

ACCORD AND SATISFACTION

Introduction

*Scaffidi v Perpetual Trustees Victoria Ltd*¹ considered the interpretation of settlement deeds and the circumstances in which a settlement deed can be validly terminated when the settlement sum is not paid. With close reference to High Court authorities², the decision provides a review of the approach to the construction of what was, for the most part, a typical settlement deed.

Facts

Perpetual sued Mrs Scaffidi to enforce a mortgage.

Mrs Scaffidi denied Perpetual's claim and joined her son (Mr Scaffidi) to the proceedings alleging, in effect, that he was responsible for granting the mortgage and was guilty of misleading and deceptive conduct.

Following a mediation in 2009, Perpetual, Mrs Scaffidi and Mr Scaffidi entered into a settlement deed under which Mr Scaffidi was to pay \$550,000 to Perpetual within 21 days of court approval being granted for the settlement, which was required given that Mrs Scaffidi was under a disability at the time.

Mr Scaffidi did not make the settlement payment and subsequently Perpetual purported to terminate the settlement deed due to the non payment of the settlement sum.

Perpetual sought orders that the settlement deed had been validly terminated and that Perpetual was entitled to pursue the original action. Mrs Scaffidi argued, in effect, that Perpetual was not entitled to pursue the original action since she had been released by the deed.

Key terms of the settlement deed

The key terms of the settlement deed included the following:

'3. Settlement

3.1 Mr Scaffidi (or his nominee) must pay the Settlement Sum to Perpetual within 21 days of the Approval.

...

3.3 Within 7 days of receipt of the Settlement Sum, Perpetual will at the election of Mr Scaffidi provide [documents in connection with the discharge of the mortgage]

3.4 Upon payment of the Settlement Sum, the Parties will cause consent orders to be filed at the Supreme Court of Western Australia dismissing the Claim, the Counterclaim and the Third Party Proceedings with no order as to costs and vacating all previous costs orders.

3.5 In consideration of payment of the Settlement Sum within the time stipulated in clause 3.1 of the Deed, each Party releases and discharges the other Parties from all liability now existing or which might, but for this Deed, arise in respect of: [the Claim, Counterclaim, Third Party Claim and the Dispute].'

¹ *Scaffidi v Perpetual Trustees Victoria Ltd* [2011] WASCA 159

² In particular the comments by Gummow J in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 and *Federal Commissioner of Taxation v Orica Ltd* [1998] HCA 33; and by Dixon J in *McDermott v Black* (1940) 63 CLR 161.

4. Bar to Proceedings

4.1 Party not to take action

A party must not at any time take or continue any action, suit or proceeding, or make any claim or demand of any nature against any other party or anyone else arising out of the circumstances that gave rise to the Dispute.

4.2 Bar to Proceedings

Other than in proceedings taken to enforce the provisions of this Deed, this Deed may be pleaded as a bar to any action or proceeding mentioned in clause 4.1.'

Discharging existing obligations or rights of action

The discharge of an existing obligation or right of action is often effected by a release by deed for which consideration is not required. The existence of a deed does not necessarily indicate that the plaintiff has received satisfaction (discussed below) in respect of the legal wrong in question.³

The discharge of an existing obligation or right of action may also be effected by way of accord and satisfaction. This requires that the plaintiff agree to accept something in place of the full remedy to which the plaintiff is entitled. The 'satisfaction' may be a promise to do something, in which case the discharge of liability is immediate, or it may be the performance of the act or thing promised, in which case the discharge of liability does not occur until the promise is performed.⁴ We refer below to the three-part classification applied to accord and satisfaction.

The question of whether the settlement deed used in *Scaffidi v Perpetual* effected a release was analysed in terms of whether there had been an accord and satisfaction.

Accord and satisfaction or accord and conditional satisfaction

The particular question posed and considered by the Western Australian Supreme Court was whether the settlement deed was an 'accord and satisfaction' (as contended by Mrs Scaffidi) or was an 'accord and conditional satisfaction' (as was contended by Perpetual).

In posing this question, the court accepted a three part classification applicable to release by accord and satisfaction:⁵

- **Mere accord executory**

This arises where the proposed compromise arrangement between the parties does not constitute an enforceable contract. It is only once the satisfaction is provided that the plaintiff's existing cause of action is discharged. Until then the old cause of action is not extinguished and nor does a new one arise;

- **Accord and satisfaction**

This occurs where there is an immediate and enforceable agreement under which the plaintiff agrees to take the defendant's new promise in substitution for the existing claim. If so, the original cause of action is extinguished and cannot be sued upon;

- **Accord and conditional satisfaction**

This is said to exist where the compromise between the parties amounts to an existing and enforceable agreement but which does not operate to discharge any existing cause of action unless and until there has been performance. If there is no performance then the plaintiff may either treat the agreement at an end and proceed on the original cause of action or the plaintiff may sue on the compromise agreement in place of the original cause of action.

³ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at page 611

⁴ *Scaffidi v Perpetual* at [26] citing Dixon J in *McDermott v Black* (1940) 63 CLR 161

⁵ *Scaffidi v Perpetual* at [29] and following regarding the inadequacy of the binary classification of accord executory and accord and satisfaction and citing Phillips JA in *Osborn v McDermott* (1998) 3 VR 1

Held

The court held in favour of Perpetual that on the proper construction of the deed and given the events which occurred, there was no accord and satisfaction. Mr Scaffidi's non-payment of the settlement sum gave Perpetual the right to terminate the settlement deed under general law and Perpetual could sue Mrs Scaffidi on its original cause of action.⁶

In reaching this conclusion the court found in summary⁷ that:

- the releases in clause 3.5 of the settlement deed did not take effect immediately upon entry into the deed. The releases were stated to take effect 'In consideration of payment of the Settlement Sum'. Therefore, the satisfaction required under the deed was the payment of the settlement sum, not merely a promise to pay the settlement sum;
- the terms of clauses 3.3 and 3.4 of the settlement deed also supported the contingent nature of the release provided in clause 3.5;
- the covenant not to sue in clause 4.1 did not operate to bar Perpetual from suing on the original cause of action since the covenant was held not to be in respect of the Claim, Counterclaim and Third Party Claim, which were the terms used to refer to the proceedings commenced in respect of the original cause of action;⁸
- alternatively, even if clause 4.1 was a covenant not to sue on the Claim, Counterclaim and Third Party Claim, there was 'no reason to suppose that the parties intended' those claims to be effectively released as at the commencement of the settlement deed when the release of the claims under clause 3.5 did not operate in that way.

The court acknowledged that the question of the effectiveness of the releases provided by Mr and Mrs Scaffidi (as opposed to the releases provided by Perpetual) was somewhat different since it was difficult to characterise their releases in terms of accord and satisfaction. However, the court held that 'it must be presumed that' the releases by Mrs Scaffidi and Mr Scaffidi in favour of each other and Perpetual were intended to operate contemporaneously with Perpetual's release of Mrs Scaffidi.⁹

Observations

Parties are increasingly being encouraged to resolve their civil disputes by agreement rather than by pursuing civil proceedings to a judgement.¹⁰ *Scaffidi v Perpetual Trustees Victoria Ltd* provides a reminder and brief review of some of the issues that parties need to be mindful of when structuring a compromise arrangement. The decision provides an overview of the legal framework that may apply when a party fails to perform its obligations under a settlement deed.

August 2011

This article was prepared by Anthony Di Mento.

For assistance with dispute resolution matters, please contact Paul O'Brien, Director (t: 9231 7020, e: pobrien@ypol.com.au) or Anthony Di Mento (t: 9231 7024, e: adimento@ypol.com.au)

DISCLAIMER

This update is intended to provide a general summary only and does not purport to be comprehensive. It is not, and is not intended to be, legal advice.

© YPOL Pty Limited

⁶ *Scaffidi v Perpetual* at [47].

⁷ We do not summarise all of the arguments referred to by the parties or dealt with by the court

⁸ *Scaffidi v Perpetual* at [41].

⁹ *Scaffidi v Perpetual* at [38].

¹⁰ See for example Part 2A of the *Civil Procedure Act* (NSW) (commencement postponed); *Civil Dispute Resolution Act* 2011 (Cth)