SUPREME COURT OF QUEENSLAND

CITATION:	*Al-Freah & another v Thompson & another* [2022] QSC 166
PARTIES:	**Mohammad Al-Freah** (first plaintiff) **Al-Freah Medical Services Pty Ltd ACN 604 911 159 ATF Al-Freah Medical Practice Trust ABN 53 623 210 099** (second plaintiff) **v** **Mark Stephen Thompson** (first defendant) **Wildash Holdings Pty Ltd ACN 125 836 188** (second defendant)
FILE NO/S:	3855 of 2022
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 August 2022
DELIVERED AT:	Brisbane
HEARING DATES:	12 July 2022 – 13 July 2022
JUDGE:	Hindman J
ORDER:	**1. Judgment for the defendants on the plaintiffs' claim.** **2. The plaintiffs pay the defendants' costs of the proceeding on the standard basis.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENT – WHETHER CONTRACT CONCLUDED – where the plaintiffs allege a contract of compromise was reached with the defendants – where the corporate plaintiff and defendant were shareholders of companies together with others – where another shareholder in the companies had brought proceedings relating to the companies – where the parties attended mediation to resolve all claims – where mediation did not resolve the claims – where in correspondence subsequent to the mediation the defendants made an offer to the plaintiffs –

where the plaintiffs accepted the offer – where no deed of settlement was entered into – where all proceedings were not settled – whether the correspondence evidences an immediately binding contract of compromise between the plaintiffs and the defendants separate from the other proceeding.

Corporations Act 2001 (Cth), s 1071B(2)

400 George Street (Qld) Pty Ltd v BG International Ltd [2012] 2 Qd R 302
Feldman v GNM Australia Ltd [2017] NSWCA 107
GR Securities v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631
Masters v Cameron (1954) 91 CLR 353
Molonglo Group (Australia) Pty Ltd v Cahill [2018] VSCA 147
Queensland Phosphate Pty Ltd v Korda (as joint and several liquidators of Legend International Holdings Inc (in liq)) [2017] VSCA 269
Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd) [2008] NSWCA 149
Sinclair, Scott & Co Ltd v Naughton (1929) 43 CLR 310

COUNSEL: G Handran QC and D Fawcett for the plaintiffs
B O'Donnell QC and J Sargent for the defendants

SOLICITORS: Derek Legal for the plaintiffs
Thomson Geer for the defendants

Introduction

[1] The plaintiffs apply for orders, inter alia, for specific performance of an alleged contract of compromise reached with the defendants.

[2] The first plaintiff, Mohammad Al-Freah (**Al-Freah**), is a doctor. The second plaintiff, Al-Freah Medical Services Pty Ltd (**AFMS**) is effectively Al-Freah's corporate emanation. Al-Freah is a director of AFMS.

[3] The first defendant, Mark Thompson (**Thompson**), is also a doctor. The second defendant, Wildash Holdings Pty Ltd (**Wildash**) is effectively Thompson's corporate emanation. Thompson is a director of Wildash.

[4] AFMS and Wildash, together with two other companies (that are effectively corporate emanations of two other doctors), are shareholders in The Gastrointestinal Centre Pty Ltd (**GIC**) and Endoexcellence Pty Ltd (**EE**), that engage in the business of the supply of medical services. Each of the four doctors are directors of GIC and EE.

[5] The other doctors and companies abovementioned are:

(a) Dr Geoffrey Francis (**Francis**), director of Cochine Pty Ltd (**Cochine**); and

(b) Dr Animesh Mishra (**Mishra**), director of Animesh Mishra Pty Ltd (**AM**).

[6] The directors and shareholders of GIC and EE fell into dispute about the affairs of GIC and EE from at least March 2020. Insofar as the parties had "sides" in the dispute, at least initially, on one side Al-Freah appeared aligned with Thompson, and on the other side Francis appeared aligned with Mishra.

[7] That dispute resulted in proceeding number BS9558/21 being commenced in the Supreme Court of Queensland on 19 August 2021 by Cochine (**the Cochine proceeding**). Each of GIC, EE, Wildash, AFMS and AM are defendants to the Cochine proceeding.

[8] The plaintiffs in this proceeding in the statement of claim allege that by an agreement evidenced in writing, the plaintiffs and defendants to this proceeding solved the Cochine proceeding.[1] That is denied by the defendants in this proceeding in their defence. The plaintiffs in their reply appear to concede that the Cochine proceeding was not solved, but allege that there is nonetheless a binding agreement between the plaintiffs and defendants to this proceeding. The relevant writing evidencing that agreement is alleged by the plaintiffs to comprise of four pieces of correspondence dated 17 February 2022.

[9] First, is a letter from the defendants' solicitors to the plaintiffs' counsel dated 17 February 2022 (**the offer**). It provides:

> " **WITHOUT PREJUDICE SAVE AS TO COSTS**
>
> Dear Mr Garlick,
>
> **Re: THE GASTROINTESTINAL CENTRE PTY LTD and ENDOEXCELLENCE PTY LTD (the 'companies') and ORS ats COCHINE PTY LTD (the 'litigation')**
>
> As you know, we act for Dr. Thompson (and his company, Wildash Holdings Pty Ltd ('Wildash')) and you act for Dr. Al-Freah (and his company Al-Freah Medical Services Pty Ltd ('AFMS')).
>
> At the mediation on 16 December 2021 and since that date, your client has made it clear to our client that he will only agree to a settlement of the dispute/litigation if he/AFMS is paid $1,500,000, that being the purchase price it paid for its shareholdings in the companies. Your client has also stated that he requires our client pay his legal costs in the litigation to date.

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1 Statement of claim, [5].

Our client and his company Wildash make the following **confidential** offer -

1. our client/Wildash will pay by way of settlement $*[the settlement amount*[2]*]* to your client/AFMS on the below conditions numbered 2, 3, 4, 5 and 6 (to occur simultaneously with the payment);

2. our client will exercise his best efforts to pay the settlement sum of $*[the settlement amount]* by 4 March 2022, but in any event no later than 18 March 2022;

3. AFMS will transfer its shares in GIC and EE to our client/Wildash for $1 per parcel of shares, your client will resign as an employee of the GIC/EE business and as a director of GIC and EE;

4. Wildash will pay your client's legal costs in the litigation to date (please advise this sum);

5. your client and AFMS will enter into a deed of settlement (including confidentiality/non-disclosure provisions) covering items numbered 1, 2, 3 and 4 above;

6. your client and AFMS will also enter another deed of settlement mutually releasing and forever discharging our client and Wildash, Dr Francis and his company Cochine Pty Ltd, Dr Mishra and his company Animesh Mishra Pty Ltd, and GIC and EE from all claims, actions, suits, demands, costs, damages and expenses (whether known or unknown) which any of them or your client or AFMS may have had but for the execution of the deed by reason of or in connection with the business carried on by them together in The Gastrointestinal Centre Pty Ltd and/or EndoExce1lence Pty Ltd; and

7. your client will be released from any restraints on his employment, subject only to Dr Francis and Dr Mishra agreeing to this release. We will seek their agreement as soon as written confirmation of the above terms is received from you.

Given the discovery process in the litigation is now well underway and our client might have in the order of 1000s of documents to include in its List of Documents, it is critical that we have your response as a matter of urgency.

We appreciate that it is short notice, but in the interests of achieving an urgent settlement, this offer will remain open until 3pm (Sydney time) on Friday 18 February 2022. However, our client would like to communicate with the solicitors for Dr Francis and Dr Mishra early this afternoon, if possible, that our mutual clients have reached an agreement (the details of which will not be disclosed to them other than to confirm points 3 and 6 above and to seek their agreement to point 7 above).

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[2] I have removed the actual amount mentioned in light of confidentiality concerns held by the defendants about that amount. Knowledge of the amount is not essential to the resolution of this proceeding.

We look forward to hearing from you."

[10] Second, is an email from the plaintiffs' counsel to the defendants' solicitors dated 17 February 2022. It provides:

> "My client accepts the offer contained within your letter of offer on the proviso paragraph 6 also is to protect my client and paragraph 7 Dr Thompson will not press the restraint.
>
> I also ask that the settlement is confidential on the quantum of $*[the settlement amount]*
>
> Please go aheads and draw the deed
>
> Thank you client from Dr Alfreah"

[11] Third, is an email from the defendants' solicitors to the plaintiffs' counsel dated 17 February 2022. It provides:

> "Thank you for your email.
>
> We confirm our client's agreement to the provisos you set out therein.
>
> We will forward a deed to you as soon as possible to cover the terms of the confidential settlement agreement reached between our clients and, once available, we will forward the other deed to cover the giving of releases by all parties to the litigation commenced by Cochine Pty Limited No 9559/21 (which we expect will be prepared by the solicitors for Dr Francis).
>
> Our client's accountant has asked whether your client would have any objection to Mark Thompson being the transferee of the CIC and EE shares from Al-Freah Medical Services Pty Ltd, rather than Wildash Holdings Pty Ltd. Kindly obtain instructions to this end.
>
> We understand from Mr Le Plastrier that Derek Legal no longer act for your client. In those circumstances, are you happy for us to include you in correspondence to be sent to the solicitors for Dr Francis this afternoon in relation to the timing of provision of Lists of Documents and related orders. Of course, it would appear such matters will become redundant as soon as settlement deeds are signed, but until that time there is a need to attend to formal matters until the litigation has been officially discontinued. Kindly confirm."

[12] Fourth, is the email from the plaintiffs' counsel to the defendants' solicitors dated 17 February 2022. It provides:

> "Dr Thompson can transfer."

[13] The plaintiffs allege that that correspondence of 17 February 2022 evidences an immediately binding contract of compromise between the plaintiffs and the defendants to this proceeding. That is disputed by the defendants. It is the defendants' primary position

that no legally binding agreement was made between the plaintiffs and the defendants in the correspondence of 17 February 2022 set out above.

[14] The defendants advance some alternate arguments if it is found that a legally binding agreement was made between the plaintiffs and the defendants in the correspondence of 17 February 2022 set out above, that I will come to in due course.

Summary of the relevant legal test

[15] The principles set out in and following the decision in *Masters v Cameron* (1954) 91 CLR 353 are well known and are not in dispute. There are four categories of agreement to be considered. The first three were dealt with in *Masters v Cameron* at 360 (per Dixon CJ, McTiernan and Kitto JJ) in these terms:

> "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."

[16] The fourth category is an agreement whereby "the parties [are] 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."[3]

[17] The question here for consideration is, in the circumstances, did the plaintiffs and the defendants (objectively assessed):

(a) intend to make an immediately binding agreement just between themselves, whether or not there was a settlement of the Cochine proceeding, the other proceedings that

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3 *GR Securities v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634G (McHugh JA, Kirby P and Glass JA agreeing) quoting *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310 at 317.

had been foreshadowed by AM, and/or the claims made by the plaintiffs against the other doctors and/or their companies; or

(b) intend to make an agreement that would be binding only at the point where the Cochine proceeding and all claims as between all four doctors and their companies and GIC and EE were resolved?

[18] *Molonglo Group (Australia) Pty Ltd v Cahill* [2018] VSCA 147 at [131] sets out the approach to apply in determining whether the alleged contract of compromise arose on 17 February 2022. It provides:

> "Where the issue is not the meaning of a term in a document to which the parties have agreed, but whether the parties intended that document to be a binding contract, the issue is 'to be determined objectively, from the text of the document, construed in the context of the circumstances in which it came into being'. It is relevant to take into account the commercial context and surrounding circumstances of the parties' dealings. The parties' precontractual conduct is relevant and admissible on the issue of what each party by words and conduct would have led a reasonable person in the position of the other party to believe."

[19] A consideration of post-contractual conduct can also be relevant to consider; in particular in so far as it might reveal (1) what was (objectively) important or essential to the transaction, (2) admissions, or (3) probative evidence of the parties' (objective) contractual intentions.[4]

[20] Thus, it is necessary to set out in better detail the commercial context and surrounding circumstances of the parties' dealings both before and after 17 February 2022.

Commercial context and surrounding circumstances of dealings

Historical

[21] As previously mentioned, the four doctors (Al-Freah, Thompson, Francis and Mishra) through their corporate emanations, carry on business through GIC and EE. Thompson, Francis and Mishra have been in practice together since July 2014. Al-Freah was the last to join the practice in February 2018. He paid $1.5 million to join the practice.

[22] The shareholders of GIC are governed by a shareholders agreement dated 28 February 2018. It contains provisions that regulate the transfer of its shares, including by affording pre-emptive rights to other shareholders. EE is governed solely by a constitution.

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4 *Queensland Phosphate Pty Ltd v Korda (as joint and several liquidators of Legend International Holdings Inc (in liq))* [2017] VSCA 269 at [37] (per curiam) citing *Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd)* [2008] NSWCA 149 at [99] – [106] (Giles JA).

[23] GIC employed each doctor under a written employment agreement. The employment agreements contain restraints of trade.

[24] From at least March 2020 the doctors were in dispute. By the Cochine proceeding, amongst other matters, Cochine claimed oppression. Amongst the relief sought, Cochine asked for orders requiring that Wildash and AFMS purchase Cochine's shares in GIC and EE. Alternate orders sought included the winding-up of GIC and EE. Cochine also sought orders that the first, second, third and fourth defendants to the Cochine proceeding, that is all defendants bar AM, pay Cochine's costs of the Cochine proceeding.

[25] Although relief, including in respect of costs, is sought by Cochine against AFMS in the Cochine proceeding, it is conduct of Thompson/Wildash that is pleaded as the basis of the claim. Al-Freah/AFMS are not alleged to have acted in their own interests detrimentally to others or to have acted oppressively.

[26] The Cochine proceeding was referred to a court ordered mediation.

Pre-mediation

[27] Shortly prior to the court ordered mediation of the Cochine proceeding occurring, Mishra/AM advanced similar complaints against Thompson/Wildash as were contained in the Cochine proceeding. A draft statement of claim was provided to the other parties. That draft statement of claim named all the same parties as in the Cochine proceeding, made further allegations and sought relief including an order for the purchase by Wildash (only) of AM's shares in GIC and EE. In the alternative, orders were sought for the winding-up of GIC and EE. AM sought its costs of the proceeding, implicitly against all the defendants to the proceeding.

[28] The parties agreed to mediate AM's foreshadowed claim at the court ordered mediation for the Cochine proceeding scheduled to occur on 16 December 2021.

Mediation

[29] A mediation agreement was signed by all parties to the Cochine proceeding and the mediator in respect of the court ordered mediation. The mediation agreement, in its terms, refers to the mediation of the dispute described at Schedule 1 of the agreement. Schedule 1 of the agreement identifies the parties to, and the court file number of, the Cochine proceeding. What appears plain from the evidence though is that at the mediation what was sought to be resolved between all of the parties was not just the Cochine proceeding but also:

(a) the foreshadowed AM proceeding;

(b) a claim by Al-Freah/AFMS in the nature of a misleading and deceptive conduct claim (also referred to as a fraud claim) that Al-Freah purported to have at least against Thompson/Wildash, but possibly against the other two doctors and their companies as well.

[30] It appears that Al-Freah's claim might only have been advanced or articulated to the other doctors for the first time at the mediation. An email from the defendants' solicitors to the solicitors for Francis and Mishra dated 10 February 2022 refers to "We all agreed that the position taken by Dr. Al-Freah at the mediation was unexpected…".

[31] The attitude of Francis to Al-Freah's claims is revealed by correspondence dated 20 December 2021 sent by Francis's solicitors to the defendants' solicitors post-mediation, which correspondence was onforwarded by Thompson to Al-Freah shortly thereafter. It provides, inter alia:

> "First, our client sees the claims of Al-Freah to be without any substance. Our client fully expects that if those claims are articulated, there will be an application made to strike them out or for summary judgment. Quite apart from anything else, the claims could only be made against your client as the maker of the alleged representations. Insofar as Mishra and Cochine are asserted to have participated, it could only be by silence."

[32] The court ordered mediation occurred on 16 December 2021. The mediation agreement, at clause 8, refers to the mediation being conducted on a without prejudice basis. Clause 13 provides that any agreement will be reduced to writing, will be executed by the parties and that prior to such execution no oral agreement is binding on any party.

[33] The mediation agreement at clause 11 provides:

> "Mediation under this agreement may be terminated:
>
> (a) by all parties to the dispute giving written notice to the mediator that they have resolved their dispute; or
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> (b) by any party to the dispute at any time giving written notice of termination to each other party to the dispute and to the mediator; or
>
> (c) by the mediator giving written notice to all parties to the dispute that further efforts at mediation are not justified and that he has accordingly ceased to act as mediator."

[34] The parties have not deposed to what occurred at the mediation on 16 December 2021 except insofar as Thompson deposes in his first affidavit affirmed 5 July 2022 that:

(a) the parties did not reach any resolution of the Cochine proceeding at the mediation; and

(b) during the mediation he was present and heard the lawyers for each of the parties try to negotiate with Al-Freah and Al-Freah's lawyers.

All parties left the mediation on 16 December 2021 without any settlement agreement contemplated by clause 13 of the mediation agreement being signed.

[35] The mediator filed a mediator's certificate dated 20 December 2021 in the Cochine proceeding on 11 January 2022 that provided:

> "I, JAMES BELL, certify that the parties hereto have participated in a mediation before me on 16 December 2021 and the procedure has finished. The parties have not resolved their dispute."

Post mediation

[36] What can be otherwise gleaned from the documentary record in evidence about the mediation and the parties' position post mediation, is as follows.

[37] First, from Francis's solicitors' letter of 20 December 2021 referred to above:

(a) an impediment to a satisfactory settlement at mediation was the position of Al-Freah;

(b) it was considered that a resolution of Al-Freah's complaints/claim would need to be reached with Thompson;

(c) Francis was contemplating an arrangement whereby the business operated by GIC and EE would effectively enter into a caretaker mode and the business be wound up so that the doctors could go their separate ways.

[38] The concept of the doctors going their separate ways also appears in an email from Thompson to each of the other directors/doctors dated 12 January 2022 wherein reference is made to Francis operating his own private practice in the very near future and to Francis's impending departure.

[39] Second, that Al-Freah had no interest in an orderly winding-up of the business of GIC and EE without money being paid to him, is revealed in an email from the defendants' solicitors to the solicitors for Francis and Mishra dated 24 January 2022. Further, correspondence from Mishra's solicitors dated 3 February 2022 to the defendants' solicitors advised:

> "Our clients consider that the best course of action would be to proceed along the lines discussed at the mediation of this matter in December

> 2021. As you will recall, at the mediation the parties discussed the potential for an orderly winding down of the operations of GIC and EE by the parties that included a sale of the assets. … To proceed with any proposal along the above lines, it is clear that Dr Al-Freah's agreement needs to be obtained. Accordingly, should your clients wish to achieve a full settlement of the various issues in dispute, it is clearly in their interests to make a concerted effort to seek Dr Al-Freah's agreement."

[40] Correspondence from the defendants' solicitors by email dated 10 February 2022 to Francis's and Mishra's solicitors refers to the position taken by Al-Freah at the mediation being unexpected and that had Al-Freah joined the other three parties who were in favour of a voluntary winding-up of the companies, settlement would likely have been achieved that day. There is reference in that correspondence to there being recent discussions between Thompson and Al-Freah. No evidence was adduced about the content of such discussions.

[41] However, it is clear that Thompson knew the amount that Al-Freah was requiring to be bought out[5] and that Al-Freah would not release the other parties from his claim unless he received that sum.[6]

[42] Third, there is an email chain between 8 and 14 February 2022 involving all of the four doctors.

(a) The first email in time refers to the mediation not resolving "our dispute". That email was from Thompson to the other three doctors.

(b) Al-Freah replied to all confirming that the mediation had failed and that there was no agreement to wind up the companies (implicitly GIC and EE). Al-Freah wrote the "the issue of the winding up of the companies will need to be decided by the supreme court and this may take another 2-3 years". Al-Freah refers to "the ongoing efforts of Geoff [Francis] and Animesh [Mishra] to destroy the business".

(c) Mishra replied all and in that reply:

(i) wrote:

> "I note Dr Thompson's wish to 'find a way to move ahead'. It seems to me that there are only 2 ways: '**negotiated settlement**' (as elucidated by GGM[7] in their recent extensive correspondence on this matter) **<u>or</u>** a continuation of the

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5 Transcript 2 page 19, lines 24-27.

6 Transcript 2 page 19, lines 36-39.

7 The defendants' solicitors.

> current proceedings which will mean '**disclosure**' (where GGM have stated that 'the volume of documents (Wildash and Dr Thompson) will have to include in its list may run into the 1000s'). I am unsure whether Dr Al-Freah has been a party to these correspondences but, as a director and shareholder of the companies, I feel he ought to be.
>
> I also note that Dr Al-Freah feels that there is no settlement possible and that this matter will remain before the courts for '2-3 years'. If that is the path we have to follow then so be it. I would simply point out that we are at this juncture after 31 months of board conflict, a failed mediation on 16 December 2021 and a failure to meet the disclosure deadline of 28 January 2022."

(ii) referred to previous correspondence (which previous correspondence dated 24/1/22 and 3/2/22 had not been sent to Al-Freah) saying:

> "6. GGM have suggested that their client is 'still keen to bring closure to this matter through a negotiated settlement … as soon as possible' (24/1/22). GGM have also stated that "my client has instructed me that he wishes to negotiate a settlement of your client's claims by purchase (by his company) of your clients' companies' interests in GIC and EE" (3/2/22)."

The progress of the Cochine proceeding

[43] Pleadings in the Cochine proceeding had closed on 26 November 2021 and disclosure was due. Correspondence from Mishra's solicitors on 11 February 2022 reveals that the parties had agreed to provide disclosure in the Cochine proceeding on or before 28 January 2022, such that by the time of that letter disclosure was overdue. The volume of documents to be disclosed by Thompson/Wildash appeared to be in the thousands of documents (see [42](c)(i) above). The fact and costs associated with disclosure appear to have been an issue at least important to Thompson as can be seen from the offer (see [9] above). The offer confirms the indication that there may be "in the order of 1000s of documents" to disclose.[8]

[44] Clearly enough Mishra thought that there was information relevant to him to be gained through disclosure from Thompson/Wildash. His email of 14 February 2022 to the other doctors provides:

> "Through disclosure and/or injunctions and/or directors duties claim my shareholder company and I may be forced to thoroughly examine what has

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8 Thompson's solicitors' letter of 17 February 2022.

> happened to GIC & EE behind closed doors and why I have been effectively locked out of the company."

Other matters

[45] It appears that the need for progress in the Cochine proceeding, along with other matters arising in correspondence between the parties, was driving some urgency in settlement negotiations as the date of 17 February 2022 was approaching. Thompson accepted in cross-examination that as at 14 February 2022, time was fast running out to achieve a settlement.[9] The ongoing situation with Francis and Mishra was accepted by Thompson to be dire,[10] having an adverse impact on Thompson.[11]

[46] Thompson was sympathetic to Al-Freah's position considering that (in his view) Al-Freah had been dragged into the dispute as a consequence of the actions of Francis and Mishra.[12] Thompson had an interest in setting up a new practice with Al-Freah in the future (if that be mutually satisfactory) and therefore in keeping Al-Freah onside – albeit not at any cost.[13]

Summary

[47] Whilst all of the commercial context and surrounding circumstances to the alleged contract of compromise are relevant, the following key aspects are emphasised (in a summary way):

(a) The disputes between the parties included the Cochine proceeding, the foreshadowed AM proceeding and a claim by Al-Freah. Al-Freah's claim was potentially against each of the other doctors and their companies.

(b) Each of Thompson, Francis and Mishra were prepared to consider a resolution of those disputes that involved an orderly winding-up of the business of GIC and EE.

(c) Al-Freah had expressed (strongly) that he was not interested in participating in such a settlement and instead required a payment of money to exit the practice, at least including the amount he had paid to buy into the practice.

(d) Accordingly, one possible way of resolving all of the disputes from Thompson's perspective was to buy out Al-Freah from the practice and then proceed with Francis

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9 Transcript 2 page 24, lines 22-41.

10 Transcript 2 page 24, lines 40-41.

11 Transcript 2 page 24, line 42 to Transcript 2 page 25, line 7.

12 Transcript 2 page 25, lines 21-26.

13 Transcript 2 page 26, lines 18-38.

and Mishra, implementing arrangements for the orderly winding-up of the business of GIC and EE.

(e) The Cochine proceeding and the foreshadowed AM proceeding would continue and not be resolved until such time as a settlement with Francis and Mishra was achieved. Disclosure in the Cochine proceeding was overdue (and had the potential to be costly, onerous and perhaps even damaging for Wildash/Thompson).

Key elements of the correspondence alleged to comprise the contract of compromise

[48] The relevant correspondence is set out at [9] to [12] above. Below I emphasise certain matters from that correspondence and indicate whether I consider each emphasised matter (considered alone) is (1) **in favour** of the plaintiffs' contention that there was a binding contract of compromise between the plaintiffs and the defendants evidenced by the correspondence, (2) **against** that contention, or (3) **neutral**.

[49] In respect of the first correspondence, the offer, the following matters are emphasised:

(a) The correspondence is marked "without prejudice save as to costs". Ordinarily that language is used when making an offer in respect of existing or foreshadowed proceedings, where the offer may be relied upon as a *Calderbank* type offer in respect of questions of costs that may arise. Here there were potentially several proceedings that phrase might be applicable to: (1) the Cochine proceeding, or (2) the foreshadowed AM proceeding, or (3) the proceeding that might arise as a consequence of the Al-Freah claim.

(b) The "Re:" to the letter provides guidance in that respect. The letter on its face is one written in regard to the Cochine proceeding (which is defined to be the 'litigation'). Whilst there was no apparent issue between Wildash and AFMS in the Cochine proceeding, a *Calderbank* type offer as between them might be effective to rely upon to make submissions as to against which of the defendants orders might be made, including as to costs.[14] I consider this matter, considered together with (a) above, points **against** the relevant contention.

(c) The letter refers to the mediation and a settlement of the "dispute/litigation". The reference to litigation is to the Cochine proceeding. There is further reference to the litigation (as defined) in the second paragraph, point 4 and the third last paragraph of

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[14] I do not accept the defendants' submission that a *Calderbank* type offer can only be relevant in looking at appropriate costs orders as between a plaintiff and a defendant to a proceeding.

the letter. Point 1 of the letter mentions "settlement". That must be the settlement of the "dispute/litigation" referred to in paragraph 2 of the letter. The references to the "dispute" seem to be an implicit acceptance that there are also wider disputes on foot between the parties and the "settlement" is seeking to resolve all matters. That is consistent with point 6 of the letter that I will come to below. Accordingly, I consider these matters point **against** the relevant contention.

(d) The letter contemplates two deeds of settlement. The first (point 5) only between the plaintiffs and the defendants covering points 1 to 4 of the offer. The second (point 6) involving the plaintiffs, defendants, Francis, Mishra and their companies, and GIC and EE. Point 6 of the letter is in these terms:

> "6. your client and AFMS will also enter another deed of settlement mutually releasing and forever discharging our client and Wildash, Dr Francis and his company Cochine Pty Ltd, Dr Mishra and his company Animesh Mishra Pty Ltd, and GIC and EE from all claims, actions, suits, demands, costs, damages and expenses (whether known or unknown) which any of them or your client or AFMS may have had but for the execution of the deed by reason of or in connection with the business carried on by them together in The Gastrointestinal Centre Pty Ltd and/or EndoExce1lence Pty Ltd;"

The plaintiffs draw attention to the language of points 5 and 6 requiring the plaintiffs to "enter" into (or execute) the two deeds. I will return to the argument advanced by the plaintiffs based on that later in these reasons. In circumstances where the second deed contemplates mutual releases, discharges against all of the parties, and the offer is only made by Thompson/Wildash to Al-Freah/AFMS, I consider this matter points **against** the relevant contention.

(e) Point 1 of the letter refers to point 6 as being a condition and contemplates it occurring simultaneously with payment. For the same reasons as (d) above, I consider this matter points **against** the relevant contention.

(f) Point 7 is to be contrasted to point 6. Whilst point 6 does not in terms refer to Francis and Mishra "agreeing" to the second deed, Al-Freah's release from his restraint of trade is said to be "subject only to Dr Francis and Dr Mishra agreeing to this release." The defendants' solicitors indicated that they would seek that agreement once written confirmation of the "above terms" was received from the

plaintiffs' solicitors.[15] I consider this matter is **neutral** in respect of the relevant contention.

(g) Point 3 of the letter, concerning (first) a transfer of shares, makes no reference to the terms of the shareholders agreement binding the parties (containing terms dealing with share transfers) or the consent/agreement of the other shareholders/doctors to such a transfer. Likewise in respect of the balance of point 3 of the letter dealing with the employee and director status of Al-Freah. It does not appear that the consent of any party would have been required for Al-Freah to resign as a director or employee, accordingly that matter is **neutral** in respect of the relevant contention. But in respect of the transfer of shares where for that to occur the consent of other parties (beyond Thompson/Wildash) would be required, I consider that matter points **against** the relevant contention.

(h) Point 5 of the letter contemplates that the first deed of settlement covering points 1 to 4 will contain confidentiality and non-disclosure provisions. The defendants submitted this points against the relevant contention because confidentiality and non-disclosure provisions were important to both parties and no detail of these clauses had been agreed. The decision in *Feldman v GNM Australia Ltd* [2017] NSWCA 107 was relied upon (which is a decision involving an underlying defamation claim). *Feldman* turns on its facts. Here, I think it was plain enough to the plaintiffs and defendants what the nature of the confidentiality and non-disclosure to be agreed required; namely, the information in points 1, 2 and 4 of the letter not to come to the knowledge of Francis and Mishra. I therefore consider this matter **neutral**.

(i) Reference is made in the second last paragraph of the letter to achieving an "urgent settlement" and the offer is left open for only a little over 24 hours. The offer expressed that the defendants wish to be able to tell the other doctors, Francis and Mishra, that the plaintiffs and defendants had reached an agreement. Whilst that may be explicable as Thompson/Wildash wanting to achieve an "in-principle" agreement with Al-Freah/AFMS so as to permit negotiations to then proceed with the other doctors, on its face, I consider this matter points **in favour** of the relevant contention.

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[15] Whilst it was submitted for the plaintiffs that the "above terms" was only points 1 – 6 of the letter, I do not consider that the proper construction of the letter. I consider that on a proper construction of the letter the "above terms" also included the first sentence of point 7, that contained a term that was "above" the reference to the "above terms". I consider that points 1 – 7 constituted one offer, the acceptance of which could only lead to there being one contract of compromise (not a contract of compromise and a collateral contract in respect of the subject matter of point 7).

(j) Nowhere in the express language of the letter is the settlement/agreement being proposed referred to as provisional or pending or subject to the agreement of the other doctors or subject to contract. I consider this matter points **in favour** of the relevant contention.

(k) The letter is written by solicitors who it can be assumed would be careful in their language and would be aware of the four categories of cases that may exist under a *Masters v Cameron* analysis. The letter was being written to counsel. I consider this matter points **in favour** of the relevant contention.

[50] In respect of the second correspondence, the following matters are emphasised:

(a) The email is written by counsel to solicitors.

(b) The references to the offer being accepted and to the settlement are matters I consider point **in favour** of the relevant contention.

(c) The provisos mentioned appear to add nothing to the offer made and said to be accepted.

[51] In respect of the third correspondence, the following matters are emphasised:

(a) The email is written by solicitors to counsel.

(b) Paragraph 2 confirms the defendants' "agreement to the provisos". Paragraph 3 of the letter refers to the "confidential settlement agreement reached between our clients". The matters at [49](j) and [49](k) apply again. I consider these matters point **in favour** of the relevant contention.

(c) Paragraph 3 of the letter refers to the second deed "cover[ing] the giving of releases by all parties to the litigation commenced by Cochine Pty Limited". In fact, the offer required the second deed to include the individual doctors as well. Nothing seems to turn on that. It was indicated that the second deed was expected to be prepared by Francis's solicitors (suggesting that the settlement was wider than a settlement only between the plaintiffs and the defendants). For the reasons in respect of [49](d) and [49](e) above, I consider these matters point **against** the relevant contention.

(d) Paragraph 5 of the letter concerned steps to be taken in the Cochine proceeding. It included, "Of course, it would appear such matters will become redundant as soon as settlement deeds are signed, but until that time there is a need to attend to formal matters until the litigation has been officially discontinued." That is suggestive again of a settlement wider than a settlement only between the plaintiffs and the

defendants being contemplated. In particular, it contemplates the settlement of the Cochine proceeding, and the discontinuance of that proceeding as a consequence of the settlement. I consider this matter points **against** the relevant contention.

[52] Nothing in the fourth correspondence requires emphasis, except to note that the time that elapsed between the first piece of correspondence and the fourth was only a little over 3 hours (11:38 to 14:47), consistent with the "urgency" expressed in the offer. For the same reasons in [49](h), on its face, I consider this matter points **in favour** of the relevant contention.

Conduct post alleged contract of compromise

[53] After the above correspondence on 17 February 2022, the defendants' solicitors wrote to the solicitors for Francis and Mishra in the following terms:

> "We thank you for your patience in this matter.
>
> Our client has now reached agreement with Dr. Al-Freah and his company Al-Freah Medical Services Pty Ltd (AFMS).
>
> That agreement includes the transfer of all shares in GIC and EE owned by AFMS to Wildash Holdings Pty Ltd for $1.00 per share parcel and simultaneous resignation by Dr. Al-Freah as an employee of the business and as a director of GIC and EE. We request confirmation that your clients agree Dr Al-Freah will be released from any restraints on his employment, effective simultaneously with the settlement of the transfer of shares.
>
> The transfer of shares, etc., should be finalised by Friday 4 March 2022, subject to your clients' approvals.
>
> Accordingly, on the basis the current litigation is discontinued and all parties provide mutual releases and indemnities with respect to the various claims against each other, our client is now in a position to agree to all of the terms set out in your letters of 20 December 2021 (from Mr Muller) and 3 February 2022 (from Mr Steele).
>
> We propose that there be two deeds of settlement; one to cover releases (to include Dr Al-Freah and AFMS as parties to the deed) and the other to cover the orderly winding up of GIC and EE and all other matters (to which Dr Al-Freah an AFMS will not be parties).
>
> Kindly let us have your draft deeds of settlement for our urgent review, along with details of your clients' costs of the litigation to date.
>
> Our client is preparing a list of the opportunities he has been pursuing (per point 9 of Mr Muller's letter and point 11 of Mr Steele's letter) and we will forward same to you very shortly."

[54] The defendants' solicitors subsequently engaged with the solicitors for Francis and Mishra to reach settlement with those parties (from 18 February 2022 to 1 March 2022), without a settlement being achieved.

[55] During the same period, Thompson commenced making arrangement with a financial institution to obtain the amounts (or at least the settlement amount with some buffer for expenses) contemplated by the offer.

[56] Thompson and Al-Freah had an exchange of emails and a meeting on 24 February 2022. During the meeting Thompson expressed that it was difficult for him to borrow the money to pay the amounts in the offer.[16] He asked Al-Freah to pay his own legal expenses.[17] Further discussions ensued but ultimately no different position as between the plaintiffs and the defendants was agreed at the meeting. It was put in cross-examination and answered by Thompson:

> "But you certainly do recall that the conversation ended very much with you conveying to him [Al-Freah] that the arrangement from the 17th of February very much remained on foot? --- Yes, subject to my arrangements with the others.
>
> Well, but you never said that to him, though, did you? --- I can't recall, sir.
>
> Now ---?--- But it always was the situation."

[57] On 1 March 2022, Thompson sent a text to Al-Freah in the following terms:

> "I know you & Saba must be very angry with me & I'm incredibly sorry for what's happened to you. I'm a broken & shattered old man with those 2 thugs giving me no respite. They want me destroyed & gone which I just don't deserve.
>
> Kate[18] will go back to Chris[19] later today with a revised offer. Although it doesn't include a massive capital payment for which I can't be held responsible, it does give you what both you & I believed you were buying into with a great future for us to work together long term as equal colleagues with whatever opportunities may lay ahead.

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16 Transcript 2 page 28, lines 40-41.

17 Transcript 2 page 30, lines 12-19.

18 Defendants' solicitor.

19 Plaintiffs' counsel.

> I don't believe you'll have lossed anything whereas I'm potentially losing my family, my dignity, my business built over 35 yrs & so my life as I know it. I just don't deserve it.
>
> I so very much hope you'll consider my offer fair & reasonable & so bring this soul destroying dispute to an end. Please help me Mo. I'm begging you. I need an urgent answer or believe me I'm about to crack!"

[58] Al-Freah responded in these terms:

> "Please don't waist your time. I agreed to indemnify the others based on the previously signed offer your lawyers sent on 17th Feb.
>
> Unfortunately, and just like you, I am now (and have been) under enormous pressure too. Saba has had enough and she just wants me to go to Court as she believes that this will put an end to this 'ping pong' of emails, proposals, motions, meetings, text msgs, meetings at your house, phone calls etc etc etc
>
> To tell you the truth, I had my Statement of Claim all ready to go by Monday 14th Feb. The only reason why it was not submitted was because of the tragic loss of Michal. Saba & I didn't want to add salt to your wounds at that time and hence we backed off. This was followed by your proposal and we were glad the SOC was not submitted.
>
> However, Saba wants an end to this and she is pressing on me to go to Court and I tend to agree with her too. I can't go on with this as it's already been two years with no results. Had we gone to Court 2 years ago we wouldn't have been far from reaching an end by now!
>
> I will however support you as a friend and colleague for a better future but for now I can't do much until this case is over. I can't put Saba & my young family through more of this. I will wait to 4th March as per deadline of your proposal. After that I will have not option but to
>
> As stated previously, my statement of claim (including $1.5m, damages, $260k's interest +++) is done and I was ready to file with the court.
>
> I am sick and tired of changes of plan and resolutions. If the deed is not received before the close of business day today, I'll consider the offer is cancelled and I'll start court proceedings.
>
> Thank you for your understanding."

[59] No revised offer was sent by the plaintiffs to the defendants.[20] Neither the defendants nor the plaintiffs drew or tendered any deed of settlement contemplated by the offer, nor was the second deed of settlement prepared by Francis's solicitors.

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[20] Transcript 2 page 32, lines 27-47.

Matters that are not part of the commercial context and surrounding circumstances

[60] The plaintiffs submit that part of the commercial context and surrounding circumstances to be taken into account is that there was virtually no prospect of the Cochine proceeding settling until Thompson reached an agreement with Al-Freah. It was submitted for the plaintiffs that was because the competing positions of Al-Freah as compared to Francis and Mishra were hopelessly in conflict in that Francis and Mishra wanted the business wound down whereas Al-Freah wanted it to remain intact. The plaintiffs submit that the only possible way Thompson could resolve the conflict was to remove Al-Freah from the deadlock by buying him out.

[61] With respect, I do not agree with that submission.

[62] Whilst it is true that Thompson found himself in a difficult position, with claims coming at him from all sides, there was any number of ways in which Thompson could seek to resolve the conflicts – some of which he in fact explored (such as buying out Francis and Mishra[21]).

[63] It is plain from the cross-examination of Thompson that:

(a) he considered there was an intractable position between the parties that he was trying to resolve;[22]

(b) he expected that if a caretaker arrangement were able to be put in place, it would require Al-Freah to be bought out;[23]

(c) whilst he knew what Al-Freah wanted, there remained a possibility of settlement without giving Al-Freah what he wanted;[24]

(d) he was dealing with the other doctors simultaneously to attempt to achieve a settlement;[25]

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21 Transcript 2 page 23, lines 31-45.

22 Transcript 2 page 18, lines 28-29.

23 Transcript 2 page 19, lines 5-8.

24 Transcript 2 page 19, lines 41-47.

25 Transcript 2 page 20, lines 1-6.

(e) he had not considered every possible variant of what might occur depending on the attitude of the other doctors; he considered the situation was dire but was focussed on finding a resolution to all the disputes.[26]

[64] I am not prepared to act on the basis that the only possible way Thompson could resolve the conflict was to remove Al-Freah from the deadlock by buying him out. That was but one option.

Analysis

The effect of the mediation agreement

[65] The defendants submit that the mediation was never terminated in accordance with the requirements of clause 11 of the mediation agreement, with the consequence that as at 17 February 2022, clause 13 of the mediation agreement continued to apply. The consequence of that was said by the defendants to be the supporting of an inference that the plaintiffs and defendants only intended to be bound at the point that the deeds contemplated by the offer were executed.

[66] I do not agree with the defendants' submissions for the following reasons:

(a) On its proper construction, termination under clause 11 of the mediation agreement is not the same concept as the mediation simply coming to conclusion at the end of the mediation day (being 16 December 2021). Termination under the mediation agreement is a step that might occur before the mediation naturally comes to a conclusion at the end of the mediation day. The mediation was to be for one day[27] (unless the parties agreed otherwise); the mediator's fee was noted by reference to that day.

(b) There is no evidence that the parties agreed to extend the mediation beyond 16 December 2021.

(c) That the mediation came to an end is to be inferred from the filing of the mediator's certificate.

(d) Clause 13 of the mediation agreement is not a clause of a type that would survive the mediation coming to an end.

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26 Transcript 2 page 33, line 5 to Transcript 2 page 34, line 17.

27 The mediation date is provided for in Schedule 2 of the mediation agreement.

(e) Even if clause 13 continued to apply (contrary to my finding), it says nothing of the binding or otherwise nature of a written agreement. The alleged agreement here was reduced to writing (the relevant correspondence of 17 February 2022). Whilst clause 13 contemplates the executing of the writing by "the parties" (and the parties are set out in Schedule 1), there is no express prohibition on the writings being executed by the parties' representatives, and no identification of the form of execution required.

(f) Further the requirements of clause 13 of the mediation agreement might be varied by the conduct of the parties, or waived. No special requirements for variation or waiver are proscribed by the mediation agreement.

[67] Accordingly, I do not accept that the mediation agreement set up the negotiations post the conclusion of the mediation as "subject to contract" negotiations as was the case in *400 George Street (Qld) Pty Ltd v BG International Ltd* [2012] 2 Qd R 302. I find that the mediation agreement, in this case, governed the mediation that concluded on 21 December 2021, and not the negotiations conducted beyond that time.

General practice and expectations of lawyers

[68] As previously mentioned, the correspondence of 17 February 2022 was between legal practitioners. I accept the defendants' submission that in the context of settlement of litigation, unless there is a clear contrary indication, the general practice and expectation of lawyers is that settlement will not become final until all terms of the deed of settlement are agreed and the deed entered into.[28]

[69] Here though, there does appear to me to be some clear contrary indications, in particular the expressed urgency to achieve a settlement, and the language used by the defendants' solicitors when referring to "agreement" without conditioning that language in any express way.

[70] Accordingly, I assess the correspondence of 17 February 2022 from a neutral starting position, rather than a starting position that ordinarily lawyers would act on the basis that a settlement is not final until all terms of the deed of settlement are agreed and the deed entered into by the parties.

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28 *MX v FSS Trustee Corporation atf First State Superannuation Scheme* [2020] NSWSC 961 at [98], [109]; *Wyzenbeek v Australasian Marine Imports Pty Ltd (No 4)* [2022] FCA 201 at [94].

The result

[71] What seems plain from the commercial context and surrounding circumstances was that both Thompson and Al-Freah (and their companies) were looking to achieve a settlement that was effective to bring all disputes (including the Cochine proceeding, the foreshadowed AM proceeding and the Al-Freah claim) to an end.

[72] The terms of the relevant correspondence of 17 February 2022, in my view, accorded with that objective. Despite the unqualified language used of "offer", "settlement" and "agreement", I consider that on a consideration of the whole of that correspondence in light of the commercial context and surrounding circumstances, what was objectively intended by the plaintiffs and the defendants was that there was to be no settlement of any separate part of the wider dispute between all of the parties. The whole of the wider dispute settled, or none of the dispute settled.

[73] Accordingly, I do not accept that Thompson and Al-Freah objectively intended to settle disputes only between themselves knowing that would have the effect that:

(a) the Cochine proceeding would remain on foot as against both Wildash and AFMS;

(b) the foreshadowed AM proceeding could be filed naming both Wildash and AFMS as defendants;

(c) Al-Freah's claim could proceed against everyone bar the defendants (particularly given the others would almost inevitably join the defendants to any such proceeding – see [31] above).

[74] Whilst in considering the relevant correspondence of 17 February 2022 it is not a matter of counting up the matters in favour or against a particular construction, I am satisfied that the relevant correspondence reveals that the parties did not intend to make an immediately binding agreement just between themselves. Instead, what was contemplated was that an agreement would be binding only at the point where the Cochine proceeding and all claims as between all four doctors and their companies and GIC and EE were also resolved.

[75] In that respect, I consider point 6 of the offer (at [9] above) particularly telling (see my comments about point 6 at [49](d) above). I do not consider that the proper construction of point 6, as submitted for the plaintiffs, was that all it contemplated was the plaintiffs executing a deed in those terms that would be held in escrow until such time as the balance

of the named persons executed same.[29] In my view what was contemplated was an effective deed, achieving the mutual releases therein mentioned, resolving all the disputes between those parties.

[76] I do not consider anything that occurred post 17 February 2022 changes the conclusion I have reached. What occurred post 17 February 2022 is sufficiently consistent with the parties understanding that the agreement of Francis, Mishra and their companies needed to be obtained for a settlement to actually become binding and be implemented.

[77] The consequence of my findings is that the plaintiffs' claim is dismissed.

Other arguments advanced by the parties

[78] Having reached the conclusion I have above, it is unnecessary for me to determine the alternate positions advanced by the defendants if I had found that by the relevant correspondence of 17 February 2022 the plaintiffs and defendants made an immediately binding agreement.

[79] The defendants advanced several different alternate positions which were disputed by the plaintiffs in several different ways. I summarise them below and set out briefly what I would have found had it been necessary to consider those alternate arguments.

Non-fulfilment of conditions

[80] First, the defendants contend that conditions of the agreement were not satisfied on or before 18 March 2022 and Thompson/Wildash validly terminated the agreement for non-fulfilment of the conditions. In that respect:

(a) The relevant conditions are said to be:

(i) Francis, Mishra, GIC and EE entering into a deed of mutual release;

(ii) Francis and Mishra agreeing to waive pre-emption rights under the GIC shareholders agreement, and agreeing (in their capacity as directors) to register a transfer of shares in both GIC and EE;

(iii) GIC agreeing to terminate Al-Freah's employment agreement and agreeing to release Al-Freah from the restraint of trade provisions of his employment agreement.

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[29] See the principles relating to such escrow set out in *400 George Street (Qld) Pty Ltd v BG International Ltd* (2010) 2 Qd R 302 at 311 [9]-[10].

(b) The defendants allege the conditions were to be satisfied within a reasonable time of 17 February 2022 and in any event by no later than 18 March 2022.

(c) The defendants allege they took reasonable steps to obtain the required agreements from Francis and Mishra but the conditions were not satisfied.

(d) The non-fulfillment of the conditions rendered the agreement voidable at the election of the defendants and that election was made either by delivery of the defence or by a letter from the defendants' solicitors dated 7 July 2022.

[81] The plaintiffs' response to the defendants' contentions is to say:

(a) The only relevant conditions are:

(i) execution of the first deed by Al-Freah/AFMS;

(ii) execution of the second deed by Al-Freah/AFMS.

(b) There is no condition as to observance of the transfer provisions in the shareholders agreement or Cochine and AM agreeing to AMFS transferring its shares in GIC to Wildash/Thompson for $1 per share parcel.

(c) In respect of (a)(i) above, the defendants did not prepare or tender the first deed for execution and so can not rely upon non-fulfilment of that condition to terminate.

(d) In respect of (a)(ii) above, the condition only required Al-Freah/AFMS's entry into the second deed which would have occurred when the settlement sum was paid.

(e) A reasonable period of time for compliance with the conditions has not elapsed, and Thompson/Wildash had no right to terminate because notice of intended termination had not first been given.

(f) If performance of the contract of compromise required the approval of the Francis and Mishra parties, then Thompson/Wildash did not take reasonable steps to obtain that approval.

[82] I mostly agree with the position advanced by the defendants. It is not necessary for me to deal with all of the competing arguments. It is sufficient for present purposes for me to disclose that I would have concluded that:

(a) Francis, Mishra, GIC and EE entering into a deed of mutual release was a condition of the agreement (for similar reasons as why I found for the defendants on the primary case);

(b) that condition was to be satisfied by no later than 18 March 2022 (so as to permit settlement to occur at least by that date as set out in the offer);

(c) the defendants took reasonable steps[30] to obtain the required agreement from Francis and Mishra, but the condition was not satisfied (see [53] and [54] above);

(d) the non-fulfillment of the condition rendered the agreement voidable, and an election was made by the defendants to void the agreement (at least by the letter from the defendants' solicitors dated 7 July 2022).

Were the plaintiffs ready, willing and able

[83] Second, the defendants contended that the remedy of specific performance should be refused because Al-Freah was not ready, willing or able to perform his obligations under the agreement. In that respect the steps it is alleged Al-Freah did not take include:

(a) preparation and tender of transfers of his shares in GIC and EE. This would require, pursuant to s. 1071B(2) of the *Corporations Act* 2001 (Cth), the delivery of a "proper instrument of transfer" signed by Al-Freah;

(b) preparation and tender of registration as director of GIC and EE. This would require notice in writing to GIC and EE (clause 28(d) of each company's constitution);

(c) preparation and tender of resignation as employee of GIC;

(d) notification of his legal costs;

(e) attempting to agree terms of deed of settlement with Thompson, including confidentiality/non-disclosure provisions;

(f) attempting to achieve satisfaction of the conditions in points 6 and 7 of the offer, by seeking agreement of Francis, Mishra, GIC and EE required to satisfy those conditions;

(g) attempting to arrange a time and place for the simultaneous completion envisaged in the offer.

[84] The plaintiffs' response to the defendants' contentions is to say:

(a) Al-Freah/AFMS's performance was to occur upon presentation of the deeds or on exchange for payment, neither of which have occurred to date;

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30 Reasonable steps did not require the defendants to comply with every demand or request made by Francis and Mishra.

(b) Almost immediately after entering the alleged contract of compromise Thompson/Wildash conveyed they would not perform such that it was redundant for Al-Freah/AFMS to perform.

[85] I mostly agree with the position advanced by the plaintiffs. The plaintiffs were expecting to receive draft deeds from the defendants, and reasonably anticipated that Thompson would attend to liaising as necessary with Francis and Mishra. It was not unreasonable for the plaintiffs to await receipt of those draft deeds, including before taking the other steps mentioned by the defendants. Once the defendants conveyed that they did not intend to perform the agreement, there was no practical reason for the plaintiffs to perform. I would not have concluded that the plaintiffs were not ready, willing and able to perform.

Futility

[86] Third, the defendants contended that the remedy of specific performance should be refused because it is futile. In that respect it was said to be futile because as at trial there was still:

(a) no agreement as to the confidentiality/non-disclosure provisions to be included in a deed of settlement;

(b) no agreement by Francis, Mishra, GIC or EE to enter into a deed of release (as required by point 6 of the offer);

(c) no agreement by Francis or Mishra to waive their rights of pre-emption under the GIC shareholders agreement, or to exercise their power as directors to register a transfer of shares in both GIC and EE;

(d) no agreement by GIC to release Al-Freah from his employment agreement, or to release him from the restraint of trade provisions in that agreement.

[87] The plaintiffs' response to the defendants' contentions was to say that the matters relied upon by the defendants do not rise to the level of futility, that the court should not conclude that the other doctors would (or lawfully could) withhold their agreement.

[88] I mostly agree with the position advanced by the plaintiffs. I would not have concluded that any relief ordered would be futile. In respect of the non-disclosure/confidentiality issues, for the reasons set out in [49](h) above, I do not consider that matter properly gives rise to a futility submission. As to the balance of the matters in [86](b) to [86](d) above, those matters seem to rely upon the position to be adopted by Francis and Mishra. Although there seems a real possibility that the necessary agreement of Francis and Mishra will not be

obtained, I would not be prepared to conclude now that the relief sought by the plaintiffs would be futile.

Orders

1. Judgment for the defendants on the plaintiffs' claim.

2. Subject to considering any submissions that either party may seek to make about costs, I propose to make an order that the plaintiffs pay the defendants' costs of the proceeding on the standard basis.