SETTLEMENTS and RELEASES

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Table of Contents

This paper was presented on 28 November 2019 at the Howells' List Barristers Continuing Professional Development Breakfast at Owen Dixon Chambers. Revised 4 December 2019.

SETTLEMENTS AND RELEASES

1. INTRODUCTION

Nothing is ever settled until it is settled right.

— attributed variously to Kipling, Lincoln and others.

Most disputes and most litigation settle, so that only a small proportion of cases go to judgment. Cases settle early on, even before issue of proceedings; at mediation; in course of trial (even after judgment is reserved); or, not uncommonly, during the appellate process. In some ways the earlier the better, but some adversarial work is usually needed to progress the dispute to a stage where it can be resolved. The process of litigation serves to articulate and refine the dispute.

Courts actively encourage compromise through orders for mediation (including, in the Commercial Court, a further order for mediation after opening and some evidence) and by the Offer of Compromise procedure, which provides a costs incentive (or deterrent) through the cost differential between a party's actual costs and costs awarded on a standard, or even indemnity, basis.

2. OBJECTIVES OF SETTLEMENT

Why settle?

- Gain certainty;
- Avoid delay and costs of litigation;
- Commercial factors, and
- Human factors —
- In short: to get paid, to get property and/or to get peace.

3. FORM OF SETTLEMENT

Settlements are contracts. They usually take the form of Terms of Settlement or, more formally, Deeds of Settlement. If time is short, for example, at the end of a long day mediation, Heads of Agreement may have to suffice.

These days, settlements are almost always in writing, and the product of some time and legal effort, but nowhere near as much as spent in preparing or conducting litigation.

3.1 Heads of Agreement

Care is needed in order to resolve the present dispute and prevent a further dispute arising. Heads of Agreement may suffice that can be done in the time available. If so, beware of *Masters v Cameron*[1] issues ("subject to contract" may mean an immediately

[1] (1954) 91 C.L.R. 353; [1954] HCA 72.

binding contract; a conditional contract that requires execution of a formal contract; or that there is no binding contract).

3.2 Legal Analysis of Terms of Settlement

The best statement of principle is the analysis in *McDermott v Black*[2] per Dixon J. (as he then was). Note the distinctions between accord and satisfaction, conditional satisfaction and accord executory:

(a) An accord is the agreement or consent to accept the satisfaction.

(b) The satisfaction is the settlement itself, i.e. the acceptance by the plaintiff of:

> "something in place of his cause of action … it may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired."

(c) An accord executory is no bar to prosecuting the original claim. Unless and until satisfaction is given, the old cause of action remains and there is no new cause of action.

Depending upon the terms, if the satisfaction is given the original cause of action may be sued upon or the new agreement (i.e. the accord) can be prosecuted. As Dixon J. noted[3]:

> "The distinction depends on what exactly is agreed to be taken in place of the existing cause of action or claim. An executory promise or series of promises given in consideration of the abandonment of the claim may be accepted in substitution or satisfaction of the existing liability. Or, on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate; if the performance, then there is no discharge unless and until the promise is performed."

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[2] (1940) 63 C.L.R. 161; [1940] HCA 4 at 183 to 185.

[3] Ibid.

Accordingly, the words of the deed of settlement or terms of settlement will be carefully scrutinized, in order to identify whether there is an accord executory or an accord and satisfaction. The question is whether there is an immediately enforceable agreement, suggesting an accord and satisfaction, or if the satisfaction is conditional, suspending the original cause of action, but not extinguishing it. See also the more recent (and, so far as the Defendant was concerned, eponymous decision Victorian Court of Appeal decision in *Osborne v McDermott*[4]:

> "Thus, there are three possibilities, not two. First, there is the mere accord executory which, on the authorities, does not constitute a contract and which is altogether unenforceable, giving rise to no new rights and obligations pending performance and under which, when there is performance (but only when there is performance), the plaintiff's existing cause of action is discharged. Secondly, at the other end of the scale is the accord and satisfaction, under which there is an immediate and enforceable agreement once the compromise is agreed upon, the parties agreeing that the plaintiff takes in satisfaction of his existing claim against the defendant the new promise by the defendant in substitution for any existing obligation. Somewhere between the two, there is the accord and conditional satisfaction, which exists where the compromise amounts to an existing and enforceable agreement between the parties for performance according to its tenor but which does not operate to discharge any existing cause of action unless and until there has been performance.
>
> Where there is a mere accord executory, no suit can be maintained upon the compromise unless and until there has been performance, and then suit is ordinarily unnecessary. Upon default in performance, the plaintiff's existing cause of action continues unaffected. With accord and satisfaction, either party may sue upon the compromise, but only on the compromise and for nothing else: the original cause of action has gone. Where there is accord and conditional satisfaction, the plaintiff is bound to await performance and accept it if tendered, but if there be no performance, then the plaintiff may proceed according to general principles called into play when any agreement is repudiated: the plaintiff may either treat the agreement (the accord) as at an end and proceed on his original cause of action; or he may, at his option, sue on the compromise agreement, in place of the original cause of action. Thus, the consequence should there be default in performance varies according to the case and, as indicated by Murphy J. in *Fraser* at 401-402, it would be surely 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."

[4] [1998] 3 V.R. 1 at 10 and 11.

4. CONSTRUCTION OF WORDS OF RELEASE

A recent case in the Supreme Court of Victoria, *Hill v Love*[5] and, on appeal, *Burness v Hill*[6], has confirmed that there are special rules which apply to the construction of words of release in terms of settlement. These special rules lead to a narrow construction of general words of release. The case was analysed by Leeming J.A.[7] in the Equity and Trusts section of the August issue of the *Australian Law Journal*.[8]

4.1 The Facts in *Hill v Love*

The basic facts in *Hill v Love* were straightforward:

(a) Mr. Hill was a solicitor and Mr. Love was his client. Mr. Hill was retained to conduct well-known, long, complex and very expensive litigation for Mr. Love against the State of Victoria and its ministers and instrumentalities.

(b) Mr. Hill took a second registered mortgagee over 275 O'Herns Road, Epping to secure the payment of his costs and disbursements by his client, Mr. Love.

(c) The first registered mortgagee of 275 O'Herns Road was the Commonwealth Bank of Australia. The Bank had similar first registered mortgages over 315 O'Herns Road, Epping and 460 Cooper Street, Epping. Mr. Hill did not have security over 315 O'Herns Road or 460 Cooper Street.

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[5] (2018) 53 V.R. 459; [2018] VSC 29 (Sifris J.).

[6] [2019] VSCA 94 (Kaye, McLeish and Hargrave JJ.A.).

[7] Judge of Appeal, Supreme Court of New South Wales; co-author of J.D. Heydon and M.J. Leeming *Jacobs' Law of Trusts in Australia*, Lexis Nexis, 2016, (Eighth Edition) and J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, Lexis Nexis, 2014, (Fifth Edition).

[8] M.J. Leeming, "Marshalling Securities and Construing Releases in Equity" (2019) 93 A.L.J. 626. See also a Letter to the Editor from D.G. Robertson in the November 2019 issue of the Journal: (2019) 93 A.L.J. 904.

(d) Mr. Love's litigation against the State of Victoria was unsuccessful. He defaulted under the first mortgages to the Bank. Mr. Love also failed to pay the costs and disbursements he owed Mr. Hill.

(e) After Mr. Love defaulted, the Bank sold 275 O'Herns Road as mortgagee. The Bank took the whole of the proceeds of 275 O'Herns Road and there was nothing left for Mr. Hill as second mortgagee.

(f) Mr. Hill then sued Mr. Love in the County Court for approximately $3.75 million for outstanding legal costs and disbursements plus interest thereon.

(g) Mr. Hill and Mr. Love settled the County Court proceeding instituted by Mr. Hill. They did so about a year after the completion of the sale of 275 O'Herns Road, which was the property the subject of Mr. Hill's second mortgage.

(h) The terms of settlement provided for $2.2 million to be paid by Mr. Love to Mr. Hill and provided for a consent judgment in this amount. The County Court gave judgment accordingly.

(i) The issues in the County Court proceeding concerned:

  (i) Mr. Hill's claim for approximately $3.75 million for costs and disbursements;

  (ii) Mr. Love's defences to that claim based on alleged breaches of the Legal Practice Act 1996 or the Legal Profession Act 2004;

  (iii) Mr. Love's counterclaim for unliquidated damages for alleged negligence.

(j) The terms of settlement signed by the parties:

  (i) recited the claim for legal fees, that the claim was denied, that there was a counterclaim and that the counterclaim was denied;

  (ii) recited that:

> "The parties have agreed to resolve this proceeding as follows:"

(iii) contained the following release:

> "In consideration of the parties entering into these terms of settlement, the parties hereby release each other from all claims, suits, demands and actions the parties now have; or but for these terms would in the future have, arising out of this proceeding and the allegations, acts, facts or matters the subject of this proceeding, and the Retainer."

4.2 Marshalling Claim

The facts set out in paragraphs (a) to (e) beginning on page 7 above entitled Mr. Hill to marshal against 315 O'Herns Road and 460 Cooper Street, that is, to be subrogated to the rights of the Bank in relation to the latter properties.

The right to marshal is an equitable right pursuant to which a second mortgagee is allowed (in certain circumstances) recourse to other properties in which the first mortgagee has an interest, that is, to properties over which the second mortgagee does not have security (apart from the marshalling right). The doctrine is the subject of a book by Associate Professor Ali, now of Melbourne University[9], and a chapter in *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*[10]; see also *The Law of Securities* by Sykes and Walker and *Fisher & Lightwood's Law of Mortgage*[11].

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[9] P.A.U. Ali, *Marshalling of Securities*, Oxford University Press, 1999.

[10] Op. cit., supra note 7: see Chapter 11 in Part III.

[11] E.I. Sykes and S. Walker, *The Law of Securities*, The Law Book Company Limited, 1993, (Fifth Edition) at 182 to 185 and E.L.G. Tyler, P.W. Young and C. Croft, *Fisher & Lightwood's Law of Mortgage*, Lexis Nexis, 2005, (Second Edition) at 684 to 689.

Neither Mr. Hill nor Mr. Love (although Mr. Hill was a solicitor and both of them were represented by solicitors) had any knowledge of the doctrine of marshalling at the time of the settlement of the County Court proceeding.

In *Hill v Love*, Mr. Hill sought to vindicate his right to marshal. Mr. Love's trustees in bankruptcy defended the claim and argued, among other things, that the terms of settlement of the County Court proceeding had released Mr. Hill's right to marshal.

4.3 Rules of Construction

As mentioned in paragraph (g) in section 4.1 on page 8 above, Mr. Hill and Mr. Love settled the County Court proceeding instituted by Mr. Hill. The Terms of Settlement signed by them contained the words of release set out in paragraph (j)(iii) on page 9 above. The words of release were of the very wide kind commonly found in terms of settlement. The trustees in bankruptcy argued that the words were wide enough to cover the right to marshal claimed by Mr. Hill. There is no doubt that if they were read very literally, the words of release covered Mr. Hill's marshalling claim.

The Supreme Court at both trial and appellate level rejected the argument that the marshalling claim was released by the terms of settlement. Two approaches to the construction of the words of release were employed by the Court. The first was the general approach to the construction of contracts ordinarily used by the courts and the second involved the special principles applicable to the construction of words of release in terms of settlement.

4.4 General Approach to the Construction of Contracts

As a matter of general principle, a contractual provision is construed by reference to the words used and the objective circumstances, that is, objectively by reference to the text, context and purpose.[12]

In the general approach to the construction of contracts, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.[13] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding[14]:

> "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating"

It may be necessary in determining the proper construction where there is a constructional choice.

In the general approach to the construction of contracts, each of the events, circumstances and things external to the contract to which recourse may be had is

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[12] *Mount Bruce Mining Pty. Ltd. v Wright Prospecting Pty. Ltd.* (2015) 256 C.L.R. 104 at [46] on 116. The High Court said at [52] on 117 that its observations in *Mount Bruce Mining* were not intended to state any departure from the law as set out in *Codelfa Construction Pty. Ltd. v State Rail Authority of New South Wales* and *Electricity Generation Corporation v Woodside Energy Ltd.* (see infra at note 14 for citations).

[13] *Codelfa Construction Pty. Ltd. v State Rail Authority of New South Wales* (1982) 149 CLR 337; [1982] HCA 24 at 352. See also Sir Anthony Mason, "Opening Address", (2009) 25 *Journal of Contract Law* 1 at 3.

[14] *Electricity Generation Corporation v Woodside Energy Ltd.* (2014) 251 C.L.R. 640; [2014] HCA 7; at [35] on 657, citing *Codelfa Construction Pty. Ltd. v State Rail Authority of New South Wales* (1982) 149 C.L.R. 337; [1982] HCA 24 at 350, in turn citing *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 at 995 to 996; [1976] 3 All E.R. 570 at 574.

objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible, on this general approach, is evidence of the parties' statements and actions reflecting their actual intentions and expectations.[15]

In the case of terms of settlement, it is relevant on the general approach to construction, that the commercial purpose of the contract is to resolve a dispute.[16]

In *Burness v Hill*, the Court of Appeal applied this general approach to reach the conclusion that the marshalling right had not been released.[17] Its analysis involved a careful consideration of the words used in the terms of settlement and the way in which the various expressions interrelated. The Court of Appeal emphasized the limitation of the general words used in the release by reference to matters arising out of the proceeding and the retainer. The analysis also involved a careful consideration of the nature of the dispute between the parties on the pleadings in the County Court. These were all objective matters which did not depend on evidence of the actual intention or knowledge of the parties. This approach did not involve any special rules applicable to the construction of words of release.

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[15] *Electricity Generation Corporation v Woodside Energy Ltd.* (2014) 251 C.L.R. 640; [2014] HCA 7; at [35] on 657, citing *Codelfa Construction Pty. Ltd. v State Rail Authority of New South Wales* (1982) 149 C.L.R. 337; [1982] HCA 24 at 352; *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 at 995 to 996; [1976] 3 All E.R. 570 at 574; and see also *FAI Traders Insurance Co. Ltd. v Savoy Plaza Pty. Ltd.* [1993] 2 V.R. 343.

[16] For a recent illustration of these principles in the context of a deed of compromise see *Daswan Australia Pty. Ltd. v Linacre Developments Pty. Ltd. (in liq)* [2018] VSCA 350.

[17] *Burness v Hill* [2019] VSCA 94 at [59] to [70].

4.5 Special Rules for the Construction of Releases

There are three "special principles"[18] applying to the construction of contracts of release. The first two of these come from the common law and the third from equity.

The two common law rules were authoritatively set out by the High Court in *Grant v John Grant & Sons Pty. Ltd*. They are as follows[19]:

(1) general words of release are limited by the recitals in terms of settlement; and

(2) general words of release are limited to the actual dispute between the parties.

These rules were re-stated and applied by the Court of Appeal in *Burness v Hill*.[20]

It will be noted from the words quoted in paragraph (j)(ii) in section 4 on page 8 above that the terms of settlement in *Hill v Love* contained a statement in the recitals that the parties had agreed to resolve the County Court proceeding on the terms set out later in the document. This statement of the purpose of the terms of settlement resulted in the limitation of the general words of release by reference to that purpose in accordance with the first of the two common law principle set out above.

Similarly, the dispute between the parties was defined by the pleadings in the County Court. The terms of settlement recited those pleadings.[21] The application of the second of the common law rules by reference to the matters in dispute between the parties,

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[18] This expression was used by the Court of Appeal in *Burness v Hill* [2019] VSCA 94 at [59] and [70].

[19] *Grant v John Grant & Sons Pty. Ltd.* (1954) 91 C.L.R. 112, [1954] HCA 23, at 123 and 123-124 respectively.

[20] *Burness v Hill* [2019] VSCA 94 at [71], [72] and [80].

[21] See paragraph (j)(i) in section 4 on page 8 above.

which did not include any question of marshalling, again led to the conclusion that the general words of the release should be limited to the particular matters in dispute.

The third special rule is the equitable principle that general words of release do not extend to claims of which the releasor was ignorant. The Court of Appeal, relying on *Grant v John Grant & Sons Pty. Ltd.*[22], held that the trial judge was justified in referring to the subjective intention of the releasor and relying on that lack of knowledge in construing the words of release.[23] As mentioned in section 4 on page 10 above, Mr. Hill (the releasor) and, indeed, Mr. Love, were ignorant at the time that the terms of settlement were signed of the existence of any possible right to marshal. The decision in *Burness v Hill* is, therefore, a very clear re-affirmation that the equitable principle concerns the subjective intention and actual knowledge of the releasor.[24]

4.6 Solemn Composition for Peace

It is also clear, however, that it is possible to provide expressly that terms of settlement will cover claims beyond those presently in dispute between the parties or claims which are unknown to the parties at the time of the terms of settlement.

As Sifris J. said in *Hill v Love*[25], the starting point for the construction of terms of release is the decision of the High Court in *Grant v John Grant & Sons Pty. Ltd*. It has been cited

[22] (1954) 91 C.L.R. 112.

[23] *Burness v Hill* [2019] VSCA 94 at [78]; the trial judge's decision that because of the ignorance of Mr. Hill, it would be unconscionable to allow the trustees to rely on the general words of release is at *Hill v Love* (2018) 53 V.R. 459 at [68] on 473.

[24] See further the extra-judicial comments of Leeming J.A., op. cit., supra note 8, at 629 and 630.

[25] (2018) 53 V.R. 459 at [65] on 472.

and followed repeatedly. Sifris J. also referred[26] to the decision of the Court of Appeal of the Supreme Court of Victoria in *Doggett v Commonwealth Bank of Australia*[27] where the Court said that *Grant v John Grant & Sons Pty. Ltd.* is not authority for the proposition that terms of settlement can never release all conceivable future disputes. Sifris J. accepted that claims and rights are capable of being released even if the releasor is unaware of those claims or rights.[28] The question is whether the words, on their proper construction, produce that result.

In *Grant v John Grant & Sons Pty. Ltd.*[29], the High Court said that:

> "No doubt it is possible *a priori* that the release was framed in general terms in the hope of blotting out, so to speak, all conceivable grounds of further disputes or claims …, whether in respect of matters disclosed by a party against whom a claim might be made or undisclosed, of matters within the knowledge of a party by whom a claim might be made or outside it."

The High Court considered that this situation would fall within the "exception"enunciated by Lord Northington in *Salkeld v Vernon*[30] to the third special rule of construction expounded above[31]. In *Salkeld v Vernon*, Lord Northington said that a Court will give effect to the broad scope of a release in circumstances where the parties have executed a deed on the basis that it reflects their desire for a "solemn composition for peace".

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[26] Ibid. at [66].

[27] (2015) 47 V.R. 302 at [63] on 319.

[28] *Hill v Love* (2018) 53 V.R. 459 at [65] on 472.

[29] (1954) 91 C.L.R. 112 at 129.

[30] (1758) 1 Eden 64; 28 E.R. 608.

[31] See section 4.5 on page 14 above.

In *Pacific Parking Pty. Ltd. v Ryssal Three Pty. Ltd.*[32], the Full Court of the Supreme Court of Victoria noted that the release itself or the surrounding facts may disclose the intent of a solemn composition for peace.

4.7 Differing Results

Doggett v Commonwealth Bank of Australia[33] and *Burness v Hill*[34] are both Victorian Court of Appeal Cases where the continuing authority of *Grant v John Grant & Sons Pty. Ltd.* was confirmed. There is, however, a difference of emphasis. In *Doggett v Commonwealth Bank of Australia*, the Court of Appeal relied on a close analysis of the matters in dispute to arrive at a wide reading of the words of release while *Burness v Hill* involved an application of the special common law rules[35] relating to the narrow construction of words of release, as well as the equitable rule[36] (which applies where the releasor is ignorant of a possible cause of action), to give a restrictive interpretation to the general words employed by the parties.

[32] [1994] VicSC 672 (Unreported 4 November 1994).

[33] (2015) 47 V.R. 302.

[34] [2019] VSCA 94.

[35] Set out in section 4.5 on page 13 above.

[36] Stated in section 4.5 on page 14 above.

5. ENFORCING SETTLEMENT

- Consent Order for striking out with right of reinstatement. A simple breach (e.g. of a payment obligation) may be the subject of summary order made in the same proceeding.[37]
- Otherwise a fresh proceeding is needed.

6. RECENT DEVELOPMENTS AND FUTURE PROBLEMS

- Recent developments in family law. The High Court decision in *Thorne v Kennedy*[38] on Section 90C binding financial agreements entered into under undue influence or in circumstances of unconscionability (usually involving illegitimate pressure, special disadvantage and, most tellingly, contrary to legal advice).
- Advocates' immunity. *Gianarelli v Wraith*[39] does not apply to settlement advice and drafting the terms of settlement: see the recent decision of the High Court in *Kendirjian v Lepore*, but note the powerful — and Victorian — dissent of Nettle and Gordon JJ.A.[40]
- Other considerations:

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[37] *Roberts v Gippsland Agricultural and Earth Moving Contracting Co. Pty. Ltd.* [1952] V.L.R. 555. Note that the summary procedure involves the exercise of the Court's discretion.

[38] (2017) 263 CLR 85; 350 ALR 1; [2017] HCA 49.

[39] (1988) 165 C.L.R. 543.

[40] (2017) 259 C.L.R. 275; 343 A.L.R. 86; [2017] HCA 13. See also *Attwells & Anor v Jackson Lalic Lawyers Pty. Ltd.* (2016) 259 C.L.R. 1; 331 A.L.R. 1; [2016] HCA 16.

(a) Human factors. Practitioners need to be sure of giving parties sufficient time to make a proper decision. A late night mediation involves risks which must be balanced against the risk of losing a deal.

(b) Involving other professionals, in particular where there is a need for tax advice, for example, GST on the settlement sum and CGT with its traps for the unwary when settling claims that involve real property, especially resulting or constructive trust claims.

7. A CHECKLIST FOR SETTLEMENT OF COMMERCIAL DISPUTES

- Names of parties. Are there non-parties to the litigation who are parties to the compromise? If so they need to be separately identified.
- Refer to any extant court proceedings (by proceeding number and names of parties).
- Recitals. Is it enough to refer to the dispute and the pleadings, or are there additional "agreed facts" which should be recited and which will then bind the parties? Is the settlement made within an admission of liability or, more commonly, with a denial of liability?
- Careful expression of payment obligation — who to pay, to whom, how, by when and any agreed indulgence (e.g. 2 days' grace).
- If more than one party is paying, are the obligations joint and or joint and several? Are directors' guarantees desirable?

- Is the settlement inclusive of costs or "plus costs". Are costs to be taxed on a standard basis or indemnity basis. Are extant costs orders covered by the releases?
- Is the settlement a "taxable supply"? Is GST payable? If so who is paying it and should the settlement sum be grossed up?
- Any CGT consequences or stamp duty consequences? If these apply, who is bearing the liability? Should the settlement sum be grossed up?
- Effect of default. Is there a default clause providing for acceleration of payment of the settlement sum? Be careful not to impose a "penalty"[41]. Consent to entry of judgment for the amount owing, together with interest pursuant to statute and costs. Proof of default, e.g. by affidavit of the solicitor for the innocent party.[42]
- Notice of discontinuance, including dispensing[43] with costs consequences of Victorian Supreme and County Court Rules 25.05 and 63.15 or consent order for striking out with a right of reinstatement; or dismissal?
- Releases — immediate or conditional? Are they to be mutual releases? Care is required with use of expressions like "hereby" and "subject to". The writers have seen both in the one release clause.
- Confidentiality and non-disparagement clauses. Salutary effect, at least. Costs consequences of repeated breaches.

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[41] The higher and lower amount or rate mechanism has been upheld by intermediate appellate courts in Australia: see *Arab Bank v Sayde Developments Pty. Ltd.* (2016) 93 N.S.W.L.R. 231; [2016] NSWCA 328 and *Kellas-Sharpe v PSAL Ltd.* [2013] 2 Qd.R. 233; [2012] QCA 371. The question remains open and is unresolved at the High Court level: *Andrews v Australia and New Zealand Banking Group Ltd.* (2012) 247 C.L.R. 205; 290 A.L.R. 595; [2012] HCA 30 and *Paccioco v Australia and New Zealand Banking Group Ltd.* (2016) 258 C.L.R. 525; 333 A.L.R. 569; [2016] HCA 28.

[42] See section 5 on page 17 above.

[43] See section 3.2 beginning on page 5 above for the distinction.

- Statute of Frauds requirements[44], e.g. a settlement relating to interests in land needs to be signed by the land-owner or interest-holder.
- Consideration? Are there mutual promises, which are enough, or is a deed necessary? Particularly in cases of non-parties who are giving a release, a deed is desirable.
- Is one of the parties acting under a disability, so that court approval is necessary? The compromise must be conditional upon the giving of such approval. Who then is to bear the costs of doing so and is a time to apply for such approval desirable?

This list is not exhaustive.

8. FURTHER READING

- Justin Toohey, "Practising Safe Settlements", LPLC Seminar Paper, 7 November 2005.[45]
- Foskett's *Law & Practice of Compromise*.[46]

[44] In Victoria, section 53(1) of the Property Law Act 1958.

[45] https://lplc.com.au/seminar-papers/practising-safe-settlements-november-2005/

[46] Sweet & Maxwell, 2015, (Eighth Edition).