DISPUTE RESOLUTION BRIEFING

Settlement agreements: the importance of early planning

Most standard mediation agreements include a term that what the parties agree at the mediation is not binding unless it is recorded in writing and signed by each party. This makes obvious sense: parties need to be clear about what they have agreed.

However, parties often first turn to the question of formal drafting at the end of a long day mediating or, where there is no mediator, after a series of difficult and tiring negotiation discussions. The process of drafting may, however, reveal new scope for disagreement. For example, X may have agreed to pay Y £10,000, but Y may object to X paying it by cheque rather than an electronic transfer, or a builder may be happy to return to the owner's property to carry out works, but the owner may only want those works carried out on certain days and at certain times.

Two recent High Court decisions demonstrate the importance of parties having early knowledge of each and every settlement term, even when negotiations are being conducted by correspondence, and the consequences of failing to do so (*AB v CD Ltd [2013] EWHC 1376; Newbury v Sun Microsystems [2013] EWHC 2180 (QB), www.practicallaw.com/7-539-0585*).

AB v CD Ltd

The claimants, A, and the defendant, C, signed a mediation agreement with a mediator and attended a mediation day, which did not result in a settlement. However, the parties' representatives and the mediator continued to correspond and talk on the telephone. Several conversations took place, which ended in A's solicitor telephoning the mediator to say that an offer made by C was accepted.

A then sent C a draft Tomlin order (*see box "Tomlin orders"*). C returned it with a significant number of amendments, including a term that the payment was in full and final settlement of all claims and causes of actions of which A were aware, or should reasonably be aware, at the date of the Tomlin order, as well as clauses about confidentiality and the costs of the mediation. A responded by saying that these terms were too late: the deal had already been done and it did not include any of C's proposed amendments.

A applied to the High Court for a declaration that the claim had been settled by an agreement, and put forward the terms on which they contended that the agreement had been made. C admitted that some of these terms were agreed but, crucially, argued that the agreement was not binding because, among other things, there was no intention to create legal relations until the agreement was reduced to writing and signed by the parties. C based this argument on the wording of the mediation agreement, which said that if the parties came to an agreement, it would not be legally enforceable unless it was incorporated into a written settlement agreement signed by the parties or their representatives.

The court held that C's offer was not caught by the terms of the particular mediation agreement as it was made after the mediation day ended. The court looked at the term of the mediation agreement, which specified that if the dispute had not been resolved at the end of the time allotted for the mediation hearing, then the hearing could be resumed at a time and place agreed between the parties and the mediators.

The court said that this clause contemplated further hearings in the presence of the parties, and not a process of communications by the exchange of correspondence or emails and that there had been no further hearings. The court concluded that, after the mediation day, the parties had agreed to use the services of the mediator on an ad hoc basis and that, in the circumstances, the requirement in the mediation agreement for a binding agreement to be in writing did not bite. The court granted A's application.

Newbury v Sun Microsystems

Shortly before the scheduled trial, the defendant, S, sent the claimant, N, an offer in a letter. N accepted the offer. S later sent a draft agreement containing additional terms to those in the offer letter. N rejected this draft and said that a binding agreement had been concluded when it had accepted S's offer. N applied to the High Court for a declaration that a binding settlement agreement had already been reached, and that there was no scope for negotiation over additional matters.

The court held that, reading the offer and acceptance letters objectively, they were intended to create legal relations and the parties had agreed on all the terms that they regarded as essential for the formation of a legally binding agreement.

S had argued that its offer letter made an offer in principle; the parties still had to negotiate other terms and, in any event, the offer letter stated that the settlement was to be recorded in a suitably worded agreement and, until then, there was no binding contract. The court was not convinced by this argument. It said that there was no explicit reference to terms still to be negotiated and agreed. The mention of terms being recorded in a suitably worded agreement referred to the terms in the offer letter which, if accepted, would be recorded as evidence of what was actually agreed.

The court also said that S's letter was not expressed to be "subject to contract". If S had used those words, it would have been clear that the terms were not yet binding or accepted until a formal contract was agreed. By not using those words, S indicated that its letter was an offer of terms capable of acceptance as it stood, and was not intended to be subject to discussion and agreement on additional or different terms.

Practical implications

Both of these cases are a stark reminder of the need to know exactly what you are offering when seeking to settle a dispute and, therefore, what is capable of being accepted so that a binding agreement may be formed.

Although there may be a range of possible settlements, one way for each party to gain an early understanding of the desired or necessary terms of any settlement is to prepare a draft settlement agreement, or agreements, in advance. These drafts should include a party's "ideal deal" and, separately, a deal that the drafting party can live with.

It is not, however, suggested that these drafts are to be shared. They are produced instead because the process of early drafting allows time to consider a number of things, including:

- The precise scope of the dispute being settled; for example, in a defective works case, is it the claim for defects set out in the pleading or letter of claim that is being settled or something more, such as defects that are yet to be discovered or yet to be formally pleaded?

- The appropriate form of settlement agreement and its required standard wording; for example, should there be a consent order, a Tomlin order or a compromise agreement?

- Whether any steps need to be taken before a mediation or negotiation for a settlement agreement to work; for example, is further information needed about something that would have to be done with a third party (such as completing a certain form or registering a document)? Does the dispute cross areas of expertise (such as a boundary dispute that requires consultation with a conveyancing professional)?

- What all the terms are that each party requires to be included in any deal: for example, is a confidentiality clause sought? Will there need to be a clause allowing payment in instalments? Does there need to be a date included by which something needs to be completed?

Tomlin orders

A Tomlin order is a type of consent order. It must be drafted in a particular form and guidance is given on this in Part 40 of the Civil Procedure Rules. The parties agree to the terms set out in a schedule and it is ordered that all further proceedings in the claim be stayed except for the purpose of carrying such terms into effect. Liberty to apply for carrying such terms into effect must also be sought. Essentially, a Tomlin order records terms of settlement agreed between the parties but those terms are not ordered by the court and are not enforceable as a judgment, at least not without a further order.

Planning in advance also assists the mediation or negotiation process since:

- Each party has a shopping list: it knows precisely what it seeks and where the desired terms rank in the pecking order. This allows a full understanding of which terms are negotiable and which are deal breakers.

- Each party has a checklist and will be able to make "full" offers. For example, offers to pay money can be accompanied by details of exactly how that money is to be paid and when; offers to attend a site can include a suggested date and time. This is particularly important for mediations, as information to fill the gaps may not be available during the mediation day. Also, points that seem minor to one party may derail the process if first raised late in the mediation day or the negotiation process.

- It saves time and, potentially, costs. Drafting and approving a settlement agreement often takes well over an hour. A draft already produced may, however, only require tweaking as the process evolves on the mediation day or during negotiations.

- If drafting in advance of the mediation day or negotiation is not possible, parties can, at the very least, ensure that when an offer is made, that offer is written out fully before it is passed to the other side.

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