Rodney David Haines v Lynne Valerie Carter[2002] ADR.L.R. 10/07

From the CA of New Zealand. Reasons for report of the Lords of the Judicial Committee of the Privy Council of the 15th July 2002, delivered 7th October 2002. Lord Bingham of Cornhill Lord Slynn of Hadley, Lord Nicholls of Birkenhead Lord Rodger of Earlsferry The Rt. Hon. Justice Tipping. PC Appeal No. 75 of 2001

Majority judgment delivered by Lord Rodger of Earlsferry

1. On 15th July 2002 their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed to the extent of declaring that under clause 2(17) of the agreement between the parties the mediators are bound to reconvene the mediation for the stated purpose, if the letter from Mr Haines to Mr Goodall dated 12 July 1999, when read along with the schedule, satisfies them that it provides evidence that the respondent breached her obligation to the appellant to act in the mediation in all good faith and that, as a result, the appellant suffered possible financial loss in excess of $50,000; but that the appeal should otherwise be dismissed. Their Lordships said they would give their reasons later. This they now do.

2. Their Lordships adopt with gratitude the account of the facts and of the issues set out in the opinion of Lord Bingham of Cornhill and Lord Slynn of Hadley. As that account explains, the appeal concerns the interpretation of clause 2.17 in an "Agreement as to Division of Property" entered into by the appellant, Mr Haines, and the respondent, Ms Carter ("Rod" and "Lynne" in the agreement), when they separated after living together from 1993 until February 1999. The agreement resulted from a process of mediation. Although one of the mediators was a lawyer, the mediation was an informal and idiosyncratic process in which neither side was legally represented. This may help to explain why the clause has proved so difficult to interpret: the judges in New Zealand were divided and, unfortunately, the same goes for the Board. It is therefore with due diffidence that their Lordships differ not only from the Court of Appeal but from the "clear opinion" of the minority.

3. When Mr Haines failed to pay the final adjusted sum due by him under clause 2.6 Ms Carter began legal proceedings and sought summary judgment for $1.5 million with interest. Mr Haines defended that application on various grounds which were rejected and which he no longer maintains. At a relatively late stage, however, Mr Judd QC argued on his behalf that, since clause 2.17 was difficult to interpret, it was wrong for the High Court to interpret it on an application for summary judgment. The court should have waited until the evidence had been led at trial so that the clause could be interpreted against the relevant matrix of fact. Their Lordships are satisfied, however, that sufficient of the facts relating to the agreement and the circumstances in which it came into existence are known and undisputed to allow them to interpret the clause in its context. Mr Judd was unable to make any plausible suggestion as to what other facts might emerge at trial that would help in interpreting this particular provision. In these circumstances the High Court and the Court of Appeal were correct to interpret clause 2.17 in the application for summary judgment. Their Lordships consider that they too should deal with the question of interpretation at this stage.

4. As Lord Bingham of Cornhill and Lord Slynn of Hadley have noted, Mr Haines and Ms Carter chose as mediators three men who would have been disqualified from acting as judges or arbitrators in their dispute. They were chosen to perform a particular task, viz, to divide up the parties' property. The agreement which resulted from the efforts of the mediators and the parties purported to do just that and nothing more. By 9 March the agreement was in a form in which Ms Carter was able to sign it and, after making certain changes in manuscript, Mr Haines signed two days later. Clauses 2.6 and 2.9(f) show, however, that as at 11 March two particular issues - as to the interest of the Haines Group in Retrac Limited and the refurbishment of a boat - remained to be resolved. These were, of course, issues relating to the division of the parties' property and so they too were to be resolved by the mediators in a further procedure, with one of them, the accountant, being designated to deal with any resulting change in the security arrangements. Immediately after the agreement was signed, the two matters were referred to the mediators who deducted $200,000 from the final sum which Mr Haines was to pay.

5. The agreement imposes a considerable number of obligations on the parties. The particular obligations are to be found in clauses 2.5 - 2.7, 2.9 - 2.16 and 2.18. More general obligations are to be found in clauses 3, 4 and 8.

6. Clause 2.17 provides: *"If either Rod or Lynne can provide evidence within six (6) months of the date of this agreement 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."*

   The Court of Appeal held that this clause related to breaches of the obligations contained in the agreement. The minority adopt that construction. So interpreted, the clause provides a mechanism whereby the mediators can assess the financial consequences, above a certain amount, of the failure of either party to perform his or her obligations as set out in the various clauses of the agreement.

7. In interpreting clause 2.17 in this way Lord Bingham of Cornhill and Lord Slynn attach some importance to its position, following a series of clauses setting out various obligations. The implication is that a logical pattern can be discerned: the agreement first sets out the obligations and then provides a mechanism for assessing the financial consequences of a breach of these obligations. Their Lordships note, however, that clause 2.18 contains an obligation in the shape of a restrictive covenant preventing Lynne from carrying on the business of house removals for a period of five years. If clause 2.17 were indeed intended to provide a mechanism for the mediators to assess the financial consequences of the breach of the parties' obligations under the agreement, then that mechanism would apply to any breach of the restrictive covenant in clause 2.18 too, provided that it occurred within the first 6 months and the necessary proof was available. But clause 2.18, containing that obligation, comes after, not before, clause 2.17, containing the mechanism. That being so, their Lordships do not find support in the position of clause 2.17 for the interpretation which the Court of Appeal placed on it.

8. In the High Court Randerson J pointed out that several of the obligations on the parties under the agreement were intended to endure for some considerable time. As their Lordships have just noted, the restrictive covenant on Lynne in clause 2.18 was to last for five years from 9 March 1999. The obligation on both parties under clause 2.10 not to perform or cause to be performed any act which might result in a liability on certain persons or entities was to last for seven years from the date of the agreement. Clause 2.15 shows clearly that the obligations on Lynne in clauses 2.12 - 2.14 were envisaged as lasting for a substantial period of time, since, if she wanted to terminate them, she had to give six months' notice.

9. Since these various obligations were intended to last considerably longer than six months, it is by no means clear why the parties would have chosen to provide a special enforcement mechanism which would operate only in the first six months. That period bears no relationship either to the duration of the obligations themselves or to the date, 9 March 2000, when Rod had to pay the final adjusted sum under clause 2.6.

10. Furthermore, if clause 2.17 is interpreted as providing a mechanism for dealing with breaches of obligations under the agreement, it sits rather awkwardly with clause 5. In terms of clause 5, either party is at liberty, if necessary, to enforce the terms of the settlement contained in the agreement. That must mean that, if one of the parties breaches a particular obligation, the other can raise proceedings in court for damages. A court would, of course, be bound to assess damages according to the law and, if successful, the party concerned would be entitled to judgment for that sum. If clause 2.17 applies to such breaches, however, the aggrieved party could put the matter before the mediators who would resolve the issue by simply determining an amount and adjusting the final sum accordingly. The two mechanisms could produce completely different results. It seems strange that, purely for breaches occurring within the first six months, there should be two wholly different mechanisms capable of producing contrasting results.

11. Moreover, the availability of legal action to enforce the terms of the agreement makes the minimum level of $50,000 for the intervention of the mediators difficult to understand. One would normally

expect that an informal mechanism would be available to deal in particular with less important breaches, while legal action would be available for more significant breaches. On the interpretation favoured by the Court of Appeal, however, the mediation cannot be reconvened unless the possible loss amounts to $50,000, whereas the parties are free to bring actions for smaller sums before the courts.

12. These, then, are some of the difficulties to which the interpretation favoured by the Court of Appeal gives rise. In coming to a different view, their Lordships have regard in the first place to a matter which can also be seen as an objection to the interpretation adopted by the Court of Appeal. As their Lordships have noted, the mediators' task was to divide up the parties' property. Mr Haines and Ms Carter had not wanted lawyers involved in that task. On the Court of Appeal's interpretation, however, the mediators' role is extended and they are to engage in a significantly different task. Instead of dividing up the parties' property, they are to become involved in assessing the financial consequences of a breach or breaches of the obligations arising out of the agreement which has divided the property. Breaches of the agreement could give rise to quite complicated issues of quantification of a very different character from the issues relating to the division of the property. There is nothing in the surrounding circumstances or in the other terms of the agreement to show that the parties would have wanted to confer on the mediators the power to resolve these issues in the broad-brush way that they were to use in dividing the property. On the contrary, the other terms of the agreement, in particular clauses 2.10 and 5, suggest that the parties envisaged that breaches of the terms of the agreement were to be handled, if necessary, by the ordinary process of legal action in the courts.

13. Their Lordships prefer an interpretation of clause 2.17 which fits with what they see as the overall scope of the mediators' role.

For that reason they prefer an interpretation under which clause 2.17 relates to the division of the parties' property, as embodied in the agreement after the mediation. That leads them to the view that clause 2.17 is intended to deal with a breach or breaches of obligation which had taken place during the procedure by which the mediators eventually divided up the property. That procedure had taken only about nine days. At the end of it the parties realised that two particular points remained unresolved. They may well have realised that other problems with the division might emerge after they signed. Clause 2.17 can be seen as a mechanism which is designed to allow the final sum to be adjusted to take account of certain of the problems that might come to light. In order to maintain the basic finality of the agreement, however, the mechanism is limited in four ways. The first is that it can be operated only if a party presents relevant evidence within six months; the second is that the evidence must be sufficient to satisfy the mediators; the third is that the mediators must be satisfied that the other party has breached his or her "obligation"; and the fourth is that the mediators must be satisfied that the breach has caused possible financial loss in excess of $50,000.

14. Like Randerson J, their Lordships consider that the requirement for the parties to provide the necessary evidence within six months of the date of the agreement is more easily understood if the mechanism is intended to deal with breaches of obligation which had by definition already occurred by the time the agreement was signed. The parties must produce the evidence within six months: after that, they cannot challenge what preceded the agreement or seek to alter the division of property embodied in it.

15. On the interpretation which their Lordships prefer, the mediators are concerned with breaches of obligation which affected their division of the property. This is consistent with their overall role and with the remedy that clause 2.17 provides. It is the mediators who deal with the problem affecting the result of their mediation and they deal with it by using the new information to make a "further" adjustment to the final sum due by Rod under the agreement. This description of the adjustment shows that the parties see it as, essentially, similar to the kind of adjustment envisaged in clauses 2.6 - 2.9, to deal with the two specific points mentioned there. Like that adjustment, it is an adjustment of the sum due by Rod as a result of the division of the parties' property under the agreement - as opposed to an adjustment made to remedy some failure by one of the parties to carry out the terms of

the agreement. Indeed the idea, implicit in the Court of Appeal's interpretation, of remedying the breach of an obligation under the agreement by adjusting the terms of the agreement itself strikes their Lordships as unusual, to say the least.

16. In his judgment dated 10 November 1999 Randerson J also came to the view that clause 2.17 was intended to deal with breaches of obligation that had occurred before the agreement was completed. To that extent their Lordships agree with his conclusion. If an interpretation on these lines is adopted, however, the most difficult point is to ascertain the nature of "the obligation" to the breach of which clause 2.17 applies. By contrast, of course, on the construction favoured by the Court of Appeal that particular point may be thought to cause little difficulty: provided the singular "obligation" is read as a plural, the clause can be seen as applying to the breach of any of the obligations contained in the agreement.

17. It appears that, until the point was noticed during the hearing before their Lordships' Board, no-one had paid any particular attention to the fact that, by contrast with clauses 2.14 - 2.16, clause 2.17 refers to the parties' "obligation" rather than to their "obligations". If the agreement had been professionally drawn, that is in itself a distinction to which their Lordships might have attached considerable importance. Here, however, the agreement has not gone through the kind of revising process that could be expected to eliminate inconsistencies of language and typographical errors. In these circumstances their Lordships would not think it right to exclude any interpretation of the clause simply on the basis of the singular "obligation". Had they been otherwise minded to adopt the Court of Appeal's interpretation, for instance, they would not have rejected that interpretation simply because of the form of this one word. On the other hand, their Lordships would consider it equally wrong to ignore the fact that the word appears in the singular and to approach the interpretation of the clause on the basis that, despite what it actually says, the parties must have intended to refer to "obligations" in the plural.

18. Randerson J acknowledged that clause 2.17 could not have been intended to allow the parties to re-open any and every issue relating to the division of their property. He held, however, that the clause would apply if Mr Haines could provide evidence sufficient to satisfy the mediators *"that there had 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."*

    Their Lordships understand that his Honour had in mind obligations which had arisen between the parties at some time in the past, while they were living together. At the hearing before the Board Mr Judd did not support that interpretation and, like the Court of Appeal and the minority, their Lordships would reject it. Contrary to the whole scheme of the mediation, it envisages the mediators, not as dividing up the parties' property, but as engaging in the very different exercise of assessing the financial consequences of a breach of some unspecified obligation that had existed while the parties lived together.

19. What, then, does clause 2.17 mean when it speaks of a party breaching his or her "obligation"? On their Lordships' general approach the reference can only be to an obligation that applied to the parties in relation to the mediation procedure that they adopted for dividing their property. The clause does not itself describe that obligation or its nature. As Lord Bingham of Cornhill and Lord Slynn of Hadley note, in this respect it contrasts with clause 2.16 in which the parties specifically acknowledge and agree that the agreement and the obligations arising from it will be completed by them "in all good faith". That clause looks to the future and does not show that the parties understood that they had been under an obligation to act in good faith during the mediation. But it does at least suggest that they had in mind obligations of good faith. It is therefore by no means surprising to find, at the very end of the agreement, a clause - clause 9 - in these terms: *"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."*

    Clause 9 is in one sense merely recording the position. Written and agreed to only at the end of the process of mediation, it cannot retrospectively impose obligations on the parties in their conduct of the

mediation. But what it can do, and indeed does, is declare that the parties have acted in all good faith in reaching the agreement. A declaration of that kind would have been otiose unless the parties were thereby acknowledging that, in reaching the agreement, they had indeed been bound to act in all good faith. Their Lordships therefore see in clause 9 an indication that, in reaching the agreement by means of the mediation, the parties had been under an obligation to act in all good faith. Such an obligation is hardly exacting and might have been implied in any event, but the parties have chosen to indicate, in this somewhat oblique fashion, that they were indeed under an obligation of that nature.

20. Not surprisingly, the agreement contains no other indication of any obligation which might have applied to the parties during the process leading up to its completion. Moreover, their Lordships see no scope for implying any other obligation. They would, accordingly, interpret clause 2.17 as referring to breaches of the obligation of good faith during the mediation. In other words, clause 2.17 comes into play only if either party can show that, as a result of a lack of good faith on the part of the other party during the mediation process, the mediators divided the property in a way that caused him or her possible financial loss of at least $50,000. Presumably, for instance, a party might have concealed some item of property or have exaggerated or failed to reveal some factor affecting its value. In these limited circumstances only, the mediators are to reconvene the mediation with a view to altering the division of the property, if necessary, by issuing a further final adjusted sum. On this interpretation, in the reconvened mediation the mediators will resume their original role. Importantly, however, the scope for adjustment under clause 2.17 is very limited and, therefore, it does not pose a threat to the finality of the agreement as a whole.

21. Their Lordships readily acknowledge that, if either party could point to bad faith on the part of the other party in reaching the agreement, this could well form a basis for having the agreement set aside. But the lack of good faith envisaged by clause 2.17 as interpreted by their Lordships relates to the division of the parties' property, the matter which the parties had wanted the mediators rather than the courts to determine. It is, in their Lordships' view, consistent with that approach for the parties to provide that, if the mediators' decision has been affected by a lack of good faith, then the appropriate way to is handle that is for the mediators themselves to look into the matter and adjust their division accordingly.

22. The debate on the interpretation of clause 2.17 is entirely academic unless Mr Haines did indeed successfully invoke its terms within the six-month period. In this connexion he relies on his letter dated 12 July 1999 addressed to one of the mediators, Mr Goodall. In the letter Mr Haines sought to raise an issue under clause 2.7 as well as clause 2.17 but the clause 2.7 issue is no longer live. The letter begins: *"We serve notice under clause 2.7 and clause 2.17 of the mediation agreement dated 11th March that we require you to analyse the following information and make the necessary adjustments. Once you have completed this we would expect you to provide a full and detailed breakdown of your findings."*

    Mr Haines then indicates that, on legal advice, he has taken steps to cancel the agreement, but he continues: *"However, on the basis that the agreement was to be found to be lawful and binding I need to ensure that I exercise my rights as per clauses 2.7 and 2.17."*

    Having dealt with the clause 2.7 point, he writes: *"In addition, under clause 2.17 of that agreement we have furnished you with further claims for amounts owing that should be taken into account. You must realise that I trusted Lynne implicitly, she had control of all the HHH group banking and finances, she has refused to assist in any areas to enable us to formulate these figures. These have been obtained after a great deal of research."*

    Mr Judd accepted that this was the key passage, which had, of course, to be read in conjunction with the figures in the schedule accompanying the letter. As Mr Haines explains in his affidavit sworn on 14 July 1999, that schedule purports to show that he sustained a loss totalling at least $2,741,659.27 as a result of Ms Carter failing to account for payments received by her or for her benefit.

23. The question for their Lordships, however, is whether the relevant passage in the letter, when read along with the schedule, could satisfy the mediators, taking a reasonable view, that it provided evidence that Ms Carter had breached her obligation to act in all good faith in reaching the agreement in the mediation, to the extent that Mr Haines had suffered possible financial loss in excess of $50,000. There seems no doubt that the letter and schedule purport to show loss exceeding that sum. The

critical issue, therefore, is whether the letter and schedule could satisfy the mediators that the loss was said to arise from Ms Carter breaching her obligation of good faith. With some hesitation their Lordships have come to the view that the mediators could be so satisfied because of the reference to Mr Haines having trusted Ms Carter implicitly: this could be construed as implying that she had betrayed that trust by concealing matters relating to the Group banking and finances. It is, of course, for the mediators, and not for their Lordships, to decide whether they are in fact so satisfied. Mr Judd indicated that, if the appeal were to be allowed, the appellant would be content with a declaration indicating their Lordships' view on the interpretation of clause 2.17.

24. In these circumstances it is unnecessary for their Lordships to deal with the issue of rectification which was touched on briefly at the hearing before the Board. Since it is possible that the question may re-emerge in the proceedings on the counterclaim, their Lordships consider it best not to trammel any subsequent discussion in the New Zealand courts with observations on the point.

25. Their Lordships will, accordingly, humbly advise Her Majesty that the appeal should be allowed to the extent of declaring that under clause 2.17 of the agreement between the parties the mediators are bound to reconvene the mediation for the stated purpose if the letter from Mr Haines to Mr Goodall dated 12 July 1999, when read along with the schedule, satisfies them that it provides evidence that Ms Carter breached her obligation to Mr Haines to act in the mediation in all good faith and that, as a result, Mr Haines suffered possible financial loss in excess of $50,000. The respondent must pay the appellant's costs before the Board. Each side must bear their own costs in the courts below.

Dissenting judgment delivered by Lord Bingham of Cornhill and Lord Slynn of Hadley

26. This appeal turns on a short issue of construction. We would for our part uphold the unanimous decision of the Court of Appeal on this issue and would humbly advise Her Majesty that Mr Haines' appeal be dismissed. But we have the misfortune to differ from a majority of the Board.

27. Mr Haines and Ms Carter met in 1991 and lived together between 1993 and February 1999. When they met they both had substantial business and property interests. Each of them was the owner or principal shareholder of competing house removal companies. During their relationship these companies were effectively merged, and their financial affairs became intertwined.

28. When the relationship broke up the need to divide their assets arose and they tried to reach an agreement, but unsuccessfully. So Mr Haines suggested that a Mr Goodall, who had been his accountant for many years and latterly Ms Carter's also, should mediate. Ms Carter agreed, and Mr Haines suggested that her father should join Mr Goodall as a joint mediator. This also was agreed. When the parties attended before the joint mediators on 2 March 1999 a barrister, Mr Lendrum, was also present. He had previously acted for Mr Haines and was also known to Ms Carter. She agreed to his acting as a third mediator, which he did.

29. The mediation continued over several days. Sometimes the parties attended on the mediators together, sometimes alone. As the rudiments of an agreement began to emerge at the end of the first week the mediators prepared a draft agreement, which was the subject of discussions leading to changes in the draft. On at least two occasions Mr Haines took the draft home with him for consideration. Neither party took independent legal advice, although Mr Lendrum outlined the relevant law at the outset of the mediation. On 11 March 1999 Mr Haines and Ms Carter signed a written agreement and their signatures were witnessed by two of the mediators.

30. It would have been open to Mr Haines and Ms Carter to have sought a legal determination of their respective property interests, whether from a court or from an arbitral tribunal. In either event it would have been necessary to prove (or agree if possible) the relevant facts and apply the relevant legal rules to decide who was entitled to what. This process would probably have taken some time, would probably have required the parties to seek legal and other assistance and would probably have cost a significant sum of money. This was not the course the parties chose. Instead they chose to submit the problem to three men, each of whom would have been disqualified from acting as a judge or arbitrator. The mediators adopted procedures wholly acceptable in mediation proceedings but inappropriate in legal proceedings or arbitration. And the agreement which the parties made was in

terms which no judge or arbitrator could have ordered, reflecting not an evaluation of the parties' respective legal rights and obligations but the bargain which they were willing to strike to achieve a prompt settlement.

31. The agreement is entitled "Agreement as to Division of Property". The informality of the proceedings is reflected in the description of the parties as Rod and Lynne. Sub-clauses 2.1 to 2.4 specify the various classes of property which are henceforth to be the sole and separate property of each of the parties respectively. The details do not matter, save _to note that Mr Haines is to become the sole owner of three home removal companies, including the company which had formerly been his and that which had formerly been Ms Carter's. Documentation to give effect to the agreement is to be executed within four working days of presentation for signature. "In consideration for the ownership and/or changes of ownership confirmed or created in this agreement" Mr Haines is to pay Ms Carter $1.7 million by 9 March 2000. But this figure is to be subject to adjustment by the mediators in respect of two specified items, on which it is clearly contemplated that the parties may wish to submit further evidence before a final figure is reached. This adjustment is to be made "as soon [after 31 March 1999] as 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". Provision is made for a transfer of shares by Ms Carter to Mr Haines and payment by him for the shares.

32. At this point in the agreement, beginning with sub-clause 2.10, there follow a series of sub-clauses imposing obligations on the parties respectively. Sub-clause 2.10 prohibits both parties from doing certain acts and continues: *"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. "*

Succeeding sub-clauses impose obligations on Mr Haines (2.11, 2.14) and Ms Carter (2.12, 2.13) and both of them together (2.15), but in none of these sub-clauses is any provision made for the consequences of breach. Sub-clause 2.16 makes provision for Ms Carter's inability to perform her obligations through illhealth: *"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."*

There follows, in sub-clause 2.17, the provision on which this appeal turns: *"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."*

There follow a non-competition covenant by Ms Carter and a series of general terms of which only two need be quoted: *Rod and Lynne agree that if necessary any party shall be at liberty to enforce the terms of the settlement agreed to and recorded in this document by judicial proceeding and this agreement may be produced to a Court or tribunal as required to record the terms of the agreement.*

"5 g. 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."

33. In purporting to record the agreement of the mediators in an agreement to which they were not parties, sub-clause 2.17 reveals itself to be defectively drafted. But it must be given the meaning intended by the parties. The crux of the issue between them concerns the scope of the words *"his or her obligation to the other"*. Does this mean
    (a) his or her obligation arising otherwise than under the agreement; or
    (b) his or her obligation arising under the agreement; or
    (c) his or her obligation arising under the agreement or under the parties' mutual obligations of good faith in the formation of the contract?

Randerson J at first instance favoured construction (a). He held that sub-clause 2.17 was not intended to cover breaches of obligation pursuant to the settlement agreement. He regarded the six month time

limit as inconsistent with interpretation of the subclause as applying to any breach of obligation under the agreement. The Court of Appeal rejected this construction, reading the time-limit as directed to ensuring that any question under the sub-clause was resolved well before the completion date. We agree with the Court of Appeal. We did not understand Mr Judd QC (for Mr Haines) to contend for construction (a).

34. Construction (b) is that upheld by the Court of Appeal. In our opinion it is the natural and straightforward interpretation of the sub-clause, following as it does a series of other sub-clauses in which the parties have undertaken obligations to each other with no contractual provision governing the consequences of breach. The parties had entrusted to the mediators the task of dividing their joint and several assets between them and had agreed a total figure (subject to adjustment) to be paid by Mr Haines. They had undertaken mutual obligations. It was very natural to entrust to the mediators, if need arose, the further task of assessing the financial consequences (subject to crossing a quantitative threshold) of breach of those obligations. If the evidence was provided within six months, any necessary adjustment (upwards or downwards) could be made well before the date for completion.

35. Construction (c), as we understand, is the construction favoured by the majority of the Board. There is in our opinion nothing in sub-clause 2.17 to suggest that it has reference to the duty of good faith of which general mention is made in clause 9. The reference to good faith in clause 2.16 is directed to performance of the agreement. It seems to us that this construction, for which we did not understand Mr Judd to contend, derives no support from the language or the context of the agreement. Of course it is true that a party induced to enter into an agreement by fraud or misrepresentation has his remedies, but they are not remedies for which sub-clause 2.17 makes provision.

36. Since it is accepted that Mr Haines cannot show any breach of any obligation arising under the agreement, construction (b) is fatal (subject to any argument he may have on rectification) to his attempt to resist payment of the adjusted sum payable under the agreement. It is our clear opinion that construction (b) is the correct construction, as the Court of Appeal held, and we would so decide.