VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP263/2014

CATCHWORDS

Preliminary hearing – whether first respondent's claims against third joined party excluded by Agreement entered into in July 2009 - relevant principles

APPLICANTS	Owners Corporation 2 Plan No PS515508R and Ors
FIRST RESPONDENT:	MAV Group Pty Ltd (ACN 108 154 534)
SECOND RESPONDENT:	Points Architects Pty Ltd (ACN: 082 139 133)
THIRD RESPONDENT:	BCG (Aust) Pty Ltd (ACN: 114 332 017)
FIRST JOINED PARTY:	Bicon Pty Ltd (ACN: 070 741 374)
SECOND JOINED PARTY:	Moncor Investments Pty Ltd (ACN 095 049 728)
THIRD JOINED PARTY:	C&N Scaffolding Pty Ltd
FOURTH JOINED PARTY:	KAM Group Pty Ltd
FIFTH JOINED PARTY:	Peter Majstorovic
SIXTH JOINED PARTY:	Intrax Consulting Engineers Pty Ltd (ACN 106 481 252)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Preliminary hearing
DATE OF HEARING	22 June 2015
DATE OF ORDER	13 July 2015
CITATION	Owners Corporation 2 Plan No PS515508R v MAV Group Pty Ltd (Building and Property) [2015] VCAT 1025

RULING

The first respondent is not excluded from bringing its claims in this proceeding against the third joined party by virtue of the agreement dated 14 July 2009 and signed on 17 July 2009.

ORDER

Costs reserved with liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for one hour.

DEPUTY PRESIDENT C AIRD

APPEARANCES:	Only the first respondent and the third joined party appeared at this preliminary hearing, the other parties having been excused from attending
For First Respondent	Mr J Stavris of Counsel
For Third Joined Party	Mr C Twidale of Counsel

REASONS

1 In or about October 2007 the first respondent builder entered into a contract with Rose Anna Pty Ltd for the construction of a three storey residential building on top of existing commercial premises in Rosanna (described as the 'Stage 2 Works'). In August 2014 the applicants commenced these proceedings seeking orders for the payment of damages for, or the rectification of, allegedly defective building work by the builder. In the expert report attached to the application, the cost of rectification of common property defects is estimated to be $1,476,969.

2 On 18 May 2015, upon application by the builder, I made orders joining a number of the builder's sub-contractors to the proceeding as joined parties, including the third joined party, C & N Scaffolding Hire Pty Ltd ('C&N'). The builder seeks contribution or indemnity from each of the joined parties in relation to the defects claimed by the applicants.

3 The applicants claim the cement sheet wall cladding is defective and claim $319,450 as the cost of rectification. The builder claims that C&N, alternatively C&N and the fourth and fifth joined parties are responsible for the defects, and seeks contribution and indemnity from each or all of them in proportions to be determined by the Tribunal.

4 On 18 May 2015, after ordering that C&N be joined as a party, I made the following orders at the request of MAV and C&N:

> The proceeding as between the first respondent and the third joined party is listed for a preliminary hearing on 22 June 2015 before Deputy President Aird commencing at 10.00 a.m. at 55 King Street Melbourne with an estimated hearing time of 1 day to consider the following question:
>
> Assume for argument's sake:
>
> (a) the applicants' allegations against the first respondent ('MAV') are true; and
>
> (b) the first respondent's allegations against the fourth (sic) joined party ('C&N') are true
>
> does the agreement reached between C&N and MAV dated 14 July 2009 and signed on 17 July 2009 nonetheless exclude MAV from bringing its claims in this proceeding against C&N?

5 Although preliminary hearings are generally discouraged by superior courts, unless determination of the issue will lead to a resolution of the entire proceeding, I considered it appropriate that this issue be determined before the parties incurred any further costs in this proceeding which has the very real possibility of being expensive and protracted. There are complex technical and legal issues to be determined. If C&N is correct, then MAV's claims against it would be struck out at an early stage. However, for the reasons which follow I find that the agreement signed on

17 July 2009 does not exclude MAV from bringing its claims in this proceeding against C&N.

6 Both parties filed written submissions, and affidavits by the directors of each company. MAV relies on affidavits by its director, Tony Arzenti dated 30 March 2015 and 15 May 2015 , and C&N relies on affidavits by its director, Nicola Nardo dated 8 May 2015 and 1 June 2015. Both Mr Nicola and Mr Arzenti adopted their affidavits under oath and were cross examined. Mr Stavris of Counsel appeared on behalf of MAV and Mr Twidale of Counsel appeared on behalf of C&N.

7 After C&N closed its case, Mr Stavris made a no case submission which I refused, indicating that I would be assisted by hearing from Mr Arzenti. Also, being mindful of the provisions of ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') in my view, 'no case submissions' should only be considered in the clearest of cases.

BACKGROUND

8 In 2008 C&N was engaged by MAV to supply scaffolding, and to supply and install polystyrene, matrix cladding and blue board at two projects: the Rosanna project which is the subject of this proceeding, and another at Coburg. The details of the contract are not relevant to the preliminary question.

9 In October 2008 C&N and MAV fell into dispute and C&N ceased work. The parties resolved their issues on 17 July 2009 when they signed an agreement dated 14 July 2009. The agreement was prepared by Mr Arzenti of MAV and is typed on 'MAV Group' letterhead. It is in the form of a letter:

> C & N Scaffolding Hire P/L
>
> [address]
>
> Attention: Nick Nardo
>
> **RE: 14 Bell Street Coburg & 40 Beetham Parade, Rosanna Final Payment**
>
> Further to our meeting held at Suite 3, Level 1, Lincoln Road, Essendon on the 14th July 2009 at 10.30am, we would like to confirm our discussions and agreement to the following items:
>
> 1. Agreed amount of $22,000 including GST.
> 2. No further claims to be issued by either parties on signing this agreement. (sic)
> 3. Full and final payment on signing this agreement.
>
> We would like to thank you for the mutual agreement we have reached and wish you all the best.
>
> | | |
> |---|---|
> | Signed on Behalf of MAV Group P/L
Tony Arzenti | Signed on Behalf of C & N
Scaffolding Hire P/L
Nick Nardo |

THE PARTIES' RESPECTIVE POSITIONS

10 C&N contends that as the issues prior to the parties entering into the Agreement included allegations by MAV of defective work at both sites, and a claim by MAV from C&N for breach of contract, the express term 'claim' must include any allegations of defective works and claims for damages by MAV.

11 Further, that the terms 'final payment', 'no further claims' and 'full and final payment' indicate that it was an *express term of the agreement that the parties fully "release" each other with respect to the issues subject to the dispute*. (sic) It contends that the release extended to all known and unknown defects.

12 MAV contends the Agreement confirms the settlement the parties reached in relation to the issues which had been identified prior to the Agreement being signed. Further, that the 'release' did not extend to any items which were not known about and had not been identified prior to the Agreement being signed. In particular, it did not relate to the defective works which are the subject of this proceeding.

THE PRINCIPLES

13 Mr Twidale referred me to various extracts from *Cheshire & Fifoot Law of Contract*[1] including:

> 10.31 **Objective approach** The High Court has repeatedly emphasised that the court approaches the task of ascertaining the meaning of the parties' expressions objectively. It is not interested in their subjective understanding but rather applied the meaning that an objective outsider would attribute to the contract in the circumstances…Determination of the objective meaning requires:
>
> - …the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[2]

14 I accept this is the appropriate test and, in order to determine the *objective meaning* of the Agreement, it is appropriate that I have regard to the correspondence which passed between the parties during the dispute.

15 I found this correspondence to be of greater assistance in objectively ascertaining the intention of the parties when they entered into the Agreement than the evidence given by Mr Arzenti and Mr Nardo nearly five years after the Agreement was entered into.

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[1] 10th Australian Edition

[2] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 185 ALR 152 at [11] and other decisions referred to therein.

The correspondence

16 Mr Arzenti has exhibited copies of numerous emails and other correspondence with C&N and Mr Nardo to his affidavits. Mr Nardo has exhibited some correspondence to his affidavits but concedes that these are copies he has received from MAV in relation to this proceeding. He gave evidence that C&N destroys it business records after five years, and therefore no longer has any documentation in relation to the Rosanna project. Further, that he did not have access to any electronic records as these would have been on an old computer which 'crashed'.

17 I set out below copies of the correspondence which I am satisfied are relevant to the question before me.

18 On 10 November 2008 Mr Arzenti emailed Mr Nardo:

> Nick,
>
> As usual you deny that you have received any phone calls from us but regardless I sent you a email which you have replied back today.
>
> Our last communication with you was on the Saturday 11th October and due to you not replying to our phone calls and emails up to date, it clearly demonstrates that you do not care the time delays we have suffered due to not completing your works and abandonment of our projects.
>
> You clearly led us to believe that you had the resources and capabilities to complete works on time as promised and continued to lie and mislead out company, which we had faith in you based on our previous relationship. As result of your actions you have caused us additional costs and damages and continue to.
>
> If you reason for not continuing your works was due to not receiving payment on time, why did you abandon the project as your payment was due at the end of October. Also invoices have not been invoiced on time as requested on numerous occasions and some invoices received to date we reject.
>
> We will not release any payment until all the works associated to you are completed, therefore we can assess all back charges and liquidated damages we have encountered. I hope that the invoices you have submitted will cover all costs because if they don't we will sue you for loss of revenue.
>
> Again, I will give you the opportunity to contact Vince by the Wednesday 12th November to organize dismantling of the remaining scaffolding. If we do not here from you we will organize other contractors and back charge all costs. (sic)

19 On 13 November 2008 Mr Nardo emailed Mr Arzenti:

> Tony,
>
> I have seek legal advice from my lawyer whom has recommended that we sort this matter out rather than take legal action.

> Can we meeting Monday November 17,2008 mid-morning to resolve the matter of outstanding payments and works to be completed. I am sure we can come to an agreement we are both able to work with. I wait to hear from you. (sic)
>
> Nick

20 On 25 November 2008 Mr Arzenti emailed Mr Nardo:

> Nick
>
> Vince and I have left a message with you this morning, there is no one on site to continue the dismantling of the scaffold, As per our site meeting you told us it would take one and half days to dismantle the scaffold which having only two men on site this will take much longer. If you don't contact us within a hour we will organize other scaffolders from not on without further notice.
>
> Regarding your payment I have started to review the figures but it is hard for us to finalize amounts until all works are complete.

21 On 15 December 2008 Mr Arzenti emailed C&N regarding the Rosanna project:

> Please find attached work summary approved to date, as per the attached documentation, we have a substantial loss.
>
> Please find below the payment summary:
>
> 1. 14 Bell St Coburg (inc Retention) $10,876.16
> 2. 40 Beetham Parade Rosanna ($27,367.48)
>
> Balance ($16,491.32)
>
> Even if we credit you back the scaffolding at 14 Bell Street, which equates to $13,293.87, we still have a loss of $3,197.45.
>
> As discussed, you mentioned that your concerns was that you required payment to cover Archiclad's bill for the supply of materials. Therefore we are prepared to offer you a final payment of $15,000 for the both projects.
>
> We believe this offer is more than fair considering that we both walk away with a loss and if you accept this offer we can pay you immediately.
>
> Please reply A.S.A.P. (sic)

22 The payment summary set out MAV's calculations as to the value of work which it considered had been completed by C&N on Blocks A and B (at the Rosanna project), added variations, and then allowed for 'certified deductions'. I understand these to be the deductions which MAV had determined should be made.

23 In relation to the Coburg works, MAV claimed the following backcharges:

i. Textured painting to matrix panels $3,080.00

ii. Labour to rectify matrix panels $1,960.00

iii.	Replacement of damaged roof sheeting	$4,700.00
iv.	6 weeks liquidated damages	$9,000.00

24 In relation to the Rosanna project, MAV claimed the following backcharges:

i.	Completion costs by another subcontractor	$37,812.00
ii.	Purchase of cladding material for completion works	$11,803.27
iii.	Rectification of polystyrene to join matrix/repairs with colour	$ 2,890.00[3]
iv.	Removal of C&N's scaffold from site	$10,634.14
v.	Sundry items	$ 351.75
vi.	12 weeks liquidated damages	$18,000.00

25 On 12 May 2009 C&N's solicitors sent the following letter of demand to MAV:

> We confirm that we act for C & N Scaffolding Pty Ltd and are instructed that your company is still indebted to our clients in the sum of **$115,254.68** as at October 2008 for services rendered namely:
>
> 1. Scaffolding
> 2. Polystyrene
> 3. Matrix Cladding; and
> 4. Blue board
>
> We are further instructed that the sum of $63,820.59 was received on or about October 1, 2008, however the above said amount remains outstanding despite numerous reminder letters which you have either neglected or refused to comply with.
>
> We put you on notice unless a bank cheque in the said sum is received within 14 days of the date of this letter we are instructed to commence legal proceedings without further notice.
>
> FIRST AND FINAL NOTICE

26 On 9 June 2009 Mr Arzenti emailed C&N's solicitors:

> As requested please find attached copy of charges, also regarding the labour component of the [Rosanna] project I under charged by $1,936.00 as per attached KAM Group Invoice 143. In relation to the Bell St project I forgot to charge the handrail invoices totalling $1,749.00 as per attached topcat safety rail invoice.
>
> If the offer of **$15,000** is accepted the total amount for both projects for the lost time charges would be $8,802.55 instead of $27,000 as per

[3] The parties agree that $2890 is the only reference to, or allowance for defective work at the Rosanna site

the summaries, less the above missed charges would equate to $5,117.55. (sic) [emphasis added]

WHAT WAS THE DISPUTE ABOUT?

27 It is clear from the correspondence that the parties fell into dispute in the latter part of 2008 over C&N's claims for payment, and delays in the works which MAV claimed were caused by C&N's alleged abandonment of the works. It is clear from the affidavit material and the cross-examination of the parties, that they adopted a different approach to the pricing of the works carried out by C&N.

28 Mr Nardo confirmed under cross examination that MAV had disputed its claim for payment of $115,254.68 because it said the works were not completed, and that there was some defective work at both sites. It is agreed that it cost $2,890 to rectify the defective work at Rosanna. Further, that C&N had stopped work on the Rosanna site because it had not been paid by MAV and that many of its emails to MAV were simply to say *'pay me and I will come back to site'.* Mr Nardo said that when MAV failed to pay C&N he arranged for two 'legal letters' to be sent, one from a debt collector[4] and the second from its solicitors.[5]

THE EXTENT OF THE RELEASE

29 MAV contends the Release in the Agreement only applies to the matters clearly in dispute at the time the Agreement was signed. C&N contends the Release extends to all claims known at the time, and any claims which might arise in the future.

30 Mr Twidale referred me to the comments by Pembroke J *The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Limited and Ors (No 2)*[6] where he stated

> 22. The principle to which *Grant v John Grant & Sons* stands is sometimes described more widely than is justified. It is not, and never has been, authority for the proposition that the general words of a release can only ever apply to matters then known to the parties…
>
> 23. There are two aspects to the reasoning in the joint judgement in *Grant v John Grant & Sons* (supra). First, the High Court held, as a matter of construction, that the general words of the release should be construed by reference to the subject matter of the particular disputes which the recitals said the parties had resolved to settle on the terms of the deed. In other words, in accordance with ancient principle and sound practice – "the general words of a release should be restrained by the particular occasion"… "the general words of a release are to be restrained

[4] From Robert McIntyre & Associates, Debt Recovery dated 6 November 2008
[5] 12 May 2009 as referred to earlier in these Reasons
[6] [2012] NSWSC 322

by the particular recital:…and, "If there be introductory matter, that will qualify the general words of the release"…

24. Thus the resolution of the first aspect of the decision in *Grant v John Grant & Sons* depended on the interpretation of the release according to settled rules of construction. It involved no new principle. The joint judgement endorsed the following statement by Lord Langdale: "Ít has been considered that the general words of release are to be restrained by the contract and intention of the parties, that contract and intention appearing by the deed itself or from any other proper evidence…

…

30 Significantly however, the joint judgment in *Grant v John Grant & Sons* (supra) also recognised that there will always e cases where, properly characterised the parties should be taken to have intended that the general words of a release should operate to encompass all conceivable further disputes, whether disclosed or mot and whether within the knowledge of a party or parties.

31. …The evident purpose of the Deed appears to have been to described the area of dispute which had been resolved; to define the areas of dispute which the parties agreed could continue to be litigated; and to provide for a release in relation to all present and future claims other than those which they agreed could continue.

31 In *Grant v John Grant & Sons*[7] the majority of the High Court (Dixon CJ, Fullagar, Kitto and Taylor JJ at 123-124 adopted the reasoning of Lord Westbury in *London & Southern Western Railway Co v Blackmore*[8] that:

> The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given.

And at 129:

> From the authorities which have already been cited it would be seen that equity proceeded upon the principle that a releasee must not use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties, character and extent of the liability in question and the actual intention of the releaser.

32 In *Multiplex*, Pembroke J said at 10

> …Not only does Clause 5.1(a) make clear that the release is to operate in relation to both present and future claims but the point is reinforced by the definition of "Claims" in Clause 1.1. It include all claims whenever arising (albeit in the past, present or future')".

[7] (1954) 91 CLR
[8] (1870 LR 4 HL 610

Discussion

33 Unlike the Deed in *Multiplex* the Agreement does not define the dispute. The only objective evidence about the nature and extent of the dispute is as set out in the correspondence between the parties.

34 It is clear from the correspondence, and the Payment Summaries, that the primary dispute concerned C&N's claim for payment of its outstanding invoices against which MAV sought to offset the cost of completion by an alternative subcontractor, specified defects in relation to both projects, and a delay claim quantified by MAV as liquidated damages. There is absolutely no evidence that it was in the contemplation of the parties at the time they entered into the Agreement, that there were any other defects, or more relevantly, that the settlement was in relation to any defects other than those known to the parties at the time. Certainly, there was no suggestion at the time the Agreement was entered into that it was known, or had been alleged, that the cladding was not installed in accordance with the manufacturer's specifications as is now claimed by the applicants in this proceeding.

35 I reject Mr Twidale's submission that Mr Arzenti's failure to amend the Agreement between the time he typed it on 14 July 2009 and it being signed on 17 July 2009, to make it clearer, was confirmation that it was intended to apply to any claims for defects which were not known to the parties at the time, but which might arise at some time in the future.

36 It follows, and I agree with Mr Stavris, that the phrase *No further claims to be issued* in the Agreement should properly be read as referring to no further claims in relation to the issues in dispute.

CONCLUSION

37 Considered objectively, in conjunction with the correspondence passing between the parties prior to the agreement being signed, including the Payment Summaries prepared by Mr Arzenti, the primary issue in dispute was payment of the outstanding invoices. Mr Arzenti made it quite clear in his emails to C&N that there were back charges/deductions for delay

38 I reject any suggestion that, as a sophisticated business man Mr Arzenti would have made it clear that the release did not include future defects if that is what he intended. Although he might be a sophisticated business man, and I am simply not able to comment about that, he is not a lawyer and there is no evidence that he has ever been involved in civil litigation, although he was pressed about this in cross examination. He consistently confirmed under cross examination that he did not believe there were any defects in the work at the time the Agreement was prepared. Mr Nardo's evidence was not persuasive, giving me the strong impression of having been influenced by the benefit of hindsight.

39 Accordingly I will declare that MAV is not excluded from bringing its claims in this proceeding against C&N by virtue of the Agreement dated 14 July 2009 and signed on 17 July 2009.

DEPUTY PRESIDENT C AIRD