Settlement agreements: at what point is a settlement "agreed"?

BRIEFING

Introduction

Negotiating the settlement of a dispute is rarely straightforward. In the course of negotiations it can be easy for the parties to focus on agreeing the settlement figure and lose sight of the significance of ensuring that the ancillary terms of the settlement are also agreed.

As the recent case of *Bieber v Teathers Ltd (In Liquidation)*[1] demonstrated, failure to be clear about the basis on which the settlement is "agreed" may result in one party being bound by a settlement that they did not intend. The case is a salutary reminder that without the necessary care and attention being taken to settle negotiations, an outcome that is wholly unsatisfactory and unintended may be reached.

Bieber v Teathers Ltd (In Liquidation)

The claimants in the High Court case of *Bieber v Teathers* were individuals who invested in a series of TV and film production partnerships formed by the defendant, which subsequently went into liquidation. The aim of these partnerships was to invest in productions to take advantage of tax concessions made available under a series of Finance Acts between 2000 and 2007.

Most of the productions that were financed failed commercially and none generated the tax relief intended. The claimants considered this to be due to the fault of the defendant and they pursued their claims in negligence collectively.

During the course of the proceedings, the parties entered into settlement negotiations. In the course of those negotiations, the Claimant's solicitor (C) emailed the Defendant's solicitor (D) indicating a willingness to compromise. This was followed by a discussion between the two solicitors. D claimed to have said that agreeing the figures was the key to progressing the discussions further and according to D, C had said that agreeing figures was the key to settling the case.

Shortly before the trial, C accepted a settlement offer by email from D, which focused exclusively on the sum to be paid to C. In the acceptance email C indicated that it would be circulating a draft consent order, to which D responded: "Noted, with thanks".

[1] [2014] EWHC 4205 (Ch).

On receipt of the draft consent order, D sent a long form settlement agreement to C which contained terms of the settlement that went beyond the sum agreed to be paid and included an indemnity to D in the event of third party claims. C refused to sign that agreement.

C asserted that the claims had been settled by an agreement evidenced in the email exchange and were thus not dependent on the subsequent agreement of settlement terms.

The claimants sought a declaration from the court that a binding settlement was reached by exchange of emails between the parties' solicitors, in which the claimants had agreed to settle the proceedings in return for a payment by the defendant to the claimants collectively of £2 million.

Outcome: key points from the judgment

The High Court held that a binding settlement agreement had been reached during exchange of emails between the parties' solicitors, notwithstanding that they were subsequently unable to agree on the detailed terms of the settlement which at least D had expected would follow.

There was nothing to suggest that the parties had anticipated that negotiations would be conducted in a two-stage manner whereby a figure was agreed before all other terms. It was clear that the offer was a proposal to settle all the claims, counterclaims and costs by a net payment to C in a specified sum. That offer was capable of acceptance and was so accepted.

At no point during the negotiations did D attempt to reserve its position in relation to third party claims or state that its offer was "subject to contract" or subject to agreement of supplemental terms. A subjective and internal reservation of its position was immaterial to the question of whether a binding agreement was reached.

Considering the whole course of the parties' negotiations, the parties had reached a concluded agreement even though further documentation was anticipated by D. D's response, "Noted, with thanks", indicated that it considered there were no remaining issues to be addressed.

C's reference to a consent order did not vitiate the parties' intention to reach a final and binding agreement after the exchange of emails had been completed. It implied that there was nothing of substance left to agree other than the form of words necessary to carry the agreement into effect and conclude the court proceedings.

Preparedness to negotiate the terms of a consent order did not necessarily lead to the conclusion that the parties had not earlier entered into a binding agreement to settle the dispute.

Contrary to a previous offer made by D, the offer C accepted was not expressed to be subject to contract and could not be construed as including any such condition.

Concluding thoughts

This recent High Court judgment acts as a reminder that it is essential that settlement negotiations are conducted professionally, so that the outcome intended by both parties is achieved.

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