SUPREME COURT OF QUEENSLAND

CITATION:	*Mitchell v Pacific Dawn P/L* [2003] QSC 086
PARTIES:	**BRUCE JOSEPH MITCHELL** (plaintiff) **v** **PACIFIC DAWN PTY LTD** ACN 070 358 280 (defendant)
FILE NO/S:	S 3872 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20, 21 August, 27 September 2002
JUDGE:	B W Ambrose J
ORDER:	**I answer question 3(a) as follows –** **The meeting of 22 December 2000 did result in an agreement between the plaintiff and the defendant in the terms alleged in paragraphs 13 to 16 of the defence and in respect of this agreement, consideration (albeit minimal) did pass from the defendant to the plaintiff. The consideration passing from the defendant to the plaintiff was the reduction of the retention fund to 2.5% of the plaintiff's certified entitlements under the contract (from either 8% or 4%) to be held by or on behalf of the defendant to meet rectification costs. The agreement was legally binding upon the plaintiff subject to his right to repudiate it on the grounds of unconscionable conduct and economic duress exercised upon him by the defendant with the assistance of its architect to persuade him to make that agreement.** **I answer question 3(b) as follows –** **The compromise agreement of 22 December 2000 was entered into as a consequence of the unconscionable conduct and economic duress brought to bear by the defendant with the assistance of his architect upon the plaintiff and consequently it is unenforceable by the defendant as alleged in para 13 of the reply.**
CATCHWORDS:	BUILDING AND CONSTRUCTION CONTRACTS – Recovery of monies – application to determine separately two questions arising on the pleadings – whether building contract

varied by further agreement – whether consideration passed from defendant to the plaintiff – whether binding contract formed – whether agreement obtained by defendant through economic duress and unconscionable conduct

Foakes v Beer (1884) 9 AC 605, considered
Musumeci & Anor v Winadell Pty Ltd (1994) 34 NSWLR 723, followed
Stilk v Myrick (1809) 170 ER 1168, considered
Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, considered

COUNSEL: P J Dunning for the plaintiff
S R Lumb for the defendant
SOLICITORS: Primrose Couper Cronin Rudkin for the plaintiff
Lethbridge Hogan O'Hanlon for the defendant

[1] **AMBROSE J:** This is an application to determine separately two questions arising on the pleadings delivered between the parties.

[2] On 1 May 2001 the plaintiff delivered a statement of claim claiming the sum of $341,638.49 due under a building contract between him and the defendant pursuant to which he constructed a multi-storey commercial/residential building at High Street, Toowong.

[3] By defence filed 12 June 2001 the defendant denied indebtedness and pleaded in paras 13, 14, 15 and 16 of the defence that on 22 December 2000 the plaintiff and defendant agreed to compromise their positions by way of settlement whereunder *inter alia* the plaintiff agreed to accept the sum of approximately $273,000 in final settlement of all claims he had against the defendant.

[4] The defendant contends that the essential term of the agreement was that the plaintiff would accept in full settlement of his claims against the defendant payment of –

- $160,000.00 (inclusive of GST) on 22 December 2000
- $46,799.00 (plus GST applicable) on or before 22 June 2001 and
- $66,250.00 from retention funds then held to secure the costs of defects rectification

[5] The defendant pleaded that as at 22 June 2001 the plaintiff had "no other right currently enforceable" against the defendant.

[6] In para 13 of the reply of the plaintiff delivered 25 June 2001 he admits that a meeting occurred on 22 December 2000 between him and the defendant but in para 13(b) –

> "(b) denies that the meeting was for the purpose of attempting to reach a full and final settlement of all matters between them but says rather the Plaintiff attended the meeting with a view to obtaining payment of monies which were owed to the Plaintiff by the Defendant in accordance with the Varied Agreement"

[7] The plaintiff further pleads in para 14 of his reply –

"14. The plaintiff denies the allegations contained in paragraphs 15 & 16 of the Defence and in particular:

(a) denies that any legally binding agreement to compromise was entered into;

(b) in the alternative, if an agreement was entered into of the kind alleged, it was arrived at by the application of such improper economic duress by the Defendant on the Plaintiff as to render it unenforceable."

[8] On 7 September 2001 it was ordered by consent *inter alia* –

"3. The following questions be determined separately from other questions in the proceeding before the trial of the proceedings:-

(a) Whether the meeting on 22 December 2000 as referred to in paragraph 14 of the Defence and paragraph 13 of the Reply resulted in any legally binding agreement in terms alleged in paragraphs 13 to 16 of the Defence and if so what were its terms;

(b) Whether, if any agreement of the kind alleged in paragraphs 13 to 16 of the Defence was entered into, it was arrived at by the application of such improper economic duress by the Defendant on the Plaintiff as to render it unenforceable as alleged in paragraph 13 of the Reply."

[9] On the material it seems that the construction of the building in issue had reached the stage of practical completion by 20 December 2000.

[10] It is clear that on that day the defendant was significantly in default in making payment to the plaintiff of monies due under the building contract. Various certificates of practical completion had been given and at that stage many of the plaintiff's subcontractors were demanding payment of monies due to them for work they had performed in constructing the defendant's building but due to the failure of the defendant to pay to the plaintiff the monies owing to him, he was unable to make those payments.

[11] On 22 December 2000 a meeting was held between the plaintiff and the directors of the defendant in the office of the defendant's architect Mr Tan.

[12] In the course of this meeting there was discussion in the course of which Mr Tan purported to record in his handwriting various offers and acceptances proffered in the course of that discussion. At the end of that discussion his notes of what had allegedly transpired were signed by the plaintiff and the directors of the defendant and witnessed by one of the plaintiff's subcontractors Mr Tones and by Mr Tan. (*vide* Ex 11). Those notes read as follows –

"22.12.2000

<u>Minutes of Meeting</u>

Mr. & Mrs. Fan - Pacific Dawn P/L
Bruce Mitchell - Mitchell Builder

Ian Jones - □
H Tan - H H Tan Architects P/L

Bruce Mitchell will accept $2,836,387.47 as final settlement at Practical Completion. ~~Bru~~ Pacific Dawn P/L will pay Mitchell Builders the balance of claim minus 2.5% retention.

Bruce Mitchell has offered to put $10,000 of the final claim to-wards the retention amount to ~~ps~~ settled later.

Bruce Mitchell has offered again to accept $2,831,387.40.

Settlement amount now $2,765,137.40
& $66,250-00 26 weeks later.
Settlement Payment to-day $206,387.90 plus GST.

Pacific Dawn P/L can only pay $160,000-00 inclusive of GST to-day & balance of $46,799-00 plus GST ^on or before six months later..

ON Behalf of All PARTIES

(1) BUILDER BRUCE Mitchell B Mitchell

(2) Pacific Dawn P/L Bill Fan Bill Fan

~~Carolyn Fan~~
&
(3) Pacific Dawn P/L Carolyn Fan Carolyn Fan

Witnesses - I.P. Tones
H.H. Tan"

[13] With respect to the first question in my view whether or not Ex 11 on its face might amount to an agreement in writing between the parties to it, there can be little doubt that it is capable of being evidence of the essential terms of an oral agreement reached in the course of discussions that took place on 22 December 2000.

[14] Having regard to the evidence of the plaintiff and Mr Tan I am of the view that that document strongly supports the defendant's contention that on 22 December 2000 there was an agreement along the lines it pleads.

[15] On the other hand on its face there was a minimal (if any) consideration passing from the defendant for the plaintiff's abandonment of part of his claim to a significant sum due to him under the contract – to the extent of approximately $300,000.00.

[16] Essential to the question of consideration passing from the defendant to the plaintiff is the defendant's contention that it had a *bona fide* claim against the plaintiff for compensation for delay in handing over to the defendant a building constructed in accord with the contract between them at the stage of practical completion. Stated shortly it is now the contention of the defendant that the plaintiff under the terms of

the contract was obliged to pay to the defendant a very significant sum by way of compensation for an alleged delay of about six months in completing the work he was obliged to complete under the contract.

[17] One consideration therefore with respect to determination of the first question is whether the defendant had a *bona fide* claim for compensation for the plaintiff's delay pursuant to the building contract between them or whether upon the evidence which was canvassed at great length upon the hearing of this application there was no such *bona fide* claim but merely one raised by the defendant in an attempt to permit it to argue that its abandonment of its *bona fide* claim for compensation for the plaintiff's delay in completing the building provided sufficient consideration to make what would otherwise appear to be an inexplicable agreement pursuant to which the plaintiff abandoned a claim to a large sum of money owing to him by the defendant for no consideration apart from the defendant's agreement to accelerate payment of part of retention monies in a joint account held under the terms of the contract.

[18] Should the defendant fail to demonstrate upon the evidence that there was consideration for the plaintiff's abandonment of a large part of its claim against it – the onus being on the defendant of course to prove consideration passed from it for the plaintiff's abandonment of a large part of his claim – then strictly speaking it would not be necessary to determine the second question.

[19] On the facts of this case I have come to the conclusion for reasons which I will later elaborate that the defendant has arguably proved a minimal consideration for the plaintiff's abandonment of a large part of his claim.

[20] Both questions were argued at length and I will determine the second question on the assumption that Ex 11 does evidence an agreement between the plaintiff and the defendant in respect of which a minimal consideration did pass from the defendant to the plaintiff.

[21] I proceed on the basis that accepting that the agreement sufficiently recorded in Ex 11 is *prima facie* legally binding upon the plaintiff, the onus is on him to demonstrate that such agreement resulted from unconscionable conduct of and/or economic duress applied by the defendant of such a kind as to make it unenforceable against him.

[22] It is the plaintiff's case that initially he entered into a written "lump sum" contract with the defendant for the construction of a commercial/residential high rise building in High Street, Toowong, under the terms of which he was obliged to complete the construction of the building by 25 April 2000 for "a guaranteed upper limit cost of $2,650,000.00", the plaintiff and defendant to share equally any reduction in building cost below that sum. It was agreed that the plaintiff would receive a fee of 7.5% of the construction cost as at completion of the project – ie $198,750.00 if the cost was the upper limit of $2,650,000.00. The total cost of the project therefore would be $2,848,750.00 plus 107.5% of the cost of variations and extras for which the defendant was liable under the contract. In my view this contract should be characterised neither as a lump sum nor cost plus contract but rather as one exhibiting some of the characteristics of both types of building contract.

[23] However it is the plaintiff's case that due to quite inadequate investigation of the site and lack of adequate overall planning and design for the construction of the building, unforseen lengthy delays occurred in the course of construction, for which the defendant was responsible under the contract.

[24] In fact the plaintiff was persuaded to commence on-site building work months before plans for its ultimate construction had been completed or approved. Part of the plans involved the construction of underground car parking, but failure to properly investigate the site required lengthy and costly steps to be taken to overcome deposits of rock which had to be removed to permit construction of the building to proceed. Similarly investigative procedures had not disclosed the existence of a sewerage pipeline crossing the site which had to be shifted involving significant delay and expense. It is clear on the material that not merely was it expensive to achieve this result but also the relocation of the sewerage pipeline impeded significantly the progress of the building work in its initial stages.

[25] As well as that, excavation of the site led to the collapse of support for an adjacent building allotment and this also required significant additional works which led to delay and the incurring of additional costs for which the defendant was contractually liable.

[26] In the course of all the problems encountered in completing the foundation works and structural work of the proposed building up to street level, the defendant changed the overall building design. Initially the building had been designed to have the first two floors on and above street level available for commercial use. However as the building construction was underway it was decided that it would not be economically viable to construct such a building and the design was changed so that one of the proposed commercial floors was redesigned to accommodate residential units. This change in design of course resulted in further delay in getting council approval etc. Moreover it involved as one might expect significant alterations in the building structure.

[27] Different sized steel structural members were required for construction and before this could lawfully be achieved Council approval had to be obtained for the redesigned building.

[28] In the course of all this initial delay it is clear on the evidence (apart from that of the defendant) that it was agreed that the building henceforth should be constructed on a simple cost plus basis rather than upon a fixed maximum building cost contract with variations plus a 7½% builders profit thereon. The effect of this variation was to abandon the upper limit of cost of $2,650,000.00 contained in the original contract and to reconstitute the contract as a simple cost plus contract. I am not persuaded that at the end of the day this variation probably made very much difference. The delays and additional costs incurred as a result of inadequate initial planning and changes in design would probably all have been borne by the defendant as variations under the terms of the original contract. However it was clearly decided by all concerned after the third progress payment certificate had been prepared that the building would be constructed henceforth on a simple cost plus basis – albeit that various terms in the written contract initially specifying a maximum construction cost remained operative subsequent to its oral variation to convert it to a simple cost plus contract. In my view it is not entirely accurate to describe the original contract as "a lump sum" rather than "a cost plus" contract. The original

contract would be more accurately described as one under which the maximum construction cost was fixed with the builder being entitled to an additional 7½% of that fixed cost. The varied contract was one under which no maximum construction cost was fixed.

[29] The plaintiff contends that the various certificates of completion (of which there were 11) make it clear on their face that the defendant did not at any stage prior almost to the time of practical completion being achieved – even raise any question as to undue delay on the part of the plaintiff. In my view upon the evidence called upon this application no such question could reasonably have been raised. There was no suggestion in any of those certificates (which were in fact paid) that the defendant claimed to be entitled to hold back any part of the sums demanded and certified by the architect for the defendant as payable by it to the plaintiff, in respect of any alleged entitlement to compensation for the plaintiff's delay.

[30] These matters to which I have just referred are relevant not merely to answer question two; but also to answer question one.

[31] The essence of the plaintiff's case with respect to question two is that the defendant quite deliberately postponed payment of the sums certified to be due by its architect and the quantity surveyors retained by its bank financing this building operation, to place the plaintiff in such a financial position as to make him unable to pay his subcontractors. It is the plaintiff's case that withholding payment of monies certified to be due for work already performed was a quite deliberate strategy adopted by the defendant to place him in a position where shortly before Christmas 2000 subcontractors were refusing to complete and indeed threatening to take down from the defendant's building materials that they had incorporated in it if their claims for the work they had done were not promptly paid.

[32] The plaintiff was a building contractor; he had other works underway and the prospect of it becoming known in the trade that he was not meeting his current obligations to subcontractors, must have placed him in an invidious position in the market place where he competed for work.

[33] Threats were made by the defendant that if the plaintiff did not accept the sum offered to him on 22 December 2000 no payment at all would be made and the plaintiff's pursuit of the defendant through the courts would inevitably postpone his receipt of monies to which he was then entitled for a significant period of time; this of course would place him in an invidious if not impossible position in tendering for other building projects and indeed in performance of current and future building contracts part of which required work to be performed by other subcontractors.

[34] It has long been the rule that, without more, a debtor may not rely upon the agreement of a creditor to accept in full discharge of a debt owed to him a sum less than that owed. The rule, known as the rule in *Pinnel's case*, is founded upon the lack of any consideration passing from the debtor to the creditor in such a case. The rule was confirmed in *Foakes v Beer* (1884) 9 AC 605.

[35] This rule is also described as the *Stilk v Myrick* principle. That case is reported in (1809) 2 CAMP 317, 6 ESP 129: 170 ER 1168. Strangely *Stilk v Myrick* was not analysed or even referred to in the judgments in *Foakes v Beer* decided some 75 years later.

[36] More recently this principle was considered in the English Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1. In that case *Stilk v Myrick* was distinguished and it was held that a promise by one party to a contract to make a payment additional to that to which the other was entitled in return for that other's promise to perform its existing contractual obligations could secure to that party a benefit or avoid a detriment to it, which was capable of constituting consideration provided however that the person receiving the benefit or avoiding the detriment as a consequence of fulfilment of the promise of additional payment was not exercising economic duress or fraud in obtaining that promise.

[37] In *Musumeci & Anor v Winadell Pty Ltd* (1994) 34 NSWLR 723 Santow J considered all three cases to which I have referred. At 747 [B-F] adopting substantially the analysis of Glidewell J in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* he summarised the position as follows –

> "The present state of the law on this subject can be expressed in the following proposition:
>
> (i) If A has entered into a contract with B to do work for, or to supply goods or services to, B in return for the payment by B, and
>
> (ii) At some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or be able to, complete his side of the bargain, and
>
> (iii) B thereupon promises A an additional payment or other concession (such as reducing A's original obligation) in return for A's promise to perform this contractual obligation at the time, and
>
> (iv) (a) As a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit provided that A's performance, having regard to what has been so obtained, is capable of being viewed by B as worth more to B than any likely remedy against A (allowing for any defences or cross-claims), taking into account the cost to B of any such payment or concession to obtain greater assurance of A's performance, or
>
> (b) as a result of giving his promise, A suffers a detriment (or obviates a benefit) provided that A is thereby foregoing the opportunity of not performing the original contract, in circumstances where such non-performance, taking into account B's likely remedy against A (and allowing for any defences or cross-claims) is capable of being viewed by A as worth more to A than performing that contract, in the absence of B's promised payment or concession to A.
>
> (v) B's promise is not given as a result of economic duress or fraud or undue influence or unconscionable conduct on the part of A nor is it induced as a result of unfair pressure on the part of A, having regard to the circumstances, then,
>
> (vi) The benefit to B or the detriment to A is capable of being consideration for B's promise, so that the promise will be legally binding."

With respect I accept His Honour's summary as a correct statement of the law at this stage of its development.

[38] The principles canvassed in these cases are discussed in an article by Rembert Meyer-Rochow in (1997) 71 ALJ 532.

[39] I do not propose to embark upon a detailed analysis of the authorities to which I have referred or of those discussed in Mr Meyer-Rochow's article. I observe merely that the law on this topic has developed over the last century to suggest that although courts may now be more inclined to find a benefit accruing to a creditor as a consequence of his agreement to accept from his debtor in satisfaction of the debtor's obligations a sum less than that due at law under a contract, they will not do so when the creditor's agreement to accept the lesser sum is procured by economic duress or unconscionable conduct on the part of the debtor.

[40] I will turn first therefore to analyse very briefly the evidence relevant to answering the first question encapsulated in para 8(a) hereof.

[41] On 2 November 2000 Certificate number 11 issued noting that the project was a "cost plus contract" and certifying that the "fair and reasonable" amount due upon the issue of that certificate was $278,959.21 (Ex BJM 2).

[42] It referred to "cost overruns" resulting from "latent conditions in-ground for rock excavation, existing sewer diversion, propping of neighbouring property, and design changes".

[43] That certificate recorded an estimate of the costs which would be incurred to complete the project in the sum of $183,635.66. It is unclear to me how this figure was arrived at having regard to the maximum "construction value" specified under the original contract before its variation. The projected completion date on that certificate was "late November 2000" and the certificate recorded that –

> "…delay has been experienced due to the large extent of rock excavation required. Additional delays caused by wet weather during the early months of this year have also contributed to delays".

[44] It was also certified that as at 2 November 2000 the plaintiff was not in any default of obligations under the building contract. I observe merely that had there then been any suggestion that he was already six months overdue under the contract for completion of the building one would not expect a certificate in these terms to issue because clearly there would have been a default under clause 1.2.10 of the initial contract the effect of which would have been to entitle the defendant to retain sufficient monies to which the plaintiff was then entitled in a joint account opened for that purpose to secure its recovery of compensation from the plaintiff for that delay.

[45] Certificate 11 was not paid by the defendant within the time required.

[46] Perhaps this is understandable because in early November both the defendant and its architect were attempting to persuade the plaintiff to agree that he would complete the works necessary on the project for the sum of $183,635.66 which had been the defendant's architect's estimate of completion costs in Certificate 11 to which I

have already referred – calculated in some fashion which is unclear to me, apparently by having regard to the maximum cost of construction contemplated by the terms of the original contract – ignoring the additional costs incurred to which that certificate referred.

[47] When these discussions were taking place the plaintiff estimated that the costs to complete the building would be approximately $300,000.00.

[48] After further negotiations the plaintiff on 6 November 2000 agreed to complete the building project for the sum of $183,635.66 provided –

(a) the certificate 11 sum of $278,959.21 was paid forthwith and

(b) the sum of $141,403.00 being held as retention money pursuant to clause 10 of the written contract was released in full and

(c) the sum of $183,635.66 which had been nominated as the estimated cost of completion in certificate number 11 was paid within seven days of the final certificate – which would be certificate number 12.

[49] It must be remembered that at the time this compromise agreement was reached, practical completion was expected in late November 2000 – i.e. within perhaps a couple of weeks.

[50] The defendant however did not comply with this agreement;

(a) It did not pay any part of the sum of $278,959.21 which it had agreed to pay immediately.

(b) At no time did it pay $183,635.66.

(c) It permitted payment of the sum of only $143,403.00 which was part of the retention money then held on joint account of the plaintiff and the defendant as security for the cost of rectification work, if any, required under the contract.

[51] When cross-examined as to why the early compromise agreement had not been honoured by the defendant its managing director, Mr Fan, said that the plaintiff did not want to be paid in full the monies that he had agreed to take in compromise of his action at that time. I reject that evidence which unsurprisingly was flatly contradicted by the plaintiff. I find such evidence implausible keeping in mind that the plaintiff had indeed agreed to waive something in excess of $100,000.00 of his estimated cost of completing construction to achieve the immediate or almost immediate payment of the sums promised by the defendant in that initial compromise agreement.

[52] In about mid November 2000 the provision of unexpected mechanical services and other services were required (*vide* Ex BJM 10 and 14). The cost of these services of course under the cost plus contract was to be borne by the defendant.

[53] The compromise agreement of 6 November 2000 was not complied with by the defendant and the plaintiff accepting its non-fulfilment by the defendant indicated that he would simply deliver his last progress claim – claim number 12 as he had delivered his previous progress claims.

[54] By late November 2000 it is not disputed that at least $450,000.00 would have been owing to the plaintiff by the time he handed over to the defendant the keys of the developed project upon payment of all monies to which he was then entitled. Throughout November and December 2000 the defendant's director repeatedly assured the plaintiff that all monies that he was owed would be paid to him at the date of handover.

[55] However no attempt was made to perform the terms of the compromise agreement of 6 November 2000. It is contended for the plaintiff that its entering into this agreement was simply part of a strategy adopted by the defendant to persuade him to keep working on the site to complete the building project for the defendant in spite of the fact that he was owed many hundreds of thousands of dollars and would probably be owed something in the order of $400,000.00 by the time practical completion had been achieved.

[56] On 12 December 2000 the plaintiff delivered a practical completion claim called claim number 12. That claim was for $387,987.41 plus GST.

[57] The plaintiff and the defendant and the defendant's architect acknowledged the plaintiff's latest claim in the order of $400,000.00 in a meeting on 14 December 2000 and this acknowledgment was subsequently recorded in the minutes of that meeting taken by the defendant's architect Tan. I accept the evidence of the plaintiff on this issue and refer to Ex BJM 23.

[58] It follows therefore that about a week before the date of the compromise agreement of 22 December 2000 nearly $280,000.00 was admittedly owing by the defendant to the plaintiff, under Certificate 11 and a further sum of approximately $400,000.00 had been claimed as additional monies due upon handover of the completed project under claim number 12 – those sums amounting to approximately $680,000.00.

[59] On 10 November the defendant had paid to the plaintiff $140,000.00 and on 1 December had paid a further $60,000.00 – ie a total of only $200,000.00 of the monies then claimed by the plaintiff to be owing.

[60] In fact on 15 December 2000 the plaintiff advised the defendant that it owed him something in excess of half a million dollars and it was only in discussions held on 14 December that Mr Fan for the very first time raised any suggestion of any default on the part of the plaintiff by reason of delay. In this respect I refer to Ex BJM 24.

[61] On 16 December 2000 the defendant's director procured his bank to confirm to the plaintiff that he would be paid all monies to which he was entitled to persuade him to withdraw a notice of default he had given on 15 December 2000 pursuant to cl 12.1 of the contract, so that handover on completion could take place. I accept the evidence of the plaintiff in this respect and refer to Ex BJM 25. I reject the evidence of Mr Fan that he did not know and/or did not remember this event. It is clear on the material that by the time of the alleged compromise agreement on 22 December 2000 the defendant was well aware that the plaintiff was under pressure from subcontractors as a consequence of its failure to pay him in respect of certificate 11, and although it raised no real objection to the size of his final claim number 12, was also well aware that he was entitled or claiming to be entitled to a sum of about $.68m a significant part of which would be needed to meet his obligations to subcontractors etc prior to Christmas 2000.

[62] In cross-examination the defendant's director unabashedly admitted that in November and December 2000 he had "lulled" the plaintiff into the belief that he would be paid all monies owing to him at the time of handover of the keys to the building project upon practical completion (on 21st December 2000).

[63] Indeed on 21 December 2000 to dissuade Mr Evans, one of the plaintiff's subcontractors, from removing material used on the project the defendant paid him $100,000.00. In this respect I accept the evidence of Mr Evans.

[64] It is clear from the evidence which I accept that the defendant in significant breach of its contractual obligations to make timely payment of monies it owed to the plaintiff assisted and/or advised by its architect persuaded the plaintiff to continue to complete the building project thereby incurring significant additional costs, by promising to pay all outstanding costs plus his margin on them upon practical completion. I am satisfied that the defendant had no intention of keeping that promise.

[65] I accept the evidence of the plaintiff that on 22 December 2000 he was owed a sum of nearly $280,000.00 and had a *bona fide* claim for nearly $400,000.00 and was then to the knowledge of the defendant being harassed by his subcontractors whose claims he had not paid because he had not received monies undoubtedly owing to him by the defendant. Because the merits of the quantum of the plaintiff's claim were not canvassed or indeed addressed upon this application I will refrain from making any finding on that issue which in any event would not be determinative on the real issues of unconscionable conduct and economic duress canvassed upon it.

[66] I accept the evidence of the plaintiff that both the defendant and its architect made it clear to him at the 22 December 2000 meeting that the defendant did not intend to pay him the monies which he claimed, part of which indeed had already been certified as being presently owing to him, and that he had the option either of taking the money that was offered to him on the terms and conditions under which it was offered or of taking the defendant to court to litigate his claim. If he ultimately succeeded in recovering judgment, receipt of the proceeds of that judgment would be significantly delayed and he would have to bear the consequences in the market of his failure promptly to meet the legitimate claims of his subcontractors. It was asserted that the defendant had available to pay to the plaintiff in December 2000 the sum of only $160,000.00. This was clearly untrue and indeed the defendant's director admitted this in the course of cross-examination.

[67] The claim of impecuniosity by the defendant at this time was simply another aspect of the unconscionable behaviour in which it engaged to avoid meeting promptly in full its contractual obligation to the plaintiff.

[68] An example of the nature of the commercial behaviour of the defendant and its architect is illustrated in the evidence given by Mr Mathers, one of the plaintiff's subcontractors who was required to rectify some minor work in early 2001. Mr Mathers estimated that the cost of this work would be $25,000.00. However the defendant's architect suggested for reasons consistent only with an attempt to financially embarrass the plaintiff that Mr Mathers should quote $120,000.00 for that relatively minor rectification work. Mr Mathers swore that Tan said that he and Fan wanted to "hold back" further money from the plaintiff. This evidence was not

challenged in cross-examination and was uncontradicted by Mr Tan when he gave evidence.

[69] The director of the defendant admitted in fact to instructing his architect to tell Mr Mathers what he should charge for the necessary rectification work disregarding the lower quote received from Mr Mathers.

[70] I accept the plaintiff as an honest and reliable witness. I am unpersuaded that Mr Fan is a reliable witness; in fact to the contrary I regard him as unreliable. I regard his architect Mr Tan as motivated more to support the defendant in its dispute with the plaintiff which to my mind was attributable to the cost overrun resulting from lack of adequate site investigation and change in design of the projected building, than to act as an objective arbiter between the plaintiff and the defendant in the administration of their building contract.

[71] I am satisfied that the plaintiff agreed to the compromise of its claim against the defendant on 22 December 2000 by reason of the unconscionable conduct and economic duress it exerted upon him on and prior to that date.

[72] Under clause 10.14.1 of the written contract it is provided that 8% of the amount certified to be the value of the work completed was to be deducted and held to meet the cost of any rectification work required.

[73] Under clause 10.15.1 within ten days of completion the defendant's architect was required to issue a special progress certificate to the builder entitling him to one half of the amount then held in the retention fund.

[74] It is clear therefore that the agreement of 22 December 2000 upon which the defendant relies gave the plaintiff a benefit in reducing the amount to be held on retention from that provided in the contract (ie 8% and 4% respectively) to a 2.5% retention).

[75] In my view it is not possible therefore for the plaintiff to contend that no consideration whatever passed from the defendant to him under the terms of this compromise agreement. There was perhaps some benefit accruing to him which he would not otherwise have enjoyed, albeit it was a very slight benefit in my view and more than outweighed by the enormous reduction in not merely the "settlement sum" arrived at in the previous compromise agreement of 6 November 2000 but also in the money which I am satisfied was the subject of the plaintiff's *bona fide* claim number 12 made on 12 December 2000. Indeed as I have indicated in late November 2000 it was common ground on the correspondence between the parties (Ex BJM 14) that the defendant would have to pay at least $450,000.00 to meet its contractual obligations when keys of the project were handed over by the plaintiff to the defendant upon practical completion.

[76] It is unnecessary upon this application to consider what precise sum was in fact owing to or claimed by the plaintiff on 22 December 2000 or for that matter on any other date. Indeed upon the evidence and submissions made upon this application I have some difficulty in determining the extent of the plaintiff's claim as at 22 December 2000. It suffices to determine that the *bona fide* claim that the plaintiff then contemplated and/or made greatly exceeded the amount he agreed to accept to compromise it on 22 December 2000. The ultimate entitlement of the plaintiff in respect of his completed construction of the defendant's building is a matter to be

determined upon trial. In his statement of claim he seeks to recover in excess of $340,000.00.

[77] I therefore answer question 3(a) referred to in para 8 hereof as follows –

> The meeting of 22 December 2000 did result in an agreement between the plaintiff and the defendant in the terms alleged in paragraphs 13 to 16 of the defence and in respect of this agreement, consideration (albeit minimal) did pass from the defendant to the plaintiff. The consideration passing from the defendant to the plaintiff was the reduction of the retention fund to 2.5% of the plaintiff's certified entitlements under the contract (from either 8% or 4%) to be held by or on behalf of the defendant to meet rectification costs.
>
> The agreement was legally binding upon the plaintiff subject to his right to repudiate it on the grounds of unconscionable conduct and economic duress exercised upon him by the defendant with the assistance of its architect to persuade him to make that agreement.

[78] I answer question 3(b) referred to para 8 hereof as follows –

> The compromise agreement of 22 December 2000 was entered into as a consequence of the unconscionable conduct and economic duress brought to bear by the defendant with the assistance of his architect upon the plaintiff and consequently it is unenforceable by the defendant as alleged in para 13 of the reply.

[79] The consequence of my answers to these questions will be the determination of the plaintiff's claim (whether or not amended) based upon the established cost of construction of the defendant's building incurred by him plus 7.5% of that cost.