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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2012

Before:

THE HON MR JUSTICE RAMSEY

Between:

Point West London Limited Claimant
- and -
Mivan Limited Defendant

David Turner QC (instructed by Charles Russell LLP) for the Claimant
Sean Brannigan QC (instructed by Robin Simon LLP) for the Defendant

Hearing date: 23rd April 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON MR JUSTICE RAMSEY
Mr Justice Ramsey:

Introduction

1. In October 2007 the Claimant (“Point West”) entered into a Settlement Agreement with the Defendant (“Mivan”). In these proceedings, commenced under CPR Part 8, Point West seeks a declaration as to the scope of that Settlement Agreement and in particular its impact on Mivan’s liability for defects.

Background

2. Point West was the developer and is now the landlord of a property at 116 Cromwell Road, constructed on the site of the old West London air terminal and now known as Point West. Between 1997 and 2001 the property was developed into 399 apartments with underground parking, a leisure centre and a supermarket. Phase 4 of that development consisted of the design and construction of a marketing suite, sky lobby and 48 apartments.

3. Mivan was the building contractor for the phase 4 Works under an agreement made under seal on 22 August 2000 incorporating the JCT Standard Form of Building Contract with Contractors’ Design (1998 edition) (“the Building Contract”). The original contract sum was over £10 million and included a provisional sum of £750,000 for the fit out works to the penthouse flat on floors 16, 17 and 18 (“Flat 1601”).

4. On 19 February 2001, a “change order” was issued which required Mivan to renew the curtain walling to the 16th and 17th floors, in accordance with recommendations reviewed and agreed by IWA, a firm of consultants with expertise in curtain walling, who were retained by Point West. Practical completion was certified on a flat by flat basis and a global practical completion certificate for the Phase 4 works was issued in June 2001. No certificate of making good defects has been issued. A final account in respect of Mivan’s work under the Building Contract was agreed by the parties in the sum of £12,549,490.02, as recorded in an agreement made on 16 July 2002 between Mivan and Point West’s quantity surveyors, Davis Langdon and Everest.

5. Flat 1601 was purchased by the Rothschild Trust (Bermuda) Limited (“the Bermuda Trust”) and completion occurred on 5 July 2002. From July 2002 onwards Flat 1601 has been occupied by Mr David Gomes Da Costa and members of his family.

6. Prior to that date Point West was aware of problems with the curtain walling system and water ingress in relation to Flat 1601. When the flat was purchased a sum of £50,000, later reduced to £25,000, was held back as retention against defects, including the water ingress.

7. By the date of the Settlement Agreement in October 2007 and as set out in the Statement of Agreed and Assumed Facts, the parties were fully aware that there were persistent, known and unresolved defects in the curtain walling system and that investigations and remedial works over the course of nearly 6 years had not
fully remedied those defects. Point West involved IWA as consultants and Mivan engaged Fenestral Limited (“Fenestral”) as specialist sub-contractors to deal with curtain walling issues. Neither IWA nor Fenestral guaranteed the outcome of the remedial works to the curtain walling undertaken in the period up to the Settlement Agreement in October 2007. Both IWA and Fenestral indicated that there was at least a very real possibility of undetermined and unresolved defects to the construction, design and detailing of the curtain walling. They indicated that opening up for further investigation was warranted if the solutions applied did not prove to be effective. The defects in the curtain walling were of an unknown scope and extent and it was plain that the attempted repair works had not succeeded. The problem with the curtain walling had not therefore been resolved by the steps taken prior to the Settlement Agreement.

8. As part of the Building Contract, a heating and cooling system was designed for Flat 1601 and installed in or around July 2001. From the outset, it was apparent that the heating and cooling system could not deliver adequate heat. Various complaints were made by Mr Da Costa and prior to April 2003 it was noted that there appeared to be no air return vents in the system. Mr Da Costa commissioned Mr Graham Woodroffe of CBG Consultants to investigate defects in the heating and cooling system and he produced a report in March 2007. It set out, in detail, what he considered to be significant design and installation defects in the heating and cooling system. On 6 August 2007 a copy of the report was made available to Mr Ian Wilson of BTW, a Project Manager acting on behalf of Point West. Mr Wilson then emailed it to Mr Drew Graham of Mivan on 20 August 2007. Mr Wilson also received on 6 August 2007 a document which set out points arising from a brief inspection carried out for Mr Da Costa by Prime Building Consultants Limited on 4 May 2007.

9. As set out in the Statement of Agreed and Assumed Facts, at the date of the Settlement Agreement both parties knew that there were defects in the heating and cooling system of a unknown scope and extent. Problems relating to the heating and cooling system had been adverted to in a number of defects list produced by Mr Da Costa and in the expert report provided by him to support criticisms of the heating and cooling system but those defects and the accuracy of the expert’s criticisms had not been investigated in full.

10. So far as the financial position between Point West and Mivan was concerned, it was the subject of a number of exchanges between Mivan and Mr Wilson, acting on behalf of Point West, in the period from early 2005 until September 2007. Initially, as set out in one of Mivan’s assumed facts, Mivan sent Mr Wilson a spreadsheet which showed sums claimed in relation to the period between January 2002 and August 2004 and the period since August 2004, broken down as “base build” snagging and Mivan snagging. Mivan claimed a sum of £90,416 in respect of base build snagging, together with retention of £27,000, making a total of £117,416. Mr Wilson responded to that spreadsheet by transferring a number of items from the base build snagging column to the Mivan snagging column, stating that, in particular, sums paid to Fenestral of £19,236 and £21,702 were not Point West’s responsibility “due to original defective design”. In Mr Wilson’s spreadsheet the total, including retention of £27,000, was £80,981.
11. On 28 April 2005 Mr Graham of Mivan emailed a draft document to Mr Wilson which had the title “Statement of Final Account Settlement” and was in the following proposed terms:

“We hereby agree to the gross value of £12,894,062.00 (twelve million eight hundred and ninety four thousand and sixty two pounds) excluding VAT, as being the final account for all work carried out by us for the above project.

We further acknowledge and agree the outstanding amount in respect of the above gross value as being the sum of £80,981.00 excluding VAT, representing the only monies due or to become due to achieve full and final settlement in respect of the above works.

This settlement is subject to the client’s:
(a) acceptance of the works to the external envelope as being complete and to a satisfactory standard
(b) certification that all other works carried out under the main contract are complete and satisfactory
(c) carrying out any further remedial work required by the tenant.”

12. On 16 May 2005 Mivan issued an invoice to Mr Wilson based on that draft final account seeking a sum of £53,980.56, excluding £27,000 retention. That was the same as the rounded figure of £53,981 in Mr Wilson’s spreadsheet. The sum was not paid by Point West.

13. On 28 September 2007 Mr Graham of Mivan emailed a statement of account to Mr Wilson. That showed the invoice of 16 May 2005 in the total sum, including VAT, of £63,427.16 as being the balance outstanding. Mr Wilson responded to that email on 9 October 2007 to say that “Lee [Goldstone] would like to do a deal to enable Mivan to walk away”. Mr Goldstone is a director of Point West. Mr Graham suggested a settlement figure of £55,000 to Mr Wilson in reply on 10 October 2007. He then asked for news of the position on 12 October 2007 and, in reply, Mr Wilson asked Mr Graham to telephone him. That telephone call led to the first of three letters which form the Settlement Agreement by which it was agreed that Point West would make a further payment of £50,000 (including VAT) to Mivan.

14. The first letter was dated 15 October 2007 and was written by Mr Graham to Mr Wilson in the following terms:


Following the subsequent telephone conversation of 12th October, 2007 between Ian Wilson and the undersigned, we would confirm the agreement reached regarding Mivan’s Final Account in respect of all Works carried out, and any corresponding outstanding matters.

The agreement comprises a further payment of £50,000 (including VAT), representing the final assessment of monies due or to become due thus
achieving full and final settlement in respect of the above works, together with any and all outstanding matters.
We would confirm that this final agreement concludes Mivan’s responsibilities and obligations in respect of their works at the above project.
We appreciate your assistance in this matter, and now look forward to receipt of the final payment as agreed in due course.”

15. Mr Goldstone responded to Mr Graham on 18 October 2007 in the following terms:

“Further to your letter of 15th October...
The contents of your letter are accepted subject to you being prepared to assist me in the legal aspects of the case on Flat 1601. This may involve some time on the part of Mivan along with the production of necessary documents but I am not looking to you to do any further remedial works. Any time incurred on this would be reimbursed at an appropriate rate.
I hope you can confirm your agreement to this as we are literally just starting the legal proceedings against Mr Da Costa and the Bermuda Trust.
In anticipation of your agreement to this I wish you to thank you for your support and your patience in all these matters.”

16. The third letter was dated 18 October 2007 and was written by Mr Graham to Mr Goldstone in the following terms:

“We acknowledge receipt of your letter dated 18th October, 2007 reference JLG/jas, and appreciate your assistance and prompt response in agreeing the content.

In relation to the condition regarding Flat 1601, we would confirm our agreement to provide any reasonable assistance that you may require in connection with the impending legal proceedings

We trust this meets with your approval, however, should you require any further information, please contact the undersigned.”

17. In the Statement of Agreed and Assumed Facts it is stated that the settlement agreement was reached on the basis known to both Mivan and Point West:

(1) Mr Wilson’s view, on behalf of Point West, was that whilst it was possible that Point West was about to commence proceedings against Mr Da Costa for arrears of rent, his view and that of Point West was that Mr Da Costa’s complaints were unjustified and/or minor in nature and could be dealt with accordingly; and

(2) Mr Goldstone’s view, on behalf of Point West, was that Point West’s prospects of success in that claim were, however, potentially hampered by the fact that Point West did not have all of the documentation that it thought it might need to prove its case, and Point West therefore wished to have Mivan’s assistance in that regard.
18. As recorded in the judgment of Her Honour Judge Hazel Marshall QC dated 15 December 2011, on 23 November 2007 Point West commenced proceedings in Central London County Court against the Bermuda Trust for arrears of service charge, payment of retention and sums in relation to the preparation of notices under the lease. The Service charge claim was transferred to the Leasehold Valuation Tribunal but the proceedings in the County Court proceeded on the basis of dealing with the Bermuda Trust’s counterclaim in respect of building defects. The Judge made findings in relation to both the curtain walling system and the heating and cooling system and awarded the Bermuda Trust damages against Point West.

19. Point West commenced these CPR Part 8 proceedings against Mivan by a claim form issued on 22 August 2011, attaching particulars of claim and supported by a witness statement of Mr Goldstone dated 16 August 2011. Mivan applied to the Court for directions on 20 September 2011 on the basis that the proceedings were not appropriately brought under Part 8. An order was made at a hearing on 11 November 2011 for the production of agreed or assumed facts and for a further case management conference. On 23 March 2011, with the assistance of the court, a Statement of Agreed and Assumed Facts was produced and the hearing was fixed for 23 April 2012.

20. That Statement of Agreed and Assumed Facts contained both agreed facts and also facts asserted by each party but not agreed but which were to be assumed. In the event only two of the assumed facts were considered to be possibly relevant to my conclusion on the Settlement Agreement. I was therefore invited to express a view as to whether my conclusion would have been materially different if certain assumed facts were or were not established. Those two matters were, first, as set out in paragraph 35 of the Statement of Agreed and Assumed Facts whether the further works carried out were works which formed a variation to the original Building Contract, as asserted by Mivan or were additional works outside the Building Contract, as asserted by Point West.

21. The second relevant assumed fact, was that in paragraph 50 of the Statement of Agreed and Assumed Facts that, at the date of the Settlement Agreement, the parties were fully aware that there was something fundamentally remiss with the curtain walling and there were obvious indications that Point West would have to replace the whole curtain walling system. I shall deal with the effect of these two assumptions in due course.

The pleaded case

22. In paragraph 15 of the Particulars of Claim Point West sought a declaration in the following terms:

“The agreement between the Claimant and Defendant in October 2007 did not include a settlement of any liability to pay damages in respect of defects which the Defendant had or would in the future have under the Building Contract including in particular any such liability in respect of...
latent (i.e. unknown) defects which existed in October 2007 of the kind referred to above as the Fundamental Latent Defects.”

23. In paragraph 8 of the Particulars of Claim Point West pleaded that the final account under the Building Contract was agreed in July 2002 and that thereafter Mivan carried out specified further works for Point West and submitted invoices in respect of those works. Point West then pleaded in relation to the letters in October 2007 as follows:

“In or around October 2007 the Claimant and the Defendant came to a commercial agreement in respect of outstanding sums due in respect of the further works.”

24. At paragraph 9 of the Particulars of Claim, Point West pleaded that Mivan had averred that the October 2007 settlement agreement included “a settlement of any liability which it had or would in the future have under the Building Contract in respect of any defects to the curtain walling, including in particular any latent (i.e. unknown) defects which existed in October 2007.”

25. At paragraph 11 Point West pleaded that, in the County Court proceedings, it faced new allegations by Mr Da Costa that, amongst other things, the curtain walling and the heating and cooling system suffered from widespread fundamental defects in the design and installation which necessitated complete replacement at very substantial cost. It referred to these as “Fundamental Latent Defects”. Whilst Point West referred to leaks in the curtain walling at paragraph 7, it pleaded that the leaks in the period to 2006 were regarded by all concerned as relatively minor instances of minor workmanship failings. In relation to the Fundamental Latent Defects, Point West pleaded in paragraph 13 that these were not known about at the time of the commercial agreement in October 2007.

26. It can be seen that Point West’s pleaded case, at that stage, was that the October 2007 agreement was a financial settlement in relation only to the further works which had been carried out by Mivan after the agreement of the final account for the Building Contract in July 2002. Further Point West contended that the defects in the curtain walling and the heating and cooling system were not known about at the time of the agreement in October 2007 and therefore came within a category of “latent (i.e. unknown) defects” and that Point West’s liability to pay damages under the Building Contract for defects, in particular, those latent defects, was not included in the October 2007 Settlement Agreement.

27. During the course of argument and at the invitation of the court, Mr David Turner QC who appeared on behalf of Point West, put forward the following amended declaration, based on the way in which Point West was now putting its case:

“The agreement between the Claimant and Defendant in October 2007 did not include a settlement of any liability to pay damages in respect of defects which the Defendant had or would in the future have under the Building Contract including in particular any such liability in respect of the defects which existed in October 2007 which were the subject matter of the proceedings in the Central London County Court referred to in
paragraph 11 above and/or any other defect(s) whose consequences were unknown at that time.”

28. In response, Mr Sean Brannigan QC who appeared on behalf of Mivan summarised Mivan’s position in terms of the following declaration:

“The Agreement between the Claimant and Defendant in October 2007 precludes the Claimant from seeking damages or specific performance in relation to:
(a) The defects forming the subject matter of the County Court proceedings CHY08472; and
(b) Any other defects in the Point West Development which were Patent as at 18th October 2007.”

The law

29. I was referred to the familiar principles which apply to the construction of a contract and, in particular, those summarised by Lord Hoffmann in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 at 912H to 913E. In the context of the present case, I must consider the background knowledge which would reasonably have been available to the parties in the situation in which they were in October 2007. As Lord Hoffmann said, subject to the requirement that the background knowledge should have been reasonably available to both parties and that it excludes the previous negotiations of the parties and their declarations of subjective intent, it includes “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”. As confirmed by the House of Lords in Chartbrook v Persimmon Homes [2009] 1 AC 1101, the exclusionary rule in respect of pre-contractual negotiations should be maintained: see Lord Hope at [1] to [4]; Lord Hoffmann at [28] to [41] and Lord Rodger at [69] to [70].

30. The general rule is that words should be given their natural and ordinary meaning but this has to yield to business common sense if detailed semantic and syntactical analysis of the words would lead to a conclusion which would flout business common sense: see Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC191 at 201 per Lord Diplock, cited by Lord Hoffmann in Investors Compensations Scheme at 913. As recently stated by Lord Mance in his judgment in the Supreme Court in Rainy Sky v Kookmin Bank [2011] UKSC 50 at [20] to [21]:

“20.... It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.

21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the
background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”

31. However in construing the contract, it is not the function of the court to remedy any lacunae in the parties’ bargain or to improve or make a contract which the parties did not make for themselves: see, for example, Charter Reinsurance v Fagan [1997] AC 313 at 338 and Great North Eastern Railway v Avon Insurance Plc [2001] 2 Lloyd’s Rep 69 at [34].

32. There are no special principles which apply to settlement agreements and the court applies the above general principles: see BCCI v Ali [2002] 1 AC 251 at [8]. However in construing a settlement agreement the court should be slow to infer that a party to that settlement agreement was intending to surrender rights and claims of which it was unaware and could not have been aware. As Lord Bingham said in BCCI v Ali at [17], he shared a “reluctance to infer that a party intended to give up something which neither he, nor the other party, knew or could know that he had.”

33. Lord Clyde also referred to this at [79] where he said this:

“Generally if they intend their agreement to cover the unknown or the unforeseeable, they will make it clear that their intention is to extend the agreement to cover such cases. If an agreement seeks to curtail the possible liabilities of one party, he, if not both of them, will generally be concerned to secure that the writing clearly covers that curtailment.”

34. I was also referred to Foskett on the Law and Practice of Compromise (7th edition) where, at para 2-01, it is said that “a compromise in the true sense of the term does not arise until some dispute or difference of view exists between the parties, which by agreement, they resolve.” However, as pointed out in that paragraph there is no necessity for there to be pending litigation but there must be some actual or potential dispute. This is developed further at para 2-08 where the author states that parties frequently seek to compromise “potential” issues between them even if those issues have not yet been elevated to the status of an actual dispute. Reference is then made to the common wording by which a sum is paid in full and final settlement of all claims which a party has or may have arising from a specified incident or other state of affairs. The author then comments:

“The intention of wording of this nature is plain. It is intended that the payment should discharge finally all claims that have not merely already been advanced, but also those which might subsequently be advanced in connection with whatever incident or state of affairs had brought the parties into dispute. It follows that the intention of the agreement underlying the use of this
35. The author also states at paragraph 2-11 that the release of an unforeseen claim may be achieved even in circumstances where the common wording has not been expressly used by the parties and refers to the case of Bristow v Grout (1987) CAT 1134 where the compromise of a claim for damages “for the personal injury, losses, expenses and inconvenience arising from the accident” was held to have compromised a claim for further damage as a result of the accident but of which the Claimant was earlier unaware.

36. With those principles in mind I now turn to consider the intention of the parties as to the meaning of the Settlement Agreement.

**Factual background**

37. The factual background to the current dispute is set out in the Statement of Agreed and Assumed Facts and I have summarised some parts of it above.

38. Mr Turner emphasises the fact that in October 2007, to the knowledge of both parties, Point West believed that Mr Da Costa’s complaints about the curtain walling and air conditioning were unjustified and were minor in nature and could be dealt with accordingly. He submits that, objectively, there was no reason for either party to suppose that Point West was considering making a claim against Mivan in October 2007. He says that at no time, prior to the conclusion of the Settlement Agreement, was there any actual dispute between Point West and Mivan in relation to the design or installation of either the curtain walling or the heating and cooling system in Flat 1601 or had Point West intimated a claim or even the possibility of a claim against Mivan for any historic breach of contract in relation to the design and installation of either the curtain walling or the heating and cooling system of Flat 1601.

39. He submits that, by October 2007, more than five years had elapsed since the end of the defects liability period and the date of agreement of the final account and that Point West’s patience with Mr Da Costa had worn out. In those circumstances he submitted that it was entirely understandable that Mivan and Point West should both have been willing to come to terms which would allow Mivan to “walk away” from the site and make financial adjustments which would always have fallen to be made at the conclusion of the contractor’s presence on site.

40. Mr Turner submits that, as set out in Mivan’s initial letter of 15 October 2007, the agreement was one regarding “Mivan’s Final Account” in respect of “all Works carried out, and any corresponding outstanding matters.” He submits that those words direct attention to matters which are outstanding and correspond with the final account. He refers to the next paragraph in the letter of 15 October 2007 that the agreement comprises a further payment of £50,000 “representing the final assessment of monies due or to come due” and then continues “thus achieving full and final settlement in respect of the above works, together with any and or outstanding matters.” He submits that whilst the nature of the full and final settlement is not defined, it plainly encompasses a financial settlement of the
monies contractually payable one way or the other and is consistent with the contractual arrangements for payment found within the terms of the Building Contract.

41. He submits that this is the only interpretation which properly reflects the fact that the full and final settlement is expressed as being a consequence of the payment rather than a separate and discrete provision of the Settlement Agreement. He says that in determining what were the “outstanding matters” the answer is that it included payment to Mivan and the further remedial works for which Fenestral had quoted but which had not been carried out and which Mivan would otherwise have been obliged to undertake as part of a continuing obligations to rectify defects.

42. In relation to the final provision that “this final agreement concludes Mivan’s responsibilities and obligations in respect of their Works at the above Project”, he submits that the agreement brought Mivan’s responsibilities and obligations to an end in relation to the continuing obligation to rectify defects so that, in short, they were able physically to walk away from the site. He submits however, that there is no suggestion on the face of the letter that it was seeking to create a discharge from any accrued liability for breach of contract by Mivan.

43. He submits that this is also consistent with Mr Goldstone’s letter of 18 October 2007 where he said “I am not looking to you to do any further remedial works”. Mr Turner submits that this should be interpreted as being a release in relation to Mivan’s obligations to carry out remedial works but not a discharge from liability for breach of contract by Mivan.

44. As a result Mr Turner submits that the true scope of the Settlement Agreement was to effect the quantification of a final account (whether payable for works outside the original Building Contract or as a variation to the final account agreed for the Building Contract in 2002) and to release Mivan from any continuing obligation to carry out further works. He submits that the agreement does not refer to, let alone discharge, Mivan from any existing liabilities and that was a matter which was simply not addressed by the parties at the time, whether by the Settlement Agreement or otherwise. He submits that this position was understandable given that no claim had been intimated by Point West against Mivan; that both parties were proceeding on the basis that Point West believed any outstanding problems to be minor and easily resolved; that there was no dispute between Point West and Mivan in relation to existing liabilities which the parties might have wished to compromise and that the parties’ focus was on bringing Mivan’s presence at site to an end and making the necessary financial adjustments to bring that about. He submits that if either party had intended that the Settlement Agreement should operate as a discharge or release from accrued liabilities for breach of contract then, as set out by Lord Bingham and Lord Clyde in BCCI, that would have been spelt out.

45. On behalf of Mivan Mr Brannigan refers to the agreed fact that, at the time of the Settlement Agreement, Point West and Mivan knew that there were unresolved defects with the curtain walling and the heating and cooling system in Flat 1601. He submits that on that basis Mivan would be released from further responsibility
for such defects even if the parties had only agreed “a full and final settlement in respect of the above works”, that is all works on site.

46. However Mr Brannigan submits that the parties went further and in the knowledge that the Bermuda Trust was alleging defects and Point West had expressed a wish “to do a deal to enable Mivan to walk away” the parties agreed that it was a “full and final settlement in respect of the above works, together with any and all outstanding matters” in circumstances where the only outstanding matters were the defects now complained of.

47. He also relies on the fact that the parties stated that “this final agreement concludes Mivan’s responsibilities and obligations in respect of their Works at the above Project” which is directly inconsistent with Point West’s assertion that the Settlement Agreement left Mivan with responsibilities and obligations in relation to the defects in their works.

48. He also refers to the request in the letter for Mivan to provide assistance “in the legal aspects of the case on Flat 1601” and that this might “involve some time on the part of Mivan along with the production of the necessary documents” and the subsequent words in this context “I am not looking to you to do any further remedial works”. Mr Brannigan submits that this wording is directly inconsistent with the assertion now being made that, on an objective basis, the parties were agreeing that Mivan would retain responsibility for the defects.

49. In summary, Mr Brannigan submits that applying the words used in the letter in their ordinary commonsense way and against the commercial issues facing the parties, the parties were agreeing as part of a full and final settlement that Mivan would accept less money, would help Point West in its litigation with Mr Da Costa in respect of Flat 1601 and Mivan would be released from liability for the defects forming the subject matter of the litigation.

50. In relation to the distinction drawn by Mr Turner between liability to make good defects and liability to pay damages for breach of contract in relation to defects, Mr Brannigan submits that it is entirely inconsistent with Mr Goldstone’s statement in the letter of 18 October 2007 for Point West now to say that, whilst they were not looking to Mivan to do any further remedial works, they were looking to Mivan to pay damages for the costs of those remedial works. Rather he submits that the settlement agreement precludes Point West from seeking damages or specific performance in relation to the defects forming the subject matter of the Counterclaim in the County Court Proceedings or for any other defects in the Point West development which were patent as at 18 October 2007.

**Decision**

51. As set out above, the background to the Settlement Agreement was that the Building Contract had reached practical completion in 2001 and the final account for the Building Contract was agreed in 2002. However there was still work carried out after the agreement of the final account which, whether under a separate contract or a variation to the Building Contract, was partly remedial work for which Mivan was responsible and partly additional work in relation to “base
build” work carried out under the base contract. The work carried out by Mivan under the Building Contract included both the installation of the curtain walling and the installation of a heating and cooling system.

52. By October 2007 there were defects both in the curtain walling, in the form of leaks and also in the heating and cooling system in terms of failure of performance. Point West had decided that they should commence litigation against the occupier of Flat 1601 and, in order to pursue that litigation, required the assistance of Mivan.

53. It is against that background that the letters exchanged by the parties in October 2007 have to be construed. It is common ground that the Settlement Agreement settled the final account, whether a separate account or an amendment to the July 2002 Final Account. It is also common ground that the agreement brought to an end Mivan’s rights and obligations in relation to the performance of remedial work to remedy defects in their works. The question is whether the Settlement Agreement also released Mivan from its liabilities for the defects.

54. Point West submits that the Settlement Agreement did not include a settlement of any liability to pay damages in respect of defects which the Defendant had or would in the future have under the Building Contract whereas Mivan contends that it did release Mivan from liability for the defects claimed in the County Court Proceedings and for any defects patent as at 18 October 2007.

55. In my judgment the agreement released Mivan from defects which were patent at 18 October 2007. I reach that conclusion for the following reasons.

56. First, by the time of the Settlement Agreement the outstanding matters were the question of payment to Mivan and defects. The financial matters were settled on the basis of the statement from Mivan of 28 September 2007, referred to in the letter of 15 October 2007. That statement was based on Mivan being responsible for work carried out by Fenestral up to the autumn of 2004. So far as defects were concerned there was further remedial works to the curtain walling and, in particular, a quotation by Fenestral for £6,468 plus VAT for the works itemised in their fax of 18 April 2006. There was also the question of work to the heating and cooling system in Flat 1601 which had been the subject of the report sent to Mr Wilson in August 2007 and forwarded by him to Mr Graham. In the recommendations in section 4 of that report, work was included which was said to be necessary to provide improvements to the installed system.

57. In my judgment, the outstanding matters therefore included liability for the defects in the curtain walling or the heating and cooling system which were evidently patent at 18 October 2007. Those were outstanding matters “corresponding” to “all works carried out” by Mivan, as set out in the letter of 15 October 2007.

58. Secondly, whilst the Settlement Agreement made provision for a further payment which represented the final assessment of monies due or to become due to Mivan “thus achieving full and final settlement” in respect of issues of payment for “all Works carried out”, it was also intended to achieve full and final settlement “in respect of the above works”, that being all Works carried out, “together with any
and all outstanding matters”. That combination of phrases, in my judgment was intended to take the settlement further than a financial settlement and was intended to refer to defects which were “outstanding matters”. As set out in the third paragraph of the letter of the 15 October 2007, it was intended therefore to form a full and final settlement in respect of any and all outstanding defects.

59. Thirdly, that conclusion is strongly supported by the fourth paragraph of the letter of 15 October 2007 which confirms that the agreement “concludes Mivan’s responsibilities and obligations in respect of their Works at the above Project”. That clearly envisages a full and final settlement in respect of Mivan’s responsibilities and obligations in respect of defects and, in the context of the letter read as a whole, that refers to outstanding defects, being defects which were patent at 18 October 2007.

60. Fourthly, Mr Goldstone’s letter of 18 October 2007 shows that Point West had in mind the necessity for Mivan to provide assistance in the legal proceedings which were just starting against the Bermuda Trust. Mr Goldstone accepted the terms of the letter of 15 October 2007 and was keen for Mivan to assist in those legal proceedings. He was keen to emphasise that he was not “looking to” Mivan to do any further remedial works. Whilst, as Mr Turner submitted, that could be argued to be merely a release from an obligation to make good defects but not from the underlying liability for the defects, I do not consider that this is a possible interpretation in the light of the background and the context of the October 2007 letters. At that stage, as set out in the agreed facts, Point West was of the view that the complaint in relation to Flat 1601 were unjustified or minor in nature and could be dealt with accordingly and that Point West’s prospects of success in the claim in the County Court Proceedings would be potentially hampered by the fact that Point West did not have all the documentation needed to prove its case and it therefore wished to have Mivan’s assistance. I agree with Mr Brannigan that, in that context, when Mr Goldstone said “I am not looking to you to do any further remedial works” it is quite impossible to read that as saying but I reserve the right to look to you to pay the costs of carrying out further remedial works.

61. Therefore, in summary, I consider that the Settlement Agreement was intended to bring to an end Mivan’s responsibilities and obligations in respect of any and all outstanding matters including defects which were patent at 18 October 2007, thereby covering outstanding payment matters and outstanding defects in all of Mivan’s works.

62. In relation to the two disputed assumed facts I do not consider that the relevant assumptions make any difference to the outcome. Whether there was a separate contract for the further works after July 2002 or whether that was a variation to the Building Contract, the Settlement Agreement covered all works that were carried out under the Building Contract or under a further contract. It applied to the work carried out rather than a particular agreement under which that work had been carried out.

63. In relation to the disputed assumption that the parties were fully aware in October 2007 that “There was something fundamentally remiss with the curtain walling” and “There were obvious indications that [Point West] would have to replace the
whole curtain walling system”, that assumption seems to me to run contrary to the agreed fact in paragraph 78 of the Statement of Agreed and Assumed Facts that Mr Wilson’s view, on behalf of Point West, was that the complaints by Mr Da Costa were unjustified and/or minor in nature.

64. However, even if both parties had been aware that there was something fundamentally remiss with the curtain walling and there were obvious indications it had to be replaced then I do not consider that would alter the result. It is evident that Point West was of the view that proceedings should be commenced against the Bermuda Trust and that, in order to pursue those proceedings properly, they needed the assistance of Mivan. In that context they were prepared to release Mivan from their liability for the defects and, whilst that may seem a commercially undesirable approach in that assumed context, it is not for the Courts to rewrite or improve the agreement or make an agreement which the parties themselves did not make.

65. It follows that, whichever of the disputed assumptions are taken, my decision on the construction of the Settlement Agreement would not be altered.

66. It follows that, in principle and subject to any comments on the particular wording, I would make a declaration similar to that proffered by Mr Brannigan, that is in the following terms:

The Agreement between the Claimant and Defendant in October 2007 included a settlement of any liability of the Defendant for and precluded the Claimant from seeking damages or specific performance in relation to:

(a) The defects forming the subject matter of the County Court proceedings CHY08472; and
(b) Any other defects in the Point West Development which were patent as at 18th October 2007.