IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-4991
[2014] NZHC 1390

BETWEEN	ANITA MARIA FINNIGAN, TINOS TRUSTEE LIMITED and CARYTIDS TRUSTEE LIMITED Plaintiffs
AND	AUCKLAND COUNCIL First Defendant
	FEARON HAY ARCHITECTS LIMITED Second Defendant

Hearing: 18 June 2014

Appearances: D K Wilson for Plaintiffs
No appearance for First Defendant
J M Keating for Second Defendant

Judgment: 18 June 2014

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors:
Ellis Gould, Auckland, for Plaintiffs
MinterEllisonRuddWatts, for First Defendant
Kennedys, Auckland, for Second Defendant

Copy for:
D K Wilson, Barrister, Auckland, for Plaintiffs

[1] This leaky-building case concerns a house built at 38 View Road, Waiheke Island. The plaintiffs, the trustees of the Irini Trust, are the owners of the property. The Irini Trust is a sub-trust of the Tinos Trust, which owned the property at the time of construction. Anita Finnigan is one of the trustees of both trusts. She is the plaintiff who dealt with the second defendant.

[2] The second defendant is the architect that designed the house. It has applied to strike out and for summary judgment on the grounds that it has already entered into an agreement with the plaintiffs in full and final settlement of their claim.

What the case is about

[3] The trustees of the Tinos Trust had the house built at View Road between 2004 and 2006. Ms Finnigan engaged the architect to design the house, apparently in 2003. The architect carried out the design work and applied for a building consent in early 2004. It was a major job. Construction costs are said to have come to about $1m. The architect's fee was for approximately $100,000. When extras were added on, it was ultimately paid about $115,000.

[4] In 2009 the owners found that the house had water-ingress problems. They instructed a building consultant, Mr Medricky, to inspect the building. He reported that the defects required repair. That repair work has now been carried out. The cost of the repairs, including GST, is said to come to $651,066. The plaintiffs have sued for the recovery of these repair costs plus general damages. The defendants are the Auckland Council and the architect.

[5] The claim against the architect is for negligence in its design work. Specifically, it is alleged that there was inadequate detail. There was insufficient detail for the council to assess the application for building consent adequately and for the builder to put up a house that was free of defects, weathertight, and which met reasonable standards of construction. The details were so lacking that the building did not comply with the Building Code and was not weathertight and suitable for residential use.

[6] The statement of claim contains, as a first schedule, an extensive pleading of defects in the house. A second schedule sets out alleged deficiencies in the design documentation and specifications of the architect. That schedule reinforces the primary pleading that the deficiencies in design were a lack of sufficient information and detail.

The settlement agreement

[7] The settlement agreement the architect relies on arose out of an earlier proceeding. In 2005 the architect sued Ms Finnigan in the District Court at Auckland for outstanding fees. It appears that while Ms Finnigan had paid the initial agreed fee, the architect claimed for extras for additional work. It applied for summary judgment. This was before the changes to the District Courts Rules in 2009. It was the kind of summary judgment application that may be made under the High Court Rules, although the amount was clearly within the jurisdiction of the District Court.

[8] Ms Finnigan opposed the summary judgment application. For this hearing the parties have not provided the pleadings in the District Court but they have put in evidence copies of affidavits by Ms Finnigan and her builder, Mr Campbell; Mr Fearon, director of the second defendant; and the project architect, Mr Atcheson. They have also put the settlement agreement in evidence. That was a letter dated 10 May 2006 signed by counsel on both sides that recorded the terms of settlement. The relevant parts of the letter are:

> Further to our various discussions, we confirm settlement of the proceedings on the following basis:
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> 1 In full and final settlement of all issues as between the parties, howsoever arising including but not limited to all allegations of negligence and breach of contract, the defendant has made against the plaintiff the defendant will pay to the plaintiff by 1:00pm today the sum of $10,000 to the trust account of John Ewart, Solicitor, and the defendant will pay a further sum of $4,000 upon delivery of certain drawings which are described in more detail below.

[Paragraphs 2 and 3 of the letter deal with delivery of drawings and payment of the sum of $4,000.]

4 Upon payment above, the proceedings will be discontinued.

[9] The architect relies on that agreement to say that Ms Finnigan and the trustees of the Irini Trust are barred from suing it for the alleged defects in design leading to the water-ingress problems which are the subject of this proceeding.

[10] I record one matter which is not in dispute. In the District Court the architect sued only Ms Finnigan. The architect did not sue the other trustees of the Tinos Trust or the Irini Trust. However, it seems to be common ground that that agreement binds not only Ms Finnigan personally but also the trustees of the Tinos Trust, the owners of the property at View Road at that time, and the trustees of the Irini Trust (as sub-trustees and current owners of the property). No point was taken as to Ms Finnigan's authority to bind not only herself but also the other trustees.

[11] The plaintiffs say that the agreement of 10 May 2006 did not settle the claims now made in this proceeding which, they say, were not known at that time. It is necessary therefore to consider these matters:

(a) What does the agreement of 10 May 2006 mean?

(b) On its true construction, does it apply to the claims made in this proceeding?

Interpretation of the agreement

[12] The architect says that the agreement operates as a general release. It says first, as a matter of the plain meaning of the words, and second, when the agreement is read in its context, it is released from all liability for the plaintiffs' claim.

[13] Counsel have referred to a number of authorities which deal with the interpretation of a settlement agreement containing a general release. The two more significant cases are the Court of Appeal's decision in *Tag Pacific Ltd v The Habitat Group Ltd*[1] and the House of Lords' decision in *Bank of Credit and Commerce*

[1] *Tag Pacific Ltd v The Habitat Group Ltd* (1999) 19 NZTC 15,069 (CA).

International SA v Ali.[2] Counsel agreed that there is not any significant difference of approach between the Court of Appeal in *Tag Pacific* and the majority in *Bank of Credit and Commerce International SA v Ali*. I take the following extract from *Tag Pacific* as setting out the applicable principles. Tipping J said:[3]

> It is not always helpful to focus on so-called rules of construction. Certainly they are not to be elevated into principles of law. The ultimate objective is always to ascertain the intention of the parties from the words they have used, interpreted in the light of the objective circumstances known to them at the time. The general rule said to govern this case represents no more than a reflection of the inherent probabilities, ie that people are unlikely to intend to release a claim of which they are unaware at the time. But it is always possible for parties to do so, and such an intention will be found if clearly demonstrated by the words used. This we consider to be the correct modern approach to the construction of documents such as releases and, indeed, all contractual documents. It is not inconsistent with the various authorities to which we were referred, which included *London & South Western Railway Co v Blackmore* (1870) LR 4 HL 610 at 623 per Lord Westbury) and *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 129 per Dixon CJ, Fullagar, Kitto and Taylor JJ. The summary to be found in *Chitty on Contracts* (Vol 1, *General Principles* (27th ed, 1994) paras 22-003 to 22-005 is to the same effect…
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> Although each case will turn on the words used in their factual setting, the actual decisions in *Grant* and in *Blackmore* show that an intention to release an unknown claim is not lightly to be inferred, even when apparently very general words have been used. This accords with commercial common sense. To that extent it may be helpful to speak of a rule of construction, provided it is remembered always that everything turns on the words used interpreted in their factual setting.

[14] The speeches of the majority in *Bank of Credit and Commerce International SA v Ali* are to similar effect, in particular the speeches of Lord Bingham[4] and Lord Nicholls[5] emphasising the importance of context.

[15] Other cases were also cited. I apply the principles above, while bearing in mind that the terms and circumstances of agreements were different in other cases. Therefore, while other cases are of assistance in seeing how the principles are applied, they are not directly applicable to the circumstances of this case. In particular, *Nixon v Richardson* is about the dissolution of a partnership.[6] That is a

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2 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251.
3 At 15,074.
4 At [8]-[9].
5 At [23], [27]-[29].
6 *Nixon v Richardson* HC Auckland CIV-2010-404-1412, 1 September 2010.

different matter, both because the agreement used different words from the present one (it referred to "all claims") and because the context was different. Similarly, *McGowan v Hamblett*[7] dealt with settlement in a probate dispute where an agreement was made for the distribution of an estate. It is important to understand that in both those cases, there was high value placed on finality in settling disputes.

[16] The architect's first submission was that the wording of the agreement was sufficient to conclude the matter in its favour. The architect's argument focused on the words:

> all issues between the parties, howsoever arising, including but not limited to all allegations of negligence and breach of contract.

[17] The submission was that "all issues" can extend widely, to encompass not just claims but matters going beyond claims. The agreement was not limited to allegations of negligence and breach of contract, but extended more widely than that. "Howsoever arising" had a temporal aspect. It applied not only to "howsoever" a claim might arise under any head of law, but also to claims, unknown to the parties, that might arise later.

[18] I do not accept that this agreement can be read out of context in the way proposed by the architect. Since the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[8] it has become clear that agreements must be construed within their context. It is therefore inappropriate to try to interpret an agreement purely on its text, without regard to the surrounding circumstances.

[19] The submission of the architect can be tested by taking a counter-example. As an extreme example, if following this settlement agreement the architect published defamatory statements about the plaintiffs, that would be an issue between the parties, "howsoever arising". The words "including but not limited to all allegations of negligence and breach of contract" allow claims outside allegations of negligence or breach of contract. Taken literally therefore, the architect could defame Ms Finnigan with impunity. Clearly that is absurd. This settlement

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7 *McGowan v Hamblett* [2007] 1 NZLR 120 (HC).

8 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

agreement was not intended to deprive Ms Finnigan of the right to sue for defamation but taking the words literally, without regard to the context, can lead to that absurd result. Obviously it is necessary to read this agreement within its context.

The context of the agreement

[20] I start generally, and then look at the matter more narrowly. The agreement had its origins in Ms Finnigan's project to build the house at 38 View Road. It arose out of the provision of services by the architect, in particular the design and specifications.[9] The problem that arose in 2005 and 2006 was that the architect had not been paid all that it claimed it was entitled to. That situation is not unusual. Towards the end of any building project, those who provided services may claim that more is due to them than what they have been paid to date. Often their claims arise out of variations and extras on the job. In response, employers want to lower their liability as much as they can. They will try to contend that there have been short supplies, defects, delays or overcharging by the service provider. They will raise these arguments to cut down what they have to pay.

[21] In this case the matters raised by both sides were exactly of that sort. The architect was claiming more than the initial fee it had negotiated for on the basis of variations and extra work which it said it had had to carry out arising out of additional instructions given during construction. In response, Ms Finnigan contended that some of that was necessary re-design work to repair deficiencies in the architect's original work.

[22] Ms Finnigan also raised complaints that she had not signed any agreement with the architect. She complained of lack of detail in the architect's invoices. She went on to complain about double-charging. She contended that there were errors in the plans supplied by the architect. A builder on the job, Mr Campbell, who seems to have acted as a project manager, also made complaints about the architect's designs:

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[9] The architect stresses that it was required to provide only design services and not supervision. The plaintiffs note that the architect did come on site occasionally after the issue of the building consent. I am not required to resolve that, but the allegations in the statement of claim focused on alleged deficiencies in the architect's design, not on inadequate supervision or observation of the building work.

(1) The boundary dimensions were incorrectly calculated.

(2) Dumb waiter – no detailed finish of space around the dumb waiter.

(3) Waste water from roof – no provision made for waste water from the concrete terrace roof.

(4) Bath mixer set out – not included in plans and specifications.

(5) Master bedroom – headboard needed changing.

(6) Lounge fireplace – as designed the lifter did not work.

(7) Track design for cedar shutters – inadequate plans.

(8) Stainless steel terrace roof garden rail required redesigned.

(9) Front door pivot hinges – top of door hit block lintel above it.

(10) Wall between bedrooms 3 and 4 – needed amending for doors to fit.

(11) Garage door – replacement needed.

(12) Kitchen door detail – could not be built as designed.

The architect, in turn, replied with evidence countering the complaints made by Ms Finnigan and Mr Campbell.

[23] The evidence of Ms Finnigan and Mr Campbell was in opposition to an application for summary judgment. The complaints went not only to the quantum of the architect's claim – such as double-charging and excessive charging – but also the quality of the work provided by the architect. That was to raise matters that went to abatement under the rule in *Mondel v Steel*[10] or could be raised by way of equitable

[10] *Mondel v Steel* (1841) 8 M & W 858, 151 ER 1288 (Exch).

set-off. These are matters of defence which would go to extinguish or reduce any liability on a summary judgment application.

[24] The outcome is unsurprising – in fact, fairly typical for such a dispute. Both sides had legal advice and I have no doubt that each received advice recommending that the matter be settled rather than go to hearing. For both sides there would be efficiencies in obtaining a settlement rather than having a protracted dispute. For the architect, there would be uncertainty whether it could obtain summary judgment, given the kinds of issues raised by Ms Finnigan and Mr Campbell. They are matters that would not lend themselves to ready resolution on an opposed summary judgment application. But, likewise on Ms Finnigan's side, a long-term view would indicate to her that there would be increasing costs in defending a relatively small claim, and there would be advantages in trying to resolve matters.

[25] Seen in that way, this dispute is little different from others that arise towards the end of a construction project where contractors and other service providers want to get paid and there are disputes as to what is owed, with the employer trying to reduce the amount claimed. That provides the context for the agreement.

[26] The wording of the letter of 10 May 2006 can be seen as settlement of issues required as part of the "wash-up" of the construction project and of the architect's part in it. The amount for which they were to be paid for the job was to be finally settled. Complaints that Ms Finnigan might want to raise to avoid payment were now to be written-off, so that she could not raise new matters to resist payment. A fixed sum was agreed for payment. The terms of payment were fixed. That was the context.

[27] The terms of payment were drawn so as to prevent Ms Finnigan raising new matters, between the time of the agreement and the time for payment, to again avoid payment.

Does the settlement agreement apply to the claim in this case?

[28] Now for the claim for design defects leading to water-ingress problems. It is necessary to bear in mind that such problems take time to show up. It is not just a case of an occasional leak but the fact that rot can set in over time, which can lead to major problems. Experts are required to identify problems arising out of water ingress, to establish the scope of any defects and resulting damage, and to assess whether there can be any liability attaching to any of those associated with the construction and design of the building. Expertise is needed to know whether alleged defects can result in breaches of the Building Code.

[29] It is not suggested that any of those matters could have been appreciated by either side at the time of the agreement of 10 May 2006. The architect did not suggest that this was a known problem at the time of the agreement of 2006. Neither Ms Finnigan nor Mr Campbell identified that as a problem in May 2006.

[30] The architect says that in this agreement Ms Finnigan was not just squaring up what she ought to pay to the architect for outstanding work, but had given away a claim for over half a million dollars. Both the Court of Appeal's decision in *Tag Pacific Ltd v The Habitat Group Ltd* and the House of Lords' decision in *Bank of Credit and Commerce International SA v Ali* say that parties can competently contract to give a release for claims of which they know nothing. Both the majority in the House of Lords and the Court of Appeal in *Tag Pacific* said that such an intention would be found if clearly demonstrated by the words used. I do not regard the words used as clearly demonstrating an intention to oust an unknown claim for a leaky building for which the cost of repairs has gone to $650,000.

[31] Ms Keating sought to establish that there was a common thread between the complaints raised by Mr Campbell in 2006 and the complaints against the architect in this proceeding. She made the point that Mr Campbell complained about lack of detail in the plans. She noted that on his evidence Mr Campbell had undertaken work himself because he did not have sufficient detail or information to go from the plans provided by the architect. Ms Keating pointed to the pleadings against the architect and noted that complaints were of insufficient detail and insufficient

information, rather than incorrect design. She therefore said that there was a common complaint underlying matters raised by Mr Campbell and the matters in the statement of claim.

[32] I prefer instead the evidence of Mr Medricky on that issue. Mr Medricky, the building consultant, has given an affidavit considering the defects identified in 2006 and has compared them with his own inspection of the premises in 2009 and with the pleadings. He finds that the matters raised by Ms Finnigan and Mr Campbell were by and large superficial. Two matters he dealt with separately were wastewater from the roof and a stainless steel terrace roof garden rail. But he makes the point that those are not related to weathertightness issues. His evidence is that the plaintiffs' proceeding now is based on weathertightness issues, not on the matters raised by Ms Finnigan and Mr Campbell in their affidavits of 2006. It is arguable for the plaintiffs that there is not the common thread which Ms Keating tries to draw between the defects raised in 2006 and the defects in the pleading.

[33] The architect has not adduced any evidence to refute Mr Medricky's evidence. It probably would not have been useful to do so because, in a summary judgment application, the court is unlikely to resolve differences between expert witnesses.

Outcome

[34] On the interpretation I have given to this settlement agreement, I find that it is arguable for the plaintiffs that the matters raised in this proceeding are outside the matters settled in the agreement of May 2006. Accordingly, because the plaintiffs, in my view, have an arguable case against the second defendant, notwithstanding the agreement of May 2006, I cannot find that the architect has a watertight defence. I dismiss the application for summary judgment, and I dismiss the application to strike out the statement of claim against the second defendant.

[35] I make an order for costs in favour of the plaintiffs against the second defendant on a 2B basis. I expect counsel to be able to agree costs but if they cannot memoranda may be filed. The party filing submissions second should file them within **five working days** of the first party's submissions.

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R M Bell
Associate Judge