

Case in Brief

Negotiating settlements: agreement binding if substance of dispute is resolved

A recent decision out of the Australian state of Victoria is a reminder of the importance of engaging in best practices when negotiating settlements of disputes.

In *Sully v Englisch*¹, the Applicant, Sully, brought proceedings in the Victorian Civil and Administrative Tribunal (**VCAT**) against the respondent, Englisch, for misleading and deceptive conduct. The VCAT ordered in favour of Sully, following which Englisch then filed a notice of appeal against the VCAT's decision.

The parties attended a mediation in relation to Englisch's appeal in September 2020. They reached an agreement to settle but did not prepare any written terms of settlement on the day of the mediation. The mediation was left "open" by the Judicial Registrar at its conclusion and the proceeding was listed for directions hearing at the end of the month. There was further correspondence between the parties after the mediation concerning the terms of settlement, but no written terms were signed.

Sully claimed that a binding settlement agreement was reached at the mediation, but Englisch disagreed. The trial judge ruled in favour of Englisch. Sully sought leave to appeal, arguing that the trial judge erred when finding that there was insufficient evidence that the parties intended the terms to be legally binding.

Both parties agreed on the following relevant legal principles to be applied to determine whether the parties had agreed to be immediately bound by the agreement:

- Whether an agreement reached is meant to be immediately binding should be determined objectively, taking into account the presumed or inferred intent of the parties. The ultimate question to answer is what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe;

- A party's subjective intention or belief is not determinative, although it may be relevant; and
- For an agreement to be immediately binding, the original oral agreement must be complete, certain and enforceable on its terms. A written agreement may be executed later.

In its ruling, the Court of Appeal applied the "objective test", finding that a reasonable person observing the mediation would have concluded that the parties had reached a binding agreement by the end of the mediation, therefore, Sully had proven that the parties intended to be immediately bound by the agreement reached at the end of the mediation.

The Court of Appeal was of the view that by the end of the mediation, Sully and Englisch had obtained that which was of most concern to them. The fact that the settlement appears to have achieved a favourable outcome supports the contention that whatever further steps or documentation were contemplated, they were procedural or speculative in nature. The fact that the parties later found things to argue about does not change what had already occurred.

This case has a wide application and serves as a reminder to all parties negotiating the settlement of claims that an agreement will be binding if the substance of the dispute is irrevocably resolved, with only procedural or non-essential matters outstanding. It also emphasises the importance of having clear and concise terms at the outset of negotiations, which ensures a greater deal of certainty.



1 *Sully v Englisch* [2022] VSCA 184