

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).

Authorities such as *McDermott v Black*<sup>[31]</sup> and *Baxter v Obacelo Pty Ltd*,<sup>[4]</sup> 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. As Dixon J said in *McDermott v Black* [\[1940\] HCA 4](#); (1940) 63 CLR 161 (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 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 and c. Ltd. and Talbot v. Associated Newspapers Ltd.* (1933) 2 KB 616, 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* (1849) 14 QB 380, 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."

Dixon J went on to say (at 184-5):

"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.

*Blue Moon Grill P/L v Yorkey's Knob Boating Club Inc* [2006] QCA 253

### 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."

To the extent the accord remains executory, it is because of the wrongful conduct of Mr McGrath in not accepting the rifle; and there is a rule of construction that a person cannot take advantage of his own wrong : *New Zealand Shipping Co Limited v Société Des Ateliers et Chantiers de France* [\[1919\] 1 AC 1](#); *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; *Plumor Pty Ltd v Handley* (1996 ) 41 NSWLR 30 at 34; *Hunyor & Anor v Tilelli* (1997) 8BPR [97667] 15,629 at 15,631; *Munro & Anor v Bodrex P/L* (2002) 10 BPR 19,403; [\[2002\] NSWSC 122](#); *Mitchell v Pattern Holdings Pty Limited* (2002) 11 BPR 20,241; [\[2002\] NSWCA 212](#); *Brothers v Park and Anor* [\[2004\] ANZ Conv R 451](#); [\[2004\] NSWCA 241](#) at [\[82\]](#); *Ruthol Pty Ltd v Mills* [\[2003\] NSWCA 56](#) at [\[94\]](#) – [\[100\]](#).

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).

