

DRAFTING RELEASES

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Oral exchange of executory promises

The Full Federal Court seemed to accept the proposition in Canvas Graphics Pty Ltd v Kodak (Australasia) Pty Ltd [1995] FCA 1346 (30 June 1995) that an accord and satisfaction could be constituted by an oral exchange of executory promises, referring to British Russian Gazette and Trade Outlook Ltd. v Associated Newspapers Ltd. (1933) 2 KB 616 per Scrutton LJ at 643-644; & Fraser v Elgen Tavern Pty Ltd (1982) VR 398 per Murphy J at 400-401).

Accord and satisfaction or accord executor?

Authorities such as McDermott v Black and Baxter v Obacelo Pty Ltd distinguish between an accord and satisfaction and an accord executory. However, it is a question of fact whether an intending plaintiff has accepted in place of a cause of action an executory promise or the performance of the promise.

Background facts : McDermott v Black [1940] HCA 4; (1940) 63 CLR 161

These appear from the judgment of Latham CJ

“The plaintiff Black made an agreement with the defendant McDermott to purchase for £16,000 four thousand shares in a company which conducted a dance hall. He delivered to the defendant Commonwealth bonds to the value of £2,000 as an initial payment. Before he made any further payment he wrote to the defendant complaining that the defendant had made certain misrepresentations—four in number. The defendant in his subsequent correspondence admitted that if the alleged statements had been made they were misrepresentations, but denied that he had made them. After further correspondence between the solicitors for the parties the plaintiff withdrew the allegations of misrepresentation and the defendant agreed to allow an extension of time for completion of the contract. The plaintiff did not pay the balance of purchase money within the extended time, and the defendant determined the contract. The plaintiff sued the defendant for rescission of the contract, for restitution and, alternatively, for damages. One, Swann, was joined as a defendant, it being alleged that he also made material misrepresentations to the plaintiff which induced the plaintiff to enter into the contract.

The learned trial judge (*Martin J.*) found that certain of the misrepresentations alleged in the correspondence were made by McDermott, that they were false to his knowledge, that they were material, and that they induced the plaintiff to enter into the contract. He gave judgment for the plaintiff for the return of the bonds with interest at four per centum from the day on which they were handed over until judgment or, alternatively, for payment of £2,000 with the said interest. The liability of Swann was reserved for further consideration. Swann was served with a notice of appeal but did not appear upon the appeal.

The defendant contends that the arrangement for withdrawal of the allegations made by the plaintiff and for an extension of time constituted a bar to the maintenance of the action. It was argued that this arrangement amounted either to a release of any cause of action based upon these allegations or to an agreement not to sue in respect of them. The learned judge found that another misrepresentation was made, which was not mentioned in the correspondence, and the allegation of which therefore was not withdrawn by the plaintiff. As to this misrepresentation the defendant contends that the learned judge made his finding under the misapprehension that it was corroborated by a particular witness and that, as the finding was made upon the basis of this mistake, this court may properly set it aside.

The first question which arises relates to the character and legal effect of the arrangement (to use a relatively non-committal term) for the withdrawal of allegations of misrepresentation. The learned judge held that the alleged arrangement was "too vague a thing to be enforceable as a contract."

I am unable to agree that a withdrawal of damaging allegations is a matter so vague as to be incapable of being an element in a contract. Such a withdrawal, especially when, as in this case, the withdrawal is evidenced by writing, may be regarded as of real value and importance as an abandonment of serious imputations against the character of the person in respect of whom they are made.....”

McDermott : statement of principle

However, over the , the essential statement of principle has become associated with what was said by Dixon J (at 183-185):

“The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one. The decision of the Court of Appeal in *British Russian*

Gazette &c. Ltd. and Talbot v. Associated Newspapers Ltd. [14], though doubtless some of the reasons display less zeal for principle than for reform, does not appear to me to be inconsistent with the received doctrine that no new cause of action is given by an accord executory. In that case, the agreement constituting the accord was made as a compromise of three several causes of action vested in three persons respectively. It was made by one of them purporting to act not only on his own behalf but also as agent for the other two. In fact he had no authority to do so, and he was held liable for damages for breach of warranty of authority. This result might perhaps be supported, even if the agreement were an accord executory, on the ground that, at all events, the opposite party had acted to some extent on his representation of authority, but the intention of the parties appears to have been that the agreement of compromise should itself have been accepted as in satisfaction of the causes of action, so amounting to an accord and satisfaction. The case, therefore, provides no more than a late illustration of the doctrine, finally established perhaps by *Flockton v. Hall* [15], that of accord and satisfaction there are two cases, one where the making of the agreement itself is what is stipulated for, and the other, where it is the doing of the things promised by the agreement. The distinction depends on what exactly is agreed to be taken in place of the existing cause of action or claim. An executory promise or series of promises given in consideration of the abandonment of the claim may be accepted in substitution or satisfaction of the existing liability. Or, on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate; if the performance, then there is no discharge unless and until the promise is performed”.

See also *Tallerman and Co. Pty. Ltd. v. Nathan's Merchandise (Victoria) Pty. Ltd.* [1957] HCA 10; (1957) 98 CLR 93 per Dixon CJ, Fullagar J at 114.

For a recent restatement of these principles, see *Blue Moon Grill P/L v Yorkey's Knob Boating Club Inc* [2006] QCA 253

Where accord remains executory because of failure of one party to co-operate

There is a rule of construction that a person cannot take advantage of his own wrong : *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 147-8, 161; *Brothers v Park and Anor* [2004] ANZ Conv R 451; [2004] NSWCA 241 at [82]; *Ruthol Pty Ltd v Mills* [2003] NSWCA 56 at [94] – [100].

Mediation Agreements

If a mediation contract is agreed between the parties resolving the issues in dispute and the settlement sum is paid, an accord and satisfaction is constituted with the effect that the terms of the mediation contract replace the causes of action set out in the first application: Sun Cool Pools and Spa's Pty Ltd v Freedom Pools and Spas [2005] QCCTB4.

If there is an accord and satisfaction, the only remedies available arise under the mediation contract itself and any rights or causes of action that existed in the original application are now replaced. In McDermott v Black [1940] HCA 4; (1940) 63 CLR 161 at 183-4, Dixon, J said:

“the essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. It may be a promise or it may be the act or thing promised. Whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired.”

This passage was approved by the High Court in Tallerman and Co. Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd [1957] HCA 10; (1956) 98 CLR 93 at 114.

Without prejudice offers that are accepted

Where there is acceptance of an offer marked “without prejudice” then the observations of Williams J, in Tallerman and Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd [1957] HCA 10; (1956-1957) 98 CLR 93 at 118 are apposite:

"When the solicitors for the plaintiff said that they accepted the offer in a letter headed 'without prejudice' they may have inserted the words 'without prejudice' because the offer had been made by the defendant 'without prejudice' but in the letter of 4th June these words could have no meaning because when an offer is accepted the contract is complete and the acceptance of the offer could not be made without prejudice to its legal effect."

Recitals as an aid in the construction of settlements

Recitals can be used as an aid in the construction of operative terms : Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407 paras [380] ff and the use of the present, past or future tense in a recital may be significant (ibid).

General words used in standard form settlement agreements : what is their reach ? a consideration of Grant v John Grant & Sons Pty Ltd [1954] HCA 23; (1954) 91 CLR 2

The following extracts from Smolle v Australia and New Zealand Banking Group Limited [2007] FCA 1673 usefully summarise the main case in this area :

“42 The principles relating to the construction of deeds, including in particular deeds of release , have long been well settled: see generally Robert Norton, *A Treatise on Deeds* (Sweet & Maxwell, 1906) at Chs III–VIII.

43 In *Grant v John Grant & Sons Pty Ltd [1954] HCA 23*; (1954) 91 CLR 112 Dixon CJ, Fullagar, Kitto and Taylor JJ accepted that a release expressed in general words will usually be read down by reference to what was in the contemplation of the parties at the time of the execution of the release Their Honours expressly adopted (at 123–124) the reasoning of Lord Westbury in *London & South Western Railway Co v Blackmore* (1870) LR 4 HL 610 at 623 that:

"The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given".

44 Their Honours went on to state (at 129–130):

"From the authorities which have already been cited it will be seen that equity proceeded upon the principle that a releasee must not use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor."

45 In *McCarthy v McIntyre [1999] FCA 784* a Full Court of this Court stated (at [106]):

"In Grant v John Grant & Sons Pty Ltd (1954) 91 CLR 123, the joint reasons for judgment (Dixon CJ and Fullagar, Kitto and Taylor JJ) approved two related principles. First, the general words of a release should be restrained by the particular occasion (at 123). Thus, the general words of a release are to be construed by reference to the recitals

in the particular deed. Secondly, the general words in a release are limited to those things which were specially in the contemplation of the parties at the time when the release was given (at 123-124)."

46 More recently in *Commonwealth Development Bank of Australia Ltd v Kok*, in the matter of *Kok* [\[2003\] FCA 90](#) Beaumont J stated (at [34]):

"In the first place, it is a settled principle of interpretation that general words in an instrument of release are limited always to that thing, or those things, which were specially in the contemplation of the parties at the time when the release was given".

See also *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581 at 599–600.

47 In *Banque Bruxelles Lambert v Australian National Industries Ltd* (unreported, New South Wales Court of Appeal, 26 February 1997) the issue was whether a particular costs order was released by the deed in question. The sole point argued on the appeal was whether the principles enunciated in *Grant v John Grant* applied, so as to exclude the costs order from the release. After an extensive analysis of the surrounding circumstances, Beazley JA (with whom Meagher and Cole JJA agreed) concluded:

*"In this matter the terms of the instrument quite clearly included a release of the costs order. The surrounding circumstances included negotiations leading up to the final entering into of the Major Creditor's Deed of Release on 22 September 1992. At one stage in those negotiations, as was clearly evidenced by the letter of 17 December 1992, BBL would have liked to have reserved the costs order made by Rogers CJ Comm D at first instance. There is no evidence and indeed the evidence is to the contrary, that ANI ever agreed to that. There is no evidence that BBL between 17 December and the time of the execution of the Deed, did not decide in the interests of the overall commercial settlement, to forego its right to that costs order. In those circumstances I cannot see how the principle in *Grant v John Grant & Sons Pty Ltd* applies."*

48 The principles established by these authorities illustrate why, on 18 October 2007, I concluded that the bank was entitled to rely upon the Deed of Release as a complete answer to the Smolles' claim against it. I rejected Mr Williams' attempt to read the Deed of Release down so as to cover only the balanced trust investment and those losses incurred by reason of the investment in the Bond prior to the execution of the Deed. I could see no basis for reading the Deed of Release as permitting the Smolles to sue for future losses arising out of their investment in the Bond. Mr Williams' submission seemed to me to involve an artificial and entirely implausible interpretation of the plain language of the Deed of Release, and the clear and unambiguous definition of the "claim" that was to be settled by it.

49 Mr Williams' submission also seemed to me to be inconsistent with the "surrounding circumstances". The bank clearly intended that any settlement should apply to all claims made by the Smolles, including their claims in relation to the Bond. Notably it had

rejected the amended version of the Deed of Release , executed by the Smolles on 16 August 2001, which sought to exclude certain transaction costs in relation to the switch from the balanced trust to the Bond. Reynolds Lawyers' letter of 11 March 2002 stated that the variations to the Deed of Release were "unacceptable" to the bank. As finally executed on 25 March 2002, the Deed of Release dealt specifically with the Smolles' claim against the bank for "compensation in relation to" their investment in the balanced trust *and* the Bond.

50 Having regard to the plain language of the Deed of Release , and the surrounding circumstances, I am of the view that the principles expressed in *Grant v John Grant* cannot be invoked to exclude any of the Smolles' claims in relation to the Bond from the settlement.

51 It was on this basis that I indicated that I would summarily dismiss the Smolles' claim against the bank, and provide reasons at a later date. However, I made it plain that I would do so solely on the basis of the Deed of Release , and not by reason of any of the other matters upon which Ms Loughnan relied.

For recent consideration of the John Grant line of authority, see *Primus Telecommunications Pty Limited v Koee Communications Pty Limited* [2007] NSWSC 91, which after citing extensively from that case, continued as follows :

“66 In *Qantas Airways Limited v Gubbins* [\(1992\) 28 NSWLR 26](#), Gleeson CJ. (as he then was) and Handley JA., in Joint Reasons for Judgment, at 28G-29B/C, observed:

“There was no dispute before the tribunal that a settlement agreement had been entered into. The question was whether it covered the claims which the respondents wished to pursue. The case for the respondents was that, although they had executed releases in general terms they had been assured by the appellant that the claims they were releasing were different from the claims now in issue, which had been said to be ‘entirely separate’. They said that they had been assured that the releases would not be raised as a defence to their present claims, and, on the faith of that assurance, gave the releases Surprisingly, the legal representatives of the parties debated that issue in terms of the legal concepts of waiver and estoppel, without adverting to the decision of the High Court in *Grant v John Grant & Sons Pty Ltd* [\[1954\] HCA 23](#); [\(1954\) 91 CLR 112](#), which is directly in point, and which sets out the principles by reference to which a court will decide whether a general release will be held to cover a particular dispute. The rule is that the general words of a release will, in an appropriate case, be read down to conform to the contemplation of the parties at the time the release was executed.”

67 Kirby P (in *Gubbins*) discussed the relevant principles at 43-45. After citing from the joint judgment in *Grant* at 125 and at 130, Kirby P. said:

“This principle is still good law in Australia. It has never been modified by the High Court .”

68 His Honour went on (at 44B-E):

“.....Deeds of release are usually expressed in very wide terms, as in *Grant* and here. In the days of *Grant*, such deeds came out of the conveyancer’s collection. Nowadays, they come rolling off the word processor. Most people, at least in the position of these respondents, execute them without attention to the detail and to the generality of their expression. It is thus entirely legitimate to consider what is the subject matter to which such a deed was directed if it is later contended that, despite the generality of its language, the parties at execution had something more confined in mind. Such is a rule of equity. Unsurprisingly, given the origins of that rule, it is a rule which ‘equity, good conscience and the substantial merits of the case’ would have made relevant to the present litigation before the tribunal.”

See further *Snowy Mountains Organic Dairy Products Pty Ltd v Wholefoods Pty Ltd & Ors* [2008] VSC 405 (8 October 2008)

Principles of construction application to settlement agreements

In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,.....the High Court [16] said:[17]

“This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.”

Accordingly, a paragraph of an affidavit was ruled inadmissible, as it descended into the subjective of Mr Kinnear’s “or even what he might have conveyed or attempted to convey to the plaintiff about his understanding of what he was doing. The meaning of the Deed of Release is to be determined objectively. That is, by what a reasonable person in the position of the parties would have understood it to mean. This requires consideration not only of the text of the Deed of Release but also the surrounding circumstances known to the parties and to the purpose and object of the transaction entered into by them.”

Primus Telecommunications Pty Limited v Kooee Communications Pty Limited & Anor [2007] NSWSC 91 sheds further light on the proper approach to construction of settlement deeds .

“24 The primary route to this construction is no more and no less than:

i. a reading of the Separation Agreement taking into account [in the manner stated in ii below], what were the circumstances with reference to which the words were used, and what is the object appearing from those circumstances, which the person using them had in view: cf *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384 per Lord Wilberforce; *Lakatoi Universal Pty Ltd v Walker* [2000] NSWSC 113 at [1039];

ii. the background knowledge which a reasonable person in the position of the parties will be regarded as having, for the purposes of the construction of a contract, includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man with the proviso that it should have been reasonably available to the parties: cf *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 at 912-913.

The principles

25 Generally it is sufficient to note that the principles which are apt to inform the proper approach to the construction of a commercial document were set out in *Hudson Investment Group Ltd v Australian Hardboards Ltd* [2005] NSWSC 716 at [287] – [297] which formulation is adopted for present purposes.

26 Of particular significance to the matter presently in issue are the following portions [repeated in *Hudson*] taken from the judgment of McColl JA in *Peppers Hotel Management Pty Ltd v Hotel Capital Partners Ltd* [2004] NSWCA 114 at [71] and [72]:

[71] Gibbs J’s statement in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99 at 109 that “the court should construe commercial contracts “fairly and broadly, without being too astute or subtle in finding defects”, finds reflection in the statement in *International Fina Services AG v Katrina Shipping Ltd* (“*The Fina Samco*”) [1995] 2 Lloyd’s Rep 344 at 350 per Neill LJ (with whom Roch and Auld LL.J agreed) that the primary focus is the agreement itself which “must speak for itself, but ... must do so in situ and not be transported to a laboratory for microscopic analysis”.

[72] Consistently with this approach, it has been held that if detailed semantic and syntactical analysis of a written contract lead to a conclusion that flouts business commonsense the contract must be made to yield to business commonsense: *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201 per Lord Diplock; applied by Gleeson CJ, Gummow and Hayne JJ in *Maggbury Pty Ltd v Hafele Australia Pty Ltd*, above, at 198.

27 There is, it seems to me, clear substance in the submission put by Primus to the effect that the contentions of Kooee in relation to the net debtors issue, present a strong aura of commercial unreality. This is because the submission involves Primus selling all of the relevant class of debts without payment at all for any of those for which it had made some provision in its books. I accept that this presents as a somewhat startling commercial outcome which would effectively mean that very large sums were simply being in effect given away in the context of an agreement that was sought by the defendants to go on their own way in selecting a new commercial carrier and to enable the selling of the shares in the first defendant to B Digital. This permits the Court, cognisant of the circumstances in which the Separation Agreement was entered into and as a matter of commercial reality, to read the words "less any of those debts in respect of which Primus has made provision" [in the definition of 'Debtors Amount'], as meaning "less *any part* of those debts in respect of which Primus has made provision".

Satisfaction/settlement with one or more joint or concurrent tortfeasors : extracted from Jacobs Commercial Damages (Thompson , looseleaf, 2008]

The question is whether section 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and analogous State and Territory legislation, on the one hand, and on the other, common law rules, addressed below, bar a plaintiff from pursuing a joint or concurrent tortfeasor in circumstances where the plaintiff has resolved its claim (via settlement, or judgment), with one of them.

As noted in *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; [2001] HCA 66 at [3], s 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) states:

- 5(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -
- (a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage;
 - (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered ... against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given; the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

...

Concurrent tortfeasors are those whose acts concur to produce the same damage. Concurrent tortfeasors are either:

- joint tortfeasors, or
- several concurrent tortfeasors: see *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 49 ALJR 233.

In *Baxter v Obacelo Pty Ltd* (2000) 48 NSWLR 522, Giles JA reviewed the authorities on the topic. At [60], he summed up the law as follows:

If joint or concurrent tortfeasors are sued in the same proceedings, the judgments for compensatory damages will be for the same loss suffered by the plaintiff and in the same amount, and there will be no occasion for the limitation of recovery. If the judgments are for different amounts because one of the tortfeasors must pay exemplary damages, s 5(1)(b) may not apply to those damages (see *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (at 469-470), per Brennan J), but if it does there will be no reason to limit recovery to a lower amount simply because the judgment for that amount was given first - that would defeat the award of exemplary damages. Only where settlement brings a first judgment in an amount different from the damages ultimately awarded in a later judgment in the same proceedings can any question of limiting recovery arise, and there is no reason to confine the plaintiff to a settlement amount which might well reflect the tortfeasor's impecuniosity rather than the plaintiff's loss. The plaintiff having sued both or all tortfeasors in the one proceedings, there will be no point in limiting recovery in order to discourage multiple proceedings, nor will recovery up to the higher amount of the later judgment necessarily be excessive recovery. Where the plaintiff brings successive proceedings, perhaps striving for a better result with experience, the limitation is appropriate, but not otherwise.

In *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; [2001] HCA 66 at [25] the High Court, consisting of Gleeson CJ and Callinan J (with whom Gummow and Hayne JJ would appear to have agreed at [52]) said this at [18]-[19]:

Glanville Williams, in *Joint Torts and Contributory Negligence*, published in 1951, used “concurrent tortfeasors” as a generic term for joint tortfeasors and several concurrent tortfeasors. Concurrent tortfeasors are persons whose acts concur to produce the same damage. Joint tortfeasors are responsible for the same wrongful act leading to single damage. Such joint responsibility may arise from vicarious responsibility of one for another, or from the non-performance of a joint duty, or from concerted action. Several concurrent tortfeasors are independent tortfeasors whose separate acts combine to produce damage. In their case, “concurrence is

exclusively in the realm of causation”. In *Thompson v Australian Capital Television Pty Ltd*, Brennan CJ, Dawson and Toohey JJ said:

The difference between joint tortfeasors and several tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage. As was said in *The “Koursk”* [1924] P 140; [1924] All ER Rep 168, for there to be joint tortfeasors “there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage”. Principal and agent may be joint tortfeasors where the agent commits a tort on behalf of the principal, as master and servant may be where the servant commits a tort in the course of employment. Persons who breach a joint duty may also be joint tortfeasors. Otherwise, to constitute joint tortfeasors two or more persons must act in concert in committing the tort.

At common law, the liability of joint tortfeasors was joint and several. A plaintiff could sue joint tortfeasors separately, in independent actions, for the full amount of the loss. Or the plaintiff could sue all the joint tortfeasors in the same action. Several concurrent tortfeasors, on the other hand, could not be joined as defendants in the one action. That was because they were severally liable “on separate causes of action”. The difference between action and cause of action was significant. A person suffering injury as a result of the wrongdoing of joint tortfeasors had only one cause of action. Some consequences of this will be considered below. Such a person might bring one action (ie proceeding), or more than one action. In the case of several concurrent tortfeasors, there was a separate cause of action against each, and if a plaintiff desired to sue more than one, it was necessary to commence separate actions.

As Gleeson CJ and Callinan J observed in *Baxter (2001)* , there are various corollaries to the principle that a plaintiff has only one cause of action against a number of joint tortfeasors, viz:

- (i) where an action is brought against two or more joint tortfeasors, only one judgment for one sum of damages can be given in favour of the plaintiff: at [20];
- (ii) the single cause of action resulting from the joint commission of a tort merges in the first judgment which the plaintiff is awarded in respect of it. This bars the plaintiff from recovering judgments against any other joint tortfeasor: at [21] ff;
- (iii) an unqualified release of one joint tortfeasor releases the others: at [26].

In *Baxter (2001)* it was submitted by the appellant that s 5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) led to the result that where there was a damages award, by consent, against one tortfeasor, then the sums recoverable under any judgments given way of damages against both the party with whom there had been settlement, and also the appellant, shall not in the aggregate exceed the amount of

damages awarded by the consent judgment.

Their Honours rejected the construction which the appellant sought to give to s 5(1)(b) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). Their Honours concluded at [35] as follows:

This conclusion does not result in any inconsistency between pars (a) and (b). They are addressed to different, although related, topics. The word “action” has the same meaning in both paragraphs, but the expression which is controlling in par (a) is that judgment recovered against one joint tortfeasor “shall not be a bar to an action against” another. A bar to an action is a ground upon which an action must fail. It makes no difference whether the action in question is a pending proceeding or one yet to be commenced, or whether it is the same proceeding as that in which judgment has been entered against one tortfeasor or a separate proceeding. That is not inconsistent with reading par (b) as meaning what it says. What it says does not apply to the present case because there was not more than one action.

Baxter v Obacelo Pty Ltd (2001) 205 CLR 635; [2001] HCA 66 made it clear that the terms of any settlement between P and D1 may well be of great importance in determining whether money to be paid by D1 was in full and final settlement of the entirety of the damages claim or not: see at [23] and [48].

The High Court then considered whether there was any common law or equitable principle, marshalled to the principles of accord and satisfaction, which led to the result which the appellant desired. Namely, that where there has been settlement between the plaintiff and one of the defendants, then that of itself constitutes a settlement with all. The key paragraphs of the High Court's decision are set out below at [39]-[41]:

In *Tang Man Sit v Capacious Investments Ltd* Lord Nicholls of Birkenhead, delivering the judgment of the Privy Council, said, concerning cumulative remedies:

Faced with alternative and inconsistent remedies a plaintiff must choose between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently, and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other. There are limitations to this freedom. One limitation is the so called rule in *Henderson v Henderson* ... In the interests of fairness and finality a plaintiff is required to bring forward his whole case against

a defendant in one action. Another limitation is that the court has power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together. A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

Discussion of this subject often contemplates judgment entered by a court following a judicial assessment of damages. That will ordinarily involve a judicial assessment of the entire extent of the plaintiff's loss or damage. Or judgment may be entered by consent, and this may be by way of compromise. Recoupment of the whole of a plaintiff's loss may not be the only circumstance in which it might be unconscientious to pursue a claim against another. Subject to those qualifications, the principles stated by his Lordship are in point. They were referred to in *Thompson v Australian Capital Television Pty Ltd*.

... But what exactly is meant by "full satisfaction" in a context such as the present?

The High Court then emphasised that the terms of any settlement may be very important by showing that the settlement against one defendant would, leading to a consent judgment, was not intended to represent the full amount of the plaintiff's loss or damage. The critical question was whether the claim in fact had been satisfied and their Honours emphasised that the mere fact that there was an element of compromise in the settlement, did not of itself imply the absence of full satisfaction.

Their Honours continued at [45], [47]:

In most cases in which this problem arises, as in the present case, the second tortfeasor will not be a party to the settlement agreement. The agreement will not have contractual effect as between the plaintiff and the second tortfeasor. A defence of accord and satisfaction is not available to the second tortfeasor.

...

If there has been a judicial assessment of the whole of the plaintiff's loss or damage, resulting in an award of damages by way of judgment in that amount against one tortfeasor, satisfaction of the judgment by that tortfeasor will put an end to any claim, or possible claim, against another tortfeasor, whether a joint tortfeasor or one of several concurrent tortfeasors, ...

Their Honours left it open, in a circumstance where there had been no judicial assessment

of damages, for a defendant to contend that it would be unconscionable for the plaintiff to press rights against it in light of settlement with another defendant: at [48].

Kirby J came to a similar conclusion. His Honour said at [91]:

It is unnecessary to resolve the question of whether the intention of the parties to the settlement is to be derived subjectively – from what they expected and meant in their own minds – or (as I would prefer) objectively from the effect of what they did – from what a reasonable observer (represented ultimately by a court) would impute to the parties. In either event, the only interpretation of the conduct of the respondents and of Mr Whitehead was that the respondents were reserving their right to proceed against Mr Baxter in respect of the residue of their damage which they continued to assert.

The New South Wales Court of Appeal in *Itek Graphix Pty Ltd v Elliott* [2002] NSWCA 442 at [180]ff focussed on the criticality of the terms of settlement in seeking to determine whether the parties thereto had intended the moneys received to be in full satisfaction of the plaintiff's claim. The court considered that the parties' intention was to be judged objectively. Hence the court had regard to the terms of settlement and the pleadings. Regard was however made, in the alternative, to subjective intention which was said to be in force or flowed from the objective analysis.

Section 5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) applies equally to actions against joint tortfeasors and actions against several concurrent tortfeasors. “Ex facie, the provision does not operate to debar a second or later action in respect of the same damage but rather limits the amount of damages that a plaintiff may recover under subsequent judgments.”: see *Harris v Perkins* [2001] NSWSC 258 at [20]. There are several concurrent tortfeasors when the independent acts of two persons contribute to the same damage: *The Koursk* [1924] P 140; [1924] All ER Rep 168. Joint tortfeasors are, at common law, jointly and severally liable for the whole damage subject to the limitation of the rule in *Brinsmead v Harrison* (1872) LR7CP 584, which rule was abolished by s 51A of the aforesaid legislation: *Harris v Perkins*: [2001] NSWSC 258 at [19]; and from which case the above two propositions have also been distilled.

[40.1230] The rule against double recovery

Generally, courts would not permit double recovery for the same loss under different causes of action, having regard to the basic compensatory aim of awarding damages: *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; [2001] HCA 66.

Where a settlement discharges the parties with immediate effect, then that constitutes accord and satisfaction. See further the separate judgment of Gummow and Hayne JJ in *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at [56] ff.

Effects of proportionate liability on settlement agreements

New South Wales Civil Liability Act 2002

In the case of the Commonwealth, see Part VI of the [Trade Practices Act 1974](#), [Part 7.10](#) Division 2A of the [Corporations Act 2001](#) and [Part 2](#), Sub-Division GA of the *Australian Securities and Investment Commission Act 2001*. In the case of NSW, see [Part 4](#) of the [Civil Liability Act 2002](#). In the case of Western Australia, see [Part 1F](#) of the [Civil Liability Act 2002](#), and the [Civil Liability Amendment Act 2003](#). In Queensland, see [Part 2](#) of the [Civil Liability Act 2003](#). In Tasmania, see the [Civil Liability Act 2002](#), [Part 9A](#). In the Northern Territory, see the [Proportionate Liability Act 2005](#). In the Australian Capital Territory, see the [Civil Law \(Wrongs\) Act 2002](#). South Australia has enacted the *Law Reform (Contributory Negligence and Apportionment of Liability Act 2001)* Part 3, and is in the process of adopting a proportionate liability regime.

Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors [2008] VSCA 208 (22 October 2008)

Nettle JA

24AJ. Contribution not recoverable from defendant

Despite anything to the contrary in [Part IV](#), a defendant *against whom judgment is given under this Part* as a concurrent wrongdoer in relation to an apportionable claim -

- (a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and
- (b) cannot be required to indemnify any such wrongdoer.[\[2\]](#)

4 The principal question in this appeal is whether s 24AI prohibits a concurrent wrongdoer who settles an apportionable claim, and thus against whom no judgment is given under [Part IVAA](#), from claiming contribution under [Part IV](#) in relation to the settlement sum.

5 As Ashley JA demonstrates in his incisive analysis of the legislation, the answer to that question is no. There is nothing in s 24AI or elsewhere in [Part IVAA](#) which prohibits a concurrent wrongdoer from settling an apportionable claim for a settlement sum which is greater than the proportion of the claim that the court would have determined to be just if the claim had gone to judgment. Consequently, if a concurrent wrongdoer settles an apportionable claim for more than that amount, there is nothing in s 24AI or elsewhere in

[Part IVAA](#) which prohibits the concurrent wrongdoer from claiming contribution in relation to the settlement sum.

6 Nor in my view is there anything at all surprising about that result once it is remembered that, although the rights of contribution created by [Part IV](#) are purely statutory,^[3] they and [Part IVAA](#) reflect the equitable doctrine of contribution that ‘persons who are under co-ordinate liabilities to make good the one loss ... must share the burden pro rata’.^[4] *Consequently, whether a settlement sum exceeds the proportion of a claim for which a settling wrongdoer would be adjudged to be responsible under [Part IVAA](#) (I shall call that: the wrongdoer’s ‘proportionate liability’) depends not only on the amount of the apportionable claim and the number and degrees of responsibility of concurrent wrongdoers, but also upon the terms and effect of the settlement .*

7 So, for example, if the amount of an apportionable claim were \$1 million and there were four concurrent wrongdoers, each of whom was equally responsible for the loss and damage suffered, and one of them settled with the plaintiff for \$250,000 without prejudice to the plaintiff’s rights as against the three remaining concurrent wrongdoers,^[5] a claim for contribution by the settling concurrent wrongdoer would surely fail; for it would be seen that the settling wrongdoer had paid no more than his proportionate liability .

8 On the other hand, if in consideration of the \$250,000 settlement sum, the

settling wrongdoer procured not only his own release from the claim but also the release or release pro tanto of one or more of the other concurrent wrongdoers, the settling wrongdoer would have a good claim for contribution against those concurrent wrongdoers. To persist with the example, and take it one step further, if in consideration of the settlement sum of \$250,000 the settling wrongdoer procured not only his own release but also procured or caused each of the concurrent wrongdoers wholly to be released or discharged from liability, the settling wrongdoer’s proportionate liability would be one quarter of \$250,000, namely, \$62,500, and he would have a good claim for contribution against the other concurrent wrongdoers for \$62,500 per wrongdoer.^[6]

9 In this case, the appellant has not yet procured the release of the alleged concurrent wrongdoers, although it has procured the means to cause their release, and thus it cannot yet be said that the appellant has necessarily paid more than its proportionate liability . But equally, until and unless there has been a trial of the appellant’s claim for contribution (and, in that trial, an assessment of the plaintiff’s claim and the degree of responsibility of each alleged concurrent wrongdoer for the loss and damage suffered) it cannot be said that the appellant has not paid more than its proportionate liability. There is also the possibility that the appellant may yet procure the release of one or more of the alleged concurrent wrongdoers and so amend its Third Party Statement of Claim to include that fact (albeit a fact arising after the institution of the claim).^[7] “

McAskell & Anor v Cavendish Properties Ltd & Ors [2008] VSC 328 (29 August 2008)

“17 It is plain enough on the pleadings, and I will assume for the purposes of the application, that the present proceeding involves an apportionable claim.

18 The real question is whether the terms of the settlement between the plaintiffs and first to fifth defendants are (or could at any later stage become) relevant to an issue in the proceeding. The builders’ argument is that the terms of settlement are relevant to the question of double recovery.

19 As to that, in Boncristiano Winneke P[4] observed that[5]:

“... in cases where the plaintiff seeks to recover from the several defendants compensation in respect of the same damage it is fundamental that the plaintiff cannot recover more than the total damage which he or she has sustained. Where the claims for damages are concurrent, in the sense that the claims ‘overlap’, recovery by the plaintiff of the whole or part of the loss claimed from one defendant will necessarily be taken into account in assessing the damages to be recovered from the other.”

He added that[6]:

“The fundamental question is whether the claims against the various defendants are ‘concurrent’ in the sense that the relief sought is the same. Nor is it to the point that the damages received from one defendant have been received pursuant to a compromise of the claim against that defendant, by way of acceptance of moneys in court or otherwise.”

20 In Gunston Byrne J referred to Boncristiano and observed, by reference to [s 24AK](#), that “the rule against double recovery may come into play to bring about some adjustment as between the wrongdoers” (emphasis added). I note, however, that no question of double recovery or “adjustment as between the wrongdoers” arose on the facts in Gunston because the amount recovered by the plaintiff from all the concurrent wrongdoers did not exceed her total loss and damage.

21 Nevertheless, the terms of [s 24AK](#) contemplate that, in determining whether a plaintiff’s recovery of damages in a subsequent action will result in the plaintiff recovering more than his or her actual loss or damage, regard be had to any damages previously recovered by the plaintiff in respect of the loss or damage. The expression “damages previously recovered by the plaintiff in respect of the loss or damage” is presumably a reference to any amount recovered by the plaintiff under a settlement with any of the concurrent wrongdoers, in addition to any amount recovered by the plaintiff under a previous judgment against any of the concurrent wrongdoers in respect of the apportionable claim. In those circumstances, the terms of any settlement might well be relevant to the proper application of [s 24AK](#), and to any “adjustment between wrongdoers” which may be required. But these matters would not arise for determination until the Court had determined in the later proceeding that the defendant was liable. That

is because if the later defendant was found not to be liable, no amount of damages would be recoverable from that defendant at all, hence there would be no need to limit the amount the plaintiff could recover from that defendant by reference to what the plaintiff had already recovered, and consequently no need for any adjustment as between the defendants. In short, any amount recovered under an earlier judgment and/or settlement would be irrelevant as against the later defendant.

22 In these circumstances, and to the extent that the builders in the present case seek to bring their application on the basis of [s 24AK](#) and the observations of Byrne J in relation thereto, the application is premature because the builders have not yet been held liable for the plaintiffs' alleged loss or damage.

23 In any event, [s 24AK](#) is not relevant to the present case, because the section does no more than make clear that where a plaintiff has previously recovered judgment against a concurrent wrongdoer, that judgment does not prevent the plaintiff from bringing another action against any other concurrent wrongdoer, provided that the amount recovered in the later proceeding (when combined with any recovery under the earlier judgment and any settlement) does not exceed the plaintiff's total loss or damage. As the present case is not one in which any party has already recovered judgment, [s 24AK](#) has no work to do here. Rather, the plaintiffs have settled with the first to fifth defendants, and wish to continue their action against the builders. There is nothing to prevent them from doing so. The first to fifth defendants will remain in the proceeding so that if and when the case proceeds to a decision on the merits, the Court can, as it is required to do under [s 24AI\(1\)\(a\)](#), determine the liability of each defendant and third party who is a concurrent wrongdoer in relation to the claim. That is to say, the Court will determine the respective liability of each defendant and third party, the liability of each being limited to an amount reflecting the proportion of the loss or damage claimed that the Court considers just having regard to the extent of each defendant or third party's responsibility for the loss or damage.

24 As to the extent of the respective defendants' liability, I do not accept the builders' submission that their liability depends on the amount recovered or recoverable under the terms of settlement. Although it was obiter, I agree with the analysis of Byrne J in [Gunston \[7\]](#) to the effect that in a proceeding involving an apportionable claim, a settlement by the plaintiff against one concurrent wrongdoer does not affect the liability of any of the other concurrent wrongdoers, at least insofar as the plaintiff does not recover an amount in excess of his or her total loss or damage.

25 As to that, the principle in *Boncristiano* is applicable, but it only arises if and when the builders are held to be liable. If that occurs, it may be that any amount recovered by the plaintiffs in the settlement will need to be taken into account when entering judgment against the builders, but at present there is no issue between the parties as to double recovery, so the terms of settlement are irrelevant and not discoverable.

