Drafting effective settlement terms

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"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, and expenses and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough." – Abraham Lincoln

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Introduction

Mediation is a flexible[1] and unique process which has become entrenched in Australia's litigation milieu. Indeed, community and private mediation now exists in all Australian jurisdictions.[2] As Ulrich Magnus noted in 2012, "Mediation is officially seen in Australia as a preferred, cheaper and quicker alternative to traditional court litigation."[3]

In Victoria, the rules of procedure of each of the Supreme, County and Magistrates' Courts include provision for the referral by the Court of parties to a civil dispute to mediation, with or without their consent. Additionally, the Courts enjoy broad powers under the Civil Procedure Act 2010 (Vic) to actively case manage proceedings.[4] Part of the Court's case management function includes encouraging the parties to co-operate with each other in the conduct of the civil proceeding, to settle the whole or part of the civil proceeding and to use appropriate dispute resolution.[5] Mediation is also a feature of the Victorian Civil and Administrative Tribunal (VCAT) and the Tribunal similarly has the capacity to refer a proceeding for mediation.[6]

In this context, mediation is central to the litigation process and accordingly, there is an imperative for lawyers, counsel and other stakeholders to improve their negotiation and mediation skills, particularly, when drafting effective, binding settlement terms.

This presentation will examine a recent case where the Supreme Court of Victoria found a settlement deed to be non-binding; identify common issues which arise when drafting settlement deeds; and, discuss the different orders which parties can seek when notifying the Court of a positive settlement outcome and the consequences of those orders.

Power to refer parties to mediation

Civil Procedure Act 2010 (Vic)

Under Part 4.2 of the *Civil Procedure Act 2010* (Vic) (**CPA**), the court has broad powers of case management.[7] Specifically, under s 47 of the CPA, for the purposes of ensuring that a

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[1] Peter Condliffe, *Conflict Management A Practical Guide* (Lexis Nexis Butterworths, 5th ed, 2016, 278.
[2] Ibid quoting Nadja Alexander (2001, p 2).
[3] Ibid quoting Ulrich Magnus (2012, p 871).
[4] *Civil Procedure Act 2010* (Vic) s 47.
[5] Ibid s 47(3).
[6] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88(1).
[7] Note, pursuant to s 4 of the CPA, the CPA applies to all civil proceedings. "Civil Proceeding" is defined in s 3 of the CPA and means any proceeding in a court other than a criminal proceeding or quasi-criminal proceeding. "Court" is also defined in s 3 of the CPA and means, the Supreme Court, the County Court and the Magistrates' Court.

civil proceeding is managed and conducted in accordance with the overarching purpose,[8] the court may give any direction or make any order it considers appropriate. The court may give directions or make any orders it considers appropriate with respect to the use of appropriate dispute resolution, to assist in the conduct and resolution of all or part of the civil proceeding.[9] Appropriate dispute resolution is defined in s 3 of the CPA and includes mediation, early neutral evaluation, judicial resolution conference, settlement conference, reference of a question, a civil proceeding or part of a civil proceeding to a special referee, expert determination, conciliation and arbitration.

Under s 66 of the CPA, the court may make an order referring a civil proceeding or part of a civil proceeding to appropriate dispute resolution. Under s 66(1) such an order may be made with or without the consent of the parties as long as the appropriate dispute resolution medium is not an arbitration, reference to a special referee, expert determination or any other type of appropriate dispute resolution which results directly or indirectly in a binding outcome.[10] However, s 66(1) is subject to the rules of the relevant court.

Supreme Court of Victoria

In the Supreme Court of Victoria, pursuant to s 50.07(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), the Court may, with or without the consent of any party, order that the proceeding or any part of the proceeding be referred to a mediator. All commercial disputes will be referred to mediation, or other appropriate dispute resolution, unless the Court decides that there is good reason not to do so.[11] In a civil proceeding, the Court may consider referring the parties to a judicial mediator to mediate the dispute.[12] Judicial mediators in the Supreme Court are usually judicial registrars or associate judges. Under s 68(1) of the CPA, a judicial officer has the same immunity as a judge acting judicially when conducting a judicial mediation.[13]

County Court of Victoria

Under s 47A of the *County Court Act 1958* (Vic), the Court may, with or without the consent of the parties, refer the whole or any part of a civil proceeding to mediation or arbitration. The power under s 47A of the *County Court Act 1958* (Vic) is exercised subject to and in accordance with r 50.07 of the *County Court Civil Procedure Rules 2018* (Vic). Under r 50.07.01 of the *County Court Civil Procedure Rules 2018* (Vic), at any stage of a proceeding, a judicial registrar may, with or without the consent of any party, order that the proceeding or any part of the proceeding be mediated by a judicial registrar. Under this rule, the judge may refer a proceeding for judicial mediation.[14]

Magistrates' Court of Victoria

In the Magistrates' Court of Victoria under s 108(1) of the *Magistrates' Court Act 1989* (Vic), the Court may, with or without the consent of the parties, refer the whole or any part of a civil proceeding to mediation. Order 50 of the *Magistrates Court General Civil Procedure Rules*

[8] See s 7 of the CPA. The overarching purposes of the CPA and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. One way in which the overarching purpose may be achieved is through appropriate dispute resolution: CPA s 7(2)(c).
[9] CPA s 48(2)(c).
[10] CPA s 66(2).
[11] Supreme Court Practice Note SC CC 1 [13.2].
[12] Supreme Court Practice Note SC Gen 6, *Judicial Mediation Guidelines*.
[13] Ibid [4.5].
[14] For more information on judicial mediation in the Commercial Division of the County Court of Victoria, see County Court Practice Note 1-2015, *Operation and Management of the General List of the Commercial Division,* especially pages 7-8, par 41-46 on Judicial Resolution Conferences.

2010 (Vic) governs the mediation referral process. For example, r 50.04 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic) provides that the Court, constituted by a magistrate or registrar, may refer a proceeding or any part of a proceeding to an acceptable mediator for mediation under s 108(1) of the *Magistrates' Court Act 1989* (Vic).

By Practice Direction No. 6 of 2007, the "Mediation Pilot Programme" was introduced in Broadmeadows Magistrates' Court in 2007. This purpose of this mediation programme was to limit the cost and delay involved in the resolution of civil disputes in the Magistrates' Court.[15] In collaboration with the Dispute Settlement Centre of Victoria (**DSCV**), the pilot programme was introduced so that defended claims of less than $10,000, would be mediated.[16] Whilst initially only available in Broadmeadows Magistrates' Court, the programme has been extended to various Magistrates' Courts in Victoria. Now with the exception of Melbourne Magistrates' Court, defended civil matters less than $40,000 are referred to the DSCV for mediation.[17]

Ihab Al Azhari v 27 Scott Street Pty Ltd

In *Ihab Al Azhari v 27 Scott Street Pty Ltd*[18], Almond J held that the parties did not intend to be bound by a handwritten document which was signed by the parties' respective legal practitioners at the conclusion of a court ordered mediation.

Mediation terms

In this case, the settlement terms were as follows:[19]

1. These terms of settlement are in summary form of terms to be more fully engrossed.

2. The parties agree to settle this proceeding on the following terms:

   (a) the first defendant will transfer unencumbered the following properties in the development known as The Lonsdale situated at 27 Scott Street, Dandenong ('the land').

      (i) Retail 1(a) at value of $440,500;
      (ii) Retail 1(b) at value of $597,500;
      (iii) Retail 3 at value of $447,500. ('The properties').

   (b) the properties will be transferred (sic) in fee simple after discharge of the construction funding facility.

   (c) the first defendant will give to the 2nd Plaintiff a mortgage not to be registered but secured by a caveat over the land situated at 27 Scott Street Dandenong, which caveat will remain until such time as the titles are transferred into the 2nd Plaintiff's name. If the defendants default under the terms, the plaintiff may register the mortgage.

[15] See Magistrates' Court of Victoria Practice Direction Notice No. 6 of 2007: https://www.mcv.vic.gov.au/sites/default/files/2018-10/Practice%20Direction%206%20of%202007.pdf
[16] Ibid.
[17] https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/mediation.
[18] [2017] VSC 600.
[19] These terms are reproduced in the written judgment of Almond J at par 7. Note, there were two plaintiffs in this case, however, the first plaintiff, Best Fab Pty Ltd discontinued its claim and Mr Al Azhari became the sole plaintiff to the proceeding.

(d) the 2nd Plaintiff will execute and provide the required documentation for the security of land to be provided to financiers of construction funding.

(e) Upon execution of these terms and performance by the defendants of their obligations thereunder the parties hereby release each other from all claims, liabilities and obligations arising out of all and any claims the subject of this proceeding including, but not limited to the agreement referred to in paragraph 3 of the Statement of Claim and the deed referred to in paragraph 7 of the Statement of Claim.

(f) In the event that the 1st defendant fails to transfer the properties when due, the defendants consent to orders for specific performance together with costs of entry of judgment. These terms are evidence of the defendants' consent to such judgment.

(g) The proceeding be struck out with a right of reinstatement and the parties sign consent orders to this extent on signing the terms.

The preliminary question

The sole question before the Court was whether, by signing these terms, the parties intended to be bound immediately, or whether they intended to be bound only when formal terms were executed.[20] The Court ordered that this question be determined as a preliminary question.[21]

Legal principles

In determining whether the parties intended to be immediately bound, his Honour first had regard to the decision of the High Court in the case of *Masters v Cameron*.[22] In that case, Dixon CJ, McTiernan and Kitto JJ identified three classes of cases where parties who have been in negotiation, reach agreement on terms and, agree that the content of their negotiations should be expressed in a formal contract. The classes are as follows:

(1) Where the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fullller or more precise but not different in effect.[23]

(2) Where the parties have completely agreed upon all the terms of their bargain 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.[24]

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[20] *Al Azhari v 27 Scott Street Pty Ltd* [2017] VSC 600, 1 [3] (Almond J).
[21] Ibid. Note, under r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), the Court can determine that any question in a proceeding be tried before, at or after the trial of the principal proceeding, and may state the question or give directions as to the manner in which it shall be stated. This is sometimes referred to as a trial of a preliminary question. Such an order will be appropriate where determination of the preliminary question will either end or substantially dispose of or narrow the issues in dispute. See also r 47.05 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).
[22] (1954) 91 CLR 353.
[23] *Masters v Cameron* (1954) 91 CLR 353, 360 quoted in *Al Azhari v 27 Scott Street Pty Ltd* [2017] VSC 600, 3 [8] (Almond J).
[24] Ibid.

(3) Where the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.[25]

Almond J also noted that a fourth class of case was articulated by Knox CJ, Rich and Dixon JJ of the High Court in *Sinclair, Scott & Co v Naughton*[26] as follows: "… one 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."[27]

If the parties fall into either the first or second class, then the parties will have entered into a binding contract.[28] If the parties fall into the third class, then the parties will not have entered into a binding contract.[29] If the parties fall into the fourth class identified in *Sinclair*, then again, the parties will be bound.

In relation to the first class of case, the High Court noted that this is the most common type of contract and that the parties will be bound "at once" to perform the agreed terms, regardless of whether or not a formal document comes into existence.[30] In relation to the second class of case, the parties are bound to bring a formal contract into existence and then to execute its terms.[31] The unifying feature of these two classes is "final mutual assent", so that when the parties' legal representatives draw up the terms of contract, they do not have the power to vary the terms already settled.[32]

In relation to the third class, the High Court opined that in these cases, the "terms of agreement are not intended to have, and therefore do not have any binding effect of their own."[33] This might be the case where the parties intended to deal only with major matters and that periphery matters will be dealt with or introduced into the formal document. Or, it might be the case, that the parties want to preserve their right to withdraw from the negotiation, until a formal document has been properly executed.[34]

In addition to the above, Almond J also noted that a contract should be construed objectively by reference to its text, context and purpose.[35] Additionally, when construing the terms of a commercial contract, it is necessary to consider what a "reasonable business person would have understood the terms to mean."[36] This enquiry will require consideration of the "language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract."[37]

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[25] Ibid.
[26] (1929) 43 CLR 310 (Knox CJ, Rich and Dixon JJ) (*'Sinclair'*).
[27] Ibid, 317. See also *Civil & Allied Technical Construction Pty Ltd v A1 One Quality Concrete Tanks Pty Ltd* [2015] VSCA 75, 12.
[28] *Masters v Cameron* (1954) 91 CLR 353, 360.
[29] Ibid
[30] Ibid.
[31] Ibid.
[32] Ibid 361, citing *Rossiter v Miller* (1878) 3 Ap. Cas. 1124 (Lord Blackburn).
[33] Ibid.
[34] Ibid.
[35] *Ihab Al Azarhi v 27 Scott Street Pty Ltd* [2017] VSC 600, 4 [10] (Almond J) quoting *Mount Bruce Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116-117 [46]-[50].
[36] Ibid.
[37] Ibid.

The parties' submissions

The defendants submitted that upon signing the terms of the agreement, the parties intended to be bound immediately.[38] They submitted that this case was a class of case which fell into either the first or second class of *Masters v Cameron*, or the fourth class identified in *Sinclair*.[39] They asserted that the agreement contained all "essential terms" and that only procedural or mechanical terms were required for the sole purpose of carrying out the essential terms of the agreement.[40]

The defendants also relied on an email sent by the plaintiff's solicitor to the Court after the mediation which they submitted contained an admission that the parties had entered into a concluded contract.[41]

Conversely, the plaintiff submitted that the mediation terms fell squarely into the third class of case in *Masters v Cameron* and that the "objective intention of the parties was not to be bound unless and until a formal contract was executed."[42]

Court's disposition

In determining which class of case the terms of settlement should be classified, his Honour considered that it was necessary to have regard to the events and surrounding circumstances that lead to the signing of the terms.[43] His Honour observed that it was clear from the evidence adduced, especially from the plaintiff, that the parties mistrusted each other and it was in this context that the mediation was conducted.

His Honour considered that the parties had not "reached finality" (first class) and were not "content to be bound immediately and exclusively by the terms agreed at mediation" (second class). In his Honour's view, there were "too many matters of importance on which the parties had not reached consensus for it to be otherwise."[44] His Honour noted that the mediation terms were "high level terms", "general in nature" and not intended to reflect a "concluded bargain".

In holding that no concluded agreement had been reached, his Honour considered the following six factors relevant:[45]

1. The three retail properties[46] which were to be transferred by the defendants to the plaintiff, were described generally. No plan of subdivision or any other document was used to identify with specificity the properties which were to be transferred. Accordingly, there was no way of knowing the measurements or dimensions of the properties or their location within the development.

2. During the mediation, the plaintiff was not provided with a pro forma contract of sale of the retail properties, or a vendor's statement in respect of the properties. However, these documents were tendered at the hearing. His Honour noted that these documents provided for fittings, fixtures applicable to the relevant lot, the relevant

[38] *Ihab Al Azarhi v 27 Scott Street Pty Ltd* [2017] VSC 600, 5 [12] (Almond J).
[39] Ibid.
[40] Ibid.
[41] Ibid 6 [14] and 16 [57]. His Honour characterized this email as "post-mediation" conduct.
[42] Ibid 6 [16].
[43] Ibid 9 [26].
[44] Ibid 10 [32].
[45] Ibid 10-15 [33]-[53].
[46] Ibid 2 [7]. Clauses 2(b)(i), (ii) and (iii) of the mediation terms.

owners corporation rules and the applicable lot entitlement and lot liability. The mediation terms did not make provision for any of these matters.

3. The date of settlement was not specified in the mediation terms. Instead, at clause 2(b) of the mediation terms, there was a reference to the properties being transferred after discharge of the "construction funding facility." This facility is undefined and there is no date for the discharge of the facility.

4. The terms provided that the first defendant give the plaintiff a "mortgage not to be registered but secured by a caveat over the land". Importantly, the terms of the mortgage are not specified in the mediation terms. Additionally, the principal sum to be secured is not specified.

5. As required by s 126 of the *Instruments Act 1958* (Vic) and s 54 of the *Property Law Act 1958* (Vic), neither the plaintiff's solicitor or the defendant's solicitor were authorized in writing by their clients to sign a contract of sale of an interest in land at the mediation.

6. The parties could not have intended to be immediately bound by the mediation terms because such an outcome would mean that the mediation terms constituted a contract for the sale of land in breach of the *Sale of Land Act 1962* (Vic), because no vendor's statement or "conspicuous note"[47] had been provided.

On the above bases, His Honour stated that "it is more likely that the parties intended to address and resolve these matters as part of a binding agreement to be arrived at in subsequent negotiation of formal terms."[48]

His Honour also concluded that clauses 2(e) and 2(g) of the mediation terms, respectively, the mutual release clause and the agreement to sign consent orders striking out the proceeding with a right of reinstatement, did not assist either party or the Court in answering the preliminary question.[49]

In relation to the mutual release clause, his Honour noted that in the original draft of the document, the mutual release was to take effect immediately, that is, upon signing the mediation terms.[50] However, the plaintiff's solicitor, during the course of negotiation, added the phrase "and perform by the defendants of their obligations thereunder".[51] His Honour held that this amendment had the effect of postponing the operation of the mutual release, until the conclusion by the defendant of its obligations.[52] His Honour noted however, that the nature and extent of those obligations was not articulated in the terms and did not help in answering the preliminary question.[53]

Further, in relation clause 2(g), the consent clause, the Court noted that this clause required that the "proceeding be struck out with a right of reinstatement and the parties sign consent orders to this extent on signing the terms."[54] His Honour considered that on its proper

[47] *Sale of Land Act 1962* (Vic) s 9AA(1A).
[48] *Ihab Al Azarhi v 27 Scott Street Pty Ltd* [2017] VSC 600, 15 [52] (Almond J).
[49] Ibid [54].
[50] Ibid 15-16 [55].
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid 16 [56].

construction, this clause was a reference to the terms to be entered into the future.[55] In any case, his Honour considered that this clause did not assist in determining whether the parties intended to be immediately bound or only upon the signing of formal terms.[56]

Post mediation conduct

1. *Email to the Court*

Some emphasis was placed by the defendants on an email sent by the solicitors for the plaintiff to the Court on 9 February 2017. In that email, the solicitors for the plaintiff had written the following note:[57]

> "Dear Associate,
>
> Thank you for your email below.
>
> A mediation was held in the matter on 24 January 2017 in which the matter was settled on the basis of a heads of agreement, to be formalized in a deed of settlement which is currently being finalized.
>
> Accordingly we do not accept that a directions hearing will be required on 16 February 2017. However we will ensure that the Court is notified either way prior to 4.00 pm on 14 February 2017."

The defendants submitted that this amounted to an admission by the plaintiff that the matter had settled and that the parties were bound by the mediation terms.

His Honour held that this note was merely a recitation of the events that had occurred and nothing more than that.[58]

Draft deed of settlement

A draft deed of settlement was exchanged between the parties subsequent to the mediation. This draft deed of settlement was tendered during the course of the hearing and importantly, this document, unlike the original mediation terms, provided that the "parties would execute 'the standard contracts of sale for the settlement lots' (which included a Vendor's Statement, Plan of Subdivision, details of Lot entitlement and Lot liability and a list of fixtures and fittings), a mortgage appearing in a schedule to the drat deed, which specifies the principal sum in consideration for the advance as defined and the settlement date as defined."[59]

Conclusion

Accordingly, his Honour held that the mediation terms fell within the third class of *Masters v Cameron*, that the intention of the parties was not to make a concluded bargain at all, unless and until they executed a formal contract.

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[55] Ibid.
[56] Ibid.
[57] Ibid 6 [14].
[58] Ibid 16-17 [57].
[59] Ibid 17 [58].

Lessons from *Ihab Al Azhari v 27 Scott Street Pty Ltd*

- What is the intention of the parties? Do the parties want/intend to be immediately bound? Do the parties want their rights and obligations recorded in a formal document and intend only be bound upon execution of the formal document?

- If the parties fail to give consideration to significant matters, then it is likely that the Court will be slow to conclude that the parties intended to be immediately bound.

- Obligations –

    - Obligations should be expressed clearly and simply. Use active language.

    - What obligations are central to the litigation?

    - Is time of the essence?

    - Best practice: specify the date and time by which the obligation needs to be performed.

    - E.g. by 4.00 pm on 30 May 2019, the defendant must pay the plaintiff the sum of $1,000.00.

    - Contemporaneous and conditional obligations –

        - Do you want the parties to perform the obligations at the same time?

        - Do you want Party A to perform an obligation and performance of that obligation to be conditional on whether Party B performs an obligation? i.e conditional.

    - If money is being transferred, consider how and to whom the money should be paid. EFT? Bank cheque? Paid directly to the client or into the solicitor's trust account?

    - If you are proposing to transfer property – e.g. a car, or land, then make sure you have identified the property with specificity. If you are transferring land, provide a contract of sale, vendor's statement and make sure that you are adhering to the provisions of the *Instruments Act 1958* (Vic), the *Property Law Act 1958* (Vic), the *Sale of Land Act 1962* (Vic) and any other relevant law.

- How do you secure the obligation?

    - If one party fails to comply with an obligation, consider the following:

        - Do you want the agreement to fail?

        - Do you want the right to claim penalty interest?

        - Caveat over property? Identify the property you propose to caveat.

        - Mortgage over property? What is the nature of the mortgage? What is the identity of the property?

        - Do you want the proceeding to be reinstated? If so, do you want the proceeding to continue on foot? Or, do you want summary judgment entered in favour of your client? Do you want summary/default judgment entered for the full sum claimed in your pleading?

- Mutual releases.

    - Conditional – that is, a release should be conditional on a party's performance of an obligation.

    - When do you want the mutual release to start? At the time of the performance of the obligation, or at a later date? (for e.g. once orders finalizing the proceeding have been authenticated by the court).

- Costs?

    - Consider whether the parties will pay their own costs of the proceeding.
    - Consider *Amaca Pty Ltd v CSR Ltd* [2018] VSC 67 (Macaulay J).

- Confidentiality and non-disparagement clauses?

    - Note, mediation as a starting point is confidential: s 131 of the *Evidence Act 2008* (Vic). However, there are exceptions to the rule.

    - Also see s 24A of the *Supreme Court Act 1986* (Vic) and *Forsyth v Sinclair (No 2)* [2010] VSCA 195.

- Signing.

    - Parties should sign every page.

    - Solicitors should avoid signing on behalf of their client. Indication that the client has been taken through each clause.

    - If you are signing on behalf of your client, make sure you have authority to do so.

    - If you are acting for a company remember the requirements of s 127 of the *Corporations Act 2001* (Cth).

- Post mediation conduct – be aware that actions and steps taken after mediation might bear on a court's determination of what is important/essential to the transaction, potential admissions and as probative of the parties' contractual intentions.[60]

[60] *Queensland Phosphate Pty Ltd v Korda* [2017] VSCA 269, 14 (37) (Tate, Beach JJA and Sifris AJA) citing *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141 [77].

- Phrases such as “These terms of settlement are in summary form of terms to be more fully engrossed” should be avoided.”

Orders

After a matter has settled and terms of settlement have been signed and sometimes, even before terms of settlement have been signed, it is customary for the parties, or the mediator, to notify the Court that the matter has settled.

If the matter has not settled, the proceeding will continue, and steps will need to be taken to prepare the proceeding for trial. That is, the matter will be fixed for hearing and trial orders should be sought from the Court which provide for the filing and serving of court books, opening submissions, witness statements or outlines and so on.[61] If the mediation was conducted during the course of the trial and did not settle, then the trial of the proceeding will continue.

If the matter has settled, the parties will need to provide draft orders to the court for authentication so that the matter can be finalized. Common types of orders that can be sought are:

- That the proceeding be dismissed.
- That the proceeding be discontinued.

There is a plethora of jurisprudence on the meaning of “dismissed” and “discontinued” and the authorities differ somewhat. However, the High Court’s decision in *Bailey v Marinoff* [1971] 125 CLR 529 (‘*Bailey*’) and *Roberts v Gippsland Agricultural and Earth Moving Contracting Co. Pty Ltd* [1956] VLR 86 (‘*Roberts*’) provides some guidance to practitioners.

Veronica Holt

Aickin Chambers

1 March 2019

[61] Pro forma trial orders can be found at pp 38-40 of Supreme Court Practice Note SC CC1.