Traps in settling litigation

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It is an everyday occurrence in courts across Australia: parties to litigation, or their legal representatives, settle proceedings. The agreement by which the proceedings are settled is a contract. If it is a binding agreement one of the parties can hold another party to the promises of that agreement. As you would expect, the cases that make this clear have involved one of the parties trying to avoid the terms of any settlement agreement.

It is instructive to consider these cases due the regularity in which we will find ourselves entering settlement agreements for our clients or, they entering an agreement themselves, doing so in light of our advice and through our representation.

Who should execute the document?

Before considering the cases that confirm the settlement agreement can bind the parties, it should be noted that 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. Consequentially, it was also not for the barrister to sign (though this has been amended by the *Uniform Civil Procedure Rules (Amendment No 55)* 2012 (NSW) item 3).

This requirement arises from r 4.4 of the *Uniform Civil Procedure Rules* 2005 (NSW) (the "Rules"). This rule is picked up in the recently issued statement from the District Court, *Settlements*. It pays to read that statement in full, as it discusses many do's and don'ts in the District Court, but for this discussion item 8 of the statement is relevant. It provides:

> SIGNATURES: The consent judgment/orders must contain the original signatures of the parties authorised by r 4.4. R 4.4 does not include counsel.[1] It must be clear as to the party or parties on whose behalf the solicitor is signing (eg 'for the plaintiff and 1st cross defendant').

From the writer's experience the requirements of r 4.4 of the Rules is honoured more in the breach than the observance. But the District Court's issue of the *Settlements* statement, and the mere fact that the Rules provide for it, suggest we should all be aware of this provision.

Settlement Agreements

As stated, 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.

[1] This would be overtaken by the 2012 amendments.

Even if the agreement of the party is fleeting, provided they agreed at the relevant time (that is, a meeting of the minds) they will be held to their agreement. 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 led to the High Court,[2] which said (at 243-4):

> The question whether the compromise is to be set aside depends upon the existence of a ground which 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 required, duress, mistake, undue influence, abuse of confidence or the like. The rule appears rather, from the positive statements of the grounds that suffice (cf. *Halsbury's Laws of England,* vol. 26, 2nd ed., pp. 84, 85); but there is a dictum of *Lindley* L.J. which is distinct enough: " … To my mind the only questions is whether the agreement on which the consent order was based can be invalidated or not. Or course if that agreement cannot be invalidated the consent order is good": *Huddersfield Banking Co. Ltd. v Henry Lister & Son Ltd.*(1).

The Full Court of the Federal Court has 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. In *Singh v Secretary, Department of Family & Community Services* [2001] FCA 1281 at [8]-[10] the Full Court[3] said:

> The relevant principles for present purposes were explained in *Harvey v Phillips*. The High Court there distinguished between two possible situations, as follows: [sic]
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> One is the situation which exists before the formal entry of judgment. Here, the Court possesses a judicial discretion to set aside a compromise and to intercept that entry, for instance, in the event of an injustice arising by reasons of misapprehension or mistake made by counsel in consenting to an order. This discretion may be exercised notwithstanding that there were not grounds sufficient to invalidate a contract under general law. But in the case of a compromise 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 (at 242-243 [of *Harvey v Phillips*]).
>
> The second situation is after the entry of formal judgment. Here (as in the case of a compromise entered into within counsel's actual and apparent authority), the question whether the compromise is to be set aside depends upon 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 (at 243-244 [of *Harvey v Phillips*]).

[2] Dixon CJ, McTiernan, Williams, Webb & Fullagar JJ
[3] Beaumont, Kiefel & Hely JJ

Thus, whether the consent orders are entered or not, the court has no authority to set aside the parties agreement where there is no misapprehension or mistake in consenting to the order. If the party's legal representative has actual or apparent authority to enter the settlement agreement the party will be bound.

This is, in part, because the other party is entitled to rely on the bargain made. So much was discussed by the High Court in *Harvey v Phillips* at 244:

> The issue is one which must be considered from the defendant's point of view as well as from hers. When the defendants accepted the compromise requiring them to pay £4,000 they believed that thereby they were putting an end to the litigation. They acted upon the statement made by her counsel that the compromise was made with the authority of the plaintiff. Once it appears that the plaintiff did in fact give an assent which had not been withdrawn up to the moment when the terms of settlement were signed, it can be nothing to the point to say afterwards to the defendants that it was the result of her real desires or her judgment being overborne by advisers, whatever may have been the degree of moral pressure she felt.

In a case in which the writer was recently involved an argument was put that an agreement is not binding if it is described as a "Heads of Agreement", whether or not the terms of the agreement bear this out. They submitted that an agreement containing the heading "Heads of Agreement" makes it an agreement to agree and is thus not binding. This argument was recently rejected by Sackar J in *A W Ellis Engineering Pty Ltd v Malago Pty Ltd* [2012] NSWSC 55.

In *A W Ellis Engineering Pty Ltd v Malago Pty Ltd* a mediation attended by the parties and their legal representatives led to a document titled "Heads of Agreement" to be executed by the parties. Clause 1(g) of the heads of agreement provided:

> Without affecting the binding nature of these Heads of Agreement the parties within 7 days to execute a formal document or documents as agreed between their respective solicitors to carry out and express in more formal terms and additional terms as these Heads of Agreement. The formal agreement is to contain a provision for monthly payments of 21.6% share of gross Marina berth income based on a reasonable estimate of income for that year

The legal representatives attempted to finalize the subsequent formal agreement; it was to no avail. The plaintiffs there contended that there was a binding arrangement whether or not a formal document was executed; the defendants contended that the heads of agreement could not as a matter of law be a binding and legally enforceable agreement and that the document on its proper construction was incomplete and uncertain in its terms.

Whilst discussing the general principles applicable in this area (at [96]-[113]) Sackar J said the following:

> [96] Whether or not the parties here intended the agreement to be immediately binding is to be determined objectively having regard to the language contained in the Heads of Agreement. The High Court has repeatedly affirmed this proposition [citations omitted].

> [97] The Heads of Agreement must of course be read in the light of the surrounding circumstances.
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> …
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> [102] If the terms of such a document indicate that the parties intended to be bound immediately, effect must be given to it. Construction of a document may make it sufficiently clear that the parties were content to be bound immediately by the terms to which they had agreed, notwithstanding they contemplated further documentation.

After setting out the principles on this issue, his Honour concluded as follows at [114]-[116]:

> In my opinion the terms of the Heads of Agreement indicate in plain and unequivocal language that the parties intended to bind themselves immediately upon signing the document. I am also of the view that the Heads of Agreement contain all the relevant and essential terms required for a legally binding and enforceable contract.
>
> I am simply unable to accept any of the arguments advanced by the Defendants in opposition to such a conclusion. I am entirely unpersuaded that the language chosen by the parties could objectively be viewed as anything other than evincing an intention to be immediately bound, subject to more formal documentation including the potential for additional terms to be settled by the parties' respective solicitors.
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> There are a number of pointers in the language in the Heads of Agreement which clearly indicate that the parties were intended immediately to conclude an agreement. First, the description "Heads of Agreement" is a very clear indicator in and of itself. …

The relief Sackar J gave in *A W Ellis Engineering Pty Ltd v Malago Pty Ltd* was to declare the settlement agreement was a binding contract and to grant specific performance of that contract. This was the primary relief the plaintiffs sought, but in the alternative they also sought an order that the defendant executed 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.

Conclusion

If, having executed the settlement terms as the solicitor in the case, you find yourself in the position where the other side does not consider themselves bound to the agreement, steps can always be taken to have them honour – and be held to – the valid agreement that settled the matter.