Have you settled? 'Yes' or 'No' might not be the answer

AMANDA ADAMSON, SENIOR SOLICITOR, LAW CLAIMS

When negotiating settlements always specifically advert to whether or not your negotiations result in an agreement which is immediately binding

"Did you settle?" ask your colleagues expectantly when you return from Court. Most of the time your answer will be "Yes" or "No".

The conversation will not usually go like this: "Did you enter an immediately binding legal contract for the client today?"

"No, but we are in the third class of *Masters v Cameron* and I think we will get there eventually", even though such a conversation might be the technically correct answer. Accordingly, it does not take much imagination to understand the issue facing the Court in *Gailey Projects Pty Ltd v McCartney and Anor*[1] about whether the parties had reached a legally binding settlement after a day of negotiation.

On the first day of a two-week trial, the trial Judge stood the matter down to allow the parties to negotiate. You can picture the scene that the trial Judge described; offers passing backward and forward, counsel and solicitors variously involved, in and out of conference rooms and over the telephone. By 5pm, the words "*done deal*" were uttered by someone and there was discussion whether the Judge should be informed of the settlement. It was decided that the solicitors should exchange emails recording what had been agreed and report to the Judge the following morning that settlement had been reached. There was some discussion about a deed and a suggestion by at least one party that a deed was unnecessary. That evening, an email was sent purporting to set out the terms of settlement. The email was different in five respects from the agreement that had been reached during the day. This lead to an allegation by the plaintiff that there was no settlement. The defendant applied to the trial Judge for a declaration that settlement had been reached.

The trial Judge's reasons contain an orthodox analysis of contract formation.[2] The trial Judge's consideration of whether the parties intended to be immediately legally bound by their agreement arises from *Masters v Cameron*[3] where the High Court divided the intention to create legal relations prior to execution of a written agreement into three classes and *Sinclair, Scott & Co Ltd v Naughton*[4] where a fourth class was proposed. As to these classes:

1. in the first class, the parties have reached finality in all terms of the bargain and intend to be **immediately bound** to perform all terms and at the same time intending to have those terms restated in a form that is fuller or more precise but no different in effect;
2. in the second class the parties have reached finality in all terms of the bargain and intend to be **immediately bound** but have nevertheless made performance of one or more terms conditional upon the execution of a formal contract;
3. in the third class, the parties do **not intend to be legally bound** unless or until they execute a formal contract;
4. in the fourth class, the parties have reached finality in some terms of the bargain and intend to be **immediately bound** to perform those terms and at the same time intend to make a further contract in substitution of the first contract containing additional terms by consent.

The parties are immediately bound to varying extents without a contract in writing in the first, second and fourth classes but not at all in the third class. As the trial Judge explicitly observed, there is no presumption that parties do not intend to be legally bound until a deed is executed.[5]

The principles applied by the trial Judge are well established by the South Australian decision of *Lucke v Cleary & Ors*.[6] In that case, the Full Court referred to the following matters:

- The intention to be immediately bound is assessed objectively.
- A solicitor has ostensible authority to bind a client in settlement of litigation.
- Evidence of post contractual conduct is admissible on the question of whether settlement has been reached.

When having regard to the following matters, the *Gailey* trial Judge concluded that the parties had intended to be immediately bound by 5pm on the day of the negotiation:

- Negotiations were conducted on the first day of a 10-day trial such that it was readily inferred the parties were attempting to avoid trial costs.
- Negotiations were conducted by Senior Counsel.
- One of the agreed terms required action within 24 hours.
- No person had said that there was no deal unless it was reduced to writing.
- Although a deed had been mentioned, at least one party had expressed it to be unnecessary.
- The words "*we accept*" and "*we have a deal*" are consistent with the intention to create legal relations.
- The express purpose of the email

Even the phrase *subject to contract* while perhaps usually signifying an *in principle* agreement or an agreement to agree sometime in the future needs to be measured against the relevant context.

exchange between solicitors was to set out what had already been agreed.
- The parties intended to inform the Judge of the settlement the following morning.
- Counsel had spoken to persons outside to the litigation to the effect that it had settled.

On one hand, Courts have warned against making incorrect assumptions from the use of words and conduct that parties usually associate with the formation of contracts such as "*deal*" or "*bargain*" and the shaking of hands.[7] On the other, a mere reference to the drafting of a deed does not make the agreement subject to contract.[8] Even the phrase *subject to contract* while perhaps usually signifying an *in principle* agreement or an agreement to agree sometime in the future needs to be measured against the relevant context.[9]

Although Courts have said that there is no particular language or conduct that will be determinative of the objective analysis of the parties' intentions, in *Lucke,* the communication to the Court that the parties had settled was an important feature in favour of the finding of an immediately binding settlement.

The lesson to be learned from cases like *Gailey* and *Lucke* is that there is no downside to expressly stating either that your client

intends to be immediately legally bound by terms which you go on to identify or it does not. There may be utility in actually using the language of the High Court's *Master v Cameron* classes. At the very least, language of this kind is likely to prompt relevant and constructive discussion about the parties' intentions, the certainty of terms and the relevance of any subsequent deed before representations are made to the Court.

Endnotes

1 [2017] QSC 185
2 At [46], the trial Judge posed three questions; (i) Did the parties have an intention to create legal relations? (ii) Were there material terms which were yet to be agreed or were uncertain? (iii) Was any agreement to compromise intended to be conditional upon execution of a deed of settlement?
3 [1954] HCA 72
4 [1929] HCA 34
5 [2017] QSC 185 [70]
6 [2011] SASCFC 118
7 *Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd* [2015] QSC 119 [33]
8 *Lucke v Cleary & Ors* [2011] SASFC 118 at [72]
9 *Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd* [2015] QSC 119 [36] – [38]