New South Wales
Court of Appeal

CITATION:	**VUKMIRICA v BETYOUNAN [2008] NSWCA 16**
HEARING DATE(S):	12 February 2008
JUDGMENT DATE:	14 May 2008
JUDGMENT OF:	Giles JA at 1; McColl JA at 92; Bell JA at 93
DECISION:	(1) Appeal allowed; (2) Set aside the verdict and judgment in favour of the plaintiffs; (3) Remit the matter to the District Court for a new trial; (4) Costs of the trial to be in the discretion of the judge hearing the new trial; (5) Respondents pay appellant's costs of the appeal and have a certificate under the Suitors Fund Act.
CATCHWORDS:	Negligence - solicitor - husband and wife borrowed money - acted on loan and mortgage - part of money "invested" and lost - whether investment without clients' authority - with authority of husband - whether with authority of wife - whether authority of wife to be implied - whether ostensible authority to be found - factual findings flawed - failure to make findings as to wife's involvement with husband's intentions - or with subsequent false account of transaction - findings in part based on observations of husband and wife in court not made known to solicitor - new trial ordered.
CATEGORY:	Principal judgment
LEGISLATION CITED:	Civil Liability Act 2002 Civil Procedure Act 2005
CASES CITED:	Angaston and District Hospital v Thamm (1987) 47 SASR 177; Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 113 CLR 72; Dare v Pulham (1982) 148 CLR 658; Equiticorp Finance Ltd v Bank of New Zealand (1993) 32

	NSWLR 50; Farrer v Messrs Copley Singletons (Formerly Known as Messrs Gowan and Singleton) [1997] EWCA Civ 2127; Government Insurance Office Of New South Wales v Bailey (1992) 27 NSWLR 304; Kappis v State Transit Authority (1995) 11 NSWCCR 386; Kassem v Crossley [2000] NSWCA 276; Leotta v Public Transport Commission of New South Wales (1976) 50 ALJR 666; Pacific Carriers Ltd v BNP Paribas [2004] HCA 35.
PARTIES:	Marta Vukmurica (Appellant) Dola Betyounan (1st Respondent) Ramona Betyounan (2nd Respondent)
FILE NUMBER(S):	CA 40869/06
COUNSEL:	P Garling SC / G Gregg (Appellant) I D Roberts SC (Respondents)
SOLICITORS:	Thomson Playford (Appellant) Peter A Collins & Associates (Respondents)
LOWER COURT JURISDICTION:	District Court
LOWER COURT FILE NUMBER(S):	DC 1826/05
LOWER COURT JUDICIAL OFFICER:	Gerahty DCJ
LOWER COURT DATE OF DECISION:	14 December 2006

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40869/06
DC 1826/05

GILES JA
McCOLL JA
BELL JA

Wednesday 14 May 2008

VUKMIRICA v BETYOUNAN & ANOR

Judgment

1 **GILES JA**: The respondents, Mr Dola Betyounan and Mrs Ramona Betyounan, borrowed $150,000 from a financier on mortgage security. The appellant, Ms Marta Vukmirica, was retained as their solicitor for the loan and mortgage transaction.

2 As found by Geraghty DCJ, Mr Betyounan instructed the appellant that $90,000 of the loan should be provided by a bank cheque drawn in favour of Karl Suleman & Co. The appellant acted accordingly, and the cheque was given to Mr Betyounan. Mr Betyounan "invested" the money in an enterprise promoted by Mr Karl Suleman; the exact enterprise is unclear, and I will call it a Suleman scheme. The money was lost.

3 The trial judge held that the appellant was liable to the respondents for the $90,000, plus interest, because the appellant negligently failed to obtain instructions from Mrs Betyounan as to the payment of the $90,000, and if she had done so the money would not have been put into the Suleman scheme.

4 There were no less than forty grounds of appeal. In the manner the appeal was conducted, it is not necessary to set them out or deal with

them seriatim. Sufficiently for consideration of the appeal, the appellant contended that -

(a) the appellant was not liable to the respondents because Mr Betyounan's instructions as to payment of the $90,000 were given also on behalf of Mrs Betyounan;

(b) in holding the appellant liable the trial judge went outside the pleadings and the way the respondents' case was run; and

(c) the holding that the appellant was liable was vitiated by flawed fact-finding.

Events to investment of the money

5 The respondents lived in Queensland and owned a property at Glenwood in New South Wales. The Glenwood property was unencumbered. The respondents had partly constructed a home on the land.

6 At some time prior to 14 September 2001 the respondents applied to direct Mortgage Solutions Pty Ltd ("DMS") for a loan. There were multiple copies of the application form in evidence, all signed in a number of places by both respondents. Some of the copies of the printed form were in blank even as to the amount of the loan and the security offered. One copy, appearing to bear the same signatures on the same application form, was completed and was dated 10 September 2001.

7 The circumstances of the signature of the application form were a matter of dispute. Albeit rather unclearly, the substance of the respondents' evidence was that Mr Betyounan was referred by a mortgage broker, Quick Loan Services, to the appellant; that he saw the appellant and signed the application form at her offices; and that the appellant faxed it to Mrs Betyounan in Queensland who signed it and faxed it back. The

appellant, however, said that she had nothing to do with the application for the loan.

8 By one set of signatures the respondents subscribed to the declaration in the printed form that the credit to be provided to them by the credit provider "is to be provided wholly or predominantly for business or investment purposes (or for both purposes)". Another set of the respondents' signatures was placed on a "Loan Purpose/Declaration Checklist" which stated that the "Declaration as to Purpose" was to be completed if the proposed loan was not provided wholly or predominantly for personal, domestic or household purposes. In the application forms left in blank the Declaration as to Purpose was blank, but in the completed copy there was written in "set up investment fund".

9 The trial judge did not make full findings as to the completion and signature of the application form. He appeared to accept that it had been signed in blank and had been "completed by someone other than DB or RB". Subject to [12] below, he made no finding as between the respondents' account and the appellant's evidence that she had nothing to do with the application for the loan.

10 DMS sent to the respondents a letter dated 14 September 2001 ("the approval letter"), conveying approval for a loan of $150,000 from Perpetual Trustees Australia Ltd ("Perpetual") on the security of a mortgage over the Glenwood property. A number of copies of the approval letter were in evidence, in identical terms save that some stated the Loan Purpose as "Set Up Investment Fund" (Ex D and again Ex E, from the appellant's file) and the others stated it as "Home loan" (part of Ex 5 and again Ex 15, an enclosure with a letter sent by the respondents to the Legal Services Commissioner). An issue at the trial was whether the Ex 5 approval letter was not genuine, but was a fabricated copy with a change to the Loan Purpose.

11 In their statement of claim the respondents alleged that at all material times "the plaintiffs were clients of the defendant", and in her defence the appellant admitted that she -

> " ... agreed to act on behalf of the plaintiffs on or about late September or early October 2001 to provide legal advice and facilitate the exchange and settlement of their re-finance loan of $150,000 ... ".

12 The trial judge made no finding as to when the appellant was retained beyond the admission on the pleadings, but it was common ground that the retainer was by Mr Betyounan's communications with the appellant. The trial judge stated that "the first encounter between MV and DB about which there is any evidence occurred on 3rd October 2001". He appears thereby to have rejected the respondents' evidence of the circumstances of signing the application form.

13 On 27 September 2001 Perpetual's solicitor wrote to the respondents care of the appellant, enclosing a loan contract, mortgage and other documents for execution. The loan contract stated that the purpose of the loan was "to assist you For investement purposes [sic]".

14 On 3 October 2001 Mr Betyounan attended upon the appellant and signed the loan contract, the mortgage and other documents, including a direction addressed to Perpetual to draw the cheques on settlement "as advised by Vukmirica Solicitor".

15 What passed between Mr Betyounan and the appellant on this occasion was disputed. The substance of Mr Betyounan's evidence, although there appeared to be confusion in it with signing the application form, was that he just signed where the appellant pointed, that he told the appellant that the money was for his building work, and that at no time was there mention of Karl Suleman or Karl Suleman Enterprises. According to the appellant, however, she discussed the documents which Mr Betyounan signed, and when she asked what he wanted to do with the money Mr

Betyounan said that he wanted to complete a building he was doing "plus invest with Karl Suleman a sum of approximately $100,000". The appellant had some knowledge of Suleman schemes, and said that she advised Mr Betyounan strongly against this and obtained his signature to a note dated 3 October 2001 stating -

> "I Dola Betyounan
>
> (1) Acknowledge that Marta has advised me that it is 100% risk to invest with Karl Suleman – no guarantees.
>
> (2) On settlement you are to draw a cheque to Zia George for $4,000."

16 Mr Zia George was the person at DMS, or perhaps at Quick Loan Services, with whom Mr Betyounan had dealt.

17 Mr Betyounan maintained in cross-examination that there was no reference at the meeting with the appellant to Karl Suleman, and that at that time he did not know who Karl Suleman was. He admitted to a general knowledge of someone with a high return money-making scheme involving shopping trolleys, which at the trial appears to have been common ground was Karl Suleman, but no more. When faced with the note Mr Betyounan said that it was his signature but (as best one can understand some confused evidence) that he signed the piece of paper in blank.

18 The trial judge considered both Mr Betyounan and the appellant unreliable in their recollections, but did not accept that Mr Betyounan signed the note in blank and found "that DB instructed MV to invest the money with Karl Suleman, and in accordance with his instructions, she directed a cheque to be drawn in favour of Karl Suleman Enterprises, which she later handed to him". When the instructions were given by Mr Betyounan was not clearly found, see [26] below.

19 It was common ground that Mrs Betyounan did not attend upon the appellant on 3 October 2001 together with her husband, or in person at all. She signed the loan contract, mortgage and other documents, including the direction to draw cheques on settlement, on 4 October 2001 (although sometimes a document's date of 3 October 2001 wrongly represents the date of her signature), before Mr Anthony Marino, solicitor, in Queensland. Here again there was conflict in the evidence.

20 According to the appellant, she said to Mr Betyounan that she would "need to verify that Mrs Betyounan is a party to this loan as her name is also on these loan documents". She was given a telephone number for that purpose, and Mr Betyounan took the documents away saying that he would fly to Queensland and have his wife sign them. The appellant telephoned Mrs Betyounan and told her that she would have to see a solicitor, and Mrs Betyounan said that she would. In speaking to Mrs Betyounan, the appellant asked whether she wanted the loan to proceed, saying that Mr Betyounan had "told me the money will be invested with Karl Suleman this is a 100% risk", and Mrs Betyounan replied "I know what we're doing" or "We know what we're doing". The appellant said to Mrs Betyounan, "Am I to follow you husband's instructions?" to which Mrs Betyounan replied "Yes". At a later date Mr Betyounan brought the signed documents back to the appellant.

21 According to Mrs Betyounan, however, she had no contact at all with the appellant. She gave evidence about the signing of the application form, and then evidence that at the beginning of October Mr Betyounan said that he would send her some documents to sign in front of a justice of the peace; that she could not find a justice of the peace so she "went upstairs and ... found a solicitor, and I signed them in front of a solicitor"; and that she returned the documents by post to Mr Betyounan.

22 The trial judge found that "neither MV nor her firm made contact with RB in Brisbane; that she did not seek instructions ... ". This central finding was not challenged in the appeal.

23 However it occurred, the appellant came to hold documents signed by both respondents. She gave them to her secretary Ms Kylie-Ann Horton, who was experienced in conveyancing matters, to attend to settlement.

24 Ms Horton said that in preparation for settlement she telephoned Mr Betyounan to ascertain how cheques were to be drawn. She had no recollection of the occasion, but a note indicated that $148,229 was to be paid by Perpetual of which $90,000 was to be by a cheque in favour of "Karl Suleman Enterprises" and $53,418 by a cheque in favour of "D Betyounan", and at the foot of the note she had written "Mr Betyounan agreed to same when I confirmed how he wanted cheques drawn".

25 The trial judge did not accept that Ms Horton "received these instructions directly from DB, or that he confirmed them in person or on the phone". He said that it did not affect "the outcome of the hearing", because "[w]hat is important is that while MV received instructions from DB, she failed to seek instructions from her other client RB".

26 As I have said, the trial judge found that Mr Betyounan "instructed MV to invest the money with Karl Suleman". If the instructions were not through a telephone call from Ms Horton to Mr Betyounan, it is not clear when they were given. The trial judge may have been satisfied that the note reflected some other occasion on which they were given, but he did not find when that occurred.

27 Ms Horton prepared a letter dated 18 October 2001 to Perpetual's solicitor stating that he was "hereby authorised and directed to pay the following", listing payees and amounts. It was common ground that the letter stood as the direction to pay "as directed by Vukmirica Solicitors" in the direction to draw cheques on settlement signed by the respondents. The listing of payees and amounts was -

"1. Karl Suleman & Co $90,000.00

2.	Zia George	$4,000.00
3.	Vukmirica Solicitors	$750.00
4.	Australian Taxation Office	$61.00
5.	D Betyounan	$53,418.00"

28 Settlement took place on 19 October 2001. Bank cheques were provided in accordance with the letter of 18 October 2001.

29 A letter from the appellant dated 22 October 2001 ("the settlement letter") addressed to the respondents in Queensland confirmed settlement, and as part of the report to the clients stated how the cheques had been drawn. The letter, which was marked Ex 1, said -

> "Cheques were drawn as follows:
>
> | | | |
> |---|---|---|
> | "1. | Karl Suleman & Co | $90,000.00 |
> | 2. | Zia George | $4,000.00 |
> | 3. | Vukmirica Solicitors | $750.00 |
> | 4. | Australian Taxation Office | $61.00 |
> | 5. | D Betyounan | $53,418.00 |
>
> We enclose cheque 1 and 5 as directed by you."

30 Mr Betyounan agreed that he picked up a letter with cheques on 22 October 2001, although he did not specifically identify the settlement letter. The effect of his evidence, however, was that he did not receive the $90,000 cheque in favour of Karl Suleman Enterprises. This also was disputed.

31 From some rather confused evidence, according to Mr Betyounan he was telephoned and told that his cheque was ready, and when he went to the appellant's offices he was given an envelope with the $53,418 cheque and was told the rest of the money would be kept in a trustee account and paid out as progress payments for the building work. Whether the trustee account was an account of the appellant or Quick Loan Services was not clear. Mr Betyounan gave evidence of taking the envelope to Mr George, with at least the $4,000 cheque. It is hard to understand whether Mr Betyounan was saying that the rest of the money was also taken by him to

Mr George to be held there; from the letter to the Legal Services Commissioner in March 2002, see below, that was what Mr Betyounan meant to say.

32 Neither the appellant nor Ms Horton gave direct evidence of giving the letter including the $90,000 cheque to Mr Betyounan. The appellant denied Mr Betyounan's account of the rest of the money being held back. According to Ms Horton, her usual practice was to take photocopies of cheques so that when the client picked a cheque up the photocopy could be signed and dated. The evidence included photocopies of all the cheques provided on settlement, including on the one page photocopies of the cheques in favour of Karl Suleman & Co for $90,000 and in favour of D Betyounan for $53,418. The page bore Mr Betyounan's signature and the date 22 October 2001. Mr Betyounan agreed that he signed for the cheque in his favour, and that it was his signature on the page, but he said the page he signed had a photocopy only of his cheque; there was then some vacillation on whether the signature was an original signature.

33 The trial judge did not make full findings, although in a chronology he said that Mr Betyounan "picks up cheques" and "Q DB signs receipt?" Since the trial judge found that the appellant handed a cheque drawn in favour of Karl Suleman Enterprises to Mr Betyounan, he did not accept Mr Betyounan's account.

34 Mr Betyounan maintained that putting the $90,000 in the Suleman scheme was without his knowledge or concurrence, and on the appellant's case the cheque for $90,000 was given to Mr Betyounan. Thus there was no clarification in the evidence of putting the money into the Suleman scheme. It was common ground, however, that it was put into the scheme.

Some events thereafter

35 On 21 November 2001 Karl Suleman Enterprises Pty Ltd was placed in administration on the application of Australian Securities & Investments Commission. While the evidence did not go into detail, this marked the collapse of Suleman schemes.

36 The appellant gave evidence that she heard of difficulties with Suleman schemes, she was "worried because I had just settled recently some matters where cheques were drawn to Karl Suleman, one of which was Mr Betyounan", and that she telephoned Mr Betyounan and told him "that Karl Suleman had crashed and that I was hopeful that he would not have presented his cheque as yet that he had drawn to Karl Suleman". According to the appellant, Mr Betyounan replied that he had, and the appellant said that she would "try and stop the cheque if I can". Mr Betyounan's evidence was varied, that there was no telephone call and that there was but the cheque to be stopped was that going "in the firm of that broker George Zia".

37 On 16 November 2001 the appellant wrote to Macquarie Bank, the drawer of the bank cheques, asking that the cheques for $90,000 and $4,000 be "cancelled" and that $94,000 "be re-drawn in a cheque payable to D & R Betyounan". Curiously, the letter referred to a cheque drawn on 30 November 2001 and said that the appellant was "instructed by our client that the stated cheque has not been presented as yet".

38 It was too late. The cheques had been presented on 19 October 2001.

39 There were further communications between the appellant and Mr Betyounan, and between a Mr Adam Zomaya who spoke to Mr Betyounan at the appellant's request. It is sufficient for present purposes that Mr Betyounan was very upset at the loss of the $90,000 and, at least according to some of the evidence, blamed the appellant; although

according to the appellant he accepted that he had been warned and that she had not been at fault.

40 On 18 December 2001 Mr Betyounan lodged a complaint with the Legal Services Commissioner against the appellant. In completing the printed form he said "my $90,000 home loan disappear", and that he and his wife had borrowed a home loan from Quick Loan Services and -

> "They give me $53,400 and kept $90,000 in their trutsee account so they give me $15,000 per month until house finishes they get bankrupt an my hous is not finished ...
>
> ... in addition when I went to quick loan services they told me our [?] condition is that we released one third of $15,000.00 wick was $53,400.00. Then they will release in proeress payments of $15,000 per month until [?] home is finished I was agreed my solicitor told me I have to do so otherwise I not can have $150,000.00 home loan."

41 On 24 March 2002 a letter signed by Mr Betyounan was sent to the Legal Services Commissioner, asserting that the $150,000 had been borrowed in order to build on the Glenwood property and complaining that he had "received $53,418 and was still waiting for the full balance of the home loan" but was being asked by DMS for repayment of the $150,000. Mr Betyounan gave evidence that the letter, "Actually, my wife – she wrote it, but it was our idea, whatever is there", and that it was their "joint effort"; Mrs Betyounan said that she and her husband composed it. The letter and its enclosures became Ex 5. The complaint was about DMS more than the appellant. The letter said -

> "All we want is a draw down of the remaining balance of the home loan to finish off the house. Or for them to accept the agreement for the repayments of the $53,418.00 as they still have our title to the land and we cannot borrow money from any other bank".

42 There were a number of enclosures with the letter. One was the Ex 5 approval letter stating the Loan Purpose "Home loan". Another was a copy of the Ex 1 settlement letter, but the $90,000 cheque numbered 1 in favour of Karl Suleman & Co appeared as a cheque in favour of "Direct

Mortgage Solution (Zia George)". This copy of the settlement letter became Ex 2. Another issue at the trial was the whether the Ex 2 settlement letter provided to the Legal Services Commissioner was not genuine, but was a fabricated copy prepared by the respondents with a change to the payee of the cheque.

43 There followed correspondence between the Legal Services Commissioner and the appellant and the respondents. As the correspondence developed, it remained the respondents' position that they had been deprived of $90,000 of their home loan. A letter from Mrs Betyounan in April 2002 gave an account of the appellant's involvement in having the blank application form signed and the appellant giving Mr Betyounan a cheque for $90,000 to be taken to Quick Loan Services. The letter included that "we never received any payment other than the first cheque for $53,418 which was given to my husband in his name". This letter and a subsequent letter from Mrs Betyounan dated 12 May 2002 were in terms of "we", "our" and "us" suggestive that the respondents were jointly participants in all which, on the account put forward, occurred.

The trial judge's decision

44 On the respondents' evidence, the loan was wholly for their building work and not in part for putting into a Suleman scheme, but the appellant withheld the $90,000 and unknown to them it was put into the Suleman scheme. That case was not accepted. The respondents nonetheless obtained a verdict and judgment against the appellant. The trial judge summarised the findings on which he came to his decision -

> "1) RB retained the services of MV to act on her behalf, as did DB to act on his behalf.
>
> 2) RB and DB were joint mortgagors and joint borrowers of $150,000 from Perpetual Trustee Australia Ltd.
>
> 3) RB and DB jointly and severally were liable for the repayment of the sum borrowed.

4) MV received instructions from DB that he sought to invest monies with Karl Suleman.

5) DB did not have authority to act as the agent of RB in the loan transaction, and more particularly, to instruct MV on RB's behalf to draw a cheque for $90,000 in the name of Karl Suleman or any of his companies.

6) The circumstances surrounding and the documentation involved in the loan transaction do not give rise to any representation that DB was acting as the agent of RB such as to establish an inference of apparent or ostensible authority.

7) MV failed to seek any instructions from her client RB, and more particularly, instructions as to the drawing of a cheque in the sum of $90,000 in the name of Karl Suleman or any of his companies.

8) MV failed to deliver payment of the loan monies to her client – borrower RB.

9) In directing the mortgagee to draw a cheque in favour of Karl Suleman and Co for $90,000, MV acted without instructions of her client RB, thereby exposed her to the loss of $90,000, especially in circumstances in which she knew that inevitably the scheme of Karl Suleman was doomed to failure.

10) MV was negligent in that she failed to follow the directions of RB regarding cheque payments by failing to obtain any instructions; and in that she failed to act in the best interest of RB.

11) RB had been able [sic: unable] to recover the said amount from Karl Suleman or Karl Suleman Enterprises Pty Ltd (now in liquidation).

12) On balance, had MV sought instructions from RB, the settlement as proposed would not have gone ahead.

13) The loss was caused as a result of MV seeking instructions from one of her clients, but not from the other, when both were jointly and severally liable for repayment of the loan."

The appeal

45 If the appellant's contention (a) earlier stated is accepted, the appellant is entitled to a verdict and judgment in her favour. If the appellant's contention (b) or contention (c) is accepted, there must be a new trial.

(a) Mr Betyounan's authority

46 The appellant submitted that, even on the finding that she failed to seek instructions from Mrs Betyounan, the direction to draw the cheque for $90,000 in favour of Karl Suleman & Co and giving the cheque to Mr Betyounan were with Mrs Betyounan's authority because Mr Betyounan was acting as her agent.

47 The appellant submitted that her retainer to act on behalf of Mrs Betyounan was through the agency of Mr Betyounan, and that Mr Betyounan was therefore Mrs Betyounan's agent for the purposes of the whole of the retainer including directing how the money was to be paid. Having acted in accordance with Mr Betyounan's directions, given also as agent for Mrs Betyounan, the appellant had discharged her contractual and tortious duties.

48 The submission was founded on the admission in the defence that the appellant "agreed to act on behalf of the plaintiffs" (plural) and the common ground that Mr Betyounan retained her. However, authority to create a solicitor/client relationship is not the same as authority thereafter to give instructions in the performance of the relationship. While Mr Betyounan may have retained the appellant on behalf of Mrs Betyounan, the appellant owed duties to Mrs Betyounan distinct from those owed to Mr Betyounan, and more was needed to establish his authority to give instructions on her behalf. As was said in *Farrer v Copley Singletons* (1997) EWCA Civ 2127 (Leggatt, Morritt and Brooke LLJ) -

> "Counsel have been unable to find any authority to support the proposition that one of two or more clients of a solicitor in respect of the same transaction is entitled, without more, to receive information from and give instructions to the solicitor both on his own behalf and on behalf of the other clients. The dearth of authority is not surprising because the proposition is, in our view, contrary to basic principle. A solicitor's contract of retainer is with each and every client; the duties of the solicitor are owed and must be discharged to each of them. It must follow that a solicitor is entitled to communicate with and take instructions from only one of several clients if he has the authority of the other clients so to do. Accordingly the first of the two alternatives to which the judge referred is no different from the second; the sole question is whether Mr and Mrs Jordan and Mrs Farrer gave authority to Mr Farrer to receive information from and give instructions to Mr Forrester on their behalf as well as his own."

49 When retainer on behalf of both respondents came from the admission on the pleadings, and conferring of authority on Mr Betyounan to retain the appellant was not otherwise proved, without further evidence it could not be taken that Mrs Betyounan had left entirely to Mr Betyounan the loan and mortgage transaction so that in the discharge of the appellant's duties owed to her the appellant need look only to Mr Betyounan. The cross-examination of Mr Betyounan and Mrs Betyounan did not attempt to establish that Mrs Betyounan left the loan and mortgage transaction to Mr Betyounan and thereby or in any other way gave him authority to act on her behalf.

50 Actual authority may be found from the putative principal and agent so conducting themselves that it should be inferred (see for example *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 at 132 per Clarke and Cripps JJA). The appellant further submitted that it should be inferred from Mr Betyounan's dealings on both their behalves with the appellant with Mrs Betyounan's apparent acquiescence, reinforced by Mrs Betyounan providing the signed loan contract, mortgage and other documents to her husband for him to take back to the appellant. That falls short, in my opinion, of authority to direct how the loan was to be paid. Use of Mr Betyounan as a courier was not a conferring of general authority, and speaking of apparent acquiescence meant little when it was acquiescence in retainer of the appellant and Mr Betyounan's couriership.

51 The appellant also submitted that Mr Betyounan was acting with ostensible authority. That turns on Mrs Betyounan's conduct representing to the appellant that Mr Betyounan had her authority to direct how the loan was to be paid: *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 113 CLR 72 at 77; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at [36]. The only basis for such a representation was the return of the signed documents through Mr Betyounan. I do not think the submission is made out.

52 In my opinion, it was not established that in the direction to draw the cheque, Mr Betyounan was acting as Mrs Betyounan's agent.

(b) The pleading issue

53 In their statement of claim the respondents alleged -

> "4. On the 19th October 2001 the defendant contrary to the plaintiff's [sic] directions caused the sum of $90,000.00 from the refinance to be paid to Karl Suleman Enterprises.
>
> 5. The said sum of $90,000.00 has been lost or defrauded by Karl Suleman Enterprises."

54 It appears that at the trial the appellant maintained that the reference to "plaintiff's" (singular) meant that the respondents relied on Mr Betyounan's direction as a direction on behalf of both respondents. I do not think that was maintained on appeal, but if it was the understanding of the pleading was incorrect. It would not make much sense without identification of which plaintiff, and that there was a misplaced apostrophe is plain from particular (a) set out below referring to "plaintiffs" (plural).

55 The respondents alleged breach of an implied term of the appellant's retainer and of a duty of care in failure to "exercise any due care, skill or

diligence regarding the refinance". The particulars of breach of contract and negligence were -

> "(a) A failure to follow the directions of the plaintiffs regarding cheque payments on the refinance;
>
> (b) A failure to ensure both signatures of the plaintiffs were obtained regarding directions for payment on the refinance;
>
> (c) Requesting that the plaintiffs sign blank documents;
>
> (d) A failure to act in the best interests of the plaintiffs."

56 The appellant in her defence denied para 4, and denied that she "was negligent as alleged or at all" or "was in breach of her contract of retainer as alleged or at all".

57 On the respondents' evidence at the trial, it was not a case of acting contrary to their directions as to payment of the loan money. Their position was that the money had been put into the Suleman scheme without their knowledge or assent; it was tantamount to a case of misappropriation. As I have said, it was not accepted.

58 Perhaps because that case was seen to face difficulties, late in the trial the respondents applied to amend the particulars of negligence and breach of contract to include -

> "(e) Failing to advise each of the plaintiffs that, in the circumstances, it would be most unwise to invest with Karl Suleman, Karl Suleman Enterprises and/or Karl Suleman & Co.
>
> (f) Failing to advise each of the plaintiffs that if they invested with Karl Suleman, Karl Suleman Enterprises and/or Karl Suleman & Co, they would be likely to lose the value of that investment."

59 The application was opposed, and was refused. In his reasons refusing the application the trial judge said that the amendments "seek to raise a

range of new issues". One was the need for expert evidence as to a solicitor's duty of care in the circumstances. The other was that the amendments would -

> " ... require some evidence as to the causation issue, namely if the solicitor had given advice to one or other or both of the plaintiffs or adequate advice, whether the plaintiffs would have followed that advice. Furthermore, whether in the circumstances, and this would require expert advice [sic], knowing what the solicitor said she knew, whether a solicitor properly instructed should have refused to take instructions and refused to carry out the instructions of a client who was acting foolishly and contrary to her knowledge and advice."

60 In his substantive reasons the trial judge recorded the submission by counsel for the appellant that the respondents' pleaded case had been abandoned in their written submissions, and a new case, not pleaded and not run at trial, was being presented. The trial judge did not describe the new case, but it appears to have been the case that, even if Mr Betyounan had given instructions whereby the money had ended up in the Suleman scheme, Mrs Betyounan had not given any instructions as to payment of the $90,000.

61 The trial judge's reasons included -

> "The case pleaded and the case particularised was not the case which was run by the plaintiffs at the trial. However, in the end, as the evidence fell out, there was no doubt what was in dispute. The plaintiffs had the opportunity of presenting their evidence of the events, and the defendant had her chance to reply to the allegations.
>
> ....
>
> Whatever was pleaded and particularised by the plaintiffs, the real issues were presented at the trial. No one was in any doubt as to what matters were in issue. One client of the defendant resided in Sydney: the other lived with their children in Queensland. Both clients, were making a claim against the defendant. Both gave evidence in support of their claim, and both were cross-examined. In her evidence, the defendant attempted to answer both the claim of DB and the claim of RB. According to MV, DB was authorised to sign on his wife's behalf.

In brief, despite the pleadings, because of the way the hearing was conducted, there was no confusion as to the true issues, and therefore no unfairness or injustice to the defendant. Whether my final determination is right or wrong, to decide the case on the real issue presented at trial does not constitute an error of law."

62 The appellant did not appear to submit on appeal that the trial judge was in error in permitting the new case to be presented by the respondents. In any event, her submissions did not address the trial judge's opinion that, although the new case was not that pleaded and particularised, the real issues were understood and there was no unfairness or injustice to the appellant. It was not shown that the trial judge's opinion was not open to him with his understanding of how the hearing had gone. The trial judge should have required that the pleading be amended, but with due regard to procedural fairness there can be amendment to make a pleading conform to the evidence and want of amendment does not defeat a claim: *Leotta v Public Transport Commission of New South Wales* (1976) 50 ALJR 666 at 668; *Dare v Pulham* (1982) 148 CLR 658 at 664.

63 The substance of the appellant's submission was that the trial judge had gone even further than the new case, and had come to his decision on a case which, in his rejection of the amendment application, he had determined was not open to the respondents.

64 The appellant referred to that part of the trial judge's reasons, under the heading "The Question of Causation", in which he addressed "what RB would have done if the defendant had not been negligent". The trial judge said -

"The defendant recognised the dangers of any financial investment with Karl Suleman. She advised DB (and other clients) that his investment was almost sure to fail. She insisted that he sign a simple acknowledgement of this advice. She knew that both her clients were borrowing monies, and that both were providing security. She did not contact RB. There is no evidence of a face-to-face conference, or (independent of the assertion of MV) of a telephone call, to seek instructions, to confirm the question of agency, to assess the educational level of RB, her attitudes to what was proposed, her role in the family vis-a vis her husband, to

> provide the warning she had given to DB and observe her reaction.
>
> Observing RB in court, I consider it highly probable that, had MV given the advice she said she provided, RB would have given her firm, unambiguous instructions only to draw the cheque in favour of herself and her husband, and not in favour of Karl Suleman. As she said, she was not a gambler. She appeared to have only a rudimentary understanding of the banking and finance systems.
>
> My conclusion as to what RB would have done had she been contacted by MV and given the advice she had given to DB, has repercussions for RB of course, but also for DB. Both were jointly and severally liable to repay the debt to the loan company. Had RB been contacted and given the instructions to her solicitor which I have anticipated she would, the settlement would not have proceeded in the form it took, namely the payment of $90,000 to Karl Suleman and Co. DB's instructions to MV would have been countermanded, and he would not have lost the monies he placed in the hands of Karl Suleman. MV's negligent failure to seek instructions from RB resulted in the loss of $90,000 to both RV and DB." (emphasis added)

65 The appellant submitted that, from the emphasised portions of this passage, the trial judge had held against her on the basis that she had failed to advise Mrs Betyounan that it would be unwise to invest in a Suleman scheme and that they would be likely to lose their investment. She said that the trial judge appeared to have accepted that the appellant had advised Mr Betyounan, but that he held against the appellant not simply because she failed to seek instructions from Mrs Betyounan, but because she failed "to provide the warning she had given to DB and observe her reaction"; and in his Honour's view, if the appellant had "given the advice she said she provided" or "given the advice she had given to DB", Mrs Betyounan would have instructed her only to draw the cheque in favour of herself and her husband. This, it was said, was in the face of the refusal to allow the respondents to rely on the additional particulars involving failure to advise that investment in a Suleman scheme was most unwise and was likely to bring loss of the investment.

66 In his summary earlier set out the trial judge spoke only of failure to obtain instructions and what would have happened if the appellant had sought

instructions from Mrs Betyounan. The summary must be read together with the preceding exposition, of which the passage I have set out is part. However, what would have happened if the appellant had sought instructions from Mrs Betyounan necessarily involved consideration of what would have been said in seeking instructions. This called for consideration as a matter of fact, as distinct from as a matter of the appellant's contractual or tortious duties. The trial judge was entitled to find as facts what the appellant would have said to Mr Betyounan and take that into account in his consideration of causation. I do not think that the appellant's complaint is made out.

(c) Error in fact-finding

67 The trial judge found that Mr Betyounan was not Mrs Betyounan's agent to give instructions for drawing the $90,000 cheque in favour of Karl Suleman & Co. He found that if the appellant had sought instructions from Mrs Betyounan, Mrs Betyounan's instructions would have been such that it would not have happened. The findings were critical to the decision holding the appellant liable to the respondents for the $90,000. I do not accept the respondents' submission that the finding as to causation was not a necessary step, because the legal wrong was not misappropriation but breach of duty by failure to obtain instructions; and so there had to be determined what would have occurred if the appellant had sought instructions.

68 Although the appellant's complaint as to fact-finding applied more widely, the submissions focussed upon these critical findings.

69 If Mrs Betyounan had intended, together with Mr Betyounan, that part of the loan would be invested, and had known and intended that it would be put into a Suleman scheme in order to receive the high return, and together with Mr Betyounan had blamed the appellant for their imprudent investment and sought to recover it from her, that would be very material to authority and causation. From what Mr Betyounan told the appellant

leading to the file note of 3 October 2001, it was clear that Mr Betyounan intended that part of the loan would be put into a Suleman scheme. On the appellant's case, his later account of a home loan from which $90,000 was withheld was a false account, and it could be inferred (in particular from Mrs Betyounan's involvement in the letter of 24 March 2002 and her writing of the letters in April and May 2002) that Mrs Betyounan was jointly involved with him in the intended investment and the subsequent falsity. If that were so, a finding that Mr Betyounan was acting with her authority was at the least enhanced, and it could hardly be found that she would have told the appellant, if instructions had been sought, that money should not be put into a Suleman scheme.

70 The appellant submitted that the trial judge failed to address or make findings on this important matter, and in particular declined to have regard to or resolve whether the Ex 5 approval letter and the Ex 2 settlement letter were fabrications prepared by the respondents. That they were fabrications by the respondents not only would assist in showing the falsity of the account jointly put forward by the respondents, but also would support that Mrs Betyounan was equally with her husband intent on putting money into a Suleman scheme. The appellant submitted that the critical findings were accordingly flawed.

71 There were substantial grounds for finding fabrication of the Ex 5 approval letter. However, it was not put to either Mr Betyounan or Mrs Betyounan that the Ex 5 approval letter was a fabrication, or that he or she had been involved in its fabrication. I do not think that the appellant can use fabrication of the copy letter against them.

72 The appellant referred in this connection to the statement by the respondents' trial counsel, after a short adjournment expressed to be in order that he might take instructions, that "consistent with the duty that I owe to the court" he did not "wish to press, or for your Honour to have regard, to the entry that appears on [the Ex 5 letter] as Loan Purpose: Home loan". The appellant submitted that this supported that the Ex 5

letter was a fabrication in which the respondents were involved. I do not think that the submission rises above speculation, and fabrication was still not put to the respondents even though Mrs Betyounan was later recalled to give further evidence.

73 The appellant is, however, on sound ground with the Ex 2 settlement letter. An expert report of Ms Michelle Novotny tendered in the appellant's case concluded that it was "the product of document manipulation by means of a physical and/or digital cut-and-paste superimposition method". Ms Novotny was not cross-examined. Plainly the respondents would not have wished to provide the Legal Services Commissioner with a copy of the settlement letter stating that a cheque for $90,000 had been drawn in favour of Karl Suleman & Co, when they said they knew nothing of Karl Suleman, and that a cheque had been drawn in favour of DMS or Zia George was in accord with their account. It was open to find that the respondents had brought about the fabrication. It was sufficiently put to both Mr Betyounan and Mrs Betyounan that they had falsified the copy letter.

74 The trial judge can not have accepted the account of a home loan from which $90,000 was withheld, but he made no findings upon the respondents' putting forward an incorrect account of their loan and mortgage transaction and what happened to the money. Nor so far as appears from his reasons did the trial judge give consideration in this connection to Mrs Betyounan's joint intention that money be put into a Suleman scheme, with the significance which that could have to authority and causation. The trial judge did not refer to fabrication of the Ex 5 approval letter. As to the fabrication of the Ex 2 settlement letter, the trial judge said -

> "As to the versions of the letter of the 22nd October 2001, or the conversation between MV and DB in November 2001, on 6th December 2001, or the conversation between DB and Adam Zomaga on 7th December 2001 – all these matters post date the settlement of the loan on Friday 19th October 2001, and therefore, while mysterious and puzzling, in the light of my findings as to the

> telephone call on 3rd or 4th October 2001, the conference with DB on 3rd October 2001 and the evidence of Kay Horton as to instructions on or about 18th October 2001, there is no need to come to a concluded view of these matters.
>
> It is certainly puzzling to compare the two letters dated 22nd October 2001. There is no doubt that exhibit 2 is not a copy of the original. It is clear on the face of this document, as well as on the basis of the expert report (Ex 11), that the original document is exhibit 1. Who produced exhibit 2, modifying the original letter, when and for what purpose, and in what circumstances are questions I do not need to determine. There is insufficient evidence to resolve these questions. The variation would not seem to advantage the position of MV in any way. I did not hear from Zia George or QLS or Karl Suleman. The modified letter could have advantaged the claim of the plaintiffs. It may have been produced by a third party – QLS, for example, after it received the yellow envelope delivered by DB. I simply do not know, and do not need to determine."

75 Findings as to, at the least, fabrication of the Ex 2 settlement letter were important to proper fact-finding, and I am unable to accept that there was insufficient evidence to enable findings. More widely, in restricting his findings in the manner he did the trial judge left incomplete the consideration which should have been given to authority and causation. The trial judge's findings on those matters were materially flawed.

76 The appellant submitted that the findings as to causation were flawed in another respect. For the reasons which follow, the submission should be accepted.

77 The respondents were represented at the commencement of the trial and while they gave evidence in chief and were cross-examined. Shortly after the conclusion of the cross-examination of Mrs Betyounan, the respondents terminated their counsel's retainer. A little later, without material progress of the trial, they terminated the services of their solicitor. The transcript showed Mrs Betyounan participating in discussion with the trial judge of the respondents' representation, and she gave further brief oral evidence before the proceedings were adjourned for some time.

78 When the proceedings re-commenced the respondents were again represented. Mrs Betyounan was recalled and, over objection, gave the evidence -

> "Q. Had she told you that her husband was planning to invest with Karl Suleman, and had she told you that that involved 100 per cent risk and no guarantee, what would you have done?
> A. If, if --
>
> Q. No. If she told you that, what would you have done?
> A. I would not go on with the loan. I would just cancel it."

79 Counsel for the appellant cross-examined. He received answers to the effect that Mrs Betyounan would not have agreed with any form of investment, even with bank or a building society, because "we not the type to invest"; that the money was to build their house; and that if the appellant had told her about Mr Betyounan's intended investment with Karl Suleman she would have vetoed it without speaking to him -

> "I would have said to her, you are absolutely wrong, there is no such thing, and I would tell her to cancel the loan."

80 It appears that at the time no one realised that s 5D(3)(b) of the *Civil Liability Act* 2002 made inadmissible a statement by Mrs Betyounan about what she would have done. That point was made in submissions, and the trial judge said in his reasons -

> "In her evidence in reply, RB had asserted that had she been informed by her solicitor that her husband was giving instructions to pay monies to Karl Suleman, she would certainly not have agreed to this; that she would have instructed her solicitor not to comply with such instructions. This evidence was led on the question of causation. It was not objected to at the time by the defendant's counsel. In fact, he cross-examined RB in some detail on her evidence. (Tr 205-7) However, despite failure to object, the Act makes clear that this evidence is not admissible, and I reject it."

81 The evidence in chief had been objected to, although not on the ground that s 5D(3)(b) made it inadmissible, and counsel for the appellant may have had little choice but to cross-examine. What evidence the trial judge

intended retrospectively to reject is unclear. In the course of submissions he referred to rejecting the cross-examination, but the summation given by the trial judge appears to have some elements of the cross-examination. As appears from the passage next set out, he also appears to have acted on some of the evidence given in cross-examination. In particular, the passage includes "As she said, she was not a gambler"; Mrs Betyounan did not in fact say that she was not a gambler, and this must be a reference to her evidence that they were not the type to invest. As well, in saying that Mrs Betyounan appeared to have only a rudimentary understanding of the banking and finance systems the trial judge must have been referring to the lack of understanding she showed when asked in the cross-examination about putting the money in an account with a bank.

82 It is not satisfactory that the cross-examination was consequent on a ruling later reversed and it was left unclear what of the evidence was rejected upon the new ruling. However, the appellant's complaint went beyond this.

83 In his reasons on the question of causation to which I have earlier referred the trial judge said, and I repeat part of the passage earlier set out -

> "To determine what RB would have done if the defendant had not been negligent, I must approach the question from the point of view of the second plaintiff (subjectively), and in the light of all the relevant circumstances. Section 5D(3)(a). [of the *Civil Liability Act* 2002].
>
> From observing DB in the witness box and in court, it was plain that he was not an emotionally balanced person. He appeared disturbed, unstable, reliant on the care and support of his wife, deferring to her initiative. While he appeared stressed, she seemed calm and in control. He looked to her for reassurance and advice. It was she who had to front the Bar table when her legal representatives were no longer acting for them. She had to deal with me, while her husband sat silent, seated at the back of the court, as though he did not know what was happening, or what was to be done.
>
> ...

> Observing RB in court, I consider it highly probable that, had MV given the advice she said she provided, RB would have given her firm, unambiguous instructions only to draw the cheque in favour of herself and her husband, and not in favour of Karl Suleman. As she said, she was not a gambler. She appeared to have only a rudimentary understanding of the banking and finance systems.
>
> My conclusion as to what RB would have done had she been contacted by MV and given the advice she had given to DB, has repercussions for RB of course, but also for DB. Both were jointly and severally liable to repay the debt to the loan company. Had RB been contacted and given the instructions to her solicitor which I have anticipated she would, the settlement would not have proceeded in the form it took, namely the payment of $90,000 to Karl Suleman and Co. DB's instructions to MV would have been countermanded, and he would not have lost the monies he placed in the hands of Karl Suleman. MV's negligent failure to seek instructions from RB resulted in the loss of $90,000 to both RB and DB."

84 The appellant submitted that in determining what Mrs Betyounan would have done, and consequentially what that would have meant for putting the money into the Suleman scheme, the trial judge made assessments of Mr and Mrs Betyounan not just from his observation of them in the witness box and of Mrs Betyounan when she had to "front the bar table", but from other observation of them in court. She submitted that he was in error in taking account of impressions gained from observing them in the well of the court without drawing to the parties' attention that he had in mind doing so. It was common ground that he did not draw this to the parties' attention.

85 In *Government Insurance Office of New South Wales v Bailey* (1992) 27 NSWLR 304 this Court considered the influence of observations of witnesses outside the witness box. Use or misuse of the observations is a question of procedural fairness in the determination of disputes in a (generally) open hearing upon the evidence presented by the parties. Kirby P discussed the matter in some detail, including saying at 311 that "[i]f material is used to determine a case which is outside the legal evidence, beyond the permissible exceptions and is not disclosed to the parties, an irregularity will have occurred which may amount to a breach of the requirement of procedural fairness and necessitate the setting aside of

the judgment challenged." Clarke JA, with whom Hope AJA agreed, said at 323 that the rule to be applied was "a flexible one based upon considerations of fairness and justice", but his Honour's citation with approval from *Angaston and District Hospital v Thamm* (1987) 47 SASR 177 at 177-9 included -

> "It is clear, however, that where the judge makes observations of the actions or demeanour of a party, which actions and demeanour are not observable by counsel, and makes use of those observations in a way which has a significant influence upon his decision of the case, he is required in justice, before making such use of those observations, to make those observations and the possibility of his using them in the course of his judgment known to counsel at a stage of the hearing at which counsel still has an opportunity of dealing with them in a proper and effective way."

86 The principles in *Government Insurance Office of New South Wales v Bailey* have since frequently been recognised and applied, see for example *Kappis v State Transit Authority* (1995) 11 NSWCCR 386 and *Kassem v Crossley* [2000] NSWCA 276.

87 The trial judge did take into account his observations of the respondents outside the witness box. His reasons referred to observing Mr Betyounan "in the witness box and in court", and that the observation was of Mr Betyounan in the well of the court is made clear by the reference to Mr Betyounan sitting silent at the back of the court as though he did not know what was happening or what was to be done. It is not so clear that by "observing RB in court" his Honour meant more than observing her in the witness box or when she fronted the bar table, but it is unlikely that his observation of Mr Betyounan in the well of the court was unaccompanied by observation of Mrs Betyounan. It should be concluded that he meant wider observation of Mrs Betyounan. Counsel would not necessarily have been aware of whatever it was the trial judge saw – indeed, the trial judge did not elucidate what he observed.

88 The observations in my view plainly influenced the trial judge; they are given as the essential reasons for determining what Mrs Betyounan would have done. I put aside observation of Mrs Betyounan when she fronted the bar table, but the observations of the respondents in the well of the court in my judgment materially influenced the judge in coming to his determination. The observations some four years after the events of October 2001 were a questionable guide to how the respondents would have conducted themselves at the time of those events, especially when it is clear enough that in October 2001 Mr Betyounan took an active role in instructing the appellant and was not "silent ... as though he did not know what was happening, or what was to be done". The parties, relevantly the appellant, could well have submitted to the trial judge that time and concern over loss of the money had had an effect on how the respondents conducted themselves, or could otherwise have sought to dissuade him from reliance on the observations, or could have applied further to cross-examine, if the possibility of the trial judge using the observations had been made known. In my opinion, there was procedural unfairness vitiating the causation finding.

The judgment in favour of Mr Betyounan

89 The trial judge ordered that there be a verdict and judgment "in favour of the first and second plaintiffs as against the defendant in the sum of .... ". Although it was not one of the grounds of appeal, the Court raised with counsel whether this was correct. On the trial judge's reasoning, the appellant was in breach of her contractual and tortious duties owed to Mrs Betyounan, but she was not in breach of her contractual and tortious duties owed to Mr Betyounan. He had given instructions whereby the cheque for $90,000 was drawn in favour of Karl Suleman and Co and given to him, and he then put it into the Suleman scheme. Again on the judge's reasoning, if the appellant had sought instructions from Mrs Betyounan that would not have occurred. Since Mrs Betyounan was a joint borrower with Mr Betyounan, it may have been that she could therefore recover the whole of the $90,000 plus interest as her damages.

But Mr Betyounan had no cause of action against the appellant, and was not entitled to judgment against her.

90 Since the verdict and judgment must be set aside, it is sufficient to note this matter in case it re-arises.

Orders

91 The interrelationship of the issues to be determined upon widely conflicting evidence is such that the new trial could not be on a limited basis, and there must be a new trial generally. I propose the orders -

(1) Appeal allowed.

(2) Set aside the verdict and judgment in favour of the plaintiffs.

(3) Remit the matter to the District Court for a new trial.

(4) Costs of the trial to be in the discretion of the judge hearing the new trial.

(5) Respondents pay appellant's costs of the appeal and have a certificate under the Suitors Fund Act.

92 **McCOLL JA**: I agree with Giles JA.

93 **BELL JA**: I agree with Giles JA.

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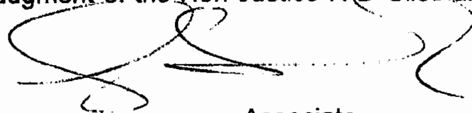
I certify that this and the preceding 29 pages are a true copy of the reasons for judgment of the Hon Justice R D Giles and of the Court.



Associate

14 May 2008