IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 102
ARC 98/11

IN THE MATTER OF	a challenge to a determination by the Employment Relations Authority
BETWEEN	BRYCE TINKLER Plaintiff
AND	FUGRO PMS PTY LTD & PAVEMENT MANAGEMENT SERVICES LTD Defendant

ARC 30/12

AND IN THE MATTER OF proceedings removed

BETWEEN	FUGRO PMS PTY LTD & PAVEMENT MANAGEMENT SERVICES LTD Plaintiff
AND	BRYCE TINKLER Defendant

Hearing:	6 and 7 June 2012 (Heard at Auckland)
Counsel:	Mark Ryan, counsel for Mr Tinkler Caroline McLorinan and Philip McCarthy, counsel for Fugro PMS Pty Ltd & Pavement Services Limited
Judgment:	3 July 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] These proceedings relate to a settlement agreement entered into between Mr Tinkler and his previous employer, Fugro PMS Pty Ltd & Pavement

Management Services Limited (Fugro). Mr Tinkler contends that the agreement is void, on the basis that it was entered into under duress. Fugro deny that this is so and seek to enforce the agreement by way of a compliance order. The matter initially came before the Employment Relations Authority (the Authority) as a preliminary issue. The Authority declined to find that the agreement had been entered into under duress.[1] Mr Tinkler challenges the Authority's preliminary determination on this point. Fugro's application for a compliance order under s 137 of the Employment Relations Act 2000 (the Act) was removed to this Court for hearing with Mr Tinkler's challenge.[2]

[2] While there was a direct conflict in the evidence of Mr Tinkler and Mr Yeaman of Fugro (the two signatories to the settlement agreement), the preliminary determination was dealt with by the Authority on the papers. It came before the Court by way of a de novo challenge. Both Mr Tinkler and Mr Yeaman gave evidence and were cross-examined.

[3] The central issue before the Court is whether the agreement was entered into under duress and is therefore void. Mr Ryan, counsel for Mr Tinkler, conceded if that is not the case, the agreement is enforceable and a compliance order should issue.

Factual background

[4] Mr Tinkler was employed in a senior management position with Fugro and had held that position for some time. He was in charge of Fugro's operations in New Zealand. Mr Yeaman is one of the managing directors of the company, based in Australia. He and Mr Tinkler knew one another well. Mr Tinkler accepted that Mr Yeaman was a very sensitive and caring man, who he had worked with for a number of years.

[5] Mr Yeaman became concerned about certain irregularities in the company's financial records. He discussed these with Mr Tinkler, initially on 1 June 2011 in

[1] [2011] NZERA Auckland 502.
[2] [2012] NZERA Auckland 151.

Sydney. Notes of the meeting that occurred between the two men record that Mr Yeaman said to Mr Tinkler that if the irregularities could not be explained he would need to refer matters to the Police.

[6] Mr Yeaman subsequently wrote to Mr Tinkler on 20 June 2011 inviting him to a disciplinary meeting. The allegations (which related to Mr Tinkler allegedly obtaining $95,153.74 in unjustifiable advances and through the compilation of false and invalid expense claims for personal gain) were fully set out in the letter. Mr Tinkler was advised of his right to representation at the meeting, which was to take place on Monday 27 June at Fugro's Hamilton office. Mr Yeaman noted in his letter that Mr Tinkler had been cooperative to this point and thanked him for that.

[7] The meeting took place as scheduled, in Fugro's meeting room. Mr Tinkler confirmed at the outset that he was aware that he could have a representative present but that he had chosen not to. The meeting concluded at 4.30pm, and was adjourned to enable Mr Tinkler to obtain legal advice. A further meeting was convened on 28 June 2011 at 2.24pm. At the beginning of the meeting Mr Tinkler was asked if he was happy to continue without representation and he said that he "had asked for guidance". The meeting continued. Notes of the meeting record that Mr Tinkler made an offer to pay back the money at issue through cashing in holidays and either extending his mortgage or selling his house, and that he expressed a willingness to sign a deed of acknowledgment of debt. The meeting concluded at 4.30pm.[3] There was agreement that the parties would meet again on Friday 8 July 2011, to enable Mr Tinkler to obtain some legal advice in the interim.

[8] Mr Tinkler says that the following morning (on 29 June 2011) Mr Yeaman came and spoke to him and talked to him about the possibility of resolution. Mr Tinkler told Mr Yeaman that he would need to see the details of any proposal in writing. A draft without prejudice settlement agreement was given to him later that morning. His evidence in chief was that it was not until he read the draft agreement that he realised that the agreement was based on his departure from the company. He

[3] Although it was common ground that Mr Tinkler had not been given the meeting notes at the time, no issue was taken as to their accuracy at the hearing.

says that he was shocked, as resignation had not previously been discussed and he had hoped to retain his employment.

[9] Mr Yeaman's evidence was that he had had a number of discussions with Mr Tinkler before the draft proposal was put to him and that Mr Tinkler himself had raised the possibility of resignation.

[10] What is not in dispute is that Mr Yeaman and Mr Tinkler went for a drive after Mr Tinkler had been given a copy of the draft settlement agreement. It was common ground that the proposal for a drive had emanated from Mr Yeaman. His evidence was that he considered it appropriate because it would enable him to talk privately with Mr Tinkler, and without interruption. He made the point that a number of delicate issues had been raised at the earlier meeting in relation to personal difficulties that Mr Tinkler's wife (who also worked at Fugro) might be experiencing, and said that he wanted to avoid generating additional office gossip and to provide something of a sounding board for Mr Tinkler.

[11] Mr Ryan put it to Mr Yeaman that the real reason for the car trip was to enable him to put improper pressure on Mr Tinkler to agree to the terms of settlement. This was a suggestion that Mr Yeaman firmly refuted.

[12] Mr Yeaman's evidence was that during the journey Mr Tinkler initiated discussions about the possibility of Police involvement, which he avoided. Mr Tinkler initially said that Mr Yeaman told him that it was a very serious matter of fraud and if he did not sign the settlement agreement he would hand the matter over to the Police and, if convicted, he would go to prison. Later in evidence he said that Mr Yeaman had told him that his (Mr Yeaman's) understanding of New Zealand law was that if he was convicted he could face time in jail. He accepted that his recollection was not entirely clear, and that his memory of events was a bit confused. Nor was he sure, when cross-examined, whether it was Mr Yeaman who had raised the possibility of Police involvement, accepting that he might have done so himself.

[13] Mr Tinkler's evidence was that, as a result of what Mr Yeaman said, he felt shell-shocked and that he had no other option but to sign the settlement agreement.

However, it is apparent that he did not immediately do so. Rather, he took time to think about it overnight. He signed the agreement the following day, after having discussed elements of it with his wife. He accepted that he had not spoken to his wife about Mr Yeaman's allegedly overbearing approach, and threats of Police involvement. His explanation of this failure (because he was very sensitive about commercially sensitive information) lacked force. Mr Tinkler also accepted that he had not sought legal advice prior to signing the agreement (although the agreement refers to him having done so), despite having had the opportunity to do so.

[14] Mr Yeaman signed the agreement, on behalf of the company, on the same day that Mr Tinkler signed it and he then emailed it to his lawyer at 1.26pm on 30 June with a cover note saying: "Done. Settlement Agreement signed."

[15] The settlement agreement was expressed to become binding once a mediator from Mediation Services had signed off on it. This occurred some two weeks later, on 18 July 2011. The agreement records that the mediator explained the effect of ss 148A and 149(1), (3) of the Act, and recorded that she was satisfied that the parties understood the effect of those provisions. Mr Tinkler accepted that the mediator had rung him and asked him a number of questions about the agreement, including whether he agreed with its terms. He confirmed to her that he did. When asked why, if he had felt under pressure to sign the agreement, he had not raised this with the mediator he said that it was because he had agreed to the terms of the settlement (thinking he had no other option).

[16] It is apparent that Mr Tinkler did take steps to obtain legal advice during the meeting of 28 June, but was unsuccessful. He had approached the Employers and Manufacturers Association but was told that they could not assist, given that they act for employers. He had, however, been given the names of two lawyers to contact. He said that one of his calls was not returned. The other call was returned after he had signed the agreement but before the mediator had contacted him and before the settlement agreement became enforceable. Rather than explore the circumstances surrounding the signing of the settlement agreement (and the pressure he says he felt under at that time) with the lawyer, Mr Tinkler told him that he had no need for legal advice.

[17] The first payment under the agreement was due on 8 August 2011. That payment was not made. Mr Yeaman wrote to Mr Tinkler on 10 August 2011 advising that he had been trying to get in contact with him for several days and that they must discuss what was happening with the repayment that had fallen due. Mr Tinkler replied on 11 August advising that he had not managed to obtain funds from the bank but that his house would be re-listed on the market. Mr Tinkler accepted in evidence that as at this date, he had been intending to make payments under the settlement agreement.

[18] In the event, it was not until Fugro took steps in the Authority to enforce the settlement agreement that Mr Tinkler contended for the first time that the settlement was void, having been entered into under duress.

Legal framework

[19] Settlements are not uncommon in the context of employment relationships. The Act sets out a number of provisions relating to them. Section 149 provides that where a problem is resolved, a mediator may (at the request of the parties) sign the agreed terms of settlement. Prior to signing the agreement, the mediator is required to explain the effect of s 149(3) to the parties and must be satisfied that, knowing the effects of that provision, the parties affirm their request.

[20] Section 149(3) provides that an explanation must be provided that:

> (a) those terms are final and binding on, and enforceable by, the parties; and
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> (ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979;[4] and
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> (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[21] Section 151 relates to the enforcement of terms of settlement agreed or authorised and specifies the enforcement options contemplated by s 149(3)(b).[5] It

[4] Section 7 of the Contractual Remedies Act relates to the circumstances in which a contract may be cancelled for misrepresentation, repudiation or breach.

provides that any agreed terms of settlement that are enforceable by the parties under s 149(3) may be enforced by compliance order under s 137 or (in relation to monetary settlement) by way of the enforcement procedure in the District Court, set out in s 141.

[22] The Authority may issue a compliance order where satisfied that any person has not observed or complied with any terms of settlement that s 151 provides may be enforced by way of compliance order: s 137(1)(a)(iii). A penalty may be imposed on any person who breaches an agreed term of a settlement: s 149(4).

[23] An issue arises as to the Court's power to inquire into whether a settlement agreement (signed by a mediator under s 149(1)) has been entered into under duress and to declare such an agreement void. The issue was not raised by either party.

[24] The Act provides that settlement agreements signed by a mediator are final, binding and enforceable: s 149(3)(a). Section 149(3)(b) expressly provides that except in relation to enforcement, no party may bring the settlement agreement before the Authority or Court. Parties seeking enforcement of a settlement agreement may apply to the Authority for a compliance order or, in relation to monetary settlements, they may utilise the enforcement procedure of the District Court: s 151. Accordingly, the Act enables settlement agreements signed by a mediator to be dealt with in the same way for enforcement purposes as Authority determinations, Court judgments, recommendations made by the Authority under s 149A, and decisions of mediators under s 150.[6]

[25] Issues relating to the enforceability of mediator-signed settlement agreements had arisen under the Employment Contracts Act 1991.[7] Section 149 of the Employment Relations Act was amended in 2004. Relevantly cl (ab) was inserted into s 149(3). This amendment expressly excluded the cancellation of a mediator-signed settlement agreement under s 7 of the Contractual Remedies Act for

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[5] *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704 at [23].

[6] For difficulties with the enforcement of non mediator-signed settlements under the Act see *Wade v Hume Pack-N-Cool Ltd* [2012] NZEmpC 64 at [14].

[7] See, for example, *Shaffer v Gisborne High School Board of Trustees* [1995] 1 ERNZ 94 (CA) at 101-102.

misrepresentation, repudiation or breach. The Explanatory Note to the Employment Relations Law Reform Bill stated that this amendment was made to give:[8]

> greater certainty of outcome in mediated settlements … [ensuring] … that settlements that are agreed to be final and binding by the parties cannot later be cancelled by 1 party.

[26] The inclusion of cl (ab) effectively removed any doubt that a mediator-signed settlement agreement could be cancelled, as had been suggested by this Court in *Hunt v Forklift Specialists Ltd*.[9] In that case, the Court (relying on the decision of the Court of Appeal in *Shaffer* that signed settlements under s 88(2) of the Employment Contracts Act may be considered a variation of the employment agreement[10]) held that such settlements could be enforced by compliance order or be cancelled.[11] The addition of ss 149 and 151 to the current Act conferred explicit powers on the Authority that the Employment Tribunal had lacked, to enforce mediator-signed settlement agreements by compliance order without considering them a variation of the employment agreement.

[27] There is authority for the proposition that settlements of employment disputes reached under duress are unenforceable.[12] However, in each case the settlement agreements did not have the imprimatur of a mediator, and none were decided within the statutory framework of s 149. As the circumstances of this case do not require a final determination as to the scope of the Court's powers in relation to mediator-signed settlement agreements (for the reasons that follow), and given that the issue was not the subject of submissions, I do not propose to express any concluded view on the point.

[28] Assuming that a mediator-signed settlement agreement may be held invalid if entered into under duress, the focus of the inquiry will be on the effect of what was threatened, rather than the threat itself, and whether it brought about a "coercion of

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[8] *Explanatory Note* Employment Relations Law Reform Bill 2004 at 7.
[9] [2000] 1 ERNZ 553.
[10] At 101-102. See the doubts expressed about the correctness of this holding by the full Court in *Counties Manukau Health Ltd (t/a South Auckland Health) v Pack* [2000] 1 ERNZ 518 at [24].
[11] *Hunt* at 557. Section 88(2) provided that the settlement would be "final and binding on the parties".
[12] *X v A* [1992] 2 ERNZ 1079; *Cabletalk Astute Network Services Ltd v Cunningham* [2004] 1 ERNZ 506; *Skinner v Stayinfront Inc* AC 5/08, 19 March 2008.

will, which vitiates consent."[13] The burden is on the party seeking to avoid the agreement. Once the fact of duress of some kind has been established, the burden is on the party resisting the claim of duress to show that it did not in fact induce the contract.[14]

[29] There are seven elements that must be established, as set out by the Court of Appeal in *Pharmacy Care Systems Ltd v Attorney-General*:[15]

> 1) There must be a threat or pressure;
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> 2) That threat or pressure must be improper;
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> 3) The victim's will must have been overborne by the improper pressure so that his or her free will and judgment are displaced;
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> 4) The threat or pressure must actually induce the victim's manifestation of assent;
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> 5) The threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative;
>
> 6) Duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action or affirmatively by applying to a Court for the avoidance of the agreement;
>
> 7) The victim may be precluded from avoiding the agreement by affirmation.

[30] In *Pharmacy Care*, Hammond J observed that a threat to instigate a criminal prosecution has generally been regarded as an improper means of inducing a party to make an agreement.[16] Ms McLorinan, counsel for Fugro, conceded that if a threat of the sort alleged had been made that would amount to an improper threat or pressure. However, it was submitted that no such threat had been made.

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[13] *Pao On v Lau Yiu Long* [1980] AC 614 (PC) at 636; *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 345, cited with approval in *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) at [89].
[14] *Pharmacy Care* at [90], citing *Barton v Armstrong* [1976] AC 104 (PC).
[15] (2004) 2 NZCCLR 187 (CA) at [98].
[16] At [94]. See too *Marsh v Transportation Auckland Corporation Ltd* [1996] 2 ERNZ 266 at 301.

Was there duress?

[31] There was a conflict of evidence about what occurred during the car trip. Mr Ryan invited me to infer, from the surrounding circumstances, that a threat of referral to the Police had been made and that the other elements identified by the Court of Appeal in *Pharmacy Care* had been made out. He submitted that such an inference could be drawn from the following strands of evidence. Firstly, that as early as 1 June 2011, Mr Yeaman had been minded to refer matters to the Police if they could not be sorted out to his satisfaction. Secondly, that despite agreeing to adjourn the disciplinary process to 8 July to enable Mr Tinkler to take legal advice, Mr Yeaman proceeded to present Mr Tinkler with a draft settlement agreement the next day. Thirdly, Mr Yeaman's email to his lawyer of 30 June 2011 advising that settlement had been reached was expressed in terms of "Done". He suggested that this was significant as reflecting a "mission accomplished" attitude, conveying to his lawyer that he had successfully executed a plan to induce Mr Tinkler to sign the agreement.

[32] I preferred Mr Yeaman's evidence as to what occurred during the car trip. I do not accept that a threat was made to Mr Tinkler. Mr Yeaman's evidence about the conversation that he had with Mr Tinkler, and his motivations for suggesting such a journey, were consistent and he was unshaken in cross-examination. Mr Tinkler was unable to recall details of the conversation that he said had occurred during the car trip, and accepted in cross-examination that he (rather than Mr Yeaman) may have raised the possibility of Police involvement. He was unclear about the timing of earlier conversations about potential options for resolution, and accepted that the issue of resignation might have been mooted prior to receipt of the draft settlement agreement.

[33] At first blush it may seem surprising that a manager in Mr Yeaman's position, and in the circumstances, would suggest a private car trip to discuss Mr Tinkler's position. However, I accept that Mr Yeaman made the suggestion for genuine reasons, and out of concern for Mr Tinkler. The proposal occurred against the backdrop of a lengthy professional relationship and concerns having been raised at the earlier meeting about the personal circumstances of Mr Tinkler's wife (who also worked in the office).

[34] It is plain that Mr Yeaman retained a considerable degree of respect and good will towards Mr Tinkler at the time the car trip occurred. He described Mr Tinkler as a good worker who had worked hard for the company for ten years. Mr Yeaman had discussed a range of options for dealing with the situation confronting Mr Tinkler, including the possibility of purchasing one of Mr Tinkler's private vehicles and exploring job opportunities within the company for him. It is evident that Mr Yeaman was alive to the additional sensitivities surrounding the position that Mr Tinkler found himself in, and I accept that he wanted to ensure that Mr Tinkler could talk privately to him, without interruption, and without generating further talk within the office. This was consistent with Mr Tinkler's acknowledgement that Mr Yeaman was a very sensitive and caring man.

[35] Nor do I accept Mr Tinkler's evidence that Mr Yeaman proceeded to apply pressure on him to sign the agreement following the car trip. Mr Tinkler returned to the office and his evidence was that he thought about the offer for the remainder of the day and overnight. Mr Yeaman had earlier made travel arrangements to return to Sydney in the afternoon of 30 June. He made an inquiry with Mr Tinkler in the morning about "where things were at". I do not accept that he pressured Mr Tinkler into signing the agreement prior to his departure.

[36] It would, as was pointed out to Mr Yeaman at the hearing, have been possible to have had the meeting in Fugro's upstairs boardroom, rather than the two men taking a drive together. However, there is nothing to suggest that if Mr Yeaman had been minded to issue a threat to Mr Tinkler to induce him to enter a settlement agreement, a private meeting in a boardroom (as opposed to a car) would have stymied his attempts to do so.

[37] I accept Mr Yeaman's evidence that his email attaching a signed copy of the settlement agreement was nothing more than confirmation that the agreement had been signed off, and did not reflect satisfaction that a nefarious plan to force Mr Tinkler to sign the agreement had come to fruition.

[38] I do not accept, based on the evidence before the Court, that Mr Yeaman threatened Mr Tinkler with a referral to the Police. His challenge accordingly fails at

the first of the qualifying hurdles identified by the Court of Appeal in *Pharmacy Care*. My conclusions are reinforced by Mr Tinkler's failure to take any steps, including by talking to a lawyer (when a lawyer contacted him), to raise any concerns about the issues that he now says he had. Nor did he raise any issues with the mediator when she contacted him to discuss the settlement agreement and whether he was happy with it. Mr Tinkler was a senior manager, with considerable commercial experience. He did not raise any concerns with anyone until the issue was advanced as a basis for avoiding payment under the agreement when it came before the Authority. It is relevant that, as at 11 August 2011, Mr Tinkler made it clear to his previous employer that he was taking steps to meet his obligations under the agreement, but was having difficulty doing so.

[39] I am left with no doubt that Mr Tinkler has belatedly raised the issue of duress in an attempt to avoid his contractual obligations, freely entered into, under the settlement agreement. The challenge to the Authority's preliminary determination is dismissed.

[40] Mr Ryan conceded that if there was a finding that the settlement agreement was not void for duress then a compliance order ought to issue. In the circumstances, a compliance order is made against Mr Tinkler requiring him to comply with the terms of settlement.

Result

[41] The challenge to the Authority's preliminary determination is dismissed.

[42] A compliance order will issue in Fugro's favour. Mr Tinkler must comply with the terms of settlement. Payment of the sum specified in cl 5(b) of the agreement is to be made within a period of 21 days from the date of this judgment, together with the first payment under cl 5(c) to be followed by the regular instalments required under cl 5(c).

Costs

[43] Costs are reserved. The parties are encouraged to agree costs between themselves. If that does not prove possible memoranda may be filed, with Fugro to file and serve any memorandum and supporting material within 60 days of the date of this judgment, and Mr Tinkler filing and serving any memorandum in response within a further 30 days.

Christina Inglis
Judge

Judgment signed at 11.30am on 3 July 2012