VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. W115/2012

BUILDING AND PROPERTY LIST

CATCHWORDS

BUILDING AND PROPERTY - Terms of settlement - Applicant alleges that a settlement agreement was so uncertain so as to be unenforceable - alternatively that her consent was vitiated by duress imposed by the third respondent during settlement negotiations - alternatively that the agreement ought be set aside on the ground of alleged misrepresentation by the third respondent, accompanied by alleged conduct of the third respondent intended to avoid the applicant becoming aware of the true position – consideration of the exceptions to without prejudice privilege attending negotiations in an attempt to settle a dispute.

APPLICANT	Rosemary June Clemens
FIRST RESPONDENT	Metricon Homes Pty Ltd (ACN: 005 108 752)
SECOND RESPONDENT	Group Four Building Surveyors Pty Ltd (ACN: 158 953 425)
THIRD RESPONDENT	Paul Lajbcygler
WHERE HELD	Melbourne
BEFORE	Member A. Kincaid
HEARING TYPE	5 February 2015
DATE OF HEARING	5 February 2015
DATE OF ORDER	17 February 2015
DATE OF WRITTEN REASONS	4 June 2015
CITATION	Clemens v Metricon Homes Pty Ltd (Building and Property) [2015] VCAT 785

ORDER

I FIND AND DECLARE that:

1. The parties entered into an enforceable contract on 1 April 2014.

2. The contract cannot be avoided by the applicant.

MEMBER A. KINCAID

APPEARANCES:

For the Applicant:	Ms R Clemens in person
For the First Respondent:	Ms D Anderson
For the Second Respondent:	No appearance
For the Third Respondent:	Mr P Labycygler

REASONS

Background

1 On 17 February 2015, I provided my answers orally to two preliminary questions referred to me, following a hearing on 5 February 2015.

2 The third respondent has since requested written reasons, and I now publish those reasons. They are essentially a transcript of the oral reasons, with minor corrections to syntax and layout.

3 The parties have been in an acrimonious dispute for some years concerning the boundary structures between their properties.

4 The third respondent constructed a new dwelling on his property (the "**works**"). The first respondent is the builder.

5 The second respondent was the building surveyor in respect of the works. The second respondent issued the building permit on 29 October 2010.

6 There is a low brick wall (about 10 metres in length and 800mm high) along the applicant's southern boundary, between her garage and Louise Street.[1] It is possibly up to 70 years old. About half the wall straddles the applicant's boundary. This wall is bowing in approximately 2 metres of its length, between her garage and Louise Street.

7 The answers to the preliminary questions will determine whether the applicant is obliged to pay half of the cost of a proposed new retaining wall and fence between her property at Louise Street, Brighton and the property of her neighbour, the third respondent, immediately to her south. The estimated total cost of these works, based on quotes received by the third respondent, is about $7,000.

8 The third respondent says that the applicant is required to pay half of the costs of the proposed wall, pursuant to Terms of Settlement they entered into on 1 April 2014 ("**the Terms**").

9 The parties signed the Terms following lengthy oral negotiations at the Tribunal.

10 The applicant submits that the Terms should be set aside because, she alleges, they are void for uncertainty, and secondly, that she entered into the Terms under duress.

11 Another reason why the applicant wishes to have the Terms avoided is that she relied on an alleged representation by the third respondent, during the negotiations, that a new retaining wall was not required to be built, and that therefore he would not agree to build one unless she paid half of the costs.

1. As shown in a Plan of Re-Establishment Survey of Absolute Surveying Pty Ltd dated 25 January 2011.

12 The applicant also alleges that, during the negotiations, the third respondent denied her request for a copy of a structural engineer's report then in his possession that would, to his knowledge, have controverted the alleged representation.

13 She says that in reliance on the third respondent's alleged representation and alleged subsequent conduct, she signed the Terms.

14 The applicant says that subsequent to signing the Terms, she received a copy of the structural engineer's report. She then concluded that the alleged representation was untrue. She considers that the structural engineer's report requires (in her words) a "properly engineered retaining wall". She says that in the usual course, such a wall would need to be constructed at the third respondent's cost given, she believes, that his works that gave rise to the need for one.

Questions for My Determination

15 Pursuant to the Order of SM Farrelly made on 21 November 2014, I am required to answer the following questions:

(a) Did the parties enter into an enforceable contract on 1 April 2014?

(b) Can it be avoided [by the applicant]?

16 Generally, a contract may be rescinded where there has been an actionable misrepresentation, duress, undue influence or unconscionable dealing. Rescission operates retrospectively, so that liability under the contract is (to use the word in the second question) "avoided" from the beginning.

The VCAT Proceeding

17 The applicant filed a proceeding at the Tribunal on 14 August 2012, seeking orders under the *Water Act 1989* to prevent an allegedly unreasonable flow of water from the third respondent's property into her garage and driveway. She also alleged that the third respondent created much deeper soil levels on his property during his building works.

18 She feared that, because of the allegedly deeper soil levels on the third respondent's property, the brick wall was acting as a retaining wall for which, she considered, it was not designed.

19 The parties attended a mediation on 12 October 2012, when the claim was settled. The parties entered into signed terms of settlement (the "**first terms of settlement"**).

20 Paragraph 6.2 of the first terms of settlement states as follows:

> The [third respondent] agrees to not increase the existing ground levels adjacent to/against the front brick fence to [his] property by raising no higher than 400mm from the level of the applicant's existing ground level.

21 On 5 November 2012, the proceeding was struck out with a right of reinstatement.

22 The third respondent was resident in Oxford, England between June 2013 and January 2014.

23 In early June 2013, the applicant approached the relevant authority Bayside City Council (the "**Council**") to convey her concerns about the structural stability of the wall. The Council subsequently sent the applicant a letter requesting her to provide a structural engineer's report providing opinion on the structural stability of the wall.[2] She then wrote to the first respondent, requesting a copy of the required report. I find that her reason for doing so was because she considered the works undertaken by the first respondent had increased the loading on the wall (and indeed, had caused the wall to act as a retaining wall), resulting in the Council's need to enquire into the structural stability of the wall. Specifically, she alleged in her letter that original soil levels of a little over 300mm in depth had been increased by the works to 600mm or more.

24 On 25 July 2013, the applicant wrote to the Council, requesting that it send its request for a structural engineer's report to the third respondent, rather than to her. Again, this seems to have been motivated by her desire not to be responsible for engaging a structural engineer when, in her view, the need to do so had been brought about by the third respondent's works. Again, she alleged in her letter to the Council that original soil levels of 300mm had increased to 650mm or more.

25 By letter dated 20 August 2013, the Council wrote to the third respondent. It informed him that a "recent concern" had been raised with Council (which I find to be that of the applicant's) concerning the retaining wall. It stated that in order for the Council to consider what action, if any, should be taken, a structural engineer's report was required on the structural stability of the retaining wall and provided to the Council within 30 days.

26 On 28 August 2013, the third respondent requested Mr Ron Popper, Structural Engineer (the "**structural engineer**") to report on the structural integrity of the wall, and to recommend an appropriate course of action.

27 The structural engineer wrote to the third respondent by letter dated 30 August 2013 (the "**structural engineer's report**") as follows:

> **DESCRIPTION**
>
> The retaining wall is of single skin clay bricks and retains soil of up to 650mm above the [property of the applicant].
>
> **OBSERVATIONS**
>
> The retaining wall from the street to the garage formed part of a brick fence which has been demolished to ground level and has rotated north due to overturning moments caused by retained soil pressure.

[2] On 12 July 2013 the applicant sent a letter to the first respondent describing the Council's letter in these terms.

OPINION

- The brick fence and what remains was not designed as a retaining wall and consequently has rotated towards [lot 54] over the many years since its construction
- This retaining wall should be demolished and rebuilt as a retaining wall designed in accordance with engineering principles, however this retaining wall from the street to the garage is not likely to deteriorate significantly within the next 6 to 12 months so that it would remain safe during that period.

CONCLUSION

- The retaining wall has sufficient structural integrity at present but should be replaced within the next 6 to 12 months.

28 On 1 September 2013, the third respondent emailed a copy of the structural engineer's report to the Council. In the same email, the third respondent expressed his understanding (apparently from his discussions with the Council) that the applicant had also received a letter from the Council, seeking a structural engineer's report. On this basis, the third respondent concluded that the applicant was responsible for half the costs of the report. The applicant did not do so. For this reason, he later took the view that he was not obliged to provide a copy to the applicant.

29 The Council emailed the third respondent on 3 September 2013, noting the structural engineer's opinion that the retaining wall was not likely to deteriorate within the next 6-12 months, and concluding that, based on this opinion, Council would not be pursuing the matter further for the time being.

Applicant applies for reinstatement, following alleged breach of the first terms of settlement.

30 On 4 December 2013, the applicant applied to reinstate the proceeding on the grounds of alleged breaches by the respondents of the first terms of settlement.

31 The Tribunal fixed 7 February 2014 as the date for the hearing of the reinstatement application.

32 The applicant emailed the Tribunal on 9 January 2014 seeking a postponement of the hearing until the end of March. She said that she needed to "gather some more information". On the same day, she wrote to the Council seeking a copy of the structural engineer's report.

33 By letter to the parties dated 17 January 2014, and in response to the applicant's request, the Tribunal listed the reinstatement hearing for 28 March 2014.

34 By Freedom of Information request dated 31 January 2014, the applicant requested from the Council a copy of the structural engineer's report.

35 By letter dated 25 February 2014, the applicant requested the third respondent to provide her with a copy of the structural engineer's report.

36 The applicant emailed the Tribunal on 21 March 2014 seeking a further adjournment of the reinstatement hearing, writing:

> I wish to ask for a further postponement, as I am endeavouring to negotiate with the neighbours over the outstanding issues & I hope the need for another hearing may be avoided. There has been an agreement in principle, but nothing formally acknowledged or undertaken yet. Please may I ask for a gap of 2 months to hopefully resolve my concerns, before I cancel the opportunity at VCAT.

37 By email to the parties dated 25 March 2014, and acting on the information provided to it by the applicant, the Tribunal informed them that the reinstatement hearing scheduled for 28 March 2014 was adjourned, and that the matter was relisted for 23 May 2014.

38 The second and third respondents replied by emails dated 25 March 2014, objecting to the further adjournment, on the grounds that negotiations had proved fruitless, that they had now ceased, and that they wanted the matter to proceed to determination.

39 The correspondence from the second and third respondents was received by the Tribunal after the 28 March 2014 hearing had been vacated, and it was not possible to restore that date. The Tribunal therefore emailed the parties on 26 March 2014, bringing forward the date for the reinstatement application from 23 May 2014 to 1 April 2014, and a Notice of Hearing was sent by the Tribunal to the parties on the same date.

Settlement of the VCAT proceeding dated 1 April 2014.

40 On 1 April 2014 Senior Member Levine made the following Orders by consent:

> 1. The Applicant alleges that [the first terms of settlement] have been breached particularly in relation to clause 6.2.
> 2. The application is reinstated, and the parties entered into negotiations.
> 3. The application is struck out with a right of reinstatement
> 4. No order as to costs.

41 The settlement of the proceeding is evidenced by the Terms, signed by the parties on 1 April 2014. They were handwritten, and followed the negotiations referred to in Senior Member Levine's Orders.

The Terms

42 Given the challenges now made by the applicant to the enforceability of agreement, I now set out the Terms in full:

> VCAT matter Real Property List 1/4/2014
>
> W115/2012
>
> The Parties agree that this matter is to be withdrawn today (1-4-14) subject to the following resolution

1. Respondent 3 (the Owners of No 11 Louise Street Brighton will install an aggie drain approx. 7 mts in length to run from existing drain to the other aggie pipe at their expense.
2. The Applicant and Respondent 3 will obtain quotes for a timber sleeper retaining wall commencing at the garage to the bowed section (approx. 5-7 mts).

   Cost to be borne 50/50 by the parties.
3. A paling fence to be constructed atop the sleeper retaining Fence palings height are to be determined by allowing approx. 15 cm gap between the [Applicant's] carport board at the top of the fence subject to standard paling height (1800mm).

   Cost to be borne 50/50.
4. The boundary fence will be tapered towards the front as per standard setback (approx. 4-5 mts from front title).

   Cost to be borne 50/50.
5. Cost of items2-4 are to be met 50% by [the Applicant] and [the third respondent and] Jo Lajbcygler.

   This is in full and final settlement of all claims made by the Applicant.
6. The 3rd Respondent will arrange for an additional part board to be installed to the base of the existing retaining wall at the rear of the property to make it more aesthetically pleasing and closely match the existing board.

   (signed) Rosemary Clemens

   (signed) Paul Lajbcygler

   (signed) Diane Anderson Metricon.

   Witness:

   (signed) Roger Parish.

43 Roger Parish is the applicant's brother. He is a chemical engineer, who attended the negotiation at the invitation of the applicant, to provide her with support. He also took part in the discussions that day.

Events Subsequent to the Terms

44 On 22 April 2014, and pursuant to paragraphs 2 and 3 of the Terms, the third respondent provided two quotations to the applicant to remove and replace the retaining wall.[3]

45 On 1 June 2014, the applicant informed the third respondent by phone that she refused to pay for one half of the proposed costs of a retaining wall and fence.

[3] Alfie's Fencing, for demolition of the retaining wall and erection of a new retaining wall ($3,410 including GST) and for the erection of a fence ($1,496 including GST)
Davnic Excavations for erection of new retaining wall $6,940 plus GST

46 By letter dated 26 June 2014, the Council provided the applicant with the structural engineer's report, pursuant to the freedom of information request made by her.

47 The Council inspected the retaining wall on 17 July 2014. Someone at the Council informed the third respondent that the inspection was undertaken at the request of the applicant.

48 The third respondent emailed the applicant again on 21 July 2014, asking her to choose which of the quotations she preferred, and inviting her to obtain alternative quotes if she was not happy with either. He also invited her to seek clarification directly from the quoting contractors if there was any clarification that she required.

49 On 21 July 2014, the third respondent emailed the Council, expressing his concern that the applicant had been in touch with the Council requesting it to take some action in regard to the retaining wall. He informed the Council that proposed works in regard to a new retaining wall were the subject of the Terms, and provided a copy of the Terms to the Council.

50 The Council served a Building Notice on the third respondent on 17 July 2014.[4]

51 The Council subsequently issued a Building Order dated 11 September 2014, stating in part:

> demolish the existing brick retaining wall located adjacent (sic) northern side boundary and forward of the front wall of the adjoining property's garage and construct a new retaining wall

52 The Building Order was issued to both the applicant and the third respondent.[5]

53 The day by which the works have to be carried out has now been extended by the Council, to allow time for the respective obligations of the parties to be determined by the Tribunal.

54 On 18 September 2014, the third respondent re-served the quotations obtained earlier, to which there was no response.

55 On 26 September 2014, the applicant requested VCAT to reinstate the proceeding.

56 The applicant places great emphasis on the fact (which I so find) that she did not receive a copy of the structural engineer's report until 26 June 2014, some time after the Terms were entered into. She says that it supports her allegation that the third respondent should be responsible for paying the costs of a new retaining wall because, she submits, the report confirms that the wall presently retains soils "up to 650mm" when previously it retained soils of only 350mm in depth.

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4 Email dated 16 September 2014 from Council's Building Inspector to the third respondent, copied to Municipal Building Surveyor.

5 Email Council Building Surveyor to third respondent dated 7 January 2015.

Are the Terms void for uncertainty?

57 The Terms are an accord and satisfaction where, in exchange for the applicant withdrawing the proceeding and agreeing to make financial contribution towards certain described works, the third respondent agreed to do certain things, and also contribute towards the cost of the works.

58 The applicant submits that the Terms do not require the third respondent to obtain a building permit in order to construct the proposed wall. She submits that a building permit is required under the *Building Regulations*.

59 She also submits that there is nothing in the Terms that imposes an obligation on the third respondent to ensure that the proposed retaining wall is properly engineered, with all appropriate engineering certifications. Her apprehension about this issue appears to arise from her understanding that the third respondent did not obtain a building permit for a retaining wall built at the rear of their properties, pursuant to a separate arrangement between the parties.

60 These omissions, she submits, render the Terms unenforceable at law.

61 In *Cosmopolitan Hotel (Vic) v Crown Melbourne Ltd*[6] the Court of Appeal of the Supreme Court of Victoria recently summarised the guiding principles concerning whether a contract is so uncertain that it cannot be enforced, as follows:

> 127. Where parties believe that they have agreed, but what they have agreed upon is incapable of being given any definite meaning, there is no contract.[7] The explanations for this conclusion may vary. It might be said that the contract is too uncertain to be enforced or that essential terms have been left for further negotiation,[8] that the language is so obscure that the parties are unable to attribute to the parties any particular contractual intention,[9] or that in truth the parties never reached an agreement[10].
>
> 128. But a provision in a contract of which there is more than one possible meaning or which when construed can produce in its application more than one result is not thereby void for uncertainty.[11] As long as a provision is capable of a meaning, it will bear the meaning which the court decides is its proper construction.[12] Only if the language is so obscure that the court is unable to attribute to the parties any particular contractual

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6 [2014] VSCA 353, 22 December 2014.

7 *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251,254 (Viscount Simon LC) 257 (Viscount Maugham) 260-1 (Lord Russell of Killowen) 268-9 (Lord Wright) ("*Scammell*")

8 *Scammell* [1941] AC 251, 261 (Lord Russell of Killowen)

9 Ibid 268-9 (Lord Wright); *Larner v George Weston Foods Ltd* [2014] VSCA 62 at [178]

10 *Scammell* [1941] AC 251, 269 (Lord Wright)

11 *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429,436-7,441

12 Ibid 436-7.

> intention will the contract be void or uncertain or meaningless.[13] In the search for that intention, no narrow or pedantic approach is warranted, particularly in commercial arrangements.[14]
>
> 129. The law does not recognise as an enforceable contract an agreement to agree or negotiate a contract.[15] That is not to say that non-essential terms might not be left to be agreed or negotiated later,[16] or that the parties might not agree that certain essential matters are to be determined by some agreed method.[17]

62 Having regard to these principles, I have concluded that the Terms do not leave essential terms for further negotiation, such as to render the Terms void. Rather, the obligation to obtain a building permit in respect of the proposed retaining wall, is imposed upon the parties as an implied term of the contract. In other words, I consider that if indeed there is a legal requirement in the circumstances to obtain a building permit, the obligation to obtain one would "go without saying"[18]

63 Further, in my view the Terms contain all the elements necessary at law to create a legally binding agreement.

64 It follows that the applicant cannot be avoided the Terms, in reliance on the proposition that they failed to deal with an allegedly essential matter.

Were the negotiations on 1 April 2014 without prejudice?

65 I turn now to the allegations made by the applicant concerning duress. It is necessary for me, for reasons that follow, to consider whether the negotiations were without prejudice and, if so, whether this prevents them being put into evidence.

66 The "without prejudice rule" is a rule governing the admissibility of evidence. It is founded upon the public policy of encouraging litigants to settle their differences, rather than litigating them to the finish.

67 There are two bases underpinning the without prejudice rule: namely the public interest in promoting the settlement of disputes without calling in aid the Courts, and an express or implied agreement between the parties that such communications will be kept confidential.[19]

68 The negotiations between the parties were not conducted during the course of a mediation or compulsory conference within the meaning of the *Victorian Civil and Administrative Tribunal Act 1998* ("**the Act**"), and therefore their contents are not expressly protected from disclosure.

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13 Ibid 437.
14 Ibid 437.
15 *Van Hatzfeldt-Wildenburg v Alexander* [1912] 1 CH 284, 288-9 cited with approval in *Masters v Cameron* (1954) 91 CLR 353, 361-2 and *Godecke v Kirwan* (1973) 129 CLR 629,638-9.
16 *Niesmann v Collingridge* (1921) 29 CLR 177, 184-5 cited with approval in *Masters v Cameron*
17 *York Air Conditioning and Refrigeration (A/sia) Pty Ltd v Commonwealth* [1949] HCA 23 and other authorities referred to in footnote 148 to the decision.
18 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 26 at 283
19 *Pihaga Pty Ltd v Roche* [2011] FCA 240 at [86]

69 However, they were genuine negotiations between the parties with the intention of settling the proceeding brought by the applicant. This much is clear from Senior Member Levine's invitation to the parties, having reinstated the proceeding, to talk among themselves in an endeavour to resolve the dispute.

70 In these circumstances, the parties negotiated in an attempt to settle the dispute. Subject to certain exceptions,[20] they are subject to the privilege governing settlement negotiations, and are therefore not admissible in evidence.[21]

Is the content of without prejudice negotiations admissible for the purpose of determining whether the agreement may be avoided?

71 The applicant bases her allegations of duress not only on what took place prior to the negotiations on 1 April 2014, but what took place during them

72 It is therefore necessary for me, as a preliminary matter, to make some observations about the extent to which the content of the without prejudice negotiations is admissible. This is also relevant to the applicant's claims of misrepresentation, discussed below.

73 The privilege attaching to settlement negotiations is not absolute.

74 Therefore, the privilege does not extend to prevent communications from being admitted to show say, that an oral settlement agreement was actually reached[22] or to establish the terms of such an agreement.

75 The privilege cannot be used to circumvent section 18 of the *Australian Consumer Law (Victoria)*, and evidence can therefore be tendered of any alleged misleading or deceptive conduct, or a misrepresentation, that occurred in settlement negotiations.[23]

76 The Court of Appeal in *Pihaga* cited, with approval, the decision of *Unilever plc* stating that the without prejudice rule is not absolute, and admits of exceptions. In particular, the Court relied on a passage in the judgment of Lord Justice Robert Walker in *Unilever* as follows:

> Evidence of the [without prejudice negotiations] is also admissible to show that an agreement apparently concluded between the parties during negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.

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20 See section 131(2) *Evidence Act 2008 (Vic)*

21 See section 131(1)(a) *Evidence Act 2008 (Vic)*. See also *Unilever plc v Procter & Gamble Co* [2000] 1 WLR 2436 at 248-2449; *Rush & Tomkins Ltd v Greater London Council* (1989) 1 AC 1280 both cited with approval in *Pihaga* (ibid) [83]-[87].

22 *Intercom Group v Nakajima* [2005] VCAT 918 (per DP Aird), agreeing with DP Mckenzie in *Hart v Huna* [1999] VCAT 626.

23 At 2444-2445. See also *Oceanbulk Shipping and Trading SA* v TMT Asia Ltd 3 WLR 1424 at [31]; *Rush & Tomkins Ltd v Greater London Council* (1989) (supra) at 1300-1301*; Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd* (1990) 27 FCR 86 per Hill J; *Rosenbanner Pty Ltd v Energy Australia* (2009) 223 FCR 406 at 412 (per Ward J)

77 Section 131(1)(f) of the *Evidence Act 2008 (Victoria)* also provides, in effect, that evidence of settlement negotiations may be adduced in a proceeding (such as this one) where the making of a settlement agreement is in issue.

Duress

Events Prior to Negotiations on 1 April 2014

78 The applicant submits that the first and second respondents, by their emails dated 25 March 2014, sought to "manipulate" the proposed 23 May 2014 hearing date earlier set by the Tribunal and that, as a result, she felt "ambushed" when having to attend on 1 April 2014 to have her proceeding reinstated. She alleges that she was not then in possession of the structural engineer's report (having made an FOI Request on 31 January 2014), that she had asked for a postponement of the hearing for that reason, and that at the time she also had two elderly parents sick and in hospital, which diverted her from required preparation.

79 She submitted that the respondents' manipulation of the hearing date, combined with what took place during the negotiations (which I deal with below) was such as to amount to duress and, for that reason, the Terms should be set aside.

80 *Cheshire & Fifoot*[24] describes the elements of duress as follows:

1. The respondent has used a form of illegitimate pressure, physical, economic or psychological, in order to compel the applicant to assent to a transaction;
2. that pressure left the applicant with no reasonable alternative but to assent to the transaction;
3. the pressure in fact caused the applicant to assent to the transaction, or was a cause of the applicant assenting to it.

81 I find that there is nothing in the circumstances leading to the hearing on 1 April 2014, that amounts to the third respondent exercising pressure on the applicant, with the result that she was compelled to assent to the Terms. It was reasonably open to the respondents, I have concluded, to request that the directions hearing sought by the applicant should take place sooner than later, on the grounds of their conclusion that a further period being extended by the Tribunal for negotiations would waste further time.

82 I also consider that the applicant had a reasonable period to prepare herself for the 1 April 2014 hearing, following her being informed by the Tribunal on 26 March 2014 that the hearing would proceed on 1 April 2014, and not 23 May 2014, the date originally set by the Tribunal. Further, the applicant's letter dated 9 January 2014 did not make it clear that she was seeking an adjournment of the 7 February 2014 proposed directions date

[24] *Law of Contract* 10th Australian Edition at p 743

because she was seeking a copy of the structural engineer's report, simply that she was in the process of "gathering more information".

83 I find nothing in the circumstances leading to the negotiations on 1 April 2014 as to amount to duress, of the type characterised above, being exerted by the third respondent upon the applicant.

Negotiations on 1 April 2014

84 The applicant is aware that the negotiations on 1 April 2014 in a hearing room, and not being a compulsory conference, were recorded by the Tribunal. She has called for the recording.

85 Having regard to the authorities discussed above, I have reviewed the audiotape, in order to determine whether there is any evidence of the applicant signing the Terms under duress.

86 The applicant submits that she had no time to receive any "expert advice", and that during the negotiations she felt "ambushed and confronted with haggling and personal attacks made by the third respondent and his wife". Her brother Mr Roger Parish, a chemical engineer, who accompanied her at all times during the negotiation, also alleges that the applicant suffered personal jibes "about her ex-partner". He alleges that it got to a stage when the representative of the first respondent had to ask them to stop.

87 I am not persuaded, from listening to the audiotape, that there is any evidence of behaviour of this sort, and certainly none that amounts in law to duress, having the effect of compelling the applicant to sign the Terms.

88 The negotiations were in all respects facilitated by the assistance of Mr Parish. They were plainly driven by a desire on the part of all parties to avoid the cost and expense of prolonging a dispute in relation to the applicant's requirements. In particular, the general content of the discussions was as follows:[25]

- The cost of a retaining wall
- addressing the applicant's desire to have an agricultural drain installed;
- the desire by the respondents for the proposed arrangement to be in settlement of all disputes;
- the applicant's reluctance to pay for such drainage as may be required;
- the applicant's requirements for a drain;
- the applicant's reluctance to agree to share the cost of a sleeper retaining wall;
- the applicant's agreement to wooden sleeper retaining wall;
- the third respondent's offer to obtain quotes;
- the extra cost of concrete sleepers instead of wooden sleepers;
- an agreement that the retaining wall and the drain had been resolved;

[25] from audiotape time 1:07 to 1:38

- the applicant's concerns about the rear retaining wall (and her desire for a board at the back);
- the applicant's assertion that the third respondent is responsible for building a retaining wall at the front;
- the parties' agreement to construct a paling fence atop the retaining wall, at shared cost;
- an offer by the third respondent to construct the drainage, and to share the cost of the retaining wall and fence and the drainage;
- the applicant's objection to pay half the drainage; and
- the subsequent agreement of the third respondent to pay for drainage, and for the parties to share jointly the cost of the retaining wall and fence.

89 I find that there was nothing in the discussions from which I can conclude that the third respondent procured the applicant's signature by duress. There is also nothing to indicate that the applicant expressed any discomfort about not receiving a copy of the structural engineer's report, for which she had made an FOI application. It appears that she also made a decision to proceed with the settlement, knowing that the soil levels had been increased by the works.[26]

90 The applicant is, in my opinion, a sensible, intelligent woman, who, if she wanted to secure an outcome other than what is evidenced by the Terms, could have done so.

91 By a statutory declaration signed 9 February 2015,[27] the applicant also alleged that she was "coerced into signing the Terms by my brother [Mr Parish] wanting to broker a resolution." The applicant also states in her email dated 5 February 2015 to the Tribunal that:

> My brother acknowledged he coerced me to sign an agreement in the circumstances, just to achieve an agreement and try to close the issue. I was very reluctant to do this, and I asked my brother 3 times to step outside the room for further discussions, but he refused to go!

92 In other words, the applicant also submits that she has a right to have the Terms set aside, not only because the third respondent coerced her, but because as she now alleges, her own advisor also did so.

93 When given the opportunity to corroborate these remarks, by a statutory declaration made 9 February 2015,[28] Mr Parish says:

> My sister asked me to step out of the room to discuss these matters. But I refused as I wanted to stay and broker an agreement and gain a resolution, fearing that this would never end.

94 There is no evidence on the audiotape of the applicant suffering any form of coercion by her brother, as also alleged. Rather, the transcript reflects Mr

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[26] See the applicant's correspondence in June and July 2013, referred to above.
[27] Filed after the hearing, with leave.
[28] Also filed after the hearing, with leave.

Parish's commendable desire to harness the considerable ill-will among the parties attending the negotiations, and to address professionally the issues one by one, with the result that the Terms were signed.

95 I also do not accept the applicant's contention that her choosing not to engage legal representation on the day put her at any disadvantage, (she chose instead to seek the assistance of her brother, Mr Parish). Having resolved to rely on the experience of her brother, it now ill behoves her to submit that this choice put her at a disadvantage.

96 In summary, I find nothing in the content of the negotiations on 1 April 2014 that amounts to duress being exerted by the third respondent, or the applicant's brother, as would entitled the applicant to avoid the Terms.

Undue influence or unconscionable conduct by the respondents?

97 For completeness, and having regard to the breadth of the second question that I am required to determine, I have also considered whether the facts give rise to a right of the applicant to avoid the Terms for undue influence or unconscionable conduct by the third respondent.

98 I have concluded that there is no evidence that either the third respondent or Mr Parish were, by their respective positions, exerted an influence over the applicant which prevented her from exercising her own independent judgment in the matter in question.[29]. There is also no evidence that the nature of Mr Parish's influence as a brother of the applicant had any special influence over the applicant during the negotiations. I therefore conclude that there was no undue influence affecting the applicant, and that the Terms cannot be avoided on this basis.

99 I also find no evidence of the third respondent having engaged in unconscionable conduct during the negotiations, that is to say, having taken unconscientious advantage of any peculiar inability of the applicant to conserve her best interests in the matter in question.[30]

100 In summary, I find that there was no conduct on the part of the third respondent or that of Mr Parish, that resulted in undue influence or unconscionability affecting the Terms, as would now entitle the applicant to have them avoided.

Misrepresentation

101 The applicant claims that she is entitled to rescind the Terms on the basis of an alleged misrepresentation of the third respondent, allegedly causing her to enter into the Terms.

102 A representation is a statement by one party to the other, before or at the time of contracting, about some existing state of affairs or past event, which

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29 See *Cheshire & Fifoot* 10th Australian edition paragraph 14.2, and see also *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 at 720

30 See *Cheshire & Fifoot* 10th Australian edition paragraphs 15.3-15.11

is one of the factors that induced the representee to enter the contract.[31] A misrepresentation is a representation that is not true. A misrepresentation provides no ground for relief unless it induced the contract. In this case, the alleged misrepresentation must have produced a misunderstanding in the mind of the applicant, and that misunderstanding must have been one of the reasons that induced her to enter into the Terms.[32]

Was the representation made as alleged?

103 During the hearing, the applicant gave evidence that the representation on which she relied was that of the third respondent, to the following effect:

> "The wall does not need to be rebuilt [as a result of my works], and therefore I'm not paying for one. I won't agree to do it unless you pay half."

104 The third respondent denies making this representation.

105 In her written submission dated 15 December 2012 she describes the alleged representation of the third respondent in this way:

> "I do **not consider that** anything needs to be done about the side brick wall being used as a retaining wall, and I am not prepared to do anything about it unless you pay half."

106 This alleged representation is considerably less emphatic than the form of words that the applicant alleged during the hearing were used by the third respondent.

107 Again, in her statutory declaration made 9 February 2015, she states that the third respondent "deliberately misrepresented the crucial findings of [the] critical [engineer's report]".

108 Mr Parish, when provided with an opportunity to corroborate the making of this representation, chose to state in a statutory declaration made 9 February 2015:

> "the third respondent said that the soil level next to the side brick wall had not been raised, **inferring** that he had kept to the agreement and the wall did not need to be rebuilt (**emphasis added**)."

109 Making a statement from which an alleged representation can be inferred, as opposed to a representation that is alleged to have been expressly made, are two very different things.

Was there any other conduct of the third respondent that, together with his alleged statement, supported the alleged representation?

110 The applicant submits that the alleged misrepresentation was compounded by the third respondent's refusal to provide her with as copy of the structural engineer's report. She says that had he provided her with a copy of the structural engineer's report, she would have realised that a new

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31 *Cheshire & Fifoot* paragraph 11.9

32 *Cheshire & Fifoot* paragraph 11.32

retaining wall was required to be built, as a direct consequence of the works undertaken by the third respondent. Her evidence was as follows:

> "I asked 'May I have a copy [of the structural engineer's report]?' The third respondent 'said nothing'."

111 The applicant states in her email to the Tribunal dated 5 February 2015 that her brother Mr Parish "recalls clearly that [she] asked for the pivotal Structural Engineer's report from the third respondent", and that the third respondent was not forthcoming".

112 Mr Parish says in his Statutory Declaration that :

> "The applicant requested the report from the third respondent on the day, but the third respondent did not provide it"

113 He also states in his statutory declaration that the applicant requested a further postponement of the hearing so she could get a response to her FOI request. Whilst this may have been the case, I find that she gave no indication to the Tribunal, in her correspondence, as to the type of information she was seeking.

114 The applicant also wrote in her email to the Tribunal dated 5 February 2015 that she said to the third respondent , in effect:

> "why can you not give us this report"?

115 This is a different request than the one related during her evidence, for it suggests a follow up question by the applicant, it having previously been made clear by the third respondent that he will not provide a copy.

116 Again, Mr Parish's statutory declaration does not assist on whether this statement was said. He just says that she asked for a copy.

117 The third respondent denies being asked for a copy of the report, and being non-responsive.

118 I have reviewed the transcript, the relevant parts of which are as follows:

Applicant:	If you've got a raised area and no drainage conditions it's going to put pressure on it and we had a report that was supplied last time recommending some relieving of the hydrostatic pressure and actually with or in the wall and I think your structural engineer's report or opinion states they cannot guarantee the safety of the wall beyond 12 months…
Mr Parish:	Let's get the thing finished. So if we get the 7 metres of drain from where the other one terminates and extend it to the front, how far it needs to go, right? The next, the retaining wall, or the wall near the, which is bowing, what are we going to do about that? Do we need to replace al of it, or do we just need to replace the bit that's bowing, or what…
Applicant:	What did the structural engineer's report say?
Third respondent:	The engineer's report says it was fine basically.

Mr Parish: Well it's bowing, its not going to be fine. It'll fall to bits in a couple of years. Time, So we can just get it sorted out.

Third respondent: I'm with you Roger

Mr Parish: The retaining wall is the sticking point now. Because its going to fall over. So what are we going to do about that? We just put a, want to put a sleeper in.

Applicant: I'm not liable when it falls over

Mr Parish Rosemary, it doesn't matter. It's going to fall over.

119 I find that the applicant did not request a copy of the report from the third respondent. Rather, she asked him what the report said.

120 I also find that although the third respondent said in response that the wall was "fine basically", he readily acceded to the suggestion of Mr Parish that the wall "would fall to bits in a couple of years time".

121 I have found no evidence, in my review of the audiotape, that the third respondent either said or inferred, as alleged by the applicant, that it was not necessary to construct a proper retaining wall, and therefore he would not build one other than on terms that the applicant pay half.

If the representation was made, was it untrue?

122 The applicant says that upon receiving the structural engineer's report, she realised that this representation was not true. Of the report, she says:

> "Upon receiving the structural engineer's report, it vindicated everything that I had said-that indeed the wall did need to be rebuilt, and it was being relied on as a retaining wall, while not having been built as a retaining wall"

123 The applicant says that had she known this, she would never have entered into the Terms. She would say that the effect of the structural engineer's report is that a new wall needed to be constructed because of the building works themselves. This being the case, she submits, she would not have moved from her position of requiring the third respondent to pay all the costs of the retaining wall.

124 The third respondent denies that the report provides any such vindication. It states that it retains soil of up to 650 mm-the applicant knew this, as she had undertaken her own measurements for the purpose of the letters to which I have referred when she alleged the depth of soil build up. He says that it confirms that it has rotated towards the applicant's property over the many years since its construction, and that the reason for its replacement would be to ensure that it is rebuilt generally in accordance with modern engineering principles, rather than because of his works.

125 It was well accepted by the parties, during their negotiations, that the wall would need to be replaced at some future date.

126 I have also concluded that even if the third respondent had stated that the wall did not need to be replaced, it may arguably have been a correct statement on 1 April 2014. This is because the 6-12 month period of time that the structural engineer's report indicates could transpire before a new wall was constructed, had not expired.

127 I therefore do not accept that even if the applicant could prove the making of the alleged representation, the terms of the structural engineer's report make it clear that it was a misrepresentation. I consider that the structural engineer's report may be construed as no more than a statement that the wall would, in any event, be required to be replaced, due to its age and given that it was built at a time when it was not in accordance with contemporary engineering principles

128 If there was a representation as contended by the applicant, and if it was untrue (neither of which I have found), there is also another hurdle facing the applicant. That is, whether in all the circumstances, it can reasonably be concluded that she relied on the representation when entering into the Terms. As I have indicated above, there is ample room for the finding that the applicant wished to enter the Terms as a matter of commercial pragmatism, that she chose to do so without having then received the structural engineer's report requested by her of the Council, and not having given any relevant consideration to whether the third respondent may otherwise have been liable to pay for the proposed works.

129 I determine that the answers to the two questions referred to me is "no". I make declaratory orders that follow from these answers.

MEMBER A. KINCAID