

COMPROMISE & CONSIDERATION

Whilst there are exceptions to the doctrine, a basic premise of common law is that an agreement will not be enforced by a court of law unless supported by valuable consideration.¹ The aim of this paper is to examine when the courts will treat a compromise agreement as lawfully binding and when the courts will strike down an agreement to pay a lesser sum in satisfaction of a larger sum for lack of consideration.² Such agreements can come about in the absence of a dispute but the most common form is a settlement agreement, brokered prior to and thus pre-empting litigation or post issue of claim bringing the dispute and the litigation to an end.

This issue relates directly to civil mediation and the settlement of contract disputes. The reach of the doctrine of consideration goes beyond part payment of debt in that a failure to establish valuable consideration can also be fatal to the enforcement of an agreement to amend the terms of a pre-existing contract.³ The reshaping of contracts is central to the concept of interest based mediation as an alternative to compromise.

The simplest way to avoid any question as to valid and sufficient consideration and to ensure the legal enforceability of a contract⁴ is to issue it in the form of a deed.⁵ However, recourse to deeds tends to be restricted to specialist areas where their value and significance is recognised in the trade. To what extent, if at all, is it either necessary or desirable that mediation settlements be issued in the form of settlement deeds? The drafting of a deed provides an appearance of an additional level of gravity which may inhibit the negotiation / settlement process. If not needed it is probably best avoided. The deciding factor is whether or not the mediation pre-empts litigation or displaces it after the action has commenced, since regarding the latter, a party can apply to the court for a “*Consent*” or “*Tomlin Order*” turning the agreement into an enforceable settlement judgement, under rule 40.6. CPR.

¹ *Thomas v Thomas* (1842) 2 QB 851.

² *Foakes v Beer* (1884) 9 App Cas 605.

³ *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705

⁴ Recourse to a deed can have the additional benefit of establishing the intention to create legal relations between individuals in social relationships, but will not cure any defects arising out of illegality.

⁵ Note that like any other contract, a contract by deed is subject to the doctrines of mistake, frustration, fraud, duress and undue influence and thus does not provide an absolute guarantee of enforceability.

The Civil Courts in the UK⁶ have traditionally supported any attempt made by disputants to resolve their differences through negotiation, thereby avoiding litigation or arbitration.⁷ Thus abandoning a bona fide claim (i.e. an honest belief that the claim is viable)⁸ or defence⁹ is deemed good consideration for the settlement of the case, evidenced by the abandonment of the action. There is no need to commence an action before settlement in order for it to amount to good consideration.¹⁰

Equally the courts will endorse a settlement brokered during the course of proceedings, at any time prior to issue of judgement, though leaving it very late in the day to inform the court may have adverse cost consequences.¹¹ Frequently a time arises during the course of a trial when a party realises the case is hopeless and a settlement is brokered to avoid further expense. The CPR 1998 goes further and actively encourages settlement as an integral part of the overriding objectives of the rules.

The consent element of a Consent Order refers to the parties consenting to ending the action. The application for the Order will include the terms of the settlement. The concept was initiated by Judge Tomlin, hence the popular / alternative name for the order. The settlement must be both unconditional and enforceable.¹²

A draft will be drawn up in the following form :-
“And the parties having agreed to the terms set out in the attached schedule.

IT IS BY CONSENT ORDERED *That all further proceedings in this claim be stayed except for the purpose of carrying such terms into effect AND for that purpose the parties have permission to apply”.*

⁶ Compare for instance the Lebanon where the courts pay no regard whatsoever to negotiated settlements and reserve the right to determine a matter once referred to them.

⁷ *Callisher v Bischoffsheim* (1870) LR 5 QB 449

⁸ *Miles v New Zealand Alford Estate Co* (1885) 32 Ch D 266

⁹ *Banque de l’Indochine v J H Rayner (Mincing Lane) Ltd* [1983] QB 711 ; *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925, 933

¹⁰ *Wade v Simeon* (1846) 2 CB 548, 565, 567

¹¹ *Brawley v Marczyński* [2002] EWCA Civ 756. Where a dispute settles out of court the substantial winner is entitled to costs, but *Yell Ltd v Garton* [2004] EWCA Civ 87 shows that where an appeal is pending the parties have a duty to notify the court if settlement negotiations are taking place, to avoid costs being thrown away.

¹² *Thakrar v Ciro Citterio Menswear PLC (in administration)* [2002] EWHC 1975 (Ch). Per Sir Andrew Morritt VC. *“The purpose of a Tomlin order is to enable the enforcement of the terms of settlement of an existing action by summary process in that action.”*

The same principle applies to arbitration. An arbitrator can issue a settlement award drafted by the parties. Thus section 51 Arbitration Act 1996 provides :-

- (1) *If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.*
- (2) *The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.*
- (3) *An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.*
- (4) *The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.*
- (5) *Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.*

In lieu of a consent order, the parties can instead draft a full settlement contract, which can then be enforced by an action for specific performance.¹³ Where the action has not yet commenced this is the principal way forward where a party fails to honour the agreement and pay. Alternatively, if the other party then pursued an action, the settlement would provide a defence to that claim on the grounds that no extant dispute exists between the parties. This would apply both to litigation and to arbitration. In both situations a settlement deed prevents further arguments about the existence of valid consideration.

This is standard procedure at the end of the mediation process. It is vital that the mediator ensures that the settlement agreement is reduced to writing if it is to be enforceable since the courts are reluctant to enforce oral mediation settlement agreements, partly because of the inherent uncertainty in determining the meaning and scope of the settlement.¹⁴ Thus the scope for oral

provisions to override the written terms of a contract have always been very restricted by the law.¹⁵ Oral evidence is admissible to add to but not to contradict the written terms of a contract¹⁶ and will be also admissible in order to complete an otherwise incomplete contract.¹⁷ Exceptions to the admissibility rule are limited to situations where a party has explained the meaning of the contract and is estopped from relying on asserting the strict wording of the contract.¹⁸ However, too much should not be read into this since the courts will consider oral evidence of waiver of the terms of a contract.¹⁹ Thus, without going so far as to state that the courts would never enforce an oral mediated settlement, the conclusion must be that it would be unwise to rely on an oral settlement. Accordingly, best practice would dictate that the settlement is reduced to writing.

Finally, it is important to ensure that the terms of the mediation settlement are clear, since otherwise the way is opened up for a challenge in respect of the interpretation of the terms of the settlement, thus defeating the objective of finality and closure.²⁰ The same applies to the terms of a consent order. The court will not issue an order if it finds that the draft terms are not *“unconditional and unequivocal.”*

The courts are nonetheless reluctant to strike down agreements to settlements on the grounds of uncertainty where the settlement was intended to have legal effect.²¹ In complex relationships, where there are many potential causes of action, a settlement which resolves the current dispute but introduces a mechanisms for settling related issues, may none the less be treated as binding.²²

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¹³ *Horizon Technologies Ltd v Lucky Wealth Consultants Ltd* [1982] 1 WLR 24.

¹⁴ In *Oil & Mineral Development Corp v Mahdi Sajjad* [2002] EWHC Com 1258 the court declined to enforce an oral mediation settlement, partly because the mediator was subject to privilege restrictions and could not give evidence, but compare *United Building & Plumbing Contractors v Kajla* [2001] EWCA Civ 1740 where the court was prepared to hear evidence in support of assertions that there had been an oral settlement to a dispute.

¹⁵ *Jacobs v Batavia & General Plantations Trust Ltd* [1924] 1 Ch 287.

¹⁶ *Hillas v Arcos* (1932) 147 LT 503 (HL)

¹⁷ *Walker Properties Inc. v Walker* [1947] 127 L.T. 204 ; *Couchman v Hill* [1947] K.B. 554

¹⁸ *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805.

¹⁹ A waiver may be express *Bruner v Moore* [1904] 1 Ch 305; but equally can be implied from conduct. *Charles Rickards Ltd v Oppenheim* [1950] 1 All ER 420, CA. In the case of a concession (as opposed to a failure to repudiate a contract for breach), there must have been an awareness, express or implied that it would be relied upon and an intention for it to be relied upon. *Watson v Healy Lands Ltd* [1965] NZLR 511

²⁰ *Haines v Carter* [2002] UKPC 49

²¹ *Brown v Gould* [1972] Ch 53, 57-58, *Foley v Classique Coaches Ltd* [1934] 2 KB 1.

²² *Cable and Wireless PLC v IBM UK* [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041