

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION

S CI 2012 05289

VIBOL KONG

Plaintiff

v

EANG KANG AND OTHERS  
(According to the attached schedule)

Defendants

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JUDGE: Derham AsJ  
WHERE HELD: Melbourne  
DATE OF HEARING: 9 October 2013  
DATE OF JUDGMENT: 14 February 2014  
CASE MAY BE CITED AS: Kong v Kang & Ors  
MEDIUM NEUTRAL CITATION: [2014] VSC 28

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PRACTICE & PROCEDURE – Summary Judgment – Test for - ss 61, 63 *Civil Procedure Act 2010* – No real prospect of success – Discretion under s 64 *Civil Procedure Act 2010* – Rule 22.02 *Supreme Court (General Civil Procedure) Rules 2005*.

EVIDENCE – Without prejudice privilege – Whether letter written by solicitor subject to privilege – Whether parties in dispute at time of letter – *Evidence Act 2008 (Vic)*, s 131.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr S. Anderson SC with Mr J. D. Loewenstein	Melbourne Legal Chambers
For the First and Fourth Defendants	Mr M. Pirrie	Frenkel Partners
For the Third Defendant	Mr J. D. S. Barber	De Wet Partnership

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HIS HONOUR:

**Introduction**

- 1 By Amended Summons filed 29 August 2013, the plaintiff (**Kong**) applies for summary judgment against the first defendant (**Kang**), the third defendant (**Taing**) and the fourth defendant (**ATS**) under r 22.02(1) of the *Supreme Court (General Civil Procedure) Rules 2005* (the **Rules**) or, alternatively, under s 63 of the *Civil Procedure Act 2010* (**CPA**).
- 2 The summary judgment sought is in respect of only part of the claims made in the Statement of Claim; in particular the claims pleaded in paragraphs 33 to 36. The substance of that claim is damages for breach of an agreement made on 16 May 2011 between Kong, Kang and Taing (**the Third Agreement**).<sup>1</sup> Under that agreement each of Eang Kang and Khay Taing agreed to pay to Vibol Kong –
  - (a) \$950,000 on 16 November 2011;
  - (b) \$950,000 on 16 May 2012;
  - (c) \$150,000 within 28 days of the rezoning of any part of a property situated at and known as 64 Hutton Road Keysborough in Victoria (**the Property**).
- 3 There were other terms of the Third Agreement. They are referred to below. The Third Agreement was preceded by two earlier agreements and was followed by two later agreements, the fourth on 26 January 2012 and the fifth on 24 June 2012.
- 4 The application is supported by no fewer than six affidavits made by or on behalf of Kong.<sup>2</sup> In answer, Kang and ATS rely upon three affidavits<sup>3</sup> and Taing relies upon three affidavits.<sup>4</sup> The more recent affidavits, filed or sought to be filed shortly before or at the time of the hearing, were either Kong's solicitor, Mr Merlo, responding to and seeking to contradict the affidavits of Kang and Taing, or Kang and Taing responding to the affidavits of Mr Merlo, and others, in support of Kong's claim. They became argumentative, repetitive and embedded disputes as to fact,

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<sup>1</sup> So called because that is how it is described in Statement of Claim.

<sup>2</sup> Vibol Kong sworn 1 July 2013, Mario Merlo sworn 26 June 2013, 23 August 2013, 26 September 2013, Ngoun Lim sworn 19 June 2013, Harada Kong sworn 29 August 2013.

<sup>3</sup> Affidavits of Eang Kang sworn 26 August 2013, 12 September 2013 and 8 October 2013.

<sup>4</sup> Khay Taing sworn 20 August 2013 and Donovan De Wet sworn 6 September 2013 and 8 October 2013.

particularly the ability of Kang and Taing to understand written and spoken English and whether they were pressured or misled into signing the minutes of the meeting that constitutes the written part of the Third Agreement.

5 There were substantial objections taken to the affidavits sworn by or on behalf of Vibol Kong. In the schedule to these reasons I set out the objections, my rulings and brief grounds for my rulings.

6 The objection to the evidence relied upon by Kong that is pervasive turns on whether “without prejudice” privilege attaches to various communications sought to be relied upon by him. These communications are alleged to constitute admissions that debts arising under the Third Agreement are due and unpaid, and that there is no other subsequent overriding agreement in place. In consequence of these alleged admissions, Kong contended, judgment should be entered for the debt.

7 The parties before me did not dispute that the minutes of the meeting of 16 May 2011 (**the Minutes**) were signed by the parties (Kong, Kang and Taing) and that these Minutes record the written component of the Third Agreement, nor that the moneys to be paid under it had not been paid.

8 Taing’s position was that he knew he had made a mistake in signing the Minutes, but that he did not understand that he had a defence until after this proceeding was served on him.<sup>5</sup> Taing’s defence is therefore that the Third Agreement was entered into in circumstances that entitle him to have it set aside on the grounds of mistake, fraud and unconscionable conduct. Kang’s position is similar. He also points, however, to circumstances occurring before the entry into the Third Agreement as supporting the absence of any commercial justification for entry into that Agreement from Kang’s perspective. Further detail of those defences is set out below.

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<sup>5</sup> Taing Affidavit of 20 August 2013 at [44].



9 There is no claim pressed in the present application under s 63 of the CPA against  
ATS, the fourth defendant, despite the summons appearing to seek judgment against  
it.<sup>6</sup>

10 Despite these defences raised by Kang and Taing, Kong seeks to rely on alleged  
admissions that were made in meetings and letters subsequent to the entry into the  
Third Agreement because, he contends, they contain admissions that the money was  
owed, and do not contain any suggestion of mistake or unconscionable conduct or  
any of the defences that are now raised. Kong points to the inconsistency so as to  
contradict the existence of those defences.

11 The only defendant to have filed a defence is the second defendant, GEM  
Management Group Pty Ltd, and it is not the subject of Kong's application for  
summary judgment. The other defendants have not filed any defences, essentially  
by agreement with Kong up to this stage. There have been several adjournments of  
the directions hearings to enable the parties to hold discussions.

### **Summary of conclusions**

12 Kong's claim is a simple claim for damages for breach of an agreement. It might  
have been a simple claim for a debt due but unpaid. But the damages sought to be  
recovered are much greater than the quantum of the debt alone.

13 The affidavits filed on behalf of Kang and Taing proceed upon the assumption that  
the Third Agreement of 16 May 2011 was entered into, that neither of them have  
paid any of the principal amounts due, but they did pay some interest payable  
pursuant to that agreement. There is thus no question that the agreement was  
entered into, and that the payments to be made by each of them were not made  
either in accordance with that agreement or at all.

14 The defences raised by Kang and Taing turn on issues of unilateral mistake,  
unconscionable conduct and misrepresentation. There is a veritable quagmire of  
facts deposed to in the many affidavits filed. Although a concerted attack was made

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<sup>6</sup> Transcript, 9 October 2013, p. 72.

on the viability of the defences raised by each of Kang and Taing, it is not possible to determine finally that they have no real prospect of success without there being a trial. However, they were raised very late – so far as the evidence before me revealed – and appear at this stage to be weak.

15 This is a case, therefore, where it is not appropriate to grant the plaintiff summary judgment under ss 61 and 63 of the CPA, or pursuant to r 22.02(1) of the Rules.

16 I conclude also that:

- (a) the letter dated 2 November 2011, which I have called the Critical Letter, is not the subject of privilege under s 131 of the *Evidence Act*; and
- (b) the subsequent letters and discussions which the defendants submitted were privileged under that section and not admissible against them, referred to particularly in exhibit MAM-5 to the affidavit of Mr Merlo sworn 23 August 2013 and in a number of paragraphs of that and other affidavits, may be privileged, but it is inappropriate to determine that question at this stage.

### **Background**

17 These proceedings were commenced by writ on 18 September 2012. Kang and ATS filed appearances on 27 September 2012 and Taing filed an appearance on 9 October 2012. No defences have been filed on behalf of any of the defendants to this application. The directions hearings were adjourned a number of times to enable discussions to take place between the parties. There have been orders for an amended Statement of Claim to be filed and served, but this has not been done. Rather, Kong has brought on this application which is limited to only a part of the claimed relief, namely damages for breach of the Third Agreement.

18 The pleaded background to the entry into the Third Agreement is as follows:

- (a) Kang and one Ngoun Lim (**Lim**) were in partnership between 2006 and 2010. In late 2006 or early 2007 there were discussions between Lim, Kang and Taing about the possibility of purchasing the Property for the purposes of future subdivision and development. For that purpose the VKK Investment Unit Trust was established (**the VKK Trust**);
- (b) the initial unit holders in the VKK Trust were: Kang (200 units); Jyng Ly Pty Ltd (200 units) (a company associated with Kang); Kong (as

trustee of the Vibol Kong discretionary trust) (100 units) and Sombat Properties Pty Ltd (as trustee for the N & M Lim Family Trust) (100 units) (**Initial Unit Holding**);

- (c) Kang was initial Trustee of the VKK Trust and on 22 March 2007 he entered into a contract to purchase the Property for a price of \$21,400,000, plus GST. A partial deposit was paid by the unit holders on a proportionate basis to their unit holdings;
- (d) settlement of the purchase of the Property occurred on or about 18 April 2011. Before that there were a number of difficulties in completing the purchase of the Property which have given rise to a number of the agreements pleaded;
- (e) the first of those agreements was made on 9 April 2010 under which Kong agreed to purchase from Kang (as trustee of the VKK Trust) and Kang (as trustee for the VKK Trust) agreed to sell to Kong, 10% of the issued units in the VKK Trust for the sum of \$2,264,818.00 (**the First Agreement**);
- (f) pursuant to the First Agreement, Kong paid to the bank account of ATS the sum of \$1,264,818.00, being the agreed price less the sum of \$1,000,000.00 owed by Lim to Kong which debt Kang agreed to offset against the purchase price. This payment was made on or about 13 April 2010;
- (g) Kong pleads that in breach of the First Agreement the units in the VKK Trust were not issued to him or, alternatively, the units issued did not represent 10% of the units in that Trust and they have been sold and the proceeds of sale misappropriated either by the VKK Trust, Kang or ATS;
- (h) further, Kong alleges that his initial unit holding was reduced in value by the issue of 30 units in the VKK Trust and/or was redeemed, transferred or sold. By reason of this, and the other matters referred to above, Kong alleges he has suffered loss and damage in the sum of \$4,100,000.00, as acknowledged by Kang and Taing, and other damages;
- (i) then it is alleged that by an agreement in writing dated 16 September 2010 (**the Second Agreement**) Kong and Kang clarified the terms of the First Agreement by entering into the Second Agreement. It is alleged that –
  - (i) Kang would sell and Kong would purchase a 10% interest in the Property for the price of \$2,264,818.00 (that is the amount agreed under the First Agreement);
  - (ii) Kang guaranteed that Kong's interest in the Property would not be reduced or affected in the event that Kang sold any further



interests in the Property to any other person, and that any further interest sold would come from Kang's interest in the Property;

- (iii) Kang indemnified Kong in respect of both capital and future profit in the event that Kong's interest in the Property was in any way reduced or affected by the issue or sale of an interest in the Property to any other person or if the purchase of the property was not completed;
- (iv) Kong then alleges that Kang breached the Second Agreement in substance because he did not sell or transfer to Vibol Kong a 10% interest in the property and Kang misappropriated the money paid by Kong, or allowed ATS to misappropriate that money. Alternatively, if any units were issued to Kong pursuant to the Second Agreement they were subsequently sold or transferred to a third party. The breaches of the Second Agreement are alleged by Kong to have caused him to suffer loss and damage in the same amount as is the subject of the claimed loss and damage arising from the breach of the First Agreement;
- (v) it is then alleged, further or in the alternative, that ATS agreed to receive the sum of \$1,264,818.00 paid by Kong and to pay that sum to the VKK Trust for the purposes of the acquisition of the units under the first agreement, that ATS breached that agreement by failing to pay that sum to the VKK Trust and by reason of that Kong has suffered loss and damage in the same amount;
- (vi) it is then alleged that various representations were made to Kong to induce him to enter into the First Agreement, that Kong relied upon those representations, that they were false and untrue, that Kang, as trustee of the VKK Trust, made the representations either well knowing they were false and untrue, or recklessly not caring whether they were true or false (a claim in fraud), that those representations constituted misleading or deceptive conduct under the *Australian Consumer Law 2010*, and by reason of the fraud, or misleading or deceptive conduct, Kong has suffered loss and damage in the same amount as is pleaded in relation to the breach of the First Agreement;
- (vii) there were then claims made against Kang, and/or GEM Management Group Pty Ltd, the second defendant, which replaced Kang as trustee of the VKK Trust, for breach of trust.

### **The Third Agreement**

19 Kong alleges that on 16 May 2011 he, Lim, Kang, Taing and one Ray Purcell – the solicitor he alleges was acting on behalf of Kang and Taing – met at Purcell's offices in Oakleigh where they discussed the failure of Kang and Taing to pay monies due



to Kong<sup>7</sup> and negotiated and agreed to a settlement of their dispute. It was agreed between Kong on the one hand and Kang and Taing on the other, that:

- (a) Kang and Taing would each pay to Kong \$950,000 AUD on 16 November 2011;
- (b) Kang and Taing would each pay to Kong \$950,000 AUD on 16 May 2012;
- (c) Kang and Taing would each pay to Kong \$150,000 AUD in circumstances where any part of the Property is rezoned on or before 16 May 2013;
- (d) Kang would procure a guarantee from ATS;
- (e) Taing would secure the sums to be paid by him by charge over the interest held by Jing Ly Pty Ltd in property situate at and known as Lot 5, 48-56 Jalta Court, Keysborough;
- (f) interest would be payable on the outstanding sums at the rate of 10% per annum;
- (g) where any payment due by Kang was outstanding for more than 28 days the balance of the amount payable by Kang would become immediately due and payable;
- (h) where any payment due by Taing was outstanding for more than 28 days the balance of the amount payable by Taing would become immediately due and payable;
- (i) KPA Lawyers, the solicitors acting for Kang and Taing, would prepare formal terms of settlement reflecting the agreement.<sup>8</sup>

20 Ray Purcell of KPA Lawyers did prepare minutes recording the Third Agreement. The minutes were executed by each of Kong, Kang and Taing.<sup>9</sup> It appears that they were not executed on the day of the meeting, but afterwards on 17 May 2011 by Kong and Kang, and on 19 May 2011 by Taing.

21 Kang and Taing paid interest to Kong on an ad hoc basis, but not in accordance with the terms of the Third Agreement.<sup>10</sup>

22 On 14 October 2011 Kong's solicitor, Mario Merlo, wrote to each of Kang and Taing requesting payment of the first instalment of \$950,000 due under the Third Agreement on or before 16 November 2011.<sup>11</sup>

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<sup>7</sup> Lim affidavit sworn 19 June 2013 ("**Lim affidavit**") para 26.

<sup>8</sup> Affidavit of Vibol Kong sworn 1 July 2013, Exhibit VK3 and para 33 of the Statement of Claim.

<sup>9</sup> Affidavit of Vibol Kong sworn 1 July 2013, Exhibit VK3.

<sup>10</sup> Affidavit of Vibol Kong sworn 1 July 2013 at [29].

- 23 On 2 November 2011 Ray Purcell of KPA Lawyers replied in a letter marked “without prejudice”. There is a dispute about the admissibility of that letter. The dispute is important because the letter is alleged to contain an admission of liability.
- 24 Kong also relied upon alleged admissions of liability contained in letters from KPA Lawyers dated 16 December 2011, 17 February 2012, 24 April 2012, 26 April 2012, 14 May 2012, 18 May 2012, 28 June 2012, 29 June 2012 and 9 July 2012.<sup>12</sup> Kang and Taing objected to the admission into evidence of these letters as being a part of without prejudice negotiations.
- 25 Because of the failure of Kang and Taing to pay the instalments due under the Third Agreement, a further meeting was held in Melbourne on Australia Day, 26 January 2012. That meeting was attended by Kong, Lim, Kong’s nephews Seiha Thong and Harada Kong, Mario Merlo, solicitor, Kang and Taing. At that meeting Kang and Taing are alleged to have made further admissions relevant to liability under the Third Agreement.<sup>13</sup> Kang and Taing objected to the admission of this evidence as being a part of without prejudice negotiations.
- 26 On 24 June 2012 a further meeting was held at the offices of the fourth defendant, ATS. In attendance were Kong, Seiha, Harada, Lim, Kang, Taing and Taing’s son, Hoy Taing. It is alleged that at this meeting Kang and Taing made further admissions relevant to liability under the Third Agreement.<sup>14</sup> Kang and Taing again objected to the admission of this evidence as being a part of without prejudice negotiations.
- 27 Kong submitted that judgment should be entered against Kang and Taing as they have not demonstrated to the requisite degree that they have a defence which has a “real” as opposed to “fanciful” prospect of success.

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<sup>11</sup> Affidavit Merlo sworn 23 August 2013 [11]-[12]; Exhibit MAM-5.

<sup>12</sup> Exhibit MAM5.

<sup>13</sup> Kong affidavit paras 30-31. Merlo affidavit paras 7 and 21.

<sup>14</sup> Kong affidavit paras 36-38. Lim affidavit paras 32-33. Merlo affidavit para 22.

## The defences

### **Kang and ATS (first and fourth defendants)**

28 Kang and ATS first submitted that Kong's pleadings are confusing and significant paragraphs ought be struck out for offending fundamental rules of pleadings (but made no application to do so). They also submitted that:

- (a) the Prayer for Relief does not identify what relief is sought against which of the Defendants and pursuant to which of the causes of action pleaded;
- (b) the Court has, on two occasions (5 April 2013 and 3 June 2013), and by consent, ordered Kong to provide an Amended Statement of Claim, but Kong has not done so; and
- (c) there are so many disputed issues of fact that the Court cannot be satisfied on the evidence that Kang and ATS have no real prospects of successfully defeating Kong's claims.

29 Kang focused at first upon the First Agreement pleaded in paragraphs 9 and 10 of the Statement of Claim and submitted that these allegations highlighted one of the two principal issues in dispute between the parties. Namely, the terms of what was said to be the "real agreement" between the parties, which involved Kang, as trustee of the VKK Trust, agreeing to sell units to Kong for \$2,264,818. But that only \$1,264,818 was paid and the balance is alleged to be a supposed "off-set" arising from some debt or dispute between Lim and Kong. Kang questioned why he, in his capacity as trustee of the VKK Trust (or in any other capacity), would make any agreement in the terms alleged by Kong in paragraph 10 (and following) of the Statement of Claim, particularly when (as Kang deposed in his affidavit of 26 August 2013):

- (a) Lim and Kong defaulted in their joint venture obligations in the first instances in their failure to pay a substantial part of the payment required of them to facilitate the purchase of the Property (see, inter alia, paragraph 65, 67 to 74 of Kang's affidavit);
- (b) Kong and Lim were then paid \$1.5 million on the redemption of their initial units (see paragraphs 93 and 98 of Kang's affidavit);
- (c) the agreement was then for Kong to take up a 10% stake in the venture at a price representing 10% of the contract price for the purchase of the Property, and Kong had not paid the full amount for that interest (see paragraph 102 of Kang's affidavit).

30 Kang's evidence is that he was subjected to unconscionable conduct by Lim, acting on behalf of Kong, and by Kong, following the making of the First Agreement (said by Kang to be the real agreement) which lead to the Third Agreement (paragraphs 95, 98 to 105, 107 to 109, 115(p), 115(q), 115(s), 115(t) and 116 to 118 of Kang's Affidavit).

31 Kang says he was at a special disadvantage vis-à-vis Kong and that unfair or unconscientious advantage was taken of him in his dealings with Lim and Kong. The circumstances include:

- (a) Kang was born in Cambodia in 1946 and left school when he was 12 years of age. He cannot write or read English. He speaks Cambodian and Chinese (Teo Chew) as his native languages. He has a limited command of the English language;
- (b) After migrating to Australia, he went to a refugee camp in Nunawading and, from there, for many years worked in menial jobs cleaning car parts on factory lines, and then as a pipe insulator;
- (c) He was not involved in the preparation or creation of the documents relied upon by Kong and did not have any assistance in the meetings attended by Kong with his lawyer that are also relied on by Kong for alleged admissions made in the course of them;
- (d) By contrast, Kong is a highly educated man who is a qualified interpreter and he (Kong) knew of Kang's special circumstances, disability or disadvantage;
- (e) Kong took advantage of his superior position and Kang's special circumstances, disability or disadvantage in circumstances where:
  - (i) Kang had been the trustee of the VKK Trust and acted in that capacity in entering into the First Agreement;
  - (ii) Kang had been replaced as trustee of the Trust by the second defendant, GEM Management Group Pty Ltd (**GEM**) in May 2010;
  - (iii) GEM offered Kong units and moneys to address his position (the payment Kong had made);
  - (iv) But Kong rejected the GEM offer and continued to pursue Kang and Taing and make significant threats against him to bring about a windfall position for Kong, who now claims \$4 million on an outlay of \$1.2 million; and
  - (v) This occurred in circumstances where Kong and Lim defaulted in the payment of a significant component of their share of the



moneys required to be paid to facilitate the purchase of the Property in the first instance, but then received \$1.5 million on the redemption of their initial unit holding.

**Taing (Third defendant)**

32 Taing relies on a number of defences. First, that there was no consideration for his entry into the Third Agreement. Secondly, that Kong took unconscientious advantage of Taing's mistake. Thirdly, an entitlement to rescind on the basis of mistake and misrepresentation.

*Unconscientious taking advantage of a mistake*

33 Taing relies upon a defence that Kong took unconscientious advantage of a mistake by him in entering into the Third Agreement. He submitted that the Third Agreement is strikingly uncommercial and one-sided and that no person in the position of Taing could possibly have agreed to it unless operating under some mistake.

34 Taing is 72 years of age. He was born in Cambodia and grew up in a rural farming community. He had some schooling up to the age of 13. He migrated to Australia when he was 36 years of age. He can speak and understand basic English, but his capacity in English is limited. He says he is almost illiterate in English.

35 Taing's affidavit identifies at [42] the mistakes under which he signed the minute. In particular:

- (a) he believed what Kang had told him before the meeting, that he was still entitled to half the unit holding redeemed by the Sombat-Kong partnership and that he could use this additional unit holding to raise money to pay Kong;
- (b) the fact that Kong's payment of \$1.2 million to Kang had been used to pay back Lim's contribution to the Trust and to pay interest on the Frankston-Dandenong Road project put him under an obligation to sign the 16 May 2011 minute recording the terms of the Third Agreement;
- (c) the amount that he agreed to pay Kong under the Third Agreement was arrived at on the basis that Kong had effectively paid \$2,479,818.96 for the 40 units to be sold to him by Kang. In fact, Kong had only paid \$1,200,000 and the \$1,000,000 set-off did not exist because the Sombat-

Kong partnership had in fact received full payment of \$1,500,000 for the redemption of the units.

36 Taing submitted that –

- (a) The Third Agreement is so uncommercial that it would have been obvious to Kong, and to anyone in his position, that in agreeing to its terms Taing was operating under a mistake. Further, Kong did not in any way query Taing's entry into the Third Agreement;
- (b) By remaining silent and not raising any query as to Taing's entry into the Third Agreement, Kong ensured that Taing did not become aware of the existence of his mistakes.

37 Further, Taing's evidence (at [40]) is that Kong was present when it was falsely represented to Taing that he was obliged to agree to the terms of the Third Agreement as a result of having received the benefit of \$350,000 of the amount paid by Kong to Kang. Kong knew or ought to have known that this was incorrect.

*No consideration*

38 He submitted that the Third Agreement must be considered in the light of the fact that Taing received no consideration for the agreement. The terms required him to pay \$1,900,000 to Kong in two instalments over 12 months, plus interest at 10% on overdue payments. The only consideration he is alleged to have received is past consideration in the form of the sum of \$350,000 paid to discharge interest owed by Taing in relation to another development. Even this was not received from Kong, but from the first defendant Kang who had received it in turn from Kong.

*Misrepresentation*

39 As mentioned in paragraph 37 above, Taing's evidence (at [40]) is that Kong was present when it was falsely represented to Taing that he was obliged to agree to the terms of the Third Agreement as a result of having received the benefit of \$350,000 of the amount paid by Kong to Kang. Kong knew, or ought to have known, that this was incorrect. Thus, it was submitted, Kong, by his business partner Lim, not only passively took advantage of a mistake, he also actively created the second mistake in the mind of Taing, in the presence of Kong, who took no step to correct Lim's misrepresentation.

### **Rescission**

40 Taing submits there is evidence that the mistakes were operative<sup>15</sup> and entitle him to rescission of the Third Agreement. The basis of the defence is:

- (a) Unilateral mistake in equity on the basis of Kong's unconscientious taking advantage of Taing's mistakes: *Taylor v Johnson*;<sup>16</sup> *Tutt v Doyle*.<sup>17</sup> See also *Blackley Investments Pty Ltd v Burnie City Council*,<sup>18</sup> in which *Tutt v Doyle* was not cited;
- (b) Unconscionable conduct, or a 'catching bargain', on the same basis, that is, in taking advantage of Taing's mistakes: *Bridgewater v Leahy*;<sup>19</sup> and
- (c) Misrepresentation in equity: *Redgrave v Hurd*.<sup>20</sup>

41 Further, if the true equitable basis of the doctrine of unilateral mistake is considered, it is not necessary that the non-mistaken party has taken active steps to create the mistake or to ensure that the mistaken party does not become aware of it: see the discussion in *Taylor v Johnson* at 432 and *Tutt v Doyle* at 12, 14-15. *Blackley v Burnie* appears to be incorrect in this regard. This principle is consistent with equity's doctrine to relieve against catching bargains which does not require the party asserting the bargain to have actively caused or maintained the weaker party's circumstances of special disadvantage; it is enough if that party passively but unconscientiously took advantage of those circumstances: *Bridgewater v Leahy* (1998) 194 CLR 457 at [76].

### **Without Prejudice Privilege**

42 Although I have concluded that this is a case where it is not appropriate to grant the plaintiff summary judgment under ss 61 and 63 of the CPA, or pursuant to r 22.02(1) of the Rules, it is necessary to deal with the claims to privilege as there are many affidavits and exhibits on the Court file that are affected by the claims. It is therefore necessary to the future conduct of the proceeding that a decision is made, to the extent appropriate at this stage, whether they should remain on the file without redaction or other treatment.

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<sup>15</sup> Affidavit of Taing at [40].

<sup>16</sup> (1983) 151 CLR 422.

<sup>17</sup> (1997) 42 NSWLR 10.

<sup>18</sup> [2011] TASFC 6.

<sup>19</sup> (1998) 194 CLR 457 at [76].

<sup>20</sup> (1881) 2 Ch D 1 at 12-13.

*The Critical Letter*

43 The critical letter relied on by Kong is the letter from Mr Ray Purcell of KPA Lawyers, purporting to act on behalf of Kang and Taing, dated 2 November 2011 (**the Critical Letter**). It is marked without prejudice. It followed, but did not refer to, two open letters from Mr Merlo of Melbourne Legal Chambers (**Merlo**) to each of Kang and Taing dated 14 October 2011 requesting payment of the sum due under the Third Agreement on the due date of 16 November 2011.

44 Kong submits that on no proper view could the Critical Letter be considered to be a “without prejudice” communication. There is no indication in the evidence that at the time this letter was written there was any dispute as to the liability of Kang and Taing to pay the monies due under the Third Agreement. Therefore, because there was no dispute between the parties at the time, the “without prejudice” label had no effect.

45 If, however, privilege does attach, Kong contended that then there has been an implied waiver of privilege by operation of law.<sup>21</sup>

46 Kong submitted that in *Mann v Carnell* the High Court laid down the principle that waiver arises through conduct that is ‘inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.’ This principle, although enunciated in a decision on waiver of legal professional privilege, was submitted to be applicable to waiver of without prejudice privilege: see *Verge v Devere Holdings Pty Ltd*.<sup>22</sup>

47 The difficulty facing Kong in making this submission is that *Verge v Devere Holdings Pty Ltd* involved the application of the common law principles applicable to without prejudice privilege. As I will point out, the question is whether s 131(1) or any of the exceptions in s 131(2) of the *Evidence Act 2008* apply.

48 Kong nevertheless contended that:

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<sup>21</sup> See *Mann v Carnell* (1999) 201 CLR 1 at 13 per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

<sup>22</sup> (2009) 258 ALR 464 at p 465 per McKerracher J.



- (a) Kang and Taing's conduct in denying the existence of the Third Agreement, denying the terms of the Third Agreement and denying any indebtedness to Kong is inconsistent with the maintenance of privilege;
- (b) Kang's conduct, by reason of the matters which he has alleged in his affidavit sworn 26 August 2013 ("**Kang affidavit**"), is inconsistent with the maintenance of privilege. In this regard Kong relied on:
  - (i) Kang's allegation that he cannot read or write English and speaks limited broken English;<sup>23</sup>
  - (ii) Kang's denials that Ray Purcell of KPA Lawyers was acting on Kang's behalf at the meeting on 16 May 2011;<sup>24</sup>
  - (iii) Kang's allegation that Kong has sought to take unconscionable advantage of him resulting in Kang executing the May 2011 Agreement;<sup>25</sup>
  - (iv) Kang's allegation generally that Kong and Lim have threatened him so as to take unconscionable advantage of him;<sup>26</sup>
  - (v) Kang's assertion that there was no agreement in the terms alleged by Kong in paragraphs 27 and 28 of his affidavit (that the parties reached the Third Agreement at the offices of KPA Lawyers on 16 May 2011);<sup>27</sup> and
  - (vi) Kang's assertion that the payments of interest referred to by Kong at paragraph 29 of his affidavit were in response to ongoing threats and intimidation by Lim and Kong;<sup>28</sup>
- (c) Kong also submitted that the maintenance of the privilege is also inconsistent with the case now put by Taing in his affidavit sworn 20 August 2013 ("**Taing affidavit**"). Kong refers to the following matters:
  - (i) Taing asserts that he is almost illiterate in English;<sup>29</sup>
  - (ii) that Taing signed the minute dated 16 May 2011 because Kang had told him that he had used some of the \$1.2 million Kang had received from Kong towards the Frankston-Dandenong Road project in which Taing had an interest;<sup>30</sup>
  - (iii) Taing's assertion that it was not clear to him who Ray Purcell was acting for at the meeting on 16 May 2011;<sup>31</sup>
  - (iv) that Taing felt pressured to agree to what was proposed by Kong because of what Kang had told him as to how Kang had

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<sup>23</sup> Kang affidavit paras 4, 35, 42, 57 and 115(f).

<sup>24</sup> Kang affidavit paras 40-41, 47-51, 57-58, 65-66, 69-70, 74-75, 77, 82, 106 and 115.

<sup>25</sup> Kang affidavit paras 70, 77, 98, 105, 109, 115-117 and 119-120.

<sup>26</sup> Kang affidavit paras 70, 77, 98, 105, 109, 115-117 and 119-120.

<sup>27</sup> Kang affidavit paras 115A (n),(o).

<sup>28</sup> Kang affidavit para 115A (p).

<sup>29</sup> Taing affidavit para 3.

<sup>30</sup> Taing affidavit paras 36, 38, 39 and 40.

<sup>31</sup> Taing affidavit para 37.

used some of Kong's \$1.2 million towards the Frankston-Dandenong Road project in which Tang had an interest;<sup>32</sup>

- (v) that in July 2011 Taing obtained advice from Ray Purcell and it was only then that he realised that he had made mistakes in signing the 16 May 2011 minute;<sup>33</sup> and
- (vi) Taing's assertion that Kong must have known that Taing was under no obligation to Kong to agree to the transaction in the 16 May 2011 minute.<sup>34</sup>

49 Kong also relied upon the operation of s 131(2)(f) and (g) of the *Evidence Act*, which removes the bar to admissibility otherwise imposed on without prejudice communications by s 131(1) of the *Evidence Act*.

50 Taing submitted that:

- (a) evidence of the meetings subsequent to 11 May 2011 ought not to be received. Those meetings were conducted on a without prejudice basis. Mr Merlo's attempt to give evidence of matters allegedly said at the November 2012 informal mediation (affidavit sworn 23 August 2013 at [10(m)]) suggests that Mr Merlo either lacks any understanding of the without prejudice privilege, or he does not care about the privilege;
- (b) if the evidence of the alleged further agreements is admitted, it can be seen that they are not in fact concluded agreements. Nothing was finally signed. There is no unconditional acceptance of an offer. Further, the negotiations that took place are properly characterised as attempts to agree a variation of the terms of the Third Agreement, which stand or fall with that agreement, and did not achieve a concluded bargain in any event; and
- (c) Mr Merlo's evidence raises public policy consideration. Not only has Mr Merlo ignored the without prejudice privilege in assembling the evidence for this application, but on his own evidence he has twice met and conversed with represented parties in the absence of their solicitor (affidavit sworn 26 June 2013 at [7] & [10], affidavit sworn 23 August 2013 at [10(o)]). This is troubling conduct, to say the least; this Court ought not to reward Mr Merlo's flouting of two important principles, one of law and one of ethical practice.

51 Mr Barber, counsel for Taing, submitted that the dispute or disputes that were the subject of negotiation in those subsequent meetings concerned an extension of time for payment of the moneys due under the First Agreement and the provision of

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<sup>32</sup> Taing affidavit para 39.

<sup>33</sup> Taing affidavit para 42.

<sup>34</sup> Taing affidavit para 43.

security for the repayment of the debts the subject of that Agreement. Mr Barber conceded, however, that at the time of the subsequent meetings there was no dispute as to the liability of his client to pay the moneys agreed to be paid under the Third Agreement. But there was a dispute about the provision of security and the terms of any extension of time, and that was the subject of negotiation at the subsequent meetings.<sup>35</sup>

52 Mr Barber submitted that once the parties are in without prejudice negotiations, then they are in those without prejudice negotiations until either an agreement is reached that concludes the negotiations or the parties agree that their communications are on an open basis. Neither of those things occurred in this case, so the communications in and surrounding the meetings subsequent to 11 May 2011 are all subject to the privilege.

53 Mr Anderson SC, Counsel for Kong, pointed out that the affidavit of Mr Barber's client, Taing, identified the dispute the subject of the meetings of 26 January and 24 June 2012, however, as a dispute about payment under the Third Agreement and, according to the evidence, had nothing to do with negotiating the provision of security.<sup>36</sup> Mr Anderson SC submitted that in the meetings and correspondence after the Third Agreement the parties were discussing another agreement in open communications. They did not have a dispute. There was no dispute that the Third Agreement had been entered into nor that the monies due thereunder, save for some payments of interest, had not been paid. There was therefore no dispute to be resolved. The subject of the communications the subject of the claim for without prejudice privilege was a further agreement as to the time for payments already overdue and the provision of security for the moneys due.

54 Moreover, it was submitted by Mr Anderson SC that the content of this Critical Letter was at odds with the position now sought to be adopted by Kang and Taing. The letter makes no reference to any matter now relied on in defence of the claims.

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<sup>35</sup> Transcript, 9 October 2013, p. 22.

<sup>36</sup> Taing affidavit 20 August 2013 at [45(a)].

This was made more material to the present application by the evidence of Taing that he realised his mistake in July 2011 (well before the Critical Letter was sent) after he met with Hakly Lao, a director of GEM, which was by then the Trustee of the VKK Trust, and told him that he (Taing) needed to sell some units in the Trust in order to pay Kong. Taing's evidence went on:<sup>37</sup>

I believe that it was on the same day or the following day that I arranged to meet with Ray Purcell to tell him that Hakly Lao had advised me. I understood from my meeting with Ray Purcell that Hakly Lao had told me the truth and that there were no more units for me....I then realised that I had made a mistake in signing the 16 May 2011 minute..."

### *Evidence Act 2008*

55 Section 131 of the *Evidence Act 2008* provides, so far as relevant, as follows:

#### **131 Exclusion of evidence of settlement negotiations**

- (1) Evidence is not to be adduced of –
  - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
  - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.
- (2) Subsection (1) does not apply if –
  - ...
  - (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
  - (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
  - ...

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<sup>37</sup> Taing Affidavit 20 August 2013 at [41].



56 The starting point for the determination of whether the Critical Letter, or any of the subsequent letters and discussions, are subject to privilege is what s 131(1) means by the phrase "negotiate a settlement". In the context of the phrase "in connection with an attempt to negotiate the settlement of the dispute", the word "negotiate" simply means, according to the *Macquarie Dictionary*, to arrange for or bring about a settlement.<sup>38</sup> The *New Shorter Oxford English Dictionary*<sup>39</sup> is more useful for present purposes. The primary meaning is "communicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement".

57 The purpose and policy objectives of s 131 inform that meaning. In *Silver Fox Co Pty Ltd v Lenard's Pty Ltd (No 3)* (2005) 214 ALR 621, Mansfield J explained at [36] the purpose of s 131(1) of the Evidence Act as follows:

Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations -- whether private or by mediation -- are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically.

58 Clearly it is in the public interest that disputes be settled or resolved without recourse to the Courts, or at least a trial. The presence of s 131 in the *Evidence Act* is a recognition of the desirability of encouraging settlements.<sup>40</sup> Section 131 does not incorporate any judicial discretion to overcome the privilege in circumstances that do not fall within the list of exceptions in s 131(2).

59 A dispute may be resolved by the parties compromising their positions. But resolution of a dispute does not require compromise by each party. The resolution may come about by one side or the other fully conceding the case of the other. Disputes are regularly resolved without any compromise, including by a claimant withdrawing its legal proceeding or the threat thereof.<sup>41</sup>

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<sup>38</sup> see *Macquarie Dictionary*, 5<sup>th</sup> Ed.

<sup>39</sup> 1993.

<sup>40</sup> see ALRC 26, Vol 1, paragraph 891.

<sup>41</sup> *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (No 2)* [2011] FCA 276 at [33] per Bromberg J.

- 60 Whether or not there was an attempt to negotiate a settlement involves an analysis of the communications made, taking into account the content of each communication and the context in which each was made.<sup>42</sup> Spigelman CJ observed in *Bhagat v Global Custodians Ltd*<sup>43</sup> that much depends upon context and characterisation.
- 61 It is well recognised at common law that whether a communication is a part of a protected negotiation does not depend on the label applied, but upon the intentions of the parties as determined from the objective evidence, usually comprising the nature of the discussions and negotiations between them: *Davies v Nyland*;<sup>44</sup> *Bentley v Nelson*.<sup>45</sup> A similar position has been taken in applying s 131 of the *Evidence Act*.<sup>46</sup> Thus the label on a letter “without prejudice” is not determinative. It may, however, be a factor to be taken into account in arriving at the intention of the parties.
- 62 What must be established is that the communication or document is connected with a genuine attempt to negotiate settlement of an *existing dispute*. The words of the section require, as a precondition to its operation, that the communication in question is made between persons *in dispute*.
- 63 Those words also mean that it must also be established that the communication is in connection with an attempt to negotiate a settlement of that dispute. There is authority that the connection must be direct,<sup>47</sup> and this can be important where the parties discuss possible compromise, on the one hand (which will attract the privilege), and where they merely assert their respective positions, on the other (which will not attract the privilege).<sup>48</sup>
- 64 At common law, without prejudice privilege is joint privilege and waiver by one party is insufficient: *Re Turf Enterprises Pty Ltd*.<sup>49</sup> Also at common law, the waiver of

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<sup>42</sup> *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (No 2)* [2011] FCA 276 at [31].

<sup>43</sup> [2002] NSWCA 160 at [29].

<sup>44</sup> (1975) 10 SASR 76 at 89-90.

<sup>45</sup> [1963] WAR 89.

<sup>46</sup> See for example *GPI Leisure Corporation Pty Ltd (In Liq) v Yuill* (1997) 42 NSWLR 225 at 226.

<sup>47</sup> *GPI Leisure Corporation Pty Ltd (In Liq) v Yuill* (1997) 42 NSWLR 225.

<sup>48</sup> *Trade practices Commission v Arnotts Ltd* (1989) 88 ALR 69 at 71-73; *Op cit GPI Leisure Corporation Pty Ltd (In Liq) v Yuill* (1997) 42 NSWLR 225 at 226.

<sup>49</sup> [1975] Qd R 266; *Walker v Wilsher* (1989) 23 QBD 335.

both or all parties to the privilege involved negotiators who became parties to litigation. One of the parties could not unilaterally waive the privilege. However, there is authority to the effect that unilateral waiver can occur in cases where the issue is whether there can be implied waiver in subsequent proceedings involving one of the parties to the without prejudice communications and a third party.<sup>50</sup>

65 It is inherent in s 131 that the exclusion of evidence of settlement negotiations to which it applies is the privilege of all the 'persons' in dispute in relation to the communications made between them, and a third party, in connection with an attempt to negotiate a settlement of the dispute. It is also therefore a joint privilege.

66 The absence of discretion in the Court and the 'code like' specification of the exceptions to the privilege set out in s 131(2) shows that at best there is limited room for the application of the principles relating to waiver to which Counsel for Kong referred. Those principles are now generally applicable by virtue of s 122 of the *Evidence Act* to claims of client legal privilege under Division 1 of Part 3.10. It is to be noted that s 122 does not apply to s 131, which is in Division 3 of Part 3.10.

67 Thus, unless the notion of inconsistency referred to in s 122, and derived from *Mann v Carnell*<sup>51</sup> is relevant to one or other of the exceptions in s 131(2), the submissions of Kong relating to waiver at common law have no application in the circumstances of this case.

#### ***Reasoning -without prejudice privilege***

68 The Critical Letter does not refer to or identify any dispute nor does it take issue with anything set out in the letters from Merlo that preceded it. On the face of it there was no dispute that it related to and attempted to resolve. The evidence thereafter does not change that position, although it reveals a negotiation about the entry into another agreement. It seems to me to be clear that there was no dispute to which the Critical Letter related. Even though it put forward a proposal, the context in which it was made and its content reveals no existing dispute. Moreover, it is not

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<sup>50</sup> See *Yokogawa Australia Pty Ltd v Alstom Power Ltd* (2009) 262 ALR 738 at [85]-[96].

<sup>51</sup> (1999) 201 CLR 1.

connected, at the point at which it is sent, to any attempt to negotiate a settlement of a dispute. It is merely a communication which proposes that the demands made by Kong can be dealt with in a practical way which will see him paid.

69 It is therefore unnecessary to delve into the operation of s 131(2)(f) and (g), on which Kong also relied to admit the Critical Letter and the subsequent letters and discussions.

70 The later letters and discussions fall into a different category. After the Critical Letter was written, with the proposal it contains, negotiations took place that reveal a dispute about the terms of the proposal. It may be that in the end these later letters and discussions will be found not to be the subject of privilege under s 131, either because properly characterised there was no dispute about the existence of the debt, and the negotiation of terms of payment and security themselves revealed no dispute capable of being the subject of an Australian proceeding: see s 131(5)(a) *Evidence Act*.

71 In the light of my consideration of the defences raised by the defendants and the necessity that these defences go to trial, it is not appropriate to determine whether the later letters and discussions are the subject of privilege under s 131. It is appropriate at this stage to preserve the position of the defendants in relation to their claims of privilege over the later letters and discussions. Therefore I will proceed on the footing that they are the subject of that privilege, without finally deciding that question. Ultimately it will be a matter for trial determination.

### **Summary judgment test**

72 Part 4.4 of the *Civil Procedure Act 2010* sets out the test for summary judgment: a court may give summary judgment if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, has no real prospect of success (s 63 CPA).



73 This liberalises the rules governing summary judgment in Victoria, such that it is easier to dispose of unmeritorious claims or defences summarily. The Court of Appeal has stated that the test:

[S]hould be construed as one of whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success; that the 'real chance of success' test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test; and that, as the law is at present understood, the real chance of success test permits of the possibility that there may be cases, yet to be identified, in which it appears that, although the respondent's case is not 'hopeless' or 'bound to fail', it does not have a real prospect of succeeding.<sup>52</sup>

74 The test must be applied according to its own terms and not according to considerations of whether the proceeding is 'hopeless' or 'bound to fail'. To adopt 'an unduly constrained, historical approach to the construction of s 63' would 'subvert the purpose of the provision'.<sup>53</sup>

75 Courts must, however, continue to exercise the power to terminate proceedings summarily with caution. Courts should therefore only exercise the power if it is clear that there is no real question to be tried. This is so irrespective of whether an application for summary judgment is made on the basis that:

- (a) the pleadings do not disclose a reasonable cause of action, and no amendment could cure this error; or
- (b) the action is frivolous, vexatious or an abuse of process; or
- (c) the application for summary judgment is supported by evidence.<sup>54</sup>

76 The power to give summary judgment must be exercised in accordance with the overarching purpose of the CPA and taking into account the fact that, if granted, a party will be deprived of the chance to pursue its claim or defence.<sup>55</sup>

77 In *Wheelahan v City of Casey (No 3)*,<sup>56</sup> it was accepted that the 'no real prospect of success' test may in some circumstances extend to cases not regarded as sufficiently hopeless to warrant striking out under the Rules.

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<sup>52</sup> *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* [2013] VSCA 158 at [29] per Warren CJ and Nettle JA (Neave JA agreeing).

<sup>53</sup> *Ibid*, at [25] per Warren CJ and Nettle JA (Neave JA agreeing).

<sup>54</sup> *Ibid*, at [35] per Warren CJ and Nettle JA (Neave JA agreeing).

<sup>55</sup> *Ibid*, at [42] per Neave JA).

78 To that end, the test expands the basis for giving summary judgment compared with the test in the Court's Rules. However, in most instances, the new test will not differ from the old test in its practical application (*National Australia Bank Ltd v Norman* [2012] VSC 14 at [12]).

79 If there is no real prospect of success, a court may nevertheless allow a matter to proceed to trial if:

- (a) it is not in the interests of justice to summarily dispose of the proceeding (s 64(a)); or
- (b) the dispute is of such a nature that only a full hearing on the merits is appropriate (s 64(b)).

80 Whether a proceeding should be allowed to go to a full hearing on the merits must be determined according to the circumstances of each case: *Barber v State of Victoria*.<sup>57</sup>

#### **Reasoning - summary judgment**

81 Mr Barber, Counsel for Taing, submitted that his evidence is plausible, especially given the extraordinarily unfavourable terms on which the Third Agreement was drawn and the fact that he is functionally illiterate in the English language. Counsel for Kang made similar submissions but focused more on the commercial foolishness of the Third Agreement in the context of the transactions that preceded it and the moneys that had been paid by Kong and the 'off-set' sum of \$1 million that had, perhaps, not been paid by Lim to the VKK Trust.

82 Kang and Taing relied on principles often attributed to the decision in *Commercial Bank of Australia Ltd v Amadio*.<sup>58</sup> The principle is that which may be invoked whenever one party, by reason of some condition or circumstance, is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is

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<sup>56</sup> [2011] VSC 15 at [8].

<sup>57</sup> [2012] VSC 554 at [15].

<sup>58</sup> (1983) 151 CLR 447 at 462; [1983] HCA 14; Counsel for each of Kang and Taing referred to different and more recent authorities that turn on the same principles, Kang on *Kakavas v Crown Melbourne Limited*, [2013] HCA 25; (2013) 298 ALR 35 ; (2013) 87 ALJR 708 and Taing on *Bridgewater v Leahy* (1998) 194 CLR 457.

then taken of the opportunity thereby created, to relieve the innocent party of the consequences of that conduct. In the application of this principle it is necessary that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.<sup>59</sup>

83 The High Court noted in *Kakavas v Crown Melbourne Limited*<sup>60</sup> that the decisions in that Court in which claims for relief from unconscionable conduct had been litigated, illustrate the necessity for a close consideration of the facts of each case in order to determine whether a claim to relief has been established.<sup>61</sup> That is difficult to do where the evidence is on affidavit, even with cross-examination, and impossible without cross-examination, unless the case is very clear. It is equally difficult to conclude that there is no basis for the intervention of equity, as Kong seeks the Court should do in this case.

84 Counsel for Kong, Mr Anderson SC, submitted that the defences raised by each of Kang and Taing were recent inventions. They were first raised when the application for summary judgment was brought. They are based on entirely self-serving conclusory evidence and are not supported by any objective evidence. Moreover, they are contradicted by other evidence. He made a full frontal attack on the affidavits of Kang and Taing, pointing, correctly it seems to me, to inconsistencies, unlikely assertions of lack of understanding, absence of advice and serious disadvantage having regard to evidence of their other business dealings, of which there is considerable evidence.

85 Mr Anderson SC pointed to the fact that the Critical Letter made no mention of any matter now relied on in defence of the claims, no mistake, duress, undue pressure,

<sup>59</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; *Kakavas v Crown Melbourne Limited*, [2013] HCA 25 at [6]; (2013) 298 ALR 35; (2013) 87 ALJR 708.

<sup>60</sup> [2013] HCA 25 at [14]; (2013) 298 ALR 35 ; (2013) 87 ALJR 708.

<sup>61</sup> *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; [1992] HCA 61; *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

disadvantage or unconscionable conduct on the part of Kong. This was at odds with the position now sought to be adopted by Kang and Taing. This was made more material to the present application by the evidence of Taing that he realised his mistake in July 2011 (well before the Critical Letter was sent) after he met with Hakly Lao, a director of GEM, which was by then the Trustee of the VKK Trust, and told him that he (Taing) needed to sell some units in the Trust in order to pay Kong. Taing's evidence went on:<sup>62</sup>

I believe that it was on the same day or the following day that I arranged to meet with Ray Purcell to tell him that Hakly Lao had advised me. I understood from my meeting with Ray Purcell that Hakly Lao had told me the truth and that there were no more units for me....I then realised that I had made a mistake in signing the 16 May 2011 minute...

86 It is thus seriously to be doubted that the defences now raised by Taing, at least, are genuine. But the difficulties identified by Mr Anderson SC in the evidence of Kang and Taing do not enable a determination of where the truth lies from conflicting and argumentative affidavits. The efficacy of the defences is not able to be resolved except at trial. Thus there are questions to be investigated at trial and the dispute is of such a nature that only a full hearing on the merits is appropriate: see s 64 of the CPA.

### **Conclusions**

87 For the reasons given above, I conclude:

- (a) that the letter dated 2 November 2011, which I have called the Critical letter, is not the subject of privilege under s 131 of the *Evidence Act*;
- (b) That the subsequent letters and discussions which the defendants submitted were privileged under that section and not admissible against them, referred to particularly in exhibit MAM-5 to the affidavit of Mr Merlo sworn 23 August 2013 and in a number of paragraphs of that and other affidavits, may be privileged, but it is inappropriate to determine that question at this stage; and
- (c) It is not possible to determine in this case that the defences indicated by Kang and Taing are not maintainable or have no real prospects of success, as Counsel for Kong sought that I do.

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<sup>62</sup> Taing Affidavit 20 August 2013 at [41].



However, they were raised very late – so far as the evidence before me revealed – and appear at this stage to be weak;

- (d) This is a case, therefore, where it is not appropriate to grant Kong summary judgment under ss 61 and 63 of the CPA, or pursuant to r 22.02(1) of the Rules.

88 I will hear the parties as to the appropriate order as to costs and further directions for the conduct of the proceedings.

## SCHEDULE - RULINGS ON OBJECTIONS TO EVIDENCE

### Affidavit of Ngoun Lim

Paragraph	Ground	Decision
24	3 <sup>rd</sup> , 4 <sup>th</sup> & 5 <sup>th</sup> sentences - conclusions	Not direct evidence, conclusions - Objection upheld (Transcript 13-14)
25	1 <sup>st</sup> sentence - conclusions	Not direct evidence, conclusions - Objection upheld (Transcript 13-14)
28	<ol style="list-style-type: none"> <li>1. 4<sup>th</sup>-13<sup>th</sup> words - conclusions</li> <li>2. last sentence - Not personal knowledge and conclusion</li> </ol>	<ol style="list-style-type: none"> <li>1. Not direct evidence, conclusions - Objection upheld (Transcript 15).</li> <li>2. Objection upheld - evidence of another' state of mind (T 15)</li> </ol>
29	Hearsay	Objection rejected. Evidence on information and belief admissible in interlocutory application.
30	<ol style="list-style-type: none"> <li>1. 1<sup>st</sup> sentence - Hearsay</li> <li>2. 2<sup>nd</sup> sentence - privileged, without prejudice communication</li> </ol>	<ol style="list-style-type: none"> <li>1. Objection rejected. Evidence on information and belief admissible in interlocutory application.</li> <li>2. Objection upheld - without prejudice privilege prima facie available.</li> </ol>
31	Hearsay	Objection rejected. Evidence on information and belief admissible in interlocutory application.
32	Privileged, without prejudice communication	Objection upheld - without prejudice privilege prima facie available.
34	Hearsay	Objection rejected. Evidence on information and belief admissible in interlocutory application.
32 (second)	Privileged- without prejudice communication	Objection upheld - without prejudice privilege prima facie available.

**Affidavit of Mario Merlo sworn 26 June 2013**

Paragraph	Ground	Decision
3	1 <sup>st</sup> Sentence - Conclusion	This is not an objectionable conclusion.
6	Hearsay	Objection rejected. Evidence on information and belief admissible in interlocutory application.
7	Privileged, without prejudice communication	Objection upheld - without prejudice privilege prima facie available.
10	Privileged, without prejudice communication	Objection upheld - without prejudice privilege prima facie available.
11	Hearsay	Objection rejected. Evidence on information and belief admissible in interlocutory application.
12	Argumentative, Conclusion	Objection upheld
13	Argumentative, Conclusion	Objection upheld
32	Conclusion	There is no paragraph 32.

**Affidavit of Vibol Kong**

Paragraph	Ground	Decision
11	Hearsay	Objection rejected. Evidence on information and belief admissible in interlocutory application.
16	Conclusion	Objection rejected.
31	privileged, without prejudice communication	Objection upheld - without prejudice privilege prima facie available.
34	privileged, without prejudice communication	Objection upheld - without prejudice privilege prima facie available.

Paragraph	Ground	Decision
35	privileged, without prejudice communication	Objection upheld – without prejudice privilege prima facie available.
36	privileged, without prejudice communication	Objection upheld – without prejudice privilege prima facie available.
37	privileged, without prejudice communication	Objection upheld – without prejudice privilege prima facie available.
38	privileged, without prejudice communication	Objection upheld – without prejudice privilege prima facie available.
32 (Second)	privileged, without prejudice communication	Objection upheld – without prejudice privilege prima facie available.
33 (Second)	privileged, without prejudice communication	Objection upheld – without prejudice privilege prima facie available.

**Affidavit of Mario Merlo sworn 23 August 2013**

Paragraph	Ground	Decision
4	Argument, privileged, without prejudice communication	There is no reference to any privileged communication in this paragraph. Objection otherwise rejected.
6	3 <sup>rd</sup> sentence – Conclusion, not personal knowledge	Objection rejected, statement made on information and belief by reference to company search.
7	not personal knowledge	Objection upheld.
8	Conclusions	Objection upheld.
10(e)	Argument, Conclusions	Objection upheld.
10(f)	2 <sup>nd</sup> sentence - Argument, Conclusions  Last sentence - Comment	Objection upheld.
10(g)	2 <sup>nd</sup> sentence to end - Argument, comment, conclusions, not personal knowledge	Objection upheld.
10(i)	last 4 sentences – Argument, comment, conclusions, not personal	Not correct reference.



Paragraph	Ground	Decision
	knowledge	
10(l)	Argument, comment, conclusions, not personal knowledge	Objection upheld.
10(m)	Argument, comment, conclusions, without prejudice communications,	Objection upheld in relation to the sentences from "At the meetings..." to the end on the ground of without prejudice privilege.
10(n)	Argument, comment	Objection upheld.
12 & exhibit MAM-5	Privilege - without prejudice communications	Objection upheld in part, with the exception of the letters of 14 October 2011 and 2 November 2011.
13 & 14	Irrelevant	Objection rejected. Relevant to Costs.
15	Argument, comment, not personal knowledge, irrelevant.	Objection rejected. Relevant to Costs.
18	Comment, irrelevant.	Objection rejected. Relevant to Costs.

**Affidavit of Harada Kong sworn 29 August 2013**

Paragraph	Ground	Decision
6	second sentence - Argument, comment.	Objection upheld.
7	Irrelevant	Objection upheld.
8	Privilege -without prejudice communication.	Objection upheld - without prejudice privilege prima facie available.
9	Privilege -without prejudice communication.	Objection upheld - without prejudice privilege prima facie available.
10	Privilege -without prejudice communication.	Objection upheld - without prejudice privilege prima facie available.
19	Not from personal knowledge, source of information not disclosed.	Objection upheld.
21	Privilege -without prejudice communication.	The fact of his attendance at the meeting is not privileged.
22	Privilege -without prejudice communication.	Objection upheld - without prejudice privilege prima facie available.

Paragraph	Ground	Decision
25	Privilege -without prejudice communication.	Objection upheld – without prejudice privilege prima facie available.
27	Privilege -without prejudice communication.	Objection upheld – without prejudice privilege prima facie available.

**Affidavit of Mario Merlo sworn 26 September 2013**

Paragraph	Ground	Decision
5	4 <sup>th</sup> sentence from “and” - Privilege -without prejudice communication.	Objection upheld – without prejudice privilege prima facie available.
21(a)	6 <sup>th</sup> sentence onwards - Privilege -without prejudice communication.	Objection upheld – without prejudice privilege prima facie available.
21(b)	3 <sup>rd</sup> sentence onwards - Privilege -without prejudice communication.	Objection upheld – without prejudice privilege prima facie available.
22	Privilege -without prejudice communication.	Objection upheld – without prejudice privilege prima facie available.
23	3 <sup>rd</sup> sentence - Conclusion, not from personal knowledge.  4 <sup>th</sup> sentence - Privilege -without prejudice communication.	Objection upheld.  Objection upheld – without prejudice privilege prima facie available.
24	Privilege -without prejudice communication.	Objection upheld – without prejudice privilege prima facie available.

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**SCHEDULE OF PARTIES**

No. S CI 2012 05289

**BETWEEN:**

**VIBOL KANG**

Plaintiff

- and -

**EANG KANG**

First Defendant

**GEM MANAGEMENT GROUP PTY LTD**  
(ACN 143 095 774)

Second Defendant

**KHAY SUONG TAING**

Third Defendant

**ATS AUSTRALIASIAN TECHNICAL SERVICES PTY LTD**  
(ACN 065 220 831)

Fourth Defendant