IN THE EMPLOYMENT COURT
AUCKLAND

AC 53/06
ARC 100/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DONALD MONTROSE GRAHAM Plaintiff
AND	CRESTLINE PTY LIMITED Defendant

Hearing: 8 September 2006

Appearances: Penelope Swarbrick, Counsel for Plaintiff
Sherridan Cook, Counsel for Defendant

Judgment: 15 September 2006

JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] The preliminary but vital issue for decision is whether Donald Graham's challenge to a determination of the Employment Relations Authority has been settled so that Mr Graham should be precluded from pursuing it. Also dealt with in this judgment are my reasons for determining, during the course of the hearing, that the plaintiff had waived legal professional privilege in a communication to him from his Australian lawyer.

Background

[2] Mr Graham brought proceedings in the Employment Relations Authority that were investigated by it between late January and late August 2005. The Authority decided against Mr Graham's claims and in particular concluded that he was not unjustifiably dismissed by Crestline, that Crestline had not breached its obligations of good faith towards him, and that it did not owe him money for outstanding annual leave entitlements.

[3] Mr Graham filed a challenge to this determination seeking a hearing de novo. The Authority subsequently determined costs against Mr Graham requiring him to contribute $24,370 towards Crestline's costs and disbursements.

[4] Crestline now says that on or about 3 May 2006 the parties agreed to settle all claims between them including Mr Graham's personal grievance and other employment claims that are the subject of the challenge. Mr Graham has denied that there was a settlement but Crestline says that he is estopped from pursuing his proceedings by virtue of the terms of the settlement. Among other things, Crestline says that the settlement required Mr Graham to discontinue his proceedings and that not only has he not done so, but he is seeking to have the case set down for a hearing.

[5] This Court's jurisdiction only extends to determining whether the New Zealand employment proceedings between the parties have been settled so that Mr Graham should be precluded from pursuing them. The status of concurrent Western Australian Supreme Court proceedings is not for determination in this case.

[6] It is necessary to examine in detail the affidavit evidence (and some cross-examination) of the three principal protagonists involved in this aspect of the case, Warren Reynolds, Crestline's chairman director of Perth, Western Australia; Mr Donald Graham (the plaintiff), a company director of Auckland; and his son, Ian Graham, an equity market analyst of Wellington.

[7] Although before the Employment Relations Authority Mr Donald Graham was represented by counsel, when he challenged the Authority's determination and, until recently, he represented himself although he has now disclosed that he took legal advice from lawyers from time to time.

[8] There are other proceedings between the parties. In 2003 Crestline issued proceedings against Mr Graham in the Supreme Court of Western Australia alleging misrepresentation and misleading conduct arising out of Crestline's acquisition of Mr Donald Graham's recruitment business in New Zealand. That proceeding has not yet gone to a hearing, although there has been at least one interlocutory skirmish out of which Mr Graham has become entitled to some costs.

[9] On 21 April 2006 Mr Donald Graham's daughter who lives in the United Kingdom telephoned his son, Mr Ian Graham, advising the latter of her concerns

about Mr Donald Graham's health and proposing that she fly to New Zealand immediately to assist to resolve a number of issues that she considered were causing hardship and distress to her father. Later that afternoon Mr Ian Graham telephoned Mr Donald Graham asking for the name and contact details of Crestline's director, Mr Reynolds. Mr Ian Graham did not disclose the true reason for his request. When Mr Donald Graham asked him, his son told him that he was proposing to type up notes about a number of matters relating to his father. Again unknown to Mr Donald Graham, Mr Ian Graham tracked down Mr Reynolds' contact details including his telephone number. Mr Ian Graham telephoned Mr Reynolds and expressed his and his family's concerns about Mr Donald Graham's health and the stresses that he was under from his dispute with Crestline and a number of other serious issues. Mr Ian Graham told Mr Reynolds that he was making the telephone call without his father's knowledge and wanted to discuss how the disputes could be brought to an immediate end.

[10] Although Mr Reynolds and Mr Ian Graham do not agree on which of them made the proposal, their discussion centred on a scheme whereby both sets of litigation in the Employment Court in New Zealand and the Supreme Court of Western Australia would be discontinued and Crestline would not enforce the Employment Relations Authority's costs award against Mr Donald Graham. The damages claim in Western Australia seems to be for A$350,000 and Mr Donald Graham's in this Court for damages of NZ$250,000 plus compensation for a 10 percent share in the value of Crestline estimated by Mr Ian Graham to be worth between NZ$100,000 and NZ$150,000. I consider it more probable that although the proposal for a settlement came from Mr Ian Graham, the proposed terms thereof came from Mr Reynolds.

[11] The details of the settlement proposal included that Mr Donald Graham would transfer his shares in Crestline back to the company and that both parties' proceedings would be discontinued as would Mr Donald Graham's claim to costs against Crestline in the Western Australian litigation.

[12] Following this telephone conversation, Mr Ian Graham sent Mr Reynolds an e-mail as follows:

Hi Warne (sic). *I appreciate your willingness to talk with me.*

I hope from our conversation that we have agreed in principle to wrapping this issue up. Dad will sign the appropriate documents to transfer his shares back to you and an agreement to drop the NZ appeal case and claim for court costs in Australia. In return you will drop all legal proceedings against dad in both NZ (i.e. your claim for court costs) and Australia.

I have just outlined this proposal to Dad and understandably he needs time to collect and digest his thoughts after learning of this bolt from the blue.

I am happy to fly over to Australia on my Dad's behalf (or in his company) to complete the necessary paperwork. Hopefully this can amount to nothing more than a few pages of words stating that both parties agree to drop all current legal proceedings and that no aspect of these past issues can be disputed again in the future. The share transfer forms will also need to be signed. If Dad agrees to this offer I see no reason why we can't (sic) *make this visit late next week.*

My farther (sic) *has lost a large part of his pride, dignity, health and wealth over the past few years due to this dispute and a range of other complicating issues. Developments in the past few days have been a catalyst for the family to take full responsibility for resolving these issues with utmost urgency. My Dad is in his late 60's and will be lucky to make it into his 70's at the rate things are going. Can I appeal to you to keep your word on the proposal we have discussed so my farther* (sic) *has some hope of prolonging and hopefully enjoying his twilight years.*

Hopefully I will be in a position to call you over the weekend with Dad's acceptance of this proposal. I have cc'ed my home email address if you need to correspond by email over the weekend.

Kind regards,

Ian Graham

[13] Mr Ian Graham then telephoned his parents and advised them of the settlement proposals that had been discussed. He describes their reaction as being one of shock and surprise that he had communicated with Mr Reynolds, and that a settlement had been proposed. Mr Ian Graham told his father that he intended to travel from Wellington to Auckland on 26 April to discuss the merits of the offer and to assist his father with a number of other "*troubling matters*" and generally to make financial plans for his future.

[14] On that day, 26 April, Mr Reynolds of Crestline wrote to Mr Ian Graham by e-mail materially as follows:

> *Hi Ian, you can be assured that I keep my word on all things. The contents of your email are correct and Steve Pynt and I are meeting tomorrow to discuss this offer. As stated during our conversation there will be no money changing hands under this offer but if it is not acceptable to you then I am also happy to pursue this matter in the most aggressive manner. We believed without question that we are* (sic) *in the right, as proved during the last hearing in the*

industrial commission. I look forward to hearing from you in regard to this matter and to putting this behind us all. Regards, Warren

[15] Mr Ian Graham met with his parents in Auckland on the evening of Thursday 27 April and what he describes as *"Debate and discussion"* continued over the following days with Mr Ian Graham feeling increasingly obliged to confirm with Mr Reynolds the acceptability or otherwise of the settlement they had discussed previously by telephone. In this regard Mr Ian Graham brought increasing pressure on his father for a decision.

[16] On 28 April Mr Ian Graham e-mailed Mr Reynolds after an earlier telephone discussion between the two on that day. In the course of that discussion Mr Ian Graham confirmed to Mr Reynolds that he was in the process of *"coaching"* his father through the merits of the settlement proposal although saying that ultimately the decision lay with Mr Donald Graham. Mr Ian Graham promised to contact Mr Reynolds again as soon as his father had reached a decision. The e-mail confirming this conversation sent by Mr Ian Graham to Mr Reynolds on 28 April was materially as follows:

Hi Warren – got your call while i was in a meeting and have just cleared your message (my cell phone is now flat so will not be contactable for the evening). I arrived in Auckland on Wednesday night and have been coaching Dad through the merits of this offer. At the end of the day he has to sign the documents off so the final decision still lies with him (note: it was the family that decided i should contact you, not Dad – he had no knowledge of it). I will be spending the weekend with him and will advise you as soon as we reach a decision. Regards, Ian

[17] Mr Reynolds responded by e-mail later on the same day, 28 April, as follows:

Hi Ian, thanks for your response. Hopefully you can work this out and I look forward to hearing from you on Monday. Regards, Warren

[18] On 1 May 2006 Mr Ian Graham again e-mailed Mr Reynolds advising that his father was continuing to seek legal advice and had not reached a decision about the settlement proposal. Mr Ian Graham's advice was, however, that he expected a further communication from his father's legal representatives.

[19] Mr Ian Graham felt obliged to respond to Mr Reynolds finally no later than midnight on Tuesday 2 May (New Zealand time). He therefore travelled to his parents' home at the end of the working day on 2 May and participated in a conference call with his father and Mr Ian Graham's solicitor in Perth, John Fiocco,

about the merits of the settlement offer. After the conversation with the solicitor, Mr Ian Graham had what he describes as a "*heated debate*" about their respective interpretations of Mr Fiocco's advice. Mr Ian Graham told his father that a final decision had to be reached by midnight and the heated debate between father and son continued for the last hour of that period. By Mr Ian Graham's account, and with the deadline approaching, Mr Donald Graham said the following (or very similar) words, "*do whatever the fuck you like*". Mr Ian Graham then told his father that he would accept the offer on his behalf and walked outside to telephone Mr Reynolds with that information. Mr Reynolds' mobile telephone was switched off so Mr Ian Graham left a voice message advising him that Mr Donald Graham had accepted the settlement proposal. Mr Ian Graham then told Mr Donald Graham what he had done. The Grahams discussed these matters again, albeit briefly, on the following morning. Their conversation addressed strategies to follow up what Mr Ian Graham had done on the previous evening.

[20] On the following day, 3 May 2006, Mr Ian Graham sent Mr Reynolds an e-mail confirming Mr Donald Graham's agreement to the settlement proposal. This was as follows:

> *Hi Warren – I trust you got my voice mail last night regarding Dad's agreement to settle on the terms we have discussed. I gather that two documents need to be drawn up: i) A "Deed of Settlement" outlining this terms* (sic) *(i.e. all legal action in NZ and Australia ceases immediately…Dad seeking court costs in Australia and the appeal case in NZ; Crestline to drop the misrepresentation case in Australia and the recovery of court costs in NZ) ii) An "Assignment of Shares" form for Dad's 25,000 shares in Crestline back to company.*
>
> *Are these documents that Steve Pynt can draw up or does it need to be done by the lawyers? (either yours or John Fiocco or jointly). If the documents come from your end John Fiocco will need to approve its contents to ensure all matters are covered. Once these drafts are approved, you could sign them and then express courier them over to NZ for Dad to sign with the completed copies returned back to you for your files.*
>
> *Please call me to discuss when you get this email.*

[21] Later that day, 3 May, Mr Reynolds telephoned Mr Ian Graham and thanked him for assisting in reaching a settlement between Crestline and Mr Donald Graham and advising that Steven Pynt, a solicitor and the finance director of Crestline, would prepare the documents. Mr Ian Graham did not then indicate that the agreement that had been reached was conditional upon documents being signed or the acceptability of their contents. That morning (3 May) also, Mr Ian Graham advised Mr Donald Graham that he would look after all matters and would notify both Mr Fiocco and

Mr Reynolds by e-mail as soon as he arrived at work to start the paper work for the settlement documents. Mr Donald Graham agreed to instruct his New Zealand lawyer to *"suspend the proceedings for the appeal of the ERA determination"*.

[22] Also on the same day, Mr Reynolds instructed Mr Pynt to draft a deed of settlement. Mr Pynt did so and forwarded this to Mr Fiocco.

[23] On the evening of 3 May Messrs Donald and Ian Graham flew to New Plymouth to meet with Mr Donald Graham's long-time friend and adviser, Peter Charlton. The purpose of this visit was to discuss another matter and their conversation touched only briefly on the legal dispute with Crestline when Mr Charlton said he would not agree with what Mr Ian Graham had done but it had been so and could not now be changed.

[24] On the following day, 4 May, Messrs Ian and Donald Graham met again in Auckland on a separate matter. At the end of their meeting they adjourned to a bar for a drink and, Mr Ian Graham says, it was in this setting that he first suspected that his father still intended to pursue the employment proceedings in New Zealand.

[25] Late on Friday 5 May Mr Donald Graham notified his son that he had taken steps to continue with the challenge in this Court and, following this advice, Mr Ian Graham says that, on instruction from his father, he no longer answered or returned calls from Mr Reynolds.

[26] On 10 May Mr Reynolds was advised by Crestline's New Zealand solicitors that Mr Donald Graham was seeking leave to file an amended statement of claim in his challenge in this Court. On the following day, 11 May, Mr Reynolds learnt that Mr Donald Graham had instructed his Western Australian solicitors to proceed with defending the claim against him and asserted that his son Ian Graham had agreed to settle claims without his authority. As a consequence, Mr Reynolds e-mailed Mr Ian Graham on 11 May asking him to get in touch as Mr Donald Graham appeared not to be honouring the settlement that Mr Reynolds asserted they had reached. The text of this e-mail was as follows:

> *Hi Ian, could you please give* [me] *a call on … to discuss the current situation. It appears to not be going as you and I agreed so we need some clarification on where to from here. Looking forward to your call. Regards, Warren*

[27] There was no further response from Mr Ian Graham. Mr Reynolds says that during his first communications with Mr Ian Graham, he was aware that the son

required his father's approval to settle the matter but relied on the advice conveyed to him by Mr Ian Graham on 2 May that Mr Donald Graham had agreed to the terms of the settlement proposal and upon the written confirmation by e-mail of this advice on 3 May.

[28] Mr Donald Graham's evidence about these matters is naturally limited because much, although not all, was done without his knowledge. He says that when told of the settlement proposal by his son, he was angry and disappointed and although appreciated Mr Ian Graham's motives, told him that he would not be a party to such settlement discussions. Mr Donald Graham says that he had competent legal advisers on both sides of the Tasman Sea and wanted them involved in the future of all litigation as he also wished to be. Mr Donald Graham says that having expressed his opposition to his son, he was preoccupied with other matters and did not address these again until pressed to do so by Mr Ian Graham on the evening of 2 May. Mr Donald Graham says that he reiterated his opposition to these proposals and to a deadline but, conscious of what he says was Mr Ian Graham's state of anxiety, he agreed to organise a telephone conference call with his lawyer in Perth (Mr Fiocco) in Mr Ian Graham's presence to discuss those matters.

[29] Mr Donald Graham says that following the telephone discussion with Mr Fiocco, he told his son that he would not do anything in respect of the proposed terms of settlement without consulting his New Zealand lawyer, Mr Tony Drake of the firm Buddle Findlay, in consultation with his wife, and after further discussions with Mr Fiocco over the following two days.

[30] Mr Donald Graham says that he indicated strongly to his son that he was not to be pressured in getting back to Mr Reynolds by the midnight deadline. Mr Donald Graham confirmed that when his son asked him what to do about the midnight deadline, he responded angrily with words to the effect that he (Mr Ian Graham) could do what he liked but that this was because Mr Donald Graham did not consider himself to be a party to any such discussions. He was aware that his son had gone outside to make a telephone call to Mr Reynolds.

[31] Mr Donald Graham confirmed that on the following morning he and his son discussed the matter briefly including that Mr Ian Graham said he wanted to get or see some paper work for his father to consider. Mr Donald Graham says that he

again told his son that he wished to speak to his own lawyer and make his own decisions on the possibilities of any negotiated settlement including of the appeal in this Court which had to be lodged by the end of the week.

[32] Mr Donald Graham says that on the evening of 3 May he was advised by his Perth solicitor Mr Fiocco that he (the solicitor) had been contacted by Crestline's solicitor to say that the matter had *"all but settled"* and that Mr Reynolds was going to organise some document drafting. Mr Fiocco's e-mail was as follows:

> *Further to last night's conversation with yourself and your son, late this afternoon I heard from Crestline's solicitor. He indicated to me that he had been advised by email by his client that the matter had* "all but settled". *However, he had not been given any instructions to prepare any documents which he thought were being drafted by Mr Pynt.*

[33] Mr Donald Graham says that later that week his son eventually accepted that he would not agree to the proposal. He advised his son to ignore Mr Reynolds' calls and not to have further dealings with him. Mr Donald Graham says that on 8 May he confirmed again to his Perth solicitor Mr Fiocco that the settlement discussions instigated by his son did not have his support and instructed him to reject any paper work arising from those discussions that might be sent to him. Mr Donald Graham says he has never seen any draft settlement documentation about these matters including, in particular and until he saw it as part of an exhibit in this matter, the draft settlement agreement prepared by Crestline.

The privilege waiver question

[34] This concerns the e-mail referred to at paragraph [32] above. The reference in Mr Donald Graham's affidavit to the e-mail is at paragraph 20 and is as follows:

> *On the evening of 3 May 2006 I received an email from Mr Fiocco, which advised me that he had been contacted by Crestline's solicitor to say the matter had* "all but settled" *and that apparently Mr Reynolds was going to organise the drafting of some documentation. …*

[35] Mr Graham said that the deleted contents related to legal advice that he received from Mr Fiocco and in respect of which he does not waive a claim to privilege.

[36] The relationship between Mr Graham and Mr Fiocco was one of solicitor-client in respect of the Western Australian proceedings. Although they are not, of course, in issue as such in this Court, their proposed abandonment by Crestline as

part of a settlement by which Mr Graham would abandon his New Zealand employment proceedings, makes them relevant to the issue I have to decide.

[37] Crestline's argument in support of a waiver of privilege by Mr Graham is based upon what it says is the plaintiff's reliance on the content of the e-mail to infer that Crestline did not regard the matter as having been settled. In these circumstances, Crestline said, Mr Graham must be taken to have waived privilege in the remainder of the e-mail as to maintain privilege would be inconsistent with his reliance on it.

[38] In this regard, Mr Cook for Crestline relied on the judgment of the Court of Appeal in an employment case, *Rochester v Fujitsu General New Zealand Ltd* [2002] 1 ERNZ 448. Mr Cook submitted it was unfair to the defendant for Mr Graham to rely upon one statement in the e-mail without disclosing its full contents so that the statement could be seen in context. Counsel submitted that if privilege had been maintained, Crestline would have been prejudiced in responding to the evidence of Mr Graham at paragraph 20 of his affidavit set out above and this may have led to injustice, particularly if the Court relied on the e-mail in support of a decision in favour of Mr Graham.

[39] The first point is that if the e-mail was produced by Mr Graham to prove or support a contention that Crestline did not consider that there had been a settlement, then this was hearsay evidence to this effect. That is because it invited the Court to rely upon an out of court statement by Mr Fiocco about what he understood Crestline's solicitor to have indicated in a conversation with him. Despite the clear hearsay nature of this evidence, Mr Graham still sought to rely upon it.

[40] In *Rochester* the Court of Appeal adopted and applied the principles that it had then recently stated in *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145, (2003) 16 PRNZ 569 (CA). In that earlier judgment the Court of Appeal stated the test for establishing whether there had been waiver of legal privilege (including both legal professional privilege and litigation privilege) as follows:

> *… it is the Court's objective judgment as to the consistency of the conduct with maintaining the privilege which must be assessed in all the circumstances. That requires close analysis of the particular context: what is the issue in relation to the privilege; how does the evidence relate to that issue; and is there inconsistency that could lead to injustice if the privilege is*

> *upheld. The weight to be given to fairness in the Court's exercise of judgment will differ according to the circumstances including the character of the privilege it is said has been waived …* (para 30)

[41] So it was incumbent in this case upon the defendant to show that Mr Graham's statement was inconsistent with maintaining privilege attaching to the e-mail and not simply that it was unfair in the abstract not to let the defendant see Mr Graham's legal advice (other privileged communications) in view of the reliance to be placed on it in this Court. In making this assessment, I assumed (having heard from Ms Swarbrick about its general nature) that the balance of the e-mail consisted of material covered by solicitor-client privilege.

[42] Although having indicated to counsel for the plaintiff my preliminary view that the second or third-hand hearsay opinion of the defendant's solicitors would have carried little, if any, weight in determining whether a settlement had been achieved, counsel continued to advance this evidence as probative of Crestline's view that there had not been a settlement. In those circumstances I considered that there was a substantial risk of injustice if the Court considered only part of the solicitor's advice to the plaintiff, given that Ms Swarbrick had confirmed that the balance of the otherwise privileged e-mail related to the question of Mr Graham's shares in Crestline that were the subject matter of the settlement discussions. It would have been unjust to have permitted the plaintiff in these circumstances to waive privilege in part of the e-mail but continue to assert it in respect of the balance. In these circumstances I concluded that privilege had been waived in the whole of the e-mail and the remaining contents were then disclosed to the defendant and the Court.

[43] As it has transpired, however, the remaining contents of the e-mail do not assist, greatly or at all, the case of either party. If anything, the portions of the e-mail now deemed to have been waived assist the defendant's case in that they confirm that Mr Donald Graham authorised his son as he did on the late evening of 2 May, having received precautionary advice from his solicitor that there could be no reliable value then ascribable to the shares that it was proposed to transfer to Crestline. The solicitor's advice to Mr Donald Graham was that the ascertainment of the value of the shares would continue to incur substantial legal costs, a topic that Mr Donald Graham and his solicitor had discussed earlier in the evening of 2 May.

The legal grounds to stay or dismiss the proceeding

[44] These were identified by Mr Cook for the defendant as two. First, the defendant says that there has been an accord and satisfaction reached between the parties which would make it an abuse of the Court's process to permit Mr Graham to continue to prosecute this proceeding in breach of that agreement.

[45] Second, and as a fall-back, the defendant says that the plaintiff should be estopped from continuing to prosecute his challenge because the defendant has acted to its detriment in reliance on Mr Graham's agreement to discontinue the case. Each of these issues raises a separate but materially identical question, whether Mr Ian Graham had authority to settle the proceeding on behalf of his father.

[46] Although the remedy sought is a striking out of the plaintiff's proceedings, and Mr Cook for the defendant sought to persuade me that the standard tests for strike-out had been met in this case, when these are analysed they do not sit comfortably with the grounds advanced. Rather, it may be more appropriate to stay permanently the proceeding if the defendant is successful on either of its broad grounds in support of its position that the case should not continue.

Accord and satisfaction

[47] An agreement between parties to settle litigation is called an accord and satisfaction. It is, to use the words of Scrutton LJ in 1933[1]:

> *… the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.*

[48] It is unnecessary for the agreement to be executed: the mutual promises make it enforceable.

[49] More recently and in this Court[2], the constituents of accord and satisfaction have been reaffirmed. There must first be a genuine dispute between the parties. Second, whether accord and satisfaction has been made is a question of fact

---

[1] *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, 643-644.
[2] *Harris v Birchwood Farm Holdings Ltd* [2002] 2 ERNZ 392.

requiring a finding of a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.

[50] In this case there is no question that there is a genuine dispute between the parties. The real question turns on the second requirement of an agreement to settle litigation. There can be little, if any, doubt in my view that if an agreement was settled, there was valuable consideration. On the terms alleged by the defendant and not disputed by the plaintiff, each party gave up valuable rights, either accrued or contingent upon success of the litigations.

The question of Mr Ian Graham's authority to represent plaintiff

[51] The plaintiff says his son had neither actual nor ostensible authority to settle on his behalf. It is only if Mr Ian Graham did not have actual authority to represent the plaintiff in a settlement of his litigation that the question of ostensible authority arises. It is common ground that, at the outset of the discussions between Mr Ian Graham and Mr Reynolds, the former did not have Mr Donald Graham's authority to settle. Was the necessary authority acquired thereafter?

[52] I am satisfied that when Mr Ian Graham communicated his agreement to the terms of settlement on late 2/early 3 May, he had the plaintiff's actual authority to do so. This decision turns upon whether Mr Donald Graham expressly authorised his son to act in his stead. That in turn focuses upon what the plaintiff intended to convey to Mr Ian Graham shortly before midnight on 2 May when he told him, *"do whatever the fuck you like"*. Mr Donald Graham now says that he intended by this to mean that his son could do whatever he (the son) liked but that would not bind Mr Donald Graham. Mr Ian Graham says that he took from his father's statement that he was authorised to do whatever he (Mr Ian Graham) thought was best, and acted in reliance upon this understanding.

[53] To resolve this conflict I have had regard the evidence of surrounding circumstances and, in particular, to assess whether these are more consistent with one account than the other. In this regard Mr Ian Graham has a better recollection of those surrounding circumstances than the plaintiff Mr Donald Graham. They are not in stark conflict with each other. Mr Donald Graham frankly conceded that he could not recall precisely what had happened immediately after he uttered the prophetic

phrase and could not say that his son's recollection of what passed between them was wrong.

[54] I am satisfied that upon hearing his father's words that he understood to give him authority to settle in the way he thought best, Mr Ian Graham told Mr Donald Graham that he was going to telephone Mr Reynolds to accept the terms of settlement. Mr Donald Graham did not demur. Next, when Mr Ian Graham had done so and left a voicemail message, he told Mr Donald Graham what had happened. Again, Mr Donald Graham did not protest or react to this advice in the way that one would have expected him to have done had his son contravened instructions recently given to him. Finally, on the following morning when father and son had had a further opportunity to discuss these matters, albeit a short one, Mr Donald Graham again did not protest the course of action to which, I am satisfied, he was aware his son had committed him.

[55] It is, therefore, unnecessary to resolve the subtle conflict between what father and son say was the intent behind the statement of the plaintiff's trusted friend and adviser, Mr Peter Charlton, later on 3 May that an error had been made, that what had been done had been done and could not be undone. Mr Charlton did not give evidence and I am unprepared to speculate about which of two different meanings should be placed upon his words. They are, in any event, not determinative of the question of agency.

[56] For these reasons I am satisfied that when Mr Ian Graham advised Mr Reynolds that the plaintiff agreed to settle the litigations on the terms previously discussed, he did so with the plaintiff's express authority. In these circumstances it is unnecessary to determine whether there was ostensible authority.

Settlement conditional upon writing

[57] Another defence raised by the plaintiff is that any agreement reached was conditional upon reduction to writing and signature by him and that this condition was not satisfied. While I accept that the parties recognised the desirability, if not the need, to record their agreement in writing and to perfect it with other written documentation (for example, the completion of a share transfer form by the plaintiff), I do not accept that the evidence shows an intention only to be bound upon execution of an agreement in writing. The terms of the parties' agreement are clear.

Although it may, with the benefit of hindsight, have been preferable for the plaintiff to have had his shareholding in Crestline valued before agreeing to transfer these shares to the company, its offer to settle on these terms including the share transfer was accepted by Mr Donald Graham's authorised agent (Mr Ian Graham) after the plaintiff had taken legal advice, including legal advice on the matter of the share transfer.

[58] There is no or insufficient evidence to support the plaintiff's contention that the agreement reached on his behalf was conditional upon his approval of its written terms. References in Mr Ian Graham's e-mail of 3 May to Mr Reynolds such as "… *two documents need to be drawn up …", "… John Fiocco will need to approve its contents …"* and *"Once these drafts are approved …"* do not make the agreement reached conditional. Rather, they addressed the formalities of its confirmation in writing.

Estoppel?

[59] This was eventually advanced by Mr Cook as an alternative or fall-back in the event that the Court might find the absence of an accord and satisfaction. For the sake of completeness because I determine that there was an accord and satisfaction, I address briefly the contention of estoppel. If the case turned on this alone, then I would have concluded that there was no estoppel. That is because Crestline has not acted to its detriment in reliance upon assurances of discontinuation of his proceeding by Mr Donald Graham. Mr Cook argued, although ultimately faintly, that the disadvantage incurred by Crestline was the cost and inconvenience of bringing this application to strike out the proceeding but, as I indicated to Mr Cook and understood him to accept, that cannot be right. For there to be an estoppel that would cause the Court to restrain the plaintiff from further prosecuting his claim, the defendant would have to have shown that it had suffered detriment by acting in reliance upon Mr Graham's assurance or advice of discontinuation and/or the other elements of the settlement. So, for example, had Crestline made arrangements to deal with the plaintiff's shares that it was told would be transferred by him but suffered loss as a result of his refusal to transfer the shares, this might have constituted the necessary disadvantage for an estoppel to operate.

[60] As noted, in any event, the success of the defendant's primary claim to accord and satisfaction and, thereby, to an abuse of process, makes analysis of estoppel strictly unnecessary.

Accord and satisfaction - decision

[61] I am satisfied that there was an accord and satisfaction reached on 2/3 May 2006 that was unconditional, whatever the commercial wisdom in hindsight of some of the terms of the agreement may have been. This was a settlement motivated not by a precise estimate of the likelihood of success in the litigation but rather on a broad brush approach to relieve Mr Donald Graham of some of a number of worrisome and debilitating circumstances in his life at that time. As such, niceties and precisions that one would expect to find on a commercial and legalistic analysis of litigation settlement were understandably absent.

Strike-out or stay?

[62] It is an abuse of court process to attempt to revive, or continue with, litigation that has been settled, in this case by an accord and satisfaction. In all the circumstances it would not be in the interests of justice to allow the plaintiff to continue to prosecute his challenge to the Employment Relations Authority's determination.

[63] Because, however, the accord and satisfaction also addresses litigation in another jurisdiction that, as I understand it, has not yet been affected by this settlement, I consider the more appropriate remedy for the defendant is to stay permanently the plaintiff's proceedings in this Court. Such an order will, for the defendant, have the same effect as a dismissal of Mr Graham's claim so long as the defendant complies with its obligations under the accord and satisfaction. It also leaves open the opportunity for the Court to revisit the status of the proceeding in case there is not a conclusion to all litigation between these parties recorded in their agreement.

[64] For the foregoing reasons, therefore, I direct that the plaintiff's claims in ARC100/05 be stayed[3] except as to costs on this application that I will determine if

[3] Pursuant to r477(c) High Court Rules 1985 by application of reg 6(2)(a)(ii) Employment Court Regulations 2000

required. Unless the parties can determine costs on this application between themselves, the successful defendant may have one month from the date of this judgment by which to apply by memorandum, with the plaintiff having a further period of one month to respond likewise.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 15 September 2006

Solicitors: Swarbrick Beck, PO Box 7120, Wellesley St, Auckland
Russell McVeagh, DX CX 10085, Auckland