

BETWEEN R D HAINES

Appellant

AND L V CARTER

Respondent

Hearing: 20 November 2000

Coram: McGrath J
Doogue J
Young J

Appearances: G J Judd QC and M J McCartney for Appellant
R B Stewart QC for the Respondent

Judgment: 19 December 2000

JUDGMENT OF THE COURT DELIVERED BY YOUNG J

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Introduction

[1] This is an appeal by Rodney David Haines from a judgment delivered by Randerson J on 26 November 1999 in which he ordered Mr Haines to pay Lynn Valerie Carter \$1,500,000 together with interest at 10.5% calculated from 14 May 1999 and costs.

Factual background

[2] Mr Haines and Ms Carter met in 1991. They lived together between 1993 and February 1999. There was a substantial business component to their relationship. Both had been involved in the house removal business before they met and they had, through their companies, been in competition with each other. They merged their businesses in 1997. The merged group of companies has been referred to in the case as the "Haines Group". Ms Carter was the sole director of the principal operating companies in the Haines Group.

[3] On the break-up of the personal relationship in mid-February 1999 (on the evidence of Ms Carter) or late February (on the evidence of Mr Haines), it was seen as necessary for Mr Haines and Ms Carter to divide up their assets.

[4] Mr Haines and Ms Carter were not able to agree between themselves on a division of assets. So they decided to bring in outside assistance in the form of mediators. The mediators they chose were Mr Keith Goodall, an accountant who

had been closely associated with both Mr Haines and Ms Carter, Mr Max Carter (who is Ms Carter's father but whose involvement in this process was at the suggestion of Mr Haines) and Mr Anthony Lendrum, a barrister who had previously acted for Mr Haines.

[5] The mediation process started at 11.00 a.m. on Tuesday, 2 March 1999 and continued for the rest of that week. By late on Friday 5 March 1999, substantial progress had been made and the mediators had prepared a draft agreement. This draft formed the basis of further discussions on Monday 8 March. Mr Haines took home with him that night a copy of the draft agreement as it then stood. On the following day, 9 March, there were further negotiations with both Mr Haines and Ms Carter seeking and obtaining changes to the draft agreement. The mediation process continued on 10 March with Mr Haines requiring further changes which Ms Carter accepted. She then signed the agreement. Mr Haines wanted more time to think about the proposed agreement. So there was no finality achieved that night. Then, on 11 March, Mr Haines made some final changes to the agreement (which were endorsed on it in handwriting) and then signed it. Ms Carter accepted the alterations by initialling them.

[6] There is one point in relation to this process which we should note. On 10 March 1999, Mr Lendrum sent a fax to Mr Goodall in these terms:-

Rod Haines has raised with you and with me the issue of the legal advice provided to the mediation in respect of defacto [*sic*] property law.

I am happy to accompany Rod to visit a barrister of his choice and explain to that persona [*sic*] and Rod the statement I made with respect to the law applying in defacto [*sic*] property disputes. Given that I am prepared to do this, and happily, I can see no reason why the agreement needs to be altered in anyway.

Comments on the mediation process

[7] In the course of his argument to us, Mr Judd QC, counsel for Mr Haines, characterised the mediation as "irregular".

[8] We agree that the mediation process was unusual in a number of respects: its proximity in point of time to the issues giving rise to the underlying dispute (the mediation starting within weeks or days of the breakdown in the personal relationship between Mr Haines and Ms Carter); the absence of legal representation for the parties; and the identity of the mediators, one of whom was Ms Carter's father.

[9] That said, the mediation process was as designed by the parties. The involvement of Mr Max Carter as a mediator was proposed by Mr Haines. The involvement of Mr Goodall avoided the necessity for outside accountancy advice to be retained on each side. The non-involvement of independent lawyers for the parties was deliberate. Plainly the parties chose decision-makers who were familiar to them both and a process that was informal. No doubt this produced a speedier and cheaper process for all involved.

[10] Against that background, we are unimpressed and uninfluenced by the complaints made by Mr Judd about the process.

Terms of the agreement

[11] The agreement itself is dated 11 March 1999.

[12] The recitals record that the parties (that is Mr Haines and Ms Carter):-

[W]ish to record in this document the agreement they have reached at mediation as to the division of their various assets.

[13] We refer first to a number of uncontroversial provisions.

[14] Clause 2.1 identified property which Ms Carter was to retain "as her sole and separate property". Clause 2.2 contained an acknowledgement of Mr Haines that he would make no further claim against certain trusts associated with Ms Carter. There were corresponding provisions in clause 2.3 (which specified the assets which Mr Haines was to retain as his sole and separate property) and clause 2.4 (pursuant to which Ms Carter acknowledged that she had no further claims against certain trusts associated with Mr Haines). Clause 2.5 provided Mr Haines and Ms Carter were to

execute all documentation required to give effect to the terms of the agreement; this to occur within 4 working days of the documents being presented to them for this purpose.

[15] We now turn to the provisions of the agreement which are principally in issue in this case:

- 2.6 In consideration for the ownership and/or changes of ownership confirmed or created in this agreement Rod will pay to Lynne the sum of One Million Seven Hundred Thousand Dollars (\$1,700,000.00) by 9 March 2000 provided only that if settlement is not made at that time then Rod shall pay to Lynne interest on any outstanding balance at the rate equivalent to the BNZ prime first mortgage rate plus 4%.

Subject only to

The mediators determining what adjustment if any should be made to that sum in respect of:

- (a) Any interest The Haines Group may have in Retrac Limited; and/or
 - (b) Whether \$100,000.00 is due to Rod in respect of the refurbishment of the vessel AMITY.
- 2.7 Rod and Lynne will provide all further evidence they wish to put before the mediators in respect of the adjustment set out in 2.6 above by filing the same at the offices of Keith Goodall no later than 1 pm on Wednesday, 31 March 1999 and both undertake to place no obstruction in the path of the other in the obtaining of any such evidence.
- 2.8 It is agreed that the mediators will then review the claims made by Rod and Lynne in respect of the adjustment and provide a final determination of Lynne's entitlement and the sum Rod is to pay Lynne (the final adjusted sum) as soon thereafter as is reasonably practicable but in any event within 14 days of 31 March 1999; such sum being accepted by and binding on the parties as a final determination of Rod's liability to Lynne.
- 2.9 Rod will make payment to Lynne of the final adjusted sum in the following manner:
- (a) The parties agree that Albert Fanshawe 62 Limited (hereinafter referred to as "AF62") is the registered

proprietor of the Russell property and that neither party has any interest in the Russell property.

- (b) The parties confirm with this agreement that Lynne is currently the owner of all the shares in AF62 and that Rod has no interest equitable or otherwise in the shares in AF62.
 - (c) That Lynne agrees to sell and Rod agrees to buy all the shares in AF62 for the sum of \$1,420,000 or such lesser amount as is required in terms of the final adjusted sum on or before 9 March 2000.
 - (d) Lynne shall execute a transfer of the said shares in AF62 within seven (7) days of the execution of this agreement; that transfer to be held in escrow by Anthony Lendrum, Barrister of Auckland pending completion of the settlement set out in this agreement.
 - (e) If Rod does not complete settlement by 9 March 2000 (time being of the essence) or such earlier time as the parties agree then the agreement for the sale and purchase of the shares in AF62 shall be at an end.
 - (f) Rod and Lynne will make further submissions to the mediators by 31 March 1999 in respect of any balance security required; it being accepted by both parties that in the event of there being no agreement within their submissions as to that security then such security will be determined by Keith Goodall taking into account the needs of both parties and The Haines Group.
- 2.10 Rod and Lynne shall not perform any act or cause any act to be performed from the date of this agreement which may result in a liability arising to any person or entity set out in Clauses 2.1 to 2.4 hereof and in particular in respect of any Haines Group liability to the BNZ or any associated banking entity. If either breaches the provisions of this clause then that party will be liable in damages to the other and the other may bring a claim against them in that regard. This mutual indemnity shall enure for seven (7) years from the date of this agreement.
- 2.11 Rod will continue to make all payments he or his business entities and/or trusts presently make in respect of any property that is the separate property of Lynne or has by operation of this agreement become the separate property of Lynne as defined in Clauses 2.1 and 2.2 hereof such payments to be:

- (a) Fully defined and recorded by Lynne and the Haines Group and provided to the mediators by 17 March 1999 for record purposes; and
 - (b) Made in full pending settlement being completed at which time Lynne shall be solely responsible for all such payments provided only that should Rod default on any such payments then the final adjusted sum due and owing shall be deemed to be payable immediately and any late payment of the same shall carry penalty interest at the BNZ prime first mortgage rate plus 4%.
- 2.12 Lynne will continue to use her best endeavours and lead the Haines Group negotiations with the Group Bankers BNZ and any ancillary financial institution but will do so on the basis that Rod will be fully informed of all representations to be made to those Bankers in advance of any such representations. This clause is to be read in conjunction with Clause 2.10 hereof.
- 2.13 Lynne will continue to use her best endeavours and assist Rod with any negotiations in respect of the Te Toki Farms and RH Holdings development at North Mall, Hamilton and will do so on the basis that Rod will be fully informed of any representations with respect to such leases or any other issues in connection with that development.
- 2.14 Rod agrees that to enable Lynne to complete her obligations in respect of Clauses 2.12 and 2.13 she shall be entitled to the entry and use of all facilities available at the Haines Group Head Offices situate at Whenuapai, Auckland provided only that:
 - (a) No files or copies of files shall be removed from the Haines Group offices; and
 - (b) Any files or copies of files presently held by Lynne shall be returned to those offices upon execution of this agreement.
 - (c) Lynne shall retain all files and records pertaining to entities she retains ownership of.
- 2.15 Rod and Lynne agree that Lynne shall perform the obligations set out in Clauses 2.12-2.14 above by such period as Rod requires or Lynne wishes at which time either Rod shall provide Lynne with a written notice of termination of the said obligations or Lynne shall provide Rod with six (6) months written notice of her intention to cease performing these obligations. During the period that Lynne performs these obligations she shall continue to receive her current salary

calculated on a days worked basis together with reimbursement. Lynne further agrees that in the event of Rod terminating her said obligations then Lynne will take no act nor make any claim against any company in the Haines Group or any person associated herewith.

- 2.16 That Rod acknowledges that Lynne's ability to perform her obligations set out in the previous clauses may be impaired from time to time by Lynne's ill health and that any inability of Lynne to perform those obligations will not alter the terms of this settlement and will create no penalty for Lynne PROVIDED HOWEVER that Rod and Lynne expressly acknowledge and agree that the agreement incorporated in this document and the obligations arising therefrom will be completed by them both in all good faith.
- 2.17 If either Rod or Lynne can provide evidence within six (6) months of the date of this agreement sufficient to satisfy the mediators that the other has breached his or her obligation to the other to the extent that the other has suffered possible financial loss in excess of \$50,000.00 then the mediators agree that in this event only they will reconvene the mediation for the sole purpose of resolving this issue. At the conclusion of such reconvened mediation the mediators will issue Rod and Lynne with any further final adjusted sum as is necessary.
- 2.18 Lynne agrees that she will not for a period of five (5) years from 9 March 1999 either alone, in partnership or as an employee or agent carry on the business of house removals PROVIDED THAT nothing in this clause shall prevent Lynne from purchasing buildings for relocation to properties owned by her or any of her associated entities.

[16] There then followed a number of general terms to which we need not refer save to note that clause 9 provided that Mr Haines and Ms Carter confirmed:-

[T]hat they have reached the agreement contained in this mediation in all good faith and that neither has sought or required independent legal advice in respect of this agreement and that this agreement records their full and final agreement on all matters and issues of property between them.

[17] We should explain the relationship between clauses 2.6 and 2.9.

[18] The most important of the obligations of Mr Haines under the agreement was to make payment to Ms Carter on or before 9 March 2000. The amount to be paid was provisionally fixed at \$1,700,000 but this figure was subject to adjustment under

clause 2.6 (a) and (b) with the extent of the adjustment to be determined by the mediators.

[19] Albert Fanshawe 62 Ltd (referred to in the agreement and, therefore, conveniently in the judgment as “AF62”) owned a house at Russell and the scheme of the agreement was that the shares in the company (and thus, in effect, the house at Russell) were eventually to go to Mr Haines. Pending settlement, the shares in AF62 were to provide partial security for Ms Carter as to her eventual entitlement under the agreement, identified provisionally pursuant to clause 2.6 as \$1,700,000 but subject to adjustment in accordance with that clause.

[20] The shares in AF62 did not provide adequate security for a payment as large as \$1,700,000. So Mr Goodall was to specify what additional security was to be provided by Mr Haines under clause 2.9(f). As a matter of common sense, this decision could only sensibly be made after the determination by the mediators of the extent of the adjustments required under clause 2.6.

[21] So, in effect, the mediators were arbitrators as to the clause 2.6 adjustments and Mr Goodall was an arbitrator in relation to the security issue.

The subsequent decisions of the mediators and Mr Goodall

[22] Ms Carter made her submissions to the mediators as to the adjustments issue on 31 March 1999. Mr Haines sought and obtained an extension of time for his submissions which were eventually made on 7 April. There were then meetings between the mediators and the parties.

[23] The mediators delivered their decision on the adjustments issue on 14 April 1999. They reduced the payment Mr Haines was required to make from \$1,700,000 to \$1,500,000. Mr Goodall also decided (pursuant to clause 2.9 (f)) that Mr Haines should provide security in the sum of \$700,000 over a property in which he resided at 38 Pohutakawa Road, Auckland. Further, the mediators also issued a document headed “Further Directions Of The Mediators Made As To Implementation Of The Agreement And At The Direct Request Of Rod And Lynne”.

[24] This last document referred to costs which were to be met by Mr Haines pursuant to clause 2.11 of the agreement in the following way:-

The mediators agree that the following costs shall be paid:

Burwood Trust

BNZF loan
Rates
Insurance

Retrac

Water
Insurance
Maintenance
Interest (difference between income & expenditure)
Rates

AF62 Ltd

Interest
Power/Phone
Insurance
Contents insurance

[25] There was some debate before us as to the status of the document and whether the mediators were empowered to make such a decision. Certainly, the wording of clause 2.1 did not confer upon the mediators the power to decide what payments Mr Haines was to make under clause 2.11. However, the process contemplated that these payments would be “[f]ully defined and recorded by [Ms Carter] and the Haines Group and provided to the mediators by 17 March 1999 for record purposes”. In the proceedings before Randerson J, Mr Judd did not raise any issue as to this document and, more significantly, as will later appear, Ms Carter’s contention that there had been default by Mr Haines under clause 2.11 was not denied until very late in the piece.

[26] For reasons which we give later in this judgment (see paragraphs 131-134), we see no need to reach any final conclusions as to the status of this document – essentially because it was not disputed by Mr Haines in the High Court that he was subject to a requirement to make certain payments and that some, at least, of those payments were not made.

Implementation of the agreement by Mr Haines – March 1999/May 1999

[27] In the period between 11 March and mid-May 1999, Mr Haines took many steps which could be regarded as involving implementation of the agreement.

[28] He told Ms Carter's personal assistant (Ngaere Tomkins) in mid-March that he owned all the shares in the companies and that he had settled with Ms Carter. He also asked her to change the telephone account and power account for the house at Russell out of Ms Carter's name. These accounts were put into his name.

[29] Arrangements were put in place for the release to Ms Carter of files associated with assets which were to become her separate property. Although there was some irascibility and dispute over this, these arrangements were nonetheless implemented, at least substantially.

[30] Mr Haines made submissions to the mediators on 7 April on the further adjustments issue. He also participated in discussions with the mediators prior to the release of their 14 April 1999 decision as to adjustments.

[31] On 8 April 1999, Mr Haines wrote to a solicitor, Simon Palmer, saying:

Would you please arrange to have all shares held by Lynne personally or by Lynne's trusts transferred into my name.

The mediation agreement was signed on 4 March [*sic*] therefore we would assume that the transfers should be effective on that date.

[32] On or about 14 April, Ms Carter handed over her resignations as director of the companies which were to vest in Mr Haines and she also executed share transfers in those companies. On 7 and 16 May 1999, Mr Haines had Ms Carter removed as a bank account signatory for companies in the Haines Group.

[33] Mr Judd QC in his submissions sought to play down the significance of these steps. He said that for reasons associated primarily with her health, Ms Carter did not wish to retain an interest in the businesses which she and Mr Haines had operated together prior to February 1999. So he said that it was always a common position that those businesses would vest in Mr Haines and the only issue which had

to be decided between the parties was what corresponding financial adjustments should be made in the final settlement between them.

[34] It is certainly the case that Ms Carter for health, and perhaps other reasons, did not wish to operate the Haines Group after the break-up of her personal relationship with Mr Haines. But the fact remains that up until 11 March 1999, Ms Carter was in a position of considerable strength *vis-à-vis* Mr Haines. She had legal control of the core operating companies making up the Haines Group. No doubt the High Court would have intervened to prevent her using that control to act oppressively *vis-à-vis* Mr Haines. However, in her reply affidavit (to which Mr Haines never responded), she was able to point to what she considered to be irregularities in some of Mr Haines' commercial conduct involving these companies. So it is difficult to see how Mr Haines could have obtained control of these companies in the short to medium term otherwise than by agreement with Ms Carter. There is certainly nothing in the affidavits to suggest that Ms Carter was prepared to allow him to regain control of the companies first and negotiate later as to the terms.

Challenges raised by Mr Haines to the effectiveness of 11 March 1999 agreement

[35] The first formal indication from Mr Haines that he regarded the agreement as not being binding according to its terms came on 23 April 1999. On that day, Mr Haines' counsel, Mr Judd, wrote to Mr Anthony Lendrum. Mr Judd asserted that the letter by Mr Lendrum to Mr Goodall dated 10 March (see paragraph 6 above):-

[I]s seen as making the agreement subject to Rod obtaining legal advice on the issues which were of concern to him.

[36] This assertion came to be developed into the argument that the agreement was subject to a condition entitling Mr Haines to obtain legal advice and to avoid the agreement if, having received that advice, he was not satisfied with the agreement.

[37] We note, as well, that Mr Haines had already begun to default on his obligations under the agreement. We say this because Ms Carter, in her affidavits in the High Court, produced two schedules showing defaults made by Mr Haines in relation to the clause 2.11 payments. These schedules show defaults which go back

to March 1999. Mr Haines has never directly challenged Ms Carter's evidence as to these defaults.

[38] These defaults were the subject of complaint by the solicitor acting for Ms Carter which were recorded in a letter to Mr Haines of 13 May 1999. This letter indicated that unless the payments which were then in default were made by 4.00 p.m. Friday 14 May, proceedings would be issued for the recovery of all money owed in terms of the agreement. The letter also noted that a first mortgage over 38 Pohutakawa Road, Whenuapai had been prepared to give effect to the security decision which had been made by Mr Goodall. Mr Haines was invited to execute the mortgage or alternatively pay the \$700,000 which would otherwise have been secured by it.

[39] Mr Haines' response was very provocative. He transferred title to the property at Pohutakawa Road to trustees. As well, his solicitors responded to Ms Carter's solicitor by asserting that the 11 March agreement was subject to a condition subsequent permitting Mr Haines to avoid it:-

[I]n the event that it and the subsequent decisions of the mediators were underpinned by an incorrect approach to the legal position.

After referring to errors on the part of the mediators, the letter then went on:-

The present position is that our client could avoid the agreement of 11 March in pursuance of the condition subsequent but would prefer not to take that extreme step until he has received reasons from the mediators. On the one hand those reasons may show that there are errors in addition to the obvious one referred to On the other, the reasons might persuade him that, notwithstanding errors underpinning what occurred, the overall outcome is fair and acceptable, with the result that he would then be prepared to elect to affirm the agreement and accept those 'decisions' which were within the mediators' mandate.

We suggest, therefore, the best way of approaching this difficult situation is for your client to join with ours in requesting the mediators to provide reasons justifying the figure of \$1,700,000 in clause 2.6 of the agreement of 11 March, and the 'decisions' which they subsequently made.

[40] Ms Carter's solicitor replied. He indicated that she intended to enforce the agreement as it stood (subject to the adjustments made by the mediators).

[41] Mr Haines' solicitors then responded by letter of 1 June asserting that not only could the agreement be avoided on the basis that it was subject to a condition subsequent but also that it was voidable for duress. The letter went on:-

Our client did not accept the figure of \$1.7m could possibly be accurate but was placed in a position where he had no option but to accept it. The best he could do was to seek the reservation represented by the condition subsequent. The duress consists of your client's communicating with the bank in a manner which was disrupting Haines Group business at a critical time and her threats to continue to do so, and her threats to communicate with the Inland Revenue Department in a way which would have disrupted extremely sensitive negotiations. . Your client indicated that these threats would be implemented if our client did not make an agreement with her on the terms acceptable to her.

[42] The result was that Ms Carter commenced proceedings for summary judgment.

The course of the proceedings in the High Court

[43] The application for summary judgment was filed on 4 June 1999. The plaintiff's affidavit in support was filed on 28 June.

[44] Notice of opposition was filed on 15 July. The notice of opposition identified the two grounds for avoidance already referred to in the correspondence, that is the alleged condition subsequent and duress. It also alleged two further grounds, namely that:-

The plaintiff breached clause 2.7 by placing obstructions in the path of the defendant in the obtaining of evidence relating to the adjustment set out in clause 2.6, thereby preventing the mediators from providing a final determination which fairly weighed the interests of the parties

and:-

Pursuant to clause 2.17 the defendant has provided evidence within 6 months of the date of the agreement which ought to be sufficient to

satisfy the mediators that the plaintiff has breached her obligation to the defendant to the extent that the defendant has suffered financial loss in excess of \$50,000, so that even if the agreement remains on foot, the amount payable to the defendant by the plaintiff more than extinguishes any liability which the defendant may have to the plaintiff.

[45] The first of these additional defences has not been taken any further in the course of the case and did not really surface in argument before us and certainly not as a discrete possible defence. So we say no more about it. The second of the new grounds, however, requires some brief discussion.

[46] It is apparent from a letter of 12 July 1999 which Mr Haines sent the mediators and from the terms of his affidavit of 14 July 1999 that the arguments which Mr Haines wished to raise with the mediators under clause 2.17 related to his concerns as to how the initial figure of \$1,700,000 and the adjusted figure of \$1,500,000 were arrived at. In other words, with the exception of the argument (which has not been pursued) that Ms Carter had breached clause 2.7, it has not been suggested by Mr Haines that Ms Carter has been in breach of her obligations under the 11 March 1999 agreement. Rather he has sought to use clause 2.17 to re-open the appropriateness of the agreement of 11 March 1999 and the mediators' decisions as to the adjustments.

[47] In his affidavit of 14 July 1999, Mr Haines also set out his duress defence.

[48] He referred to the banking arrangements between Haines House Haulage Ltd (which was one of the companies in the Haines Group) and the Bank of New Zealand. As at February 1999, the company was substantially in excess of that limit. According to Mr Haines:-

The plaintiff was threatening me that if I did not do what she wanted, she would go to the bank and undermine the situation with the bank. She said that she would tell the bank that North Mall [a development undertaken by two of the companies in the Haines Group] was not going to go as predicted, that Haines did not have the ability to meet the cashflow forecasts. She actually did purport to cancel signing authorities to prevent cheques being drawn but, in the event, because the bank did not receive a requested written instruction, this did not proceed.

[49] As well, Mr Haines said that Ms Carter threatened to make things difficult for him with the Inland Revenue Department. As to this he said:-

The Haines Group has been under investigation by the IRD since 1991. A tremendous amount of time and effort has been put in by myself and my primary adviser my accountant Keith Goodall to resolve the matters in issue. By the time we are speaking of (end of February, beginning of March 1999), those negotiations had reached a critical stage. The IRD was probably prepared to accept that all underlying tax had been paid and that it would be appropriate to put an application to the Minister for relief in respect of penalties, for one of the companies. The plaintiff was fully aware of the negotiations which had been taking place. She was fully aware of the critical point which had been reached. During this period following her departure from the house on 27 February, and her demands for me to enter into agreement, she was threatening to contact the IRD to convey information which could have undermined the negotiations. Even though in my opinion the information when properly explained and understood ought not to have caused problems, the reality was that it would at the very least cause the IRD to put any proposed agreement on hold whilst these further matters were investigated. The plaintiff told me that she had formulated a box of information, including files from the office, and had put them in Mr Bruce Stewart's office, to be given to the IRD if I did not enter into the agreement which she wanted.

[50] Later in his affidavit he referred to the process by which he and Ms Carter agreed to the mediators findings:-

The reason why I said that I would accept the mediators' findings was because of the threats that she was making as to what she would do if there was not a settlement (as mentioned above). By saying that I would accept the mediators' findings, I was able to say to her, and did say to her, that she should not continue with her threats, nor take the course of action that she was threatening, because I had said that I would accept the mediators' findings.

[51] Mr Haines also asserted that in the course of the negotiations, and in particular on 10 March, Ms Carter had said to him that if he did not sign by 5.00 pm that day she would deliver the files to the IRD.

[52] Mr Haines' affidavit was supported by an affidavit from Kathleen Ann Niblett who is his secretary. She referred to Ms Carter threatening to go to the Inland Revenue Department if Mr Haines did not go along with her requirements.

She also referred to some angry discussions over a cheque in which she alleged that Ms Carter had made graphic comments as to what would happen to Mr Haines as a “white boy” when he was in jail as a result of the information she was going to give to the Inland Revenue.

[53] Ms Carter then swore a further affidavit of 16 August 1999.

[54] In this affidavit she responded to the allegations of duress.

[55] She pointed out that in early 1999, the Haines House Haulage Ltd overdraft was in fact \$1.4 million as against the \$200,000 limit. She says that it was common ground between her (as the financial controller of the Haines Group) and the bank that there had been significant differences between projections as to the North Mall project and the actualities. She then went on to say:-

What I said to the defendant in connection with the BNZ was that if we did not reach a satisfactory agreement then I would no longer manage the North Mall project for him and he would be left to deal with the BNZ on his own. That would certainly have caused the defendant some difficulties in that hitherto the BNZ had dealt with me and relied significantly on information which I had provided. There was never any suggestion of my taking any steps to incite the BNZ to take any precipitate action.

[56] Ms Carter did acknowledge making remarks in the period between mid February 1999 and 11 March 1999 which could have been taken as threats to refer certain information to the Inland Revenue Department. She, however, asserted a context rather different from that alleged by Mr Haines and Ms Niblett.

[57] She said that she believed from late 1998 that Mr Haines was engaged in cash transactions. She said that this provided the background for her telling both Mr Goodall and Mr Haines:-

[O]f my concern over the cash transactions and the likelihood that the defendant had been stripping assets and diverting income from the joint venture companies. I made reference to the cash transactions which I had discovered. Given these concerns I said I was not going to tolerate a long drawn out contest and that if there were to be delays I was going to get auditors in to audit the companies. The defendant resisted an audit saying that it was unnecessary and that a busy body

auditor might unnecessarily feel obliged to refer transactions which he did not fully understand to the IRD. Mr Goodall said that an auditor was obliged by law to refer matters of concern to the IRD. I said I had no concerns in that regard and that I wanted a prompt and fair division. I was not going to be kept at bay whilst the defendant went on doing as he pleased. I did say that if the defendant had concerns about the IRD then that was his problem and it should not stand in the way of a fair division of our interests.

...

The defendant maintained that he had nothing to be concerned about with the IRD and that he had undergone and survived a comprehensive audit by the IRD.

[58] She accepted that in another discussion (which we take to be the discussion referred to by Ms Niblett) she had expressed dissatisfaction to Mr Haines and Ms Niblett about a GST input credit claim and a related cheque cancellation and, in particular, had told him that what was going on was fraudulent, that he was a crook and that he belonged in jail. She said that this discussion did not involve a threat by her to give information to the Inland Revenue Department and, on her evidence generally, the observations which she made were not referable to the negotiations which led to the mediation and later settlement.

[59] Her affidavit indicates that there were further discussions between her and the defendant about the Inland Revenue Department but that Mr Haines had always been dismissive of the possibility that there would be any risk to himself arising out of Inland Revenue Department inquiries and had asserted that there were no problems or issues associated with those inquiries that caused him any concern.

[60] She concluded on this topic by saying:-

I did not threaten to convey any specific information to the IRD and I have no idea what information the defendant is referring to when he says that I threatened to convey information to the IRD. I did say that the IRD might show more than just a passing interest in the cash transactions should an audit reveal irregularities – but the defendant asserted that he had no concerns about any transactions or the IRD.

I had never formulated any information for the IRD and neither did I say to the defendant that I had formulated such information. I did not give, or even say that I had given, any files, papers, documents or

information to Bruce Stewart for the purpose of forwarding them to the IRD. I did not give Bruce Stewart any documents or information that could possibly relate to the IRD issues.

[61] In the same affidavit Ms Carter set out the particulars of why she claimed that Mr Haines must be taken to have affirmed the contract and could not now seek to rescind it.

[62] She pointed to a number of steps taken by Mr Haines which she said amounted to affirmation. We have referred to a number of these steps already (see paragraphs 27-32 above). She also noted significant changes in the way in which the Haines Group operates and is controlled. As well, she referred to some correspondence between Mr Haines and Martelli McKegg Wells and Cormack. On 15 July 1999, that firm wrote to Haines House Removals Ltd concerning an alleged debt of \$20,415.83. On 29 July, Mr Haines replied. In this letter he said:-

We are in receipt of your letter of 15 July. This company did not order or receive any goods from your client.

The account was opened by Lynne Carter, who whilst a director at the time improperly ordered goods for her personal use, these goods were not for the benefit of the company. and the account was opened without the knowledge of the other shareholder [sic]. As a joint shareholder and now the sole director of that company I do not accept that charge.

You have my authority to uplift items supplied, or sue the person responsible. That person is Lynne Valerie Carter of 35 Beach Road Milford, this is also the address from where the goods can be uplifted [sic].

[63] Ms Carter concluded this part of her affidavit by saying:-

The contradictory conduct of the defendant purporting to reject the settlement agreement but at the same time retaining the benefits which the agreement conferred on him was raised with the defendant's advisors on 21 June 1999. Despite this issue being squarely raised at that time the defendant made no mention of the matter in his reply affidavit sworn on 14 July.

[64] When the litigation was reviewed before a Master in August 1999, Mr Haines was allowed two weeks to make any application for leave to file any reply affidavits. He did not take up that opportunity (in that no application for leave was ever made)

and he has not, at any time, filed any affidavit in which he has responded to the evidence of Ms Carter as to affirmation. He did, however, without leave, file two further affidavits prior to the first of the hearings before Randerson J in November 1999.

[65] The first of these additional affidavits accompanied a statement of defence and counterclaim which was filed on 23 September 1999. In this affidavit he said:-

I verify the correctness of the facts and allegations appearing in the statement of defence and counterclaim filed herein [with certain corrections which are immaterial in this context].

[66] The second of the additional affidavits accompanied an amended statement of defence and counterclaim filed on Thursday 28 October 1999. Pursuant to the pleading, he sought rectification of the mediation agreement. He adverted to this pleading in the accompanying affidavit in which he said, *inter alia*:-

I make this affidavit in order to put before the court the amended statement of defence and counterclaim by me. My statement of defence and counterclaim has been amended to seek rectification of the mediation agreement to reflect the parties' intention that the mediation could be re-opened if on inspection of records it becomes apparent that the mediator had proceeded on the basis of incorrect information.

I verify the correctness of the facts and allegations appearing in the amended statement of defence and counterclaim filed in the court and dated 28 October 1999.

[67] The reason for the attempt to raise an argument as to rectification is that the actual wording of clause 2.17 is not consistent with the contention that it permits a general re-opening of the agreement. The evidence in support of the rectification argument was confined to Mr Haines' formal verification of the pleading.

The first hearing before Randerson J

[68] The summary judgment application first came before Randerson J on 3 November 1999. In the course of the hearing the issue whether Mr Haines should be granted leave to rely on the rectification point was argued and reserved by the judge.

[69] At the end of the hearing on 3 November, the judge raised with Mr Judd whether there had been a default under clause 2.11 so as to trigger the obligation to make payment in full. This prompted Mr Judd (who had not previously mentioned this issue at all) to file a memorandum for the judge the following day. In this memorandum he noted:-

The defendant's position is that he denies that he has failed to make payments which he should have made, saying that the regular monthly payments which he has made, and benefits which the plaintiff has taken ... more than cover any payments he ought to have made.

The double negative ("he denies that he has failed ...") obscures the point which was actually being made. There was no denial that there had been defaults. Rather it was being argued that payments made by Mr Haines exceeded the amount by which he was in default so that he could rely on a set-off.

[70] There was, in fact, evidence from Mr Haines in his first affidavit which referred to other payments which he claimed that he or his companies had made to or for the benefit of Ms Carter. He did not say in his affidavit what the relevance of this evidence was. Ms Carter, in her response on 16 August 1999, had noted the absence of any indication in his affidavit of the relevance of the evidence. She had also analysed the payments which had been made against what she said were the payments required under clause 2.11. She accepted that some of the payments which were in arrears in mid-May had been paid but noted that there had been other defaults with the result that the total in default by 15 July was \$31,494.92.

[71] Mr Stewart QC, for Ms Carter, responded to Mr Judd's memorandum by protesting about the late raising of this issue. He then went on to note that the obligation under the agreement of 11 March 1999 was to make particular payments and was not an obligation which could be discharged by Mr Haines making other payments. He argued that, in any event, the payments relied upon by Mr Haines, when truly analysed, did not amount to a complete set-off for the defaults proved by Ms Carter. In this respect he was able to rely on Ms Carter's affidavit of 16 August 1999 to which Mr Haines had not responded.

The first judgment of Randerson J

[72] Randerson J delivered his first judgment on 10 November 1999.

[73] The judge found substantially in favour of Ms Carter. He rejected as untenable the argument that there was a condition subsequent as pleaded by Mr Haines. He, likewise, rejected the defence of duress essentially because he was of the opinion that Mr Haines must be taken to have affirmed the contract. In reaching this view, he was critical of Mr Haines for not responding to Ms Carter's reply affidavit. He said:-

While I accept that the legal onus of proving there is no defence to the claim remains on Ms Carter as the plaintiff, where affirmation is raised there is an evidential onus on the defendant to show that he continued to be affected by the threat after the date of the agreement.

He also concluded that Ms Carter had adequately proved that Mr Haines was in default and had thereby accelerated the payment due under clause 2.6.

[74] The one area of the case where his findings did not favour Ms Carter was in relation to his construction of clause 2.17 of the agreement. He concluded:-

[T]hat clause 2.17 was not intended to cover breaches of obligation pursuant to the settlement agreement. Rather it was intended to refer to other breaches of obligation which had not been discovered at the time the agreement was signed on 11 March but came to light in the six month period thereafter.

He went on to say that:-

[C]lause 2.17 was not intended to permit any general re-opening of matters determined or already taken into account in the course of the mediation which led to the settlement agreement or in relation to the matters reserved for the mediators' subsequent determination. The wording of clause 2.17 itself limits any reconsideration to breach of obligation by one party to the other to the extent the other has suffered possible financial loss in excess of \$50,000 and provides specifically that the mediation will be reconvened for the "sole purpose of resolving this issue".

He then adverted to the possible consequences of his preferred interpretation of clause 2.17:-

It is impossible for me to assess whether and if so to what extent, the issues raised by Mr Haines in his letter of 12 July or new matters would amount to a re-opening of matters already taken into account or determined I conclude that Mr Haines is entitled to have the mediators review the matters raised in his letter of 12 July and any other material provided to them within six months from the date of the agreement to determine whether the evidence is sufficient to satisfy them that there has been any breach of obligation by Ms Carter to Mr Haines not previously taken into account or determined and which gives rise to possible financial loss in excess of \$50,000. The mediators would then determine whether there was a need to make any adjustments to the final settlement figure which may be appropriate. This issue has the potential to affect the quantum of the claim but not the issue of Mr Haines' liability to Ms Carter.

[75] In the result, the judge entered summary judgment against Mr Haines on the issue of liability. He adjourned, however, the application for summary judgment until Wednesday 24 November with a view to deciding what should occur as to quantum given his conclusion as to the meaning of clause 2.17.

Application by Mr Haines for the recall of the first judgment

[76] Mr Haines then invited the judge to recall his judgment.

[77] The grounds for this application were that the judge had not dealt with the issue of rectification (which had been reserved in the course of argument) and generally because Mr Haines contended that the judge was wrong in his construction of clause 2.17, his willingness to grant summary judgment as to liability and his conclusions as to duress.

[78] This was supported by affidavits from Mr Haines, Ms Niblett and a Ms Alice Bremner.

[79] In his affidavit, Mr Haines said:-

The plaintiff's affidavit in reply deposed that I had done various things subsequent to the making of the settlement agreement which were alleged to amount to affirmation of the agreement. Whilst not necessarily accepting everything the plaintiff says in that regard, it is correct that I carried out acts in implementation of the settlement agreement.

The plaintiff's affidavit did not say that the circumstances which caused me to sign the agreement under duress had ceased to exist. Had the plaintiff in her affidavit given evidence that those circumstances had ceased to exist I would have sought the Court's leave to file a further affidavit to dispute those assertions and to provide evidence that the threats continued after the agreement had been signed. The threats did continue and in fact continued even after the summary judgment proceeding had been commenced. They were repeated as recently as 29 October 1999.

...

I thought the threats would stop after I signed the agreement, but they did not. When I discussed the letter from Mr Lendrum to Mr Goodall dated 10 March 1999 with her, and told her that as a result of the advice I had received there was concern that Mr Lendrum had not got it right in respect of the division of property she went "right off her tree" and said that if I tried to do anything about it she would go to the IRD.

...

My decision to avoid the agreement for duress was made because by this time I realised that whatever I did she was not going to stop threatening me, and I realised I had to stand up to her at some point, and not to give in to her blackmail. As a consequence I instructed my legal advisers to avoid the agreement.

[80] Mr Haines and Ms Bremner also referred to an incident which was said to have occurred on 29 October 1999 at a restaurant in Auckland in which it was alleged that Ms Carter confronted Mr Haines and generally harassed him. Ms Niblett, in her affidavit, alleged that a pattern of generally threatening and harassing behaviour by Ms Carter had continued after March 1999.

[81] There is a real sense in which the affidavit by Mr Haines was an attempt by him to engage in dialogue with the judge, that is by referring to particular conclusions which the judge had reached in the first judgment, and commenting adversely on them with a view, no doubt, to prompting a reconsideration by the judge of those conclusions. This is not appropriate behaviour by a litigant. Moreover we simply do not understand why these affidavits were not filed prior to the hearing on 3 November. We see no legitimate basis upon which the contents of these affidavits can now be taken into account on behalf of Mr Haines.

The final judgment of Randerson J

[82] Against that background the case came before Randerson J again on 24 November 1999 for further argument. There then followed Randerson J's judgment of 26 November 1999.

[83] The judge declined to recall his judgment as to duress or to take into account the further affidavits. He noted:-

The defendant had ample opportunity to adduce that evidence prior to the last hearing if he had wished to do so.

He adhered to his view that Ms Carter's reply affidavit had resulted in there being an evidential onus on Mr Haines:-

to place some credible evidence before the Court tending to show (to the point of a tenable case) that he remained under the alleged threats and that the allegedly affirming conduct was explicable on that basis.

[84] He declined to alter his conclusions on the interpretation of clause 2.17. He was of the view that the case called for an interpretation of that clause which was fully argued before him. He noted that although reference had been made to *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, Mr Judd had not provided details of any evidence which was not before the court which might have been relevant to the interpretation of clause 2.17.

[85] He recalled his judgment to deal with the rectification issue which he had overlooked. He dealt with that by declining leave for the rectification defence to be raised. He was in any event satisfied on the evidence that there was no defence to the claim based on rectification.

[86] Randerson J then had to address what if any relief Ms Carter should be granted.

[87] Given the judge's broad interpretation of clause 2.17, it could not be said that Mr Haines did not have arguments as to an entitlement to seek further adjustments

under that clause. In his first judgment, Randerson J had assumed that adjustments under clause 2.17 would have to be factored through into the sum which was payable under clause 2.11 if default occurred. In his judgment of 26 November, however, the judge concluded that the contractual entitlement of Ms Carter upon default was to accelerated payment of the “final adjusted sum” fixed under clause 2.6, namely \$1.5 million.

[88] As will become apparent, we are of the view that clause 2.17 is to be construed in accordance with the natural and ordinary meaning of the words which appear in it and is therefore confined to breaches of obligation under the 11 March 1999 agreement. That being the case there is no point to be served by discussing the judge’s reasoning on the inter-relationship between clauses 2.17 and 2.11.

[89] The judge entered judgment in favour of Ms Carter in the sum of \$1.5 million.

The summary judgment process in this case

[90] Where summary judgment is sought, the plaintiff can be expected to refer (sometimes very briefly) to the background to the claim and to assert, often enough in general terms, that there is no defence. Where the claim is to be defended, the defendant is likely to respond with an affidavit (or affidavits) setting out what is said to be the arguable defence or defences. A simple assertion by the defendant that he believes he has an arguable defence on a particular ground is unlikely to cut much ice unless the defendant provides a reasonable level of detail in support of that defence.

[91] Where affidavits have been filed on behalf of the defendant, the plaintiff may then respond. The rules contemplate that the exchange of affidavits will usually stop at this point. But sometimes a plaintiff will raise issues in reply affidavits which, sensibly, call for a response from the defendant.

[92] In this case, the reply affidavit of Ms Carter raised a serious issue as to affirmation in relation to the duress defence.

[93] Randerson J was unimpressed by the failure of Mr Haines to respond to Ms Carter's reply affidavit. Reading between the lines of his first judgment, he seems rather to have thought that Mr Haines did not respond because he could not, in fact, give a sensible and credible response.

[94] Before us, and to some extent in his application for the recall of the first judgment, Mr Judd QC was critical of this approach. This was for a number of reasons which included the complaint that this approach was inconsistent with the orthodox process under which plaintiff's reply affidavits are not, themselves, subject to further reply by a defendant.

[95] Given the actual course of events, this is not a very meritorious argument. Ms Carter's reply affidavit was not the last of the affidavits filed before the summary judgment proceedings were heard. Mr Haines, in fact, filed without leave two further affidavits. The first accompanied the statement of defence and counterclaim in which he asserted that the pleadings were (with certain limited exceptions) true. Further, when the amended pleadings were filed at the end of October there was the additional affidavit, to which we have already referred, in which Mr Haines asserted, without elaboration, that clause 2.17 of the agreement ought to be rectified. So, in a context where Mr Haines produced two further affidavits, neither of which addressed the issue of affirmation, his failure to reply to Ms Carter's affirmation evidence was all the more striking.

[96] Mr Judd suggested that, in other respects, the summary judgment process had miscarried. In his contention, clause 2.17 raises difficult issues of construction which could only fairly be resolved with all the background contextual evidence available. He said that that, in itself, made the case unsuitable for summary judgment given the *Boat Park* case. Further, he contended generally that providing Mr Haines had asserted on oath facts which, if true, would or might provide a defence, that also should be an end to any claim for summary judgment. It will be recalled, for instance, that the assertion that the agreement ought to be rectified was entirely unsubstantiated by detail. Yet Mr Judd's position was that, subject to leave being available to allow that defence to be raised, that assertion itself meant that the High Court and this Court must assume that it was reasonably arguable that the

agreement ought to be rectified as Mr Haines contended. Further, he also argued that given what Mr Haines had said in his affidavit as to duress, the High Court and this Court had to accept that it was reasonably arguable that Mr Haines had, indeed, been driven to enter the agreement of 11 March 1999 by reason of the threats which he alleged had been made against him by Ms Carter. He said that the judge, in his approach to the affirmation issue, had in effect imposed an onus on the defendant contrary to the rules which govern summary judgment cases. He complained about the way in which issues which were raised late in the piece, or affidavits filed on the eve of and after the first hearing, were rejected by the judge – an approach which he said was contrary to the justice of the case.

[97] The law relating to the summary judgment procedure has been stated by this court on a number of occasions, see for instance the well-known and much cited decisions *Pemberton v Chappell* [1987] 1 NZLR 1 and *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84. Nonetheless, it seems to us to be desirable to reiterate a number of the general principles associated with summary judgment; this given the arguments which have been put to us on behalf of the appellant:-

1. The process of summary judgment is intended to be summary. So the Courts are entitled to expect a defendant who wishes to maintain that there is an arguable defence will identify that defence in accordance with the ordinary rules and will give appropriate particulars of it and a reasonable level of circumstantial detail. We do not suggest that summary judgment cases are to be dealt with on the basis that the rules provide a procedural straitjacket. Common sense, flexibility and a sense of justice are required. But the situation which developed in this case was very unsatisfactory. Late affidavits were filed without leave. A defence based on a rectification argument was raised at the last minute. After the hearing had concluded, the defendant raised a new argument as to default. Then after the first judgment the defendant filed, without leave, affidavits which should obviously have been filed before the first hearing. The way Mr Haines has sought to litigate this case is totally inconsistent with the principles which underlie summary judgment.

2. A bald assertion that there is a defence but without any elaboration or detail is unlikely to be seen as raising an arguable defence for the purposes of resisting summary judgment. So the assertion by Mr Haines that he was entitled to rectification of clause 2.17 of the agreement (which in substance was the only evidence advanced as to that) simply did not meet the threshold.
3. The courts are entitled, in the summary judgment context, to be sceptical of defences which emerge at the last minute or, indeed, after a hearing has commenced. This is particularly so if the result of the late defence being allowed to be raised will be the necessity for an adjournment. For the judge to have allowed Mr Haines to rely on the rectification defence which surfaced for the first time a few days before hearing would necessarily have involved the adjournment of the hearing so as to give Ms Carter a chance to respond.
4. So where a defence is raised at the last minute and is unsubstantiated by the defendant except in the most general of terms, and in circumstances where an adjournment would be necessary if leave to rely on the defence is to be granted, protection of the integrity of the process will often require the Judge to act robustly.
5. Likewise, where a plaintiff has gone on oath and given chapter and verse as to why a particular defence is not sustainable, a failure by the defendant to respond on oath will, almost invariably, result in the conclusion that there is, in fact, no answer to what the plaintiff has said. In that way, the plaintiff will be held to have discharged the onus of proof, see for instance *MacLean v Stewart* (1997) 11 PRNZ 66. Whether this situation is properly described as involving an evidential onus on a defendant (as Randerson J suggested) is obviously open to question. Indeed, in light of what was said in *MacLean v Stewart* at 69, the term “evidential onus” is best avoided. We note, in passing, the remarks made by this court in *Westpac Banking Corporation and Another v M M Kembla NZ Ltd* (unreported, CA 50-51/00, judgment delivered 9 November 2000 at para 64). But, in any event, Mr Haines, who chose not to respond to the affirmation evidence of Ms Carter, is not well

placed to criticise the judge's conclusion that there was, indeed, no answer to that evidence.

Grounds of appeal

[98] Mr Judd, for the appellant, challenged the judgment on a number of grounds. We have, to some extent, for the ease of discussion, re-ordered some of the arguments which Mr Judd advanced.

[99] In the balance of this judgment we propose to address the six contentions which Mr Judd made on behalf of Mr Haines as to reasons why summary judgment ought to have been refused or this appeal ought to be allowed:-

1. Mr Haines can avoid the 11 March 1999 agreement pursuant to the alleged condition subsequent.
2. Mr Haines is entitled to avoid the contract for duress.
3. Clause 2.17 on its true construction and/or as it ought to be rectified provides an arguable defence.
4. There was insufficient proof of default.
5. The agreement was vitiated by fraud.
6. In the exercise in the discretion of the court, summary judgment ought to have been refused.

Mr Haines' first contention : he can avoid the 11 March 1999 agreement pursuant to the alleged condition subsequent

[100] Mr Judd's argument as to the existence (or genuinely arguable existence) of a condition subsequent as pleaded, focused heavily on a letter of 10 March 1999 from Mr Lendrum to Mr Goodall. He contended that unless Mr Haines was to have the right to review the agreement on the basis of legal advice to be received subsequently, there was no point to the letter.

[101] We agree that on the view of the case which we prefer, there was not a great deal of point to the letter. But we do not see how the letter can be talked up to render largely pointless the process upon which the parties were then embarked and ineffectual the agreement which was later to be reached.

[102] The alleged condition subsequent can hardly be seriously contended to be an implied term of the agreement. It is flatly inconsistent with the finality expressly stipulated for in the agreement which provided, and we repeat:-

Rod and Lynne confirm that they have reached the agreement contained in this mediation in all good faith and that neither has sought or required independent legal advice in respect of this agreement and that this agreement records their full and final agreement on all matters and issues of property between them.

[103] Likewise, it could hardly seriously be suggested that the condition subsequent forms part of a contract collateral to the agreement. Again it is inconsistent with the finality clause in the agreement to which we have just referred. Moreover, neither Mr Lendrum nor Mr Goodall can be regarded as being Ms Carter's agent. So there is no principled basis upon which Ms Carter could be regarded as having been bound by anything that might be thought to have been implicit in what Mr Lendrum and Mr Goodall said.

[104] Further, the term contended for by Mr Judd is a commercial nonsense. Under the terms of the agreement, Mr Haines was in a position to cement his position of control in the companies. He proceeded to do so after the agreement was signed. Why should Ms Carter be taken to have agreed to an arrangement under which Mr Haines could take out of the dispute everything which he sought but then, in effect at his election, decline to perform the financial obligations which he had undertaken to her?

[105] To put what is essentially the point just mentioned another way, we cannot regard Mr Haines' actions in taking immediate control of the companies as being consistent with an honestly held view that the agreement was, in effect, in a state of suspense or avoidable by him pending the receipt of further legal advice.

[106] So, in general agreement, therefore, with the approach taken by Randerson J, we are of the view that Mr Haines has not raised an arguable defence in this respect

Mr Haines' second contention: he is entitled to avoid the contract for duress

[107] The principles of duress derive in part from the old common law rules for the avoidance of deeds and parole contracts entered into under duress of the person (see for instance *Skeate v Beale* (1841) 11 Ad & E 903, 113 ER 688), and in part from the principles developed in respect of the common law claim for money had and received (for which duress of goods and other forms of pressure short of duress to the person sufficed eg *Maskell v Horner* [1915] 3 KB 106). What is not so widely recognised is that the courts exercising equitable jurisdiction also developed principles according to which contracts obtained by what was sometimes described as duress, and in other cases, coercion or pressure, could be set aside, see for instance *Williams v Bailey* (1866) LR 1 HL 200.

[108] Duress necessarily involves the illegitimate application of pressure by threats. The illegitimacy of the pressure may lie in the illegality of the actions threatened or, alternatively, may be associated with the illegitimacy of the particular threats in the context in which they were made.

[109] It will be recalled that the pressure complained of by Mr Haines was said to consist of threats by Ms Carter to cause trouble for him with the Inland Revenue Department and the Haines Groups' bank. Threats to report a person to a law enforcement agency unless that person submits to a particular bargain is conduct which could amount to the crime of blackmail and is thus illegitimate. Threats to inflict gratuitous harm may also be an illegitimate form of pressure. So the pressure complained of by Mr Haines could amount to duress.

[110] We have reservations whether there could be much in the complaint made by Mr Haines about the threats allegedly made by Ms Carter to cause trouble with the bank. Ms Carter customarily dealt with the bank. There was a significant overdraft problem and the bank knew that there had been variance between projections and actuality. Comments to this effect made by Ms Carter in a situation where it was

her position that Mr Haines would have some practical difficulties dealing with the bank without her assistance, do not appear to be duress but simply statements of the obvious. We are, however, prepared to accept that there was an arguable case for the view that Ms Carter had made threats to sour the relationship between the Haines Group and the Bank of New Zealand.

[111] The more significant issue relates to the threats to cause trouble for Mr Haines with the Inland Revenue Department. Randerson J accepted the possibility that threats, broadly as alleged by Mr Haines, had been made. He was right to do so on the evidence which we have reviewed.

[112] The fact that threats capable of amounting to duress have been made in the course of the negotiating process does not, without more, mean that the bargain reached as a result of that process can be avoided for duress. Many of the cases indicate that a plea of duress is available only when there has been “coercion of the will” or “vitiation of consent”, see for example the remarks of Lord Scarman in *Pao On v Lau Yiu Long* [1980] AC 614 at 635 and the cases reviewed by Tipping J in *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 342 *et seq.* Statements to this effect in the cases, however, do not mean that the party affected by duress must have been psychologically crippled by reason of pressure before relief can be available. As Lord Scarman put it in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400:-

Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no other practical choice open to him.

[113] The point Lord Scarman was making is, at least in part, a causation issue. At the very least, a party alleging duress must show that the duress alleged was at least an appreciable factor in influencing that party to enter into the bargain in question, see *Barton v Armstrong* [1976] AC 104. Further, the courts do look for a significant degree of actual coerciveness, a level of coerciveness which is sometimes described as having left the victim with no practical choice but to submit.

[114] In this case, the judge did not address in a definitive way whether he considered that there was an arguable case for the view that the pressure complained of by Mr Haines had been an appreciable factor in inducing him to sign the agreement of 11 March 1999 and had been sufficiently coercive, in fact, to amount to duress. He was, at best for Mr Haines, very sceptical on these points. The judge decided the case in accordance with the principles of affirmation.

[115] We are content to deal with this case on the same basis as the judge did – in other words, by reference to the issue of affirmation. We should say, however, that considerations associated with the affirmation evidence given by Ms Carter are closely connected to the question whether the threats alleged by Mr Haines had any significant impact on his decisions to execute the agreement of 11 March 1999 and whether they were sufficiently coercive to be regarded as duress.

[116] The avoidance of a contract which has been partially performed raises particular difficulties. The situation usually arises where it is alleged that a contract has been entered into as a result of misrepresentation. Such a case is now dealt with under the Contractual Remedies Act 1979. But because that Act does not apply to contracts entered into by duress, we are required to consider this issue in accordance with common law and equitable principles related to rescission, see *Meagher Gummow & Lehane*, Equity 3rd edit at para 2401 *et seq.* What is important in this context, is that in duress cases, the courts will not regard as affirmation (or as conduct precluding rescission) steps taken by the victim while still under the influence of pressure from the other party, see for instance the discussion in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705. The argument for Mr Haines is that steps which he took to implement the agreement should not be regarded as affirmation because he was still, at the material time, acting under duress or, in any event, there is at least a reasonable argument available on the facts to this effect.

[117] We are of the view that, on the evidence before the High Court, Ms Carter established that Mr Haines did not have an arguable defence based on duress. We say this for the following reasons:-

1. The negotiation process, via mediation, provided an improbable context in which duress could be applied. Participating in the process were Mr Goodall, who was Mr Haines' accountant, Mr Lendrum who was a lawyer and Mr Max Carter, who is Ms Carter's father and was nominated as a mediator by Mr Haines. They were people familiar to Mr Haines whom he respected and trusted.
2. Even on Mr Haines' own evidence, he did not see the pressure as particularly coercive. He claims that his tax affairs are characterised by regularity and that the only effect of the threatened exposures would have been a deferral of what was thought to be a then imminent settlement of a dispute with the Inland Revenue Department which went back to 1991. We see no reason not to take him at his word. On this basis, the possible inconvenience associated with deferral of that settlement would appear to have been minimal and hardly likely to result in him committing himself to a payment of \$1,700,000 (adjustable for the two factors referred to in clause 2.6 of the agreement) on the basis that he had no choice. Similar considerations apply in relation to the threats to disrupt banking relationships with the Bank of New Zealand. The bank appears to have been in possession of all the facts. Any attempt by Ms Carter to damage the banking relationship between companies in the Haines Group and the Bank of New Zealand would have been very destructive to her own credibility and financial position. Moreover, while the Haines Group undoubtedly had severe cashflow difficulties and there was a significant problem with the overdraft (which was around \$1.2 million over bank limits) there is no evidence of any problem which could not be resolved by, if necessary, a sell-down of assets; this given the wealth of Mr Haines.
3. We mention these factors because they point to the duress alleged by Mr Haines as involving a comparatively low level of actual coerciveness. In deference to the way in which the judge dealt with the case, we are prepared to assume, without holding, that it was arguably the case that the threats attributed to Ms Carter by Mr Haines amounted to duress and were an appreciable factor for Mr Haines in his decision to enter into the agreement.

The low level of coerciveness alleged by Mr Haines, however, is material in relation to the affirmation question to which we now turn.

4. Mr Judd contended that steps taken by Mr Haines in the exercise of his rights under the agreement cannot be treated as affirmation because it has not been shown that he was not still acting under duress at the relevant time. Mr Judd suggested that affirmation could only have been relied on if Ms Carter had in some way abandoned the threats which he claims she made. He said that in the absence of affidavit evidence to this effect (ie as to the withdrawal of the threats) there was no adequate evidential basis for the conclusion that Mr Haines' actions which are said to amount to affirmation were not themselves the result of the pressure to which he was subject. In this way his submissions echoed the comments made by Mr Haines in his affidavit filed in support of the recall application (see paragraph 79 above).
5. There are many problems with this argument including the obvious point that Mr Haines did not, prior to the judgment in which the duress issue was resolved against him, assert on oath that his enforcement of the contract was a result of the threats allegedly made by Ms Carter. So this appeal must be dealt with on the basis that there is no relevant assertion by Mr Haines on oath that the reason he acted on the agreement after it was entered into was as a result of continuing pressure to which he was subject from Ms Carter. As well, the whole argument is rather odd because the reality must be that Mr Haines moved to take control of the Haines Group and otherwise implemented the agreement because it was in his own interests to do so. In any event, the argument as a whole has no merit when assessed in terms of the actions which Mr Haines did take to which we now refer.
6. Right from the outset Mr Haines felt able to ignore those parts of the agreement which did not suit him. In particular, he did not make payments as required under clause 2.11 with defaults in terms of his obligations under this clause starting in March 1999. This does not point to him acting under duress at that time.

7. On 23 April 1999, Mr Haines was well on the way to taking complete control of the Haines Group. Yet at that time he does not appear to have felt under any significant pressure. We say that, because on 23 April he put forward, via Mr Judd, the contention that the agreement was avoidable. We think that this points to the pressure of which he complains as being of no practical coercive effect on 23 April. It rather appears as though Mr Haines had simply changed his mind about the merits of the settlement - a change of heart which might be explicable by reason of the fact that he was by then in control of the Haines Group companies.
8. Given that Mr Haines felt able to assert that the agreement was voidable on 23 April and to default on payments required under the agreement from March, there seems to us to be no evidential basis upon which it could be sensibly suggested that he was acting under duress when he moved to implement the agreement and take control of the Haines companies in early April 1999.
9. Despite having asserted that he was not necessarily bound by the agreement in Mr Judd's letter of 23 April 1999, Mr Haines continued to enforce those parts of the agreement which suited him in the period 23 April to mid May.
10. In mid-May 1999, Mr Haines responded to the request from Ms Carter's solicitors for security over the Pohutakawa Road property by placing that property in the names of trustees. This was an extremely provocative and high-handed action which might be thought to have been likely to trigger a serious reaction from Ms Carter (if he thought she was of a mind to act in that way). Whatever else this transaction might say about Mr Haines, it was not the act of a man who was still dominated by pressure emanating from Ms Carter.

[118] Since mid-May 1999, Mr Haines has continued to operate the businesses to Ms Carter's complete exclusion. We accept that the dynamics of the situation are such that if rescission was warranted, it might not be altogether easy to fix the terms upon which it should occur. Ms Carter did not wish to retain the businesses, as at

March 1999, and it is unlikely that she would have agreed to go back into the businesses on an interim basis, pending the outcome of her summary judgment proceedings, even if invited to do so by Mr Haines. So this makes us cautious about criticising Mr Haines over this aspect of his conduct.

[119] Mr Haines, by his insistence on performance of those aspects of the agreement of 11 March 1999 which suited him while, at the same time, declining to comply with his financial obligations under that agreement to Ms Carter, must be treated as having affirmed the contract. He did not, prior to the first judgment, give evidence on oath explaining this conduct. Although we regard his affidavit in support of the recall application as too late to be relevant in terms of our consideration of the case, it is fair to say, that in our view, it does not really make any sense when viewed against the detail of what happened in the relevant period.

[120] So, in agreement with Randerson J, we see no arguable defence based on duress given the undenied and unexplained affirmation evidence of Ms Carter.

Mr Haines' third contention: clause 2.17 on its true construction and/or as it ought to be rectified provides an arguable defence

[121] It follows from what we have said earlier in this judgment that we are of the view that the attempt by Mr Haines to raise in the High Court, at the very last minute, the argument based on rectification was too late and the judge was perfectly entitled to refuse leave for him to do so. Further, and this is an inter-connected point, we are of the view that the evidential foundation for the contention that clause 2.17 ought to be rectified was altogether too frail to warrant the withholding of summary judgment even if leave to raise the defence had been given.

[122] In this court, Mr Haines and his counsel sought to adduce further evidence addressed to the rectification issue. The evidence consisted of a letter from Mr Goodall in which statements of fact were made which, if sworn, could have been deployed in support of the contention that there was an arguable case for the view that clause 2.17 should be rectified broadly as Mr Haines contends. We declined leave to adduce this evidence. It was addressed to an issue which the judge himself had refused Mr Haines leave to raise in the High Court. The manner in which the

issue was raised before us was reminiscent of the way in which Mr Haines had conducted his defence in the High Court, that is attempting to put up a new argument on the eve of the hearing and in circumstances where, if leave to do so was permitted, an adjournment to allow Ms Carter an opportunity to respond would probably have been necessary. Moreover, the evidence was, in no sense, new.

[123] The one area of the case in which we differ from the assessment of Randerson J is as to the meaning of clause 2.17.

[124] The clause itself provides:-

If either Rod or Lynne can provide evidence within six (6) months of the date of this agreement sufficient to satisfy the mediators that the other has breached his or her obligation to the other to the extent that the other has suffered possible financial loss in excess of \$50,000.00 then the mediators agree that in this event only they will reconvene the mediation for the sole purpose of resolving this issue. At the conclusion of such reconvened mediation the mediators will issue Rod and Lynne with any further final adjusted sum as is necessary.

[125] The mediation encompassed consideration of the obligations between the parties and their associated entities (companies and trusts). But the parties' obligations, in that sense, provided only a subset of the ultimate question which had to be addressed – a question which also involved issues of ownership, value and the *Lankow v Rose* [1995] 1 NZLR 277 principles. The language of clause 2.17, on its natural and ordinary meaning, does not appear to contemplate a general re-opening of the settlement. Moreover, any such re-opening would be inconsistent with the finality provisions in the agreement, the very limited and specific areas in which adjustment was to be permitted, and the commercial dynamics of the situation in which Ms Carter was to surrender her advantageous position, *vis-à-vis* the operating companies in the Haines Group.

[126] We prefer the view that clause 2.17 relates to breach of obligations under the agreement itself.

[127] The reason why Randerson J did not adopt this interpretation was because of the six month time limit within the clause. He noted that many of the obligations imposed by the agreement would last longer than 6 months and could therefore be breached after the expiry of that time period. Having noted that, the judge went on:-

The period of six months available to the parties to provide evidence of breach in terms of clause 2.17 is inconsistent with it being interpreted as applying to any breach of obligation under the agreement. The commencing words of clause 2.17 also suggest that it was intended that either party would have a strictly limited period to produce evidence of breach not available at the time of the agreement.

We, however, do not see this as material. We are of the view that the time limit in clause 2.17 was intended to facilitate a determination of issues raised under it in time for any necessary adjustments to be decided upon prior to the settlement date under the agreement. Clause 2.17 does not provided an exclusive method by which complaints about breaches of the agreement can be remedied – rather it simply provides a mechanism by which a party complaining of breaches could seek a remedy which, if granted, could be incorporated in the settlement intended to occur on 9 March 2000.

[128] Finally we note that Mr Judd argued in front of us, as he argued in front of Randerson J, that clause 2.17 could not fairly be interpreted in the summary judgment proceedings because of the possibility that contextual evidence might be material to the true interpretation of the clause. In agreement with Randerson J we see no reason why the clause should not be able to be interpreted within the summary judgment proceedings. If Mr Haines wished to rely on contextual evidence he should have placed such evidence before the judge.

[129] Because it is not now contended that Ms Carter has been materially in breach of the agreement of 11 March 1999, our conclusion as to the meaning of clause 2.17 means that there is no defence available to Mr Haines under this head of the argument.

[130] We mention one other point connected with the rectification argument. Randerson J considered that a rectification claim might still be open to Mr Haines.

We are not required, on this appeal, to address this issue. Our view of the contract differs from that adopted by Randerson J. We rather think that any attempt by Mr Haines to persevere with the rectification argument would, in fact, be precluded by this judgment. Whether this is so or not, however, can only be determined conclusively if Mr Haines seeks to prosecute that claim.

Mr Haines' fourth contention: there was insufficient proof of default

[131] This issue did not surface until it was raised by the judge at the conclusion of the argument at the first hearing. For five months the case had been conducted on the footing that Ms Carter was asserting that there had been defaults which, pursuant to clause 2.11, had the effect of accelerating the clause 2.6 payment. This was asserted in correspondence by Ms Carter's solicitor, without response or denial by Mr Haines' solicitors. It was asserted on oath by her in her first affidavit. The notice of opposition filed by Mr Haines did not raise any dispute as to this issue. Nor did Mr Haines in his main affidavit in response directly challenge Ms Carter's contention (although he did suggest that he had made other payments to or for her account). The point was not raised by Mr Judd when the summary judgment application was first heard before Randerson J.

[132] When Mr Judd did raise the issue, in the interval after the first hearing before Randerson J, he took only the limited point that payments made by Mr Haines, in other respects, exceeded the payments in respect of which Mr Haines was said to be in default. As we have noted, that argument failed before Randerson J on two grounds: the first that given the nature of clause 2.11, set-off arguments were not available and, secondly, that, in any event, the payments sought to be invoked by Mr Haines were not sufficient in amount, even if a set-off was allowed, to extinguish the defaults. These conclusions were not specifically challenged before us and in any event they are plainly right.

[133] In this court, Mr Judd sought to dissect the agreement, the subsequent "decisions" of the mediators, and the correspondence and the affidavits with a view to showing that, contrary to the way in which the case was conducted in the High Court, there were no proved defaults at all.

[134] We see nothing in these arguments. If there was any merit in these arguments they should have been deployed in the High Court when they could have been answered within the confines of the summary judgment application. We are not disposed to permit these arguments to be raised before us.

Mr Haines' fifth contention: the contract was vitiated by fraud

[135] In this court, Mr Judd sought to contend that fraud, on the part of Ms Carter, provided a further possible ground of defence.

[136] This contention was recognised in the written submissions filed by Mr Judd as depending upon the court agreeing to receive a further affidavit from the appellant. In the end the application to produce that affidavit was not pursued with the result that this ground of appeal need not be further addressed.

Mr Haines' sixth contention: in the exercise in the discretion of the court, summary judgment ought to have been refused

[137] This is another argument which surfaced in this court and which was not advanced to Randerson J. That, itself, is a sufficient ground, we think, for dismissing it. However, it is right to say, that having listened to everything which Mr Judd had to say in support of this argument (and all his other arguments), we were left firmly of the view that this was a case which was ideally suited for the summary judgment procedure.

Disposition

[138] The appeal is dismissed.

[139] The appellant is ordered to pay the respondent costs in the sum of \$5,000 together with disbursements and reasonable travelling expenses, if necessary, to be fixed by the Registrar.

Solicitors

Murdoch Hall and Co, Auckland for Appellant
K P McDonald Takapuna for Respondent