FOLEY'S | LIST

ON THE SAME PAGE:

NEGOTIATING AND DRAFTING SETTLEMENT AGREEMENTS

PRESENTER: Janine Wald

DATE: 25 February, 2015

ON THE SAME PAGE
DRAFTING SETTLEMENT AGREEMENTS

Please Note: The information in this presentation does not constitute legal advice.

JANINE WALD
BARRISTER AT LAW

FOLEY'S | LIST

LONSDALE CHAMBERS

Why settle?

"For plaintiffs and defendant alike, litigation proves a miserable, disruptive, painful experience. Few litigants have a good time or bask in the esteem of their fellows-indeed, they may be stigmatized. Even those who prevail may find the process very costly."

Marc Galanter, The Day After the Litigation Explosion, 46MD.LRev.3, 8-11, 1986

Key areas of discussion

- What is a settlement agreement?
- Settlement agreements that may be set aside
- Calderbank Offers and Offers of compromise under the Rules
- Proportionate liability regime
- How to draft terms of settlement and tips and traps
- Negotiations generally
- Basic checklist in drafting a settlement agreement
- Key questions
- Why settle?

A settlement agreement is a contract

- The usual contractual principles apply
- Terms of settlement may be set aside in appropriate cases.
- See:
  - *National Australia Bank Limited v Koller* [2011] VSC 228
  - *Taylor v Johnson* (1983) 151 CLR 422; 48 ALR 265
  - *Johnson & Ors v AED Oil Limited & Ors* [2011] VSC 94

Why and how to settle

Why settle?

It is in the private interests of the litigants and in the public interest of the prompt and economical disposal of litigation.

- Discourage wasteful and unreasonable behaviour by litigants.

How can proceedings be compromised?

- There are three main mechanisms:
  1. Through the use of a Calderbank offer;
  2. By the acceptance of an offer of compromise under the Rules of Court; and
  3. As a result of a negotiated agreement (at mediation or otherwise) which is usually evidenced in written terms of settlement.

Statutory encouragement to resolve

- Section 131 (1) of the *Evidence Act 1995*: communications in settlement negotiations.

- Consider the overarching obligations in the *Civil Procedure Act 2005*: to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

Calderbank Offers

- Calderbank offers are not simply used to encourage a settlement.
- Calderbank offers (like offers of compromise) are an excellent strategic mechanism.
- They exert pressure on the recipient of the offer.
- The recipient of the offer who rejects the offer and does no better than the offer at trial, is penalised on the question of costs.
- The approach generally taken by the courts is to ask two questions:
  1. Was there a genuine offer of compromise?
  2. Whether it was unreasonable for the offeree not to accept it?

The indicia which inform the exercise the assessment of reasonableness

Per *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (Hazeldene Chicken)* (2005) 13 VR 435; [2005] VSCA 298 at 25:

A court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:

- The stage of the proceeding at which the offer was received;
- The time allowed to the offeree to consider the offer;
- The extent of the compromise offered;
- The offeree's prospects of success, assessed as at the date of the offer;
- The clarity with which the terms of the offer were expressed; and
- Whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.

Form of Calderbank Offer

- There is no particular form or special formula.
- The use of a particular form of words is not necessary.
- The usual form of a Calderbank offer derives directly from the case of Calderbank v Calderbank itself: namely, a "without prejudice" offer in a money sum plus costs, with an exception that the offer may be used in relation to costs.
- In order for the offer to be able to be put before the court on the question of costs the offer must be marked "without prejudice save as to costs."
- If the ambit of the without prejudice privilege is not circumscribed by the words "save as to costs" or similar (and the offer is therefore simply made "without prejudice") the offer will not be admissible on the issue of costs.

Offers of compromise under the Rules generally

- The Rules of Court endorse the use of offers of compromise to expedite the settlement of proceedings by imposing adverse costs on parties who reject a reasonable offer from the other litigant.
- The Court can exercise its costs discretion in proceedings where an offer of compromise has been made - but is subsequently rejected - and the offer made was retrospectively more favourable than that provided in judgment.
- Offer under the Rules of Court compel each party to carefully consider the matters in dispute once an offer of compromise has been made.
- Offers of compromise are less straightforward in multi-defendant litigation.

Advantages of an Offer under the Rules of Court

- The consequences which follow are virtually automatic.
- An offer made under the rules will generally have the same flexibility as is available under a Calderbank offer.
- It will have virtually automatic, favourable costs consequences for your client.
- Your client will have no persuasive burden (or onus) in having the court make a favourable costs order.
- There is less likelihood of a second "mini hearing" and therefore less likelihood of incurring the additional costs that inevitably are involved in a second hearing, regardless of whether that "mini hearing" is in court or by way of oral submissions.

Advantages of a Calderbank Offer

- It can be inclusive of costs (though this can be problematic).
- It is more flexible in timing (can be open for a shorter period)
- It can be withdrawn at any time without leave of the court.
- It may be oral (such as an offer in a mediation).
- It can be limited to specific interlocutory provisions of the proceeding.
- It is possible to make an offer that covers outcomes outside the proceedings although it may be more difficult to show whether it was unreasonable for the offeree not to accept it.
- It can be used if a party is not sure if its settlement offer is strictly in compliance with the rules of the court.

Pre-trial Calderbank offers and appeals

- An offer made pre-trial does not necessarily continue to operate for the purposes of an appeal.
- The Court of Appeal almost invariably refuses to exercise its discretion in favour of a party who has made an offer of compromise pre-trial but who has not renewed that offer or made a new offer prior to the appeal.
- If there is an appeal, a separate offer of compromise should be made: see *Boresic v Slingshot Holdings Pty Limited & Anor (No. 2)* NSWCA 160

Proportionate liability regime under the Wrongs Act

- Under the Victorian proportionate liability regime the court, in assessing a defendant's proportionate responsibility for a plaintiff's loss, may take into account the liability of a 'defendant' who is a concurrent wrongdoer in relation to that claim.
- Special consideration arises in drafting terms of settlement where the Victorian proportionate liability regime applies.
- Be alive to this consideration if you are acting for a defendant who is one of several joint tortfeasors.

Terms of Settlement

A "mere" accord executory

- It gives rise to NO new rights and obligations pending performance. When there is performance (but only when there is performance), the plaintiff's existing cause of action is discharged.

Accord and satisfaction

- This is where there is an immediate and enforceable agreement in replacement of the original cause of action.

Accord and Conditional Satisfaction

- The existing cause of action is not replaced until an act of performance takes place, e.g. the release is conditional upon and not given effect until payment.

Practical application of the terminology

- Think of a settlement agreement (release in exchange for payment of a sum) which is not complied with by the payor.
- If the agreement is an accord executory, the payee can sue under the original cause of action, but not for the payment owed under the settlement agreement.
- If the agreement is an accord and satisfaction, the payee can only sue on the agreement, not the original cause of action.
- If the agreement is an accord and conditional satisfaction, the payee can elect to determine whether to sue on the agreement or on the original cause of action but must make his election clear in the way that the terms of the settlement agreement are drafted.
- Be wary of provisions that could be construed as penalties!
- See: *Legal Practice Management (Vic) Pty Ltd (in liq) v Simms Corp Hotels & Leisure Pty Ltd & Ors* [2013] VSC 734 (20 December 2013)

Drafting and documenting

- What exactly is a "release"?
- What is the difference between a deed of release and a settlement agreement?
- What is a recital in a settlement agreement?
- When is an indemnity appropriate?
- "Governing law" provision
- Jurisdiction provision
- Costs provision
- Operation of this document provision
- Entire agreement provision

Tips and traps in drafting terms

- **Are the terms immediately binding or are they merely intended as a framework for future negotiation?**

Different scenarios:

- the parties intend to be bound immediately, although expressing a desire to draw up their agreement in a more formal document later;
- they intend to be bound immediately but wish the operation of a particular clause to depend upon the drawing up of a more formal document; or
- they do not intend to be bound immediately but postpone the creation of a binding contract until a formal contract is drawn up and executed; and
- the parties are content to be bound immediately and exclusively by the terms which they have agreed upon whilst expecting to make a further contract in substitution for the first contract containing by consent additional terms.

Tips and traps in drafting terms

Beware of the tax consequences

- Settlement agreements may have important tax consequences, whether they be Capital Gains Tax (CGT) or Goods and Services Tax (GST) or other consequences.
- Anticipate the tax consequences in advance. Alternatively, ensure that the terms of the settlement are not binding so that you have an opportunity to obtain specialist advice.
- Sometimes it is possible to anticipate the tax consequences of any settlement prior to the commencement of negotiations.
- Sometimes it is not-discussion (*Tapoohi v Lewenberg* [2003] VSC 379 (10 October 2003).

Tips and traps in drafting terms

- Aim to conclude the negotiations with some form of binding agreement. This will protect your client against subsequent changes of mind which may cause the settlement to fall over.
- Aim to record all of the elements of the settlement agreement in writing and cater for all contingencies and methods of enforcement.
- A settlement agreement in its simplest form the terms bind the defendant to pay the debt by a nominated date in exchange for a release when the payment is made. In default the plaintiff may enter judgment.
- In other more complex cases the parties may record the essential terms as a heads of agreement or even a terms sheet to be followed by a more detailed formal settlement agreement.

Cases

- See *Masters v Cameron* (1954) 91 CLR 353
- *Forrest v Australian Securities and Investments Commission* [2012] HCA 39 (2 October 2012)
- *Tapoohi v Lewenberg* (2003) VSC 379 (10 October 2003)

Tips and traps in drafting (continued)

Are the terms clear and precise or vague and nebulous?

- Do not draft the terms of the agreement in a vague or ambiguous manner.

Watch out for legislative formalities

- Example: section 126 of the *Instrument Act 1958* (Vic)

Default consequences

- Is the Plaintiff entitled to pursue its original cause of action or is it limited to enforcing only the settlement sum?

Enforcement

- The terms may be self- executing. Upon default in payment the plaintiff may enter judgment and the machinery exists for judgment to be entered by producing the terms of settlement with an affidavit to the effect that the plaintiff has not been paid on the due date. In such a case enforcement is made in the proceeding itself and not by way of instituting fresh proceedings.
- To enable this course to be taken the proceeding must not be discontinued until the payment condition has been satisfied.
- A variation of this approach: application is made to the court in the proceeding to enforce the terms.
- What if a non party to the proceeding is a party to the settlement agreement? Is it still possible to enforce the settlement in the proceeding? See *A G Cowley Holdings Pty Ltd v Central City Pty Ltd* (2010) 266 ALR

"Covenants not to sue" and "releases"

What is the difference?

- What is a covenant not to sue? It does not put an end to the original obligation. Rather, a covenant not to sue is a contract not to enforce the obligation.
- What is a release? It does extinguish the original litigation.
- Caution: ensure that the cause of action is not discharged by the terms of settlement if you wish the proceeding be continued for example, where a plaintiff sues a number of co-sureties or co-debtors and reaches settlement with one of them but not the others.
- See:
  1. *Walker v Bown* [1924] HCA 28; 35 CLR 48, 58
  2. *Dorgal Holdings Pty Ltd v Buckley and Others* [1996-1997] 22 ACSR 164
  3. *Associated Retailers Limited v Toys Unlimited & Ors* [2011] VSC 297 at [211] to [213]
  4. *Koram v ANZ Banking Group Ltd* [2001] NSWSC 709
  5. *Shepherds Producers Co-operative Limited v John Scott Lamont & Ors* [2009] NSWSC 294 (22 April 2009)

What is the fate of the proceeding on foot?

Will the proceedings be dismissed, discontinued, or struck out with the right of reinstatement?

There is a difference between:

- Proceedings dismissed.
- Proceedings struck out with the right of reinstatement.
- Proceedings discontinued.
- Note: be wary of these distinctions when drafting terms of settlement.

What is the fate of the proceeding on foot? (continued)

What if previous costs orders are alive?

- Often terms of settlement are concluded at a time when interlocutory orders have been made previously. The parties intend to resolve the matter for an all-in figure. What if the settlement agreement is silent as to the treatment of earlier interlocutory costs orders. Is the enforcement of those costs orders to be waived or subsumed in the all-in settlement sum?

Negotiations generally

- Negotiate in good faith.
- We owe a general duty of honesty, courtesy and fairness to the other parties.
- How much pressure can we bring to bear upon our own client? Is the agreement a product of the client's own decision, or did the lawyer override the client's will?

Solicitors' duties in negotiations

- Where the client's instructions run counter to normal ethical principles and a practitioner's own personal standards, he or she should decline to act on those instructions.

- Where the other party is relying on information previously provided by your client, but which is no longer accurate, leaving them to rely on the information at the mediation can constitute misleading or deceptive conduct as well as professional misconduct.

Basic checklist

- Work out a basic outline of a settlement agreement.
- Create and refine your own checklist.
- Ensure that each element on your checklist is dealt with.
- If possible, prior to entering the negotiation arena, create a draft settlement agreement which includes the terms of settlement that you seek to achieve.
- If possible, take the client through this document in advance.

Key Question

Is settlement in the client's best interests?

Take account of the following factors:

- The stage of the dispute reached.
- A candid assessment of the client's prospects in the litigation.
- The prospects for recovery against the other party taking into account its circumstances if judgment is recovered.
- Your client's resources.

Conclusion

- How is the settlement agreement to operate?
- Is the settlement agreement enforceable?
- Does the settlement agreement use plain and unambiguous language?
- Have you given the terms of the settlement agreement and the drafting thereof significant thought?