SNOWY MOUNTAINS ORGANIC DAIRY PRODUCTS PTY LTD v WHOLEFOODS PTY LTD

BEACH J

29 September, 8 October 2008
[2008] VSC 405

Contract — Construction — Release — Purpose and object — General words — Limitation — Relevant considerations — Surrounding circumstances — Intention of releasor — Potential claim not specifically released — Three pending actions — Mediation — Two actions compromised — Releasee not complaining about prospect of being joined in third action — Releasee insisting on limiting amendment to release — Releasee later joined as defendant in third action — Release inapplicable to claim in third action.

Practice and procedure — Abuse of process — *Anshun* estoppel — Whether unreasonable not to initiate claim in earlier proceeding.

K wrote and sent a letter ("the offending letter") to the Director of Consumer Affairs Victoria ("the director") requesting an investigation of the truthfulness of the use of the word "organic" in the labelling of milk and cream produced by SMO Pty Ltd ("SMO"). Later, K was interviewed on ABC radio about the offending letter and about the labelling of organic products. Soon thereafter, an article was published in *The Weekly Times* newspaper in which mention was made of an investigation of SMO's products. SMO sued six defendants for damages for defamation arising from those two publications, including K in respect of the ABC broadcast ("the media action"). In another action, SMO sued a company controlled by K and another individual claiming damages under Pt V of the Trade Practices Act 1974 (Cth) in respect of the publication of the offending letter to the director ("the second action"). Later, it sued the director for damages arising out of the director's alleged involvement in the radio broadcast and the newspaper article ("the third action"). Following a mediation in respect of the three actions, the media action and the second action were compromised. K signed a release which, at his insistence, had been amended to provide that it did not apply to the third action. Thereafter, SMO sought and obtained leave to join K as a defendant in the third action seeking damages for alleged contraventions of the Fair Trading Act 1999 and the Trade Practices Act. In answer to the whole of the plaintiff's claim and his being joined in that action, K sought to rely on the release. Pursuant to rule 47.04, a master ordered the trial of the following preliminary question: "Is the plaintiff's claim against the third defendant: (a) in breach of a Deed of Release between the plaintiff and the third defendant, the Director of Consumer Affairs Victoria and five other parties executed by the plaintiff on 21 December 2006 as amended on or about 31 January 2007; (b) barred by cl 5 of that Deed of Release; or (c) an abuse of the process of this court?"

Held, answering each paragraph of the question in the negative: (1) The meaning of the deed of release was to be determined objectively. This required consideration not only of the text of the release, but also of the surrounding circumstances known to the parties, and to the purpose and object of the transaction entered into by them. [32].

> *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 120 LGERA 335; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 applied.

(2) A releasee could 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 release and the surrounding circumstances, including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor. [33].

Grant v John Grant and Sons Pty Ltd (1954) 91 CLR 112 applied.

Karafotias v Karafotias (2003) 84 SASR 578 referred to.

(3) The possibility of inconsistent findings of fact was not sufficient to stay the present proceeding, there was no prospect of conflicting judgments in the proceeding, and it was not unreasonable for SMO not to raise the causes of action in this case against K in the compromised media action. [52]–[54].

Henderson v Henderson (1843) 3 Hare 100; 67 ER 313; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Walton v Gardiner* (1993) 177 CLR 378; *Johnson v Gore Wood and Co (A firm)* [2002] 2 AC 1; *Stuart v Goldberg Linde (A firm)* [2008] 1 WLR 823 referred to.

(4) There had been no abuse of process because (a) the present proceeding did not arise out of the same transaction as the media action, (b) it was not one where K did not know of the proposed subsequent proceeding prior to the resolution of the media action, and (c) he had made no complaint about the prospect that he would be joined in this proceeding. [62]–[64].

Stuart v Goldberg Linde (A firm) [2008] 1 WLR 823 distinguished.

Masters v Cameron (1954) 91 CLR 353 referred to.

Preliminary question

This was the trial of a preliminary question in an action for damages for alleged contraventions of the Fair Trading Act 1999 and the Trade Practices Act 1974 (Cth). The facts are stated in the judgment.

There was no appearance for the first and second defendants.

M W Wise for the plaintiff.

D J O'Callaghan SC and *L G De Ferrari* for the third defendant.

Cur adv vult.

Beach J.

Introduction

1 On 23 November 2004, Mr Scott Kinnear wrote a letter addressed to the Consumer Complaints Section of Consumer Affairs Victoria ("the 23 November 2004 letter"). The letter was in the following terms:

> Dear Consumer Affairs,
>
> I write to request that you investigate the truthfulness of the labelling of organic milk and cream produced under the "Snowy Mountains Organic Dairy Co" brand.
>
> I am lodging this request as both a retailer and consumer of these products. We have three retail stores that have sold Snowy Mountain Organic Milk and Cream since it first came on the market and my family has bought and consumed these products up till the last couple of weeks.
>
> I have set out on the attached pages the sequence of events that has led me to write to you today.

> Yours sincerely,
> Scott Kinnear.

The 23 November 2004 letter was written on letterhead which contained the heading "WHOLEFOODS retailers of fine certified organic foods" down the side of the page. Under Mr Kinnear's signature, he is described as "Owner/Manager". As stated in the letter, seven pages of material were attached to it.

2 On 1 August 2005, on the ABC Radio National network's program "The Country Hour", an item was broadcast ("the ABC broadcast") concerning an alleged investigation by Consumer Affairs Victoria into the advertising of Snowy Mountains Organic Dairy Products, and specifically in relation to the use of the word "organic" on its products. During the course of the ABC broadcast, Mr Kinnear said:

> The particular company involved [previously identified by an ABC reporter as Snowy Mountains Organic Dairy Products] is selling organic dairy products which are uncertified organic. We represent certified organic products across Australia, we're one of seven certification organisations out there, and as such there is protection for consumers whereby if there's any concerns we can send our independent auditors and inspectors out to verify a product. Where there's no certification involved, as in this case, then it's appropriate that fair trading laws, which are there to protect consumers, verify the integrity of organic products. So there is some question over whether it's an appropriate claim to make for the dairy products concerned, is it appropriate in this case for the word organic to be used? That's what the inquiries are about.

Mr Kinnear was then asked what this meant for the organic industry, to which he replied:

> Well it certainly doesn't mean much for the certified organic industry, because we are there leading the way, and really have been saying for a long time, that the verification systems we have in place give a very good guarantee of assurance for our customers. I think that what this means for people who are using the word organic in an uncertified context, I think it means that they need to be aware that if they are making that label claim, that there are in fact very strong laws under Fair Trading that you have to comply with, in terms of misleading and deceptive conduct, that in fact you really need to be doing the right thing, and that's what's being looked into in this particular case.

Mr Kinnear was then asked if it was correct that there are no laws preventing the word "organic" being put on labels, even if there is no certification. He responded:

> That's correct, we have — it's always been an inconsistency that's bothered the certified organic industry. We have laws which make it illegal to export product, organic product and biodynamic product from Australia, unless it is certified organic, so we have very good guarantees of authenticity legislated by the Australian government for export control orders for off-shore customers. But in fact we've never had that similar protection in Australia for our domestic consumers, there's never been any law that has said, "to use the word organic or biodynamic in Australia, you need to be certified organic". It's something that we've always thought would be appropriate, but government does have a policy of working towards codes of practice and co-regulation with industry, and has resisted any attempt at this stage to legislate the word organic in Australia. So people can use the word organic, you don't need to be certified organic, and in this particular case Consumer Affairs Victoria, as I say, is looking at the appropriateness of whether this word organic should be used by this dairy company at this time.

3 On 24 August 2005, the Herald and Weekly Times published an article ("the HWT article") headed "Dairy fears over organics". The first four paragraphs of the HWT article were as follows:

> "IMPOSTOR" organic dairy products are threatening the credibility of the industry, concerned farmers say.
>
> The farmers are calling for legislation to be put in place to prevent companies from using the term unless they are certified as organic.
>
> The request follows an investigation by Consumer Affairs into Snowy Mountains Organic Dairy Products.
>
> Despite the company's title, its suppliers did not have to be certified.

4 On 3 November 2005, Snowy Mountains Organic Dairy Products issued defamation proceedings in this court[1] ("the media proceeding") against six defendants in relation to the ABC broadcast and the HWT article. Mr Kinnear was the fifth defendant in that proceeding and was sued for his involvement in the ABC broadcast.

5 On 29 March 2006, Snowy Mountains Organic Dairy Products issued this proceeding in the New South Wales District Registry of the Federal Court.[2] This proceeding was issued naming Wholefoods Pty Ltd and one Stephen Whitsed as respondents. As originally formulated, the proceeding related to the publication of the 23 November 2004 letter to Consumer Affairs Victoria and the ABC broadcast. However, by an amended statement of claim dated 5 May 2006, all references to the ABC broadcast were deleted and the proceeding confined to one in respect of the 23 November 2004 letter.

6 On 26 September 2006, Snowy Mountains Organic Dairy Products issued another proceeding in this court[3] ("the CAV proceeding"). The CAV proceeding was brought only against the Director of Consumer Affairs Victoria and made complaint about his involvement in the ABC broadcast and the HWT article. It was alleged in the CAV proceeding that the Director of Consumer Affairs had confirmed to the ABC that Consumer Affairs was investigating a complaint about Snowy Mountains Organic Dairy Products' advertising of its products as "organic". It was also alleged in the CAV proceeding that the Director of Consumer Affairs had confirmed to the Herald and Weekly Times that Consumer Affairs Victoria had commenced an investigation into a complaint that Snowy Mountains Organic Dairy Products was advertising its products as "organic".

7 On 19 October 2006, Rares J handed down reasons for decision[4] in which he held that this proceeding should be transferred to the Supreme Court of Victoria. Formal orders cross-vesting the proceeding were made on 27 October 2006.

8 On 17 November 2006, the media proceeding, the CAV proceeding and this proceeding were mediated. The media proceeding and the CAV proceeding settled and heads of agreement were signed by the parties. This proceeding did not settle. After some further communication between the parties, a deed of release was prepared. Snowy Mountains Organic Dairy Products executed the deed of release on 21 December 2006.

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1. Number 9104 of 2005.
2. The original Federal Court number was NSD 637/2006 and in some of the documents to which I will refer later, this proceeding is referred to as "Federal Court proceeding number NSD 637/2006".
3. Proceeding number 8930 of 2006.
4. *Snowy Mountains Organic Dairy Products Pty Ltd v Wholefoods Pty Ltd* [2006] FCA 1361.

9 On 2 February 2007, the solicitors for Snowy Mountains Organic Dairy Products signed an amending letter to the deed of release. The amendments were requested by the solicitors for Mr Kinnear. On 21 February 2007, Mr Kinnear executed his counterpart of the deed of release. I will say more about the circumstances surrounding this event below.

10 By summons issued 28 March 2007, Snowy Mountains Organic Dairy Products sought leave to join Mr Kinnear as a third defendant to this proceeding. On 11 April 2007, a master of this court ordered that Mr Kinnear be joined as a third defendant. I will say more about the circumstances surrounding the joinder of Mr Kinnear below.

11 Mr Kinnear is sued in this proceeding in respect of his involvement in the publishing of the 23 November 2004 letter to Consumer Affairs Victoria. It is alleged against him that his conduct in publishing the letter was conduct in trade or commerce that was, inter alia, misleading or deceptive or was likely to mislead or deceive and in contravention of ss 9 and 10 of the Fair Trading Act 1999 and ss 52 and 53(a) of the Trade Practices Act. It is also alleged against Mr Kinnear that he aided, abetted, counselled, procured, induced, was knowingly concerned in or a party to and/or conspired with others to effect contraventions by Wholefoods Pty Ltd of s 52 of the Trade Practices Act (alternatively s 9 of the Fair Trading Act).

12 In answer to the whole of the plaintiff's claim and his being joined in this proceeding, Mr Kinnear pleads[5] that the plaintiff's claim:

> (a) is in breach of the Deed of Release between the plaintiff and the third defendant, the Director of Consumer Affairs Victoria and five other parties executed by the plaintiff on 21 December 2006 as amended on or about 31 January 2007;
> (b) is barred by clause 5 of that Deed of Release; and
> (c) is an abuse of the process of this Court and should be struck out.

Particulars and further particulars are subjoined to this plea.

13 On 20 September 2007, a master of this court ordered pursuant to r 47.04 the trial of the following preliminary question in this proceeding:

> Is the Plaintiff's claim against the Third Defendant:
> (a) in breach of a Deed of Release between the Plaintiff and the Third Defendant, the Director of Consumer Affairs Victoria and five other parties executed by the Plaintiff on 21 December 2006 as amended on or about 31 January 2007;
> (b) barred by clause 5 of that Deed of Release; or
> (c) an abuse of the process of this Court.

14 This is the trial of the preliminary question referred to in [13] above. For the reasons given below, the answer to each paragraph of the question is no.

The material upon which this trial was conducted

15 This trial was conducted solely upon documents. No viva voce evidence was given. The trial was conducted upon material disclosed in affidavits sworn by the plaintiff's solicitor, Mr Vaughan Hager, Mr Kinnear's solicitors, Ms Nicole Wearne and Ms Renee Gorenstein, Mr Stephen Lester, the secretary and general

5. In para 7 of the third defendant's amended defence and counterclaim dated 2 June 2008.

manager of the plaintiff, and Mr Kinnear. The affidavits were as follows:

(a) Mr Hager: Originally only Mr Hager's affidavits of 31 July 2007, 28 April 2008 and 29 August 2008 were relied upon, but during the hearing a full copy of Mr Hager's affidavit of 28 March 2007 (a copy of which without exhibits had been Exhibit "NJW 32" to the affidavit of Ms Wearne sworn 10 December 2007) was relied upon. Further, during his reply submissions, senior counsel for Mr Kinnear relied upon an additional affidavit of Mr Hager sworn 16 April 2008.

(b) Mr Lester: An affidavit of Mr Lester sworn 22 November 2007.

(c) Ms Wearne: Affidavits of Ms Wearne sworn 18 September 2007 and 10 December 2007.

(d) Ms Gorenstein: An affidavit of Ms Gorenstein sworn 2 June 2008.

(e) Mr Kinnear: An affidavit of Mr Kinnear sworn 28 August 2008.

16 Not all of the exhibits to these affidavits were relevant. Prior to the hearing, I was provided with a folder of key documents, the earliest of which was dated 3 November 2005 and the latest of which was dated 30 March 2007.[6] During the trial, I was given additional exhibits ranging in date from 28 March to 27 April 2007.[7] Further, some of the exhibits in the key documents folder were themselves affidavits. For example, RSG 3 was an affidavit of Mr Kinnear sworn 19 July 2006 and NJW 32 (provided at trial) was the affidavit of Mr Hager sworn 28 March 2007 without its exhibits.

17 While the court file discloses a number of written submissions made by the parties from time to time and in reference to the matters raised in para 7 of Mr Kinnear's defence, ultimately (in so far as written submissions were concerned), the plaintiff only relied upon its written submissions of 26 November 2007 and its reply submissions to Mr Kinnear's outline of submissions dated 29 August 2008. Mr Kinnear relied upon his written submissions dated 29 August 2008. Helpfully, the parties were able to agree on a chronology.[8] I have already set out a number of matters that are referred to in the chronology and I do not propose to burden these reasons by setting out the rest of the chronology. I will make reference to other events as described in the chronology where necessary.[9]

18 In addition to the factual matters I have set out above, two further aspects need to be dealt with. They are:

(a) The circumstances in which the deed of release came to be executed; and

(b) The circumstances surrounding the joinder of Mr Kinnear to this proceeding.

The circumstances in which the deed of release came to be executed

19 On 17 November 2006, the parties to the media proceeding, the CAV proceeding and this proceeding met to mediate all three proceedings. After opening statements in a joint session (at which it would appear that the position

6. In chronological order, the documents were described as NJW 1, NJW 2, VWH 7, NJW 3, NJW 4, VWH 1, NJW 5, NJW 6, VWH 3, NJW 9, NJW 12, RSG 3, VWH 3, VWH 6, VWH 5, VWH 8, NJW 16, NJW 17, NJW 19, VWH 1, VWH 2, NJW 20, VWH 10, NJW 26, NJW 27, NJW 30, RSG 1 and RSG 2.
7. In chronological order, these exhibits were NJW 32, NJW 31, NJW 33 and VWH 16.
8. T8.5.
9. The chronology originally contained 43 items, but at trial a 44th item was added as 37A: see T8.8.

of the plaintiff in respect of this proceeding was not put), the parties in this proceeding separated to a different room to conduct the mediation of this matter separately from but concurrently with (and using the same mediator) the media proceeding and the CAV proceeding. The matter is more fully described at paras 35–40 of Ms Wearne's affidavit sworn 10 December 2007 and paras 7–12 of Mr Hager's affidavit sworn 16 April 2008. While Ms Wearne's evidence is hearsay, no objection was taken to it. However, to the extent that there are differences in description in these affidavits, I have preferred the firsthand evidence of Mr Hager. In any event, there does not appear to be any dispute that the media proceeding and the CAV proceeding settled, this proceeding did not settle and Mr Kinnear was not told at any stage during the mediation that the plaintiff intended to join him as a defendant to the present proceeding if it did not settle.

20 Heads of agreement were signed by the parties to the media proceeding and the CAV proceeding. A deed of release was subsequently produced. The deed of release contained a release for Mr Kinnear in cl 4.3 upon receipt by Snowy Mountain Organic Dairy Products of the sum of $25,000. I shall set out this clause and refer to it in greater detail below. The deed of release also contained bar to proceedings clauses in cll 5.1 and 5.2 — again which I will refer to below.

21 On 5 December 2006, Mr Kinnear instructed his solicitors to seek inclusion in cll 4.3 and 4.5 words to the effect that nothing in those clauses was intended to have any effect on this proceeding. On 13 December 2006, similar instructions were given in respect of cl 5.1. In the result, the last sentence in each of cll 4.3, 4.5, 5.1 and 5.2 were added at the request of Mr Kinnear. Amending letters to the deed of release were then signed by the parties at the request of Mr Kinnear's then solicitors.[10] In the letters requesting signatures,[11] Mr Kinnear's solicitors asked for signatures in the following terms:

> We ask that the legal representatives for each party countersign this letter in the space below and return to our office as confirmation of each party's consent to the above amendments. Our client will then execute the Deed of Release.

The circumstances surrounding the joinder of Mr Kinnear to this proceeding

22 In his affidavit of 28 August 2008, Mr Kinnear swears:

> 3. The first time I received any indication from the plaintiff that I would or might be joined as a party to this proceeding was on 15 February 2007, when I read a letter written by Norton Gledhill, the then solicitor for the plaintiff, dated 14 February 2007. That letter read relevantly: "Our client also intends to join Mr Kinnear personally to these proceedings and make allegations against him pursuant to the Fair Trading Act 1999 and the aiding and abetting provisions of the Trade Practices Act 1974".
>
> 4. At all times since 17 November 2007 [sic 2006] I believed that I would not be joined to this proceeding. Had I known that the plaintiff intended to join me as a defendant to this proceeding prior to or at the time of the mediation held on 17 November 2006 (which I attended) I would not have agreed to settle … [the media proceeding] … and I would not have agreed to sign the heads of agreement …

10. Not the solicitors who act for him in this proceeding.
11. Dated 31 January 2007.

There is no evidence that Mr Kinnear knew or believed that he might be joined to this proceeding prior to 15 February 2007. Indeed, counsel for the plaintiff did not contend that I should find that Mr Kinnear's knowledge or belief was acquired before 15 February.[12]

23 Six days after he received the indication that he would or might be joined as a defendant to this proceeding, Mr Kinnear executed his counterpart of the deed of Release. On 15 March 2007, Coadys, the solicitors for Wholefoods Pty Ltd (the first defendant in this proceeding) wrote to the plaintiff's solicitors advising that they would consent to the plaintiff filing its second further amended statement of claim (in which Mr Kinnear is named as the third defendant). Prior to this consent, there was an exchange of letters and emails between Norton Gledhill, Mr Kinnear and his then solicitors and Coadys concerning a *Home Office v Harman* issue.[13] While an email from Mr Kinnear's solicitors on 14 February 2007 suggests that he was being represented in this proceeding, the reference to "him" appears to me to be no more than a loose description of Wholefoods Pty Ltd and can be explained by reference to the fact that Mr Kinnear was, at the time, the sole director of Wholefoods. Further, in its letter of 28 February 2007, Coadys (who were acting for Wholefoods Pty Ltd) made it clear that they were not acting for Mr Kinnear in relation to the matter inquired of.

24 The plaintiff's application to join Mr Kinnear to this proceeding was made by summons issued 28 March 2007, and on 11 April 2007 Mr Kinnear was joined as the third defendant. No allegation of abuse of process or breach of the deed of release was made by Mr Kinnear until he filed and served his defence dated 15 June 2007.

The deed of release

25 The deed of release was entered into between all of the parties to the media proceeding and the CAV proceeding. Each of the parties are referred to by an abbreviated form of their respective names. Under the heading "BACKGROUND", the terms the "Publication", the "Confirmation", the "Proceedings" and the "Dispute" are defined as follows:

> A. On 1 August 2005 the **ABC** broadcast an edition of the *Victorian Country Hour* which featured a segment concerning **Snowy** and in which **Kinnear** was quoted (the "**Broadcast**"). On 24 August 2005, **HWT** published an edition of *The Weekly Times* which included an article concerning **Snowy** (the "**Publication**").
> B. **Snowy** alleges that **CAV** is responsible for confirming to the **ABC** that **CAV** was investigating **Snowy** (the "**Confirmation**").
> C. **Snowy** has issued the following proceedings in the Supreme Court of Victoria (the "**Proceedings**"):
> (a) No 9104 of 2005 (**Snowy v ABC, HWT, McNaught, Price, Kinnear** and **Sim**); and
> (b) No 8930 of 2006 (**Snowy v CAV**).
>
> …

12. See T68.17.
13. [1981] QB 534. See Exs VWH 13 and VWH 15–20 to the exhibit of Mr Hager sworn 28 March 2007.

E. The **ABC, HWT, Sim, Price, McNaught, Kinnear** and **CAV** are in dispute with **Snowy** regarding the effect of the **Broadcast, Publication** and **Confirmation** upon **Snowy** (the "**Dispute**").

26 Under the heading "Consideration", it is recorded, inter alia, that in exchange for the promises set out in the deed of release, Mr Kinnear agrees to pay Snowy Mountains Organic Dairy Products the sum of $25,000.[14] Clause 3.4 of the deed of release provides:

> Each of the several contributions of **ABC, HWT** and **Kinnear** is paid in full and final satisfaction of that party's liability to **Snowy** in connection with the Proceedings.

27 Under the heading "Release", there are release clauses 4.1–4.5. The relevant clauses in this case are cll 4.3 and 4.5. As amended by the amending letters, cl 4.3 provides:

> Upon receipt from **Kinnear** of $25,000 pursuant to Clause 3.1 hereof, **Snowy** and all of its related companies, directors, servants, agents and employees release and discharge **Kinnear** and all of his related companies, directors, servants, agents, employees heirs, executors, administrators, attorneys and assigns from all existing and future actions, causes of action, potential causes of action, suits, rights, claims, expenses, losses, proceedings and demands of whatsoever nature (including, without limitation, any claim for costs, interest or indemnity or any claim for criminal compensation) wherever and however arising, known or unknown, which arise out of or are incidental to the **Dispute**, the **Proceedings**, the **Broadcast**, the **Confirmation**, the **Publication** and any republication of the **Broadcast**, the **Confirmation**, and the **Publication**, (all of which are referred to in the **Proceedings**). Nothing in this clause is intended to or will have an effect in any way on the former Federal Court proceeding number NSD637/2006 that is now Supreme Court proceeding number 9714 of 2006.

As amended, clause 4.5 provides:

> Each of **ABC, HWT, CAV, Sim, Price, McNaught** and **Kinnear** and all of their related companies, directors, servants, agents and employees heirs, executors, administrators, attorneys and assigns, release and discharge each other and each other's related companies, directors, servants, agents and employees from all existing and future actions, causes of action, potential causes of action, suits, rights, claims, expenses, losses, proceedings and demands of whatsoever nature (including, without limitation, any claim for costs, interest or indemnity or any claim for criminal compensation) wherever and however arising, known or unknown, which arise out of or are incidental to the **Dispute**, the **Proceedings**, the **Broadcast**, the **Confirmation**, the **Publication** and any republication of the **Broadcast**, the **Confirmation** and the **Publication**, (all of which are referred to in the **Proceedings**). Nothing in this clause is intended to or will have an effect in any way on the former Federal Court proceeding number NSD637/2006 that is now Supreme Court proceeding number 9714 of 2006.

28 Under the heading "Bar To Proceedings", there is a bar to proceedings clause (cl 5.1) and a clarification of cl 5.1 (cl 5.2). In its final form, cl 5.1 reads:

> The parties agree and acknowledge that this Deed may be pleaded as a bar to any claim or proceedings in any Court or Tribunal if the claim or proceedings is, or is related to, a cause or causes of action released or discharged or intended to be released or discharged under the terms of this Deed. Nothing in this clause is intended to or will have an effect in any way on the former Federal Court proceeding number NSD637/2006 that is now Supreme Court proceeding number 9714 of 2006.

14. This sum was in fact paid on 13 March 2007.

In its final form, clause 5.2 provides:

> For the purpose of clarification of paragraph 5.1, **Snowy** and **Kinnear** agree that each of **ABC, HWT, CAV, Sim, Price**, and **McNaught** and all of their related companies, directors, servants, agents and employees heirs, executors, administrators, attorneys and assigns will not be joined as a party in Federal Court Proceedings numbered NSD637/2006.

29 The last sentence of each of cll 4.3, 4.5, 5.1 and 5.2 were added at the request of Mr Kinnear. The proceeding referred to in each of these sentences is this proceeding.

The proper construction of the deed of release

30 In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,[15] the High Court[16] said:[17]

> This Court, in *Pacific Carriers Ltd v BNP Paribas* [(2004) 218 CLR 451], 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.

31 At least at first glance it might be thought surprising that the solicitors for Mr Kinnear required the deed of release to be amended so that the release given to him was specifically limited so as not to apply in respect of this proceeding. An attempt was made to explain the position in para 49 of Ms Wearne's affidavit sworn 10 December 2007. Ms Wearne recounts what she was told by a partner in the firm of Mr Kinnear's former solicitors. The paragraph concludes with a statement that the amendments were not intended to permit any new claims being made by the plaintiff against Mr Kinnear in this proceeding. In *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*,[18] Mason J said:[19]

> … When the issue of which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except insofar as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.

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15. (2004) 219 CLR 165.
16. Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.
17. At 179, [40].
18. (1982) 149 CLR 337.
19. At 353. See also *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 120 LGERA 335 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [38].

32 Paragraph 49 of Ms Wearne's affidavit of 10 December 2007 is inadmissible. What is important is not Mr Kinnear's subjective intention or even what he might have conveyed or attempted to convey to the plaintiff about his understanding of what he was doing. The meaning of the deed of release is to be determined objectively. That is, by what a reasonable person in the position of the parties would have understood it to mean. This requires consideration not only of the text of the deed of release but also the surrounding circumstances known to the parties and to the purpose and object of the transaction entered into by them.

33 Both parties relied upon the High Court decision of *Grant v John Grant & Sons Pty Ltd*.[20] That case is authority for the proposition 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, character and extent of the liability in question and the actual intention of the releasor.[21] The plaintiff contends that while the words "which arise out of or are incidental to" are used in cl 4.3, cl 4.3 is very specific in relation to what it releases — the expressions "Publication", "Confirmation", "Proceedings" and "Dispute" having been defined specifically and in a way which does not include this proceeding. The plaintiff contends that the matters which were specifically in the contemplation of the parties appear from the face of cl 4.3 when one looks at those defined terms and their definitions. It contends further that not only does cl 4.3, without the final sentence, show that this proceeding was not in the contemplation of the parties at the time the release was given, the addition of the final sentence makes the construction for which it argues even more certain. To bolster its argument, the plaintiff also submits that, because the last sentence of cl 4.3 was included at the insistence of Mr Kinnear, it should be construed contra proferentem.

34 Mr Kinnear contends that the words "which arise out of or are incidental to" are words of wide import. In this regard he relies upon the Full Federal Court decision of *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd*.[22] That case concerned, inter alia, the meaning to be given to the expression "arising out of this contract" in an arbitration clause. In that context, Allsop J[23] referred to the width of the phrase "arising out of" and its synonymity with the expression "in connection with" — words that have themselves been held to be of wide import.[24] Mr Kinnear also contends that *Grant v John Grant* (above) operates to confine the true purpose of the last sentence of cl 4.3 so that it does not exclude from the release a matter which was not specifically contemplated, namely, the joinder of Mr Kinnear to this proceeding. Additionally, he contends that if the last sentence of cl 4.3 carves out this proceeding then it only carves out this proceeding as it was then constituted and it does not carve out the proceeding however constituted (and specifically as constituted after his joinder as the third defendant).

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20. (1954) 91 CLR 112.
21. See also *Karafotias v Karafotias* (2003) 84 SASR 578 at 583, [24].
22. (2006) 157 FCR 45, and specifically at 87–93, [162]–[186].
23. At 90, [175].
24. See *Burswood Management Ltd v Attorney-General (Cth)* (1990) 23 FCR 144. See also *Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 1)* (1987) 16 FCR 465 at 479.

35 If one examines cl 4.3 without the last sentence, one sees a release clause where no specific reference is made to the claims now made against Mr Kinnear in this proceeding. One would have to the give the words "arise out of or are incidental to" the widest meaning to link them to the dispute, the proceedings, the broadcast, the confirmation, the publication and any republication of the broadcast, the confirmation and the publication as those expressions are defined in the deed of release. Consistently with *Grant v John Grant* and the cases which have followed it, such an interpretation is not justified. If one then looks at the last sentence on its own, its clear words provide that cl 4.3 is not to have any effect on this proceeding. The sentence does not provide that cl 4.3 is not to have any effect on the proceeding only as this proceeding was then constituted.

36 Further, cl 5.2 throws some light on the problem. While cl 5.2 was inserted at the request of the ABC,[25] it shows that the parties contemplated the possible joinder of additional parties to this proceeding and provided that a number of parties (not including Mr Kinnear) would not be joined. Counsel for Mr Kinnear attempted to dismiss the effect of cl 5.2 by stating that it was a clause inserted at the request of the ABC and that it had nothing to do with his client. The fact that the ABC's liability was separate from Mr Kinnear's liability under the terms of the deed of release[26] does not add anything to the force of Mr Kinnear's argument. Clause 5.2 is there to be interpreted as a clause in a deed of agreement between the plaintiff and Mr Kinnear. The provenance of cl 5.2 is not material to its proper construction. In any event, the fact that cl 5.2 also provides that the *Herald and Weekly Times*, the author of the HWT article and the Director of Consumer Affairs Victoria are not to be joined to this proceeding tells against Mr Kinnear's argument. The clause has obvious operation in respect of those parties who are not related to the ABC and there is no reason why Mr Kinnear could not have had the benefit of that clause if that was what the parties intended.

37 Counsel for Mr Kinnear submitted further that the reference to an agreement between the plaintiff and his client in the first line of that clause was a nonsense because his client was not a party to this proceeding and had no capacity to agree about the joinder or non-joinder of parties to it. The answer to this submission is that the deed of release, on its face, shows that the parties contemplated that joinder of additional parties to this proceeding was a live issue and chose to exclude from that possibility a number of parties, but not Mr Kinnear. The reference to Mr Kinnear in the first line of cl 5.2 does not detract from the force of this proposition. With the same effect, cl 5.2 could have provided that the parties made the agreement or that the plaintiff or itself undertook not to join specific parties. The fact that Mr Kinnear had no capacity at that time to (in his own right) join a party to this proceeding is irrelevant.

38 So far as reliance upon *Grant v John Grant* by Mr Kinnear is concerned, that case is of little assistance to him. While notwithstanding cl 5.2 it can be said that the joinder of Mr Kinnear and the claims now made against him in this proceeding were not specifically contemplated by cl 4.3, the last sentence of cl 4.3 does not give any release to Mr Kinnear. At its highest for Mr Kinnear, the last sentence of cl 4.3 does not have any adverse impact upon him in relation to this proceeding. There is no basis for any argument that the sentence actually

25. See para 51 of the affidavit of Ms Wearne sworn 10 December 2007.
26. See cll 3.1, 3.3 and 3.4.

assists his position in relation to this proceeding. The reasoning in *Grant v John Grant* is not apposite in the construction of the last sentence of cl 4.3. *Grant v John Grant* cannot be used to read down cl 4.3 so as to take out of its operation anything not specifically mentioned. Further, to do so would almost certainly deprive the last sentence of cl 4.3 of any real operation.

39 Consistently with what I have said above, if I was to give the last sentence of cl 4.3 no meaning, then the clause would not operate (and the deed of release would not operate) so as to prevent Mr Kinnear's joinder to this proceeding and the maintenance of the claims that are currently made against him. That is the conclusion I have reached. However, the last sentence of cl 4.3 should, of course, be held to have operative effect if reasonably possible. It may be that the only operative effect was to ensure that the first defendant (being a related company of Mr Kinnear) was not prevented from successfully defending this proceeding and recovering its costs. While this was suggested during the course of argument, an objective analysis of the circumstances surrounding the entry into the deed and the terms of the deed tends to suggest that the sentence was inserted either because of a (at best) doubtful view of the effect of cl 4.3[27] or for reasons which are unable to be objectively ascertained.

40 While there is scope for a contra proferentem interpretation of the last sentence of cl 4.3, in view of what I have said above, I would not rest my decision on such a narrow basis. It is true that ordinarily one looks at terms in contracts that were inserted at the request of one party and concludes that the term was inserted for the benefit of that party and, in appropriate cases, one might reason that a contra proferentem approach was appropriate. However, this is not such a case. Why Mr Kinnear would want the insertion of the last sentence in cl 4.3 is not readily apparent. Construing cl 4.3 as a whole, in its context both within the deed of release (and specifically with reference to cl 5.2 thereof) and the circumstances in which the deed of release came to be executed, I conclude that the plaintiff's claim against Mr Kinnear in this proceeding was not released by cl 4.3.

41 Before turning to cl 5.1 of the deed of release, I should deal with one further argument concerning cl 4.3. In order to bring the claims that are made against him in the present proceeding within cl 4.3, Mr Kinnear relies upon the position taken by the plaintiff in the media proceeding for the purposes of a strike-out application before Bongiorno J.[28] Mr Kinnear contends that the plaintiff took a different position before Bongiorno J from the position he now takes. It is said that before Bongiorno J the plaintiff submitted that the various publications complained of arose out of the one transaction which could be attributed to Mr Kinnear. So much may be accepted for present purposes. Indeed, the identification of this matter is merely one example where the parties have each attempted to characterise the transactions and proceedings as either separate or constituting the one matter, depending upon the point being argued at the time. While it is interesting to note the different positions taken by the parties at

27. While it might be said that without the last sentence of cl 4.3 the plaintiff might have felt at liberty to discontinue this proceeding against Mr Kinnear's related company, Wholefoods, without any obligation to pay Wholefoods' costs — so that cl 4.3 would operate to give a de facto release by Wholefoods in respect of an entitlement it might have to costs, as I have said above, such a construction is at best doubtful.

28. An application which was heard on 16 March 2006.

different times, these identified differences cannot be determinative of the proper construction and operation of the deed, and in particular cl 4.3 thereof.

42 Clause 5.1 of the deed of release permits a party to plead as a bar to any claim in any court if the claim or proceeding "is, or is related to, a cause or causes of action released … or intended to be released … under the terms of [the deed]". While it might be said that the claim made against Mr Kinnear in this proceeding is related to the causes of action released by cl 4.3 in the sense that both have at their very base the published views of Mr Kinnear concerning the appropriateness of the plaintiff labelling its product as organic,[29] properly construed (and for the reasons given above), cl 5.1 does not enable Mr Kinnear to plead the deed of release as a bar to the present proceeding. Clause 5.1 is only intended to permit a party to plead the deed of release as a bar to proceedings seeking to litigate or relitigate causes of action released upon a proper construction of cl 4.3. Again, the last sentence of cl 5.1 and the existence of cl 5.2 (for the reasons given in respect of cl 4.3) do not assist Mr Kinnear. Further, the fact that Rares J held in the cross-vesting application[30] that there was a single controversy arising out of the assertions made by Mr Kinnear in the 23 November 2004 letter[31] is not to the point. That conclusion was made in the context of a cross-vesting application and was undoubtedly correct for the purposes of that application. However, it cannot have an effect on the proper construction of the terms of the deed of release, which was entered into after Rares J gave judgment.

43 It follows from what I have said above that the plaintiff's claim against Mr Kinnear is neither in breach of the deed of release nor barred by cl 5. Accordingly, paras (a) and (b) of the preliminary question must be answered no.

Paragraph (c) of the preliminary question

44 Paragraph (c) of the preliminary question asks whether "the plaintiff's claim against the third defendant … [is] an abuse of the process of this court". In putting his client's case, senior counsel for Mr Kinnear stated:[32]

> Our client's claim is that this proceeding against Mr Kinnear should be stayed as an abuse of process under *Anshun*[33] like principles because the proceeding could and should have been either brought or forewarned prior to the disposition by a settlement of the other two proceedings [the media proceeding and the CAV proceeding].

It is apparent from this statement that Mr Kinnear seeks to have a favourable answer to the question posed by para (c) of the preliminary question by combining "*Anshun* principles" with the principles referred to in two English decisions (*Johnson v Gore Wood and Co (A firm)*[34] and *Stuart v Goldberg Linde (A firm)*)[35] so as to produce the result that the present proceeding is an abuse of process.

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29. Or perhaps the communicating of those views to Consumer Affairs Victoria.
30. [2006] FCA 1361.
31. See [37] of Rares J's judgment.
32. T8.17.
33. *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.
34. [2002] 2 AC 1.
35. [2008] 1 WLR 823.

45 Counsel for the plaintiff contends that Mr Kinnear's approach conflates "the abuse of process point with the *Anshun* estoppel point". In his submission, *Johnson v Gore Wood* and *Stuart v Goldberg Linde* are not in the same line of authority as *Anshun*, but rather they fall within the form of abuse of process referred to by the High Court in *Walton v Gardiner*.[36] Further, he submits that the extent that *Johnson v Gore Wood* and *Stuart v Goldberg Linde* make reference to consideration such as, for example, the Civil Procedure Rules in England, they ought not lead me to a consideration that takes me to a formulation other than the High Court's formulation in *Walton v Gardiner*.[37] In *Walton v Gardiner*, Mason CJ, Deane and Dawson JJ said:[38]

> The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail. Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them. Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings. The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [[1982] AC 529] as "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people".
>
> In *Jago v District Court of New South Wales* [(1989) 168 CLR 23], at least three of the five members of the Court clearly rejected "the narrower view" that a court's power to protect itself from an abuse of process in criminal proceedings "is limited to traditional notions of abuse of process". Mason CJ considered that a court, "whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves", possesses the necessary power to prevent its processes being employed in a manner which gives rise to unfairness. His Honour quoted, with approval, the following remarks of Richardson J of the New Zealand Court of Appeal in *Moevao v Department of Labour* [[1980] 1 NZLR 464]:
>
> > "public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice".

36. (1993) 177 CLR 378.
37. See T51.4–51.12.
38. At 392–5.

Deane J expressed a similar view in his judgment in *Jago*:

> "The power of a court to stay proceedings in a case of unreasonable delay is not confined to the case where the effect of the delay is that any subsequent trial must necessarily be an unfair one. Circumstances can arise in which such delay produces a situation in which any continuation of the proceedings would, of itself, be so unfairly and unjustifiably oppressive that it would constitute an abuse of the court's process. Multiple prosecutions arising out of the one set of events but separated by many years or a renewed charge brought years after the dismissal of earlier proceedings for want of prosecution could, in a case where the relevant material had been available to the prosecution from the outset and depending on the particular facts, provide examples. Where such circumstances exist, the power of a court to prevent abuse of its process extends to the making of an order that proceedings be permanently stayed."

In her judgment in *Jago*, Gaudron J stressed that the power of a court "to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands". Her Honour added the comment "that, at least in civil proceedings, the power to grant a permanent stay should be seen as a power which is exercisable if the administration of justice so demands, and not one the exercise of which depends on any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand". Subsequently in her judgment, her Honour made clear that, subject to some refinements which she identified, that comment was also appropriate to be adopted in relation to criminal proceedings.

It should be mentioned that there was considerable discussion in the course of argument about the effect of some comments in the judgment of the majority of the Court in *Williams v Spautz* [(1992) 174 CLR 509]. When those comments are properly understood in context, however, there is nothing in them which supports the proposition that a permanent stay of proceedings can only be ordered on the ground of either improper purpose or no possibility of a fair hearing. Indeed, careful examination of them discloses that they lend some support to a denial of that proposition.

46 While it might be correct to say that abuse of process is not the same as *Anshun* estoppel,[39] the issues are not as discrete as counsel for the plaintiff would have me accept. In *Anshun*, Gibbs CJ, Mason and Aickin JJ applied *Henderson v Henderson*[40] as it had developed to hold that where a defendant in a subsequent proceeding attempted to raise a defence, there would be no estoppel unless that defence was "so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it".[41] Their Honours went on to say:[42]

> Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding.

47 *Stuart v Goldberg Linde* is in the same line of authority as *Johnson v Gore Wood*. *Johnson v Gore Wood*, like *Anshun*, was based on *Henderson v Henderson*.[43] As Handley JA put it,[44] "In the language of the stud book, one

39. See counsel for the plaintiff's submissions at T50.21.
40. (1843) 3 Hare 100; 67 ER 313.
41. At 602.
42. Ibid.
43. See the judgment of Lord Bingham of Cornhill in *Johnson v Gore Wood* at 23B and 31A and the judgments of Lord Goff of Chieveley at 38G, Lord Cooke of Thorndon at 42D and Lord

might say that *Anshun* was by abuse of process out of *Henderson v Henderson*". Notwithstanding the above, I propose to look first at *Anshun* estoppel and then abuse of process before turning to whether some combined operation of the principles (including those set out in *Johnson v Gore Wood* and *Stuart v Goldberg Linde*) leads to a conclusion that there has been an abuse of process justifying a stay of the present proceeding against Mr Kinnear.

Anshun estoppel

48 I have already set out the *Anshun* doctrine above. The issue for determination here is whether the claim now brought against Mr Kinnear in respect of the 23 November 2004 letter should have been brought against him in the media proceeding. Put another way, was it unreasonable for the plaintiff not to have raised the claim it now makes against Mr Kinnear in the media proceeding?

49 The facts in *Anshun* bear stating because they are a long way from the facts in the present case. In *Anshun*, a worker sued the owner of a crane and the hirer of the crane for damages for personal injury arising out of the hirer's use of the crane. The defendants claimed contribution from each other pursuant to s 24(1) of the Wrongs Act. Damages were awarded against both defendants, with contribution being assessed 90:10 against the owner. The owner then brought a separate proceeding against the hirer, claiming an indemnity in respect of all amounts it had paid to the worker as damages and costs on the basis of an agreement pursuant to which the hirer had agreed to indemnify the owner against any claims that might be made against it arising out of the use of the crane. The High Court held that the owner was estopped from raising the indemnity agreement because it was unreasonable for the owner to refrain from raising it in the first proceeding because the indemnity agreement was a defence to the hirer's claim for damages under s 24(1) of the Wrongs Act. That case is very different from the present case because, unlike *Anshun*, in the present case the plaintiff now seeks to pursue a different cause of action from that pursued in the media proceeding. The cause of action pursued against Mr Kinnear in the media proceeding was a cause of action in defamation which accrued on 1 August 2005. The present claim is a claim under the Trade Practices Act and Fair Trading Act in respect of a cause of action that accrued on or shortly after 23 November 2004.

50 *Anshun* and its application was discussed by the Court of Appeal in *Gibbs v Kinna*.[45] In that case, an employee obtained an award of compensation for wrongful termination from a judicial registrar of the Industrial Relations Court. The employee later sued his former employer in the Magistrates' Court for damages for breach of contract and for contravention of s 52 of the Trade Practices Act. The magistrate dismissed the proceeding, upholding the employer's objection that the proceeding could not be maintained because the claims made in it could and should have been joined with the statutory claim in the Industrial Relations Court. A judge of this court allowed the employee's appeal against the magistrate's order and the employer appealed. The Court of Appeal dismissed the appeal. Ormiston JA stated:[46]

Hutton at 50H. See also the references to *Henderson v Henderson* in *Stuart v Goldberg Linde* in the judgment of Lloyd LJ at [21] and [22] and Sir Anthony Clarke MR at [79].

44. In "Anshun Today", (1997) 71 *ALJ* 934.
45. [1999] 2 VR 19.
46. At 20, [1]–[2].

… The issue which the parties said arose before the magistrate and the primary judge was whether the subject matter of the later proceeding in the Magistrates' Court was "so relevant to the subject matter" of the action heard by a judicial registrar of the former Industrial Relations Court that "it would have been unreasonable not to rely on it": at 602. The double negative is here significant because the question is not whether it would have been reasonable to take the course of relying on a particular defence or cause action in the first proceeding, for more often than not it was then possible to rely upon the proposed defence or cause of action. The issue is whether it was *unreasonable* to defer reliance upon the defence or cause of action, so, if it cannot be shown to have been unreasonable not to have relied earlier on the defence or cause of action, then the principle stated by the majority in *Anshun's* Case will *not* shut out a party's later reliance on the defence or cause of action, unless some other principle of estoppel or the law can be called in aid. Only if deferring reliance can be shown to be unreasonable, will the party be shut out. Frequently there is no clear answer as to what was possible and reasonable in the earlier proceedings; sometimes it will have been technically possible for the party to have relied on a particular defence or set up a particular claim, but nevertheless it may *not* have been demonstrated that it was unreasonable in all the circumstances not to have relied on that defence or not to have set up the claim. The answer depends not so much on legalities as practicalities.

In the present case the appellants' argument tended to suggest that because, in one way or another, each of the claims now relied upon could have been joined in the first proceeding, then it was unfair to those defendants not to have done so. Likewise the magistrate concluded that with reasonable diligence it would have been reasonable for the respondent to pursue his additional remedies in the Industrial Relations Court. But the law is not concerned so much with hypothetical circumstances as with actual facts. Thus the question is not whether it would have been reasonable to have taken a different course but whether it was *unreasonable* to pursue the course that the respondent in fact took, by not then relying on the causes of action now the subject of proceedings in the Magistrates' Court. For the reasons expressed by Kenny JA I do not think that such a course was unreasonable, so that the magistrate erred in holding that *Anshun's* Case precluded the litigation of those claims now.

51 Phillips JA agreed with Kenny JA. Kenny JA said:[47]

In considering whether it was unreasonable in the circumstances not to raise a cause of action in earlier litigation, I do not think the notion of relevance is especially helpful. In *Anshun's* Case, the majority said, at 602–3, that the relevance of the matter relied on as a defence in a second action to the subject matter of the first action was indicative of unreasonableness in failing to plead the defence in the first action. I am inclined to the view expressed by Samuels JA in *Boles v Esanda Finance Corporation Ltd* (1989) 18 NSWLR 666 at 674, namely, that although the notion of relevance may be helpful when considering a defence which might have been raised in an earlier proceeding, the same notion is not particularly helpful when considering the failure to advance a claim. As his Honour said "[a]ll that means is really that the passage in *Port of Melbourne Authority v Anshun* (at 602) must be confined to defences".

There is at least one factor, however, which is indicative of "unreasonableness" in not asserting a cause of action in an earlier proceeding: if any judgment or order which might be made on the cause of action in the subsequent proceeding would conflict with a judgment or order in the earlier proceeding, then it will ordinarily be unreasonable to refrain from raising the cause of action in the first proceeding. In this context, the majority in *Anshun*'s Case said, at 603–4:

47. At 27–8, [24]–[28].

> "It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment …
>
> …
>
> By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction."

This factor was the most important in *Anshun's* Case. It also explains the outcome of a number of other cases: see, for example, *Boles v Esanda Finance Corporation Ltd* (1989) 18 NSWLR 666, at 673 per Samuels JA with whom the other members of the Court agreed; *Rahme v Commonwealth Bank of Australia* (unreported, Court of Appeal, Supreme Court of New South Wales, 20 December 1991) and, at first instance, (1991) ATPR ¶41-089 per Bryson J; *Bryant v Commonwealth Bank of Australia* (1995) 57 FCR 287 at 294 298 and *Westpoint Corporation Pty Ltd v Coles Supermarkets Australia Pty Ltd* (1996) 71 FCR 584 at 592 and 595. It suffices to say that in this case the respondent was not seeking to pursue any claim in the Magistrates' Court which might give rise to a judgment or order "conflicting" with the order made by the Judicial Registrar in the Industrial Relations Court. Counsel for the appellants did not contend otherwise.

Counsel for the appellants submitted, instead, that there was likely to be a related difficulty, namely, there was a risk that the findings of fact which might be made by the Magistrates' Court in the proceeding before it would be inconsistent with the findings already made by the Judicial Registrar. If this were a possibility, there may well be occasion to apply the doctrine of issue estoppel, as described by Dixon J in *Blair v Curran* (1939) 62 CLR 464 at 531–2. This is, however, a matter for the presiding Magistrate to decide. It does not prevent the proceeding from being pursued in the Magistrates' Court.

Whilst the likelihood of inconsistent judgments would, generally speaking, satisfy the criterion of unreasonableness, I assume for the purposes of this case that the criterion may be satisfied even when no such likelihood arises. If this be correct, then, in cases where there is no risk of inconsistent judgments, to decide whether or not it was unreasonable for a plaintiff not to litigate closely related issues in the one proceeding requires consideration of all the relevant facts, including the character of the previous proceeding, the scope of any pleadings, the length and complexity of any trial, any real or reasonably perceived difficulties in raising the relevant claim earlier, and any other explanation for the failure to raise the claim previously. As the majority said in *Anshun's* Case, at 603:

> "… there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few."

See also *Boles v Esanda Finance Corporation Ltd* (1989) 18 NSWLR 666 at 673; and *Ling v Commonwealth* (1996) 68 FCR 180.

Gibbs v Kinna is a case that has been followed and applied on a number of occasions, most recently by Marshall J in *Primus Telecommunications Pty Ltd v Kooee Communications Pty Ltd*[48] and the Full Federal Court in *Egglishaw v Australian Crime Commission*.[49]

48. [2008] FCA 1027.
49. (2007) 164 CLR 224.

52 The possibility of inconsistent findings of fact is not sufficient to stay the present proceeding. As Kenny JA noted, such circumstances may well occasion the application of the doctrine of issue estoppel. The settlement of the media proceeding precludes even this prospect in this case. Whether one takes the wider approach referred to by the majority in *Anshun* or a narrower approach, there is no prospect of "conflicting" judgments in this case. The media proceeding was a defamation proceeding concerning a broadcast on 1 August 2005. In essence, Mr Kinnear's defence to that proceeding put in issue that the words he was responsible for identified the plaintiff or were defamatory of the plaintiff, but that in any event they were true; alternatively, were fair comment on a matter of public interest; alternatively, were published on an occasion of qualified privilege. On the other hand, this proceeding relates to the publication of the 23 November 2004 letter and an assertion that, in publishing the letter, representations were made in trade or commerce that contravened provisions of the Trade Practices Act and the Fair Trading Act. While on one view it might be said that there is an overlap between Mr Kinnear's denial that what he wrote was misleading or deceptive or likely to mislead or deceive and Mr Kinnear's defence of truth, it is to be remembered that the truth defence applies to different words from those which are asserted to be misleading or deceptive. Further, the fact that Mr Kinnear has the capacity to raise a defence in respect of which there might be potentially overlapping facts does not mean that the plaintiff is precluded by *Anshun* from now litigating the present proceeding against Mr Kinnear. In any event, Mr Kinnear must show (adopting the wider approach) that it was unreasonable not to have included the matters that are now alleged against him in the media proceeding. Traditionally, courts have been slow to permit the joinder of different causes of action to defamation proceedings.

53 In the application before Bongiorno J heard on 16 March 2006, Mr Kinnear's then counsel[50] resisted the continued joinder in the media proceeding of the cause of action in relation to the ABC broadcast and the cause of action in relation to the HWT article. Objectively, that resistance was not surprising. The plaintiff could well have taken the view that any attempt to join into the media proceeding an additional cause of action that was distant in time involving different issues would similarly have been resisted. In the circumstances, I am not persuaded that it was unreasonable for the plaintiff not to raise the causes of action pleaded in the current proceeding in the media proceeding.

54 It follows from what I have said above that, whether one takes the wider approach referred to in *Anshun* or the more limited approach, *Anshun* does not prevent the plaintiff from maintaining this proceeding against Mr Kinnear.

Abuse of process

55 Counsel for the plaintiff, in his submission that I should look at abuse of process discretely and by reference to *Walton v Gardiner*, urged me to reject Mr Kinnear's arguments about abuse of process unless I was satisfied that the joinder of Mr Kinnear to this proceeding and the pursuit of the claims made against him was "vexatiously oppressive" — which I take to be a reference to the class of cases referred to in the majority judgment (extracted above) where the

50. Not counsel appearing in this trial.

continuance of the case would be "unjustifiably vexatious and oppressive".[51] It is of course to be remembered that the power of a court to control its own process and proceedings is such that the exercise of the court's power to protect itself from an abuse of process "is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands".[52]

56 In this case, Mr Kinnear contends that in failing to bring the present proceeding against him before settlement and/or in failing to notify him of an intention to bring the present proceeding against him before settlement, the plaintiff was involved in an abuse of process. Apart from the statements of principle contained within it, *Walton v Gardiner* does not deal with whether or not circumstances like the present case might amount to an abuse of process. Counsel for the plaintiff conceded (correctly) that *Walton v Gardiner* does not foreclose an abuse of process case of the kind advanced here by Mr Kinnear.[53] It is now necessary to look at the decisions of *Johnson v Gore Wood*[54] and *Stuart v Goldberg Linde*[55] which are relied upon by Mr Kinnear.

57 The relevant facts in *Johnson v Gore Wood* may be briefly stated as follows. The plaintiff, a business man, conducted his affairs through a number of companies, including WWH. WWH commenced proceedings against the defendants for professional negligence in connection with a transaction. Before the action came on for trial, solicitors representing WWH notified the solicitors for the defendants that the plaintiff also had a personal claim against the defendants arising out of the same matters, which he would pursue in due course. Subsequently, a solicitor acting for the plaintiff and a solicitor representing the defendants discussed the plaintiff's personal claim and the plaintiff's solicitor explained that it had been thought better to wait until the company's claim had been concluded before dealing with the personal claim. A settlement of WWH's claim and the plaintiff's claim was discussed, as was a settlement of the plaintiff's claim. WWH's proceedings were eventually compromised on payment to WWH of a substantial proportion of the sum claimed by it. Subsequently, the plaintiff issued a writ against the defendants and the defendants applied for the action to be struck out as an abuse of process. At first instance, the judge declined to strike out the plaintiff's claim. The Court of Appeal ordered that the judge's order be set aside in so far as he had dismissed the defendants' application to strike out the proceeding as an abuse of process. On appeal, the House of Lords allowed the appeal, concluding that the plaintiff's action was not an abuse of process.

58 Dealing with *Henderson v Henderson*, Lord Bingham of Cornhill said:[56]

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to

51. *Walton v Gardiner* at 393.
52. Per Gaudron J in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 74.
53. T72.5.
54. [2002] 2 AC 1.
55. [2008] 1 WLR 823.
56. At 31.

> abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all … It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

59 A little further on, Lord Bingham said,[57] with reference to the rule in *Henderson v Henderson*:

> An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter.

As to the argument that there would not be an abuse if the first action was settled, Lord Bingham said:[58]

> A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.

Lord Bingham concluded that there was no abuse. On this issue, Lord Goff of Chieveley agreed,[59] Lord Cooke of Thorndon agreed[60] and Lord Hutton agreed.[61] Lord Millett agreed, delivering separate reasons.

60 It is not necessary to set out the relevant facts in *Stuart v Goldberg Linde*, they are set out in [8] and following in the judgment of Lloyd LJ. It suffices to say that that was a case where the claimant commenced a second proceeding in respect of the same transaction for which he had already recovered damages. The master struck out relevant parts of the particulars of claim as an abuse of process of the court on the basis that all the claims against the defendants arising out of the same transaction should have been asserted in the earlier proceeding. On appeal, a judge dismissed the plaintiff's appeal. On further appeal, the Court of Appeal allowed the plaintiff's appeal, concluding that the defendants had not persuaded

57. At 32.
58. At 32.
59. At 38.
60. At 42.
61. At 50.

the court that an abuse of process had occurred. However, in the course of delivering judgment, Sir Anthony Clarke MR said:[62]

> For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the Civil Procedure Rules, namely that of cooperation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated.
>
> While these considerations have been highlighted in the *Aldi Stores Ltd* case [2008] 1 WLR 748, they have been relevant considerations at least since the CPR came into force in 1999. It is for these reasons that in my view the claimant should have notified the first defendants and the court of a proposed inducement claim in the autumn of 2000. I entirely understand the point made by Lloyd LJ, at para 48, that if the result had been that the undertaking claim had to await trial of liability on the inducement issues that would (or at any rate might) have been inconsistent with the essential point of an undertaking. That, however, would have been a matter for the case management judge, who would have given such directions as were appropriate. I respectfully disagree with Lloyd LJ in so far as he says, at para 50, that the master was wrong to regard the claimant's position in seeking to enforce the undertaking by itself as other than reasonable. For the reasons I have given, the reasonable course was to raise the matter with the first defendants and the judge rather than to make a tactical decision to keep his powder dry until he saw how the cross-examination of Mr Linde went.

61 Notwithstanding these views, Sir Anthony Clarke MR concluded that he was not satisfied there was an abuse of process. Similarly, neither Sedley LJ nor Lloyd LJ were satisfied on the facts of that case that there was an abuse of process. Counsel for the plaintiff sought to undermine the force of *Stuart v Goldberg Linde* and *Johnson v Gore Wood* to the extent that they were based upon the CPRs and the approach of the CPRs being to require a more "cards on the table" approach.[63] As will become apparent below, it is not necessary to rule on this submission. However, while it might be said that the text of the CPRs discloses a more "cards on the table" approach,[64] this does not detract from the force of much that is said in those decisions.

62 Mr Kinnear's claim that there has been an abuse of process in the present case is even weaker than the plaintiff's claim in *Stuart v Goldberg Linde*. First, it cannot be said that the media proceeding and the present proceeding arise out of the same transaction in the way that the two proceedings in *Stuart v Goldberg Linde* arose out of the same transaction. Secondly, the present case is not one where the party alleging abuse of process did not know of the proposed subsequent proceeding prior to the resolution of the first proceeding. In this case, Mr Kinnear knew he might be joined six days before he executed his counterpart of the deed of release. Counsel for Mr Kinnear contended that this fact was

62. At 850, [96] and [97].
63. See *Stuart v Goldberg Linde* at 850, [97] and 851, [101].
64. See, for example, rr 1.1, 1.2, 1.3 and 1.4.

irrelevant on the basis that there was a binding settlement when the heads of agreement were signed on 17 November 2006. He relied upon the first class of case identified in *Masters v Cameron*.[65] That is, the proper analysis of this case is that on 17 November 2006 the parties reached finality "in arranging all the terms of their bargain and intend(ed) to be immediately bound to the performance of those terms, but at the same time propose[d] to have the terms restated in a form which … [would] be fuller or more precise but not different in effect".

63 I accept that this case belongs to the first class of case referred to in *Masters v Cameron*. However, the point is of no great significance when one looks in more detail at the facts. As at 31 January 2007, Mr Kinnear's then solicitors were seeking amendments to the deed of release which they required before Mr Kinnear would execute his counterpart. Notwithstanding Mr Kinnear's knowledge of the prospect that he would be joined in this proceeding, Mr Kinnear made no complaint about this fact and required no amendment to the deed before he executed his counterpart. Indeed, no complaint was made until he delivered his first defence in this proceeding. If there was an abuse, one would have expected this to have been raised by Mr Kinnear's legal representatives before he executed his counterpart of the deed (or, at the very least, at the time he was joined to this proceeding). His failure to make complaint is evidence that not only was his joinder not seen as abusive at the time, but also, on the facts, it was not abusive.[66] Looking at all of the circumstances as I have identified them, there is no abuse of process.

Anshun and abuse of process

64 I have looked at the *Anshun* issue and the abuse of process issue separately and concluded that neither issue justifies a conclusion in Mr Kinnear's favour. Taking up the invitation from Mr Kinnear's counsel to look at the matter more globally (by reference to *Anshun* and building the notion of abuse of process onto that), I remain of the view that there has been no abuse of process. Further, whether the issues are looked at separately or together, the passages in the affidavits sworn on behalf of the plaintiff that deal with the plaintiff's reasons for not joining Mr Kinnear to this proceeding at an earlier point in time (and before the mediation)[67] do not lead me to change this view. The passages in those affidavits do not disclose any abuse. Additionally, they do not establish that it was unreasonable for the plaintiff not to join or foreshadow the joining of Mr Kinnear in this proceeding prior to the conclusion of the mediation.

Conclusion

65 For the reasons given above, the answer to the preliminary question is:

(a) to (c): No.

66 Subject to hearing from counsel, I would propose the following order:

The question ordered to be tried by order of Master Evans on 20 September 2007 be answered as follows:

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65. (1954) 91 CLR 353 at 360.
66. See *Johnson v Gore Wood* at 34 per Lord Bingham of Cornhill.
67. See what counsel for Mr Kinnear described as the non-explanation in para 17 of Mr Hager's affidavit of 28 April 2008 and what he described as the unreasonable or unsatisfactory explanation given in para 10 of Mr Lester's affidavit sworn 22 November 2007.

Question

Is the Plaintiff's claim against the Third Defendant:

(a) in breach of a Deed of Release between the Plaintiff and the Third Defendant, the Director of Consumer Affairs Victoria and five other parties executed by the Plaintiff on 21 December 2006 as amended on or about 31 January 2007;

(b) barred by clause 5 of that Deed of Release; or

(c) an abuse of the process of this Court.

Answer

(a) to (c): No.

67 I will hear counsel on the question of costs.

Question answered in the negative.

Solicitors for the plaintiff: *Mills Oakley Lawyers*.

Solicitors for the third defendant: *Deacons*.

C MELIS
BARRISTER-AT-LAW