papers at the defendant's property in order to apply for the old age pension. The list included "Bank

statements" and "Letter stating Compo payout". Plainly the Department of Human Services were aware of the settlement of the plaintiff's workers injury compensation proceedings and the fact that the sum in settlement of that claim had been paid. All of the materials that the plaintiff needed were located except for the bank statements. The plaintiff says there was an exchange to the following effect:

Plaintiff: "I need your bank statement as the money is in your account"

Defendant: "Just tell them you gave me the money"

Plaintiff: "I'm not telling lies for you or for anyone else"

1. This alleged exchange is problematic because the defendant was not asking the plaintiff to lie for him. If the plaintiff's account is to be believed, the beneficiary of any lie would be the plaintiff, not the defendant, if it could be assumed that concealment of the Settlement Sum would have made a difference to the plaintiff's eligibility for the old age pension. I do not accept the plaintiff's account.
2. The plaintiff further alleges that the defendant said words to the effect, "I will just sell the house and give you your money back," to which he responded to the effect, "Just do what you got to do and let me know when the money is in my account".
3. The defendant denies the plaintiff's account, but does not give a detailed account of the conversation on that day.
4. I am not persuaded that the defendant said the words attributed to him at paragraph 85 above, or that properly understood that they constitute an admission. I do accept, however, that the plaintiff reiterated in September 2019 that he required payment to him of the Settlement Sum and the conversation proceeded on that basis.
5. In my view, this supports the allegation that the plaintiff had already sought the Settlement Sum to be paid to him. On the evidence, this appears to have occurred in about May 2019. I also note in this regard that shortly afterwards the plaintiff commenced steps to obtain legal assistance to recover the Settlement Sum.

Money had and received to the use of the plaintiff

1. The plaintiff's claim is advanced solely on the basis of the common law count of money had and received by the defendant to the use of the plaintiff.
2. The elements of the cause of action, which the plaintiff must establish are:
 1. The defendant received a definite and ascertained sum of money;
 2. The money received was the plaintiff's money or money in which he was interested; and

3. The defendant cannot in good conscience retain the money by reason of the presence of some qualifying or vitiating factor which gives rise to a prima facie obligation to make restitution.
1. The last of these elements is sometimes treated as a more general principle that restitution is available where the retention of the money by the defendant would be unconscionable: e.g. *JZ Lee Interiors Pty Ltd v Smith* [2015] VSC 693 at [24]. While the question of unconscionability is clearly relevant, it is not part of proof of the elements of the cause of action that retention of the money in all the circumstances is unjust: see *David Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378-9; [1992] HCA 48 and *Coshott Family Pty Ltd v Lyons* [2022] NSWCA 216 at [20].
2. Rather, the plaintiff must prove the existence of some qualifying or vitiating factor which gives rise to a prima facie obligation to make restitution. The defendant may then seek to establish some responsive defence which displaces that prima facie obligation: *Coshott* at [21]. It is in this sense that the overall question of unconscionability arises.
3. The vitiating factors are well known, having been collected by Lord Mansfield in *Moses v Macfarlan* (1760) 2 Burr 1005 at [1012]; (1760) 97 ER 676 at 681, and debated ever since: see K Mason, *JW Carter and G J Tolhurst, Restitution Law in Australia* (4th ed, 2021, LexisNexis) at [120]-[132].
4. In the following passage, his Lordship stated that the action for money had and received:
... lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

1. The categories of vitiating factor are not closed: *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 at 681; [2001] HCA 68 at [93]-[95]; *Coshott* at [22].
2. The plaintiff puts his case on the following bases:
 1. The element of receipt of a definite and ascertained sum of money that was the plaintiff's or in which he had an interest is satisfied by the uncontested evidence as to the receipt of the Settlement Sum, which comprised monies due to the plaintiff in settlement of his workers injury claim, into the defendant's bank account on 5 April 2018;
 2. The relevant vitiating factor was one or more of:
 1. the established category of agency, in that the Settlement Sum were paid into the defendant's account by a third party to be disposed of in a particular way: *Coshott* at [27]; *Scott v Davis* (2000) 204 CLR 333 at [229] per Gummow J; [2000] HCA 52.

2. the established category of failure of consideration, described by the plaintiff in his closing submissions as a "total" failure of consideration;
3. the taking by the defendant of undue advantage of the plaintiff's situation, being the last of the categories enumerated by Lord Mansfield in *Moses v Macfarlan*; or
4. even if the present case sits outside the established categories of case, the circumstances nevertheless demonstrate the existence of a qualifying or vitiating factor, which gives rise to an obligation to make restitution.

Agency

1. A person may be authorised to receive money from a third party on behalf of a principal: *Pape v Westacott* [1894] 1 QB 272. There is no doubt that such a person is an agent with respect to those monies. An agent who, in acting within his or her authority, receives money on behalf of a principal must pay that money over to the principal, or otherwise account for it, as prescribed by the terms of the agency: *Harsant v Blaine Macdonald & Co* (1887) 56 LJQB 511. If the agent fails to pay over the money to the principal without lawful justification, the agent is liable to be sued in an action for money had and received (restitution): *Reid v Bennett* [1955] VLR 505 at 508 per Sholl J.
2. Further, where a principal has entrusted money to his agent for a particular purpose which the agent has not carried out, the principal can countermand any instruction to that purpose and recover the money as had and received to his use: *Coshott* at [28]-[33]. There is no reason that this principle would not apply where money is received from a third party rather than the plaintiff.
3. In this case, the defendant received the Settlement Sum from the plaintiff's solicitors at the direction of the plaintiff. On the facts as I have found them, the purpose for which those monies were paid to the defendant was to hold them until the plaintiff demanded payment to him; and a secondary purpose was to deploy some of those monies to acquire a block of land or accommodation for the benefit of the plaintiff at his direction.
4. The defendant did not apply the Settlement Sum to any purpose for which he had been authorised by the plaintiff: he did not pay the Settlement Sum to the plaintiff on demand, which I have found was first made in or around May 2019, and did not deploy those monies to acquire a block of land for the plaintiff prior to the plaintiff's demand for payment to him of the whole sum in May 2019.
5. In the absence of the defendant establishing a lawful justification for retention of the Settlement Sum, the plaintiff has made good his claim for money had and received from the date on which he demanded payment to him, which I have found to be May 2019.

Total failure of consideration

1. In light of my findings with respect to agency, it is not strictly necessary to rule on the plaintiff's alternative arguments as to failure of consideration, undue advantage and the creation of a new category on the facts of the present case. I will, however, briefly set out my views as a matter of completeness.
2. On the facts as I have found them, I consider there has also been a total failure of consideration. The plaintiff directed the payment of the Settlement Sum into the defendant's account with the dual purposes of receiving and retaining those monies until called for by the plaintiff and providing the defendant with the funds to purchase land and/or a dwelling for his future accommodation, with the balance to be provided to the plaintiff on demand. The latter purpose was not fulfilled by the defendant in whole or in part prior to the demand by the plaintiff for the return of the Settlement Sum.
3. Accordingly, when the defendant failed to pay the Settlement Sum over to the plaintiff on demand, the former purpose also failed.

Undue advantage or unconscionability as a vitiating factor

1. In her submissions, counsel for the plaintiff contended that the plaintiff's circumstances and the defendant's knowledge of those circumstances, both at the time of the mediation and subsequently, and the defendant's conduct amount to the taking of undue advantage within the last category of *Moses v Macfarlan*. Essentially, the submission reduces to a contention that the retention of a benefit in unconscionable circumstances gives rise to a vitiating factor.
2. The relevant unconscionable circumstance, it is contended, is the whole of the circumstances by which the defendant came to hold the Settlement Sum and his subsequent dealing with them in a way inconsistent with the purpose for which they were paid into his account.
3. I do not find this ground to be made out. In particular, it appears to be, in truth, a general submission that unconscionability in the sense rejected by the High Court in *Dauids Holdings* can give rise to a vitiating factor.
4. Unconscionability is a protean concept and has both specific equitable and statutory meanings depending on its context. The equitable doctrine of unconscionability depends on the establishment of "special disadvantage" in the sense of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconscientiously taking advantage of the opportunity thus placed in his hands: *Blomley v Ryan* (1956) 99 CLR 362 at 415 per Kitto J.

5. The plaintiff has not alleged, still less has he proved, that he suffered from any special disability within the relevant equitable principle. While it may be accepted that some disadvantage accrues to the plaintiff by virtue of the defendant having control of the plaintiff's money, this is not a special disadvantage.
6. The plaintiff also refers to Australian Securities and Investments Commission (ASIC) v Kobelt (2019) 267 CLR 1, which was a case of statutory unconscionability under s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth). Statutory causes of action for conduct in trade or commerce which are unconscionable in all the circumstances do not assist the plaintiff. Extending statutory unconscionable conduct available only in trade or commerce or a financial services context to the present circumstance on the basis of a claim for money had and received would be a significant extension of principle.
7. Finally, this case does not appear to be an appropriate one for the extension of the categories of vitiating factors.

Whether the Settlement Sum was gifted by the plaintiff to the defendant

1. If the defendant were to establish that the Settlement Sum was transferred into his account by the plaintiff's solicitors at the direction of the plaintiff as a gift, he would thereby defeat the plaintiff's claim.
2. To make good that allegation, it would be necessary for the defendant, who bears the onus in this regard, to establish:
 1. An intention on the part of the plaintiff to transfer the property;
 2. An act which gives effect to that intention;
 3. No obligation on the plaintiff as donor to make the transfer; and
 4. No return to the donor of material advantage.
1. In this regard, see Leary v Federal Commissioner of Taxation (1980) 32 ALR 221 at 222-223 per Bowen CJ.
2. The defendant has not discharged his onus in this regard. The objective facts as I have found them do not support the first, second or fourth of the above elements.
3. Finally, the Court raised with counsel for the plaintiff the question of whether the defendant had the benefit of a presumption of advancement, particularly in light of the recent authority of Bosanac v Commissioner of Taxation [2022] HCA 34. The presumption is in truth not a presumption at all but rather, at its highest, a fact which precludes the presumption of a resulting trust with respect to certain property transfers. To the extent that it may have arisen by virtue of the relationship of father and son as between the plaintiff and defendant, it has been displaced by the facts as I have found them.

Interest

1. The plaintiff is entitled to interest on the debt. Interest should only run from the date on which the plaintiff's cause of action is complete. On the facts as I have found them, the cause of action was complete when the plaintiff first demanded payment to him of the Settlement Sum, being May 2019. I do not consider the cause of action to have been complete at any earlier time because:
 1. it was always contemplated that the actual monies comprised in the Settlement Sum would not be paid to the plaintiff, but their equivalent, as the monies had been paid into a working bank account and mixed with whatever monies of the defendant were also in that account. The disbursement of those monies does not defeat the purpose of the agency; and
 2. there was no evidence that the defendant had put it beyond his capacity to pay such a sum to the plaintiff prior to the plaintiff's demand for payment. While he accepted that all of the Settlement Sum had been spent, it was not established that he did not have available to him, in that account or otherwise, an equivalent sum which could be used to pay the plaintiff on demand prior to May 2019.
1. I have taken 15 May 2019 to be the date on which the cause of action accrues and calculated interest at the relevant court rates on \$213,000 from that date to today, which amounts to \$36,532.13.

Costs

1. The plaintiff has been successful and is prima facie entitled to his costs. I will nevertheless hear the parties on costs.

Orders

1. Although the plaintiff has been successful, the Court remains hopeful that the parties can nevertheless reach some accommodation even at this late stage. They have each obviously provided assistance to the other, and at times over the years have been close. The plaintiff has many times visited the defendant to spend time with him and his own son and contemplated living close to him. If such opportunity for familial closeness has not been lost already, it seems appropriate to provide the parties with a final opportunity to negotiate a settlement in light of these reasons, including paragraph 30, which might allow them to salvage their relationship.
2. Accordingly, although a party has succeeded and is entitled to judgment in the sum of \$213,000, I will stay judgment for a period of 21 days to give the parties an opportunity to resolve the matters between them.
3. The orders of the Court are:
 1. Judgment for the plaintiff in the sum of \$213,000.

2. The defendant pay interest on the judgment sum in the amount of \$36,532.13.
3. Stay orders (1) and (2) for 21 days.

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