De Jersey CJ, Keane JA and Mullins J : Supreme Court of Queensland. Court of Appeal. 16th March 2007.

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **KEANE JA:** On 2 September 1999, the plaintiff entered into a contract with the defendant whereby the plaintiff agreed to construct a building on the defendant's land at Toowong. The parties fell into dispute; and, in 2001, the plaintiff commenced proceedings for damages totalling something of the order of $300,000.

[3] Orders were made for the separate determination of questions relating to whether the parties had, on 22 December 2000, compromised their rights under the contract, and, if so, whether the compromise was unenforceable because it was made by reason of the application of duress by the defendant. At first instance, each of these questions was determined in the affirmative by Ambrose J.[1] There was an appeal from these determinations. The Court of Appeal upheld the first of the determinations by Ambrose J, but set aside the second and ordered that that question be determined by another judge of the Supreme Court.[2] The Court of Appeal's order was made on 28 November 2003. That question has yet to be determined.

[4] The present appeal arises out of continuing skirmishing by the parties about the pleadings. On the defendant's application, the learned primary judge struck out paragraphs 23, 24 and 25 of what is now the plaintiffs Further Further Amended Statement of Claim. The plaintiff sought to strike out a number of paragraphs of the Further Amended Defence on the footing that the defendant was precluded from agitating the contentions therein contained by the determination of Ambrose J which was upheld by the Court of Appeal in November 2003. Both these applications were resolved in the defendant's favour by the learned primary judge.

[5] I may say immediately that I am in respectful agreement with the orders of the learned primary judge, substantially for the reasons given by his Honour. It is necessary, of course, that I should state more explicitly my reasons for this conclusion; but, because the inordinate time and expense already lavished on this matter by the parties (and, as a result, by the Court) has been out of all proportion to the amount actually in dispute, and the difficulty of the issues involved, I propose to express my reasons briefly.

The defendant's attack on the statement of claim

[6] While the defendant's attack was focussed upon paragraphs 23, 24 and 25 of the current edition of the statement of claim, it is necessary to set out some earlier paragraphs as well. The relevant paragraphs of the plaintiff s current pleading are as follows:

> *"16. In the premises by 22 December 2000:*
> *(a) the construction costs claimed by the Plaintiff including GST were $3,149,129.69; and*
> *(b) the Defendant had paid or caused to be paid to the Plaintiff towards those construction costs a total of $2,632,816.94;*
> *(c) there therefore was owed to the plaintiff as the defendant knew a total of $516,312.75 comprised of*
> *(i) the balance of the amount of progress claim number 12, namely $287,687.41;*
> *(ii) GST of $52,969.83;*
> *(iii) an amount for the work performed between 12 December and 22 December estimated at $109,404.00 inclusive of GST; and*
> *(iv) the retention of $66,250.00.*
>
> *17. By 22 December 2000 as the defendant knew the building works were incomplete and the plaintiff would be required to perform further works to complete them.*
>
> *18. By 22 December:*
> *(a) the plaintiff owed monies to his subcontractors and suppliers;*
> *(b) the plaintiff paid the claims of subcontractors and suppliers from the payments made by the defendant to the plaintiff pursuant to the Varied Agreement;*
> *(c) the plaintiff did not have sufficient funds to pay his subcontractors and suppliers without the funds then owing to him by the defendant;*
> *(d) a number of the plaintiffs subcontractors and suppliers were pressing for immediate payment of their claims for work done;*
> *(e) some subcontractors were then threatening to remove materials and dismantle works previously completed by them on site unless paid that day;*
> *(f) due to the time of year the plaintiff had no means of raising monies to pay the subcontractors and suppliers to whom he owed monies;*
> *(g) the plaintiffs reputation in the building industry would be adversely affected by his failure to pay his subcontractors and suppliers.*
>
> *19. At 22 December the defendant knew of each of the facts pleaded in paragraph 18 hereof.*
>
> *20. On 22 December at a meeting at the office of the defendant's architect, the defendant by its agents Hock Tan and Bill and Caroline Fan, stated to the plaintiff:*
> *(a) the plaintiff had to accept a total payment of $2,836,387.47 for the job because that was all the defendant could and would pay;*

[1] ***Mitchell v Pacific Dawn Pty Ltd*** [2003] QSC 086.
[2] ***Mitchell v Pacific Dawn Pty Ltd*** [2003] QCA 526.

(b) the plaintiff had to accept a payment that day based on that figure or he would get nothing;
(c) if the plaintiff refused the offer the defendant would sue him for damages for delay.

21A. The Defendant is estopped from denying the facts alleged in paragraphs 6 - 21 hereof by reason of the decision of His Honour Justice Ambrose pronounced on 4 April 2003 in respect of question 3(a).

21. The defendant knew that the statement pleaded in paragraph 20(a) was false and that the threatened legal proceedings pleaded in paragraph 20(c) were baseless.

22. The defendant made the statements to compel the plaintiff to enter into an agreement with the defendant (the December Agreement) whereby the plaintiff accepted as a final settlement of all claims including GST in respect of the work performed and to be performed by him in relation to the building works the sum of $272,637.40 payable as follows:

22.12.00	*$ 160,000.00 (incl. of GST)*	
On or before 22.06.01	*$ 46,700.00*	*(plus GST if applicable)*
Retention	*$ 66,250.00*	

23. By reason of the matters pleaded in paragraphs 18 to 22 the Plaintiff was coerced into entering into the December Agreement as the defendant knew and intended. The plaintiff would not have entered into the said agreement but for the defendant's illegitimate pressure and unconscionable conduct, the threats and immediate demands of his subcontractors and suppliers, and his inability to act otherwise than consistently with the demands of the defendant.

24. In the premises:

(a) the December agreement was voidable; and

(b) on 3 January the plaintiff in a meeting with the defendant's agent Tan orally avoided the December agreement and by letter dated 15 January 2001 to the defendant's agent Tan, the plaintiff confirmed that avoidance.

25. In the alternative, the conduct of the defendant referred to in paragraphs 18 to 22 hereof constituted unconscionable conduct within the meaning of s51AA of the Trade Practices Act."

[7] The vice in paragraphs 23 and 25 stems, in part, from an apparent confusion of the legal principles which the pleading seeks to invoke. Duress and unconscionable conduct are distinct doctrines with different bases and incidents: they are not different ways of describing the same doctrine. The expression "illegitimate pressure" is not a synonym for "unconscionable conduct". That the plaintiff was able to refer to occasions when the latter expressions have been used judicially as if they were synonymous[3] is simply a reflection of the uncertainty which may attend the use of the expression "unconscionable conduct". This uncertainty has been exposed, and deprecated, in the decisions of the ***High Court in ACCC v CG Berbatis Holdings Pty Ltd*** [4] and ***Tanwar Enterprises Pty Ltd v Cauchi***.[5] It is obviously desirable that uncertainty of this kind should be avoided in a pleading, especially where the use of the expression "unconscionable conduct" is apt to "encourage the false notion that there is a distinct cause of action akin to an equitable tort" [6] which is being pursued.

[8] The decision of the High Court in ***ACCC v CG Berbatis Holdings Pty Ltd*** [7] has made it clear that the equitable doctrine relating to unconscionable conduct is not concerned to prevent a party simply taking advantage of superior bargaining power. Rather, it is concerned to prevent a party taking unconscientious advantage of legal rights against another where those rights have been obtained by virtue of some special disability on the part of a disadvantaged party, which has prevented that party from making a sound judgment to "conserve his or her own interests". [8]

[9] It may be noted that nowhere in paragraphs 18, 19, 20 and 21 of the current statement of claim is there an allegation that the plaintiff laboured under some disability or disadvantage that might tend to impede his ability to make a rational decision in his own best interests to accept or reject the propositions put to him on behalf of the defendant in relation to the 22 December 2000 compromise. The matters alleged in these paragraphs of the current statement of claim do not support a claim to relief on the basis that the defendant's reliance on the legal rights obtained by it in the compromise of 22 December 2000 is contrary to conscience. To raise such a claim it would be necessary to plead, in addition, that the plaintiff, by reason of some special disability which affected him, was unable to appreciate the disadvantageous nature of the bargain which he was making, and that the defendant knew of this disadvantage.

[3] ***Crescendo Management Pty Ltd v Westpac Banking Corporation*** (1988) 19 NSWLR 40 at 46; ***National Australia Bank Ltd v Freeman*** [2001] QCA 473 at [43]; ***Parras Holdings Pty Ltd v Commonwealth Bank of Australia*** [1997] FCA 1107.

[4] (2003) 214 CLR 51 at 62 - 63 [5] - [9], 70 - 74 [35] - [46].

[5] (2003) 217 CLR 315 at 324 - 326 [20] - [26].

[6] ***Tanwar Enterprises Pty Ltd v Cauchi*** (2003) 217 CLR 315 at 325 [24].

[7] (2003) 214 CLR 51 at [14], [39] - [40]. This understanding is reflected in the following decisions: ***Kostopoulos v GE Commercial Finance Australia Pty Ltd*** [2005] QCA 311 at [59]; ***Australia and New Zealand Banking Group Ltd v Karam*** [2005] NSWCA 344; ***Spira v Commonwealth Bank of Australia*** (2003) 57 NSWLR 544; ***Turner v Windever*** [2005] NSWCA 73; ***Kokos International Pty Ltd v Libra Motors Pty Ltd*** [2005] WASC 209; ***Astvilla Pty Ltd v Director of Consumer Affairs*** [2006] VSC 289; **Matland Holdings Pty Ltd v NTZ Pty Ltd** [2004] FCA 710; **Pacific National (ACT) Ltd v Queensland Rail** [2006] FCA 91; ***Durkin v Pioneer Permanent Building Society Ltd*** [2003] FCA 419; ***Gartner v Ernst & Young (No 2)*** [2003] FCA 1436; ***Australian Competition & Consumer Commission v Oceana Commercial Pty Ltd*** [2003] FCA 1516

[8] ***ACCC v C G Berbatis Holdings Pty Ltd*** (2003) 214 CLR 51 at [14].

[10] Apart from the potential for confusion generated by the use of the expression "unconscionable conduct", the expression "illegitimate pressure" is embarrassing when used in a pleading, in that it simply raises the question why "pressure" is said to be "illegitimate". Further, to the extent that, as Senior Counsel for the plaintiff seemed to accept, pressure is illegitimate only because of the use of unlawful means to apply it, the use of the expression adds nothing to the case sought to be made by the plaintiff.

[l11] To the extent that the plaintiff is able to establish that he was induced to make the compromise of 22 December 2000 by fraudulent misrepresentations by the defendant or threats by it of a refusal to perform its contractual obligations, the plaintiff will be able to establish a cause of action in deceit or duress respectively. [9] References to "illegitimate pressure" and "unconscionable conduct", and the facts alleged in paragraphs 18 and 19 of the current statement of claim, are immaterial and unnecessary and, therefore, embarrassing. It is necessary for the plaintiff to replead his case in order to ensure that the trial of the action is not bedevilled by unnecessary incoherence or uncertainty as to the terms of the debate.

[12] For these reasons, in my respectful opinion, the learned primary judge was right to require the plaintiff to replead his case.

The plaintiffs attack on the defence

[13] In the defendant's current pleading, it alleges that, if the compromise of 22 December 2000 is lawfully avoided by the plaintiff, the plaintiff is thrown back upon its rights under the contract as originally made. The plaintiff, on the other hand, argues that the original contract was varied in terms which were to his advantage, on or about 30 January 2000. According to the plaintiff, it is the contract as so varied which revived as the charter of the parties' rights and duties when the compromise of 22 December 2000 was avoided. Of immediate relevance, the plaintiff contends that the decision of Ambrose J, insofar as it upheld the making of the compromise of 22 December 2000, created an issue estoppel, not merely in relation to that 22 December 2000 compromise, but also in relation to the variation of 30 January 2000.

[14] The basis for the plaintiffs contention in this regard is that Ambrose J, in the course of his reasons, accepted that the parties effectively varied the original contract on 30 January 2000 so as to change what had been a lump sum contract into a cost plus contract. [10]

[15] It is clear, however, that the issues relevantly submitted to Ambrose J for his determination did not depend, so far as the actual facts directly material to the determination of those issues were concerned, upon whether the original contract had been varied on 30 January 2000. The whole point of the first issue put before Ambrose J for separate determination was whether, on 22 December 2000, the parties had agreed to replace their previous agreement, whatever its terms and whether or not the original contract had been varied prior to 22 December 2000, with a new charter of rights and duties.

[16] Any incidental finding made by Ambrose J in favour of the plaintiff on the point now under discussion was not a finding in relation to any of the *"ultimate facts which formed the very title to rights"*,[11] being the rights established by the making of the 22 December 2000 compromise. Nor was it necessary for Ambrose J "*to decide ... as the groundwork for his decision"* on the 22 December compromise, that the original contract had been varied on 30 January 2000.[12]

[17] As Fullagar J said in ***Brewer v Brewer*** [13] *"... there can be no estoppel unless what is put forward is inconsistent with a former finding or decision"*. It is in no way inconsistent with the determination that the parties entered into the compromise agreement of 22 December 2000 for the defendant to put forward the proposition that, absent that compromise, the rights of the parties were established by the original contract and had not been varied prior to 22 December 2000.

[18] On the plaintiffs behalf, it was argued that it was, indeed, necessary for Ambrose J to find that the original agreement had been varied on 30 January 2000 because it was the giving up by the defendant of rights which arose under that variation which afforded an arguable basis for concluding that the defendant had given consideration sufficient to bind the plaintiff to the compromise of 22 December 2000.[14] That argument must be rejected.

[19] In truth, Ambrose J found consideration, sufficient to support the 22 December 2000 compromise, in the defendant's agreement at that time to reduce the retention of amount for which the original contract provided. [15] The variation of 30 January 2000 did not appear as a fact material to that conclusion. The defendant's rights to retain moneys under the contract, and its willingness to forego its rights in relation to retention moneys, had nothing at all to do with the 30 January 2000 variation of the original contract. Ambrose J did not find, nor was he required to find, that the original contract was varied on 30 January 2000 as a necessary part of the "groundwork" for his decision of the first question posed for his determination.

[9] Cf ***Nixon v Furphy*** (1925) 25 SR (NSW) 151 at 158; ***Corr v Gilsenan*** [1946] St R Qd 44; ***Re Hooper and Grass Contract*** [1949] VR 269 at 272.
[10] ***Mitchell v Pacific Dawn Pty Ltd*** [2003] QSC 086 at [28].
[11] ***Blair v Curran*** (1939) 62 CLR 464 at 532.
[12] Cf ***Blair v Curran*** (1939) 62 CLR 464 at 532.
[13] (1953) 88 CLR 1 at 15.
[14] ***Wigan v Edwards & Anor*** (1973) 1 ALR 497 at 512 - 513.
[15] ***Mitchell v Pacific Dawn Pty Ltd*** [2003] QSC at [72] - [75].

[20] At the highest for the plaintiff in this regard, it can be said that Ambrose J may have treated the question whether the 30 January 2000 variation had at that time altered the contract from "a lump sum contract" to a "cost plus contract" as having some bearing upon the credibility of the allegations that a compromise was reached on 22 December 2000. What each party believed he or it was entitled to under the contract at that time may have made that party's oral evidence about the events of 22 December 2000 more or less credible. But whether or not the original lump sum contract had been varied to become a cost plus contract was not a fact material to the compromise on 22 December. Ambrose J, in finding that the contract had been varied on 30 January 2000 to become a simple cost plus contract, said: "I am not persuaded that at the end of the day this variation probably made very much difference. "[16] That this variation did not "make very much difference" is readily apparent from the reasons of Ambrose J in which he summarised the facts material to his conclusion that a binding compromise was made on 22 December 2000.[17] Nowhere in these reasons does his Honour advert to the 30 January 2000 variation as a fact material to his conclusion.

[21] It may also be noted that Ambrose J concluded his reasons for judgment with the statement that, by reason of his answers to the questions posed for his decision, the plaintiffs claim should be determined "based upon the established cost of construction of the defendant's building incurred by him plus 7.5% of that cost"! [18] On the appeal from the decision of Ambrose J, McPherson JA, with whom Mackenzie and Wilson JJ agreed, held that "so far as [this] remark ... was intended to constitute a further finding consequent upon his determination of [the] questions, it too cannot stand". [19] There has been no appeal from the decision of the Court of Appeal. The effect of the decision of the learned primary judge in this case was thus in harmony with the decision of the Court of Appeal.

Conclusion and orders

[22] The appeal should be dismissed.

[23] The plaintiff should pay the defendant's costs of the appeal to be assessed on the standard basis.

[24] MULLINS J: I agree with Keane JA.

ORDER: 1. Appeal dismissed
2. Plaintiff to pay the defendant's costs of the appeal, to be assessed on the standard basis

D R Cooper SC for the appellant instructed by MacDonnells Law
A M Daubney SC, with P D Tucker, for the respondent instructed by Hogan and Company Lawyers

[16] **Mitchell v Pacific Dawn Pty Ltd** [2003] QSC 086 at [28].
[17] ***Mitchell v Pacific Dawn Pty Ltd*** [2003] QSC 086 at [71] - [77]
[18] ***Mitchell v Pacific Dawn Pty Ltd*** [2003] QSC 086 at [79]
[19] ***Mitchell v Pacific Dawn Pty Ltd*** [2003] QCA 526 at [16].