SUPREME COURT OF QUEENSLAND

CITATION:	*Mermaids Café and Bar Pty Ltd v Elsafty Enterprises Pty Ltd* [2010] QSC 80
PARTIES:	**MERMAIDS CAFÉ AND BAR PTY LTD** (plaintiff) **v** **ELSAFTY ENTERPRISES PTY LTD ACN 096 009 371** (defendant)
FILE NO/S:	BS12406/08
DIVISION:	Trial Division
PROCEEDING:	Determination of separate issue
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2010
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	8, 9 and 10 February 2010
JUDGE:	Margaret Wilson J
ORDER:	**Declaration that the action and counter-claim have been compromised.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF SUPREME COURT – DISPOSITION WITHOUT TRIAL – COMPROMISE – where defendant is lessee from the Crown of certain land – where building has been constructed on land – where plaintiff held a sub-lease of part of building for period 26 June 2003 to 25 June 2008 and conducted a restaurant and bar there – where there has been ongoing discord between plaintiff and defendant – where Court declared in earlier litigation that plaintiff was entitled to options to renew sub-lease – where in current proceeding plaintiff seeks declaration that it validly exercised option to renew sub-lease and seeks an order for specific performance of a new sub-lease – where defendant alleges that by reason of breaches of previous sub-lease which were unremedied at expiry, plaintiff disentitled to new sub-lease and alleges various matters adverse to plaintiff which Court should consider in exercise of discretion whether to grant specific performance – where defendant alleges that claim and counter-claim were compromised by an agreement reached on 15 January 2010 as evidenced by a written document bearing that date – whether claim and counter-claim compromised

Land Act 1994 (Qld)
Supreme Court Act 1995 (Qld), s 297

Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd and Others (1986) 40 NSWLR 622, considered
Booker Industries Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600, cited
Elsafty Enterprises Pty Ltd v Mermaids Café and Bar Pty Ltd [2007] QSC 394, referred to
G & R Securities Pty Ltd v Baulkham Private Hospital Pty Ltd (1976) 40 NSWLR 631, cited
Love & Stewart v S Instone & Co (1917) 33 TLR 475, cited
Masters v Cameron (1954) 91 CLR 353, applied
Sinclair, Scott & Co v Naughton (1929) 43 CLR 310, cited
Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444, cited

COUNSEL: A P J Collins for the plaintiff.
A Elsafty (not a lawyer) for the defendant.

SOLICITORS: Fitz-Walter Lawyers for the plaintiff.

[1] **MARGARET WILSON J**: The defendant is the lessee from the Crown of land in Goodwin Terrace, Burleigh Heads. A building known as Burleigh Beach Pavilion has been constructed on the land.

[2] The plaintiff held a sub-lease of part of the ground floor of the building ("the demised premises") for the period 26 June 2003 to 25 June 2008. It has continued to occupy the demised premises since the expiration of that sub-lease. At all material times it has conducted a restaurant and bar "Mermaids" there.

[3] Mr Jonathan Ingall is the director of the plaintiff company. He is a builder by occupation. Mr and Mrs Elsafty are the directors of the defendant company. Mr Elsafty is a chemical engineer by profession, and each of them takes an active part in their company's business.

[4] There has been ongoing discord in the relationship between the plaintiff and the defendant. There was earlier litigation in which Justice PD McMurdo declared that, as against Elsafty Enterprises Pty Ltd, Mermaids Café & Bar Pty Ltd was entitled to options to renew the sublease. [1]

[5] This proceeding was commenced on 2 December 2008. The plaintiff seeks a declaration that it validly exercised the option to renew the sub-lease and an order for specific performance of a new sub-lease.

[6] By its defence and counter-claim the defendant alleges that, by reason of one or more breaches of the previous sub-lease which were unremedied at its expiry, the plaintiff is disentitled to a new sub-lease, and that there are various matters adverse to the plaintiff which the Court should take into account in the exercise of its discretion whether to grant specific performance.

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1 *Elsafty Enterprises Pty Ltd v Mermaids Café and Bar Pty Ltd* [2007] QSC 394.

Compromise?

[7] By a further further further amended defence and counter-claim filed on 27 January 2010 the defendant alleges that the claim and counter-claim were compromised by an agreement reached on 15 January 2010 as evidenced by a written document bearing that date.

[8] By an amended reply and answer filed on 8 February 2010 the plaintiff:–

(a) denies that any agreement was reached on 15 January 2010;

(b) contends that if there was any such agreement it was void for uncertainty or because it was incomplete;

(c) contends in the alternative that the purported agreement was void or should otherwise be set aside because the defendant failed to disclose that the head lease from the Crown was likely to be forfeited pursuant to the *Land Act* 1994 and otherwise that the obligations for future works imposed on the defendant by the purported agreement would not be carried out by it.

[9] This is the determination of the separate issue whether the claim and counter-claim were so compromised. The plaintiff chose not to rely on the non-disclosure alleged in its amended reply and answer.

History of litigation

[10] The proceeding was tried before the late Justice Dutney. The evidence had been concluded and the submissions part heard when the trial was adjourned. His Honour died before the date on which it was to resume.

[11] Section 297 of the *Supreme Court Act* 1995 provides:-

"**297 Hearing de novo when trial judge unable to continue**

(1) When after the commencement of the hearing of any cause or matter, civil or criminal, including any appeal before a judge, but before judgment in the cause or matter has been given, the judge dies or becomes incapable of continuing to sit or, in the case of a cause or matter which has been heard but judgment wherein has not been given, of giving the judge's judgment, any party to the cause or matter may, upon giving 7 days notice to the other party or parties, apply to a judge for an order that the cause or matter be heard and determined de novo.

(2) On an application under this section to a judge, that judge—

(a) if this section is applicable in the cause or matter by reason of the temporary incapacity of a judge—may, according as the judge deems fit, either adjourn the cause or matter as the judge deems necessary in order to enable the judge before whom the hearing thereof was commenced to give judgment and, if necessary for that purpose, to complete the hearing, or order the cause or matter to be heard and determined de novo; and

> (b) in any other case—shall order the cause or matter to be heard and determined de novo.
>
> (3) When, pursuant to this section, a cause or matter is heard and determined de novo—
>
> (a) the judge so hearing and determining the same may make such order as to the costs of the first hearing as the judge shall think fit; and
>
> (b) the first hearing shall for all purposes, other than that set out in paragraph (a), be deemed a nullity."

[12] The proceeding came before the Court for directions on more than one occasion. It was referred to mediation, but the dispute was not resolved. The issues of fact were narrowed, and directions aimed at reducing the length and cost of a re-trial were given, including directions:–

(a) that the evidence of witnesses whose credit would be in issue be given orally subject to cross-examination;

(b) that evidence of other witnesses be given by tendering the transcript of their evidence, including their cross-examination, before Justice Dutney;

(c) that Counsel meet and identify exhibits tendered before Justice Dutney which might be admitted into evidence at the re-trial.

[13] The re-trial was scheduled to take place over three days commencing 8 February 2010. I viewed the premises on 27 January 2010.

Meeting on 15 January 2010

[14] On 15 January 2010 the parties met to try to resolve outstanding issues in the absence of their lawyers. At the conclusion of that meeting Mr Ingall handwrote a document containing 14 numbered paragraphs. He and Mr and Mrs Elsafty initialled each page and signed the last page.

[15] The defendant alleges that the claim and counter-claim were compromised by an agreement reached at that meeting, and that the agreement is evidenced by that handwritten document.

[16] The meeting was attended by Mr Ingall, Mr and Mrs Elsafty, Mr Mark Henry (Mr Ingall's financial advisor), Mr Stephen White, (a former building and plumber inspector who was doing some project management work for the Elsaftys) and Mr Michael Hart. Mr Hart, a well respected local businessman known to Mr Ingall and the Elsaftys, was the chairman.

[17] The defendant's solicitors, Baxters, had written to the plaintiff's solicitors Fitz-Walters on 22 December 2009 offering to settle the plaintiff's claim on certain conditions. Mr Hart used that letter as an agenda. A redacted form of it was admitted into evidence. It was in these terms:-

> "The defendant offers to settle the plaintiff's claim on the following conditions

1. Conditional upon the performance by the plaintiff of conditions 2 to 4 hereunder, the parties execute within 7 days of those conditions being satisfied a new sub lease for a further term of 5 years commencing 26 June 2008 and ending on 25 June 2013 to be submitted to the Minister administering the Land Act within 7 days of being executed by both parties and as follows

   (i) Item 1 of the form 7 becomes Elsafty Enterprises Pty Ltd
   (ii) Item 6 of the form 7 commencement date becomes 26 June 2008
   (iii) Item 6 of the form 7 expiry date becomes 25 June 2013
   (iv) Item 6 of the form 7 will also note 2 x 5 year options to renew
   (v) Item 4 of the Reference Table becomes 26 June 2008
   (vi) Item 5 of the Reference Table becomes 25 June 2013
   (vii) Item 6 of the Reference Table rental becomes $248,869 plus GST for areas 3A, 3B, 5D & 6; $41,195 plus GST for area 4C; $5,280 plus GST for area 4F
   (viii) Item 7 of the Reference Table CPI review dates become 26/06/2009, 26/06/2010, 26/06/2011, 26/06/2012. If first option exercised 26/06/2014, 26/06/2015, 26/06/2016, 26/06/2017 If second option exercised 26/06/2019, 26/06/2020, 26/06/2021, 26/06/2022
   (ix) Item 9 of the Reference Table Market review dates If first option exercised 26/06/2013 If second option exercised 26/06/2018
   (x) Item 10 of the Reference Table security amount $27,073.20
   (xi) Item 12 of the Reference Table yes – 2 option periods
   (xii) Item 13 of the Reference Table – first option period 5 years, second option period 5 years
   (xiii) Item 14 of the Reference Table outgoings $2,873.84 plus GST with such amount to increase annually by the increase in the consumer price index in accordance with the formula in clause 5.1
   (xiv) The definition of "we, us, our" changes from RJ Enterprises Pty Ltd to Elsafty Enterprises Pty Ltd
   (xv) The sub lease terms are otherwise as contained in the expired sub lease 708858690

2. The plaintiff remove all of its plant and equipment from the service yard area (excluding rubbish bins) within 7 days of acceptance of this offer.

3. The plaintiff pay arrears of CPI rent increase due since 26 June 2009 to date within 7 days of acceptance of this offer at the rate of $1,965.24 per month. As at the date of this offer the amount due is $11,791.44 for the period July to December 2009 inclusive.

4. The plaintiff provide insurance as required under the sublease in the joint names of the landlord and tenant within 30 days of acceptance of this offer. To avoid doubt the insurance required is that contained in the policy issued by CGU Insurance as comprised by Exhibit 51 in the trial before the late Justice Dutney.

> To make it clear, this offer does not relieve the plaintiff of any obligation to repair or redecorate or expand the kitchen under the previous sub lease, supplemental deed or otherwise, but it is not a condition that the plaintiff do so before a further sub lease is granted.
>
> This offer is open for acceptance until Wednesday 7 January 2010."

[18] The meeting lasted about three hours (exclusive of a lunch break). Under Mr Hart's guidance the points in the letter were resolved seriatim, and other outstanding issues between the parties were discussed. Various persons took notes. When all of the issues had been dealt with, Mr Hart said he would have notes/minutes compiled and sent to the parties. Mr White left at that stage. However, the parties decided to record then and there matters agreed. So there was effectively a recapping of the outcome of the discussion on each issue. As the outcome on each was confirmed, Mr Ingall recorded it in a numbered paragraph. There were 14 paragraphs. Mr Hart clarified that there were not outstanding matters, and Mr Ingall put a line against the number 15.

[19] The handwritten document was in these terms:–

> "1. Lease is to be prepared along the lines of letter of offer dated 22/12/09. (i) to (vi) as written. Point (vii) is accepted subject to confirmation these are valuers figures. Points (xiii) and (ix) as written. '(x)' as written subject to confirmation of amount. Items (xii) and (xiii) as written. Items (xiii) and (xv) as written. Outgoing amount to be verified.
>
> 2. Work done to date in the service yard is acceptable to the landlord.
>
> 3. Subject to clarification of indices and formula application. No interest to be charged. Tax invoices to be sent ASAP after execution of lease.
>
> 4. Confirmation landlord is listed on insurance policy.
>
> 5. Both parties to pay their own legal costs in respect of these proceedings.
>
> Further issues
>
> 6. Ocean Terrace roof structure
> (a) Landlord is proposing to replace the structure with a concrete roof. This is subject to statutory approvals. In the short term an independent consultant will be appointed by Steve White/John Ingall to advise on scope of works to effect repairs. The water tightness of the roof to be addressed ASAP.
> Time frame – appoint consultant by end of Jan '10. Water proofing to be completed by end of third week in Feb '10. Corrosion treatment (short term) to be carried out in conjunction with restaurant closing for refurbishment works. It is agreed that until problems with the roof structure are addressed that refurbishment works are restricted.

7. Kitchen/Kiosk
Plumbing and associated building works to ceiling space to be carried out by Jonco Construction Services P/L. The cost of this work is $23,000.00. This is to be invoiced in four instalments during the period Feb to May/June. Jonco accepts responsibility for the repairs/replacements.

8. Western Terrace and kitchen extensions
There is no obligation on either party to carry out any future works.

9. Service yard
Water proofing work to be carried out. Consultant to determine scope of works, supervise and approve. Careful coordination required. Target completion date ASAP or by end of May ’10.

10. Lower level toilets
Landlord to refurbish – target date end of May ’10. Doorway to be provided in passageway together with keypad entry.

11. Outgoings and part 10 other charges
Outgoings as per lease. Other charges Mermaids to pay for water consumed as per meter, plus their own gas and electricity charges. Landlord to pay for waste water and refuge.

12. Signage invoice
Landlord to credit back signage invoices levied.

13. Security deposit
Landlord to refund security deposit that was taken. Tenant to lodge bank guarantee with new lease.

14. Mechanical exhaust/HWS relocation
All costs are landlord’s expense.

15. -"

[20] At the conclusion of this process everyone relaxed a little. Mr Henry gave evidence of making a contemporaneous note of what occurred. It was:–

> "2:15 Agreement signed. Fitz-Walter to formalise as Margaret can read Jon’s handwriting!"

Margaret was Margaret Miller, an associate at Fitz-Walter Lawyers and Jon was Mr Ingall. Mr Ingall made a jovial remark to the effect he was glad he would not have to see the Elsaftys’ barrister again. There is no evidence of anything being said about the effect of the handwritten document, apart from Mr Henry’s evidence that it was to be "formalised" by the plaintiff’s solicitors.

[21] Mr and Mrs Elsafty went straight to their solicitor and gave him a copy of the handwritten agreement. He sent a copy to the plaintiff’s solicitor.

The Intention of the Parties

[22] The Court must glean the parties' intention from the contents of the document against the relevant factual background. Statements subsequently made by Mr Ingall, Mr or Mrs Elsafty, Mr Hart or anyone else about their intentions do not assist.

[23] The dispute involved litigation about the plaintiff's entitlement to a sub-lease of commercial premises. Those premises were on Crown land leased to the defendant under the *Land Act*. A sub-lease would have to be in writing and it would require the Minister's consent.

[24] There was a long history of conflict between the parties. There had been previous litigation establishing the plaintiff's entitlement to options to renew. Now the parties were embroiled in litigation about the plaintiff's entitlement to a new lease after the exercise of an option. There had been various unsuccessful attempts to reach a negotiated resolution. There had been a trial before Justice Dutney followed by an unsuccessful mediation. The date for the re-trial was fast approaching. Until this point both sides had had lawyers acting all along.

[25] I am satisfied that the parties intended that their solicitors would prepare some formal documentation. But the question is whether they intended to be immediately bound by an agreement reached on 15 January 2010.

Masters v Cameron

[26] In *Masters v Cameron*[2] Dixon CJ, McTiernan and Kitto JJ said:-

> "Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."

[27] In *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd and Others*[3] McLelland CJ said:-

> "There is in reality a fourth class of case additional to the three mentioned in *Masters v Cameron*, as recognised by Knox CJ, Rich J

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2 (1954) 91 CLR 353 at 360.

3 (1986) 40 NSWLR 622 at 628.

> and Dixon J, in *Sinclair, Scott & Co v Naughton*,[4] namely, '…one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms'. Their Honours refer to the speech of Lord Loreburn, in *Love & Stewart v S Instone & Co*[5] where his Lordship said that:
>
> > 'It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. If that were the intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain'."

His Honour's decision was affirmed on appeal.[6]

[28] Mr Elsafty submitted that the parties had reached an agreement within the first category in *Masters v Cameron*. Counsel for the plaintiff submitted that the case was within the third category.

Uncertainty?

[29] Mr Elsafty submitted that there was an agreement evidenced by the handwritten document. He did not submit that there were any further oral terms.

[30] So, the first issue is whether the terms of the handwritten document are sufficiently certain to be of a contractual nature.

[31] The handwritten document is to be read with the letter from Baxters Solicitors.

[32] Sub-paragraphs (i) – (xiv) of paragraph 1 of the letter refer to essential information to be inserted in the new sub-lease, such as the name of the sub-lessor and the commencement and expiry dates of the new term. They were described by reference to the form and wording of the expired sub-lease.

[33] On the proper construction of the handwritten document, the parties agreed on the items in paragraphs 1 – 4 of the letter. In three instances the agreement was conditional:-

> 1(vii): rental – subject to confirmation of valuer's figures
>
> 1(x): security – subject to confirmation of amount
>
> 3: arrears of CPI rent increase – subject to clarification of indices and formula applications.

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4 (1929) 43 CLR 310 at 317.
5 (1917) 33 TLR 475 at 476.
6 *G & R Securities Pty Ltd v Baulkham Private Hospital Pty Ltd* (1976) 40 NSWLR 631.

The conditional nature of these points of agreement did not detract from their contractual nature. In fact, the conditions were all subsequently fulfilled. In this regard the agreement was sufficiently certain to have contractual character.

[34] There was no uncertainty about what was agreed about the costs of the proceeding.

[35] Then the handwritten document went on to deal with the further issues which had been ongoing sources of discord.

[36] The Ocean Terrace roof structure: this referred to the covering of the area 5D in the plaintiff's restaurant. Presently there is sail cloth stretched over a steel frame. It has deteriorated in the weather conditions and the plaintiff has been pressing for a more permanent structure. Counsel for the plaintiff attacked paragraph 6 as vague and uncertain. I do not accept that submission, and shall endeavour to deal with each point taken in relation to it.

(a) A consultant was to be appointed "in the short term". That was rendered certain by the later stipulation that the consultant be appointed by the end of January 2010.

(b) There was no stipulation as to the identity or credentials of the consultant, but it was clearly provided that Mr White and Mr Ingall should select someone. That was understandable in light of their own qualifications and experience.

(c) There was no express provision as to what should happen if Mr White and Mr Ingall did not agree on the consultant. There are two answers to this – (a) the dispute resolution clause in the sub-lease might be activated; or (b) if there were a failure of a mechanism under the contact, the Court might provide an alternative mechanism.[7]

(d) The submission that the scope of the work on which the consultant was to advise was not defined involves a misreading of clause 6, which provided that it was for the consultant to advise on the scope of the repair work that was needed.

(e) The phrase "water tightness to be addressed ASAP" was rendered certain by the later stipulation that water proofing be completed by the end of the third week of February 2010.

(f) The words "corrosion treatment (short term)" are not uncertain. The nature and extent of the corrosion treatment was an aspect of the scope of the repair work needed. The scope of work was a matter on which the consultant was to advise. In the context short term clearly meant pending permanent replacement of the structure.

(g) The words "to be carried out in conjunction with refurbishment work" were attacked as uncertain. However, I accept the submission of Mr Elsafty that that referred to the plaintiff's obligation to paint and redecorate under the sub-lease (clause 23.4).

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[7] *Booker Industries Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600; *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444.

(h) The last sentence, which provided that until problems with the roof structure were addressed refurbishment works were restricted, was attacked as uncertain. However, that was merely an acknowledgment that some aspects of the refurbishment the plaintiff would otherwise be obliged to carry out would be negated by non-fulfilment of the defendant's repair obligations. The sentence meant simply that the plaintiff was not obliged to undertake those aspects until repairs had been effected. This is related to the scope of the necessary repair work, a matter on which the consultants were to advise.

In short, clause 6 was not so uncertain as to be devoid of contractual character.

[37] Counsel for the plaintiff attacked paragraph 7 as purporting to impose obligations on Jonco Construction Services Pty Ltd, which was not a party to the agreement. Jonco is the vehicle through which Mr Ingall conducts his business as a builder. He is its sole director and shareholder. I accept the submission of Mr Elsafty that Mr Ingall was acting in his capacity as a director of Jonco in accepting this obligation. As between the plaintiff and the defendant, the defendant undertook to retain Jonco to carry out the work for $23,000.00 on the basis Jonco would invoice the amount owing in four instalments and accept responsibility for the work. As between the defendant and Jonco, there was a collateral agreement to that effect.

[38] Counsel for the plaintiff submitted that paragraph 9 was uncertain because it did not specify who was to carry out the water proofing work or in what manner. But again, this was part of the scope of works to be determined by the consultant. It was the defendant's responsibility under the sub-lease. A target date was set. That was sufficiently certain. If the work were not achieved within a reasonable time of that date, there might well be a breach by the defendant.

[39] Clause 10 relating to the lower level toilet was expressed in sufficiently certain terms to be of contractual character.

[40] Similarly clause 11 relating to outgoings and other charges under part 10 of the sub-lease.

[41] Paragraph 12 related to a signage invoice which was the subject of paragraph 5(e) – (g) of the counter-claim. There is no uncertainty in that paragraph.

[42] Paragraph 14 concerned the costs of relocating the mechanical exhaust and hot water system. There is no uncertainty: the defendant accepted responsibility for the cost.

Binding agreement

[43] I am satisfied that the handwritten document of 15 January 2010 dealt with all of the matters then outstanding between the parties. Mr Hart confirmed this at the end of the meeting. It did so in terms sufficiently certain to be contractual in nature. Insofar as some of the matters were resolved conditionally, the conditions were subsequently fulfilled.

[44] Those matters had been the stumbling block to the party's entering into a new sub-lease for five years from 26 June 2008 to 25 June 2013. Having resolved those matters, the parties were in a position to enter into a new sub-lease. They clearly

intended to have their solicitors prepare necessary documentation. In all the circumstances I infer that they intended immediately to be bound by the terms of the handwritten agreement, and to have their solicitors prepare a new sub-lease on the terms of the expired sub-lease, subject to the matters agreed at the meeting. In short, I am satisfied that the parties reached an agreement on 15 January 2010 within the first category in *Masters v Cameron*.

Relief

[45] Accordingly, there should be a declaration that the action and the counter-claim have been compromised.