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TOMLIN ORDERS AND CONFIDENTIAL SETTLEMENT AGREEMENTS – TAKING THE STING OUT OF THE TAIL?

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SUMMARY

On appeal in the High Court from an application decision by Master Davison, Warby J has confirmed that confidential schedules to Tomlin Orders are compatible with open justice and that, while the Court has power to stay proceedings based on terms contained in the confidential schedule, the court has no jurisdiction to review the private settlement agreement itself.

Background

The underlying action in *Zenith Logistics Services (UK) Limited & Others v Coury* [2020] EWHC 774 (QB) concerned an alleged misapplication of corporate assets between four Claimants and eleven Defendants. During the course of the proceedings, the Claimants and the fourth Defendant reached a compromise agreement and sought to file a Tomlin Order to stay the proceedings on terms contained in a confidential agreement as referenced in the schedule of the Order.

On review of the application, Master Davison indicated that he was not in the practice of making Tomlin Orders with confidential schedules unless confidentiality is justified on usual grounds and that the presence of a confidentiality clause was not in and of itself insufficient. The Claimants' solicitors argued in submissions made by correspondence that the court had no jurisdiction to see the private confidential settlement agreement.

Master Davison decided not to grant a Tomlin Order. He stated that the court's powers, and therefore the principle of open justice, applied to the term of a settlement agreement and that the court therefore had a right to see those terms. Master Davison gave permission to appeal.

Appeal in the High Court

Warby J upheld the Claimants' appeal and found that:

(a) The settlement agreement did not form part of the court's order and therefore the court had no jurisdiction to request to see it; and
(b) The fact that the settlement agreement is confidential and therefore not in the public domain, does not derogate the principle of open justice.

On his first finding, Warby J concluded that the court's powers in a Tomlin Order are limited to the stay of proceedings and liberty to apply as, per the White Book, the settlement agreement does not form part of the Order "as such". Furthermore, the court is not being asked to approve the terms of the settlement agreement, nor does it have power to amend or vary those terms and should not concern itself with the enforceability of the agreement when giving a Tomlin Order.
In relation to Master Davison's contention that a confidential settlement agreement contravenes the principle of open justice, Warby J held that the terms of a private settlement agreement are not usually reportable and reference to them in a confidential Schedule does not give rise to a right of inspection. Therefore, open justice is not derogated by extending confidentiality to that agreement.

In addition, Warby J highlighted the court's duty to further the overriding objective and to help parties settle (CPR Rule 1.4(2)(f)). Compromising the confidentiality of agreed settlement terms raises an obstacle to settlement, or at best drive the parties into settlement on different terms, the enforcement of which would require a separate action, with extra administration and cost.

What does this mean in practice?

The sealing of a Tomlin Order is usually a final formality. However, it may come as a nasty surprise to some clients with highly sensitive settlement terms, who do not wish those terms to be provided to any third parties, if they are only informed by their lawyers at a late stage that their settlement agreement will need to be provided to the court in order to stay the proceedings.

This was an appeal in the High Court (QBD), not the Court of Appeal, and therefore will not be binding as authority in other High Court cases. Practitioners should note that practices for Tomlin Orders also vary between different divisions of High Court and will continue to do so for the moment. So whereas Warby J's decision relates practice as it should be in the QBD, the Chancery Division has a different practice. Moreover, in the Commercial Court there is a requirement to provide a confidential settlement agreement either by CE-File or by emailing the Judge's clerk directly.

Nonetheless, Warby J's message is clear: the court does not have jurisdiction over a confidential schedule to a Tomlin Order and there is no basis within the CPR to demand to review a confidential settlement agreement as a pre-requisite to making a Tomlin Order. Parties wishing to ensure that they settle on terms which are kept entirely confidential as between them will therefore be encouraged by this judgment, particularly if their proceedings are within the QBD.

The author would like to thank trainee solicitor Camilla Grierson for her contribution to this blog.

BCLP has extensive experience in advising on settlement and the procedural requirements for effecting settlement. If you require any advice on the settlement of existing disputes, please get in touch with us.

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