

Release clauses in disputes settlement

Authors: Lesly Ann Cho & Judith Milazzo

Broad and all-encompassing release clauses generally found in agreements in settlement of a dispute may be limited in its application depending on the circumstances and knowledge of the parties at the time the release came into existence.

Key Takeaways

- When deeds of settlement and release are entered into, they often contain clauses which broadly release the parties from any future known and unknown claims against each other.
- While release clauses are often drafted as widely as possible, their broad terms may be constrained by the subjective knowledge and intention of the releasing party. This is so when they are unaware of the obligation being released, or if they did not intend to release it, such as unforeseen circumstances.
- Accordingly, the general words of a release may not always be relied on to escape liability. Careful consideration should be had when negotiating such clauses, and it may be appropriate to draft them with a degree of specificity depending on your circumstances.

The limit of a release?

Entering into a deed of settlement and release is common when parties settle a dispute, or when proceedings settle out of Court. It is also common for parties to negotiate fairly broad release clauses, with the intention that it would absolve the party seeking to rely on such release from any and all liability with respect to known and unknown future events against a particular party. After all, release clauses are designed to protect parties from future potential claims and litigation.

However, not all circumstances are often known or within the contemplation of the parties at the time a deed of settlement and release is negotiated and entered into, and unforeseen circumstances inevitably arise. This is the very subject matter of the NSW Court of Appeal's decision in *Reid v Commonwealth Bank of Australia* [2022] NSWCA 134.

The facts

Mr. Reid entered into a number of loan facilities with the Commonwealth Bank of Australia (**CBA**) in connection with a number of companies of which he was the director. Mr Reid and his wife each personally guaranteed those transactions, which became the subject of Court proceedings.

The CBA and the Reids settled those proceedings and entered into a Deed of Settlement. It was a term of that Deed that the CBA would take possession of and sell a property owned by the Reids. CBA subsequently took possession of the property and entered into a sale contract with a third party. However, prior to the settlement of the sale, the property was vandalised by unknown parties and subsequently sustained substantial damage. CBA allowed the purchaser a deduction of \$370,000 from the sale price for the damage.

Mr. Reid commenced proceedings against CBA in December 2019 claiming that CBA was liable to account to him for the deduction in the sale price of the property. To this end, Mr Reid claimed that such damage was caused by the CBA's breach of its obligation to protect the property as mortgagee in possession. The primary judge dismissed Mr. Reid's claim and he appealed the decision. On Appeal, the CBA made an application for summary judgment.

Issues

On appeal, the Court of Appeal had to consider whether or not Mr Reid had released the CBA from liability under the Deed of Settlement with respect to CBA's obligation, as mortgagee in possession, to protect the subject property from the damage caused to it. The release clause contained in the Deed of Settlement demonstrated an intention to release all unknown and future claims, and relevantly provided as follows:

“Mr. Reid ... release[s] and discharge[s] the Bank from all liability for damages or loss and from all sums of money, accounts, actions, proceedings, claims, demands, costs and expenses whatever which Mr. Reid ... has or had or at any time in the future may have against the Bank for or by reason or in respect of any act, cause, matter or thing arising out of or in connection with or incidental to the Loans, the Loan Agreement, the Property, the Sale, the Mortgage, the Guarantee, the Bank Proceedings, the Family Court Proceedings, the Companies’ Proceedings, or in any way relating to the matters referred to in the recitals.” [at 13]

Findings

The Court found that the general words of a release should be read narrowly and limited by the knowledge and intention of Mr Reid when he agreed to provide the release. The Court found that the unusual circumstances of the case were unimagined by Mr Reid at the time he entered into the Deed of Settlement – that is, he did not contemplate that the vandalism on the property might occur or that the CBA would thereafter allow a \$370,000 deduction from the sale price on account of the resulting damage on the property.

Further, in circumstances where the property had sustained substantial damage while in the CBA's possession, the Court found that the CBA could not rely on the general words of the release to escape liability for the damage.

The Court dismissed the CBA's application for summary judgment.

If you would like further information or require assistance in negotiating the resolution of a dispute, please contact [Lesly Ann Cho](#), Partner, or your usual ClarkeKann contact.