

**JUDGMENT : HIS HONOUR HARGRAVE J** : Supreme Court of Victoria. Melbourne. Commercial & Equity Division. Commercial List. 15<sup>th</sup> February 2007

## INTRODUCTION

- 1 The plaintiff, Buxton Construction Pty Ltd, is a building contractor. I will refer to it as "the contractor".
- 2 The defendant, Golf Australia Holdings Ltd, is the owner of the Moonah Links Golf Course. I will refer to it as "the owner".
- 3 By a building contract dated 11 February 2005 made between the parties, the contractor agreed to construct golf lodges for the owner at the Moonah Links Golf Course.
- 4 Disputes arose between the parties under the building contract. The contractor's claims included claims for delay costs arising from extensions of time, variations and a challenge to the right of the owner to deduct liquidated damages from amounts due for completed works. The owner's claims included an assertion that it was entitled to deduct liquidated damages from amounts otherwise due to the contractor by reason of delays in completion of the golf lodges.
- 5 No legal or arbitral proceedings were commenced in respect of the disputes. Instead, the parties agreed to mediate their disputes. Prior to the mediation taking place, the parties exchanged position papers in which they each set out their claims and contentions.
- 6 The mediation took place on 11 July 2006. After negotiations, the disputes were compromised and brief handwritten terms of settlement were signed on behalf of the parties.
- 7 The terms of settlement provide:

### TERMS OF SETTLEMENT

#### Between:

Golf Australia Holdings Limited ("Owner")

and

Buxton Constructions Pty Ltd ("Contractor")

in relation to contract dated 11 February 2005 ("the Contract")

#### It is Agreed:

1. In full and final settlement of the Owner's claims against the Contractor set out in the Owner's position paper dated 7 July 2006 and in full and final settlement of the Contractor's claims set out in the Contractor's position paper dated 7 July 2006 and in full and final settlement of all other claims which either party could make against the other under or pursuant to the Contract (save those expressly provided for herein) the Owner shall pay to the Contractor by 31 July 2006 the sums of:
  - (a) \$98,000;
  - (b) \$12,105;
  - (c) the unpaid amounts due in respect of payment certificates 1 to 17; and
  - (d) GST on all of the above items (provided the Contractor has issued a tax invoice in respect thereof).
2. Defects and final completion will continue to be administered in accordance with the Contract.
3. Each of the Owner and the Contractor releases and discharges the other of them from and against all actions, suits, demands, claims, costs, loss, expense and damage howsoever arising in relation to the claims set out in paragraph 1.

Dated 11<sup>th</sup> of July 2006.

- 8 The proceeding concerns a dispute between the parties as to the proper interpretation of the terms of settlement. The parties agree that the terms of settlement constitute a binding and concluded written agreement. There is no claim in the proceeding that the terms of settlement are void for uncertainty, that the terms of settlement should be rectified, that the terms of settlement should be set aside on any ground or that any party was misled or deceived in any way. Further, neither party contends that the terms of settlement were partly oral or that there was any collateral contract. The sole issue is the proper interpretation of the terms of settlement.
- 9 The dispute as to the interpretation of the terms of settlement concerns the entitlement of the contractor to be paid \$190,000 for work done by it under the building contract. At the time the terms of settlement were executed, the owner had not paid the \$190,000. Instead, the owner had deducted it from amounts otherwise due to the contractor. The owner claimed that it was entitled to deduct the \$190,000 because the contractor was indebted to it for liquidated damages in this amount.
- 10 The parties agree that some evidence of the surrounding circumstances in which the terms of settlement were signed is admissible for the purposes of interpreting the contract. However, there is a dispute as to certain further evidence which the contractor wishes to rely upon for this purpose.
- 11 Notice of the substance of the disputed evidence was given in the witness statements filed by the contractor before trial. In response, the owner filed written submissions objecting to the giving of the disputed evidence. The grounds of objection were expanded in oral submissions at trial. Given the nature and volume of the objections,

and my desire to reserve my decision in respect of them, I determined to hear the disputed evidence subject to the owner's objections and to deal with those objections in my reasons for judgment if it was necessary to do so.

- 12 It was submitted on behalf of the contractor that, even in the absence of the disputed evidence, the contractor's interpretation of the terms of settlement should be preferred. I will accordingly proceed to consider the proper interpretation of the terms of settlement without having any regard to the disputed evidence.

#### AGREED EVIDENCE

- 13 As I have said, the parties agree that some evidence is admissible as part of the surrounding circumstances in which the terms of settlement were executed. I have already referred to some of this evidence. However, it is necessary to describe it in more detail in order to consider the rival contentions as to the proper interpretation of the terms of settlement.

- 14 First, it is agreed that reference may be made to the relevant terms of the building contract which gave rise to the dispute. The relevant terms of the building contract are as follows:

- (1) In order to achieve payment, the contractor must first give a "payment claim" to the contract administrator (a nominee of the owner) seeking payment on account of the contract price.<sup>1</sup>
- (2) Upon receiving a payment claim from the contractor, the contract administrator must give a "payment statement" to the contractor and the owner. The payment statement must set out the contract administrator's determination as to (amongst other things) the value of work completed in accordance with the building contract, the amount already paid to the contractor and the amount then payable by the owner to the contractor "on account of" the contract price; together with the reasons for any difference in the amount set out as then payable from the amount in the contractor's payment claim.<sup>2</sup>
- (3) Subject to the right of the owner to set-off against any moneys due to it by the contractor for, amongst other things, liquidated damages, upon receipt of a payment statement, the owner is obliged to pay the amount set out as then payable in the payment statement to the contractor.<sup>3</sup>
- (4) Any payment made pursuant to a payment statement is not evidence of the value of work or that work has been satisfactorily carried out in accordance with the building contract, nor does it constitute an admission of liability, but is only to be taken as a payment "on account".<sup>4</sup>
- (5) Where there is a delay in the completion of the works beyond the specified date for completion, the contractor must pay liquidated damages to the owner.<sup>5</sup>
- (6) The owner may deduct from moneys otherwise due to the contractor any claim to money which the owner may have against the contractor, including a claim for liquidated damages.<sup>6</sup>

- 15 Second, it is agreed that reference may be made to the "payment certificates" numbered 1 to 17, which are referred to in paragraph 1(c) of the terms of settlement. It was common ground that these payment certificates constituted payment statements for the purposes of the building contract. Further, it was agreed that evidence of amounts paid in respect of these payment certificates at the time of the mediation constitutes a relevant fact. In this regard:

- (1) Payment certificates numbered 1 to 13 had been paid prior to the mediation.
- (2) Payment certificate 14 stated that the value of work done since the previous payment certificate was \$702,975. However, the amount of \$190,000 in respect of the owner's claim for liquidated damages has been set-off in the certificate, leaving a balance of \$512,975 for payment by the owner. This amount (plus GST) was paid by the owner prior to the mediation.
- (3) Payment certificate 15<sup>7</sup> was paid prior to the mediation.
- (4) Payment certificates 16 and 17<sup>8</sup> were not paid at the time of the mediation.

- 16 Third, it is agreed that the position papers referred to in the terms of settlement may be referred to. Relevantly, each of the position papers referred to the dispute concerning the entitlement of the owner to deduct liquidated damages in the sum of \$190,000 from the \$702,975 otherwise due to the contractor under payment certificate 14. The contractor asserted that the owner had no entitlement to deduct liquidated damages, because the contractor was entitled to extensions of time and consequent delay costs. The owner disputed the claims for extension of time and contended that it had been entitled to deduct liquidated damages.

- 17 Fourth, it is agreed that, prior to the mediation, the parties reached agreement as to the payment by the owner to the contractor of \$12,105 in respect of a variation which is not referred to in the position papers. This is the amount referred to in paragraph 1(b) of the terms of settlement.

<sup>1</sup> Clause 12.6.

<sup>2</sup> Clause 12.7.

<sup>3</sup> Clauses 12.8; 12.19.

<sup>4</sup> Clause 12.9.

<sup>5</sup> Clause 13.7.

<sup>6</sup> Clause 12.19.

<sup>7</sup> Or its equivalent. The practice was not uniform.

<sup>8</sup> Or their equivalent. The practice not uniform.

18 Fifth, the parties agree that the mediation took place on 11 July 2006 and that, at the conclusion of the mediation, the terms of settlement were signed by a duly authorised officer of each of the parties.

#### INTERPRETATION ABSENT DISPUTED EVIDENCE

- 19 It is necessary to construe the relevant provisions of the terms of settlement in accordance with general principles of contractual interpretation. This requires the Court to consider what reasonable persons in the position of the parties would have understood the words to mean, by reference to the text of the agreement, the surrounding circumstances known to the parties and the purpose or object of the transaction.<sup>9</sup> Further, in interpreting the words and resolving any ambiguity, the Court should proceed in a common sense and non-technical way and give the agreement a commercially sensible construction.<sup>10</sup>
- 20 By clause 3 of the terms of settlement, each party released and discharged the other from all claims "arising in relation to the claims set out in [clause] 1." The claims set out in clause 1 include all claims "under or pursuant to the building contract save those expressly provided for herein." <sup>11</sup> Relevantly, the terms of settlement expressly provide that the owner will pay the contractor the amounts stated in cl. 1(a), 1(b), 1(c) and 1(d) of the terms of settlement. No question of interpretation arises from the terms of cl. 1(a), 1(b) or 1(d). Further, there is no issue that the owner must, under cl. 1(c), pay the unpaid amounts stated in payment certificates 16 and 17. The only issue is whether the balance of the amount stated in payment certificate 14 as payable for work done, which was not paid by the owner because of the deduction of \$190,000 for liquidated damages, is an unpaid amount due in respect of payment certificate 14. If it is, then it must be paid under cl. 1(c).
- 21 Payment certificate 14 refers to two relevant amounts. First, in respect of the value of work done by the contractor, an amount of \$702,975. As I have said, this amount was as determined by the contract administrator under cl. 12.7 of the building contract. Second, in respect of the owner's claim to liquidated damages, amounts totalling \$190,000. In the payment certificate, the \$190,000 has been set-off against the value of work done by the contractor, leaving a net amount payable. This net amount had been paid by the owner at the time of the mediation and the execution of the terms of settlement.
- 22 The contractor's case is that the terms of settlement should be interpreted as releasing it from any liability to pay the liquidated damages which were deducted from the amounts otherwise stated as payable in payment certificate 14. On the other hand, the unpaid amounts due to it under payment certificates 1 to 17 are not the subject of any release, because it is expressly provided that they will be paid. In these circumstances, the balance of the amount due to it for work done, as stated in payment certificate 14, constitutes one of the "unpaid amounts due in respect of payment certificates 1 to 17", as referred to in cl. 1(c) of the terms of settlement.
- 23 The owner contends that the terms of settlement unambiguously provide that any claim by the contractor for the amount which is the subject of the liquidated damages deduction is the subject of the release contained in cl. 3 of the terms of settlement; and that all that was ever due by it in respect of payment certificate 14 was the net amount after deduction of the liquidated damages. That amount was paid before the mediation and, accordingly, there was no amount unpaid in respect of payment certificate 14 following the execution of the terms of settlement.
- 24 I do not accept the submissions made on behalf of the owner. In my view, there is an unpaid amount due in respect of payment certificate 14. The unpaid amount is \$190,000. I am of this view for the following reasons.
- 25 First, the words must be construed in the light of the clear intention of the parties to release each other from all claims under or pursuant to the building contract "save those expressly provided for herein." By these mutual releases, it is clear that the parties intended to release the contractor from any obligation to pay any amount due by it to the owner under the building contract, including in respect of any claim by the owner for liquidated damages. There is no express provision to the contrary. However, the unpaid amounts due by the owner to the contractor under payment certificates 1 to 17 were not the subject of the releases. It is expressly provided in cl. 1(c) that those amounts are to be paid.
- 26 Second, cl. 1(c) imposes an obligation on the owner to pay that which is unpaid by it to the contractor in respect of payment certificates 1 to 17. It does not impose any obligation on the contractor to pay amounts unpaid by it to the owner in respect of these payment certificates, such as for liquidated damages.
- 27 Third, the payment by the owner to the contractor of the net amount stated in payment certificate 14, and the receipt by the contractor of that amount, does not mean that the owner should be taken to have paid to the contractor the whole of the sum of \$702,795 stated in the payment certificate. The building contract does not make any such provision. To the contrary, the scheme of the building contract is to treat payments by the owner under payment statements as "on account" of the contract price and without any admission of liability. There is no reason to suppose that the parties intended any different consequence when the owner de-facto "paid" itself for liquidated damages claimed by it, by means of exercising its right of set-off.

<sup>9</sup> *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40].

<sup>10</sup> See, eg, *Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288, 300; *Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494, 499, 503-4; *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, 437; *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109-10; *Di Dio Nominees Pty Ltd v Brian Mark Real Estate Pty Ltd* [1992] 2 VR 732, 740; *MLW Technology Pty Ltd v May* [2005] VSCA 29, [76]-[81]; *Mannai Investments Co Ltd v Eagle Start Life Assurance Co Ltd* [1997] AC 749, 770-1.

<sup>11</sup> Emphasis added.

- 28 Fourth, there is nothing in the terms of settlement or in the surrounding circumstances which indicates any different intention for the purposes of the terms of settlement. To the contrary, the fact that each party in its position paper claimed an entitlement to the \$190,000 reinforces the conclusion that the parties intended to treat the \$190,000 as an unpaid amount due to the contractor under payment certificate 14. This is especially so when regard is had to the release of all of the owner's claims, and the express preservation of the contractor's claims for amounts due and unpaid in respect of the payment certificates.
- 29 Accordingly, I conclude that reasonable persons in the position of the parties would have understood that cl. 1(c) of the terms of settlement required the owner to pay to the contractor the amount due in respect of the full value of the work done by the contractor, as determined by the contract administrator and stated in payment certificate 14. The parties should not be taken to have understood that cl. 1(c) required only that the owner should pay that amount less the owner's claim for liquidated damages.

**CONCLUSION**

- 30 It follows that the owner must pay the contractor the sum of \$190,000, together with GST on that amount pursuant to cl. 1(d) of the terms of settlement.
- 31 Having regard to my findings as to the proper interpretation of the terms of settlement without having any regard to the disputed evidence, it is not necessary for me to consider the admissibility of the disputed evidence.
- 32 I will hear the parties as to the precise form of orders and as to costs.

For the Plaintiff Mr P Solomon instructed by Deacons

For the Defendant Mr M Robins instructed by Nathan Kuperholz