

# DISTRICT COURT OF QUEENSLAND

CITATION: *Quinn v Descon Group Australia Pty Ltd & another* [2023]  
QDC 256

PARTIES: **ANTHONY QUINN**  
Plaintiff  
**v**  
**DESCON GROUP AUSTRALIA PTY LTD ACN 625 771 075**  
First Defendant  
**and**  
**DANNY ISAAC**  
Second Defendant

FILE NO/S: BD No 1910/23

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: Brisbane District Court

DELIVERED ON: 23 November 2023 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 23 November 2023

JUDGES: Porter KC DCJ

ORDER:

1. Judgment for the plaintiff against the first and second defendants in the sum of \$440,368.56, inclusive of interest.
2. The first and second defendants' counterclaim is dismissed.
3. The first and second defendants pay the plaintiff's costs of the application on the indemnity basis, fixed in the sum of \$16,500.00.
4. The first and second defendants pay the plaintiff's costs of the proceeding on the indemnity basis to

**be agreed, or failing agreement, to be assessed.**

**CATCHWORDS:** PRACTICE AND PROCEDURE – Civil proceedings in state and territory courts – Pleadings – Striking out - Where the plaintiff applies to strike out certain paragraphs of the further amended defence and counterclaim pursuant to r 171 of the Uniform Civil Procedure Rules 1999 (Qld) – Where certain paragraphs should be struck out as abuse of process – Where certain paragraphs are pleaded in plenary descriptive terms – Where certain paragraphs were pleaded with lack of particulars – Where the misrepresentation and duress cases advanced in the pleadings relied on the statements and representations – Where there was no evidence to sustain the pleaded case of mistake – Whether the whole of the further amended defence and counterclaim be struck out.

PRACTICE AND PROCEDURE – Civil proceedings in state and territory courts – Ending proceedings early – Summary disposal - Where the plaintiff applies for summary judgment on the claim against the defendants and on the counterclaim.

**COUNSEL:** C Templeton for the Plaintiff  
J Ward for the Defendants

**SOLICITORS:** ACLG Lawyers for the Plaintiff  
Kanter Law for the Defendants

## **Background**

- [1] I have before me an application filed 16 November 2023 by the plaintiff in these proceedings, which seeks:
- (a) That certain paragraphs of the further amended defence be struck out, and that the defendant's further amended counterclaim be struck out under rule 171 *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR);
  - (b) Judgment on the claim against the defendants and on the counterclaim; and
  - (c) Various costs orders, which I do not need to deal with at the moment.
- [2] The history of the matter is important in appreciating the state of the proceedings at the time they came before me today. The proceedings were commenced not that long ago, in the scheme of things, on the 4th of July 2023. The plaintiff, Mr Quinn, was involved in the construction industry, broadly, and he had had a dispute with the first defendant, Descon Group Australia Pty Ltd (**Descon**), and the second defendant, Mr Isaac. That dispute was a Fair Work proceeding. It was settled by a deed of settlement entirely in writing, dated 25 November 2022.
- [3] Pursuant to that settlement deed, Descon and Mr Isaacs were to pay a total of \$745,000 as the settlement sum. That amount was to be paid by the payment of \$150,000 within a month or so, and then the balance by instalments of \$35,000 through to 18 September 2023. The initial payment of \$150,000 was not made on time, so judgment was obtained for that sum in proceedings in this Court. Subsequently, none of the \$35,000 instalments were paid.
- [4] The plaintiff initially brought proceedings for all the payments that were due at the time of the filing of the statement of claim. The claim was for \$420,000. There are other payments due after 30 June 2023, totalling approximately \$175,000. Those payments are not presently the subject of a claim, although, I think I am safe in assuming they have not been paid either.
- [5] The statement of claim is a simple one. It alleges the relevant terms of the settlement deed, then alleged that the instalments up to 30 June were not paid, that \$420,000 was accrued as due and owing and that various default provisions have been complied with. There was also a pleaded claim for costs under a provision of the settlement deed.
- [6] The defendants filed a notice of intention to defend and defence on 8 August 2023. That defence, broadly, claimed damages for breach of a non-disparagement clause in the deed, and sought to rely upon those damages as a set off or, alternatively, as a basis to terminate the settlement deed. That defence was, to be generous to it, in very general terms.
- [7] A series of notice for non-party disclosure were issued. After a reply was filed, the plaintiff brought an application to strike out the substantive part of the defendant's defence, (which was at that time, paragraphs 22 to 26), to strike out the counterclaim, and to set aside the non-party disclosure notices.
- [8] Paragraphs 22 to 26 at that time were in the following form:

22. The Defendants say it was an essential term of the Settlement Deed that the Plaintiff comply with his obligations pursuant to clause 8 of the Deed not to make any

disparaging comments about the First or the Second Defendant (**Non-Disparagement Obligation**).

23. The Plaintiff in breach of the Non-Disparagement Obligations has made disparaging comments to:

- (a) Kollosche Property Management Pty Ltd
- (b) Queensland Newspapers Pty Ltd
- (c) Kathleen Skene;
- (d) the Queensland Building and Construction Commission
- (e) Subbies United Pty Ltd; and
- (f) GCB Constructions Pty Ltd.

further particulars of which will be provided upon completion of disclosure

24. As a consequence of the Plaintiff's conduct as pleaded in paragraph 23:

- (a) the First Defendant has suffered loss and damage in an amount to be assessed including:
  - (i) damage to its goodwill;
  - (ii) loss of revenue; and
  - (iii) loss of potential and existing customers.
- (b) the Second Defendant has suffered loss and damage in an amount to be assessed including:
  - (i) emotional hurt, humiliation and embarrassment;
  - (ii) damage to their relationship with potential and existing customers of the First Defendant;
  - (iii) damage to their relationship with their friends and family;
  - (iv) reduction of their professional reputation and standing;
  - (v) damage to their reputation with members of the community; and
  - (vi) loss of income.

25. The amount of loss and damage suffered by the Defendants as pleaded in paragraph 24 is an amount to be assessed but is not less than the Settlement Sum.

26. By virtue of the matters pleaded in this Defence, the Defendants are entitled to:

- (a) terminate the Settlement Deed; or
- (b) further and in the alternative setoff any amounts payable to the Plaintiff by amounts it is entitled to for loss and damage arising out of the Plaintiffs Breach of the Settlement Deed.

[9] That application was returnable on the 28th of August 2023 before me. At that time I ordered that the notices of non-party disclosure be set aside. On that day, Mr Henry appeared, instructed by Kanther Law, and he had with him an amended pleading. The application was otherwise adjourned to 31 August with a view to being carried on by reference to the foreshadowed amended Defence. That amended defence was filed in Court on the 31st of August when the matter came back before me. The amended defence, at paragraphs 22 to 26, were substantially amended in the following form:

22. The Defendants say it was an essential term of the Settlement Deed that the Plaintiff comply with his obligations pursuant to clause 8 of the Deed not to make any disparaging comments about the First or the Second Defendant (**Non-Disparagement Obligation**).

23. The Plaintiff in breach of the Non-Disparagement Obligations has made disparaging comments to:

- (a) Kollosche Property Management Pty Ltd
- (b) Queensland Newspapers Pty Ltd
- (c) Kathleen Skene;
- (d) the Queensland Building and Construction Commission
- (e) Subbies United Pty Ltd; and
- (f) GCB Constructions Pty Ltd.

further particulars of which will be provided upon completion of disclosure

- (g) Saleh Zern Alabden.
- (h) other unknown persons.

24. As a consequence of the Plaintiff's conduct as pleaded in paragraph 23:

- (a) the First Defendant has suffered loss and damage in an amount to be assessed including:
  - (i) damage to its goodwill;
  - (ii) loss of revenue; and
  - (iii) loss of potential and existing customers.
- (b) the Second Defendant has suffered loss and damage in an amount to be assessed including:
  - (i) emotional hurt, humiliation and embarrassment;
  - (ii) damage to their relationship with potential and existing customers of the First Defendant;
  - (iii) damage to their relationship with their friends and family;
  - (iv) reduction of their professional reputation and standing;
  - (v) damage to their reputation with members of the community; and
  - (vi) loss of income.

25. The amount of loss and damage suffered by the Defendants as pleaded in paragraph 24 is an amount to be assessed but is not less than the Settlement Sum.

25A From on or about October 2021 to on or about 25 November 2022 the Plaintiff made various disparaging and or defamatory comments about the Defendants and business related to them to various media organisations and others by inter alia.;

- (a) Unlawfully providing the media and others, documents and or information disclosed by the Defendants and their commercial business associates in Court proceedings under compulsion for a purpose that was collateral to Court proceedings that were settled by way of the Settlement Deed.
- (b) Unlawfully providing the media and others defamatory and untrue information that caused loss and damage to the Defendants' commercial business activities.
- (c) Unlawfully disclosing confidential information obtained by the Plaintiff through his prior employment by the Defendants.

25B. Prior to the entry into the Settlement Deed the Plaintiffs made various representations to the Plaintiff to the effect:

- (d) If the Defendants failed to enter into the Settlement Deed, then the Plaintiff would not cease to disparage the Defendants to various media organisations and others but that if the Settlement Deed was entered into that the Plaintiff would cease to disparage the Defendants to the media and others.

- (e) At all material times, the Plaintiff, knew that this was a false statement knowingly made with the intent to induce the Defendants to enter into the Settlement Deed.
- (f) The Defendants relied upon the representations pleaded at paragraph 25B(a) herein when they entered into the Settlement Deed.
- (g) would not have entered into the Settlement Deed but for the representations pleaded at paragraph 25B(a) herein.
- (h) Further, and or in the alternative, at all material times, the Plaintiff's disparagement of the Defendants to the various media organisations and others;
  - (i) were unlawful malicious and made for an improper purpose; and
  - (ii) constituted an illegitimate form of undue harassment.
- (i) As result of:
  - (i) The Plaintiff's disparagement of the Defendants to the various media organisations and others prior to the Defendants' entry into the Settlement Deed.
    - (A) the Defendants were placed under duress.
    - (B) the Defendants would not have entered into the Settlement Deed but for the aforementioned duress.

26. By virtue of the matters pleaded in this Defence, the Defendants are entitled to:

- (a) terminate rescind the Settlement Deed in equity, and or at common law and or under statute; or
- (b) further and in the alternative setoff any amounts payable to the Plaintiff by amounts it is entitled to for loss and damage arising out of the Plaintiffs Breach of the Settlement Deed; or
- (c) In the alternative, an order that the Plaintiff be restrained, by himself, his servants or agents, from disparaging or making any statement or publication, or authorising any other person to disparage or make any statement or publication, whether oral or in writing in respect of:
  - a. the Defendants
  - b. each of the officers and employees of the First Defendant
  - c. the commercial activities of the Defendants.

[10] On that day I made orders in the following terms:

- (a) that paragraphs 22 to 26 of the amended defence and counterclaim be struck out;
- (b) the defendants have leave to re-plead subject to order 3;
- (c) the defendants not have leave to re-plead a cause of action of the first defendant for breach of clause 8 of the deed – the settlement deed clause;
- (d) that the defendants must not issue any further notice of non-party disclosure without leave; and
- (e) that the defendants file and serve any amended defence and counterclaim by 2 October 2023;
- (f) that the matter be placed on the commercial list to be managed by me;
- (g) that the matter be listed for mention at 9 am on 10 October 2023; and
- (h) a fixed costs order.

- [11] A further pleading was filed on the 6th of October 2023, styled as an amended defence, but it was in fact a further amended defence. The substantive part of that pleading is to be found in paragraphs 22 to 26 of the pleading:

22. The Defendants say it was an essential term of the Settlement Deed that the Plaintiff comply with his obligations pursuant to clause 8 of the Deed not to make any disparaging comments about the First or the Second Defendant (**Non-Disparagement Obligation**).

22A The First Defendant denies that it is liable for the full Settlement Sum because on the proper construction of the Settlement Deed it is only severally liable for the Settlement Sum.

**Particulars**

The First Defendant and the Second Defendant will rely upon the Settlement Deed and its surrounding context and purpose at the trial of this matter.

22B The Second Defendant denies that he is liable for the Settlement sum because on the proper construction of the Settlement Deed he is only severally liable for the Settlement Sum.

**Particulars**

(a) The First Defendant and the Second Defendant will rely upon the Settlement Deed and its surrounding context and purpose at the trial of this matter.

23. The Plaintiff in breach of the Non-Disparagement Obligations has made disparaging comments to:

- (a) Kollosche Property Management Pty Ltd
- (b) Queensland Newspapers Pty Ltd
- (c) Kathleen Skene;
- (d) the Queensland Building and Construction Commission
- (e) ~~Subbies United Pty Ltd;~~ and
- (f) GCB Constructions Pty Ltd.

~~further particulars of which will be provided upon completion of disclosure~~

- (g) Saleh Zern Alabden.
- (h) other unknown persons.

24. As a consequence of the Plaintiff's conduct as pleaded in paragraph 23:

- (a) the First Defendant has suffered loss and damage in an amount to be assessed including:
  - (i) damage to its goodwill;
  - (ii) loss of revenue; and
  - (iii) loss of potential and existing customers.
- (b) the Second Defendant has suffered loss and damage in an amount to be assessed including:
  - (i) emotional hurt, humiliation and embarrassment;
  - (ii) damage to their relationship with potential and existing customers of the First Defendant;
  - (iii) damage to their relationship with their friends and family;
  - (iv) reduction of their professional reputation and standing;
  - (v) damage to their reputation with members of the community; and
  - (vi) loss of income.

25. The amount of loss and damage suffered by the Defendants as pleaded in paragraph 24 is an amount to be assessed but is not less than the Settlement Sum.

25A From on or about October 2021 to on or about 25 November 2022 the Plaintiff made various disparaging and or defamatory comments about the First Defendant and the Second Defendant to various media organisations and others by inter alia:

- (a) Making untrue and defamatory statements about the First Defendant and the Second Defendant by way of background.
- (b) Providing the media and others, private and confidential documents and or information disclosed by the First Defendant and the Second Defendant to the Plaintiff in Court proceedings under the compulsion for a purpose that was collateral to the Court proceedings. (the “**Court Documents**”).
- (c) Providing the media and others defamatory and untrue information that was intended by the Plaintiff to cause loss and damage to the First Defendant’s and the Second Defendants commercial business activities.
- (d) Unlawfully disclosing private or confidential information regarding the First Defendant and Second Defendant obtained by the Plaintiff through his prior employment by the Defendants.

25B. The Plaintiff issued subpoenas in Federal Circuit Court proceedings BRG 464/2021 (“**BRG 464/2021**”) to various commercial associates and clients of the First Defendant seeking documents of a sensitive confidential commercial nature (the “**Confidential Documents**”).

25C. On or about mid November 2022:

- (a) The Plaintiff contacted the Second Defendant personally and directly and not through the Plaintiff’s legal representatives or the legal representatives of the Second Defendant.
- (b) At the time of the contact, the Plaintiff provided a copy of the unexecuted Settlement Deed later executed on 25 November 2022 to the Second Defendant.
- (c) At the time of the contact, the Plaintiff made the following statements and representations to the Second Defendant (the “**Statements and Representations**”) to the effect that:
  - i. that if the First Defendant and the Second Defendant did not execute the Settlement Deed,
    - a. then the Plaintiff would continue to disparage the First Defendant and the Second Defendant to various media organisations and others.
    - b. then the Plaintiff would continue to disclose to various media organisations and others the Court Documents and would also disclose the Confidential Documents.
    - c. that the Plaintiff’s continuing disparagement and his provision of Confidential Documents to various media organisations and others would severely damage the commercial interests of the First Defendant and the Second Defendant.
    - d. that the Settlement Deed was intended to prevent the Plaintiff from continuing to disparage the First Defendant and the Second Defendant to various media organisations and others.
    - e. that the Settlement Deed was intended to and would prevent the Plaintiff from continuing to disclose the Court Documents and any Confidential Documents to various media organisations and others.

- ii. If the Settlement Deed was executed by the First Defendant and the Second Defendant then the Plaintiff would not:
  - (i) disparage the First Defendant and the Second Defendant to various media organisations and others;
  - (ii) provide further Court Documents to various media organisations and others; and
  - (iii) provide further Confidential Documents to various media organisations and others; and
  - (iv) with the Plaintiff's intention of causing loss and damage to the commercial interests of the First Defendant and the Second Defendant.

### **Misrepresentation**

- ii At all material times, the Plaintiff,
  - (A) knew the Statements and Representations to be false,
  - (B) alternatively, was reckless as to the truthfulness the Statements and Representations; and
  - (C) knowingly made the Statements and Representations with the intention of inducing the First Defendant and the Second Defendant to enter into the Settlement Deed.
- (iii) The First Defendant and the Second Defendant relied upon the truthfulness Statements and Representations when they executed the Settlement Deed.
- (iv) The First Defendant and the Second Defendant would not have entered into the Settlement Deed but for their belief in the truthfulness of the Statements and Representations.

### **Duress**

- (a) Further, and or in the alternative, at all material times, the Plaintiff's disparagement of the First Defendant and the Second Defendant to various media organisations and others and the Statements and Representations;
  - (i) were unlawful malicious and made for an improper purpose; and
  - (ii) constituted an illegitimate form of undue harassment.
- (b) As a result of:
  - (i) The Statements and Representations; and or
  - (ii) The Plaintiff's disparagement of the Defendants to the various media organisations and others prior to the Defendants' entry into the Settlement Deed,
    - (A) the Defendants were placed under duress,
    - (B) the Defendants would not have entered into the Settlement Deed but for the aforementioned duress.

### **Mistake**

- (a) Further, and or in the alternative, at all material times, the Second Defendant was and is;

- (i) the founder of the First Defendant;
  - (ii) the managing director of the First Defendant;
  - (iii) the controlling mind of the First Defendant;
  - (iv) the sole shareholder of the First Defendant;
  - (v) an employee of the First Defendant; and
  - (vi) the public face and public identity of the of the First Defendant.
- (b) On 25 November 2022 the First Defendant and the Second Defendant executed the Settlement Deed;
- (c) At all material times the Settlement Deed contained several essential terms including but not limited to:
- (i) Clause 4; and or
  - (ii) Clause 8.
- (d) At all material times the Second Defendant was under a serious mistake and or misapprehension about the contents of the Settlement Deed in relation to the content or subject matter of:
- (i) Clause 4; and or
  - (ii) Clause 8.
- insofar as it related to the obligations of the Plaintiff under the Settlement Deed not to disparage and not to continue to disparage the Second Defendant to various media organisations and others by inter alia:
- (i) Making untrue and defamatory statements about the First Defendant by way of background intended by the Plaintiff to cause loss and damage to the First Defendant's and the Second Defendants commercial business activities.
  - (ii) Providing to various media organisations, the Confidential Documents and the Court Documents intended by the Plaintiff to cause loss and damage to the First Defendant commercial business activities.
  - (iii) Providing the media and others defamatory and untrue information that was intended by the Plaintiff to cause loss and damage to the First Defendant's commercial business activities.
  - (iv) Unlawfully disclosing private or confidential information regarding the First Defendant obtained by the Plaintiff through his prior employment by the First Defendant.
- (e) At all material times the Plaintiff was aware that the First Defendant and the Second Defendant entered into the Settlement Deed under the serious mistake or misapprehension about the obligations of the Plaintiff under the Settlement Deed not to disparage and not to continue to disparage the Second Defendant to various media organisations and other by inter alia:
- (xi) Making untrue and defamatory statements about the First Defendant by way of background intended by the Plaintiff to cause loss and damage to the First Defendant's and the Second Defendants commercial business activities.
  - (xii) Providing to various media organisations, the Confidential Documents and the Court Documents intended by the Plaintiff to cause loss and damage to the First Defendant commercial business activities.

- (xiii) Providing the media and others defamatory and untrue information that was intended by the Plaintiff to cause loss and damage to the First Defendant's commercial business activities.
- (xiv) Unlawfully disclosing private or confidential information regarding the First Defendant obtained by the Plaintiff through his prior employment by the First Defendant.
- (f) At all material times prior to the execution of the Settlement Deed the Plaintiff intended and set out to ensure that the First Defendant and the Second Defendant did not become aware of the existence of the First Defendant's mistake or misapprehension regarding the about the obligation of the Plaintiff not to disparage and not to continue to disparage the Second Defendant to various media organisations and others by inter alia:
  - (i) Making untrue and defamatory statements about the First Defendant by way of background intended by the Plaintiff to cause loss and damage to the First Defendant's and the Second Defendants commercial business activities.
  - (ii) Providing to various media organisations, the Confidential Documents and the Court Documents intended by the Plaintiff to cause loss and damage to the First Defendant commercial business activities.
  - (iii) Providing the media and others defamatory and untrue information that was intended by the Plaintiff to cause loss and damage to the First Defendant's commercial business activities.
  - (iv) Unlawfully disclosing private or confidential information regarding the First Defendant obtained by the Plaintiff through his prior employment by the First Defendant.

...

26. By virtue of the matters pleaded in this Defence, the Defendants are entitled to:

- (a) terminate rescind the Settlement Deed as against the First Defendant and the Second Defendant in equity, and or at common law and or under statute; or
- (b) further and in the alternative setoff any amounts payable to the Plaintiff by amounts it is entitle to for loss and damage arising out of the Plaintiffs Breach of the Settlement Deed; or
- (c) In the alternative, an order that the Plaintiff be restrained, by himself, his servants or agents, from disparaging or making any statement or publication or authorising any other person to disparage or make any statement or publication, whether oral or in writing in respect of:
  - a. the Defendants
  - b. each of officers and employees of the First Defendant
  - c. the commercial activities of the Defendants

[12] When the matter came on before me for mention, Mr Templeton, who has appeared for Mr Quinn through this litigation, indicated an intention to apply to strikeout the further amended defence and to seek summary judgment. I made directions to give effect to that, and the result was that on 16 of November, the plaintiffs filed the

application before me to strikeout paragraphs 22 to 26 and the counterclaim, and for summary judgment on the claim and the counterclaim.

- [13] In response to the initial application to strike out the first defence, on the 28th of August 2023, Mr Isaac, who is the guiding mind and will of the First Defendant as well as being the Second Defendant, filed an affidavit. In the intervening period of three months, no further material has been filed by Mr Isaac. That has some relevance because in the hearing before me on the 28th, it was made quite clear that there were substantial difficulties with the amended defence, which resulted in the operative part of that defence being struck out.
- [14] The further amended defence was filed in accordance with my orders on the 6th of October, some six or seven weeks ago. The application for strikeout and judgment was filed on 16 November 2023 but foreshadowed on the 10th. There is no further material before the Court from Mr Isaac.
- [15] The further amended defence is defective from a pleading perspective in fundamental ways. The gravamen of the pleading is to, more or less, admit the substantive allegations of the plaintiff as to the operative terms of the deed for payment and that the instalments up to 30 June this year have not been paid, but to deny that any amounts are payable for the reasons in 22 to 26 of the further amended defence, (set out above).

### **The strike out application**

- [16] The first thing to note about the current defence is that paragraphs 22, 23, 24, 25 and 26 are in substantially the same terms as the paragraphs I ordered to be struck out (though in respect of 26, with some slight amendments, and possibly some slight amendments to paragraph 23). Mr Templeton, not surprisingly, submitted that those paragraphs should be struck out as an abuse of process. And they are an abuse of process. It is difficult to think of any possible justification for repeating paragraphs that had already been the subject of an order by this Court striking them out. Accordingly, those paragraphs should be struck out. It is frankly hard to understand – and no explanation is given – as to how the repetition of those paragraphs occurred.
- [17] Mr Templeton submitted also that all the other paragraphs in the operative part of the defence and which supply the foundation for the counterclaim should also be struck out. I agree with his submission.
- [18] I start with 22A and 22B. The problems with those pleadings are:
  - (a) I cannot see a credible construction of the settlement deed that would result in the first and second defendant being only severally liable; and
  - (b) I could not understand how the fact of several liability provided any defence.
- [19] I should observe, given the opportunity to try to come up with something, ultimately, Mr Ward, who appeared for the defendants, could not think of a submission as to why that could make any difference to liability under the deed either. I could explain the different character of joint and several liabilities, but in the circumstances of this case, none of it matters at all. Those two paragraphs are struck out.

- [20] Then, in paragraph 25A, the leading returns to the alleged disparaging and defamatory comments. Paragraph 25A is pleaded in plenary descriptive terms. It is devoid of any particular statement or act, which would sustain the plenary and conclusory allegations in 25A. The affidavit of Mr Isaac, which is the only evidence before the Court in response to the summary judgment application, contains nothing that sustains the allegations in 25A. They are defective in form and there does not appear, from the material that I was taken to by Mr Ward, to be any substance to the allegations. Accordingly, paragraph 25A should be struck out.
- [21] Paragraph 25B was accepted to be irrelevant by Mr Ward and it was struck out.
- [22] Paragraph 25C provides the foundation for a good deal of what follows. Relevantly, paragraph 25C(c) alleges a long and detailed conversation in which “statements and representations” were made. I asked Mr Ward to point me to any evidence from Mr Isaac, or anyone else, for that matter, that made out the long, detailed, contentious conversation set out in paragraph 25C(c). He was not able to direct me to anything in Mr Isaac’s affidavit. In the absence of any particulars and the absence of an account of that conversation sworn to in the affidavit, I developed a concern that those allegations were made without any proper basis existing.
- [23] On instructions, Mr Ward told me that there was not a witness statement or instructions that provided particulars of any such conversation. I am deeply troubled by the fact that it was pleaded. The lack of particulars, if particulars are not provided, was a sufficient reason to strike out that paragraph. The reality is there is no evidence of any such conversation. Paragraph 25C(c) has to be struck out.
- [24] There is then a bit of a dislocation in the numbering, but the headings helpfully deal with the situation. There is a heading “Misrepresentation”, also set out above, which appears at Roman number (ii). As a matter of form, that pleading could not withstand scrutiny even if the statements and representations were false, because apart from anything else, it does not plead that they were false. It only pleads in a plenary way that the plaintiff knew that all the statements and representations were false.
- [25] It is quite important if one is going to allege, in effect, fraud against the plaintiff, that that which was said to have been stated that was false and known to be false is expressly pleaded. In any event, to the extent that the misrepresentation case relies on the conversation that set out the statements and representations, it cannot be sustained and had to be struck out.
- [26] Similarly, there was a duress case advanced. It was struck out because it relied on the statements and representations.
- [27] There was a further pleading of mistake. It was unclear from the pleading what kind of doctrine of mistake was being invoked. The inference drawn by Mr Ward and, indeed, by me and, I think, Mr Templeton, is that it alleged some kind of *Taylor v Johnson* unilateral mistake in equity,<sup>1</sup> but it was almost impossible to work out from the pleading exactly what and how that was supposed to work. It included extensive allegations which would need to be particularised in any event, and there does not seem to be any evidence in Mr Isaac’s affidavit to sustain that pleaded case if one could understand what it meant. I think it is fair to say Mr Ward abandoned any attempt to defend that particular part of the pleading.

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<sup>1</sup> *Taylor v Johnson* (1983) 151 CLR 422

- [28] That left paragraph 26 which, of course, depended on the preceding paragraphs to give rise to any right to rescind the Settlement Deed, or for damages that could be set off. The counterclaim depended on it as well. The heart of the further amended defence having been excised, the rest of the pleading and the counterclaim falls. I order that the whole of the further amended defence and counterclaim be struck out.

### **Summary judgment**

- [29] Mr Templeton pressed his application for summary judgment. I am very conscious of the hurdle to be cleared if a party is going to get a judgment without a trial. I set out the history of this matter to demonstrate the opportunities the defendant has had:
- (a) To plead a case that makes any sense at all which provides to a defence to what is, after all, a very simple claim; and
  - (b) To put on evidence that might sustain such a defence.
- [30] Being very mindful of the caution to be applied in deciding whether there is a real prospect of defending the case, or a real prospect of winning the case for the counterclaim, (though the counterclaim stands or falls with the defence), I asked counsel for the defendants, doing the best he could, to tell me what defence he thought might arise from the evidence before the Court from Mr Isaac, because that is the only evidence there is.
- [31] He referred me to paragraphs 8 to 16 of the affidavit. I should say, a good part of that material in that affidavit was successfully objected to in a way that really disabled any claim based on various newspaper articles.
- [32] Doing the best he could, Mr Ward referred me to two emails sent by Mr Quinn to Mr Isaac.
- [33] Mr Ward then referred to the allegation that on 1 November 2022, as part of the Fair Work proceeding, Mr Quinn's solicitors in that proceeding issued subpoenas to two people and a company. Mr Isaac, in paragraph 14 of his affidavit, says he became aware of it in about mid-November. He says in paragraph 15, to the extent that paragraph is not technically inadmissible, that those three subpoenas were issued to clients of the first defendant, Descon, but were not involved with, or related to, the Fair Work proceedings. That is his opinion, on a question of what is really a question of law. Then Mr Ward, working with what he had, relied on paragraph 16 of the affidavit read down so that it amounted to evidence from Mr Isaac that by reason of the issuing of subpoenas to these persons who, in Mr Isaac's opinion, were not properly involved in the Fair Work proceedings, he became concerned that if he defended the Fair Work proceedings, they would do harm, and he, therefore, urgently sought to settle the matter, and contacted Mr Quinn to try and resolve the matter.
- [34] Mr Ward speculated that in those circumstances, especially if it could be established that the subpoenas were issued for an improper purpose, it might be argued that there have been a contempt of Court for which damages might lie. There was some discussion about that, but, ultimately, it does not seem to me that that was arguable

on the material before the Court. Further, I do not understand how such a claim could be raised in this proceeding, because only that Court would have power to punish for contempt of its processes. I am unpersuaded that there is a common law claim for damages for contempt, in any event. It is probably fair to say Mr Ward himself did not press that, on reflection, and argued that a case in duress might be able to be pleaded.

- [35] It would require more instructions to establish that there was a case in duress.
- [36] Mr Templeton pointed out, first, that authority establishes that the concept of duress is limited to threatened or actual unlawful conduct and then cites the authorities in paragraph 6(f)(iii) of his outline. I suppose one might be able to characterise the issuing of subpoenas for an improper purpose as unlawful, though it does not strike me as such, except in the broadest possible meaning of that word. Certainly, acts which amount to a contempt of Court are probably unlawful, but it seems to be a long bow to draw in this case, especially where it depends for its viability on accepting Mr Isaac's opinion about the possibility that the person subpoenaed could give relevant evidence. Given the history of this litigation, I am not filled with any confidence in his judgment about such matters. But in any event, there is another difficulty. That is that a completely different case, which is unsustainable on the evidence, was pleaded in respect of duress.
- [37] There is another difficulty, and that is that, even based on paragraph 16, he says, because of his concerns, he urgently sought to settle the Fair Work proceedings and contacted Mr Quinn directly to try and resolve the matter. There is then a lacuna in what might be called the chain of causation between any issue of subpoenas that were truly issued for an improper purpose and which Mr Isaac perceived as being done for the purposes of harming him, and then caused him to think that defending the proceedings would be harmful, and that Mr Quinn was doing it for that reason and so on.
- [38] On that point, there is that the evidence of Mr Delaney, and the other evidence before me that there was a settlement arising out of discussions between counsel for the defendants and for Mr Quinn that occurred, seemingly, on the day of 24 November. Quite how Mr Isaac or Descon could still have had those matters of concern pressing on them, where there was discussions between counsel that led to a settlement, in circumstances where one can only, and should, properly assume that counsel for the defendants was acting on instructions, I do not know.
- [39] And, further, the deed was drafted by Mr Kanther (solicitors for the defendants) and, more or less, ultimately executed in that form. It is just hard to see the opportunity that Mr Quinn would realistically have had to overbear Mr Isaac's will. Even if all the factual gaps in this could otherwise be filled in those circumstances, this is not a case where there is evidence before me which realistically raises a defence of duress. This is a case where there is evidence before me which might do – if further evidence was led, further work was done on the law, and everything turned out in a way which favoured the defendants.
- [40] The material before me, the matters of the content of the previous duress allegation, the fact that the case was settled between counsel, the fact that the draft deed came from Mr Kanther, and the fact that the defendants were represented by solicitors and counsel in the dispute, lead me to the view that the idea that there is a duress case that could properly be pleaded, bearing in mind the evidence before the Court, is fanciful.

[41] For those reasons, I order that:

- (a) Summary judgment be entered for the plaintiff against the defendants for the claim in the sum of \$440,368.56, being \$420,000 plus interests of \$20,368.56;
- (b) Summary judgment be entered for the plaintiff as defendant in the counterclaim on the further amended counterclaim.
- (c) The costs of today's application be on an indemnity basis, fixed at \$15,000, plus GST, and the costs of the proceedings, including reserved costs, be paid on an indemnity basis, to be assessed if not agreed.