SUPREME COURT OF QUEENSLAND

CITATION:	*Kenneth Charles Collins v State of Queensland* [2020] QSC 154
PARTIES:	**KENNETH CHARLES COLLINS** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO:	BS 8473 of 2018
DIVISION:	Trial Division
DELIVERED ON:	5 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2020
JUDGE:	Holmes CJ
ORDERS:	**1. The application is dismissed.** **2. Parties are to file and serve submissions on costs by 5pm on 19 June 2020.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – GENERALLY – where the applicant seeks the setting aside of a Deed of Settlement entered with the respondent on the grounds that his entry into it was procured by improper conduct, duress, unconscionable conduct and undue influence – where the applicant argues that he was subject to a special disability of which the respondent took unconscientious advantage – where the applicant argues that the conduct of the mediator, his legal representatives and the respondent amounted to illegitimate pressure on him to sign the Deed of Settlement – whether the Deed of Settlement should be declared void or set aside on the grounds of duress, undue influence or unconscionable conduct CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – MATTERS NOT GIVING RISE TO BINDING CONTRACT – VAGUENESS AND UNCERTAINTY – OTHER MATTERS – where the parties were to release and discharge each other under a Deed of Settlement on and from the "Effective Time" – where the term "Effective Time" was not defined in the Deed of Settlement – whether the Deed of Settlement is void for lack of certainty

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – OTHER MATTERS – where the respondent filed a Notice of Discontinuance prior to making payment of the settlement sum to the applicant, in breach of a clause of the Deed of Settlement – where the applicant argues that the Deed of Settlement should be declared void as a result – whether the relevant clause is an essential term of the Deed of Settlement – whether the respondent's breach of the relevant clause entitles the applicant to terminate the Deed of Settlement

Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549; [1987] HCA 15, applied
D. T. R. Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, [1978] HCA 12, applied
Thorne v Kennedy (2017) 263 CLR 85; [2017] HCA 49, applied
Upper Hunter County District Council v Australia Chilling and Freezing Co Ltd (1968) 118 CLR 429; [1968] HCA 8, applied

COUNSEL: The applicant appeared on his own behalf
M H Hindman QC for the respondent

SOLICITORS: The applicant appeared on his own behalf
Crown Law for the respondent

[1] The applicant, Mr Collins, seeks the setting aside of a Deed of Settlement entered with the respondent State of Queensland, with a declaration that it is unenforceable or void, as well as the setting aside of a Notice of Discontinuance entered in consequence of the settlement.

The background to the application

[2] Mr Collins brought the proceedings which were the subject of the disputed settlement in respect of the loss of his yacht, which was wrecked on Flat Rock, near North Stradbroke Island. He sued the respondent for damages in an amount of about $1,500,000 for negligence and breach of statutory duty, alleging that it failed in duties to provide a navigation light near or on Flat Rock and to attempt salvage of the yacht. An order was made for a mediation, which took place on 9 September 2019, with both parties represented by solicitor and counsel. (Mr Collins had been self-represented in the litigation thus far.) The mediation resulted in the parties' entering the Deed of Settlement; they executed it, and a consequential Notice of Discontinuance, on the day of the mediation.

[3] The provisions of the Deed relevant for present purposes are cl 2 and cl 3:

"**2**. **Settlement**

2.1 In consideration of the Plaintiff agreeing to immediately sign a Notice of Discontinuance, without any admission of liability, the State agrees to:

i. Pay to the Plaintiff the Settlement Sum within 14 business days;

ii. Sign and file the Notice of Discontinuance upon payment being made;

iii. Provide a copy of the filed Notice of Discontinuance to the Plaintiff

2.2 The State will pay the Settlement Sum to the solicitors for the Plaintiff by way of electronic funds transfer into the Solicitors trust account, which [sic] details are to be provided.

3. Release

(a) on and from the Effective Time, the Parties unconditionally and irrevocably release and discharge each other…from all Claims…under or in connection with the Proceedings."

"Effective Time" was not defined in the Deed. The "Settlement Sum" was $15,000, representing Mr Collins' costs of the mediation.

[4] On 10 September 2019, the respondent filed the Notice of Discontinuance. On 13 September 2019, Mr Collins was paid the settlement sum by transfer of the funds to his solicitors' trust account.

[5] Mr Collins says that the Deed is void for four reasons: because, although it provides for the parties to release and discharge each other from all liability "on and from the Effective Time", it contains no definition of "Effective Time"; because the respondent breached an essential term of the Deed by filing the Notice of Discontinuance prior to payment of the settlement sum; because of improper conduct at the mediation; and because, he alleges, his entry into the Deed was procured by duress, unconscionable conduct and undue influence. (He did not advance any argument as to why the Deed should be regarded as unenforceable, notwithstanding the terms of the declaration sought.)

[6] At the hearing of the application, Mr Collins, who was unrepresented, relied on his own affidavits, which annexed a good deal of material, and an affidavit from the solicitor who acted for him at the mediation, Mr Sergeyev. The respondent relied on the affidavit of its solicitor at the mediation, Ms Freeleagus. All three deponents were cross-examined. Broadly speaking, their accounts of events (as opposed to the construction to be placed on those events) were consistent.

Preparation for the mediation

[7] Having been retained to represent Mr Collins in relation to the mediation, Mr Sergeyev gave him the names of four counsel who would be suitable mediators. Mr Collins preferred one in particular because of his long experience in mediations.

That mediator's name was provided, with the three others, to Ms Freeleagus. She opted for another counsel on the list, but when Mr Collins emailed her directly requesting her acceptance of his preferred mediator, she agreed. Ms Freeleagus said in oral evidence that she saw no point in arguing about it; the preferred candidate was a respected mediator, and she was prepared to meet Mr Collins' expressed wish. A mediation agreement was signed appointing the mediator of Mr Collins' choice.

[8] Mr Collins said that when he advocated for the appointment of the mediator, he did not know that the latter had been briefed by the respondent. In that regard, he relied on a copy of a news report from February 2014, referring to the mediator in question as a barrister briefed by the Crown. (Mr Collins asserts that it shows he was the Crown's first preference as counsel, but the article does not seem to say as much.) Had he known, he would have chosen a different mediator.

[9] The mediation agreement provided that the mediator would conduct the mediation in the way he considered appropriate to achieve an efficient and expeditious resolution of the dispute. It permitted him to meet separately with the parties as he considered appropriate, without disclosing any communication or discussion with, or information received from, one party to the other. The mediator undertook to "fairly and impartially assist the parties" in their discussions of the disputes, issues and other matters, and was entitled in private conference to make observations on the practicality of proceeding to litigation of the matters in issue.

[10] The index to the mediator's brief is annexed to one of Mr Collins' affidavits. It shows that the brief contained the pleadings, transcripts of earlier proceedings, outlines of submissions, the order for mediation and the parties' disclosed documents. The respondent's documents included logs and reports on the incident; audio recordings from Police Communications; transcriptions of recordings; emails, including an exchange between a deckhand, Mr Keller, and the investigating officer; and a chart. Mr Collins' documents seem mostly to have related to quantum, but they included his sailing plan.

[11] Mr Sergeyev said that some other material which Mr Collins had given him was not provided to the mediator because it was not relevant for the purposes of the mediation. Mr Collins said that those documents included an affidavit in which he transcribed a conversation between a member of Volunteer Marine Rescue and police communications, with the former expressing his concern about the state of the vessel on the rock. One of Mr Collins' complaints was that this document, and others he had provided, were not used by his counsel at the mediation. Mr Sergeyev said in evidence, however, that the mediation bundle contained everything that he was instructed Mr Collins wanted it to contain.

[12] Before the mediation, Mr Collins conferred with his solicitor, and later with both solicitor and counsel, on each occasion being given an explanation of the mediation process. His counsel emphasised to him that he should not interject in the discussion during the plenary meeting.

The course of the mediation

[13] The mediation took place at a barristers' chambers, of which both the mediator and Mr Collins' counsel were members. Mr Collins attended with his lawyers. An

officer from Marine Safety Queensland was the respondent's representative, attending with Ms Freeleagus, counsel, and a representative of the respondent's insurer. The mediation began with a plenary session at which the mediator described the process and the parties summarised their positions. According to Mr Collins' affidavit,[1] the mediator raised "questions about various aspects" which he, Mr Collins, answered. There was discussion of the relevance of the Safety of Life at Sea Convention. Mr Sergeyev said that "some of the core issues" were discussed in that session. Mr Collins noticed that the respondent was in some possession of some charts, but neither the charts nor any of his documents were produced for consideration during this session. The parties then split up, Mr Collins going with his solicitor and counsel to the latter's chambers while the respondent's group remained in the conference room.

[14] In his counsel's chambers, Mr Collins took the opportunity to print out a proposed settlement document which he had previously prepared. The document explained the effect of the loss of the yacht on the lives of Mr Collins and his wife and proposed a settlement of $1.2 million to rectify the position. Mr Collins said he asked his counsel to present the document to the respondent's representatives, but he declined to do so. Mr Sergeyev said that he recalled the document's being printed and counsel's being asked at some stage to deliver it to the respondent, which he did not see him do. He thought, though, that there was some intervening event, but could not recall the details; he did not believe that counsel had acted contrary to his instructions.

[15] The mediator reported to Mr Collins' group that the respondent had not made any offer, and was asked to continue negotiations. He returned and said that Mr Collins' offer had been rejected. He then put to Mr Collins the proposition that he had made a mistake in navigating, asserting that he had put a "go to" command into his chart plotter; he drew what he suggested was the line of navigation on a piece of paper. Mr Collins understood this to be an accusation that he had put into his navigational system an instruction to take a direct course, as a result of which his yacht had collided with the rock. The mediator also suggested that he failed to take note of some lights to the east of Flat Rock, which were not, according to Mr Collins, navigational lights. In what Mr Collins described as an aggressive way, the mediator asserted that he had caused the incident.

[16] Mr Collins in his evidence said that he had told the mediator this was wrong, and the mediator knew nothing of the circumstances; he had never used a "go to" command in such a situation. In fact, he said in evidence, his practice was to navigate by way-points, rather than putting in a direct course. Mr Sergeyev confirmed that the mediator had put to Mr Collins that he had made the mistake in relation to the "go to" command, Mr Collins had strongly denied that he had done so and seemed, to Mr Sergeyev's observation, to be very agitated.

[17] The mediator informed Mr Collins that the respondent had made an offer, which was to waive its own costs of some $85,000 and to pay $15,000 towards Mr Collins' mediation costs. He described the offer as the best that he was able to secure. He informed Mr Collins that his case was weak and would not stand up at trial. Mr Collins' counsel concurred with that view, and asked Mr Collins about his

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[1] The respondent took no issue with Mr Collins' adducing evidence of what occurred at the mediation: *Civil Proceeding Act* 2011 s 53(1).

financial status. He pointed out that he would not be able to afford the cost of a trial. On Mr Sergeyev's account, the mediator put arguments to Mr Collins to convince him to settle, based on his assessment of his prospects of success and the costs implications were he to lose. Mr Sergeyev expressed an opinion that the amount of pressure put on Mr Collins was "medium to high".

[18] Mr Collins said that given the authority asserted by the mediator and the failure of his own legal representatives to offer any challenge to what was said, with his counsel in addition raising the costs implications of proceeding to trial, he felt under great pressure and incapable of considering clearly what he should do. He accepted the mediator's and his counsel's view that the respondent's offer was all he could expect and concluded that his case was hopeless. His solicitor and counsel suggested that he put off signing any documents for 24 hours, but because he felt depressed, unable to grasp what had occurred and believed that proceeding was pointless, he declined to do so, saying that postponement would not change the outcome.

[19] Mr Sergeyev said that he and counsel had given Mr Collins a copy of the Deed to read and explained its general effect. They advised him that if he signed the Deed and the Notice of Discontinuance the proceedings would be discontinued on those terms. He and counsel had urged Mr Collins to take 24 hours to consider his agreement to the terms of the Deed to make sure that he was happy with the outcome and had considered it properly.

[20] Mr Collins having accepted the respondent's offer, his counsel drew up a handwritten "head of agreement" which Mr Collins signed. Ms Freeleagus prepared a settlement deed, using as a template a document from another matter which contained a definition of "Effective Time". Considering it unnecessary, she removed it, not appreciating that the term still appeared in cl 3(a). After some amendments she, as the respondent's solicitor, and Mr Collins executed the Deed. Mr Collins' counsel suggested a Notice of Discontinuance also be signed while the parties were present, so a notice was prepared; once again, it was signed by Mr Collins and Ms Freeleagus. In an affidavit, Mr Collins gave this description of his state of mind:

> "In an extremely depressed state I signed both documents under extreme pressure from the mediator and my counsel".

[21] Mr Sergeyev said that he had noticed a change in Mr Collins' demeanour after it was put to him that he had made the navigational error; he became submissive and almost silent. While the deed was being revised, he and Mr Collins took a break in order to find some food, because they had not had any lunch. Mr Collins, who was normally very talkative, seemed subdued and said that he was not hungry and wanted to return. Mr Sergeyev did not, however, consider Mr Collins' behaviour at the time the Deed of Settlement and Notice of Discontinuance were signed to be

> "…completely out of place because people do get distressed at mediations and I have seen, you know worse reactions, I've seen better reactions, but I think no one walks away from mediation happy…".

[22] Ms Freeleagus in her affidavit said that after the plenary session, none of the respondent's representatives spoke to Mr Collins again. She had no knowledge of the discussions between the mediator and Mr Collins and his lawyers. Her client (as represented by the Maritime Safety official) and she discussed matters during the period that the parties were separated, and the mediator engaged with them. She declined to give any detail of what had been discussed, because the respondent had not waived privilege. Ms Freeleagus denied having stated anything wrongly to the mediator in order to induce him to form an opinion about how Mr Collins had navigated. She had no control over what the mediator was going to do once he left the room in which he had been conferring with the respondent's representatives, and she did not know what he actually did do when he re-joined Mr Collins and his representatives. She denied a proposition put to her that the respondent had failed to participate in the mediation.

After the mediation

[23] On the following day, Mr Collins wrote a letter to the mediator (in the form of a statutory declaration) setting out his view of events; which was, in essence, that he had been denied justice at the mediation because the mediator had made a judgment, on evidence provided by the respondent, that he, Mr Collins, had made a mistake. Mr Sergeyev wrote to Ms Freeleagus on 13 September, saying that because the settlement sum had not been paid, the Notice of Discontinuance had been filed contrary to the terms of the Deed. He wrote again on 24 September, pointing out the failure to define the term "Effective Time" and the premature signing and filing of the Notice of Discontinuance. In addition, the letter asserted that Mr Collins had signed the settlement Deed under pressure amounting to undue influence and duress and requested that there be a renegotiation of the settlement.

Mr Collins' case on improper conduct, duress, undue influence and unconscionable conduct.

[24] Mr Collins' Amended Points of Claim alleged that the Deed of Settlement was void because of improper conduct in the mediation, not only by the respondent but by the mediator and his own legal representatives. In that regard, he raised what he said was the respondent's failure to declare a potential conflict of interest on the part of the mediator; its failure to act in good faith in the mediation process; actual lack of impartiality on the part of the mediator; and failures by his lawyers in their advice to him.

[25] I interpolate here: improper conduct would not per se lead to a conclusion that the Deed was void, but some aspects of what was alleged in that regard might be relevant in consideration of the questions of duress, undue influence and unconscionable conduct, which if made out, would give rise to the kind of relief Mr Collins seeks. It is in that context then, that those matters fall to be considered.

[26] Mr Collins alleged in his Amended Points of Claim, affidavits and submissions at trial that the respondent had acted improperly in not alerting him to what he said was a potential conflict of interest on the part of the mediator, because he had been briefed by the respondent in the past. It had not acted in good faith because it had not fully participated in the mediation process, instead impeding it. After the plenary session its representatives had not taken any part in any session with him. It had denied him an opportunity to discuss the core issues in the proceeding (by

which, it emerged, he meant the respondent's alleged negligence). He had served a notice to admit facts, the proposed admissions in which should, in his view, have been discussed.

[27] Mr Collins also alleged that his own legal representatives had been at fault: his barrister (who was in chambers with the mediator) had not told him about the mediator's professional association with the respondent; neither counsel nor Mr Sergeyev had, before the conference, prepared or discussed a draft mediation deed in the terms he wanted to achieve; counsel had not put Mr Collins' proposed settlement document, or other documents he thought relevant, to the respondent; and counsel and Mr Sergeyev had not read the content of the Deed of Settlement to him or explained the "broader implications" of its signing.

[28] The mediator, Mr Collins contended, was not impartial and allowed the respondent improperly to adduce evidence capable of affecting his perception of the case. As a result, he made allegations that Mr Collins was responsible for the incident in which the yacht was wrecked, to which Mr Collins was denied a response. The mediator had failed to ask him to explain what occurred or to draw what he maintained was his course of navigation. He ought to have brought the parties into a second plenary conference in order for the allegation to be tested.

[29] As to unconscionability, Mr Collins submitted that the respondent knew he was self-represented because of a lack of means, had unsuccessfully sought legal aid and faced difficulties in the litigation because of a want of financial and legal resources. The respondent had exploited that financial disability to persuade him that the proposed settlement was the only possible outcome. It had improperly influenced the mediator to form an opinion adverse to his interests; that was apparent from the mediator's comments, which could only have been the product of the private session with the respondent. The judgment as to his responsibility for the wreck must have been reached on evidence put by the respondent; which, Mr Collins suggested, was possibly an email from Mr Keller, his crew member. The reference to the lights east of Flat Rock could only have come from the respondent's having referred to its charts in private session. The mediator had improperly dismissed Mr Collins' case as weak. On the basis of these matters, Mr Collins asserted that the respondent had influenced the mediator's opinion, affecting his impartiality. This amounted, he said, to an unconscientious advantage taken of a party with a special disability.

[30] Mr Collins did not really particularise the claims of undue influence or duress beyond saying that he had been made to sign the deed "in indecent haste" under duress, in circumstances where his will had been overborne and he had been subject to illegitimate pressure, impairing his judgment. From his material, though, it seems clear that he was relying on the conduct of the mediator in putting the allegation that his navigational error had caused the accident and the warnings from both the mediator and his own counsel of his poor prospects and the financial risks of proceeding to trial.

[31] In closing submissions, Mr Collins proposed (for the first time) that the Deed should, as a matter of public policy, be set aside because of the behaviour of his counsel and the mediator, regardless of whether the respondent was involved in it.

The respondent's response

[32] The respondent admitted in its Points of Defence that the mediator had previously, over many years, acted from time to time in matters for it and against it, and as a mediator in matters in which it was a party. It had not expressly disclosed that fact to Mr Collins, but it could reasonably be inferred that his lawyers would have known of it. It also admitted that it knew that Mr Collins had been self-represented in the litigation and assumed that was for financial reasons, but did not admit to any further knowledge of the details of his pleaded financial disability. It denied that Mr Collins was under any special disadvantage, and even if he were, it had not unconscientiously taken advantage of any such disadvantage.

[33] The other allegations were made against Mr Collins' own lawyers and the mediator, and it had no knowledge of any dealings between Mr Collins and them. The respondent did not know what took place between Mr Collins and the mediator after the initial plenary session; to its knowledge the mediation proceeded in an orthodox manner; and it had not witnessed the mediator acting other than impartially.

Consideration - duress, undue influence and unconscionable conduct

[34] The boundaries between duress, undue influence and unconscionable conduct are, as the High Court observed in *Thorne v Kennedy*,[2] "blurred",[3] particularly those between duress and undue influence. The latter may arise from the exertion by one party of excessive pressure, depriving the other of free choice

> "…where it causes the person substantially to subordinate his or her will to that of the other party…".[4]

Duress, in contrast, does not require deprivation of free will, but rather the application of pressure of a particular type. In *Thorne v Kennedy*, the High Court left unresolved the question of whether that pressure must, to give rise to relief, be constituted by an

> "…unlawful threat or conduct or, alternatively, whether other illegitimate or improper, yet lawful, threats or conduct might suffice".[5]

Unconscionable conduct

> "…requires the innocent party to be subject to a special disadvantage 'which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests'. The other party must also unconscientiously take advantage of that special disadvantage."[6] (Citations omitted).

[35] I accept Mr Collins' evidence, supported by that of Mr Sergeyev, that the mediator put to him aggressively that he had caused the wreck of his yacht by mis-navigation. Although the liability evidence which might have been adduced at a trial as to the circumstances of the wreck was not before me, I am prepared to consider the issue on the basis of what Mr Collins says: that the mediator's conclusion was wrong. I am also prepared to draw an inference that the mediator drew the conclusion about

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2 (2017) 263 CLR 85.
3 At 99.
4 At 100.
5 At 98.
6 At 103.

how the incident happened from what was put to him by the respondent. That may have been, as Mr Collins proposed in his material, on the basis of his crewman's email or by reference to charts which the respondent's representatives had.

[36] I accept also Mr Collins' evidence that he was dismayed and overwhelmed by what was put to him by the mediator and his counsel about his poor prospects of success and the financial risks of litigating. That caused him to accept the proposed outcome, which he soon regretted and tried to undo.

[37] Mr Collins did not adduce any evidence on which I could make a finding that he was subject to any special disadvantage. His affidavit said nothing as to his financial position. He made the allegation in his submissions that he lacked financial and legal resources but did not provide any detail, let alone suggest that this position had been conveyed to the respondent. He had been unrepresented earlier in the litigation, and one might infer from that, as the respondent acknowledged in its Points of Defence, that he had not sufficient means to afford legal representation at a trial or in interlocutory proceedings; but that could by no stretch of the imagination amount to special disadvantage. Nor had the respondent any reason to suppose the existence of any such disadvantage.

[38] Mr Collins has failed to demonstrate any conflict of interest on the part of the mediator. There was no suggestion, for example, that the latter was in some way dependent on the respondent for work or that the outcome of the mediation could conceivably affect his livelihood. (Indeed, there was no evidence that he was currently available to perform the respondent's work or that it was considering him for briefing.) And it is perfectly clear that he was not the respondent's choice; it was only at Mr Collins' urging that Ms Freeleagus agreed to his appointment. There was nothing in the circumstance of the mediator's having taken briefs from the respondent in the past which should have caused anyone involved a concern about conflict of interest. The fact that Mr Collins might have chosen differently had he known of the past briefing of the mediator does not mean that anyone concerned in the mediation was obliged to convey it to him.

[39] Nor is there anything in the allegation that the respondent failed, in bad faith, to participate in the mediation. How the mediation progressed was up to the mediator. The terms of the mediation agreement gave him a wide latitude as to how to proceed; he was free to choose whether to have further sessions or to traverse the evidence to any greater extent or to reconvene the plenary session to provide Mr Collins another opportunity to give his point of view. So far as the propriety of its engagement with the mediator is concerned, the respondent was entitled to put its version of events to him, using, if it chose, charts to explain its case theory or particular items of disclosed evidence to support its version. Mr Collins seems to have thought that a mediation should proceed as if it were a Court proceeding, with the evidence fully canvassed, and opportunities to respond to the competing allegations. That was not so.

[40] There is no basis for a finding of improper conduct by Mr Collins' legal representatives. Some of the allegations against them were of very tenuous relevance to Mr Collins' claim, but, in any event, I make these findings. There was little point in their drafting a settlement deed before it was known what the settlement would be. It is not clear why counsel did not put Mr Collins' own

settlement proposal to the respondent at the mediation, but, given Mr Sergeyev's evidence on the point, I would not conclude that there was any simple failure to follow instructions. (That is not to say that giving the document to the respondent was, in any event, likely to have been at all useful.) It was not suggested that counsel was instructed to put other documents forward at the mediation, and there was no reason for him to do so. Nor was it necessary to discuss every aspect of the claim.

[41] More relevant is the part counsel played in persuading Mr Collins to accept the settlement offer. But it was not improper for him to put his concerns about Mr Collins' prospects squarely to him; the financial risk he ran if he went to trial was obvious and cogent. Counsel might have taken a more vigorous role in defending Mr Collins against the accusation that he was the cause of the incident, but he may well have thought, rightly or wrongly, that the evidence led to that conclusion. Similarly, if the mediator was wrong in putting to Mr Collins that he was the cause of the wreck, there is no evidence that the mistake was made other than in good faith. Under the mediation agreement he was entitled to put to Mr Collins observations about the practicality of proceeding to litigation; which plainly enough would include pointing out poor prospects on the facts as he saw them (correctly or otherwise). There is no basis for a finding that either counsel or the mediator applied illegitimate pressure to Mr Collins.

[42] Mr Collins' legal representatives did, I find, explain the effect of the Deed of Settlement to him. He knew that it meant the end of his action in exchange for the respondent's paying $15,000 towards his costs, and not pursuing its own. It was not necessary for his lawyers to read the Deed to him, or to take him through it point by point. They would reasonably have perceived him as an intelligent and highly literate man capable of reading it and understanding it for himself. Properly, they suggested to him that he take time to consider it; he chose not to take that course. There is no evidence that his barrister and solicitor were motivated by anything but the desire to achieve the best outcome for Mr Collins.

[43] I accept that under the pressure he actually was feeling, Mr Collins may have been deprived of his free will to a considerable extent; but on the evidence of Mr Sergeyev, his reaction was not so remarkable that those around him, including, and especially, the respondent's representatives, should have been aware of it. From the respondent's perspective, he was represented by both solicitor and counsel and had the benefit of independent advice. And, importantly, if Mr Collins' will was overborne, it was not the result of pressure exerted by the respondent. Indeed, he said specifically that he felt pressure from the mediator and counsel; there was no evidence that if pressure were exerted by them, it was at the behest of the respondent. To the contrary; Ms Freeleagus' evidence was that the respondent played no part in the mediator's course of action once he returned with the respondent's offer to Mr Collins.

[44] Mr Collins may have mounted his last-minute public policy argument – that the Deed should be declared void because of the conduct of his counsel and the mediator – recognising the difficulty of demonstrating any connection between the respondent and his dealings with them. It is necessary only to observe that even had there been the misconduct of which he complains, it would be an odd approach to public policy to deprive a party of the benefit of an agreement because of the

behaviour of others (including the other party's own legal representatives) with which it had no connection.

[45] Mr Collins has failed to establish that the respondent exerted any pressure amounting to duress or undue influence or behaved unconscionably in connection with the mediation.

The failure to define "Effective Time"

[46] Mr Collins argued that the Deed was void for lack of certainty because "Effective Time" was not defined. Courts will not readily conclude that a commercial transaction should be regarded as void because of some lack of clarity in its terms:

> "So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G.) & Nephew Ltd. v. Outston* (1941) AC 251 is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless. In the search of that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved."[7]

[47] The search for intention is not a difficult one in this case. The Deed of Settlement imposed by cl 2 certain obligations on the parties: on Mr Collins to sign the Notice of Discontinuance, and on the respondent to pay the settlement sum and sign and file the Notice of Discontinuance, providing a copy of the filed notice to Mr Collins. The result in cl 3 followed sequentially and logically from the completion of those steps: the parties would then release and discharge each other. "Effective Time" could only rationally be read as the time at which the steps in cl 2 had been completed. There is no difficulty in ascertaining what the parties intended, nor is there any uncertainty about the order of events. The Deed is not void on this ground.

The effect of the breach of cl 2.1(ii) of the Deed

[48] The respondent was in breach of cl 2.1(ii), which required it to sign and file the Notice of Discontinuance upon payment of the settlement sum, because it did so in advance of payment. Mr Collins does not take any issue with the signature of the Deed on the day of the mediation conference; indeed, that seems to have been done by agreement between the parties, at his counsel's suggestion. He says, however, that 2.1(ii) is an essential term requiring strict compliance, so that failure to observe it rendered the Deed void.

[49] Failure to perform an obligation which amounted to an essential term would entitle Mr Collins to terminate the Deed of Settlement (rather than rendering it void). Courts are reticent to construe a contractual term as a condition a breach of which gives rise to a right to terminate, because a construction that encourages performance, rather than avoidance, of contractual obligations is to be preferred.[8]

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7 *Upper Hunter County District Council v Australia Chilling and Freezing Co Ltd* (1968) 118 CLR 429 per Barwick CJ at 437.

8 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 556-7.

The question of whether a term is essential is to be answered with regard to the general nature of the contract and its provisions, with particular regard paid to

> "…the importance which the parties have attached to the provision as evidenced by the contract itself as applied to the surrounding circumstances".[9]

[50] Clause 2.1(ii) is not expressed to be an essential term, although that, of course, is not conclusive. By cl 2, in exchange for Mr Collins' agreement to immediately signing the Notice of Discontinuance, the respondent undertook to do three things: pay the settlement sum; sign and file the Notice of Discontinuance; and provide a copy of it. Its undertaking to do those three things was in consideration of Mr Collins' agreement to fulfil his part of the bargain, not vice versa; his obligation was immediate, and did not depend on when the respondent did what was required of it. It is plain that what was important to the parties was that Mr Collins straight away do what was necessary on his part for the discontinuance of the action, in exchange for his then being paid the settlement sum.

[51] I doubt, in fact, that any part of cl 2.1 apart from those aspects was essential. It is arguable, though, that the respondent's agreement to file the Notice of Discontinuance should be regarded as essential because it might be said to have benefited Mr Collins by relieving him of the burden of filing the document. But the prescription as to its doing so upon payment being made was inessential. It is clear that Mr Collins lost nothing by an alteration in the order in which the respondent took the steps required of it. If more were needed, his counsel's accepted proposal that the Notice of Discontinuance be signed by both parties immediately – in effect an agreed variation to the terms of the Deed – spoke to a mutual perception that questions of timing were not material.

[52] There was no breach of an essential term. Mr Collins was not entitled to terminate the agreement represented by the Deed of Settlement.

Orders

[53] The application is dismissed. The parties are to file and serve submissions on costs within 14 days of delivery of this judgment.

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9 *D. T. R. Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 431.