SETTLEMENTS

Recent pronouncements for litigators

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Two recent court pronouncements – one a case and the other a District Court direction to practitioners – need to be kept in mind by all litigation practitioners. Failure to heed these pronouncements may lead to avoidable costs and delay.

As a solicitor in a case, if settlement terms have been agreed on and the other side does not consider itself bound, steps can always be taken to have them honour the valid agreement. In the recent case of *AW Ellis Engineering Pty Ltd v Malago Pty Ltd* [2012] NSWSC 55, the NSW Supreme Court confirmed that a party who agrees to a settlement, but who has not yet signed consent orders, cannot avoid the agreement. The importance of this is twofold: first, you can hold an opponent to a settlement properly made, and second, to ensure you don't proffer an agreement that binds your client before they think they are bound. This knowledge is both a sword and a shield.

In order to ensure your settlement document is effective from the start, the checklist in the recently issued statement from the District Court, "Settlements", should be borne in mind. The District Court notes, "An increasing number of settlement consent documents are being rejected by the Court. This results in delay, further costs and sometimes unnecessary court appearances." Thus, practitioners should check that when confirming settlement agreements in court orders the new court note has been satisfied.

Settlement agreements

An agreement to settle proceedings is a contract. Provided the agreement satisfies the requirements of a contract – intention to create binding legal relations, certainty of terms and consideration – it will bind the parties. Even if the agreement of the party is fleeting, provided they agreed at the relevant time (that is, there was a meeting of the minds) they will be held to their agreement.

In *AW Ellis Engineering Pty Ltd v Malago Pty Ltd,* the defendant sought to avoid a settlement agreed by legal representatives at mediation and reduced to writing as a heads of agreement. The parties attended and were involved in the mediation.

An argument was put that an agreement is not binding if it is described as a heads of agreement, as it is an agreement to agree. Sackar J rejected this argument,[1] and went on to hold both parties were bound to the agreement reached at mediation.

In *Harvey v Phillips* (1956) 95 CLR 235 a party to proceedings overtly resisted settlement proposals. She was encouraged to settle the dispute by the judge, senior and junior counsel of both sides, her solicitors and a trusted friend. Finally, overborn by the pressure, she agreed to a settlement. Senior Counsel of both parties executed the terms of settlement. The court, informed of the settlement, congratulated the parties on reaching the settlement but did not enter the terms of settlement as an order or judgment. Immediately after the court was adjourned, the plaintiff changed her mind and disputed the effectiveness of the settlement. Her appeals ended up in the High Court,[2] which said a settlement agreement can only be set aside on a ground that "would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is require, duress, mistake, undue influence, abuse of confidence or the like".[3]

In *Singh v Secretary, Department of Family & Community Services* [2001] FCA 1281 the full court of the Federal Court interpreted and applied *Harvey v Phillips* as authority for the proposition that the court has no jurisdiction to allow a party out of his settlement agreement where that party cannot establish grounds necessary to render a contract void or voidable.[4]

The full court said there are relevantly two situations where it will order the contract as void:

☐ before formal entry of judgement – where the court has judicial discretion to set aside a compromise unless it is "made within the actual, as well as the apparent, authority of counsel, a court does not appear to possess an authority to rescind it or set it aside";[5] or

☐ after entry of formal judgment – where "the existence of a ground sufficient to render a simple contract void or voidable, or to entitle the party to equitable relief for illegality, fraud, non-disclosure, duress, mistake, undue influence, abuse of confidence or the like".[6]

Therefore, before the formal entry of judgment a court cannot "intercept" the settlement if the solicitor or counsel were acting within the actual, or apparent, authority. This will most often be the case and courts adopt this approach, in part, because the

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Checklist of matters to take into account in drafting a settlement agreement.

☐ Form – use Form 44 (Consent judgment or order).

☐ Identity of parties – the names of the parties must be identical to that used on the originating process and their details must be included on the form.

☐ Verdict – absent special circumstances, it is unnecessary and inappropriate for there to be a verdict against any party.

☐ Multiple defendants – make clear against which defendant(s) any judgment is to be entered. Also be clear on the amount.

☐ Unnecessary orders and notations – review the draft orders to ensure all orders are appropriate, especially if the plaintiff is a minor.

☐ Finalisation of entirety of proceedings – a settlement should either be a partial settlement or dispose of the entirety of the proceedings against all parties.

☐ Cross-claims – do not overlook cross-claims.

☐ Signatures – the original signatures of the parties authorised by r.4.4 of the Uniform Procedure Rules 2005 is required.

☐ Dismissal – orders should provide for the dismissal of the proceedings or of the proceedings commenced by the statement of claim/cross-claim. ☐

The full text of the District Court note "Settlements" can be downloaded from tinyurl.com/7r4bmbs.

other party is entitled to rely on the bargain made.[7]

This was the position that his Honour took in *AW Ellis Engineering Pty Ltd v Malago Pty Ltd* in declaring the settlement agreement was a binding contract and granted specific performance. It was the primary relief the plaintiffs sought but in the alternative they also sought an order that the defendant execute the deed of settlement. This option should always be considered but is less desirable than seeking specific performance of the declared contract. It is less desirable because it will likely lead to further argument regarding the extent to which the terms of the deed of settlement deviates from the settlement agreement. In *AW Ellis Engineering Pty Ltd v Malago Pty Ltd*, the additional cost and effort occurred via disagreements over the settlement deed.

"Parties may be held to an agreement to settle if the requirements of a binding contract are present – nothing about the nature of proceedings makes the bargain less susceptible to these principles of contract."

In short *AW Ellis Engineering Pty Ltd v Malago Pty Ltd* makes plain that parties may be held to an agreement to settle if the requirements of a binding contract are present – nothing about the nature of proceedings makes the bargain less susceptible to these principles of contract. Be conscious of them when negotiating in litigation.

District Court statement

The District Court has recently published a one-page document (see box) which provides a checklist of nine items that cause the court concern. It is instructive to keep a copy of the actual statement for reference whenever a matter is to be settled.

Although all items of the statement are important, and should read, one particular item is worthy of further discussion. In entering a settlement agreement, it is open to unrepresented litigants to execute the document themselves, but if represented by a solicitor it is for the solicitor to sign. Consequently, it is also not for the barrister to sign. This is highlighted at item 8 of the "Settlements" statement. It arises from r.4.4 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR).

In most cases, the requirements of r 4.4 of the UCPR are honoured more in the breach than the observance but the District Court's issue of the "Settlements" statement, and the mere fact that the UCPR provide for it, suggest we should all be aware of this provision. □

ENDNOTES

1. *AW Ellis Engineering Pty Ltd v Malago Pty Ltd* [2012] NSWSC 55 at [96]-[113] and, especially, at [114]-[116].
2. *Harvey v Phillips* (1956) 95 CLR 235 per Dixon CJ, McTiernan, Williams, Webb & Fullagar JJ.
3. Ibid at 243-4.
4. *Singh v Secretary, Department of Family & Community Services* [2001] FCA 1281 per Beaumont, Kiefel & Hely JJ at [8]-[10].
5. Ibid at [9].
6. Ibid at [10].
7. Above n.2 at 244. □