SUPREME COURT OF QUEENSLAND

CITATION:	*Jiona Investments Pty Ltd & Ors v Medihelp General Practice Pty Limited* [2010] QCA 99
PARTIES:	**JOHN LAWRENCE CLIFT** (third party/appellant) **JIONA INVESTMENTS PTY LTD** (first plaintiff/not party to appeal) ACN 009 963 553 **JOHN PETER FEROS** (second plaintiff/not party to appeal) **VIOLA ISABEL FEROS** (third plaintiff/not party to appeal) **v** **MEDIHELP GENERAL PRACTICE PTY LIMITED** ACN 010 695 173 (defendant/respondent)
FILE NO/S:	Appeal No 14167 of 2009 SC No 6875 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2010
JUDGES:	Muir JA and Atkinson and Ann Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed;** **2. The order made on 23 November 2009 by the primary judge be set aside; and** **3. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where appellant agreed under a deed to indemnify respondent and others in relation to a claim – where respondent settled claim and sought to enforce indemnity – where clause contained agreement by appellant and Foundation to consult and discuss any settlement

negotiations undertaken regarding the claim – where clause provided no settlement could be reached without consent of appellant and Foundation – where appellant submitted clause obliged respondent to consult with appellant and Foundation and obtain their consent before settling claim – where respondent submitted clause only obliged appellant and Foundation to consult with each other – whether respondent obliged to consult with appellant and Foundation before settling the claim

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT – IN GENERAL – where respondent filed and served on appellant a third party notice and statement of claim for indemnity – where appellant did not file a notice of intention to defend – where respondent settled claim with other party – where appellant argued that there was no relevant defence to the third party claim until the principal proceeding was completed – whether primary judge erred in refusing counsel for the appellant leave to appeal and argue in defence of respondent's application – whether primary judge erred in giving judgment for respondent

Uniform Civil Procedure Rules 1999 (Qld), r 135, r 137, r 138, r 197, r 198, r 658

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, cited
Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424; [2004] HCA 28, cited
Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549; [1987] HCA 15, cited
Bofinger v Kingsway Group Ltd (2009) 239 CLR 269; [2009] HCA 44, cited
Chan v Cresdon Pty Ltd (1989) 168 CLR 242; [1989] HCA 63, cited
McIntosh v Dalwood (No 3) (1930) 47 WN (NSW) 85, cited
Troiani & Anor v Alfrost Properties Pty Ltd [2002] QCA 281, cited

COUNSEL: W Sofronoff QC SG, with P A Hastie, for the appellant
R E Bain QC, with G D Beacham, for the respondent

SOLICITORS: ClarkeKann Lawyers for the appellant
Macrossans Lawyers for the respondent

[1] **MUIR JA: Introduction**
Under a deed made on or about 10 July 2002 between parties, including the respondent, Medihelp General Practice Pty Limited, and the appellant, Dr John Clift, the appellant agreed to indemnify Medihelp and others in relation to a claim, then foreshadowed, by the "Feros Group" against one or more of Medihelp, the appellant and others, "for damages arising out of" an agreement identified in recital H to the Deed.

[2] The Feros claim eventuated. Jiona Investments Pty Ltd and Dr Feros commenced and prosecuted Supreme Court proceeding BS 6875/04 in which they claimed against Medihelp, damages totalling $6,500,000, interest and costs. In February 2009, Medihelp filed and served on the appellant a third party notice and statement of claim, claiming an indemnity "in relation to any sum ordered to be paid by [Medihelp] to the plaintiffs including interest and costs". Also claimed was "an indemnity in relation to [Medihelp's] costs of and incidental to the proceeding".

[3] The plaintiffs and Medihelp entered into an agreement on 3 November 2009, compromising the plaintiffs' claims in the proceeding. The appellant did not at any time file a notice of intention to defend the third party claim. The appellant was advised by fax dated 19 November 2009 that the principal proceeding had been resolved and that Medihelp would seek to have judgment in the third party proceeding entered against him.

[4] There was then an exchange of correspondence between the parties' solicitors. The appellant's solicitors contended, inter alia, that as the indemnity claimed in the third party statement of claim was limited "to any sum ordered to be paid", and as no such order had been made, Medihelp would require leave to amend and that the application for such leave and supporting material had to be served on the appellant.

The hearing at first instance

[5] On 23 November 2009, counsel for Medihelp and counsel for the appellant appeared before the primary judge. Counsel for Medihelp was granted leave to read and file an application by Medihelp for judgment against the appellant for: $1,200,000 (a sum paid or payable pursuant to the compromise); "costs associate (sic) with the defence or settlement of the plaintiff's claim" and Medihelp's costs in the principal and third party proceedings. Leave was also given for the reading and filing of affidavits in support of the application.

[6] Counsel for the appellant sought leave to appear but, after substantial argument, leave was refused and, pursuant to r 658 of the *Uniform Civil Procedure Rules* 1999 (Qld), judgment was entered against the appellant in favour of Medihelp for $1,200,000 (the settlement sum) and $407,378.47 (on account of Medihelp's costs in the principal proceeding). The appellant was also ordered to indemnify Medihelp in respect of the costs payable to the plaintiffs by Medihelp pursuant to the compromise agreement.

The issues on appeal

[7] Before the primary judge, and initially on appeal, there were two questions of construction to be determined:

- Is the broad language of the introductory words of clause 5 of the Deed constrained by the words of paragraphs (a), (b) and (c) of the clause such that the indemnity provided by the clause is only to the extent specified in those paragraphs?; and

- Was there an obligation imposed on Medihelp under clause 6(b) of the Deed to consult with the appellant and Foundation before compromising the Feros claim and, if so, what are the consequences of Medihelp's failure to obtain that consent?

The clause 5 construction argument, addressed at length in the appellant's outline of submissions, was abandoned on the hearing of the appeal.

[8] The remaining issues are whether the primary judge erred in giving judgment for Medihelp and in refusing counsel for the appellant leave to appear and argue in defence of Medihelp's application.

The relevant provisions of the Deed

[9] The Deed relevantly provides:

> "H The Feros Group have given notice to make a claim against MGPL and/or the Medihelp Group and/or the Plaintiffs and/or the Defendants for damages or other relief arising out of an agreement made between the Feros Group and MGPL and/or the Medihelp Group and/or the Defendants prior to the execution of the Sale of Shares Agreement relating to the purchase and/or merger of the Feros Group by or with the Medihelp Group (**"Feros Claim"**). The Plaintiffs have sought damages in the Proceedings against the Defendants in respect of the Feros Claim."

[10] The "plaintiffs" were defined as Foundation Health Care Ltd and Foundation Medical Centres Pty Ltd. At relevant times, one of these companies controlled the Medihelp Group of companies. The "defendants" were defined as the appellant, Clift BV1 and Trounce BV1. The "cross-defendants" were Mr Jones and Mr Atkins.

> "**5 FEROS INDEMNITY**
>
> [The appellant] shall indemnify and continue to indemnify and hold harmless MGPL, the Medihelp Group, the Plaintiffs and the Cross Defendants jointly and severally in relation to the Feros Claim. This indemnity shall extend to and include, without limitation, the following:
>
> (a) any sum of money or damages ordered by a Court to be paid by MGPL, the Medihelp Group, the Plaintiffs or the Cross Defendants to the Feros Group including interest and costs arising from the Feros Claim.
>
> (b) any sum of money payable under a settlement reached in accordance with clause 6;
>
> (c) any legal or other professional or advisory costs associated with the defence or settlement of the Feros Claim incurred by the MGPL, the Medihelp Group, the Plaintiffs or the Cross Defendants after the Execution Date (although such parties agree not to obtain such services without first consulting [the appellant] regarding their intention or need to incur these costs).
>
> **6 SETTLEMENT**
>
> (a) [The appellant] covenants and agrees with MGPL, the Medihelp Group, the Plaintiffs and the Cross Defendants jointly and severally that he will use his best endeavours to actively negotiate a settlement with the Feros Group and

obtain an appropriate release and discharge from the Feros Group in favour of MGPL, the Medihelp Group, the Plaintiffs and the Cross Defendants in relation to the Feros Claim.

(b) [The appellant] and Foundation agree to consult and discuss any settlement negotiations undertaken in respect of the Feros Claim, and no settlement will be reached unless the party purporting to reach a settlement has first obtained the consent of [the appellant] and Foundation (both of whose consent may not be unreasonably withheld)."

Construction of clause 5

[11] It is no longer contended that the scope of the indemnity provided by clause 5 is confined by paragraphs (a), (b) and (c) of the clause.

Construction of clause 6

[12] Counsel for Medihelp contended that clause 6(b) applied only to the appellant and Foundation and that this explained the existence of clause 5(b). Other arguments advanced were as follows. A contractual indemnity is to be construed strictly[1] and any doubt concerning construction (which may arise from the apparent width of possible application) should be resolved in favour of the person providing the indemnity.[2] A settlement of the primary proceedings negotiated by Foundation or the appellant "may well have taken into account factors extraneous to the litigation", but highly relevant to them. Clause 5(b) ensures that the indemnity extends even to such a settlement as long as the appellant consents to it or does not unreasonably withhold his consent. It thus may have been difficult to demonstrate that the settlement was "unreasonable in accordance with the usual principles".

[13] Clause 6(b) does not commence, as does clause 6(a), with the appellant expressly agreeing with all other parties. It commences with the recording of an agreement between the appellant and Foundation to consult and discuss "any settlement negotiations undertaken in respect of the Feros Claim": not merely settlement negotiations undertaken by the appellant. The provision that no settlement be reached "unless the party purporting to reach a settlement has first obtained the consent of [the appellant] and Foundation", provides an indication that clause 6(b) is not concerned solely with an agreement between the appellant and Foundation. The words "the party purporting to reach a settlement" arguably include reference to a party other than the appellant and Foundation. Were it otherwise, there would be no need for the consent of both the appellant and Foundation to be obtained and the provision may well have been worded differently: e.g., "unless whichever of Foundation and the appellant is not proposing the settlement consents to it, which consent may not be unreasonably withheld". Also, on Medihelp's construction there would be no need for the appellant's consent: he would have negotiated the settlement.

[14] Clause 6(a) imposes an obligation to pursue negotiations only on the appellant. That does not support the view that the "settlement negotiations" in clause 6(b) should be construed as ones conducted by either the appellant or Foundation but not the other parties to be indemnified. Nor does Medihelp's construction of clause 6(b) explain the use of the words "any settlement negotiations undertaken" rather than "such settlement negotiations".

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1 *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at [17] – [23].

2 *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at [53].

[15] The role of sub-clause (a) is to impose an obligation on the appellant to "use his best endeavours to actively negotiate a settlement", whereas the role of sub-clause (b) is arguably quite different: to record an agreement to consult and discuss entered into between the appellant and Foundation and to record the agreement between all parties that there be no settlement by any party without the consent of the appellant and Foundation.

The consequences of non-compliance with clause 6(b) of the Deed

[16] If the proper construction of clause 6(b) of the Deed is as discussed above, it remains necessary to consider the consequences of a failure on the part of Medihelp to obtain the appellant's consent to the settlement. Counsel for Medihelp argued that a construction of clause 6(b) which denied indemnity to Medihelp where it concluded a reasonable settlement but had failed to seek the appellant's prior consent (despite the fact that the appellant could not have refused to give his consent because the settlement was reasonable and he could not unreasonably refuse consent), would be unreasonable and uncommercial. That broad assertion, with respect, fails to have regard to the language of clauses 5 and 6 and to the nature of the relevant obligations. The High Court, in *Andar Transport Pty Ltd v Brambles Ltd*[3] affirmed the principles applicable to the construction of guarantees adopted in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[4] and applied in *Chan v Cresdon Pty Ltd*[5] and held that such principles were relevant to the construction of indemnity clauses.

[17] Central to the proper construction of clause 6(b) is the following statement of principle in the joint reasons in *Ankar*:[6]

> "At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety. The doctrine of strictissimi juris provides a counterpoise to the law's preference for a construction that reads a provision otherwise than as a condition. A doubt as to the status of a provision in a guarantee should therefore be resolved in favour of the surety and so the provision should be interpreted as a condition, or perhaps as an innominate term, instead of a mere warranty."

[18] Their Honours then proceeded to explain the basis on which a creditor's failure to comply with a term of the suretyship contract operated to relieve the surety of liability:[7]

> "If the surety is to be discharged for breach of a promissory term in the suretyship contract, the justification for the discharge must be that the creditor has failed to comply with a provision that, as a matter of interpretation, requires strict performance as a condition precedent to the surety's obligation or at least requires substantial performance of the promise such that the surety would not have entered into the contract if it had not been assured that there would not be a breach such as the breach which in fact occurred. If on its

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3 (2004) 217 CLR 424 at 437.
4 (1987) 162 CLR 549.
5 (1989) 168 CLR 242 at 256.
6 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561.
7 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561.

> true interpretation the term is not intended so to operate, it is not easy to understand why the surety should be discharged by its breach. Of course, in construing the contract the court is entitled to look to the general setting in which the contract has come into existence: see, eg, the discussion in *Reardon Smith Line Ltd v Hansen-Tangen*." (footnote omitted)

[19] Clause 6(b) had the potential to bear significantly on the appellant's liability under clause 5. Under the first sentence of clause 5 and under paragraph (b) of clause 5, the appellant was liable to indemnify any of the indemnified parties for any moneys paid or payable by them under a settlement arrived at "in relation to the Feros claim". The indemnity under paragraph (b) of clause 5 applied only where the settlement was "reached in accordance with clause 6". As a matter of construction, one would think that such a settlement had to be one to which the consent of the appellant and Foundation had either been obtained or unreasonably withheld. However, there was no such limitation contained in the words of the first sentence of clause 5. In my view, it is arguable that the failure to obtain the appellant's consent under clause 6(b) involved a breach of a provision which required "strict performance as a condition precedent to the surety's obligation".

[20] If that conclusion is correct it does not follow, necessarily, that the appellant can escape liability under clause 5. For example, if the evidence revealed that the appellant, by his conduct, expressly or impliedly, showed that his consent would not have been forthcoming, however reasonable the proposed settlement,[8] Medihelp may have been relieved of the obligation to obtain the consent. What is apparent from the above discussion, however, is that the determination of the rights of the parties depends on findings of fact and that because of the nature of the proceeding at first instance, not all relevant facts were placed before the Court.

The basis of the primary judge's decision

[21] The primary judge rejected the argument advanced by the then counsel for the appellant on the construction of clause 5. His Honour considered it "arguable" that "the reference in clause 6(b) to settlement is a reference to a settlement which was negotiated by [the appellant]". His Honour did not deal further with clause 6(b) beyond stating that he accepted the submission made on behalf of Medihelp that the burden was on Medihelp to establish that the compromise "was a reasonable settlement in order to crystallise the loss for which it is entitled to an indemnity".

[22] His Honour then said:

> "The history of this matter discloses that [the appellant] some time ago ceased to play any active role in these proceedings. He declined to even take a sensible precautionary step of filing a notice of defence in which he set out what allegations he agreed to and what allegations he denied. That, though, is consistent with his failure to take any part in these proceedings for some considerable period of time, in circumstances where there has been no defence filed and where the assertion that there is now a defence rests solely upon the construction of two clauses of the deed containing the indemnity."

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[8] See, for example, *Peter Turnbull and Company Proprietary Limited v Mundus Trading Company (Australasia) Proprietary Limited* (1953) 90 CLR 235 at 246, 247; *Kelly v Desnoe* [1985] 2 Qd R 477 at 495; *Park v Brothers* (2005) 80 ALJR 317 at paras [41] – [43].

[23] The primary judge's refusal to give leave to the appellant's counsel to appeal was thus based on: his rejection of the appellant's argument on the construction of clause 5; his conclusion that it was arguable that clause 6(b) did not assist the appellant; the finding, by inference, that the compromise was reasonable and the conduct of the appellant in failing to file a notice of intention to defend at any time, including on or immediately before the day of the hearing.

Has the appellant shown any appellable error – the appellant's arguments

[24] Counsel for the appellant argued as follows. The claim and statement of claim were based on a misunderstanding of the nature of the indemnity provided by the Deed and made no claims known to law. It is possible to sue for specific performance of an indemnity or to claim damages if there is a failure to indemnify. In appropriate circumstances a declaration of rights in respect of the indemnity may be sought, but where the indemnity is in respect of a contingent liability, the grantor has no obligation to indemnify until the liability ceases to be contingent.

[25] Reference was made to *McIntosh v Dalwood (No 3)*[9] in which Harvey CJ in Eq said at 86:

> "The cases show that a plaintiff can call upon the debtor to pay the debt under his contract of indemnity from the principal debtor before he has actually paid the liability. In my opinion the same principle exactly applies to a contract of indemnity against the payment of a liability. The cases to which I have been referred show that that liability must have crystallized into an actual present and enforcible demand before the indemnifier can come into court to get relief. As long as it remains a contingent liability, which may or may not arise, the court will not entertain any proceedings, but where it has become an actual present demand which the contracting indemnifier has contracted to pay, the court of Equity will order specific performance of the contract by ordering the indemnifier to pay it, instead of leaving the indemnified merely to a remedy for damages after he may have been ruined."

[26] Alternatively, there was no relevant defence to the third party claim for indemnity until Medihelp sought to enter judgment with respect to a settlement to which the appellant had not consented. The absence of a filed defence to the third party claim was no basis for an objection to the right of a litigant to be heard on an application for judgment. The primary judge should have concluded that there was a real, as opposed to a fanciful, prospect of the appellant succeeding in his defence and the principle that great care must be exercised before the party is deprived of its opportunity for a trial of its case was ignored.[10]

Consideration

[27] I do not regard the appellant's arguments as fanciful. The correctness of the principles stated in the above passage from *McIntosh v Dalwood* is beyond doubt.[11]

[28] Any liability of Medihelp under clause 5 was contingent until it settled with the plaintiffs. Had the appellant denied the existence of an obligation to indemnify

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9 (1930) 47 WN (NSW) 85.

10 *Rich v CGU Insurance Ltd* (2005) 79 ALJR 856; *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232; and *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd* [2009] QCA 135.

11 *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 82, 83; *Re Dixon* [1994] 1 Qd R 7 at 18 – 20; and *Agnes & Jennie Mining Co v Zen* (1982) 4 WWR 563.

under circumstances coming within clause 5, Medihelp may well have been able to obtain a declaration as to its rights, but that is not what was sought.

[29] However, I am inclined to think that the appellant's argument takes too narrow a view of the scope of the relief claimed by Medihelp. For example, I consider it reasonable to regard the claim for "indemnity in relation to any sum ordered to be paid by the defendant to the plaintiffs" as shorthand for "an order that the third party pay to the defendant any sum ordered in the proceeding to be paid by the defendant to plaintiffs". The claim, after all, was in a third party statement of claim in proceedings in which the defendants denied liability to the plaintiffs.

[30] Nevertheless, it does not seem from the preceding part of the pleading that the claim for an order that the third party appellant pay such moneys to the plaintiffs rather than Medihelp and the statement of claim does not allege the material facts which would justify an order that the third party pay the subject money to the defendant, Medihelp: for example, an allegation that Medihelp has paid the moneys ordered to be paid to the plaintiffs.

[31] Such pleading difficulties are by no means insuperable, but normally, where a party makes any change in a claim or pleading which has a material bearing on the rights or obligations of another party, that other party must be afforded the opportunity of meeting the varied claim or allegations if it wishes to do so. Turning to what became the appellant's alternative argument, until the principal proceeding was compromised, the appellant had no basis for concluding that he had a defence. He and his legal advisors, however, were aware that the third party notice and the statement of claim contained no claim for payment by the appellant of any moneys required to be paid by Medihelp under a settlement agreement: no such claim could be made (except in relation to costs) while Medihelp's liability to the plaintiffs remained contingent. The first claim for payment of moneys was made in the application for judgment pursuant to r 658, which was filed by leave of the primary judge. That application did not seek leave to amend the third party notice but relied on the claim in the third party notice and statement of claim for "further or other relief".

[32] As counsel for Medihelp pointed out, r 197 of the *Uniform Civil Procedure Rules* 1999 (Qld) applies chapter 5 of those rules to a third party proceeding and r 198, which is in chapter 5, provides for the filing and service of a defence by the third party within 28 days after service on it of the statement of claim. Rule 135 prevents a defendant taking a step in a proceeding without having first filed a notice of intention to defend "Except with the court's leave". Rule 138 provides that a defendant may file and serve a notice of intention to defend at any time before judgment, even if the defendant is in default of r 137. Rule 137 is the rule requiring a notice of intention to defend to be filed within 28 days after service on the defendant of the claim. The appellant could thus have filed and served a notice of intention to defend on the day of the hearing before the primary judge. If that had been done the appellant would have been able to rely on a defence; no leave would have been required.

[33] In my respectful opinion, the primary judge erred in refusing the appellant leave without considering whether the appellant had an arguable case arising out of the construction of clause 6 of the Deed. His Honour, by implication, found that no such case existed in relation to clause 5 but that was just one of the two arguments

advanced on behalf of the appellant. Admittedly, as is so often the case, the advancement of the lengthy and tenuous argument in respect of clause 5 served to distract attention from the more substantial, but fleetingly addressed point on the construction of clause 6(b).

[34] The following statement of principle by Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*[12] is apposite:

> "It is, of course, well accepted that a court whose jurisdiction is regularly invoked in respect of a local defendant (most often by service of process on that defendant within the geographic limitations of the court's jurisdiction) should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

[35] A broadly similar approach has been traditionally taken in relation to applications to set aside regularly obtained judgments.[13]

[36] In *Troiani & Anor v Alfrost Properties Pty Ltd*,[14] McPherson JA observed that the refusal of leave to defend on the grounds of unjustified delay where "a plausible defence on the merits" had been shown, was "an unusually heavy sanction for delay".

[37] I am also of the view that the primary judge erred in finding, implicitly, that the appellant had been guilty of relevant delay in not filing a defence and that this failure was relevant to whether the appellant's counsel should be heard on Medihelp's application. This was not a case in which a party had been responsible for relevant delay or any failure to comply with obligations under the Rules. The failure to file and serve a notice of intention to appear and a defence before the hearing was, in my view, a forensic error which weakened the appellant's position, as it exposed him to the necessity of obtaining leave to appear. The failure to file a defence was also something on which the respondent's counsel could, and did, rely in their submissions. However, once the fury, sound and dust of the engagement at first instance are penetrated, it may be seen that the appellant had a fairly arguable point on the merits which could have emerged only after the appellant became aware of the settlement, and that there were no disentitling factors such as delay or prejudice standing in the way of a trial on that point.

[38] The claims sought to be enforced by Medihelp's application were, arguably, at the very least, not within the relief expressly claimed in the claim and statement of claim. The compromise which provided the factual basis for the most substantial claim had just been made. For these reasons also, the appellant should not have

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12 (2000) 201 CLR 552 at 575, 576.

13 *National Mutual Life Assn of A/asia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441 at 449, 450; *National Australia Bank Limited v Singh* [1995] 1 Qd R 377 at 380 and *AVS Property Pty Ltd v QLD-1 Pty Ltd* [2007] QSC 365 at paras [11], [12].

14 [2002] QCA 281 at 8.

been deprived of the opportunity of resisting the new claims without compelling grounds.

[39] Consequently, I would order that:

(a) the appeal be allowed;
(b) the order made on 23 November 2009 by the primary judge be set aside; and
(c) the respondent pay the appellant's costs of the appeal.

[40] I would make no order as to the costs of the hearing at first instance.

[41] **ATKINSON J:** I agree with the orders proposed by Muir JA and with his Honour's reasons.

[42] **ANN LYONS J:** I agree with the reasons of Muir JA and with the orders proposed.