Negotiating & Documenting Out of Court Settlements

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Thursday 18 March 2009

Introduction

Having reached an agreement for settlement of proceedings, the last thing that the parties will want is a secondary dispute over either the terms of the settlement or the performance of the settlement agreement. To ensure clarity, the terms of the settlement are reduced to writing. This seminar will look at some of the issues that might arise in reducing a settlement agreement to writing.

An example of a settlement gone wrong

In preparing this paper and preparing for this workshop I was searching for some sample facts to use for the purpose of facilitating discussion. While I was contemplating inventing something, I came across the Victorian case of *Osborn v McDermott* [1998] 3 VR 1. This case was cited as a "horror story" in the section of Ritchie's Uniform Civil Procedure dealing with the consequences of an opponent's failure to honour a settlement agreement.

Briefly, that case involved an agreement to repair a Bentley motor vehicle that was reached in 1986. Unfortunately by 1992, the repair had not been finished and proceedings were commenced. There were issues about the identity of the contracting party as well as a cross claim for unpaid work and the inevitable seeking of orders for the return of the car.

In February 1993 and agreement was reached at a pretrial conference to settle the matter and Osborn's solicitors sent a letter in the following terms to the solicitors for McDermott:

> *"We confirm that at the pre-trial hearing in the second of the above matters on 12 February 1993, both matters were settled upon payment to Mr McDermott (or his nominee) of $18,000 inclusive of costs. Our clients have sent us the sum of $18,000. Our clients propose to collect the vehicle on Tuesday 23 February 1993. They propose to have it sent by TNT to Sydney. They would appreciate it if the*

> *motor and body of the vehicle could be at one address. We understand that the motor and body had been stored separately. We would appreciate receiving release for perusal and execution. Our clients desire a clear statement to the effect that the whole of the vehicle, and/or its replacement parts will be available to them, in case it transpires that some parts have been inadvertently stored elsewhere and overlooked."*

Issues arose in the collection of the car and the matter ultimately ended up in the Victorian Court of Appeal.

> Phillips JA said (at 3 – referring to the terms above) that: "*It might have been thought that this would be the end of the dispute between the parties over the restoration of the Bentley motor car. Unfortunately, it was but the start of a dispute over the settlement. That has led first to a hearing in the County Court in October 1994 and now to a hearing in the court of Appeal - some three years after that pre-trial conference in February 1993 when agreement appeared to have been reached*."

The issue on appeal was whether the agreement was a mere accord executory (which would not discharge existing rights and duties) or whether it was a compromise by way of accord and satisfaction (which does operate as a discharge). The Court found that it was an accord executory, but Phillips JA (at 11) said: "...*it would surely be in the best interests of the parties if their legal advisers saw to it, when settling litigation, that the intended consequence upon default was clearly expressed and not left to implication*."

Judgment/Order or Agreement?

The first issue that the parties will have to consider is whether they intend to consent to orders of the Court or whether they would prefer to have a separate binding inter-parties agreement. It is my experience that litigants are often reluctant to consent to a judgment and often prefer to have a separate agreement, however, it is also the case that a judgment by consent can be appropriate in some cases.

One of the issues that may arise when it is agreed to enter judgment is whether the proposed orders are within the jurisdiction of the Court. The parties may agree something that is

beyond the power of the court to order. In those cases an agreement is clearly necessary. A party may also find a judgment to be an attractive option because it can then avail itself of the enforcement procedures of the court if the terms are not honoured.

It is also interesting that under the Uniform Civil Procedure Rules ("UCPR") the facility for a document entitled "terms of settlement" appears to have disappeared, although it is a practice that appears to be still followed in some courts. The UCPR clearly contemplates that orders and judgments can be given by consent, with rule 36.1A providing:

> **(1)** The court may give judgment, or order that judgment be entered, in the terms of an agreement between parties in relation to proceedings between them.
> **(2)** Unless the court, for special reasons, otherwise orders, the court must refuse to give judgment, or order that judgment be entered, in terms that restrict, or purport to restrict, any disclosure of the terms of the judgment or order.
> **(3)** Subrule (2) does not limit the effect of any agreement between the parties that contains provisions that restrict the parties, or purport to restrict the parties, from disclosing the terms of the agreement or of the judgment or order.

Some features of judgments

A final judgment has a number of effects on subsequent proceedings between the same parties:

(a) First, the original cause of action is extinguished by its merger in the judgment. This applies to both the successful and unsuccessful party. So if a plaintiff's case fails then the plaintiff will be estopped from asserting the existence of the cause of action in the future. This is the doctrine of res judicata;

(b) Second, the judgment bars any further proceedings in respect of successive actions on the same facts (ie the judgment is conclusive of the issues necessary for the decision as well as the decision itself); and

(c) Thirdly, the decision may preclude the parties from raising causes of action and issues in future proceedings which they could and should have raised in the former litigation. This extension of the doctrines of res judicata and issue estoppel is referred to as 'Anshun estoppel'.

Res judicata and consent judgments?

Res judicata arises only from a judgment on the merits. Res judicata does not arise where:

(a) a party discontinues an action; or
(b) accepts a sum paid into court; or
(c) an action has been dismissed for want of prosecution; or
(d) non-compliance with a self-executing order for discovery; or
(e) because the statement of claim fails to disclose a cause of action.

However, a default judgment will give rise to a res judicata, as the judgment is made on the basis of the available evidence, the defendant having foregone the opportunity of putting forward a defence. Similarly, a consent judgment, intended by the parties to dispose finally of the substantive proceedings between them, will give rise to a res judicata.

What is the effect of a dismissal of proceedings?

Section 91 of the Civil Procedure Act provides:

(1) Dismissal of:

(a) any proceedings, either generally or in relation to any cause of action, or

(b) the whole or any part of a claim for relief in any proceedings,

does not, subject to the terms on which any order for dismissal was made, prevent the plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings.

(2) Despite subsection (1), if, following a determination on the merits in any proceedings, the court dismisses the proceedings, or any claim for relief in the proceedings, the plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in that or any other court.

Costs

The general rule (and see UCPR 42.1) is that costs follow the event. Clearly if judgment is going to be agreed (or some other agreement entered) the parties may reach another agreement on costs. Typically this will be that each party pay their own.

When drafting orders it is not uncommon to see “no order as to costs”. In my, perhaps overly pedantic opinion there is a difference between no order as to costs and each party pay their own costs. When there is no order there is simply no order and it leaves the door slightly ajar for a future application in relation to costs. It is much more certain when each party is ordered to pay their own costs.

Deeds

The first very basic question is what is a deed? Halsbury’s Laws of Australia tells us (at [140-1]) that: “*A deed is the most solemn act that a person may perform with respect to a particular property or contract and the form of a deed is that which is laid down by the law from time to time. A deed is an instrument which either of itself passes an interest, right or property, creates an obligation binding on some person, or amounts to an affirmation or confirmation of something which passes an interest, right or property.*”

At common law, there were a number of formal requirements for a deed:

(1) it must be written on parchment, vellum or paper;

(2) it must be sealed; and

(3) it must be delivered.

In NSW, Part 3 of Conveyancing Act (which commences at s38) modifies these requirements. There is also a further requirement of evidence that a party actually intended to execute the instrument as a deed and be immediately bound by it.

Although the distinction is no longer of great importance there was a difference at common law between deeds poll (which is made by, and expresses the intention of, one party or is made by two or more persons expressing a common intention) and indentures (which is made by two or more persons as parties and evidences some form of agreement between the parties). It is clearly the latter that we are discussing in the current context.

When is a deed required?

Once again Halsbury's Laws of Australia discusses (at [140-120]) the various circumstances in which a deed was required under the general law. One of these is for the express release of a right in land, tenements or hereditaments, goods or chattels, or any real or personal action, claim or demand. Halsburys explains:

"*An express release (other than an express release made for valuable consideration) of a common law right of action — for example, arising out of a breach of contract or from an actionable wrong — must be made by deed. An obligation which arises under contract (but does not arise out of a breach of contract) may only be discharged, in the absence of valuable consideration, by deed*."

Elements of a deed

The main elements of a deed are:

(1) the actual description of the instrument;

(2) the date;

(3) the names of the parties;

(4) the recitals;

(5) the testatum, or witnessing part containing the operative words and (and in the case of property conveyances the habendum which describes or limits the estate being conveyed); and

(6) the testimonium, or execution clause.

In drafting a deed it is very important to pay close attention to the recitals. Recitals are the statements of fact that are necessary to explain the act or agreement that is being evidenced by the deed. The recitals are effectively a statement of agreed facts which form the basis for the agreement. Consequently, the parties are estopped from later denying the facts where it is clear that all parties have mutually agreed that a fact is true. It may be that the estoppel is limited to one party if it is clear that the intention was that only one party admitted the fact.

Effect of a deed

The execution of a deed is consideration in its own right (ie it is an exception to the contract law requirement that promises require consideration to be enforceable). Once a deed has been validly executed and subsequently delivered by the party making the deed, this party becomes conclusively bound by the provisions of the deed and cannot thereafter resile from it or recall it.

A deed takes effect on the date of its delivery and not the day on which it is stated to have been executed, although there is a presumption that a deed is delivered on the date of execution.

The Final Words - "Plain English"

This is not a seminar on legal drafting as a discipline in its own right. However, all draftspersons should express themselves with brevity and clarity. I don't want to say anything else about drafting other than to refer you to the example in Appendix 1. That example is taken from Hunt "Drafting: Plain English versus Legalese", Waikato Law Review 1995 and is based on a precedent contained in Woolaston, F L *Woodfall's Law of Landlord and Tenant* (1840). Good drafting does impact on the ease of interpretation of a document.

APPENDIX 1

EXAMPLE OF PLAIN ENGLISH DRAFTING

Some commonsense plain English drafting can transform the following agreement for the building of a house from this

> **MEMORANDUM OF AGREEMENT**, made and entered into this second day of May, 1994, between John Smith of the one part, and Mary Jones of the other part, as follows, viz. **THE SAID** Mary Jones, for the consideration hereinafter mentioned, doth agree with the said John Smith that she, the said Mary Jones, or her assigns, will, within the space of three calender months next following day of the date hereof, find and provide all fit and proper materials and things, and erect, build and finish, in a good, sound, substantial, and workmanlike manner, one brick house or building on a certain piece or parcel of ground, situate in 41 Matipo Ave, Rotorua, according to the plan thereof hereunto annexed. **AND THE SAID** John Smith for the consideration aforesaid, doth agree with the said Mary Jones well and truly to pay or cause to be paid unto the said Mary Jones, the sum of 60,000 dollars of lawful money of New Zealand, in manner following; that is to say, 20,000 dollars, part thereof, as soon as the foundation of the said house shall be laid, 20,000 dollars other part thereof, when the brick work of the said house shall be carried up and covered in, and 20,000 dollars, being the remainder thereof, in full payment of and for building the said house, when the same shall be completed inside and out fit for occupation, subject to the approbation of Jill Black, as surveyor of the said John Smith: **AND LASTLY, THE SAID** John Smith and Mary Jones do further to agree to perform for each other, with all convenient speed, this memorandum of agreement, in penalty of 500 dollars for each individual week, for any failure by more than one week, of the true performance of the erecting, building and finishing, in a good, sound, substantial, and workmanlike manner the aforesaid house, or failure to pay, or failure to pay part thereof, for building the said house. **AS WITNESS, &c.**

Into this:

> Contract for Building a House:
>
> **Date:** May 2, 1994.
>
> **Between:** John Smith the landowner and Mary Jones the builder.
>
> **To:** Build a house at 41 Matipo Avenue, Rotorua.
>
> **Conditions of the contract:**
>
> 1. Mary Jones agrees to build a house for John Smith by August 2, 1994.
> 2. The house will be built to the specifications of the attached plan.
> 3. John Smith will pay Mary Jones 60,000 dollars for building the house.
> 4. The payment will be in three instalments of 20,000 dollars.
>
> i. John Smith will pay the first instalment when the foundations have been laid.
>
> ii. John Smith will pay the second instalment when the brick work is completed and the house is covered in.

iii. John Smith will pay the third instalment when the house is completed to a standard which is acceptable to Jill Black.

5. If John Smith does not pay an instalment within one week from the day it is due a penalty will be incurred. The penalty is incurred every week an individual instalment remains unpaid. The penalty is 500 dollars per week per unpaid instalment.

6. If Mary Jones does not complete the house within one week from August 2 1994 a penalty will be incurred. The penalty is incurred every week the house is not completed. The penalty is 500 dollars per week.

Signed by John Smith & Mary Jones etc.