# SUPREME COURT OF QUEENSLAND

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| CITATION: | *IBM Australia Ltd v State of Queensland* [2015] QSC 342 |
| PARTIES: | **IBM AUSTRALIA LTD ACN 000 024 733**<br>(applicant)<br>**v**<br>**STATE OF QUEENSLAND**<br>(respondent) |
| FILE NO/S: | No 1729 of 2015 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 7 December 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25-28 August 2015 |
| JUDGE: | Martin J |
| ORDER: | **It is declared that, on the proper construction of the Supplemental Agreement between the applicant and respondent dated 22 September 2010, the applicant was released from the claims made by the respondent against the applicant in proceeding BS 11683/13.** |
| CATCHWORDS: | CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the applicant and respondent entered into a contract – where the parties entered into a Supplemental Agreement which contains releases by each party in favour of the other with respect to, among other things, "any action, claim, proceeding …" – where 'claim' is a defined term under the Supplemental Agreement – where the respondent commenced proceedings against the applicant for damages based upon a series of misrepresentations, alleged to have been made by the applicant, which amount to a breach of its duty of care and misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act* 1974 (Cth) – whether the respondent can rely on extrinsic evidence to demonstrate that the dispute between the parties concerned the performance of the contract and was not concerned with representations or conduct preceding the entry into the contract – whether the Supplemental Agreement has the effect of preventing the respondent from prosecuting the damages proceedings |

*Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501
*Bank of Credit & Commerce International SA (in liq) v Ali [No 1]* [2002] 1 AC 251
*Byrnes v Kendle* (2011) 243 CLR 253
*Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337
*Fraser v The Irish Restaurant & Bar Company Pty Ltd* [2008] QCA 270
*Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112
*IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466
*International Air Transport Association v Ansett Australia Holdings Limited & Ors* (2008) 234 CLR 151
*Karam v ANZ Banking Group Ltd* [2001] NSWSC 709
*Kazeminy v Siddiqi* [2012] EWCA Civ 416
*Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207
*Mac Developments (Gold Coast) Pty Ltd v Rams Financial Group Pty Ltd* [2010] QCA 477
*Northbuild Constructions Pty Ltd v Capital Finance Aust Ltd* [2006] QSC 81
*Perth Airport Pty Ltd v Ridgepoint Corporation Pty Ltd* [2013] WASC 33
*Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26
*Queensland Power Co Ltd v Downer EDI Mining Pty Ltd* [2010] 1 Qd R 180
*Salkeld v Vernon* (1758) 1 Eden 64
*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165

COUNSEL: S Doyle QC and S Webster for the applicant
L Kelly QC, A Stumar and S Eggins for the respondent

SOLICITORS: Jones Day for the applicant
Minter Ellison for the respondent

**Introduction**

[1] The history of attempts to improve the efficiency of government services in Australia is not one of consistent outcomes. There have been many successes, some indifferent results and a few spectacular fiascos. The attempt that gives rise to this case belongs firmly in the last category. It has emerged from an effort which has been described as taking "a place in the front rank of failures in public administration in this country. It may be the worst."[1]

[2] The many steps leading up to the implementation of a new payroll system for Queensland Health ("QH") need not be described in great detail. A brief overview will suffice.

[3] From the middle of 2003 the State of Queensland had been engaged in the creation of a Shared Services Program ("SSP") which was intended to amalgamate and rationalise government services across a number of departments and agencies. The centralised agency which was to emerge from this process would be responsible for many tasks including the payment of public servants. Various providers were engaged in this endeavour for about four years. The system then being used by QH was called "Lattice" and it was nearing the end of its useful life – its supplier had given notice that it would not service or update the system after 30 June 2008. A new system had to be found.

[4] Engagement with a number of providers had not been fruitful. In the first half of 2007 a process was implemented with a view to obtaining a "Prime Contractor" who would be responsible for the design and implementation of a new system. IBM was the successful tenderer and on 5 December 2007 a contract ("the 2007 Contract") was executed with the State of Queensland by which IBM would provide the nominated services to identified departments. The problem which existed with the QH payroll was well known and it was given priority so far as the provision of a new system was concerned.

[5] Eventually, after much expenditure, the proposed whole-of-government solution was abandoned and IBM's contract was revised so that it was only to provide the new payroll system for QH.

[6] The new payroll system "went live" on 14 March 2010. It was a calamity. The result was described by the Hon Richard Chesterman AO QC in his report in the following way:

> "It was a catastrophic failure as all Queenslanders know. The system did not perform adequately with terrible consequences for the employees of QH and equally serious financial consequences for the State. After many months of anguished activity during which employees of QH endured hardship and uncertainty, a functioning payroll system was developed, but it is very costly. It required about 1,000 employees to process data in order to deliver fortnightly pays".[2]

[7] For the purposes of this application, it is irrelevant where the fault lay. Nevertheless, in order to give context to the agreement which is at the heart of this dispute it is necessary to outline some more of the history of this sad venture.

[8] In May 2010 the State issued a Notice to Remedy Breach pursuant to the contract it had with IBM. That notice set out details of some alleged breaches. In late June 2010 the State issued another notice to IBM. That notice asserted a failure by IBM to remedy the

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1 *Queensland Health Payroll System Commission of Inquiry Report*, 31 July 2013, [2.15].

2 Op cit at [2.14].

breaches identified in the earlier notice. The State notified IBM that it was in material breach of the contract and required IBM to show cause why the State should not terminate the contract.

[9] IBM denied that it was in breach of the contract as alleged in either Notice.

[10] Negotiations between the parties took place and, in September 2010, IBM and the State entered into the "Supplemental Agreement". The Supplemental Agreement contains releases by each party in favour of the other with respect to, among other things, "any action, claim, proceeding …".

[11] In December 2013, the State commenced proceedings against IBM for damages ("the damages proceedings"). The Claim and Statement of Claim were served on IBM a year later. Nine days after that the State sought to amend its Claim and filed and served an Amended Statement of Claim ("ASOC"). IBM applied to disallow the amendments and then filed this application. The amendment application and the disallowance application have been adjourned pending the outcome of this proceeding.

[12] In this application, IBM seeks the following orders:

(a) a declaration that on the proper construction of the Supplemental Agreement, IBM was released from the claims made by the State in the damages proceedings,

(b) a permanent injunction restraining the State from prosecuting the damages proceedings, and

(c) a declaration that IBM is entitled to be indemnified by the State for all of its actual costs incurred as a result of the commencement of the damages proceedings.

**The issues**

[13] The major issue between the parties is whether or not the Supplemental Agreement has the effect of preventing the State from prosecuting the damages proceedings.

[14] Within that major issue lie other disputes concerning the appropriate way to construe the Supplemental Agreement.

[15] In order to determine the major issue it is necessary, first, to identify the nature of the claims made in the damages proceedings.

**The damages proceedings – what is claimed?**

[16] The State seeks the following relief:

(a) damages under s 82 (1) of the *Trade Practices Act* 1974 (Cth) ("TPA"), and

(b) damages in tort.

[17] In the proposed ASOC other relief is also sought including orders compensating the State for its loss and damage or future loss and damage and directing the refund of monies paid to IBM under the 2007 Contract.

[18] The claim for damages is based upon a series of misrepresentations, alleged to have been made by IBM, which amount to a breach of its duty of care and misleading or deceptive conduct in breach of s 52 of the TPA.

[19] The misrepresentations are all alleged to have been made before the State entered into the 2007 Contract and are pleaded under five headings:

(a) That IBM had the capability and expertise to design and build a payroll system for QH in which programs known as "Workbrain" and "SAP" would be integrated, with "Workbrain" performing rostering and award interpretation functions ("the Expertise Representations"),

(b) That the human resources system implemented in the Department of Housing ("DOH") was suitable to be used as the basis for a payroll system for QH ("the DOH representations"),

(c) That it was feasible, realistic and possible for a new QH payroll system to be delivered by August 2008 ("the Timing Representations"),

(d) That the new payroll system proposed by IBM, the plan to implement that system by August 2008 and the plan to base that system on the DOH system were appropriate risk mitigation strategies and were low risk ("the Low Risk Representations"),

(e) That the prices which IBM had quoted in the course of the tender were realistic estimates of the prices for which IBM could complete the anticipated work relating to the implementation of the Shared Services Solutions Program ("the Price Representations").

[20] The State pleads that IBM made those representations negligently and that they were misleading or deceptive. In the proposed ASOC further allegations are made that the representations constituted a breach of s 53 of the TPA. It is also proposed to be alleged that the State relied upon each of the representations at the time it entered into the 2007 Contract. It is then alleged that, had it not been for those representations:

(a) the State would not have entered into the 2007 Contract,

(b) it would have instead contracted with Accenture Australia Holdings Pty Ltd, and

(c) that company would have replaced or upgraded the existing Lattice payroll system which was being used by QH.

[21] In order for false statements of fact to be actionable misrepresentations they must have been intended to induce, and did induce, the State to enter into the 2007 Contract. That is the gist of the ASOC. In order to demonstrate that the State suffered damage as a result of entering into the 2007 Contract, the State has pleaded that it suffered loss and damage consisting of, among other things, the following:

(a) the extra cost of implementing the QH payroll system,

(b) the costs of rectifying the defects and flaws in the QH payroll system provided by IBM and of making the system work so that it correctly paid QH staff,

(c) the extra costs of additional payroll staff required to ensure that employees were paid accurately and on time,

(d) losses consequent upon the IBM payroll system overpaying staff after March 2010,

(e) the cost of programs introduced to manage the issues and problems caused by the IBM payroll system,

(f) the cost of programs used to assist managers and staff to cope with the effects of the IBM payroll system,

(g) the extra costs of upgrades to the QH payroll system after 2013 being those costs over and above what the costs would have been had IBM not been engaged, and

(h) losses arising from the making of payments to IBM for work performed after 5 December 2007 other than in connection with the QH payroll system.

[22] The causes of action pleaded in the ASOC will, if the matter proceeds, require that evidence be given of the work done by IBM after the 2007 Contract was awarded because that will be necessary to demonstrate the falsity of the representations. In other words, the alleged failure by IBM to perform in accordance with the 2007 Contract will, necessarily, form an indispensable part of the State's case.

**The Supplemental Agreement – the terms of the release**

[23] The recitals in the Supplemental Agreement include:

> "A. The State engaged IBM as prime contractor for the Shared Services Solutions Program for the Queensland Government, pursuant to a contract dated 5 December 2007 ("Contract"). The Contract includes statement of work 8 Lattice Replacement Project for the replacement of the Queensland Health payroll system ("SOW 8").
>
> B. The State and IBM are in dispute over certain matters in relation to the Contract and have agreed to resolve their dispute, without any admission of liability by either party, on the terms of this agreement, pursuant to the dispute resolution process in the Contract."

[24] The acronym SOW stood for "Statement of Work". There were a number of them. An SOW defined the services provided by IBM for the QH Project to replace the QH payroll system. The Lattice SOWs formed part of the 2007 Contract and were "subject to the terms and conditions set forth therein".

[25] Clause 1.1 of Supplemental Agreement provides:

"The terms and conditions of this agreement vary the terms and conditions of the Contract as set out in this agreement. From 31 August 2010 until 31 October 2010, IBM is relieved of its obligations to provide Deliverables to the State pursuant to SOW 8 of the Contract."

[26] The Supplemental Agreement also contained a number of conditions precedent. It was not disputed that those conditions have been satisfied.

[27] The releases given by each party are set out in clause 5. The release given by the State ("the Release") is as follows:

"**5.1 Release by State**

…

(b) If:

(i) on 31 October 2010, there are:

(A) no Severity Level 1 Defects which the State notified to IBM before 29 October 2010 in the Queensland Health payroll solution as delivered by IBM (under the Lattice SOWs and this agreement), and

(B) no unremedied material breaches of this agreement by IBM in respect of which the State has given IBM a written notice; and

(ii) there are:

(A) no Severity Level 1 Defects which occurred on 29, 30 or 31 October 2010 in the Queensland Health payroll solution as delivered by IBM (under the Lattice SOWs and this agreement) (which the State must immediately notify to IBM) and which have not been rectified within 7 days, and

(B) no unremedied material breaches of this agreement by IBM in respect of which the State has given IBM a written notice,

then the State releases the IBM Parties from all Claims ("**State Release**") and agrees that the IBM Parties may plead this agreement to bar any Claim and the State agrees that it will not sue those parties in any jurisdiction in respect of the Claims and agrees that such covenant will not be terminated ("**State Covenant**").

(c) The State agrees that if the State Release or the State Covenant are breached, monetary damages would not be an adequate remedy and it will consent, on the application of any IBM Party to the entry of a permanent injunction enjoining it from breaching the covenants not to sue.

(d) If the State makes a claim against an IBM Party which is the subject of the State Covenant or State Release, then the State fully indemnifies each IBM Party against any liability (including the amount of any judgment, settlement

sum and legal and other costs) incurred by the IBM Party as a result of that claim.

(e) Each party acknowledges that (except as specifically set out in this agreement) it:

(i) enters into this agreement freely and voluntarily based upon its own information, legal advice and investigation;

(ii) does not execute this agreement as a result of or in reliance on any promise, representation, advice, statement or information of any kind given or offered to it by or on behalf of the other party, whether in answer to any inquiry or not; and

(iii) enters into this agreement with the intention of settling on a final basis, according to the provisions of this agreement, all claims in respect of the Contract and any other disputes which now exist, or may exist or have ever existed between the State and any IBM Party, in any way related to the Contract notwithstanding that any party may become aware of or come into possession of new information with respect to the Contract."

[28] The word "claim" is defined in clause 7.3 of the agreement in the following way:

**"Claim** means:

(a) in clause 5.1, any action, claim, proceeding, allegation, suit, arbitration, complaint, cost, debt due (including proof of debts), entitlement (whether actual or contingent), demand, determination, inquiry, judgment, verdict or otherwise, whether such matters arise at common law, in equity, pursuant to statute, pursuant to contract, in tort or otherwise that the State had, has or might have had against an IBM Party in respect of IBM's obligations and acts or omissions prior to 1 September 2010 pursuant to the Lattice SOWs:

(i) to deliver the Deliverables on time in accordance with the Lattice SOWs;

(ii) to ensure that Deliverables did not incorporate Defects, in relation to Defects known to the State as at 31 August 2010;

(iii) resulting in any Severity Level 2 to 4 (inclusive) Defects in the Deliverables whether known or not at the date of this agreement; or

(iv) to remedy Defects in accordance with the Contract.

(b) in clause 5.2, any action, claim, proceeding, allegation, suit, arbitration, complaint, cost, debt due (including proof of debts), entitlement (whether actual or contingent), demand, determination, inquiry, judgment, verdict or otherwise, whether such matters arise at common law, in equity, pursuant to statute, pursuant to contract, in tort, or otherwise that IBM had, has or might have had against a State Party in respect of the State's obligations to provide resources to IBM under the Lattice SOWs."

**Why the Release does apply – IBM's case**

[29] IBM submits that the damages claim comes within the scope of the Release. There are, in summary, four factors which support that conclusion.

[30] First, the Release is not confined to particular causes of action.

[31] Secondly, the parties recorded a shared intention that the Release operate extensively – cl 5.1(e)(iii) of the Supplemental Agreement.

[32] Thirdly, the State and IBM were aware of potential claims for pre-contractual misrepresentations in 2010 when the Supplemental Agreement was negotiated.

[33] Fourthly, commercial efficacy and common sense support a reading of the Release which extends to the damages proceeding.

**Why the Release doesn't apply – the State's case**

[34] The State's argument – put briefly – is that the Release does not extend to liability for any acts or conduct (including misrepresentations) which preceded the entry into the 2007 Contract. This flows from the confined definition of "Claim" in cl 7.3.

[35] IBM can't rely, the State argues, on cl 5.1(e)(iii) of the Supplemental Agreement because it is subject to the qualifying phrase in cl 5.1(e) which works to confine the ambit of the Release by reference to the definition of "Claim".

[36] The Supplemental Agreement amends the 2007 Contract but, apart from the changes made by the Supplemental Agreement, the rights and obligations of the parties under the 2007 Contract were to continue. This continuation tells against the conclusion that IBM had been released in respect of all claims.

**Objections to evidence**

[37] The State filed a number of affidavits and the deponents were cross-examined upon those affidavits. Other evidence was led by the State in support of its construction of the Release on the basis that extrinsic evidence was able to be led in order to assist in the interpretation of the Release. This was objected to by IBM and the question of the admissibility of this evidence will be dealt with later in these reasons.

**The construction of releases – are they in a special category?**

[38] IBM contends that the modern approach to the construction of releases is to construe them in the same manner as any other contractual provision. So much has been accepted in *Perth Airport Pty Ltd v Ridgepoint Corporation Pty Ltd* [3] and *Mac Developments (Gold Coast) Pty Ltd v Rams Financial Group Pty Ltd* [4].

[39] The so-called modern approach can be found in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [5] where the following appears:

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3 [2013] WASC 33 at [133].
4 [2010] QCA 477 at [32]-[38].
5 (2004) 219 CLR 165.

> "[40] This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."

[40] Gleeson CJ put it this way in *International Air Transport Association v Ansett Australia Holdings Limited & Ors*[6]

> "[8] In giving a commercial contract a businesslike interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure. An appreciation of the commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market. This is a case in which the Court's general understanding of background and purpose is supplemented by specific information as to the genesis of the transaction. The Agreement has a history; and that history is part of the context in which the contract takes its meaning. Before considering that history, it is necessary to explain, by reference to the text, how the issue of construction arises."

[41] As a general proposition, it is not permissible to examine the way in which the parties dealt with each other before the contract was formed. In *Byrnes v Kendle* [7], Heydon and Crennan JJ said:

> "[99] One reason why the examination of surrounding circumstances in order to decide what the words mean does not permit examination of pre-contractual negotiations is that the latter material is often appealed to purely to show what the words were intended to mean, which is impermissible. The rejected argument in *Chartbrook v Persimmon Homes Ltd* was that all pre-contractual negotiations should be examined, not just those pointing to surrounding circumstances in the mutual contemplation of the parties. The argument purported to accept that contractual construction was an objective process, and that evidence of what one party intended should not be admissible. But other parts of the argument undercut that approach. Mr Christopher Nugee QC submitted: "The question is not what the words meant but what these parties meant … Letting in the negotiations gives the court the best chance of ascertaining what the parties meant". It would have been revolutionary to have accepted that argument."

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6 (2008) 234 CLR 151.
7 (2011) 243 CLR 253.

[42] Their Honours went on to observe that "… the actual state of mind or either party is only relevant in limited circumstances …"[8].

[43] One of those circumstances arises when it is necessary to determine the ambit of a deed of release. In that case, the following reasoning in *Grant v John Grant & Sons Pty Ltd* [9] applies:

> "The question is whether upon a proper interpretation of the deed the general release clause should be restrained to matters in dispute within the meaning of these recitals. The question depends primarily on the application of the prima facie canon of construction qualifying the general words of a release by reference to particular matters which recitals show to be the occasion of the instrument. But it is also affected by the general tenor of the deed. It is unnecessary to say more about the canon of construction or to discuss further the contents of the deed. **As to the first all that remains is to apply the principle that prima facie the release should be read as confined to the matters forming the subject of the disputes which the deed recites**. As to the second, such indications as can be found in the provisions of the deed point rather in the same direction. The detailed character of the terms of settlement, the careful readjustment of rights, the specific reference to the debt of H. C. Grant and his wife and its discharge and the particularity of the allocation of things and contracts between the companies do not favour the view that a general release was intended going outside the actual area of dispute."[10] (emphasis added)

[44] In *Qantas Airways Ltd v Gubbins*[11] , Gleeson CJ and Handley JA referred to *Grant* and said that it:

> " … sets out the principles by reference to which a court will decide whether a general release will be held to cover a particular dispute. **The rule is that the general words of a release will, in an appropriate case, be read down to conform to the contemplation of the parties at the time the release was executed**."[12] (emphasis added)

[45] A useful list of the relevant principles was created by Santow J in *Karam v ANZ Banking Group Ltd* [13]:

> "[406] The principles applicable to construing releases or purported releases can conveniently be set out in a series of propositions:
>
> (1) In construing a release, here embodied in a letter of variation to the terms of lending, the Court should ascribe to the release the meaning that the release would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time that they signed the document containing the

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8 Ibid at [101].
9 (1954) 91 CLR 112.
10 Op cit at 131-2, *per* Dixon CJ, Fullagar, Kitto and Taylor JJ
11 (1992) 28 NSWLR 26
12 Op cit at 29
13 [2001] NSWSC 709, reversed on appeal in *ANZ Banking Group Ltd v Karam* (2005) 64 NSWLR 149 on grounds unrelated to the summary set out above.

release: *ICS v West Bromwich BS* [1998] 1 All ER 98 per Lord Hoffman at 114.

(2) In order for the Court to give effect to what in an objective sense the contracting parties intended, it is clear that a party may agree to release claims or rights of which it is unaware and of which it could not be aware, *provided* clear language is used to make plain that that is its intention: see *Salkeld v Vernon* (1758) 1 Eden 64, 28 ER 608 per Lord Keeper Henley.

(3) Consistent with this emphasis on intention, general words in a release are limited to what was specifically in the contemplation of the parties at the time when the release was given: *Grant v John Grant and Sons* (1954) 91 CLR 112 per Dixon CJ, Fullagar, Kitto and Taylor JJ; *Iletrait Pty Ltd v McInnes* (NSWCA, 17 April 1997, unreported) per Priestley JA with whom Grove AJA and Handley JA agreed).

(4) Although there are no special rules of construction, such as a *contra proferentem* requirement, in the absence of clear language courts have been slow to infer that a party intended to surrender rights and claims of which it was unaware and could not have been aware: *BCCL v Ali* [2001] 1 All ER961 at 966 per Lord Bingham, (contrast Lord Nicholls in *BCCL v Ali* (supra) at 971-972 who was of the view that for the purposes of construction a general release is simply a term in the contract).

(5) Although each release should be considered against its own matrix of facts, an example of this line of 'cautionary principle' (Lord Bingham's phrase) is the frequently cited judgment of the High Court of Australia in *Grant v John Grant & Sons Pty Ltd* (supra), where Dixon CJ, Fullagar, Kitto and Taylor JJ (at 125) referred with approval to the proposition put by Sir Frederick Pollock in his 'Principles of Contract' (Stevens: London, 1950) 13th ed at 412, that 'in equity a release shall not be construed as applying to something of which the party executing it was ignorant.'

(6) Despite the fact that, strictly speaking, releases are subject to no special rules of construction, a transaction in which one party agrees in general terms to release another from any claims upon it does have special features: *BCCL v Ali* at 984 per Lord Hoffman.

(7) In such circumstances it may well be appropriate to imply an obligation upon the beneficiary of such a release to disclose the existence of claims of which it actually knows and which it also realises might not be known to the other party*: BCCL v Ali* at 984 per Lord Hoffman, for such an obligation is consistent with a concern to protect parties from sharp practice, by preventing advantage being taken of the known ignorance of the conceding party; *BCCL v Ali* per Lord Nicholls at 973. (The Bank made no such disclosure here.)

(8) Most recently in this Court in *Amaca Pty Limited formerly known as James Hardie & Coy Pty Limited v CSR Limited* [2001] NSWSC 324, Bergin J adopted the principles of construction broadly as outlined above,

> including the 'cautionary principle' and taking into account the purpose of the contract and the circumstances in which made."

**The equitable principle which applies**

[46] A particular equitable doctrine applies to releases. It is not a principle of construction as there are no special principles of equitable construction[14].

[47] In *Bank of Credit & Commerce International SA (in liq) v Ali [No 1]* [15] , Lord Bingham said that there is "a long and in my view salutary line of authority [which] shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."[16] His Lordship also said:

> "A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not have been aware, even claims which could not on the facts known to the parties have been imagined**, if appropriate language is used to make plain that that is his intention**."[17] (emphasis added)

[48] He referred to the decision of Lord Keeper Henley in *Salkeld v Vernon*[18], and to its endorsement by the High Court in *Grant* where the majority said:

> "No doubt it is possible a priori that the release was framed in general terms in the hope of blotting out, so to speak, all conceivable grounds of further disputes or claims between all or any two or more parties to the deed, whether in respect of matters disclosed by a party against whom a claim might be made or undisclosed, of matters within the knowledge of a party by whom a claim might be made or outside it. If so the case would fall within the exception which, in the passage already cited, Lord Northington [Lord Keeper Henley] made from his proposition that a release *ex vi termini* imports a knowledge in the releasor of what he releases, namely the exception expressed by the words 'unless upon a particular and solemn composition for peace persons expressly agree to release uncertain demands' (*Salkeld v. Vernon*)"[19]

[49] In *Grant* the majority expressed the applicable principle in this way:

> "From the authorities which have already been cited it will 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 as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence,**

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14 The legal construction of an instrument is the same in equity as at law. See *Louinder v Leis* (1982) 149 CLR 509 at 524 and *Bank of Credit & Commerce International SA (in liq) v Ali [No 1]* [2002] 1 AC 251 at [17].

15 [2002] 1 AC 251.

16 Op cit at [9].

17 Ibid.

18 (1758) 1 Eden 64.

19 *Grant* at 129.

> **character and extent of the liability in question and the actual intention of the releaser**." [20]

[50] In this case, the State argues that the words of the Release do not go so far as to capture a claim based upon representations made before entry into the 2007 Contract.

[51] Before any consideration can be given to the application of the principle in *Grant*, or the admission of extrinsic evidence, it is first necessary to examine the terms of the Release.

**The terms of the Release**

[52] Clause 5.1 contains the release by the State. After some sub-clauses which deal with pre-conditions[21] the clause provides:

> "the State releases the IBM Parties from **all Claims** ("State Release") and agrees that the IBM Parties may plead this agreement to bar any Claim and **the State agrees that it will not sue those parties in any jurisdiction in respect of the Claims** and agrees that such covenant will not be terminated."

[53] As IBM is released from "all Claims" it is necessary to determine the meaning of that term.

[54] The definition of "Claim" is contained in cl 7.3(a). It provides that "Claim" means:

> "… any **action**, **claim**, proceeding, allegation, **suit**, arbitration, complaint, cost, debt due (including proof of debts), entitlement (whether actual or contingent), demand, determination, inquiry, judgment, verdict or otherwise, whether such matters arise at common law, in equity, **pursuant to statute**, pursuant to contract, in **tort** or otherwise that **the State had, has or might have had** against an IBM Party **in respect of IBM's obligations and acts or omissions prior to 1 September 2010 pursuant to the Lattice SOWs**:
>
> (i) to deliver the Deliverables on time in accordance with the Lattice SOWs;
>
> (ii) to ensure that Deliverables did not incorporate Defects, in relation to Defects known to the State as at 31 August 2010;
>
> (iii) resulting in any Severity Level 2 to 4 (inclusive) Defects in the Deliverables whether known or not at the date of this agreement; or
>
> (iv) to remedy Defects in accordance with the Contract." (emphasis added)

**What does "Claim" mean?**

***The State's submissions***

[55] The State makes four points with respect to the meaning of "Claim".

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20 *Grant* at 129-30.

21 The State accepts, for the purposes of this matter, that the pre-conditions were satisfied.

[56] First, the "obligations" are only with respect to the Lattice SOWs. An obligation is only "pursuant" to the Lattice SOWs if it was an obligation imposed on IBM in accordance with the Lattice SOWs as adopted under the 2007 Contract. Further:

(a) The claims in the damages proceeding are to the effect that IBM breached a duty of care in tort and breached the statutory prohibition on misleading and deceptive conduct by reason of misrepresentations in the period prior to the entry into the 2007 Contract.

(b) The claims in the damages proceeding are not concerned with or derived from contractual obligations that were imposed on IBM in accordance with or pursuant to the Lattice SOWs. They are concerned with conduct that was engaged in anterior to the formation of the 2007 Contract, under which the Lattice SOWs were adopted.

(c) The conduct alleged in the damages proceeding was not governed by a contractual relationship and the claims made are not for breach of contract or for a failure to attain a standard imposed by law in the performance of the Lattice SOWs.

[57] So far as "acts or omissions" are concerned:

(a) An act or omission would only be "pursuant" to the Lattice SOWs if it was an act or omission of IBM which occurred in the course of IBM performing or purporting to perform the contractual obligations imposed on it under the Lattice SOWs.

(b) The claims in the damages proceeding for pre-contractual misrepresentation are not concerned with acts or omissions of IBM in the performance or purported performance of the Lattice SOWs. The relevant conduct preceded the entry into the 2007 Contract and the formation of the Lattice SOWs.

[58] Secondly, the definition of "Claim" does not extend to all the obligations of IBM pursuant to the Lattice SOWs but only to those four identified in the definition. The State argues that paragraphs (i) to (iv) in the definition of "Claim" are a carefully tailored list of the obligations and acts or omissions pursuant to the Lattice SOWs in respect of which it was intended to grant a release to IBM. Each of the paragraphs relates to an aspect of the *performance* of the 2007 Contract. That reflects the position that the intention of the parties was to finalise as between them the dispute which had arisen as to the *performance* of the 2007 Contract. There is nothing in the four sub-paragraphs of the definition which suggests that pre-contractual conduct was in contemplation.

[59] Thirdly, if the parties had intended to release all liability connected with the Lattice SOWs, or all liability connected with the 2007 Contract, there would have been no need for the careful delimitation of the obligations, acts or omissions that constitute the subject matter of the "Claims" to be released. IBM's interpretation of the words "in respect of" would render otiose the words "pursuant to the Lattice SOWs" and the four sub-paragraphs which follow after those words.

[60] Fourthly, the limitation of the Release to claims in respect of IBM's obligations, acts or omissions "pursuant to the Lattice SOWs" is not affected by the long list of synonyms in the definition of "Claim", or the recitation that claims include those in contract, in tort,

under statute or otherwise. The intention of including this broad language was to ensure that, within the scope of the intended release, all possible causes of action would be released. That is, the Release was intended to apply not only to a cause of action for breach of contract, but also to a cause of action for breach of a duty of care or statutory duty that was concurrent with the duties of IBM "pursuant to the Lattice SOWs".

[61] In summary, the State's central contention is that the Release does not extend to a cause of action for pre-contractual misrepresentation because that conduct is not concerned with an obligation of IBM "pursuant to the Lattice SOWs", or any act or omission of IBM "pursuant to the Lattice SOWs".

***IBM's submissions***

[62] IBM, not surprisingly, rejects the "narrow" construction of cl 7.3. It does so for the following reasons.

[63] The definition is not restricted to claims for liability pursuant to the Lattice SOWs, but claims in respect of obligations, acts or omissions (performed or omitted to be performed) pursuant to them.

[64] The damages proceeding is based on the proposition that IBM's acts and omissions when providing the contracting services under the Lattice SOWs resulted in delays and defects in the system. It is not a claim divorced from IBM's work in carrying out the Lattice SOWs, but one which is intimately connected to that work. The claim by the State is based on allegations that the standard of performance which was expected and based on the "misrepresentations" was not achieved.

[65] The parties' statement of intention in clause 5.1(e)(iii) of the Supplemental Agreement confirms this approach because it makes it plain that the intended scope of the Release was to extend to claims "in any way related to the Contract". That is, to any claims that have some connection to IBM's obligations, acts or omissions pursuant to the Lattice SOWs which, IBM says, is a description which is answered by the damages proceeding.

[66] There are four sub-paragraphs of clause 7.3 (a) in which reference is made to "Deliverables" and "Defects". The word "Deliverable" means the "ICT Contracting Services" provided by IBM and specified in SOWs 5, 7, 8, 8A and 12[22], in other words, all of IBM's contracting services provided in connection with the QH payroll system. The word "Defects" is not defined in either the Supplemental Agreement or the 2007 Contract. Clause 6.1 of the 2007 Contract uses the term "Defects" in a general sense to refer to problems or shortcomings (from the State's perspective) in any deliverable. Defects are also referred to in schedule 26 of the 2007 Contract concerning warranties. Schedule 26 identifies four severity levels of this kind of defect. It appears that "Defects" can be described as being any problems with a deliverable and, for final deliverables which constitute the delivery of the system, software or other problems which are described in schedule 26 by reference to the four levels of severity.

[67] Loss or damage is an essential element of the States causes of action. Without the pleaded loss and damage the State would have no claim and, thus, no complete cause of action.

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[22] See item C1.11, Sched 1, 2007 Contract and item M8.5, Sched 2, 2007 Contract.

[68] The approach to construction adopted by the State leads to a commercial futility. The State says that, notwithstanding the Release, it may claim all losses "in respect of the entry into the IBM Contract and the entirety of the consequences which followed thereon". It is futile to release all liability for the (non) performance of a contract (or part thereof) but at the same time to preserve a liability for loss and damage which extends to the entirety of the consequences which followed from entering into it, including the apparently released non-performance.

[69] The natural reading of the definition of "Claim" is that it identifies that which the parties agreed would not later be re-agitated in legal proceedings of any kind. The damages proceeding does re-agitate those matters.

***Conclusions on the meaning of "Claim"***

[70] Clause 7.3 (a) commences with a string of words which can be divided into three broad categories. Their presence is due, to a large extent, to the fondness of those who draft contracts for the thesaurus approach to describing things. The words "action, claim, receding, allegation, suit, arbitration, complaint,…, demand" can all answer to the broad description: "cause of action". The words "cost, debt due… entitlement" can be seen as descriptions of matters which are the precursors of a cause of action. And the words "determination,…, judgement, verdict" could be describing what follows the resolution by a court or arbitrator of a dispute. It was argued by IBM that some of those words, e.g., allegation, cost, entitlement, and inquiry, demonstrate that the definition of "Claim" is not to be confined and that their use does not reveal any intention to privilege a particular element of a cause of action (i.e. breach of an obligation) above another (i.e. circumstances giving rise to loss and damage) in its operation.

[71] The touchstone of interpretation, both for statutes and private documents, is context. That this is so, has been recognised for a very long time and, notwithstanding the spreading aversion for the use of Latin maxims, is exemplified by the term *noscitur a sociis.* A notable exception to the aversion can be found in *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [23] where Spigelman CJ (with whom McColl and Basten JJA agreed) said:

> "[30] The general principle of the law of interpretation that the meaning of a word can be gathered from its associated words — *noscitur a sociis* — has a number of specific sub-principles with respect to the immediate textual context. The most frequently cited such sub-principle is the *ejusdem generis* rule. The relevant sub-principle for the present case is the maxim propounded by Lord Bacon: *copulatio verborum indicat acceptationem in eodem sensu* — the linking of words indicates that they should be understood in the same sense. As Lord Kenyon CJ once put it, where a word 'stands with' other words it 'must mean something analogous to them'. (*Evans v Stevens* (1791) 4 TR 224; 100 ER 986 at 987. See also W J Byrne (ed) *Broomes Legal Maxim* (9th ed) Sweet and Maxwell, London (1924) pp 373–374.)
>
> [31] However, as Lord Diplock put it in *Letang v Cooper* [1965] 1 QB 232 at 247:

[23] [2006] NSWCA 207.

> The maxim *noscitur a sociis* is always a treacherous one unless you know the *sosietas* to which the *socii* belong.
>
> [32] There is no such difficulty here. Unless the expression 'assumption of obligations' is confined to 'alienation', most of the adjoining words would be otiose. The reading down of general words is one of the most common mechanisms applied in the course of legal interpretation. **The Court should not give one word in an interrelated, overlapping list of expressions a meaning that is so broad as to be inconsistent with adjoining words or that renders those words irrelevant**." (emphasis added)

[72] The words used in the commencement of cl 7.3(a) can properly be seen as covering: the forerunners of a cause of action, causes of action and the consequences of a cause of action being dealt with. So far as the clause concerns this set of circumstances, there are a number of words which cover the concept of a cause of action. In any event, the notion inherent in a release is that an action may not be brought which comes within the terms of the release. That is supported by the words which follow: "whether such matters arise at common law, in equity, pursuant to statute, pursuant to contract, in tort or otherwise".

[73] It is necessary, therefore, to consider whether the causes of action advanced in the damages proceeding come within the term "Claim" as defined. These must be causes of action which the State had, or does have or might have had against IBM.

[74] The causes of action must also be "in respect of IBM's obligations and acts or omissions prior to 1 September 2010 pursuant to the Lattice SOWs …". The State contends that the phrase "obligations and acts or omissions" is conjunctive in the sense that a cause of action must be in respect of both IBM's "obligations" and "acts or omissions".

[75] It is the next step at which the parties truly diverge. So far as these circumstances require, the clause contemplates a cause of action:

(a) which arises at common law etc. or otherwise, and

(b) which is in respect of IBM's obligations and acts or omissions prior to 1 September 2010, which, in turn, are

(c) pursuant to those Lattice SOWs which are specifically identified in (i) – (iv).

[76] The phrase upon which the definition of "Claim" turns is: "in respect of". It is appropriate to examine the context which frames the Release, and, in turn, that phrase.

[77] The intention of the parties is found in cl 5.1(e)(iii):

> "Each party acknowledges that (except as specifically set out in this agreement) it:
>
> …
>
> (iii) enters into this agreement with the intention of **settling on a final basis**, according to the provisions of this agreement, **all claims in respect of the Contract and any other disputes which now exist, or may exist or have ever existed** between the State and any IBM Party, **in any way related to the Contract**

> notwithstanding that any party may become aware of or come into possession of new information with respect to the Contract." (emphasis added)

[78] The inclusion of the words "may exist" signifies that the parties intend that the release covers claims about which they may not be conscious. This is the type of "appropriate language" referred to by Lord Bingham in *Bank of Credit & Commerce International SA (in liq) v Ali [No 1]* by which parties can surrender claims of which they were unaware.

[79] The parties have recorded an intention that the Release cover "all claims *in respect* of the Contract" and "any … disputes … in *any way related* to the Contract …". These are expressions of substantial width. For example, in *Kazeminy v Siddiqi*[24] the Court of Appeal of England and Wales considered a release which contained these expressions:

> "whether past, present or future and whether or not known or contemplated"
>
> and
>
> "arising under or in any way connected with [the current proceedings] . . . or with any dealings between the parties concerning loans to or investments in the Defendants . . . by the claimants or any person whosoever."

[80] Lord Justice Moore-Bick[25] said:

> "[8] The agreement is drawn in very wide terms and I am left in no doubt that the parties intended it to encompass all rights and obligations between them arising out of their dealings in relation to the technology in question, whether they knew of their existence or not and whether they were already capable of enforcement or might become enforceable only in the future or were contingent on the happening of some future event. …"

[81] Even so, words of great width are still subject to their context. As Lord Nicholls said in *Bank of Credit & Commerce International* :

> "[29] … the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."

[82] These types of expression were considered in *Fraser v The Irish Restaurant & Bar Company Pty Ltd* [26] by Muir JA:

> "[40] The expression 'in connection with' is capable of having a wide meaning but in common with expressions such as 'relating to' and 'in respect of' its meaning must be derived from the context in which it was used. The following passages from the reasons in *Workers' Compensation Board (Qld)* v *Technical Products Pty Ltd* illustrate the point:

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24 [2012] EWCA Civ 416.
25 With whom Mummery LJ and Black LJ agreed.
26 [2008] QCA 270.

> ‘It has been said, perhaps somewhat extravagantly, that the words 'in respect of' ‘have the widest possible meaning of any expression intended to convey some connexion or relation between the two subject-matters to which the words refer’: *Trustees Executors & Agency Co. Ltd. v. Reilly* [[1941] VLR 110 at 111], cited in *State Government Insurance Office (Q.) v. Crittenden* [(1966) 117 CLR 412 at 416]. The words were cited again by Gibbs J. in *McDowell v Baker* [(1979) 144 CLR 413 at 419], and by Mason J. in *State Government Insurance Office (Q.) v. Rees* [(1979) 144 CLR 549 at 561], when his Honour added the comment: ‘But, as with other words and expressions, the meaning to be ascribed to ‘in respect of' depends very much on the context in which it is found’.

...

**Undoubtedly the words ‘in respect of’ have a wide meaning**, although it is going somewhat too far to say, as did Mann C.J. in *Trustees Executors & Agency Co. Ltd. v. Reilly* [[1941] V.R 110 at 111], that ‘they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer’. **The phrase gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends**.’

[41] The following observations of Davies J in *Hatfield v Health Insurance Commission*, although directed to a question of statutory construction, are also of relevance:

> ‘Expressions such as ‘relating to’, ‘in relation to’, ‘in connection with’ and ‘**in respect of**’ are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute… . **The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear**.’

[42] After quoting the passage from *Hatfield*, Spigelman CJ, with whose reasons the other members of the Court agreed, said in *R v Orcher*:

> ‘[32] Finally, the Full Federal Court returned to this matter in *Health Insurance Commission v Freeman* (1998) 158 ALR 267 at 273 where the Court said:
>
> > ‘The words ‘in connection with’ have been accepted as capable of describing a spectrum of relationships between things, one of which is bound up with or involved in another: see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288. However, as was pointed out by Sackville J in *Taciak v Commission of Australian Federal Police* (1995) 59 FCR 285 at 295, the question that remains in a particular case is what kind of relationship will suffice to establish the connection contemplated

> by the statute. That requires a 'value judgment about the range of the statute': see *Pozzolanic* (at 289).'
>
> [43] Again, the views expressed are equally applicable to contractual construction." (emphasis added)

[83] Terms such as "related to" are found in many types of contract. In *IBM Australia Ltd v National Distribution Services Ltd* [27] the provisions of an arbitration clause were considered. The clause provided:

> "This Agreement will be construed in accordance with and governed by the laws of New South Wales. Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration. …"

[84] Clarke JA examined the clause and said:

> "… meaning must be given to the phrase 'related to this agreement or any breach thereof': *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 at 503, per Balcombe LJ. It is not only claims arising out of the agreement or any breaches of it which are covered but also those related to the agreement and any breaches of it.
>
> The phrases 'in relation to' or 'related to' are of the widest import and should not, in the absence of compelling reasons to the contrary, be read down: *Fountain v Alexander* (1982) 150 CLR 615 at 629; *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508 at 511 and *Ashville Investments Ltd v Elmer Contractors Ltd*. In its context I would, **in the absence of contrary indications in the contract, understand the clause to be sufficiently wide to encompass claims that pre-contractual misrepresentations induced the complaining party to enter the contract."** [28](emphasis added)

[85] Handley JA agreed with Clarke JA and added:

> "The arbitration clause in this case covered 'any controversy or claim **arising out of or related to this Agreement or the breach thereof**'. That part of the submission which contained an agreement to refer controversies or claims "arising out of the Agreement or the breach thereof" appears to cover every conceivable claim which either party might have against the other in contract. In a particular context the same words may also cover other claims as well. However that may be this clause contains, in addition, an agreement to refer controversies and claims 'related to this Agreement or the breach thereof'. These are wide words which should not be read down in the absence of some compelling reason for doing so: see *Perlman v Perlman* (1984) 155 CLR 474 at 489 and *Inland Revenue Commissioners v Maple & Co (Paris) Ltd* [1908] AC 22 at 26. **These words can only have been added to include within the submission claims other than in contract such as claims in tort, in restitution, or in equity. I can see no**

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27 (1991) 22 NSWLR 466.

28 Op cit at 483.

> **basis for excluding claims arising under statutes which grant remedies enforceable in or confer powers on courts of general jurisdiction. For example, the *Contracts Review Act* 1980, the *Frustrated Contracts Act* 1978 or the *Insurance Contracts Act* 1984 (Cth). Once this position is reached there is no basis, in my opinion, for excluding claims arising under the *Trade Practices Act* 1974** (Cth)."[29] (emphasis added)

[86] The intention expressed in cl 5.1(e)(iii) is, if anything, wider than that considered in *IBM Australia Ltd v National Distribution Services Ltd* as the sub-clause refers to disputes (past, present or future) which are "in any way related to the Contract". That expression allows even the most tenuous link and would easily include representations which led to or induced the making of the 2007 Contract.

[87] The State contends that IBM can take little comfort from the statement of intention in cl 5.1(e)(iii). It says that IBM's reliance on the sub-clause is misplaced because the sub-clause is qualified by the phrases "except as specifically set out in this agreement" and "according to the provisions of this agreement" and that those qualifying phrases make the general intention expressed in clause 5.1(e)(iii) subject to the narrow definition of "Claim" which circumscribes the scope of the Release. That is, with respect, an unduly confined reading of the sub-clause.

[88] The first qualification is "except as specifically set out in this agreement". It refers to the acknowledgement of the three matters which are the entire purpose of the sub-clause. They each relate to the "joint" state of mind of IBM and the State. It is that state of mind to which this exception can apply and, by its own terms, only applies where it is "specifically set out". The definition of "Claim" does not purport to deal with or restrict the stated intention of the parties.

[89] The second qualification is "according to the provisions of this agreement". That, likewise, does not work to confine the operation of the settlement. Rather, it concerns the mechanics of the settlement – it refers, for example, to the mutual releases and the payment of money.

[90] Thus, the acknowledgement by the parties is of an intention to provide for a release which will capture actions falling within a very wide range. If "claims" was not defined and its ordinary meaning was used then the ASOC would clearly be stymied by the Release. But, the definition of "Claim" requires consideration of the expression: "in respect of IBM's obligations and acts or omissions …".

[91] The context in which it appears in cl 7.3(a) does not suggest that "in respect of" should be read down. The use of the words: "obligations and acts or omissions" suggests that the broadest range of conduct of IBM was in consideration. Similarly, those obligations etc. are expressed as being "pursuant to the Lattice SOWs" to do certain things. The list of things in cl 7.3(a)(i)-(iv) concerns Deliverables and Defects. The word "Deliverable" is not defined in the Supplemental Agreement but has the meaning given to it in the 2007 Contract and, so, it means all of IBM's contracting services provided in connection with the QH payroll system.[30] The word "Defects" is not defined in either the 2007 Contract or the Supplemental Agreement. It is, though, referred to in clause 6.1 of the 2007

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29 Op cit at 487.

30 See Sched 1 of the 2007 Contract at Item C1.11, and Sched 2 of the 2007 Contract at Item M8.5.

Contract and schedule 26 of the same contract and is used in the sense of meaning any problem with a Deliverable and, where a Deliverable constitutes the delivery of the system, the specific software problems described in schedule 26.

[92] It follows, then, that the reference in the definition of "Claim" to the Deliverables and Defects should be construed as meaning that it covers:

(a) delays in the delivery of the Lattice SOWs;

(b) defects known to the State (up to 31 August 2010) in any deliverable, i.e., any known problem in the ICT contracting services provided by IBM on the QH project;

(c) any known or unknown Severity Level 2 – 4 defects;

(d) any responsibility to remedy defects.

[93] In the light of the acknowledgement in cl 5.1(e)(iii), the long list of matters covered by the definition of "Claim", the exhaustive enumeration of the sources from which a claim may arise and the absence of any temporal limit on such a claim there is no warrant to confine the meaning of "in respect of". It should be afforded its ordinary extensive meaning.

[94] The damages proceeding can properly be seen to be "in respect of" IBM's obligations and acts or omissions as set out in cl 5.1(a). The essential part of each cause of action is the suffering of loss and damage. So far as the cause of action based on the TPA is concerned the mere breach of the statutory prohibition of misleading and deceptive conduct does not create any justiciable liability[31]. A remedy is not available in the absence of a demonstrated consequence of the breach. Similarly, it is one of the elements of the tort of negligence misrepresentation that there be damage. In the damages proceeding, the State alleges that it has suffered damage from defects and delays as a result of IBM attempting to replace the QH payroll system. It is alleged that the State suffered losses which include the cost of rectifying the defects and flaws in the system and those losses consequent upon the IBM payroll system overpaying QH staff. It is not concerned only with pre-contractual conduct.

[95] The action by the State can be expressed in the terms of the definition of "Claim" as being:

> "claim[s] … allegation[s] … complaint[s] … [arising] pursuant to statute [or] in tort … In respect of IBM's obligations and acts or omissions pursuant to the Lattice SOWs … to deliver the Deliverables on time in accordance with the Lattice SOWs … [and] to ensure that the Deliverables did not incorporate Defects …"

[96] In other words, the damages proceeding is caught by the terms of the Release.

[97] That construction would, in respect of an ordinary contract, be enough. But, with releases, there are two long-standing principles which apply to their interpretation.

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31 *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245.

[98] First, there is the principle that general words of release are confined to the matters mentioned in any recitals.[32] In this case, there are only two recitals and, of those, only one is relevant. It provides:

> "The State and IBM are in dispute over certain matters in relation to the Contract and have agreed to resolve their dispute, without any admission of liability by either party, on the terms of this agreement, pursuant to the dispute resolution process in the Contract."

[99] The words "in relation to" are words of wide application. The authorities dealing with that proposition are referred to above. It is argued by the State that the parties were not "in dispute" over the matters which form the subject of the ASOC. I will come to that point later after I deal with the second principle which applies to the construction of releases, that is, that general words of release are construed as limited to those matters that were in the contemplation of the parties at the time the release was given.[33]

**Extrinsic material**

[100] The State's primary argument is that, on the ordinary principles of construction, it must succeed. In addition, though, it is submitted that recourse may be had to extrinsic evidence to provide a further basis for the construction I have rejected.

[101] The State wants to be allowed to rely upon the extrinsic evidence in order to demonstrate that the dispute between the parties concerned the performance of the 2007 Contract and was not concerned with representations or conduct preceding the entry into the 2007 Contract.

[102] In the ordinary course, evidence of pre-contractual negotiations is not generally admissible to interpret a concluded written agreement. As Finn J said in *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* [34]:

> "[118] The orthodoxy in this country … is that the negotiations of the parties prior to their contracting and their statements of their subjective intentions are, as a general rule, excluded by the parol evidence rule and cannot be used in the interpretation of the contract."

[103] Prior negotiations may be admitted into evidence of the surrounding circumstances where such evidence is admissible because it assists in the interpretation of a contract. In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [35], Mason J said:

> "[P]rior negotiations will tend to establish objective that ground facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in,

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32 *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 123.
33 Ibid at 123-124.
34 (2009) 261 ALR 501.
35 (1982) 149 CLR 337 at 352.

> the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification."

[104] The difficulties which are inherent in having recourse to pre-contractual negotiations was described by Muir J in *Northbuild Constructions Pty Ltd v Capital Finance Aust Ltd* [36]:

> "[51] What was said and left unsaid in the course of negotiations are objective facts within the knowledge of the parties. But the purpose of negotiations such as those under consideration is to produce a written instrument containing the parties' concluded agreement. Where such an instrument is produced, its terms constitute the parties' bargain. The negotiations have achieved their objective and, unless rectification is sought, the history of the negotiations is normally irrelevant. It is certainly not permissible, as an aid to construction of the instrument, to single out of a fluid process particular demands or assertions by one party and other party's responses or failures to respond. A party to negotiations, as a legitimate negotiating tactic, may wish to avoid direct or even indirect confrontation. Instead of bluntly rejecting a proposal it may subtly, at a later time, introduce a counter proposal or suggest wording the adoption of which will produce a result contrary to the initial proposal.
>
> [52] Even acceptance of a requested change in the wording of a draft does not necessarily establish consensus between the parties as to the legal or practical consequences of the change, particularly where the change is made in a provision which the parties understand is not in its final form.
>
> [53] Many other such examples could be provided to illustrate the wisdom of the principle that evidence of negotiations is inadmissible 'so far as they consist of statements and actions of the parties which are reflective of their actual intentions'."

[105] There is a recognised category of circumstances in which pre-contractual negotiations may be admissible. This is a situation in which evidence of the actual intention of the parties will be allowed to prevail over their presumed intention:

> "If it transpires that the parties have refused to include in the contract a provision which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that exercise the court takes into account what reasonable men in that situation would have intended to convey by the words chosen. But is it right to carry that exercise to the point of placing on the words of the contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances."[37]

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[36] [2006] QSC 81.

[37] *Codelfa*, per Mason J at 352-3.

[106] This exercise should not be undertaken unless it can be clearly demonstrated that the parties are united in their rejection of a particular construction. In *Queensland Power Co Ltd v Downer EDI Mining Pty Ltd*[38] Chesterman JA said:

> "[74] The difficulty with the exception is to determine when in fact parties can be seen to have 'united in rejecting' a particular meaning or construction. The prohibition on admitting negotiations and drafts of documents into evidence should not lightly be circumvented. It is only if one has an unambiguous expression of agreement as to the meaning of a particular word or phrase, assented to by the parties in the course of the negotiations, that the exception is applicable."

[107] I turn now to the evidence referred to by the parties on this point. It is concerned, not surprisingly, with the issue of whether or not the negotiations between the parties leading to the formulation of the Release included, or referred to, the pre-contractual representations the subject of the damages proceedings.

[108] The first Notice to Remedy Breach was issued in May 2010. Various formal open letters were exchanged between the parties from that time until 16 July 2010 when IBM sent a "Notice of Dispute" to the State. It referred certain disputes for resolution under the framework of the 2007 Contract.

[109] On 29 June 2010, the State sent a Notice to Show Cause to IBM.. In the covering letter the following appears:

> "[IBM] was engaged to design, develop and implement a Lattice interim solution for Queensland Health ("Solution") under SoW8. [IBM] is the prime contractor under the Customer Contract and conducted a due diligence process as part of the competitive tender process for award of the Customer Contract. [IBM] recommended the solution, the architecture and the Project methodology for implementing the Solution.
>
> …
>
> The [State] **entered into the Customer Contract on the basis** that [IBM] would deliver a payroll system that offered at least reasonable levels of performance, useability and reliability, coupled with Services that would provide effective management and resolution of defects. That the Solution and Services do not meet these reasonable requirements indicates a fundamental failure of [IBM] to deliver a Solution in accordance with the Customer Contract." (emphasis added)

[110] On 28 July 2010 Mr Grierson, the Director-General of the Department of Public Works, sent a letter to IBM in which he said:

> "There are a number of matters in dispute between the parties, not limited to those set out in IBM's Notice of Dispute. On Friday, 23 July 2010, the State and IBM tentatively agreed on a "without prejudice" basis to attempt to resolve all differences by way of a negotiated outcome.

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[38] [2010] 1 Qd R 180.

In order to enable the negotiations to proceed without prejudice to either party it is proposed that:

1 **the negotiations will include all matters in dispute between the parties, including** but not limited to the **matters addressed in the** Notice to Show Cause and **Notice of Dispute**, will be on a "without prejudice" basis and will commence on Monday, 2 August 2010 and conclude on Friday, 20 August 2010, unless otherwise agreed in writing by the parties…" (emphasis added)

[111] As part of the process for the conduct of those negotiations Clayton Utz (then acting for the State) provided Blake Dawson (then acting for IBM) with a document entitled "Settlement Terms Sheet". It took the form of a table in which there were various numbered items. Item 3 was in these terms:

"**Damages**

IBM will pay compensation to the State in respect of the substantial losses and additional expenses incurred by the State.

The State has suffered considerable loss and damage through the appointment of IBM, particularly in relation to Queensland Health and the Lattice Replacement Project, **in reliance on IBM's representations regarding its products and its expertise, experience and capability to satisfy the requirements of the State**. IBM's obligations included the design and configuration of the systems, which have proven not to be fit for the purpose.

For the purpose of exploring a possible settlement through these negotiations, the State has made a preliminary, limited assessment of those losses attributable only to additional resourcing costs which it has had to incur, summary details of which are as follows:

- cost of additional technical staff required to support the Queensland Health rostering and payroll solution caused by the inadequacies in the underlying design of the system;

- cost of overtime and additional staff required to support the payroll cycle process and the Workbrain SAP interface caused by IBM's inadequate design of the solution.

The above does not reflect the full loss and damage suffered by the State. If negotiations are not successful then the State reserves the right to pursue IBM for the full scope of its contractual and legal rights." (emphasis added)

[112] This assertion by the State clearly concerns "IBM's representations regarding its products and its expertise, experience and capability". It also makes complaints about "additional resourcing costs". Both of those matters are integral parts of the damages proceeding.

[113] The allegations made by the State in the letter of 29 June 2010 and in the Settlement Terms Sheet were neither accepted nor rejected by IBM. But that does not prevent the assertions of the State forming part of the dispute between it and IBM and, on an objective

reading, they do show that the dispute between the parties encompassed these assertions about IBM's pre-contractual conduct.

[114] The State contends that this allegation which it made does not constitute, at least in part, the range of disputes which existed between the State and IBM. But, this is just an example of the problem recognised by Muir J in *Northbuild Constructions Pty Ltd v Capital Finance Aust Ltd* when he said:

> "It is certainly not permissible, as an aid to construction of the instrument, to single out of a fluid process particular demands or assertions by one party and other party's responses or failures to respond. A party to negotiations, as a legitimate negotiating tactic, may wish to avoid direct or even indirect confrontation. Instead of bluntly rejecting a proposal it may subtly, at a later time, introduce a counter proposal or suggest wording the adoption of which will produce a result contrary to the initial proposal."[39]

[115] It follows, then, that these assertions formed part of the range of disputes referred to in the recital in the Release and, so, the recital does not work to confine the effect of the Release. It is unnecessary to consider the other extrinsic evidence sought to be relied upon by the State.

[116] I turn to the second ground of admissibility advanced by the State. The basis upon which the State relies for the admissibility of the evidence of former Ministers and other persons who were engaged in the negotiations leading to the formation of the Release is the equitable principle applied by the High Court in *Grant v John Grant & Sons Pty Ltd* or the special general principles referred to above for construing releases.

[117] The essence of the equitable principle is that the releasing party was unaware, at the time it gave the release, that it had available to it the claim which it now seeks to make. The equity identified in *Grant* is one which prevents the "unconscientious reliance on the general words of a release". It is an essential part of any case which relies upon *Grant* that the person seeking to avoid the strictures of a release must show that it did not know of the liability which it now seeks to enforce. The State did know of that liability and asserted it in the documents of 29 June 2010, 28 July 2010 and the "Settlement Terms Sheet". It follows that that State cannot rely upon the equity referred to in *Grant.*

[118] The rest of the extrinsic evidence – from former Ministers and others engaged in the negotiations between the parties – is not admissible. If I am incorrect and it is admissible, then it does not assist the State because:

(a) it does not reveal an actual intention to do anything other than give the release actually contained within the supplemental agreement; and

(b) it does not support a contention that the Ministers did not intend to release claims for loss due to representations made before the contract or for misleading and deceptive conduct or negligence.

[119] Both Mr Lucas and Mr Schwarten deposed to their intention to release the matters that were are in dispute between the parties. Both of those gentlemen emphasised that the paramount concern they had was to ensure that QH staff was paid in accordance with

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[39] Op cit at [51].

their entitlements. In addition to that paramount concern, Mr Lucas said that he wanted to see the controversy about whether IBM or the State was at fault for the various problems which had arisen be resolved.[40] Likewise, Mr Schwarten accepted that part of the resolution involved the State no longer seeking to make claims against IBM for the extra costs of dealing with shortcomings in the system.

[120] Neither of them, either in their affidavits or in their oral evidence, said that they had, or that they were aware of, any intention to preserve claims for pre-contractual representations or misleading or deceptive conduct.

[121] The evidence from the persons engaged by the State to negotiate on its behalf demonstrates that the State was aware of the representations alleged in the damages proceeding to have been made and, also, aware at least of the potential to make a claim under the *Trade Practices Act.*

**Conclusion**

[122] The Supplemental Agreement, properly construed, releases IBM from the claims made by the State against IBM in proceeding BS 11683/13. IBM seeks a permanent injunction restraining the State from prosecuting that proceeding. I do not expect that the State would, following this decision, seek to prosecute that proceeding and, in the absence of any expressed intention to do so, an injunction is unnecessary.

[123] IBM also seeks a declaration that it is entitled to be indemnified by the State for all of its actual costs incurred as a result of the commencement of proceeding BS 11683/13. That order is sought on the basis of clause 5.1 (d) of the Supplemental Agreement. It provides:

> "If the State makes a claim against [IBM] which is the subject of the State Covenant or State Release, then the State fully indemnifies [IBM] against any liability (including the amount of any judgement, settlement sum and legal and other costs) incurred by [IBM] as a result of that claim."

[124] It appears appropriate to make such an order but I will hear the parties on that as well as on the subject of the costs of this application.

**Order**

[125] It is declared that, on the proper construction of the Supplemental Agreement between the applicant and respondent dated 22 September 2010, the applicant was released from the claims made by the respondent against the applicant in proceeding BS 11683/13.

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40 T 1-47, T 1-48.