A slip of the mouse

Jonathan Pratt and Doug Wass provide a warning on unintended settlements

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In the recent case of *Bieber v Teathers Ltd (in liquidation)* [2014], Judge Pelling QC (sitting as a judge of the High Court) held that the parties had concluded a settlement agreement in an exchange of emails, notwithstanding the fact that the parties subsequently failed to agree the terms of a formal written settlement agreement.

Background facts

The underlying claims related to a series of film and TV production partnerships, which failed commercially and did not generate the tax relief that had been intended. The claimants blamed this failure on the defendant and issued proceedings against it. The total value of the claims was said to be approximately £20m, inclusive of interest and costs. The defendant was in insolvent liquidation meaning that (aside from proving in the liquidation) the only resource available to meet the claims was an insurance policy which provided cover for the claims up to an aggregate value of £10m, a significant proportion of which was taken up by costs incurred in defending the claims and which would be further eroded if the matter proceeded to trial.

A mediation took place in May 2014 but no settlement was reached. On 18 June 2014, the claimants' solicitors emailed the defendant's solicitors with a view to re-opening settlement negotiations. Further discussion between the solicitors ensued. On 27 June there were a series of emails in which the defendant made an offer (described as 'a final gesture to reach settlement') to settle the action for £2m. The defendant stated that it would incur the next tranche of brief fees on 30 June and, therefore, the offer would not last past that date. On 29 June the claimants' solicitor emailed that the claimants were willing to accept the £2m offer and that he would send round a draft consent order in the morning. The defendant's solicitors replied 'noted, with thanks'.

The parties then attempted to agree the terms of a formal settlement agreement but failed to do so, (mainly) because the claimants refused to indemnify the defendant in respect of any contribution claims that might be made against the defendant as a result of claims made by any of the claimants against third parties.

Thereafter, the claimants applied to the court for a declaration that a binding settlement agreement had been reached in the email exchange of 29 June. The defendant maintained that agreeing the settlement figure was only the first stage in a two-stage process and that this agreement was subject to the parties successfully negotiating the terms of a detailed settlement agreement.

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Decision

The judge agreed with the claimants and granted the declaration sought. This was largely because there was no 'objective material' to support the defendant's contention that there was a mutual understanding that negotiations would be conducted as a two-stage process, and because there was no indication by either party to the other at any stage that there were issues of substance that remained to be agreed after the exchange of emails on 29 June had been completed.

These fact-specific conclusions arose out of the judge's analysis of the parties' evidence. However, the judgment also contains a number of points of general interest, which are worth further consideration.

General principles

Firstly, the judgment contains a useful summary of the principles applicable to the formation of contracts (of any kind). The key points are:

- Whether the parties have reached a concluded agreement is to be determined objectively by considering the whole course of the parties' negotiations.

- Once the parties have to all outward appearances agreed in the same terms concerning the same subject matter, a contract will have been formed and that is so even though it is understood that a formal agreement will be entered into that records or even adds to the terms agreed. However, where it is understood that a formal agreement will be entered into, whether the parties intended to be bound immediately or only when a formal agreement has been executed depends on an objective appraisal of their words and conduct.

- The subjective state of mind of a party to negotiations and so any subjective reservations that have not been communicated to the other party to an alleged agreement are irrelevant and evidence of their existence is inadmissible.

- The fact that certain terms of economic or other significance have not been agreed does not preclude the conclusion that the parties have entered into a binding agreement. The only requirement is that the parties shall have agreed all the terms necessary for there to be an enforceable contract.

- Where the parties have expressly stipulated, or there is a mutual understanding, that negotiations will take place 'subject to contract', there will be no binding agreement until a formal written agreement has been executed.

- Even if the parties have initially agreed to proceed 'subject to contract', it is open to them subsequently to agree either expressly or by necessary implication to remove that qualification or waive that stipulation.

Time pressure

In this case, the proceedings were at an advanced stage. By 29 June, the trial date was fast approaching and costs had become a central concern for both parties. The important thing for both parties was to bring the litigation to an end before further costs were incurred and settlement became impractical. In particular, the defendant had indicated that its offer to pay £2m would not last beyond the time when its next tranche of brief fees became payable (on 30 June). This meant that, in the judge's words, 'settlement was being driven by time related issues' and this was a central plank in his conclusion that:

> Critically in my judgment the email exchanges on 29 June are objectively consistent only with the parties intending to reach a binding agreement as to settlement and to do so under the time related pressure of a further tranche of brief fees becoming payable.

Timing issues also played an influential role in the earlier case of *Jirehouse Capital v Beller* [2009]. In that case, the parties began settlement negotiations on 23 June 2009 with a view to resolving a dispute that had a floating trial date starting on 29 June 2009. The parties negotiated and agreed settlement terms in a number of emails, most of which were marked 'subject-to-contract terms'. The judge nevertheless found that the subject-to-contract umbrella had been lifted by necessary implication. His reasons included the facts that there was an imminent trial and that the parties clearly needed to achieve finality.

The case is also notable for the judge's comment that:

> The old observation that solicitors' typewriters had 2 extra keys marked 'subject to contract' and 'without prejudice' (suitably adapted to the modern world) is not without a modicum of truth...

Subsequent events

In *Bieber*, the defendant sought to rely on the fact that the parties continued to negotiate over the terms of a settlement agreement after 29 June, as being consistent only with there being a mutual understanding that the agreement reached on that date was subject to contract or was an agreement in principle subject to the agreement of all other terms and conditions.

In *Newbury v Sun Microsystems* [2013] Lewis J held that, where a contract is said to be contained in documents, conduct occurring after the date of the documents will not be a legitimate aid in determining whether, properly construed, those documents were intended to give rise to a binding contract. Judge Pelling QC accepted this analysis, adding that where, on an objective analysis, a binding contract has been reached, then what happened thereafter cannot undo that agreement unless what happened amounts to a rescission or variation of what had been agreed previously. That was clearly not the position in *Bieber*.

Conclusion

The consequence of a settlement agreement being concluded without the indemnity sought by the defendant is that the defendant may be liable for contribution claims brought by third parties who may be the subject of claims brought in respect of the same subject matter as the underlying claims brought against the defendant in this case. The obvious practice point arising out of this case is that, if a party intends negotiations (for any type of contract) to be conducted subject to contract, this should be expressly stated. Where a party considers that there are important issues that need to be agreed before it is willing to enter into a binding contract, those issues should be brought to the attention of the other side. The case also demonstrates that, when circumstances dictate that a contract needs to be concluded within a certain timescale, it is more likely that a contract will be formed without a formal written agreement being drawn up. In other words, the more fraught the circumstances, the greater the need for clarity about the basis on which negotiations are being held. ■

Bieber & ors v Teathers Ltd (in liquidation)
[2014] EWHC 4205 (Ch)

Jirehouse Capital & ors v Beller & anor
[2009] EWHC 2538 (Ch)

Newbury v Sun Microsystems
[2013] EWHC 2180 (QB)