# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Saeed v Carter Capner Law* [2020] QSC 177 |
| PARTIES: | **MIAN AMIR SAEED**<br>(Plaintiff)<br>**v**<br>**CARTER CAPNER LAW**<br>**ABN 65 600 423 881**<br>(Defendant) |
| FILE NO: | BS No 4431 of 2020 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 17 June 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 9 June 2020 |
| JUDGE: | Bowskill J |
| ORDERS: | **1. The claim filed on 23 April 2020 is set aside.**<br>**2. The proceeding is dismissed.**<br>**3. The plaintiff pay the defendant's costs of the proceeding, on the standard basis.** |
| CATCHWORDS: | PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SETTING ASIDE – where the plaintiff commenced proceedings claiming damages for negligence against the defendant, a firm of solicitors which acted for him in relation to a claim by the plaintiff for damages for personal injury suffered at work – where the plaintiff settled his personal injury claim and, subsequently, disputes arose between the plaintiff and his former lawyers, including the defendant, in relation to fees charged and the conduct of the personal injury claim – where a mediation was conducted between the plaintiff, the defendant and two other firms of solicitors involved in the dispute – where the plaintiff was legally represented at the mediation – where a settlement agreement was entered into at the mediation, signed by all parties to the dispute – where the plaintiff now contends that he did not understand the settlement agreement would have the effect of preventing him from bringing the present proceeding against the defendant – whether the plaintiff's claim against the defendant is barred under the terms of the settlement agreement – whether there |

is any prospect of the plaintiff establishing a *non est factum* defence such as to avoid the binding effect of the settlement agreement – whether the claim should be set aside

*Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337

*Petelin v Cullen* (1975) 132 CLR 355

*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165

COUNSEL: The plaintiff (respondent) appeared on his own behalf
B W J Kidston for the defendant (applicant)

SOLICITORS: The plaintiff (respondent) appeared on his own behalf
Carter Capner Law for the defendant (applicant)

[1] On 23 April 2020 the plaintiff commenced proceedings in this Court, claiming $738,643 damages against the defendant for alleged professional negligence, bad advice and breach of the client cost agreement.

[2] On 20 May 2020 the defendant filed a conditional notice of intention to defend. As required by rule 144(4) of the *Uniform Civil Procedure Rules* 1999, the defendant then filed an application under r 16 of the UCPR seeking an order that the claim be set aside or, alternatively, that the statement of claim be struck out.

[3] The primary basis on which the defendant contends the plaintiff's claim should be set aside, essentially bringing the proceeding to an immediate end, is that the claim is barred under the terms of a settlement agreement entered into on 25 October 2019, following a mediation.

[4] Alternatively, the defendant submits the plaintiff lacks standing to commence this proceeding, as the claim is "after-acquired property" in relation to the plaintiff, a bankrupt, which vests in the Official Trustee.[1]

[5] The plaintiff's claim in this proceeding arises in the following context. The plaintiff retained the services of the defendant, a firm of solicitors, to act for him in relation to a claim for damages for personal injury he suffered in the course of his work. He asserts the defendant breached its tortious and contractual duty to him, essentially, by failing to follow his instructions and properly advise him in relation to an alleged additional injury, described as "thoracic spine injury". As a consequence, the plaintiff asserts he suffered loss and damage, comprising the damages he says he would have recovered had the "thoracic spine injury" been included as part of his claim, as well as the legal costs he has paid to the defendant, and his previous lawyers.

[6] In order to deal with the defendant's argument it is necessary to understand some of the background, leading to the mediation on 25 October 2019.

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1 See ss 58 and 116 of the *Bankruptcy Act* 1966 (Cth).

[7] The defendant acted for the plaintiff for two years from April 2017 to April 2019 in relation to his personal injury claim. Prior to that, Littles Lawyers and then Patinos Personal Lawyers had acted for the plaintiff in relation to his claim.

[8] With the defendant acting for him, the plaintiff commenced proceedings against his employer in the District Court in May 2017, claiming damages for personal injury (proceeding BD 1627 of 2017).[2]

[9] Well prior to this, there had been proceedings in the Queensland Industrial Relations Commission (QIRC) in 2015, involving an appeal by the plaintiff against a decision of the Workers' Compensation Regulator rejecting his application for compensation arising out of the same workplace incident. The hearing of that appeal in the QIRC took place over three days in February 2015. The plaintiff was represented by Ms Anderson of counsel, who was instructed by Littles Lawyers. At [2] of the QIRC's decision,[3] it is recorded that the plaintiff (there, the appellant) "claims to have sustained an injury to his right shoulder on or about 12 July 2013". The evidence before the QIRC about the plaintiff's injury is addressed commencing at [10] of the decision and included reports from a number of specialists. The existence of an injury and whether it was caused by his work activities were both contested issues. The appeal was allowed, with the QIRC member finding the plaintiff had suffered an injury (to his right shoulder) which, on the balance of probabilities, arose out of or in the course of his employment.

[10] Returning to the District Court proceedings: In [6] of the statement of claim it was alleged that as a result of his work duties the plaintiff sustained a right shoulder injury and a thoracic spine injury. The claim was for just over $593,590, including about $320,500 for future economic loss. The statement of claim was settled by Mr Horvath of counsel.

[11] Prior to retaining the defendant, the plaintiff had retained Patinos Personal Lawyers. The material includes the advice that firm gave to the plaintiff in March 2017, prior to a settlement conference, as well as the advice of Dr Cross of counsel dated February 2017.[4] Relevantly, Dr Cross addresses the issue of a possible claim for a thoracic spine injury and says he does not consider this is available. I note that the report which seems to have given rise to the thoracic spine injury issue (although the plaintiff is adamant that the injury was referred to earlier) is a report from Dr Tadros, dated October 2016, which identified for the first time a thoracic spine injury.[5] In his advice of February 2017, Dr Cross described this as surprising, given no other specialist had diagnosed such an injury.[6]

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2 A copy of the statement of claim appears at pp 8-13 of the exhibits to Mr Carter's affidavit.

3 *Saeed v Simon Blackwood (Workers' Compensation Regulator)* [2015] QIRC 28 (a copy of which appears commencing at p 190 of the exhibits to Mr Carter's affidavit).

4 These documents were annexed to an affidavit of the plaintiff, filed in support of one of his applications to QCAT, and appear at pp 101-118 to the exhibits to Mr Carter's affidavit.

5 A copy of this report appears commencing at p 226 of the exhibits to Mr Carter's affidavit.

6 See p 111 of the exhibits to Mr Carter's affidavit.

[12] The material also includes an advice provided by Mr Horvath of counsel, on 8 June 2017. The questionable basis of any claim in relation to a thoracic spine injury is also discussed by Mr Horvath.[7]

[13] In [4] of its defence[8], the employer admitted the plaintiff "suffered a tear of the rotator cuff of the right shoulder that was successfully repaired, and resolved with no ongoing impairment", but denied the plaintiff suffered an injury to the thoracic spine.

[14] In late October 2018 Ms Anderson of counsel, the barrister who had represented the plaintiff in the QIRC appeal, was retained to advise the plaintiff in relation to his personal injury claim.[9] The plaintiff met with Ms Anderson and another solicitor from the defendant firm on 2 November 2018, to discuss an offer which had been made by WorkCover, which was not accepted. WorkCover subsequently, on 28 November 2018, made an offer to resolve the plaintiff's claim for $230,000 clear of statutory refunds, which was left open for a period of time, to enable the plaintiff to obtain advice about it.

[15] In further instructions to Ms Anderson of counsel dated 29 November 2018, Mr Carter set out in detail WorkCover's position in relation to the purported additional thoracic spine injury. This included that there had been an assessment process undertaken, resulting in WorkCover "rejecting entirely that the Plaintiff had suffered any thoracic spine injury in the course of his employment"; an internal review had been refused; and an appeal to the QIRC had been lodged, but withdrawn.

[16] The advice was provided by Ms Anderson of counsel on 10 December 2018.[10] The issue of a thoracic spine injury was specifically addressed, in the context of providing advice to the plaintiff about the offer which had been received from WorkCover. It is not necessary for present purposes to go into detail about the content of this advice, save for noting that Ms Anderson advised there was no reason why the plaintiff should not settle his claim with WorkCover, that indeed it was a good offer, and that there was nothing to be gained (but plenty to be lost) by the plaintiff spending additional time and money attempting to obtain an assessment for an additional injury to his thoracic spine, for reasons addressed in detail in the advice.

[17] It is apparent from the advice that, at this time, the plaintiff had already articulated a belief that he had a cause of action against Patinos Lawyers for failing to seek assessment of the purported thoracic spine injury.

[18] The plaintiff, in further material provided in relation to the application before me (exhibit 2), contends Ms Anderson was not fully briefed with all relevant material in relation to the thoracic spine injury, in particular, material he says shows that injury was present from at least 2014. That contention is not supported by the evidence.[11]

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7 See pp 303-304 of the exhibits to Mr Carter's affidavit. Again, this document was annexed to an affidavit of the plaintiff, filed in support of one of his applications in the District Court.

8 A copy of the amended defence appears at pp 14-23 of the exhibits to Mr Carter's affidavit.

9 See Mr Carter's second affidavit, sworn 12 June 2020, at pp 1-2 of the exhibits.

10 A copy of the advice appears at pp 25-33 of the exhibits to Mr Carter's affidavit.

11 See, for example, the second affidavit of Mr Carter at pages 5 (index to brief); 9 (memorandum from the plaintiff to Mr Carter and Ms Anderson, dated 3 December 2018, at para 6(b)); 17, 18, 19, 20 (emails

There was considerable exchange of correspondence, between the plaintiff, Mr Carter of the defendant and Ms Anderson following the provision of Ms Anderson's advice, and prior to 19 December 2018, directly in relation to the plaintiff's contentions that Ms Anderson had not been provided with all the material, and that the purported thoracic spine injury had been reported as early as 2014.

[19] Mr Carter says he gave a copy of Ms Anderson's advice to the plaintiff, and subsequently attended a conference with Ms Anderson and the plaintiff on 19 December 2018 at which the plaintiff agreed to settle the District Court proceedings, in accordance with the Release and Discharge which he signed on 19 December 2018, for the sum of $230,000.[12]

[20] Since that settlement, the plaintiff has agitated various disputes with the lawyers who have acted for him in relation to the claim, including the defendant, primarily as to the payment of legal fees.

[21] In relation to Littles Lawyers, that began earlier in 2018, when the plaintiff filed an application in QCAT challenging the validity of that firm's cost agreement, and the amount of its fees in relation to the QIRC trial. That application was dismissed.[13]

[22] In February 2019, there was an exchange of emails between the plaintiff and Mr Carter in which the plaintiff asked a number of questions including why "work" (which I take to mean WorkCover) did not accept a thoracic spine injury and why Mr Carter considered his fees to be fair and reasonable given that injury had not been accepted. Mr Carter provided a detailed answer, addressing in particular the reasons why WorkCover did not accept the claim for a thoracic spine injury and the basis for the consistent advice that the plaintiff's pursuit of such an injury was futile.[14]

[23] Also in February 2019, the plaintiff filed an application in QCAT, against Patinos Personal Lawyers and the defendant, seeking, amongst other things, declarations of invalidity of those firms' cost agreements; and, as against Patinos, "declarations" about matters which appear to relate to the complaint about the thoracic spine injury not being raised earlier; and, as against the defendant, "declarations" requiring the defendant to do certain things, including provide a statement as to why the defendant did not provide its bill before the plaintiff signed "a discharge release" and as to "why you didn't accept barrister Horvath advised to obtain a medical assessment for the applicant injuries and obtain an engineering reports".[15] That application was also dismissed.[16]

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from the plaintiff to Mr Carter and Ms Anderson in December 2018, on this very point); 21-23 (emails from Mr Carter to Ms Anderson on 12 December 2018, on this very point); 41 (email from Ms Anderson to the plaintiff, directly addressing this issue); 49-50 (letter from Mr Carter to the plaintiff); see also exhibit 2, which includes the email correspondence between Mr Carter and Ms Anderson of 12 December 2018.

12 See pp 34-36 of the exhibits to Mr Carter's affidavit.

13 Order of Daubney J, President of QCAT, 15 April 2019, at p 42 of the exhibits to Mr Carter's affidavit.

14 See the emails at pp 144-145 of the exhibits to Mr Carter's affidavit; and also at p 151.

15 See pp 43-44 of the exhibits to Mr Carter's affidavit.

[24] The plaintiff then attempted to litigate his concerns in the District Court proceeding, filing an application on 16 April 2019 seeking relief the aim of which appears to have been to set aside the settlement of that proceeding, and reopen the proceeding so that the plaintiff could seek damages for a thoracic spine injury.[17]

[25] The plaintiff filed another application in the District Court proceeding on 29 April 2019, this time naming the defendant and Patinos Personal Lawyers as defendants and purporting to seek relief under r 743A of the UCPR (which provides for an application for a costs assessment), but seeking a declaration that the first defendant (Patinos) made a "major mistake" in the claim, and other orders requiring Patinos to provide certain things relating to the thoracic spine injury issue; and as against the defendant (second defendant to the application) an order that it "provide a list of what successful outcome (Carter Capner Law) have received for the above claim".[18] An affidavit of the plaintiff seemingly prepared in support of this application (sworn 23 April 2019) includes assertions by the plaintiff against the defendant, once again, in relation to what the plaintiff perceives is that firm's failure to properly follow up and include the thoracic spine injury as part of the plaintiff's claim.[19] This application was struck out, by order of Porter QC DCJ made on 3 May 2019.[20]

[26] In the District Court proceeding, a declaration was made by Porter QC DCJ on 28 June 2019 that the Release and Discharge dated 19 December 2018 formed and is a binding agreement for the release and discharge of the defendant (the employer) from any liability to the plaintiff arising out of the facts and circumstances of the claims in that proceeding, including for an alleged thoracic injury.[21]

[27] On 10 May 2019 the plaintiff sought to commence a fresh proceeding in the District Court (BD 1631/19) against Patinos Lawyers and the defendant, Carter Capner Law, essentially seeking the same relief he had sought in the application referred to in paragraph [25] above. A document headed "cost statement" forms part of the application, which includes the allegations previously made against the defendant, including about the failure to properly investigate the thoracic spine injury. This document also includes details of the amounts of the defendant's bills, noting that the bill issued on 26 March 2019 claimed fees of $132,902.90.[22] On 28 June 2019, Porter QC DCJ made orders striking out the whole of the application and dismissing the proceeding.[23]

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16 Order of Daubney J, President of QCAT, 16 April 2019, at p 143 of the exhibits to Mr Carter's affidavit.

17 See p 157 of the exhibits to Mr Carter's affidavit.

18 See pp 162-163 of the exhibits to Mr Carter's affidavit.

19 See pp 167-175 of the exhibits to Mr Carter's affidavit, in particular at p 174.

20 See p 316 of the exhibits to Mr Carter's affidavit.

21 See p 319 of the exhibits to Mr Carter's affidavit.

22 See pp 327-328 of the exhibits to Mr Carter's affidavit; as to this document forming part of the application, see [38] of Mr Carter's affidavit.

23 See p 332 of the exhibits to Mr Carter's affidavit.

[28] The plaintiff commenced another proceeding in the District Court against Patinos Personal Lawyers in April 2019 (BD 1095/19).[24] Although the court documents in that matter are not in evidence, it is apparent from other material that in this proceeding the plaintiff alleged Patinos provided negligent advice in relation to the thoracic spine injury which the plaintiff alleges should have been included as part of the WorkCover proceedings.

[29] Against that background of protracted disputes between the plaintiff and his three former lawyers, a mediation was organised for 25 October 2019 between the plaintiff, Littles Lawyers, Patinos Personal Lawyers and the defendant, Carter Capner Law. The plaintiff was represented at the mediation by Ms Anderson of counsel.

[30] The index to the brief to the mediator, and the memorandum to the mediator, are part of exhibit 1 (which comprises the exhibits to the plaintiff's affidavit filed 8 June 2018).

[31] The memorandum to the mediator includes the following:

> "**Background facts**
>
> Four separate disputes are to be mediated on 25 October 2019. Each dispute arises out of a worker's compensation claim brought by Mr Mian Saeed against his former employer, Wild Breads Pty Ltd in relation to a right shoulder injury occurring over a period of time from 18 April 2013 to 12 May 2014 and specific date of 12 July 2013 (**the WorkCover proceedings**).
>
> Throughout the course of the WorkCover proceedings, Mr Saeed retained three different law firms – Littles Lawyers, Patinos Personal Lawyers (**Patinos**) and Carter Capner.
>
> The WorkCover proceedings settled on 19 December 2018 but have not been finalised as Mr Saeed is disputing the liens claimed over the settlement by Littles, Patinos and Carter Capner. Mr Saeed retained Littles between 2014 and December 2015 before retaining Patinos in December 2015. The retainer between Mr Saeed and Patinos terminated following an unsuccessful compulsory conference on 16 March 2017. Mr Saeed then retained Carter Capner who acted on his behalf until the matter settled in December 2018.
>
> In April 2019, Mr Saeed filed and served District Court proceedings against Patinos alleging that it provided negligent advice in respect to a thoracic spine injury which he alleges should have been included as part of the WorkCover proceedings.
>
> **Mediation arrangements**
>
> The parties have agreed to participate in a mediation with a view to resolving the negligence proceedings against Patinos as well as the disputed liens with Patinos and Carter Capner.

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[24] [42] of Mr Carter's affidavit.

You are briefed with the relevant documents from the WorkCover proceedings, Patinos negligence proceedings and the costs statements of the three firms involved."

[32] A compromise was reached between the parties at the mediation, which is recorded in an agreement between the plaintiff (named as the Plaintiff in the agreement), Patinos Personal Lawyers, Carter Capner Law and Littles Lawyers (collectively referred to as the Respondents in the agreement). Although the document is undated, Mr Carter's evidence is that it was entered into on the day of the mediation, and the plaintiff does not contend otherwise. He also accepts he signed the agreement. I note that the plaintiff's signature is witnessed by Susan Anderson, who I infer is Ms Anderson of counsel.

[33] This agreement is in the following terms (after identifying the parties):

"**RECITALS**:

A. The Plaintiff agreed to settle his claim and proceedings as defined in the Release and Discharge (Attachment 1) with WorkCover Queensland for the settlement sum of $230,000 on 19 December 2018.

B. The Plaintiff has agreed and given an irrevocable authority for the settlement sum, less deductions, to be paid according to the irrevocable authority dated 25 October 2019 (Attachment 2).

It is agreed as follows:

1. The payment of $75,825.53 will be made by CCL in accordance with the irrevocable authority date[d] 25 October 2019.

2. In consideration of payment of the $75,825.53 to the bank account of the Plaintiff, he:

    a. Releases and discharges the Respondents from any liability howsoever arising out [of] the facts and circumstances the subject of the claims including proceedings number 1631/19; and

    b. Indemnifies the Respondents against all claims which have arisen or which may arise in the future in relation to the facts and circumstances the subject of the claims including proceedings number 1631/19.

3. This agreement may be pleaded in bar to any action, claim, demand or proceedings brought now or in [the] future by the Plaintiff or on the Plaintiff's behalf having arisen or which may arise in the future out of the facts and circumstances the

> subject of the claim and proceedings including proceedings number 1631/19."[25]

[34] Attachment 1 to the settlement agreement is the Release and Discharge signed on 19 December 2018, recording the agreement to settle the District Court proceeding BD 1627/17. Recital B to the Release and Discharge defines "the claim and proceedings" by reference to the proceedings commenced by the plaintiff "in the District Court at Brisbane by Claim and Statement of Claim number BD 1627/2017 seeking damages in respect of those injuries".[26]

[35] Attachment 2 is a document headed "Irrevocable Authority", signed by the plaintiff on 25 October 2019, under which WorkCover Queensland is directed to pay the settlement sum (as defined in the Release and Discharge) by payment of specified amounts to Medicare, Centrelink and WorkCover Queensland (for a costs order), with the balance of $215,450.36 to be paid to the defendant's trust account. Under this document, the defendant is directed to pay to the plaintiff the sum of $75,825.53 out of the balance "in full and final settlement of any claims arising out of the claim and proceedings as defined in the Release".[27]

[36] Following the mediation, and in carrying out the settlement agreement, Mr Carter says that on 8 November 2019 the defendant received the sum of $215,450.36 from WorkCover into its trust account, being the balance of the settlement moneys paid pursuant to the Release and Discharge signed in December 2018. Mr Carter then prepared a "statement" which he sent to the plaintiff, which sets out the various amounts to be deducted from the settlement moneys (including, in addition to the deductions referred to above, deductions for the defendant's outlays, Mr Horvath's and Ms Anderson's fees, a payment to Littles, Patinos' outlays and an amount to be shared between Patinos and the defendant of $77,165.53) leaving a balance of $75,825.53 to be paid to the plaintiff.[28] Mr Carter says that was paid to the plaintiff on 12 November 2019.

[37] It is apparent from the "statement" that the settlement involved the defendant (and, presumably Patinos) agreeing to accept a reduction in its fees, having regard to the total amount of the defendant's outstanding bill referred to elsewhere in the material (of about $132,900).

[38] At [53] of his affidavit Mr Carter says the sum of $85,825.53 referred to in the statement remains in the defendant's trust account to be divided between the defendant and Patinos Personal Lawyers in respect of their costs. That figure is different from the figure which appears in the Statement (at p 340 of the exhibits) for "Patinos and CCL", which is $77,165.53. As it happens, if you add the amount identified as "payment to Littles", of $8,660.00, to this amount, you get $85,825.53. In this regard, I note the material includes an email from a Mr Shannon of the defendant's firm to the plaintiff, sent on 12 November 2019, saying "the payment to Littles has been stopped as those

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25 Underlining added.

26 See p 337 of the exhibits to Mr Carter's affidavit.

27 See p 336 of the exhibits to Mr Carter's affidavit.

28 See p 340 of the exhibits to Mr Carter's affidavit.

costs are being paid direct by the Regulator".[29] I mention this for completeness, and I will seek to clarify it with the defendant's legal representative at the time of delivering these reasons. But this issue does not affect the determination of the defendant's application as a matter of law.

[39] Notices of discontinuance of both District Court proceedings, BD 1627/17 (the claim against the employer) and BD 1095/19 (the claim against Patinos) were filed in November 2019.

[40] The defendant relies upon the settlement agreement entered into on 25 October 2019 as a complete bar to the current proceeding commenced in this Court.

[41] In relation to this, the plaintiff asserts that he believed the purpose of the mediation was to "sign the release document for Workcover, accepting Patino's lawyers offer, and a settlement document with Patino's lawyers", and that the document he was given to sign "related to these two transactions, i.e. the Workcover and Patino's settlements" and that he "did not understand the legal terminology used". He says "I feel CCL [the defendant] owed me a duty of care to inform me of the legal implications of signing the document not just saying to me that I should sign to get compensation". He says the mediation was "very much a group of lawyers then just myself as a person who was reliant on their skill and professional conduct", suggesting that his legal representative, Ms Anderson, was not able to ensure his rights were upheld "because she is a barrister that relies on the work from these law firms". The plaintiff asserts that he did not understand at the time of signing the agreement that the effect of it was that he could not take any further action against the defendant.[30]

[42] The determination of the defendant's application turns, in the first instance, on the proper construction of the agreement entered into on 25 October 2019. In that regard, the relevant principles of construction are well-established. The agreement is to be construed objectively, by reference to what a reasonable person in the position of each of the contracting parties would have understood it to mean, having regard to the language used by the parties, the surrounding circumstances known to them at the time of the transaction and the commercial purpose or objects to be secured by the agreement.[31] As articulated by Mason J in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352:

> "… when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting."

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29 See p 341 of the exhibits to Mr Carter's affidavit.

30 [12]-[14] of Mr Saeed's affidavit, filed 8 June 2020.

31 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[47]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at [16], [17] and [73].

[43] The material before the court includes correspondence sent by the plaintiff, both to Mr Carter of the defendant and Ms Anderson of counsel, after the agreement made on 25 October 2019, in which he makes assertions similar to those which he now makes. In this regard, the general principle is that it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made. A distinction is sometimes drawn between proof of a term and the meaning of a term. Evidence of subsequent conduct may be admissible on the former question, particularly where the contract is not wholly in writing, but not the latter.[32] The plaintiff's subsequent assertions in correspondence are not concerned with proof of a term in relation to a contract not wholly in writing. The only purpose for which the plaintiff would seek to rely on that subsequent correspondence is to support his argument as to the construction (meaning) of the settlement agreement. The subsequent correspondence is not admissible for that purpose.

[44] Dealing first with the question of construction, objectively, the meaning and effect of the release and discharge under the settlement agreement entered into on 25 October 2019 extends to a release and discharge of the defendant in respect of the plaintiff's claim for damages for negligence the subject of this proceeding. On the proper construction of clauses 2 and 3 of the settlement agreement:

(a) The release and discharge extends to the defendant, as one of the three "Respondents" who are parties to the settlement agreement.

(b) The release and discharge is in respect of "<u>any</u> liability <u>howsoever arising</u> out of the facts and circumstances the subject of <u>the claims</u> including proceedings number 1631/19". Objectively, the reference to "the claims" is a reference to "the claim and proceedings" referred to in recital A to the settlement agreement, which in turn refers to the Release and Discharge which is attachment 1 to the settlement agreement. A liability on the part of the defendant (as the plaintiff's former solicitors) for damages for breach of the duty of care owed by them, as solicitors, to the plaintiff, their client, in the conduct of the claim is a [any] liability [howsoever] arising out of the facts and circumstances of the claim and proceedings.

(c) The indemnity extends to "all [such] claims which have arisen or which may arise in the future…".

(d) By clause 3, it is expressly agreed that the settlement agreement may be pleaded in bar to any [such] action, claim, demand or proceedings brought now or in the future by the plaintiff.

[45] It is clear from the background circumstances leading up to the mediation on 25 October 2019 that the plaintiff's dispute with the defendant concerned not only the defendant's fees, but also the plaintiff's perception that the defendant had failed to properly investigate, and include as part of his personal injury claim, a claim for a thoracic spine injury. Although he had not commenced proceedings against the defendant, prior to the mediation, he had articulated that this was a central part of his complaint against the defendant, as it was against Patinos Personal Lawyers as well. The settlement agreement reflects a compromise of the dispute between the plaintiff

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[32] See *Tripple A Pty Ltd v WIN Television Qld Pty Ltd* [2018] QCA 246 at [59], and the authorities there referred to.

and the three law firms which had acted for him in relation to his personal injury claim. In so far as the defendant is concerned, it is apparent that it reflected a compromise in terms of the fees to be paid by the plaintiff.

[46] The plaintiff effectively contends he should not be held to be bound by the written settlement agreement which he signed,[33] on the basis that he now says he did not understand it would have the effect of preventing him from pursuing a claim against the defendant of the kind he now wishes to pursue – that is, a claim for damages for alleged negligence in relation to a particular aspect of the way in which the defendant firm dealt with his personal injury claim, namely, the thoracic spine injury issue.

[47] As to this, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 the plurality said at [42]-[46], after referring to the objective approach to interpretation of contracts:

> "[42] Consistent with this objective approach to the determination of the rights and liabilities of contracting parties is the significance which the law attaches to the signature (or execution) of a contractual document. In *Parker v South Eastern Railway Co* [(1877) 2 CPD 416 at 421], Mellish LJ drew a significant distinction as follows:
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> > 'In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it.'
>
> [43] More recently, in words that are apposite to the present case, in *Wilton v Farnworth* [(1948) 76 CLR 646 at 649] Latham CJ said:
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> > 'In the absence of fraud or some other of the special circumstances of the character mentioned, a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it. Any weakening of these principles would make chaos of every-day business transactions.'
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> [44] In *Oceanic Sun Line Special Shipping Co Inc v Fay* [(1988) 165 CLR 197 at 228], Brennan J said:

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[33] See *Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [33].

> 'If a passenger signs and thereby binds himself to the terms of a contract of carriage containing a clause exempting the carrier from liability for loss arising out of the carriage, it is immaterial that the passenger did not trouble to discover the contents of the contract.'

> [45] It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be. …"

[48] In so far as the plaintiff's assertions raise a plea of *non est factum* – that notwithstanding he signed the settlement agreement on 25 October 2019, it is *not his deed* and therefore he should not be bound by it – in my view there is no basis on which this "extraordinary" defence,[34] could be said to be made out here.

[49] As explained in *Petelin v Cullen* (1975) 132 CLR 355 at 359, the strict qualifications which attach to the defence are designed to achieve the objective of keeping it within narrow limits, given the importance which the law assigns to the act of signing an agreement. Those strict qualifications are as follows:

> "The class of persons who can avail themselves of the defence is limited. It is available to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; it is also available to those who through no fault of their own are unable to have any understanding of the purport of a particular document. To make out the defence a defendant must show that he signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to carelessness on his part. Finally, it is accepted that there is a heavy onus on a defendant who seeks to establish the defence."[35]

[50] Carelessness in this context refers to "a mere failure to take reasonable precautions in ascertaining the character of a document before signing it". The insistence that such precautions should be taken as a condition of making out the defence is of fundamental importance when the defence is asserted against an innocent person – that is, a person who does not know and has no reason to suspect that the document was signed under some misapprehension as to its character – who relies on the document and the signature it bears.[36]

[51] There can be no suggestion in this case that the defendant induced the plaintiff to enter into the settlement agreement, or made any (mis)representation to him as to its

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34 See, for example, *Metway Leasing Ltd v Commissioner of State Revenue* [2004] 2 Qd R 409; [2004] QCA 54 at [21].

35 *Petelin v Cullen* (1975) 132 CLR 355 at 359-360. Underlining added.

36 Ibid, at p 360.

character. The plaintiff was separately represented at the mediation by a lawyer. The defendant, and the other law firms, were "parties" to the dispute with the plaintiff. They were each separately represented at the mediation. In that context, the defendant owed no duty to the plaintiff, to advise him in relation to the mediation or the settlement agreement.

[52] As to the plaintiff's background, it is recorded in [3] of the QIRC decision[37] that:

> "The [plaintiff] is an Australian citizen who arrived from Pakistan in 1987. He has been employed in a range of work since then. He commenced as an apprentice chef then worked as a chef in a family restaurant, and subsequently as a sales consultant and special project manager in real estate, and then as a limousine driver."

[53] At [1] of his affidavit the plaintiff says that English is his second language and that he has struggled to articulate himself as well as understand the legal process. However, he is clearly able to read, write and speak fluently in English. I say that based on the fact that the plaintiff represented himself in the hearing before me, and presented as an articulate and capable person. He prepared an 11 page affidavit, responding in detail to the affidavit of Mr Carter. The exhibits to Mr Carter's affidavit include many detailed documents, including court documents, documents purporting to be agreements of various types, and correspondence, which were prepared by the plaintiff. He may not understand the legal process – not many lay people would – but I can see no basis at all on which to conclude that he is unable to read, or that it could be inferred he was unable (owing to English being his second language) to have any understanding of the character or effect of the settlement agreement which he signed on 25 October 2019. On the contrary, the plaintiff clearly knew the settlement agreement that he signed on 25 October 2019 was an agreement recording the compromise of a dispute.

[54] There is in my respectful view no prospect of the plaintiff successfully raising a *non est factum* defence, such as to avoid the binding effect of the settlement agreement.

[55] It follows that, having regard to the terms of the settlement agreement, the plaintiff is barred from commencing a proceeding of the kind he now seeks to advance against the defendant. It is therefore appropriate to order that the claim be set aside, and the proceedings dismissed.

[56] In light of that conclusion, it is unnecessary to address the defendant's alternative argument, as to a lack of standing due to the plaintiff's bankruptcy.

[57] The orders of the court will be that:

1. The claim filed on 23 April 2020 is set aside.
2. The proceeding is dismissed.
3. The plaintiff pay the defendant's costs of the proceeding, on the standard basis.

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37 See p 192 of the exhibits to Mr Carter's affidavit.

[58] As to costs, although the defendant sought indemnity costs in its application, and had foreshadowed seeking such costs in correspondence before the hearing, that was not pressed at the hearing. It might be observed that is an eminently reasonable position to have adopted, given all the circumstances of this case.