Session 6:

Drafting Watertight Settlement Agreements

Presented by:

Sydney Jacobs, Barrister

13th Floor Wentworth Chambers, Sydney

29th October 2019

Drafting Commercial Contracts with Precision: A One Day Masterclass

Session 6: Drafting Watertight Settlement Agreements

By
Sydney Jacobs, Barrister
BA LL.B (UCT), LL.M (Cam)
13 WENTWORTH

Outline:

While a settlement agreement may be seen as just another contract, it comes with unique drafting quirks and challenges. This practical session explores a range of key issues relating to drafting settlement agreements, including:

- **Offers of settlement & Calderbank letters**
- **Agreements versus deeds**
- **Structuring the settlement - key issues to take into consideration:**
    - **Indemnities and releases**
    - **Which terms of the agreement are essential and need to be part of a binding settlement agreement?**
- **Extent of a solicitor's authority to contract – lessons from *Feldman v GNM Australia***
- **Are you bound before you know it?**
- **Role of implied terms in settlement agreements**
- **Thinking about the tax traps – when to seek additional tax advice before signing on the dotted line**
- **GST implications of settlement agreements**
- **Case studies**
- **Checklist for settlement agreements**

1. ACCORD AND SATISFACTION

"[31] An accord and satisfaction extinguishes the existing cause of action and replaces it with a new cause of action based on the agreement. A valid accord and satisfaction is not a discretionary factor relevant to the subsequent litigation of the original claim; it is an answer to the claim."

Australia Postal Corporation v Gorman [2011] FCA 975; (2011) 196 FCR 126

2. BOUND BEFORE YOU KNOW IT BY A SPRINGING CONTRACT

In *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353, the parties signed a document dated 6 December 1951 by which the respondent agreed to sell a farm to the appellants 'subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions'. At 360, the Court set out three broad categories that contractual settlement agreements may fall into:

> (1) the parties have agreed on all terms and intend to be immediately bound to perform those terms "but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect"; or
>
> (2) the parties have agreed on all terms and intend no departure from or addition to that which their agreed terms express or imply, "but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document"; or
>
> (3) the parties do not intend "to make a concluded bargain at all, unless and until they execute a formal contract."

Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622**;** (confirmed on appeal in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634).

What is commonly referred to as the "*fourth category*", was identified by McClelland J in *Baulkham Hills* at 628, being a situation in which:

"... the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms."

An example of a Category Two case, is afforded by N*iesmann v Collingridge* [1921] HCA 19; (1921) 29 CLR 177 where it was agreed that part of the deposit for the purchase of land which had been arranged orally was to be paid "*on the signing of the contract.*"

Subsequent courts considering *Masters* have considered that the categories set out in *Masters* are "neither strict nor prescriptive" or "exclusive nor necessarily exhaustive": *Feldman v GNM Australia Ltd* [2017] NSWCA 107, [68].

Offers to settle disputes can be made with varying degrees of formality, and with varying degrees of legal consequence.

When litigation is on foot, there can be an offer under the UCPR, by way of a *Calderbank* offer or simply a laconic 1 liner offering something on a purely commercial basis, e.g. an amount, or something specific e.g. to transfer a property or hand over a machine or rectify defects in a building.

There are various overlays of common law and statutory rules to keep in mind.

Offer and acceptance

In *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833, it was accepted there might be such a thing as a "springing contract."

"[369] There was in fact a clear point of crystallisation of contractual intent. The contract arose from the prior conduct and communications of the parties, in particular around mid December. Mr Campbell QC called this a " springing contract " and something not known to the law. On the contrary, a number of authorities discuss the need not to constrict one's thinking in the formation of contract to mechanical notions of offer and acceptance. Contracts often, and perhaps generally do, arise in that way. They can also arise when business people speak and act and order their affairs in a way without necessarily stopping for the formalities of dotting "i"s and crossing "t"s or where they think they have done so. Here, the "i"s were not dotted and the "t"s were not crossed because of Mr Graham's conduct. Sometimes this failure occurs because, having discussed the commercial essentials and having put in place

necessary structural matters, the parties go about their commercial business on the clear basis of some manifested mutual assent, without ensuring the exhaustive completeness of documentation*. In such circumstances, even in the absence of clear offer and acceptance, and even without being able (as one can here) to identify precisely when a contract arose, if it can be stated with confidence that by a certain point the parties mutually assented to a sufficiently clear regime which must, in the circumstances, have been intended to be binding, the court will recognise the existence of a contract*.

Sometimes this is said to be a process of inference or implication. For my part, I would see it as the inferring of a real intention expressed through, or to be found in, a body of conduct, including, sometimes, communications, even if it be the case that the parties did not consciously advert to, or discuss, some aspect of the relationship and say: `and we hereby agree to be bound' in this or that respect. The essential question in such cases is whether the parties' conduct, including what was said and not said and including the evident commercial aims and expectations of the parties, reveals an understanding or agreement or, as sometimes expressed, a manifestation of mutual assent, which bespeaks an intention to be legally bound to the essential elements of a contract."

Folld in eg *White v Timbercorp Finance Pty Ltd (in liq); Collins v Timbercorp Finance Pty Ltd (in liq)* [2017] VSCA 361.

Offers *generally speaking* can be withdrawn before acceptance, so long as the offeree receives notice of the withdrawal prior to acceptance: Treitel *The Law of Contract* (12 th ed.) [2-058] and see (former Justice) Heydon's new contract text (2019).

3. CALDERBANKS v OFFERS UNDER THE RULES

Citing Justice Beazley's presentation to NSW Young Lawyers Civil Litigation Committee Seminar "*Without Prejudice" Offers and Offers of Compromise* 26 September 2012, Sydney (viewed online Oct 2019).

(verbatim extracts follow from the article cited above, of the hon Mrs Justice Beazley)

- A Calderbank offer **may** entitle a party to a different costs order, other than that costs follow the event.

- A Calderbank offer does not automatically result in the court making a favourable costs order.

- A Calderbank offer is an exception to the rule that costs follow the event. The offeror bears the persuasive burden of satisfying the court to exercise the costs directions in the offeror's favour.

- A Calderbank offer may be inclusive of costs (although it may be difficult to prove such an offer is reasonable, or that the refusal to accept was unreasonable).

- An offer which does not conform to the rules may in certain circumstances be treated as a Calderbank offer.

- An offer may be made limited to liability.

- An offer may take into account contributory negligence.

- A combined offer may be made on behalf of a number of plaintiffs.

- An offer may forego interest.

- An offer may include terms in addition to a money sum.

- An offer may include terms not to be disclosed.

- An offer of compromise must be a "genuine offer of compromise".

- The rejection of the offer must be unreasonable.

See further the more detailed CPD paper on my 13th Floor website on Calderbank offers.

UCPR, r 20.26(1) - (4) provides:

"20.26 Making of offer

(1) In any *proceedings*, *any party* may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.

(2) An offer must be *exclusive of costs*, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs.

(3) A notice of offer:

(a) must bear a statement to the effect that the offer is made in accordance with these rules, and

(b) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to the payment so made or ordered.

(4) Despite subrule (1), *a plaintiff may not make an offer unless the defendant has been given such particulars of the plaintiff's claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer*."

The consequences of rejecting: if a "rules offer" is rejected, and the offeree goes on to achieve no better in the litigation, the offeree then pays costs on an indemnity basis: UCPR, Pt 42, Div 3.

The purpose and policy of this rule is to "encourage early settlement of disputes by rewarding the party who seeks to do so, and providing a disincentive to the party to whom the offer is made and who has chosen not to accept the offer." Per the hon Justice Beazley in HH's article, above.

"[78] First, if it is intended that a rules offer is to operate additionally as a Calderbank offer, but should for some reason be found to be noncompliant, that intention should be stated in the covering letter.

[79] Secondly, in making a rules offer, as the law presently stands, no reference should be made to costs. In following that advice, you have the comfort of knowing that in Vieira v O'Shea (No 2), Basten JA peremptorily dismissed a submission that a rules offer which made no reference to costs might be construed as being inclusive of costs." Per the hon Justice Beazley in HH's article, above.

4. **"SIMPLE" CONTRACTS under hand v DEEDS (OR A "SPECIALTY")**

Beware the technicalities of Deeds

There are so many technicalities in deeds, that it may be a trap to think one is more

secure in using a deed than a contract.

The key thing is intention to create a deed.

See the discussion by Seddon in his very useful practical work, Seddon on Deeds, p 32 ff headed "*The hazards of deeds"*. The word "snares" also features in this sub section.

Traditional common law requirements include that a deed must be writing on paper, vellum or parchment, sealed, delivered, whereby an interest, right or property passes, or a binding obligation is created, or there is an affirmation of some prior act whereby an interest, right or property has passed:

See Norton *A Treatise on Deeds* (2nd ed, 1928) by Morrison and Goolden.

Technicalities include:

i. what are the formalities of a deed?

   E.g. signature: see Sec 38 *Conveyancing Act* NSW

   Sec 38 A *CA*: Permits the creation in *electronic form* and attested as per provisions of the Act.

   A corporation registered under the 2001 Corporations Act does not need to append a seal to execute a deed: Seddon p 13.

   What are the formalities of witnessing?

   See e.g. Sec 127 (1) *Corporations Act* 2001

ii. who has the authority to sign a deed?

iii. how is a deed to be delivered?
   Is exchange in a mediation room, sufficient?

iv. limitations issues;
v. old style wording:

   exordium (commencement of the deed)

   testatum (consideration, if included, and operative terms)

   habendum/ temeddum/ declaration of uses / reddendum

execution block

See Seddon p 10

"Covenant" means a term of a deed

vi. a host of other issues

Similarities between Simple Contracts & Deeds

There are many similarities e.g. the same rules as to consensual variation, construction & enforcement apply to both. As Seddon p 19 points out, whilst many lawyers consider that a deed "imports consideration", it is always better to at least provide for nominal consideration, if there is a prospect that one will need to invoke an equitable remedy to enforce the deed or perhaps, rectify the deed: Seddon (ibid), p 22 explaining that equity does not assist a volunteer.

Also, past consideration is no consideration, and hence a guarantee via deed may be able to be challenged on this basis: Seddon (ibid) p 23. Likewise, paying a lesser amount in settlement of a larger debt owing, is not good consideration: this type of settlement ought be by deed: Seddon (ibid) p 23.

Estoppel

A form of estoppel unique to deeds is estoppel by deed: statements of fact arguably become what Seddon characterises as "immutable" representations.

There is a debate as to whether this is really a sub set of conventional estoppel.

See Seddon (ibid) p 182 ff

An ineffectively executed deed might still be enforceable as a contract: paras [56] ff of *Nurisvan Investment Ltd & Anor v Anyoption Holdings* [2017] VSCA 141.

5. STRUCTURING SETTLEMENT AGREEMENTS

This depends to some degree on the type of dispute.

Starting at the end, if the dispute is as to money, it will be useful to have a table to annex of amounts payable, and due dates when payable, and rates of interest and

the like.

A more sophisticated table might include the discounted amount payable if paid by the earlier date; and the non - discounted amount payable if paid by a later date.

If the dispute is in an easement matter, say for stormwater, then annexure A will most likely be a surveyor's sketch showing the boundaries, easement corridor and other salient matters; and Annexure B will be proposed terms.

Returning then to the beginning. A traditional structure would be as follows:

Heading including a description of whether its Deed or Heads of Agreement etc., parties and date.

Recitals setting out such key background facts as the parties can agree to. Its easiest to agree to matters that are mere allegations, e.g.

X alleges he is owned $1m; Y alleges he has paid or provided value to X in the sum of $850,000.

Only a powerful creditor e.g. a bank with a mortgage, is able to extract a recital to the effect that there is, in fact, a debt due, owing & payable.

Recitals can set out the *purpose sought to be achieved*. In this context, the purpose is to settle the entirely of a dispute once and for all, or perhaps, a discrete part of a dispute.

Operative Terms

Previously, a common phrase used in deeds was "Now this deed witnesseth", but nowadays, in the age of plain English, clear words such as "And the parties now agree", will suffice.

Indemnities & releases & bar to further actions: how far does one go?

Confidentiality

Non competition

Non disparagement

Which clauses are essential?

Warranty as to each party having received legal advice

ADR clause to e.g.

-- resolve disputes arising from settlement agreement?

-- settle the terms of any clauses not agreed , or any collateral documents necessary to give effect to the settlement (such as a development application; or confidentiality clause)

Execution and attestation by a witness (if by deed).

6. IMPLIED TERMS

The process to work out what terms are implied, may be described as partly one of inference, and partly one of implication, although the two concepts overlap: para [30] of *Nurisvan Investment Ltd & Anor v Anyoption Holdings* [2017] VSCA 141. Thus, in *Hawkins v Clayton* (1988) 164 CLR 539, Deane J stated:

"In these circumstances, it is necessary to identify two distinct stages in the ascertainment of relevant terms. Those stages may well overlap and it will often be unnecessary to distinguish between them in practice. The first stage is essentially one of inference of actual intention: what, if any, are the terms which can properly be inferred from all the circumstances as having been included in the contract as a matter of actual intention of the parties? The second stage is one of imputation: what, if any, are the terms which are, in all the circumstances, implied in the contract as a matter of presumed or imputed intention?"

7. EXTENT OF A SOLICITOR'S AUTHORITY TO EFFECT SETTLEMENT; IMPLIED TERMS; ESSENTIAL TERMS

Lessons from *Feldman v GNM Australia*

In February 2015, the first respondent published articles about the applicant and his evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse.

The second respondent was the journalist of the articles.

In March 2015, the applicant served on the respondents a concerns notice under the *Defamation Act*. In April 2015, the respondents' solicitors sent an email offering to remove the articles from its website and publish a corrective statement on the basis that the respondents be released from all liability.

The email stated that "[*a*]*n agreement reflecting the above would be documented in a Deed of Release which would also include obligations of confidentiality*".

The applicant's lawyers emailed that they would be "*willing to accept your client's offer*" on the bases specified in the email. Further correspondence followed and on 30 April 2015 the respondents' solicitors accepted the terms in the correspondence and forwarded a draft deed of release documenting what they described as "*the parties' agreed terms*".

It is critical to note that the proposed deed set out the time frame for e.g. a statement to be published, setting out the applicant's perspective; whereas no time frame was specified for the performance of the terms of other the matters alleged to have been agreed.

Further communications ensued regarding the effect of the confidentiality clause.

In July 2015, the applicant's solicitors wrote to the respondents' solicitors advising that their client "*withdraws his offer to settle the matter*". The respondents' solicitors contended that the matter had settled.

In December 2015, the applicant commenced defamation.

June 2016: The respondents were granted a permanent stay of the proceedings

The learned trial judge held that confidentiality was a *subsidiary issue.*

The two primary issues on the appeal were whether:

(1) Her Honour erred in finding there was a binding agreement between the parties, and incorrectly applied the principles stated in *Masters v Cameron*.

This question arose in context of the principle that a contract will fail for incompleteness where some essential or important part of the bargain is yet to be agreed.

(2) Her Honour erred in finding that a solicitor has ostensible authority to bind a client to a contract where litigation is not on foot.

The Court granted leave to appeal and held that:

[extracting the headnote in edited form]

In relation to issue 1:

(1) A contract will fail for incompleteness where some essential or important part is yet to be agreed. However, the terminology of 'essentiality' should be regarded with care as parties may agree to be immediately bound while deferring important matters to be agreed later. [60]-[61], [112], citing from *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, as follows:

"…….. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [at p 611] '*the masters of their contractual fate'*. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

(2) The categories of case recognised in *Masters v Cameron* describe circumstances in which a binding contract may or may not have come into existence. They are neither strict nor prescriptive. The primary question remains whether there was, objectively assessed, an intention to form contractual relations. [67]-[70], [112], [127]

(3) The language used in the correspondence between the parties' solicitors, objectively viewed, does not indicate that the applicant intended to be immediately bound, prior to the execution of the deed. [77]-[79], [112], [127]

(4) Objectively viewed, the *correspondence* between the parties' solicitors indicated that *confidentiality obligations were to be part of any binding agreement between the parties*. *The fact that the alleged agreement did not contain a term as to confidentiality indicates that there was no concluded agreement*. The significance of

obligations as to confidentiality is further supported by consideration of the commercial context in which the parties were negotiating [72]-[76], [80], [87]-[88], [112], [127]

(5) *The respondents' reliance on the first category of Masters v Cameron was inconsistent with its argument that a reasonable time would be implied for the performance of the steps contemplated by the contract for which it contends*. The absence of any confidentiality obligations in the alleged agreement further supported this. For essentially the same reasons, the case did not fall within the fourth category of *Masters v Cameron* case [81], [83], [86], [112], [127]

(6) Conduct occurring after the date of an alleged agreement is admissible on the question as to whether a contract has been formed. Here, the *communications between the parties' solicitors* and the failure of the respondents to take steps to implement the agreement were indicative that the parties did not believe they were already bound. [90]-[94], [112], [127]

In relation to issue 2:

Beazley P (McColl JA agreeing, Macfarlan JA not deciding):

(7) Whether or not a person has ostensible authority is a question of fact and in general, a solicitor does not have ostensible authority to bind his or her client to a contract. An exception arises in the context of litigation. Here, the concerns notice intimated that legal proceedings would be commenced if the applicant's demands were not met. However, the correspondence between the solicitors made clear that it was the applicant himself who would enter the contract and that he would not do so through the authority of his solicitor. [99]-[110], [112]

Lessons from the case

If potentially deal breaking clauses are not settled / agreed when in-concept settlement is reached, yet you wish to strike whilst the iron is hot, and before more level headed reflection reveals the mote in G-d's eye, then one possible way around is to have an expert determination clause.

An expert can be clothed with authority from both parties to settle any clauses or side agreements required. This would need to be coupled with a clause calling for the parties to act in good faith, reasonably and with all due expedition. One ought not leave this to the law of implied terms.

One needs a reliable set of ADR rules. As these types of agreements are often drafted “in the moment”, and finishing touches are being put after 5 pm when tempers are fraying, something alone these lines might suit.

Use short form of words to incorporate the Model ADR terms of the Society or Institute which you prefer.

As a negotiation tactic, perhaps whisper in your opposing colleagues ear pre mediation, that you will come armed with a Model clause to engross at the end, if peace breaks out, and to cater for any matter not expressly settled by 5 pm.

Compare and contract an example of Masters Category 2, also involving a confidentiality clause, *Tomas v Symbion Health* [2011] FWA 5458 where the parties agreed to settle during a conciliation meeting; but that their agreement would be “confirmed in a Deed of Release providing for confidentiality and non-disparagement”.

The conciliator had asked both parties to confirm their agreement to resolve the matter, which both parties did, and the conciliator stated that the Commission’s file would be marked ‘resolved’.

After the conciliation, a deed of release was provided to Ms Tomas for execution which she refused to sign, alleging that she had agreed to settle under duress, partly from her own representative.

8. TAX IMPLICATIONS OF SETTLEMENT AGREEMENTS

Introduction

Since compensation takes on the character of that which it replaces, if it replaces capital, then such receipts may fall to be assessed under the Capital Gains Taxation ("CGT") provisions and if it replaces income, such receipt will be assessable as income.

In other words, compensation that replaces income/revenue re trading receipts, will always be subject to taxation; whereas compensation that replaces a capital loss may possibly be subject to taxation, and if so, probably at a different rate; usually a more advantageous rate.

Where compensation is received in respect of a capital item, such as a ship or a building, this is characterised as capital.

Included in this category are:

- Loss of a contract forming part of the taxpayer's business structure.
- Compensation for loss of earning capacity. Thus, for example, in *Federal Commissioner of Taxation v Slaven* (1984) 1 FCR 11; 15 ATR 242 the Federal Court was required to determine the nature of a compensation receipt received by the taxpayer following a motor vehicle accident. The court found the compensation was for loss or impairment of earning capacity, stating that: “it is the character of the receipt in the hands of the taxpayer as recipient that must be determined”.
- Compensation for loss to business or personal reputation.

A somewhat operatic illustration of this principle is *McLaughlin v Chicago, Milwaukee, St Paul & Pacific Railway Co* (1966) 143 NWR 2d 32. In that case it was held that a plaintiff, who was a teacher as well as a priest of a religious order, was entitled to damages for the loss of his earning capacity notwithstanding that he had taken a vow of poverty and that he taught at no salary.

A metaphor that excites lecturers in tax is that of the difference between the fruit and the tree.

The tree is the capital structure that generates profits. Compensation for damage to, or destruction of, the tree has the nature of a capital receipt in the taxpayer's hands. On the other hand, anything the tree produces is fruit (for example, motor vehicles of a car manufacturer) and compensation for the fruit has the character of income in the hands of the taxpayer.

No distinction is watertight and analogies only extend so far. The same item might have the character of capital in the hands of X and revenue in the hands of Y. Take, for example, a tree. As part of the botanic gardens, it is a capital item. The same tree in a planter-box as stock-in trade is a revenue item. Thus, a tree may be a fruit. Take further, a 50 kg display of glace pears at Saks Fifth Avenue, part of its traditional Christmas window dressing. That would be a capital item. However, the same glace pears on the shelves inside would be revenue items. Thus, fruit may be a tree.

See generally CH 17 of my loose-leaf text: *Commercial Damages* (Publisher: Thomson Reuters).

I acknowledge I have extracted the following on tax, from the, with respect, excellent article *Income Tax, CGT and GST and Judgments and Settlements*, by Bearman and McInerny, viewed online October 2019.

Income tax

Generally speaking, the amount of a judgment for damages, or the amount of a settlement sum paid to a plaintiff, will be regarded as income if it was paid as compensation for lost income*: Glennan v Federal Commissioner of Taxation* (1999) 41 ATR 413.

CGT

CGT will generally apply if a "CGT Event" occurs in respect of a "CGT Asset" and results in a capital gain to a taxpayer.

Settlement agreement terms generate legal rights and therefore may constitute a CGT Asset. Some CGT Events include as follows:

-- disposal of a CGT Asset e.g. change of ownership of property to another entity;

-- where a cause of action is released, discharged or satisfied or abandoned, surrendered or forfeited;

-- one creates a contractual right or other legal or equitable right in another entity e.g. the inclusion in a deed of settlement of a non-competition clause or a restrictive covenant, in return for compensation.

A person makes a capital gain where the 'capital proceeds' received on the happening of the CGT Event exceed the 'cost base' of the CGT Asset to which the CGT Event happened.

Capital proceeds will include any money or other property received on the disposal of a CGT Asset, while the cost base of an asset may consist of up to five integers.

One integer is legal costs.

Income tax and CGT

Compensation received by way of settlement may be viewed as both income and capital. When that occurs, the amount of any capital gain is reduced up to the extent the amount is otherwise included in assessable income. The result is that capital losses cannot be brought into account to reduce the burden of tax.

Undissected amounts

If a claim is made for multiple heads of loss, some of which represent lost income and some of which represent lost capital, a settlement on the basis of the payment of an un-dissected lump sum will be capital: *McLaurin v Federal Commissioner of Taxation* (1961) 104 CLR 381; *Allsop v Federal Commissioner of Taxation* (1965) 113 CLR 341.

In PUB00246 *Income Tax – Treatment of Lump Sum Settlement Payments*, the Commissioner concludes that if there is no reasonable and objective basis for apportioning a sum received under a settlement agreement, the entire amount will be treated as revenue and will therefore be taxable.

See generally Taxation Ruling TR 95/35, which sets out how the Commissioner will apply the CGT provisions to judgments and settlements.

9. CHECK LIST FOR SETTLEMENT AGREEMENTS

- *Psychological aspects*: What can I "give" the other side, or how much can I give the other side, by way of recognition of their perspective, without overly impacting my own interests? E.g.
- a recital where one records the *assertion* of the other party?
- a recital where one acknowledges the other side has felt upset and hurt by what has occurred, but whilst denying liability?
- a complete falling on your sword, but in return for better payment terms?

Lexicon: Am I intending to be immediately bound? if so, say so.

Pluperfects and hypotheticals e.g. "my Client would be minded to execute the

agreement if ……..", are rubbery and may lead a court to incline to the view that there is no presently concluded agreement.

- Deed or simple contract?

- Which category of *Masters v Cameron* are we in?

- If money is to change hands in amongst a whole host of other obligations, have I made it clear exactly what triggers the obligation to pay? Do I want the money payable only once certain specific obligations have first been performed?

  If Yes -- then express as *conditions precedent.*

- If certain things as yet to occur e.g. one party seeking development consent, have I put in a sunset clause? Or am I content to rely on a clause which says each side must co-operate reasonably and in good faith to achieve the contractual goal?

- What is my authority to make the offer? Express? Implied?

- Have I provided advice on prospects and litigation risks, in a timely manner? If not, why would I take the risk of engaging in settlement discussions, and expose myself to complaints that e.g. I pressured the client to accept too little?

- If I'm banging off emails on the go, making and responding to settlement offers, have I protected myself by saying somewhere in really large print, that no agreement can spring into place until signed counterparts have been exchanged, or perhaps even approved by the client's Board etc, and until then, its merely a negotiation?

- If the dispute is about an easement, have I obtained a surveyor's sketch to depict what I mean? Or am I going to rely on the references to DP's, Lot no's and other like confusions that may provoke future disputation?

- If the dispute is about payment of money, do I have a schedule?

- Am I making admissions that can wash up on some distant shore?

- What about confidentiality?

- If the settlement relates to a dissolution of a partnership, is there to be a non-compete / restraint of trade clause?

~ Thank you ~