JUDGMENT : Chesterman J. Supreme Court of Queensland. Brisbane. Trial Division. 18th August 2006

[1] Both plaintiff and defendant have attacked the other's pleading in this action which should have been determined years ago. The defendant struck first by an application dated 18 July 2006 seeking orders that paras 23, 24(b) and 25 of the Further Further Amended Statement of Claim (`statement of claim') be struck out. In the alternative an order was sought that the plaintiff provide further and better particulars of some paragraphs in that pleading. Two days later the plaintiff sought orders that a very large number of the Third Further Amended Defence (`third defence') be struck out. As the argument progressed the number of impugned paragraphs decreased until an order was sought only with respect to paras 4, 7, 9, 18, 19 and 23.

[2] The plaintiff's claim, which was filed in May 2001, is for damages for breach of contract in the sum of $341,638.49 together with interest. The plaintiff was a builder who agreed with the defendant to erect a commercial and residential building on High Street in Toowong. He performed the contract but claims he has not been paid in full the amounts due to him under it.

[3] The statement of claim filed on 7 July 2006 pleads that the parties entered into a written contract for the construction of the building and that the plaintiff commenced work on 7 October 1999. It is then pleaded that on or about 30 January 2000 the parties varied the contract so that:
(a) it became a 'cost plus' contract;
(b) progress claims were to be submitted to quantity surveyors appointed by the National Australia Bank;
(c) the defendant would pay the amount certified as due by the quantity surveyors;
(d) certain clauses of the original contract would no longer apply; and
(e) otherwise the terms and conditions of the original contract would remain in full force and effect.

[4] The plaintiff claims that it has fully performed the contract and submitted claims for payment to the quantity surveyors who certified that amounts were payable but that the defendant has not paid the full amount so certified.

[5] For its part the defendant alleges inter alia that it had a claim against the plaintiff for his dilatory performance and that the respective claims of the parties against each other were compromised by an agreement made on or about 22 December 2000. The plaintiff replies to this assertion by alleging that any such agreement was unenforceable. This plea is raised in the paragraphs which the defendant seeks to strike out.

[6] Obviously if the parties made a binding agreement to compromise their respective claims on certain terms the trial will be greatly simplified and the evident difficulties the plaintiff has in demonstrating what amount he should have received pursuant to the contract, and what amount he has been paid, and whether he was late in finishing so as to give rise to a right in the defendant to recover damages, will be avoided. Accordingly on 7 September 2001 Moynihan SJA ordered (by consent) that two questions be determined as separate issues. They were:

(a) whether the meeting on 22 December 2000 as referred to in para 14 of the defence and para 13 of the reply resulted in any legally binding agreement in terms alleged in paras 13 to 16 of the defence and if so what were its terms; and

(b) whether, if any agreement of the kind alleged in paras 13 to 16 of the defence was entered into, it was arrived at by the application of such improper economic duress by the defendant on the plaintiff as to render it unenforceable as alleged in para 13 of the reply.

[7] The defence pleaded:

'14. On [22] December 2000 the plaintiff and the defendant met for the purpose of attempting to reach a full and final settlement of all matters between them ("the settlement meeting").

15. On the occasion of the settlement meeting the plaintiff and the defendant agreed to compromise their respective positions by way of settlement between them ("the settlement agreement").

16. It was a term of the settlement agreement that the plaintiff would accept as a final settlement for all claims in relation to the works performed and to be performed by him in relation to the building works the sum of $272,637.40 ...'

[8] The reference to para 13 of the reply found in the formulation of the second question is, I think, a mistake. The reference should be to para 14. That alleged:

`The plaintiff denies the allegations contained in paras 15 and 16 of the defence and in particular:

(a) denies that any legally binding agreement ... was entered into;

(b) in the alternative, if an agreement was entered into of the kind alleged, it was arrived at by the application of such improper economic duress by the defendant on the plaintiff as to render it unenforceable.

... Particulars are contained in ... affidavits sworn by the plaintiff

[9] The separate questions came on for trial before Ambrose J on 19, 20, 21 August and 27 September 2002. On 4 April 2003 his Honour answered both questions in the affirmative: see [2003] QSC 86. The formal answers were:

`I answer question 3(a) as follows -

The meeting of 22 December 2000 did result in an agreement between the plaintiff and the defendant in the terms alleged in paragraphs 13 to 16 of the defence and in respect of this agreement, consideration (albeit minimal) did

pass from the defendant to the plaintiff. The consideration passing from the defendant to the plaintiff was the reduction of the retention fund to 2.5% of the plaintiffs certified entitlements under the contract (from either 8% or 4%) to be held by or on behalf of the defendant to meet rectification costs. The agreement was legally binding upon the plaintiff subject to his right to repudiate it on the grounds of unconscionable conduct and economic duress exercised upon him by the defendant with the assistance of its architect to persuade him to make that agreement.

I answer question 3(b) as follows -

The compromise agreement of 22 December 2000 was entered into as a consequence of the unconscionable conduct and economic duress brought to bear by the defendant with the assistance of his architect upon the plaintiff and consequently it is unenforceable by the defendant as alleged in para 13 of the reply.'

[10] An appeal by the defendant against the answer given to question (b) succeeded. On 16 October 2003 the Court of Appeal ordered that the answer to the question designated 3(b) be set aside and that the question be determined afresh: see [2003] QCA 526.

[11] Despite the lapse of almost three years since that order was made the question has not been determined. The parties are still quarrelling about pleadings.

[12] The further further amended statement of claim relevantly alleges:

'18. By 22 December:

(a) the plaintiff owed moneys 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 plaintiff s subcontractors and suppliers were pressing for immediate payment ...;

(e) some subcontractors were then threatening to remove materials and dismantle works previously completed ... 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

(g) the plaintiff s 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 each of the facts pleaded in para 18 ...

20. On 22 December at a meeting in 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 ... because that was all the defendant could and would pay;

(b) the plaintiff had to accept the 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.

21. The defendant knew that the statement pleaded in para 20(a) ... was false and that the threatened legal proceedings pleaded in para 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 ... the sum of $272,637.40 ...

23. By reason of the matters pleaded in paras 18 ... to 22 hereof ... 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) ……..

(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 ... the plaintiff confirmed that avoidance.

25. In the alternative, the conduct of the defendant referred to in paras 18 to 22 ... hereof constituted unconscionable conduct within the meaning of s 51 AA of the Trade Practices Act...'

[13] The defendant's complaints about paras 23, 24 and 25 are that they do not make it clear on what legal basis the plaintiff contends that the compromise agreement was voidable and that the terminology used is confusing. Moreover, although a number of preceding paragraphs, which contain allegations of fact, are identified, the facts relevant to each legal basis for avoiding the agreement are not separately identified and related to the legal basis. It is pointed out that there is considerable uncertainty in the plaintiff's use of the terms `illegitimate pressure', `unconscionable conduct', and the reference to the plaintiff having been coerced into the agreement.

[14] Next it is said that if the plaintiff's case is truly that the defendant behaved unconscionably in securing the plaintiff's agreement to the compromise he has not pleaded sufficient facts to bring himself within the scope of the equitable (and statutory) doctrine as described by the High Court in ***Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*** (2003) 214 CLR 51.

[15] In that case Gleeson CJ said (at 63-64):

`In everyday speech, "unconscionable" may be merely an emphatic method of expressing disapproval of someone's behaviour, but its legal meaning is considerably more precise.

*In **Blomley v Ryan** ... Fullagar J, after pointing out that the circumstances of disability or disadvantage that can be involved in unconscionable conduct are of great variety and are difficult to classify, gave ... examples ... The common characteristic of such circumstances is that they place one party at a serious disadvantage in dealing with the other.*

*...It was the inability of a party to judge his or her own best interests that was said by McTiernan J in **Blomley v Ryan** ... and again by Deane J in **Amadio** ... to be the essence of the relevant weakness.*

Unconscientious exploitation of another's inability, or diminished ability, to conserve his ... own interests is not to be confused with taking advantage of a superior bargaining position.'

[16] Gummow and Hayne JJ said (at 74): *`...the facts fell within that well-established area of equitable principle concerned with the setting aside of transactions where unconscientious advantage has been taken by one party of the disabling condition or circumstances of the other. In such situations ... equity intervenes not necessarily because the complainant has been deprived of an independent judgment and voluntary will, but because that party has been unable to make a worthwhile judgment as to what was in the best interests of that party.'*

[17] It is pointed out that the statement of claim does not plead any facts which might go to establish the relevant special disadvantage of the plaintiff vis-a-vis the defendant or that the plaintiff had diminished capacity to judge what were his best interests when he negotiated the compromise agreement. Nor, it is pointed out, does the statement of claim plead conclusions in those terms. The defendant therefore asks that the paragraph alleging unconscionable conduct be struck out as standing without any factual basis.

[18] There is considerable force in the submissions but Mr Cooper SC who appeared for the plaintiff made it clear that the case for avoiding the compromise agreement has two legs. One is economic duress and the other is misrepresentation. The economic duress is said to consist of the defendant's intimation that it would repudiate the building contract and not pay the plaintiff what was due to him, but would pay something less if the plaintiff gave up his claims for full payment in circumstances where the plaintiff was being pressed by his creditors and had no source of finance other than payment from the defendant. The second leg is that the statement by the defendant that it could pay the plaintiff the amount offered by way of compromise but could pay no more, because it had no more, was false but induced the plaintiff's consent to the compromise.

[19] The plaintiff, as I understood Mr Cooper's submissions, does not rely upon unconscionability, as explained in Berbatis, as a legal basis for attacking the compromise.

[20] Mr Daubney SC who appeared for the defendant relied on ***Australia & New Zealand Banking Group v Karam*** (2005) 64 NSWLR 149 in which the (NSW) Court of Appeal deprecated the use of the terms `economic duress' and `illegitimate pressure' as legal labels to be ascribed to conduct which is relied upon for the purpose of setting aside a legal transaction, such as a contract. The court said (at 168):

*`The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence ... or unconscionable conduct based on an unconscientious taking advantage of his ... special disability or special disadvantage, in the sense identified in **Commercial Bank of Australia Ltd v Amadio** ...'*

[21] The head note to the case is, I think, inaccurate when it asserts that the court held that: *`The terms "economic duress" and "illegitimate pressure" should be abandoned in favour of equitable concepts relating to unconscionability. This approach will allow a weaker party to invoke principles of undue influence, or rights to relief based on unconscionable conduct in circumstances where that party suffers from a special disadvantage in the sense identified in ... **Amadio** ...'*

In the passage I quoted the court did not (as I read it) recommend abandoning `economic duress' as a doctrine or concept, but sought to confine it. The court was critical of the use of the term *`illegitimate pressure'*.

[22] I respectfully agree that the term *`illegitimate pressure'* should be abandoned. It has always begged more questions than it pretended to answer and its use by McHugh JA in ***Crescendo Management Pty Ltd v Westpac Banking Corporation*** (1988) 19 NSWLR 40 (at 46) has always been unhelpful. Pressure was said to be: *`... illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct ... will not necessarily constitute economic duress.'*

[23] Unconscionable conduct now has to be understood in the light of ***Berbatis*** (rather than, I think, ***Amadio***). If conduct is unconscionable in that sense a transaction resulting from the unconscionable conduct may be set aside without recourse to doctrines or concepts of economic duress or undue influence, which are different. It is more confusing than helpful to describe one doctrine by reference to others.

[24] Economic duress, even if confined as the Court of Appeal thought it should be in ***Karam***, is a doctrine providing an accepted basis for setting aside transactions in appropriate circumstances. That term has a respectable pedigree

and what is meant by it is reasonably well established by the cases: ***Universe Tankships Inc of Monrovia v International Transport Workers' Federation*** [1983] 1 AC 366; ***Barton v Armstrong*** [1976] AC 104; ***Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd*** (1991) 22 NSWLR 298; ***Dimskal Shipping Co SA v International Transport Workers' Federation*** [1992] 2 AC 152.

[251 In several cases the threat to break an existing contract between the parties has been held to be unlawful and such as to amount to economic duress: see ***North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*** [1979] QB 705 and ***B & S Contracts & Designs Ltd v Victor Green Publications Ltd*** [1984] ICR 419.

[26] There is a proper legal basis for the case the plaintiff wishes to plead: that he was compelled to accept the compromise by the defendant's threat to renounce the building contract and not pay the moneys outstanding under it in the circumstances I have described. This is arguably economic duress as the cases describe it.

[27] There is obviously no difficulty with the contention that the compromise agreement was voidable because it was induced by a fraudulent misrepresentation.

[28] There is, then, legal justification for the case which the plaintiff wishes to present to avoid the agreement of compromise made on 22 December 2000. It is nonetheless true that those bases do not emerge clearly in the impugned paragraphs of the statement of claim which additionally contain reference to concepts of illegitimacy and unconscionability which are not, in fact, relied upon and which are confusing. The statement of claim does not expressly plead avoidance of the compromise agreement by reason of the misrepresentation.

[29] The statement of claim would be improved if the plaintiff made clear the legal basis for the relief he claims and distinctly identified the facts which give rise to each of those bases. It may be he will wish to give up the claim for relief under s 51AA of the Trade Practices Act 1974 (Cth) which depends on proof of unconscionable conduct.

[30] The defendant's objection to para 24(b) is that the letter identified is not capable of amounting to an avoidance, or a confirmation of the avoidance, of the compromise agreement. Nevertheless it appears clear that the defendant understood by the end of December 2000 that the plaintiff had purported to avoid the contract. There is no real substance in the objection but the plaintiff should accurately identify the instance of avoidance.

[31] Accordingly I order that paras 23, 24 and 25 of the further further amended statement of claim dated 7 July 2006 be struck out and give the plaintiff leave to re-plead.

[32] The plaintiff's application is to strike out allegations in the defence which it is said the defendant may not make because of the answer given by Ambrose J to question 3(a). There are said to be issue estoppels arising from his Honour's findings. The nature of the debate can be understood by reference to what Ambrose J found. His Honour said: [1] `*It is the plaintiff's case that initially he entered into a written "lump sum" contract ... for the construction of a commercial/residential high rise building ... under the terms of which he was obliged to complete the construction ... by 25 April 2000 for "a guaranteed upper limit cost of $2,650,000.00", the plaintiff and defendant to share equally any reduction in building costs below that sum. It was agreed that the plaintiff would receive a fee of 7.5% of the construction cost ... at completion ... In my view this contract should be characterised neither as a lump sum nor cost plus contract but rather as one exhibiting some of the characteristics of both types of building contract.*'

[33] It will be remembered that the plaintiff had pleaded that the parties varied the building agreement. The defendant denies the variation. Ambrose J found:[2] ` ... *[I]t is clear on the evidence (apart from that of the defendant) that it was agreed that the building henceforth should be constructed on a simple cost plus basis rather than upon a fixed maximum building cost contract with the variations plus a 7%z% builders profit ... The effect of this variation was to abandon the upper limit of cost of $2,650,000 ... and to reconstitute the contract as a simple cost plus contract ...*'

[34] The plaintiff's claims for payment were predicated upon the agreement as varied. Of course the plaintiff has no rights to payment under the building contract as long as the compromise agreement made in December 2000 subsists. There is a finding that that agreement was made. Whether it subsists depends upon the answer, which is yet to be given, to question 3(b). If the second answer is also affirmative the parties will be left to their respective rights under the building agreement. In that event the defendant contends that it is the contract as initially made which will determine the plaintiff's right to payment. It denies the variation. The third defence pleads in the paragraphs earlier identified that the plaintiff's entitlement is to be measured by reference to the `lump sum' contract. The plaintiff seeks to have these references struck out because of Ambrose J's findings that the contract had been varied and become a `cost plus' contract.

[351 The principles of the doctrine of issue estoppel are easy to state but may be difficult to apply. The High Court in ***Kuligowski v Metrobus*** (2004) 220 CLR 363 at 373 accepted the formulation propounded by Lord Guest in **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)** [1967] 1 AC 853 at 935. An issue estoppel will arise where: (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel is final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

1 [2003] QSC 83 at [22].
2 Ibid at [28]

[36] There is no doubt here that requirements (2) and (3) have been satisfied. Ambrose J determined an issue separately identified and formulated and pronounced a formal declaration from which there has been no appeal. The parties are obviously identical: the action is ongoing.

[37] It is requirement (1) which is in issue. As to that the High Court (at 379) approved the encapsulation of the law by Barwick CJ in ***Ramsay v Pigram*** (1968) 118 CLR 271 at 276. His Honour said: *`Long standing authorities ... warrant the statement that, as a mechanism in the process of accumulating material for the determination of issues in a proceeding between parties, an estoppel is available to prevent the assertion in those proceedings of a matter of fact or of law in a sense contrary to that in which that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties ... The issue thus determined ... must have been identical in each case.'*

[38] It is necessary to draw attention to his Honour's insistence upon the `precise matter' being `necessarily and directly decided', and that the issue be identical in each case. This requirement is capable of expansion. The process was explained by Dixon J in ***Blair v Curran*** (1939) 62 CLR 464 at 531-3:

`A judicial determination directly involving an issue of fact or of law disposes once for all the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior ... decree ... necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared ... Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right ... the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment ... [T]he judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue ...

The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision ... or necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided ... yet are not in point of law the essential foundation or groundwork of the judgment ...'

[39] Mr Justice Ambrose found that the parties had by express agreement binding upon them varied the terms of the original building contract so that it became a `cost plus' contract. That finding was disputed by the defendant who gave evidence against it. The point was actually litigated in the trial of the separate questions ordered to be determined.

[40] The terms of the declaration made by the judge did not refer to the variation. His Honour answered the precise question posed for his consideration. The declaration was that: *`The meeting of 22 December 2000 did result in an agreement ... in the terms alleged in paragraphs 13 to 16 of the defence ... The agreement was legally binding upon the plaintiff subject to his right to repudiate it on the grounds of unconscionable conduct and economic duress ...'*

[41] The question to be answered is whether the finding as to the variation was `legally indispensable' to the judicial conclusion expressed in the declaration. The declaration will be conclusive for subsequent litigation `as to a matter which it was necessary to decide ...'. One has to distinguish between matters which were `fundamental or cardinal to the prior decision' from those which `even though actually raised and decided ... [were] not in point of law the essential foundation of the ... decree.'

[42] The problem can be looked at in two ways. The declaration determined that the parties had compromised their rights by the December agreement. One then asks naturally what rights were compromised? The answer is the rights the parties respectively had under the building agreement. One again might naturally ask how those rights were to be described more particularly, and the answer must be, by reference to the terms of the contract. That inquiry would necessarily involve the question whether the original contract had been varied. By this process one arrives at the conclusion that the declaration determined that the parties compromised their respective rights under the varied contract.

[43] The other approach is to take the inquiry no further than the first question. The declaration bound the parties to their agreement of 22 December 2000 the terms of which were set out in the defence. That is, the parties substituted the rights they had against each other arising out of the building contract by the rights given in the December agreement. The parties' prior rights were uncertain: each had a claim against the other and each disputed the other's claim. Whatever the merits of the respective claims the parties agreed to compromise them in a new agreement. Its whole point was to resolve the conflict between them and its uncertain outcome.

[44] The second approach is legally intelligible. The declaration could have been made without a determination of what were the terms of the contract about which the parties were in dispute. There was a separate dispute about the terms. An adequate foundation for the declaratory answer to question 3(a) was that the parties were locked in dispute about their respective entitlements under their building contract. It was not necessary to determine what those respective rights were. The whole point of the compromise was to avoid that difficulty.

[45] I think this is the proper analysis. The declaration could have been made without an inquiry into what lay behind the dispute which the parties compromised. An inquiry into, and a determination of, those antecedent questions was not necessary as the legal foundation of the declaration. It was not legally indispensable to the conclusion

expressed in the declaration. It was not necessary to decide that there had been a variation to the terms of the building contract in order to conclude that all of the parties' disputes concerning the building contract had been compromised.

[46] It is clear both from the exposition of the law by Dixon J in Blair and by the approach of the High Court in ***Kuligowski*** that the operation of issue estoppel is to be strictly confined. In the latter case the examination of the questions in issue in the two proceedings were undertaken with enormous exactitude to conclude that they were not the same.

[47] The conclusion I have reached is, I think, consonant with the conduct of the litigation. It was obviously thought expedient to determine the two questions as preliminary issues because, depending on the answers, the litigation might thereby have been concluded. The result is still possible. If in a retrial question 3(b) is answered negatively there will be no need for a further hearing. The parties will have been found to have only those rights which they agreed to in the compromise. What antecedent rights they might have had will be irrelevant. It is only if question 3(b) is answered affirmatively that the rights of the parties will depend upon the terms of the building agreement, varied or not.

[48] Indeed I think it likely that the question of variation was irrelevant to the questions which Ambrose J was asked to answer and any evidence germane to that issue could successfully have been objected to. As it was both parties joined in that particular fray.

[49] The plaintiff, with some justification, objects to the defendant now denying the fact that the contract was varied to become a `cost plus' one when that question was litigated between them before Ambrose J and was the subject of a finding adverse to the defendant. It is submitted that to permit the question to be agitated again, with the risk that the result might be different, reflects poorly upon the administration of justice. One can sympathise with the submission but I think it is answered by Dixon J's observation in ***Blair*** at 532:

> *`Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish ... the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.'*

The remedy lay in objecting to the evidence, or in formally proposing a supplementary question to be answered by the judge, namely whether the contract had been varied. However to answer that question and to litigate the issue would have been inconsistent with the approach which was implicit in the questions actually put. The answers were meant to obviate the need to inquire into the rights of the parties prior to the compromise.

[50] The plaintiffs attack on the third defence fails.

[51] It was agreed that the defendant's application for particulars should be adjourned pending the plaintiff's repleading the paragraphs of the statement of claim I have struck out.

[52] The orders I make are that paragraphs 23, 24 and 25 of the Further Further Amended Statement of Claim be struck out. I give leave to the plaintiff to deliver another amended statement of claim. I adjourn the defendant's application for particulars of the Further Further Amended Statement of Claim. I order that the costs of and incidental to the defendant's application be its costs in the cause. I dismiss the plaintiff's application and reserve the costs of and incidental to that application.

[53] If the parties want the benefit of an order for costs they should get this action ready for trial and have question 3(b) answered.

ORDER:

1. Paragraphs 23, 24 and 25 of the Further Further Amended Statement of Claim be struck out.
2. Leave to the plaintiff to replead paragraphs 23, 24 and 25 of the Further Further Amended Statement of Claim.
3. The defendant's application for particulars of the Further Further Amended Statement of Claim is adjourned.
4. The costs of and incidental to the defendant's application be its costs in the cause.
5. The plaintiffs application is dismissed.
6. The costs of and incidental to the plaintiffs application are reserved.

Mr D Cooper SC for the plaintiff instructed by MacDonnells
Mr A M Daubney SC with Mr P Tucker for the defendant instructed by Hogan & Company