Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Taouk v Ho [2019] NSWCA 156**
Hearing dates:	4 June 2019
Decision date:	27 June 2019
Before:	Gleeson JA at [1] Emmett AJA at [59]
Decision:	Summons seeking leave to appeal is dismissed with costs.
Catchwords:	APPEAL – leave to appeal – building and construction dispute – appeal from Local Court to Supreme Court on a question of law – primary judge found that respondent not bound by releases and bars to action in the settlement deed – where deed delivered to applicant's solicitors – where applicant disclaimed deed without executing it – whether injustice to applicant in refusing leave to appeal
Legislation Cited:	Local Court Act 2007 (NSW), ss 39(1), 40(2)(c) Supreme Court Act 1970 (NSW), s 101(2)(r) Uniform Civil Procedure Rules 2005 (NSW), rr 42.1, 50.11
Cases Cited:	Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps [1985] VR 70 Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd (1986) 40 NSWLR 622 Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164 Beesly v Hallwood Estates Limited [1961] Ch 105 Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd [2017] NSWCA 184 Federal Commissioner of Taxation v Taylor (1929) 42 CLR 80 G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631 Jaycar Pty Ltd v Lombardo [2011] NSWCA 284 Mallot v Wilson [1903] 2 Ch 494 Masters v Cameron (1954) 91 CLR 353; [1954] HCA 72 Mirzikinian v Tom & Bill Waterhouse Pty Ltd [2009] NSWCA 296 Monarch Petroleum NL v Citco Australia Petroleum Ltd

[1986] WAR 310
Naas (Lady) v Westminster Bank Ltd [1940] AC 366
Re Paradise Motor Co Ltd [1968] 2 All ER 625; [1968] 1 WLR 1125
Secretary, Department of Family and Community Services v Smith (2017) 95 NSWLR 597; [2017] NSWCA 206
Segboer v A J Richardson Properties Pty Ltd [2012] NSWCA 253
Sinclair, Scott & Co v Naughton (1929) 43 CLR 310; [1929] HCA 34
Smeaton Grange Holdings Pty Ltd v Chief Commissioner of State Revenue [2016] NSWSC 1594
Wilson v Frost [1935] 35 SR (NSW) 521

Category: Principal judgment

Parties: Joseph Taouk (Applicant)
Yuen Min Ho (Respondent)

Representation: Counsel:
Mr I G Roberts SC / Mr R Wathukarage (Applicant)
Mr R Freeman (Respondent)

Solicitors:
Gardner Ekes Lawyers (Applicant)
Scarfone & Co Solicitors (Respondent)

File Number(s): 2018/393487

Decision under appeal **Court or tribunal:** Supreme Court of New South Wales

Jurisdiction: Civil

Citation: [2018] NSWSC 1854

Date of Decision: 6 December 2018

Before: Johnson J

File Number(s): 2018/110582

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **GLEESON JA:** Application is made by Mr Joseph Taouk for leave to appeal against orders made by Johnson J on 6 December 2018 dismissing with costs an appeal from a decision in the Local Court on 12 March 2018 in favour of Yuen Min Ho (Ms Ho):

Taouk v Ho [2018] NSWSC 1854 (the Principal Judgment). On 14 December 2018, Johnson J made an order that Mr Taouk pay Ms Ho's costs of the proceedings in the Supreme Court on an indemnity basis: *Taouk v Ho (No 2)* [2018] NSWSC 1942.

2 In the Local Court, a Magistrate gave judgment in favour of Ms Ho against Edifice Australia Pty Ltd (Edifice) and Mr Taouk in the sum of $81,914.32 inclusive of interest, and ordered that Edifice and Mr Taouk pay Ms Ho's costs up to 2 October 2017 on the ordinary basis and from 3 October 2017 on an indemnity basis.

3 Leave to appeal is required because the matter in issue does not amount to or exceed $100,000: *Supreme Court Act 1970* (NSW), s 101(2)(r).

4 For the reasons that follow, leave to appeal should be refused and an order made that the summons seeking leave to appeal filed 6 March 2019 be dismissed with costs.

Background

5 The materials provided to the Court on the application for leave to appeal were deficient. The materials did not include the pleadings or transcript or the Magistrate's reasons for judgment (in full) in the Local Court, or the amended summons and submissions of the parties on the appeal to the Supreme Court. The following narrative is taken from the summary by the primary judge, which was stated to be drawn from material before the Magistrate. The primary judge emphasised that he was not purporting to make findings of fact, but to recite what was largely common ground between the parties: Principal Judgment [17].

6 In March 2016, Ms Ho entered into an agreement with a different Joseph Taouk who traded as CanBuild Projects (CanBuild) to carry out residential work on her land at South Strathfield. CanBuild was not licensed to carry out such work and was unable to obtain home owners' warranty insurance. Mr Taouk, the applicant in this proceeding, and sole director and shareholder of Edifice, a licensed builder, was a relative of Mr Taouk of CanBuild. It seems that CanBuild engaged Edifice to "partner" with it to undertake the building work for Ms Ho.

7 Ms Ho alleged that Mr Taouk, of Edifice, represented to her that Edifice would carry out the work and obtain the necessary insurance for such work; that the same Mr Taouk procured Edifice's insurer to issue a certificate directly to Ms Ho naming Edifice as the builder under Edifice's licence; and that in reliance upon the conduct of and representations made by Mr Taouk regarding the insurance, she paid CanBuild $75,000 in respect of work which was said to be both defective and incomplete.

8 A dispute ensued in relation to the building work. Ms Ho commenced proceedings in the Consumer and Commercial Division of NCAT against CanBuild, Edifice and Mr Taouk claiming an amount of $75,000 plus costs.

9 The dispute was the subject of settlement correspondence which culminated in a letter dated 19 December 2016 from Gardner Ekes, the solicitors for Mr Taouk and Edifice to the solicitors for Ms Ho accepting her offer to settle the matter on the basis of payment

of the sum of $65,000 plus costs which were estimated at approximately $8,000 inclusive of GST and disbursements (the December agreement). In the Gardner Ekes letter, it was stated that the amount of $73,000 "will be paid on or before 28 February 2016". It is common ground that the reference to "2016" was a typographical error and should have read "2017". The letter continued:

> We will provide a draft deed of settlement and release to your office by close of business Tuesday, 20 December 2016.
>
> Our client otherwise reserves its rights and should you have any questions in relation to the above, please contact the writer.

10 Thereafter, a draft deed of settlement and release was prepared by Gardner Ekes and submitted to Scarfone & Co, the solicitors for Ms Ho. Following negotiations between the solicitors of some minor amendments to the deed, Ms Ho executed the deed and it was returned by Scarfone & Co to Gardner Ekes under cover of a letter dated 2 February 2017 which stated:

> We refer to correspondence in this matter and enclose herein duly executed Deed of Settlement and Release by our client.
>
> Please forward to us your client's executed counterpart.

11 It is common ground that the deed was never executed by either Edifice or Mr Taouk. The refusal by those parties to execute the deed was first communicated by Ms Rothwell, a solicitor from Gardner Ekes, to Mr Scarfone in a telephone conversation on 3 March 2017. Ms Rothwell told Mr Scarfone that her "client refuses to pay and wants nothing to do with it". In an affidavit by Mr Taouk sworn on 23 August 2017 in the Local Court proceedings, he deposed at par 5:

> In this matter settlement offers were made between the parties but I ultimately refused to sign a Deed of Settlement because I wanted to have my day in court. I say I do not owe Ms Ho any money. I am not going to pay personally for her building works. My lawyers advise me that this is an unjust enrichment to her.

12 That remained the position at the time of the hearing of the Local Court proceedings on 12 March 2018.

The deed

13 The deed as executed by Ms Ho was expressed to be between Edifice and Mr Taouk (of Edifice) on the one hand and Ms Ho on the other hand.

14 Clause 2.1 of the deed provided:

> Edifice Australia shall pay to Ms Ho the settlement amount in full and final settlement of Ms Ho's claim.

15 The Settlement Amount defined in cl 1.1 as $73,000 was required by cl 2.2 to be paid by lump sum on or before 28 February 2017. The terms "Ms Ho's Claims" and "Claims" were defined in cl 1.1 of the deed:

> "Ms Ho's Claims" means all Claims which Ms Ho has or, but for this Deed, might have had against Edifice Australia or Mr Taouk in connection with or arising out of the Building Works provided by Canbuild Projects, other than claims expressly arising under this Deed.

> "Claims" means any claim, cost, damage, debt, expense, liability, loss, allegation, suit, action, demand, cause of action or proceeding of any kind, whether at law or in equity or arising by virtue of any statute, whether present, future or contingent, which a party now has or but for the execution of this Deed, could or may have had.

16 Clauses 3.1 and 3.2 of the deed provided for mutual releases and bars to action:

> 3.1 Upon receipt of payment of the Settlement Amount, Ms Ho will release and relinquish any and all claims based upon the same or similar set of facts against Edifice Australia and Mr Taouk.
>
> 3.2 Upon receipt of payment of the Settlement Amount, Ms Ho will relinquish any and all claims based upon the same or similar, set of facts, against any parties, including Joseph Taouk trading as Canbuild Projects, whether or not, noted in this deed or a party to this deed.

17 Clause 8 of the deed provided for an entire agreement clause:

> Each Party represents to and agrees with each other Party that:
>
> 8.1 this Deed sets out the entire arrangement between the Parties in respect of the subject matter of this Deed; and
>
> 8.2 without limiting the generality of Clause 8.1, any promise or representation relied upon by that Party in deciding whether or not to enter into this Deed is fully and accurately reflected in this Deed and the settlements and releases contained in it.

18 Clause 10 of the deed provided for counterparts:

> This Deed may be executed in such counterparts as may be deemed necessary or convenient and all such counterparts taken together shall be deemed to constitute one and the same document.

NCAT proceedings

19 On 12 April 2017 the proceedings before NCAT were dismissed on the ground that the parties had settled the dispute by the terms of the 19 December 2016 correspondence and hence NCAT did not have jurisdiction to determine any dispute. An order was made that Edifice and Mr Taouk pay Ms Ho's costs of and incidental to the hearing on 12 April 2017 in the gross sum of $4,500, such costs to be paid no later than 26 April 2017.

Proceedings in the Local Court

20 Ms Ho then commenced proceedings against Mr Taouk and Edifice in the Local Court to recover the amount of $73,000 plus the costs ordered by NCAT of $4,500, together with interest and the costs of the Local Court proceedings. It is common ground that the action by Ms Ho was brought on the December agreement (**AT4 (26-27)**). On 12 March 2018, Magistrate Milledge gave *ex tempore* reasons for giving judgment in favour of Ms Ho for $81,914.32 inclusive of interest and making the costs order indicated at [2] above.

21 The material reasons of the Magistrate are set out in the decision of the primary judge: at Principal Judgment [61]-[62]. It is of assistance to set out the following extract of the Magistrate's reasons:

> I find that this deed - was it intended to be binding; yes, it was. A deed is not an agreement, a deed is a deed and it is intended for the purpose of the deed for the intention - it is an express intention, to be immediately bound by those terms and this is what the deed is, and of course this deed first came from the defendant. The

> defendant's express provision at pt 3.1, it says that if they accept the money from Edifice, well, then, if they accept that and the money is paid by a certain date, well, then, Ms Ho is going to relinquish any action against Edifice Australia and Mr Taouk.
>
> That was not done so the action against Mr Taouk I find is absolutely alive and well and that the letters that were before Member Meadows at NCAT clearly set out an intention for the parties to enter into negotiations. In fact, when nothing was heard from Ms Ho, Mr Ekes pursued it even more and offered more money and then, of course, got a response. The other thing that says in the deed and again, this is the deed prepared by the defendant under definitions. I suppose this is pretty standard. 'In this deed, unless the context requires another meaning' - no, there was something about the singular meaning and the plural and I just cannot find that. Under the definition it says Ms Ho's claims means 'all claims which Ms Ho has or, but for this deed, might have had against Edifice Australia or Mr Taouk in connection with or arising out of the building works provided by Canbuild Projects'.
>
> Then again Mr Taouk is mentioned in that deed so there was one other part of it there that I wanted to mention but I cannot find it in a hurry, but anyway it does not determine the outcome.
>
> I MAKE THIS FINDING, THAT MR MEADOWS AT THE TRIBUNAL HAD DISMISSED THE MATTER ON THE BASIS THAT MR TAOUK AND EDIFICE'S SOLICITOR, MR EKES, WAS ENTERING INTO NEGOTIATIONS WITH MS HO, THAT IT WAS AGREED THAT MS HO WOULD ACCEPT THE MONEY FROM EDIFICE IN FULL SATISFACTION OF THE CLAIM AND THAT WHEN THAT WAS DONE THAT WAS GOING TO RELEASE ANY JOINT RESPONSIBILITY OF THE OTHER DEFENDANT, MR TAOUK, THE DIRECTOR, THAT MONEY WAS NOT PAID.
>
> I FIND THAT THE CLAIM AGAINST MR TAOUK IS - WE REVERT BACK NOW TO THE TERMS OF SETTLEMENT THAT WERE BEFORE MEMBER MEADOWS AT NCAT AND IT IS APPROPRIATE THAT THIS COURT MAKE ORDERS IN ACCORDANCE WITH THOSE TERMS. I PROPOSE ALSO TO EMBRACE IN THE ORDER THE ISSUE OF THE $4,500 COSTS THAT THE SENIOR TRIBUNAL MEMBER MADE AGAINST THE DEFENDANT ON THAT DAY.
>
> THIS IS A MATTER THAT SHOULD HAVE BEEN RESOLVED LONG BEFORE THIS AND I CANNOT SEE THE MERIT IN THE DEFENCE OR THE POSITION THAT THE DEFENDANTS HAVE TAKEN IN RELATION TO SETTLING THIS MATTER. IT SHOULD NEVER HAVE BEEN BEFORE THIS COURT.
>
> This is why I ask you how I formally express it. I simply just enter judgment for the plaintiff?
>
> FREEMAN: Yes, for the amount claimed in the statement of claim which includes that 4,500.
>
> HER HONOUR: That makes it 77,500."

The appeal to the Supreme Court

22 Mr Taouk appealed from the Local Court judgment on a question of law: *Local Court Act 2007* (NSW), s 39(1). Edifice did not appeal. It seems that Edifice had been placed in liquidation, although the precise date is not revealed by the materials on this application.

23 In his amended summons filed on 9 April 2018, Mr Taouk asserted six errors of law by the Magistrate, five challenging the money judgment and one challenging the costs order. As to the costs order, leave to appeal was also required: *Local Court Act*, s 40(2)(c).

24 Before the primary judge, Mr Taouk accepted that NCAT was correct in finding that the matter had settled in December 2016. His written submissions (par 19) stated:

> Mr Taouk accepts that NCAT was correct in holding that the matter had settled, and the proceedings should have been dismissed.

25 The primary judge was satisfied that both NCAT and the Local Court found that there was an agreement between Edifice, Mr Taouk, and Ms Ho to settle the NCAT proceedings in the sum of $73,000 (inclusive of costs), with that sum to be paid on or before 28 February 2017: at Principal Judgment [84].

26 The primary judge rejected Mr Taouk's argument that Ms Ho was bound by the deed, giving the following reasons at Principal Judgment [86]:

> I am not persuaded that anything said in *Mirzikinian v Tom & Bill Waterhouse Pty Limited* or *Australian and New Zealand Banking Group Limited v Frost Holdings Pty Limited* supports Mr Taouk's argument that the Deed became the operative contract for the purpose of the settlement. It is necessary to consider the facts of this particular case to understand the conclusions reached in NCAT and the Local Court in this respect. The conclusion reached in each of NCAT and the Local Court was that there was a concluded settlement agreement in the correspondence as at 19 December 2016, and that what occurred thereafter with the Deed did not overtake or replace that agreement. No error is demonstrated in this reasoning, let alone an error on a question of law.

27 The primary judge then addressed each of the six grounds of appeal advanced by Mr Taouk and gave brief reasons for rejecting each ground. Reference should be made to ground 3, which raised the single issue relied upon in Mr Taouk's summary of argument in this Court.

28 Ground 3 of the amended summons contended:

> The [Local Court] made an error of law in finding that because Edifice did not pay the agreed sum pursuant to the Deed:
>
> (a) The parties were bound by the negotiations that pre-dated the Deed; and
>
> (b) That the claim against the plaintiff 'reverts' to the terms of settlement that were considered by the NSW Civil & Administrative Tribunal in deciding whether to dismiss the proceedings before it;
>
> And further misconstrued the effect of both the pre-contractual negotiations and the NCAT Reasons by finding that they required the plaintiff to pay money: Principle Judgment [5].

29 As to this ground, the primary judge found at [90] of the Principal Judgment:

> Mr Taouk's Ground 3 is also misconceived in that it does not characterise accurately what was found by Senior Member Meadows in NCAT or Magistrate Milledge in the Local Court. The factual components of this ground are misplaced and certainly no error on a question of law is demonstrated.

30 Senior counsel for Mr Taouk accepted in this Court that only ground 3(a) was relevant to the present application.

31 Reference should also be made to ground 2, which is relevant to Ms Ho's response in opposition to the present application. Ground 2 of the amended summons contended:

> The [Local Court] made an error of law in finding that the plaintiff repudiated the Deed because Edifice Australia Pty Ltd (the first defendant in the proceedings below) did not pay the agreed sum.

32 As to this ground, the primary judge found at [89] of the Principal Judgment:

> Mr Taouk's Ground 2 again misconceives what occurred in the Local Court. Her Honour did not make a finding that Mr Taouk, in some way, repudiated the Deed because Edifice did not pay the agreed sum. Rather, her Honour concluded that after the concluded settlement agreement was reached on 19 December 2016, what occurred

with the Deed in truth went nowhere, because Mr Taouk and Edifice flatly refused to make payments at all to Ms Ho and that this was the position in March 2018 at the time of the hearing in the Local Court. Once again, the finding made was open to her Honour and no error on a question of law is demonstrated in that respect.

Issues on proposed appeal

33 Mr Taouk's written summary of argument referred to a single ground: that the primary judge erred at [86] of the Principal Judgment in construing the deed as not being the operative contract for the purpose of the settlement given the entire agreement provision in cl 8 of the deed. This ground was directed to challenging the primary judge's rejection of ground 3(a) of the amended summons.

The parties' arguments

34 Senior counsel for Mr Taouk properly accepted that (a) the release and barring of claims in cls 3.1 and 3.2 of the deed was an executory promise by Ms Ho, which was conditional upon receipt by Ms Ho of the Settlement Amount; (b) payment of the sum of $73,000 was never made by Edifice to Ms Ho as required by cl 2.1 of the deed, or at all; and (c) Mr Taouk could not rely upon cl 3.1, either as a release of Ms Ho's claim or a plea in bar of her claim in the Local Court.

35 Nevertheless, Mr Taouk submitted that:

(1) Ms Ho executed and delivered the deed unconditionally, and was bound by it, even though the counterpart deed was not executed and delivered by Edifice and Mr Taouk. Having delivered the deed unconditionally, Ms Ho could not withdraw the deed or recall it. Reference was made to *Naas (Lady) v Westminster Bank Ltd* [1940] AC 366 at 374-375, 389 and 403; *Federal Commissioner of Taxation v Taylor* (1929) 24 CLR 80 at 87; and *Mirzikinian v Tom & Bill Waterhouse Pty Ltd* [2009] NSWCA 296 at [43], [51]-[53];

(2) the deed superseded the December agreement, given that cl 8.1 provided that the deed sets out the entire agreement of the parties in respect of the subject matter of the deed;

(3) Ms Ho's only rights under the deed to receive the Settlement Amount were against Edifice, as the sole party named by the deed as liable to pay the Settlement Amount;

(4) the combined effect of cl 2.1 (the payment obligation by Edifice) and cl 8 (the entire agreement clause) of the deed is that Ms Ho agreed to accept the payment of $73,000 from Edifice only, and not to seek any payment from Mr Taouk.

36 Ms Ho relied upon two main arguments in seeking to uphold the primary judge's decision.

37 First, that the deed executed by Ms Ho was not delivered unconditionally, this being a contention which it was said had been raised by Ms Ho before the primary judge in a notice of contention: Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 50.11.

38 According to the submission, Ms Ho's solicitors delivered the deed to the solicitors for Mr Taouk and Edifice on the express basis that those solicitors would return the counterpart executed by Edifice and Mr Taouk. The submission continued, that the

surrounding circumstances indicated that Ms Ho did not intend the deed "to be finally executed" and immediately binding on her until she received the executed counterpart. Reference was made to the counterparts provision in cl 10 of the deed, the second sentence of the solicitor's covering letter which is set out at [10] above, and the circumstance that the deed was to replace the existing joint obligation of Edifice and Mr Taouk to pay $73,000 to Ms Ho with an obligation by Edifice only to pay $73,000 under a deed, but Edifice had not in fact executed and delivered the counterpart deed.

39 Second, that the conduct of both Mr Taouk and Edifice in refusing to accept the deed in March 2017 amounted to a disclaimer of the deed, and the deed is not binding on Ms Ho.

Disposition of application

40 Only if the decision is attended with sufficient doubt to warrant its reconsideration on appeal will leave be granted. Ordinarily, leave will only be granted concerning matters involving issues of principle, questions of general public importance or involving an injustice which is reasonably clear, in the sense of being more than merely arguable: *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46]; *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 (*Be Financial*) at [32]; *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [28].

41 The proposed appeal does not raise any question of principle or matter of public importance. Nor has Mr Taouk demonstrated any injustice which is reasonably clear, in the sense of going beyond a merely arguable error.

42 In the present case, the December agreement falls within the so-called fourth category of *Masters v Cameron* (1954) 91 CLR 353; [1954] HCA 72, as originally described by Knox CJ, Rich and Dixon JJ in *Sinclair, Scott & Co v Naughton* (1929) 43 CLR 310; [1929] HCA 34 at 317:

> … one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms.

See also *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, which affirmed the decision of McLelland J (as his Honour then was) in *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd* (1986) 40 NSWLR 622 at 628E.

43 Accepting the unchallenged finding of the Magistrate that there was a concluded and binding agreement between the parties in terms of the December agreement, the parties were expecting to make a further agreement in substitution for the December agreement, containing, by consent, additional terms. In fact, the deed contained both mutual releases and a release in favour of a non-party, namely Mr Taouk of CanBuild: cl 3.2.

44

Whether the deed superseded the December agreement raises two questions. First, whether Ms Ho was immediately bound by the deed upon delivery to the solicitors for Edifice and Mr Taouk. Second, the proper construction of the deed. It is only necessary to address the first question.

45 The difference between delivery of a deed absolutely or conditionally is explained by Rich, Stark and Dixon JJ in *Federal Commissioner of Taxation v Taylor* at 87:

> When a deed between parties is executed by one of them it is a question of fact whether he delivered it absolutely in the first instance, or conditionally with the intent that it should not take effect as his deed until the other parties had also executed it … If it is delivered absolutely in the first instance, it is at once operative, as the deed of the person who so executed it, in spite of the fact that he delivered it upon the faith of the other parties executing it. Of course, if in such a case the other parties fail in the event to execute it, relief in equity is available to the party who executed it upon the faith of the others doing so. … If on the other hand the person who first seals the deed delivers it as an escrow intending it to become his deed when and not before the other parties execute it, then, upon the condition being fulfilled, the deed becomes effectual to give title as from its first delivery.

46 Where a deed is delivered in escrow the effect is that the deed is not recallable, but equally it is not operative until a particular condition is satisfied: *Segboer v A J Richardson Properties Pty Ltd* [2012] NSWCA 253 at [72] citing *Beesly v Hallwood Estates Limited* [1961] Ch 105 at 118; *Federal Commissioner of Taxation v Taylor* at 87-88*; Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps* [1985] VR 70 at 79. As Sackville AJA (Allsop P and Campbell JA agreeing) explained in *Segboer v A J Richardson Properties Pty Ltd*:

> Delivery of a deed in escrow is to be distinguished from a case where the grantor's intention is not to be bound at all until some future event occurs, in which case there is no delivery. An example is where a party to a conveyance transaction executes a deed and returns it to his or her solicitor in the expectation that, in accordance with usual conveyancing practice, the deed will not be operative until exchange: *Hooker v Christian Brothers* at 118 [(1977) NSWLR 109], *Bradbrook* at 269 [A J Bradbrook, "The Delivery of Deeds in Victoria" (1981) 55 *Australian Law Journal* 267].

47 Whether a deed has been delivered unconditionally, delivered in escrow, or not delivered at all depends upon the executing party's intention. This question is to be determined on the basis of the words used by and the conduct of the promisor, taking into account the circumstances attending the execution of the deed: *Segboer v A J Richardson Properties Pty Ltd* at [73].

48 In the Local Court, the Magistrate seems to have made a finding that the deed was delivered by Ms Ho. Although the Magistrate did not specifically advert to the distinction between delivery of a deed unconditionally or in escrow, the finding that Ms Ho intended to be immediately bound by the terms of the deed ought to be read as a finding that the deed was delivered by Ms Ho unconditionally.

49 While Ms Ho challenged this finding on appeal before the primary judge in her notice of contention while seeking to uphold the Magistrate's ultimate decision, the reasons of the primary judge at Principal Judgment [86] are a little unclear as to whether his Honour accepted Ms Ho's contention that the deed was delivered in escrow. Certainly his Honour referred to the authorities apparently relied upon by Mr Taouk, including

Mirzikinian v Tom & Bill Waterhouse Pty Ltd, in support of his argument that the deed was delivered by Ms Ho unconditionally. However, his Honour's reasons for finding that there was no error, let alone an error on a question of law, in the Magistrate's decision that the deed did not supersede the December agreement, are not expressed in terms of a finding that the Magistrate found that the deed executed by Ms Ho was delivered conditionally or in escrow.

50 If the correct reading of the primary judge's reasons is that there was no error on a question of law by the Magistrate in finding that the deed did not supersede the December agreement because the deed executed by Ms Ho was delivered conditionally or in escrow, then I do not consider that Mr Taouk has demonstrated an injustice which is more than merely arguable, given the surrounding circumstances in which Ms Ho executed the deed, as referred to in her argument: see [38] above.

51 If that reading of the primary judge's reasons is incorrect, then the alternative reading of his Honour's reasons is that there was no error by the Magistrate in finding that by their conduct, Edifice and Mr Taouk refused to accept the deed.

52 Although neither the Magistrate nor the primary judge expressly addressed the possibility of disclaimer, the challenge by Mr Taouk to the Magistrate's finding that the parties' rights reverted to the December agreement put in issue on the appeal before the primary judge the legal consequences of Mr Taouk and Edifice's conduct.

Disclaimer

53 Disclaimer operates to avoid a deed. The position is explained by Sir Frederick Jordan CJ in *Wilson v Frost* [1935] 35 SR (NSW) 521 at 525:

> The following is, I think, the effect of the relevant authorities. At common law, if a deed to which several persons are expressed to be parties is executed by one of them unconditionally, and not as an escrow subject to a condition that it is not to be binding unless the others execute it too, it is binding at law upon the party who executed it, notwithstanding that all or some of the other parties do not execute it: *Cumberlege v Lawson* (1 CB (NS) 709); *Federal Commissioner v Taylor* (42 CLR 80). If, however, one of the covenantees who has not accepted benefits under the deed disclaims it, this operates at least as a *pro tanto* avoidance of the deed at common law: *Wetherell v Langston* (1 Exch 634). In equity, if it appear that although the deed was executed unconditionally by the obligor he nevertheless executed it upon an understanding, express or tacit, that the other parties were to execute it also, or were to be bound by it, a Court of Equity will relieve the obligor from the deed if it is shown that one of the parties, who has not done any act adopting it, has repudiated it or is incapable of being bound by it: *Peto v Peto* (16 Sim 590); *Bolitho v Hillyar* (34 Beav 180); *Plumley v Horrell* (20 LT 473); *Luke v South Kensington Hotel Co* (11 Ch D 121 at 125); *Conolly v Conolly* (3 SR 381); *Bennett v Greensill* ([1927] NZLR 167); *Federal Commissioner v Taylor* (42 CLR 80 at 87); *In re Morton* ([1932] 1 Ch 505); *Sigg v Sigg* (22 SR 598). Until it is proved that a party who has not executed the deed has repudiated it, the presumption is that he has accepted it if it would be to his advantage to do so: *Leake on Contracts*, 7th ed, 97.

54 In *Monarch Petroleum NL v Citco Australia Petroleum Ltd* [1986] WAR 310 at 364, Kennedy J said:

> Although disclaimer can be effected by conduct — see *Stacey v Elph* (1833) 1 My & K 195; 39 ER 655 — it:

> "can only be made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it" — *Lady Naas v Westminster Bank Ltd* [1940] AC 366 per Lord Russell at 396.
>
> "Disclaimer of a deed has been rightfully described as a solemn irrevocable act. If it is alleged, the court must be satisfied that it is fully proved by the party alleging it, who must also establish that it was made with full knowledge and with full intention " — per Lord Wright in *Lady Naas v Westminster Bank Ltd* at 400.

55 Here, the conduct of both Mr Taouk and Edifice in March 2017 involved more than a refusal to pay the $73,000 which, under the deed was required to be paid by 28 February 2017. Both Edifice and Mr Taouk by their conduct unequivocally refused to execute the deed and stated through their solicitor to Ms Ho's solicitor that they "want nothing to do with it". Plainly, they intended to disclaim the deed. Disclaimer once communicated cannot be withdrawn: *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632; [1968] 1 WLR 1125, a case involving disclaimer of a gift. The consequence is that the deed was avoided as against Ms Ho.

56 Although nothing turns on it in this case, the better view is that the avoidance of the deed is retrospective; that is, the deed is avoided *ab initio*: *Mallot v Wilson* [1903] 2 Ch 494 at 501 (Byrne J); *Smeaton Grange Holdings Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1594 at [94]-[101] (White J), appeal allowed on other grounds: *Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd* [2017] NSWCA 184.

57 The proposed appeal does not have sufficient prospects to warrant a grant of leave because Mr Taouk has not shown that it is more than merely arguable that the primary judge erred in rejecting ground 3(a) of the amended summons. The consequence of disclaimer by Mr Taouk and Edifice, being avoidance of the deed, meant that Ms Ho was not precluded for suing Mr Taouk and Edifice on the December agreement for non-payment of the $73,000 and the costs in the NCAT proceedings. No injustice has been demonstrated by Mr Taouk.

Conclusion and Orders

58 The application for leave to appeal should be refused. There is no reason why costs should not follow the event: UCPR, r 42.1. I propose the following order:

(1) Summons seeking leave to appeal is dismissed with costs.

59 **EMMETT AJA:** The question in these proceedings is whether the applicant, Mr Joseph Taouk (Mr Taouk) has a liability to the respondent, Ms Yuen Min Ho (Ms Ho), under a compromise agreement made between them on 19 December 2016 (the Compromise Agreement). The Compromise Agreement arose out of proceedings brought by Ms Ho against Edifice Australia Pty Ltd (Edifice) and Mr Taouk in the Consumer and Commercial Division of the New South Wales Consumer and Administrative Tribunal (the Tribunal), claiming damages for breach of a contract for building work made between Edifice and a different Mr Joseph Taouk, who trades as CanBuild Projects (CanBuild), on the one hand, and Ms Ho, as owner, on the other

hand (the Building Contract). By the Compromise Agreement, Edifice and Mr Taouk agreed to pay the sum of $73,000 to Ms Ho on or before 28 February 2017 in full settlement of her claim, inclusive of costs and interest.

60 The Compromise Agreement was made by letter of 19 December 2016 from Gardner Ekes, solicitors for Edifice and Mr Taouk, to Scarfone & Co, solicitors for Ms Ho, which accepted an offer made by Scarfone & Co by letter of 16 December 2016. In the letter of 19 December 2016 Gardner Ekes said that they would provide a draft deed of settlement. However, it was common ground that, notwithstanding the reference to a deed of settlement, the exchange of correspondence gave rise to a binding agreement in settlement of Ms Ho's claim. It was also accepted that Mr Taouk incurred joint and several liability with Edifice under the Compromise Agreement.

61 On 24 January 2017, Gardner Ekes sent a draft deed of settlement to Scarfone & Co. The parties to the deed were Edifice, Mr Taouk and Ms Ho. Scarfone & Co requested amendments to the deed by email later that day and, on 25 January 2017, Gardner Ekes sent an amended deed of release. On 27 January 2017, Scarfone & Co sent an email saying that the signed deed would be forwarded shortly and, by letter of 2 February 2017, Scarfone & Co sent to Gardner Ekes a counterpart of the amended deed of settlement that had been executed on behalf of Ms Ho.

62 However, on 3 March 2017, a solicitor from Gardner Ekes telephoned a solicitor from Scarfone & Co and said that her "client refuses to pay and wants nothing to do with it" and that Mr Taouk had not signed the deed of settlement. The "client" referred to by the solicitor from Gardner Ekes was Mr Taouk, who was speaking both for himself and for Edifice. The deed of release was not executed by Edifice or by Mr Taouk.

63 Nevertheless, on 12 April 2017, the proceedings brought by Ms Ho in the Tribunal were dismissed on the ground that the parties had settled the dispute by the terms of the 19 December 2016 correspondence and, hence, the Tribunal did not have jurisdiction to determine any dispute. An order was made that Edifice and Mr Taouk pay Ms Ho's costs and incidental to the hearing on 12 April 2017 in the gross sum of $4,500 such costs to be paid no later than 26 April 2017.

64 Neither the sum of $73,000 nor the sum of $4,500 was paid to Ms Ho. Accordingly, Ms Ho commenced proceedings in the Local Court against Mr Taouk and Edifice and on 12 March 2018 a Local Court magistrate entered judgment in favour of Ms Ho against Edifice and Mr Taouk in the sum of $81,914.32, inclusive of interest. Mr Taouk then appealed to the Supreme Court on a question of law under s 39(1) of the *Local Court Act 2007* (NSW) from the orders made by the magistrate. Edifice was not a party to the appeal.

65 The essential issue raised by the appeal concerned the effect of the deed of settlement signed by Ms Ho. The question was whether the signing and delivery of the deed of settlement by Ms Ho had any relevant effect on the Compromise Agreement. On 6 December 2018, a judge of the Common Law Division (the primary judge) concluded

that it did not and dismissed the amended summons filed on behalf of Mr Taouk. On 14 December 2018, the primary judge ordered Mr Taouk to pay Ms Ho's costs of the proceedings on an indemnity basis. By summons filed on 6 March 2019, Mr Taouk seeks leave to appeal from the orders made by the primary judge.

66 The deed of release signed by Ms Ho contained recitals of the Building Contract and the dispute that arose out of it. Clause 2.1 of the deed of settlement relevantly provided that Edifice would pay to Ms Ho the sum of $73,000 in full and final settlement of all claims that Ms Ho might have had against Edifice or Mr Taouk in connection with or arising out of the Building Contract. Clause 8.1 relevantly provided that each party agreed that the deed of settlement set out the entire agreement between the parties in respect of the subject matter of the deed. The question is whether the execution of the deed by Ms Ho and delivery of it to Gardner Ekes had the effect that Mr Taouk was discharged from the obligation that he incurred by reason of the Compromise Agreement to pay the sum of $73,000 to Ms Ho.

67 I have had the advantage of reading in draft form the proposed reasons of Gleeson JA. I agree with his Honour that the proposed appeal does not have sufficient prospects of success to warrant the grant of leave to appeal. Mr Taouk has not shown that it is anything more than merely arguable that the primary judge erred in dismissing the amended summons. In particular, I agree with his Honour that the conduct of Mr Taouk amounted to a disclaimer, the consequence of which was that the deed of settlement, assuming that it was delivered unconditionally by Ms Ho, was avoided. I agree with the order proposed by Gleeson JA.

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Decision last updated: 27 June 2019