

Briefing Note: Compromising Claims, Offers of Settlement and Part 36

An Introduction to the Briefing Note

This Briefing Note contains a summary of the main provisions of the court's Civil Procedure Rules ("CPR") relating to settling a claim. However, it should not be relied upon as legal advice and you should always contact us for advice tailored to your specific circumstances.

Litigation can be expensive. As a result, the CPR encourages parties to try to resolve disputes, as far as possible, without going to court. A settlement reached before court proceedings are issued is normally no less effective than a judgment at the end of court proceedings. Even during the course of litigation, the CPR provides that the parties should try to settle their case, with cost penalties for parties who fail to engage in genuine efforts to settle.

Why Look to Settle?

- Significant costs can be saved by reaching a settlement. Even if you win at trial and are awarded your costs, your opponent is only likely to be ordered to pay between 65% and 90% of your total costs, with 65% being common. This can mean that much of your legal bill cannot be recovered from the other side, even if you've won the case.
- Settlement can avoid spending your time, or in the case of a business that of management and other key employees, in preparing for court. This can be particularly time consuming at the disclosure and the witness statement stages.
- Trials are stressful occasions. A settlement gives the parties finality without the need for a trial. The outcome of a trial is often hard to predict as a case can turn on the performance of a witness or the preference of a judge, and even if you win at trial the other side may appeal against the outcome.
- By its very nature, a settlement can be a compromise between parties, meaning that each side has to give a little. Both parties can be winners, whilst, at court, normally there is just one winner. Inevitably, there is a loser.
- Settlements can sometimes include remedies not normally available at Court, for example, an agreement that one party will perform a service for another.
- Trials are normally held in public with possible publicity and a corresponding risk of damage to commercial reputation. Confidentiality clauses may be inserted in settlement agreements. This means that third parties will not usually be entitled to know the terms of settlement.
- A settlement can result in ongoing commercial relations between the parties: trials cause entrenched positions and are likely to destroy future commercial relations.
- If one party has particularly deep pockets, it can use litigation tactics to cause the opponent to run up disproportionate costs. Settlement can pre-empt this type of conduct.
- At the end of a trial, or at an interim hearing, the Court will determine who should pay whose costs. The starting point is normally that the losing party should pay the winner's costs. However, the Court

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Summary:

Guidance on the sometimes complex area of how to settle litigation and why exploring settlement is an essential part of the litigation process.

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must have regard to the conduct of the parties, and a party that fails to make any offer of settlement or engage in a settlement process, will often be penalised on costs.

How Should You Attempt Settlement?

Efforts to settle can be made in relatively informal ways, through oral or written offers and in round table discussions. There are also more formal settlement procedures, sometimes referred to as alternative dispute resolution ('ADR').

Formal Frameworks for Settlement

The most common methods of ADR are: -

Mediation

This is normally a day-long meeting attended by all parties, where settlement is facilitated by a neutral third party, known as a mediator. A mediator is qualified as such and may come from a business or legal background. The parties are not bound to reach a deal, nor is any decision imposed on them. Notwithstanding this, it is a highly effective way of achieving a settlement (even in the most difficult cases).

Expert Determination

This involves the parties in dispute asking a third party (usually an expert in the field of the dispute) to consider the parties' cases and key evidence and then to make a binding decision. It is informal and quick and the decision can be enforced in the courts. The main drawback is that there is normally no right of appeal, nor any other way of challenging the decision made.

Arbitration

This is common in international commerce. Again, an arbitrator is a neutral third party appointed by the parties to make a binding decision. The procedure for the arbitration is agreed between the parties and can range from the very informal to a format which is all but identical to a court case. The key attractions of arbitration are its informality; its confidential nature; and the fact that an arbitration award is usually easier to enforce in other countries than a court judgment.

Adjudication

This is common in construction disputes and provides an interim remedy during the course of work, in particular, in relation to delay and disruption, extension of time and final account disputes.

ADR can be undertaken before court proceedings are issued, simultaneously or during an agreed period when the proceedings are put on hold.

Written Offers of Settlement

This is the most common method of trying to reach a compromise. There are four main types of offer:

1. A 'Part 36' Offer

This is an offer made in accordance with Part 36 of the CPR. These rules are complex but – if fully complied with – lead to highly effective offers of settlement. Broadly speaking, if a Part 36 offer is not accepted within the relevant period, normally 21 days from the date it is made, the party receiving the offer ("the offeree") is put at a significant costs risk. The costs risk is: if the offeree is the claimant and he is awarded judgment for less than the Part 36 offer at trial, the defendant is likely to be able to recover his costs from the expiry of the

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relevant period (i.e. even though the defendant lost at trial). This potentially reverses the normal outcome of the loser paying the winner's costs. Similarly, if the offeree is the defendant, the defendant is likely to be subject to costs sanctions if the claimant equals or beats his offer at trial. The purpose of Part 36 is to encourage settlement, in particular by enabling those who make sensible offers to protect themselves against the risk of being ordered to pay their opponent's costs. It is a technical area of law and advice should be sought.

2. A 'Without Prejudice Save as to Costs' Offer

This means that the offer cannot be referred to in the proceedings (including at trial), except on the issue of costs (i.e. after a decision on who is right and who is wrong has been made). Accordingly, the judge will not see a party's offer as an implied weakness in their case, before handing down judgment. At the end of a trial, the offer can be taken into consideration on the issue of costs, but it does not have quite the same effect as a Part 36 offer. More particularly, it is only something which the judge has to take into account when deciding what order for costs to make.

3. A 'Without Prejudice' Offer

This is a valid offer, but cannot normally be used in arguments about costs at the end of proceedings.

4. An 'Open' Offer

This is an offer that can be shown to the trial judge during proceedings and will only rarely be used. It is sometimes used to show that the person making the offer is being eminently reasonable.

Well-pitched offers of settlement can be vitally important, whether you are a claimant or a defendant. If an offer is attractive enough, it may well be accepted and this will see an end to the claim on acceptable terms. If it is not accepted, it can still help on the issue of costs. An offeree should think twice about pursuing their case where there is a real risk that they will not beat the offer.

Effect of a Settlement

It is important to define the precise scope of a settlement. For example, does it settle simply any matters arising out of the contract subject to the dispute or all matters arising out of the relationship between the parties? If the settlement relates to the entire dispute, and the scope of the dispute is precisely set out, settlement will put an end to that dispute and any legal proceedings that have been commenced in relation to it. Generally speaking, no fresh action can be started in relation to the same subject matter as the settlement.

Different Stages in the Proceedings when the Courts encourage Settlement

1. Before proceedings are issued, there are a number of practice directions governing the way parties should behave. These encourage (i) the making of early settlement offers and (ii) parties taking stock of the merits and weaknesses of their case at any early stage.
2. The allocation questionnaire, which is filed by both parties after the defence, emphasises the need to try to settle the claim before a hearing. It requires legal representatives to confirm that they have explained to their client the need to try to settle. Parties can ask for a one-month stay or for assistance from the Court in arranging mediation.
3. Judges at interim hearings (hearings along the way to trial) will often encourage the parties to meet to settle. Whilst the contents of the settlement negotiations themselves should not be brought before the

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court, a judge may express disapproval towards parties who have failed to properly engage in settlement attempts.

Form of Settlement

Settlements should always be recorded in writing, preferably in one document, although settlements can also be reached by exchange of correspondence. Verbal settlement agreements should be avoided as they are open to dispute at a later date.

If no proceedings have been issued, settlement can be reduced to a simple settlement agreement alone. If the settlement involves a stay or dismissal of court proceedings, the parties will need to prepare a court order so that the case can be brought to an end and the settlement terms enforced within the existing proceedings if necessary.

Finally, it is important to note that, given the costs involved in proceeding to trial, settlement may become the only viable option for the claimant. Many claimants wrongly believe that they can simply withdraw or discontinue proceedings, once issued. However, where a claimant opts to terminate his claim or part of his claim and no consent is forthcoming from the defendant, he will normally become liable to pay the defendant's costs. Accordingly, the only effective options become to continue to trial or settle.

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