

**Settle for less...? Or for more! Tips on timing,
confidentiality and strategy in (multi-
jurisdictional) settlement arrangements**

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1.1 General issues

1.1.1 A “settlement” in civil procedures occurs when the parties to a dispute reach a binding agreement/compromise in relation to the issues giving rise to the dispute. Settlement can be achieved at any stage; it puts an end to the dispute and any legal proceedings which have been commenced (unless the settlement agreement provides for the proceedings to be stayed “except for the purposes of enforcing the terms of the settlement” – see further paragraph 1.2.1.b.1. below).

1.1.2 The Civil Procedure Rules¹ (‘CPR’) which govern how civil litigation is conducted in England & Wales contain the following provisions which deal with/encourage settlement:

- a. Pre-action protocols provide for the early exchange of information between the parties to allow/encourage settlement before proceedings are issued. Parties are also encouraged to consider settlement at all times.
- b. The CPR sets out how the court should manage cases; this includes encouraging and facilitating (where appropriate) the use of alternative dispute resolution (‘ADR’) mechanisms such as mediation and helping parties to settle all or part of a dispute.
- c. Offers made in accordance with CPR Part 36 (‘Part 36 Offers’) carry with them cost consequences in circumstances where an offeree does not accept an offer and later fails to beat or match that offer on resolution of the claim. The effect of Part 36 Offers is to focus the minds of the parties on the issues in dispute and/or the value of the claim and to consider settlement.
- d. A Directions Questionnaire is required to be filed by the parties once they have filed their statements of case². The parties complete and exchange the questionnaires in order to provide the court with details of the claim prior to a case management conference hearing. The form emphasises the requirement to consider ADR and it requires legal representatives to confirm they have explained to their client the need to try to settle, the options available and the cost implications. The form also requires the parties to indicate whether they wish the court to order a one-month stay of proceedings or to assist in arranging ADR. If a party indicates in its questionnaire that it does not consider ADR to be appropriate or that it is not willing to engage in ADR, it

¹ Statutory Instrument 1998/3132.

² Also known as pleadings (Particulars of Claim; Defence (and any counterclaim); Reply (and Defence to counterclaim)).

is required to provide an explanation for such refusal (and this may result in later costs sanctions – see further 1.1.2.e. below).

- e. The rules relating to the court's powers to award costs require the court to consider the conduct of the parties, including the parties' conduct in relation to settlement. A party that without good reason has failed to make meaningful attempts to settle may well be sanctioned in relation to costs (by either being awarded less costs or being ordered to pay the other party's costs on an indemnity basis³).
- f. The various court guides (for the different divisions of the High Court of Justice in which claims are issued) encourage ADR and set out the role the court can play in assisting with ADR.

1.1.3 The Solicitors' Code of Conduct contains the following principles which a solicitor must abide by and which will be relevant when considering settlement of a claim:

- to act with integrity.
- to act in the best interests of each client.

1.1.4 Settlement is often considered before disclosure (which is the exchange between the parties of all documents in the parties' possession and/or control which are relevant to the issues in dispute, whether they help or hinder a party's case) as the disclosure exercise can involve considerable expense and may involve the disclosure of documents which a party does not wish to provide to the other party. Settlement is however also considered after disclosure on the basis that each party may then have a clearer idea of the strength or weakness of their own case and/or the other party's case, based on the documents each party relies on in support of its case.

³ There are two bases on which costs can be awarded by the court to a winning party: on the standard basis or on an indemnity basis. Only costs reasonably incurred can be recovered by a winning party against a losing party. On the standard basis, the court will resolve any doubt which it may have as to whether or not costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party, whereas on the indemnity basis, the court will resolve any doubt which it may have as to whether the costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

1.1.5 A large number of cases in England and Wales are settled out of court. This is largely down to the expense of conducting litigation as well as the increasing popularity of ADR mechanisms such as mediation.

See (a), (b), and (d) under 1.1.2 above for means by which the court or a judge can help facilitate an out of court settlement.

Note however that the court/a judge will never actively participate in any settlement discussions. All correspondence relating to settlement proposals, all settlement discussions and any meetings are usually held on a “without prejudice” and the court/judge will not be told about or find out the details of such settlement proposals and their outcome until either a settlement is reached or at the end of a trial when an award of costs is considered (at which stage the behaviour of the parties to settlement negotiations can be taken into account in an award of costs).

1.2 Enforcement of settlement

1.2.1 In England and Wales there are two scenarios in which settlement may occur:

- before legal proceedings are issued (out of court);
- after legal proceedings are issued (in court).

Below are the most common methods for settlement within the above scenarios and details of how a settlement can be enforced (which differ depending on the scenario and the form of settlement):

a. Before legal proceedings are commenced

As no proceedings have been commenced, a court order is not required. A settlement agreement will effectively take the form of a contract.

If there is a breach by a party to the contract then its terms can be enforced through a claim for breach of contract. Defences to a claim for breach of contract are likely to be limited in such circumstances and it may therefore be possible to apply for the claim to be determined summarily by applying to court for summary judgment against the defaulting party. An application for summary judgment involves the court considering the claim at an early stage and is appropriate where there are no issues of fact in dispute.

b. After proceedings have commenced

A settlement agreement will usually take the form of a consent order or judgment which will enable enforcement of the settlement terms within the existing proceedings. There are some nuances and these are discussed below in relation to the different types of order/judgment that can be used:

1. Consent order/judgment

The parties set out their agreement in a court order/judgment that is then filed at court. An order may include the following:

- an order to pay money – usually with the right of the creditor to restore proceedings to seek execution of the order if payment is not made within a specified time;
- an injunction by consent (e.g. preventing a party from doing an act or requiring a party to do a positive act);
- a declaration (e.g. as to the correct interpretation of a contract).

How the order can be enforced will depend on what is agreed and recorded in the order/judgment. Some examples are set out below:

- the proceedings are stayed – the parties can enforce the settlement terms by reinstating the original proceedings if the order provides that the proceedings are stayed “except for the purpose of enforcing of the terms of settlement”. There is no need to issue new proceedings.
- the claim is dismissed – if the settlement terms are breached and court proceedings are required to enforce the non-defaulting party’s rights, new proceedings will be required to be issued.
- the claim is discontinued - if the settlement terms are breached and court proceedings are required to enforce the non-defaulting party’s rights, new proceedings will be required to be issued. It is unlikely however, that a claim which is settled would include a provision for discontinuance rather than dismissal of the claim, as discontinuance carries with it an automatic liability for the discontinuing party to pay the other party’s costs of the claim up to the date of discontinuance. Where a settlement is reached, it is more usual for the settlement terms to include terms as to who will pay costs or that each party bears their own costs.

2. Tomlin order

This is a form of consent order filed at court when a settlement is reached between parties to litigation.

The key characteristic of a Tomlin order is that the terms of the agreement are not set out in the order itself but are instead set out either in a schedule or a separate settlement agreement either annexed to the Tomlin order referred to in the Tomlin order as having been entered into between the parties. The Tomlin order therefore only refers to the fact that a settlement has been reached between the parties but no further details of the terms of the settlement are recorded in the Tomlin order. The purpose of a Tomlin order is to maintain the confidentiality of the settlement terms as only the Tomlin order itself and not any schedule or annex thereto will be kept on the court file. Indeed, any member of the

public is entitled to apply to the court for copies of the pleadings and court orders in a claim and therefore, to preserve the confidentiality of the settlement terms, a Tomlin order only records the fact that a settlement has been reached but not the terms of such settlement.

Since only terms set out in a court order or judgment are directly enforceable, if there is a breach of the settlement terms, the non-defaulting party will need to consider bringing new proceedings or, if the Tomlin order provides for the claim to be stayed “except for the purpose of enforcing the terms of settlement”, will need to reinstate the original proceedings to obtain an order or judgment which is capable of enforcement against the defaulting party.

1.3 Confidentiality and privilege

- 1.3.1 Settlement agreements recorded in writing are unlikely to be considered privileged and they will also not be confidential unless they are agreed to be by the parties involved.

Settlement discussions/correspondence that are a genuine attempt to settle the dispute are treated as privileged (without prejudice privilege).

- 1.3.2 The confidentiality of a settlement agreement and related discussions/correspondence can be protected as follows.

a. Settlement agreements

An agreement between the parties prior to legal proceedings being commenced will not be confidential unless the parties agree it to be. It is however common for settlement agreements to include a confidentiality clause.

After proceedings have been commenced, settlement terms will usually be recorded in a court order or judgment which will be filed at court. This is a public document (see 1.2.1.b.2 above) and is therefore neither privileged nor confidential. Where the parties wish the terms of settlement to remain confidential they will often use a Tomlin order (see 1.2.1.b.2 above) with either the settlement terms set out in a schedule or a settlement agreement annexed to the Tomlin order or with the Tomlin order simply recording the fact that a settlement agreement has been entered into between the parties.

b. Discussions/correspondence

If the discussions/correspondence are genuine attempts to settle the dispute then they are covered by without prejudice privilege which will prevent them

from being put before the court as evidence. As a point of good practice, correspondence leading to settlement should be marked as “without prejudice” and discussions should be clearly stated as being held on a without prejudice basis.

If there are subsequent proceedings involving the same parties and related issues then the discussions/correspondence will remain privileged.

Without prejudice material can only be restrained from being admitted in foreign proceedings on the grounds of public policy or breach of implied contract. As a point of good practice, case law has suggested that to restrain the use of without prejudice material in subsequent foreign proceedings an agreement should be recorded between the relevant parties that such material will not be used in foreign proceedings.

1.3.3 If the terms of a settlement agreement contain a confidentiality clause which is breached then remedies for breach of contract will be available.

1.3.4 Whether a settlement agreement can be disclosed in other proceedings will depend on what form the settlement has taken and what has been agreed between the parties:

a. Settlement agreement

In the absence of a confidentiality clause the agreement can be disclosed in other proceedings between the same parties and between other parties. If there is a confidentiality clause then the use of the agreement in other proceedings will be governed by its terms.

b. Court order/judgment containing all the settlement terms

This is a public document and can therefore be disclosed in other proceedings between the same parties and between other parties.

c. Tomlin order

A Tomlin order is often used when the parties want to keep the terms of the settlement confidential as the settlement terms are not recorded in the Tomlin order (see 1.2.1.b.2 above). Other parties will not therefore be able to find out the terms of the settlement other than from the parties to the settlement itself (subject to any confidentiality restrictions). Whether the same parties can use the settlement agreement in other proceedings will depend on what any confidentiality clause allows or any subsequent agreement permits.

It is usual for a confidentiality clause in a settlement agreement to be drafted to permit the settlement terms to be disclosed by the parties:

- to the parties' respective auditors, accountants, insurers and lawyers on terms which preserve confidentiality;
- pursuant to an order of a court of competent jurisdiction, or pursuant to any proper order or demand made by any competent authority or body where they are under a legal or regulatory obligation to make such a disclosure; and
- as far as necessary to implement and enforce any of the terms of the settlement agreement.