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Insights

GETTING THE SETTLEMENT AGREEMENT RIGHT

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SUMMARY

In this Insight, first published in PLC, Shy Jackson considers how settlement agreements, while intended to resolve disputes, can sometimes become the source of further conflict over their interpretation and performance.

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The purpose of a settlement agreement is to bring an end to a dispute and let the parties carry on with their lives, putting the past behind them.

But a settlement agreement is a contract like any other contract and can lead to disputes about its interpretation or performance, bringing the parties together again when they thought everything was resolved.

This is not an unusual risk, as can be demonstrated by looking at two recent court decisions concerning settlement agreements.

For more information about settlement and drafting settlement agreements, see *Practice notes, Settlement: an overview* and *Checklist of issues to consider on drafting a settlement agreement*.

CAN YOU ADJUDICATE TO ENFORCE A SETTLEMENT AGREEMENT?

A party has a right to adjudicate if there is a contractual adjudication clause or if the settlement agreement falls within the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996). But when the settlement agreement is separate from a construction contract the position is less clear, which was the issue in *London Eco Homes Ltd v Raise Now Ealing Ltd [2025] EWHC 1505 (TCC)*, decided in March 2025.

Here the parties entered into a JCT Intermediate Building Contract with Contractor's Design (original contract) in November 2021 and later signed a settlement agreement, in August 2023. The employer failed to pay sums agreed under the settlement agreement and, although the settlement agreement did not contain an adjudication clause, the contractor commenced an adjudication and obtained a decision in its favour.

When it came to enforcement, the judge had to decide whether the adjudicator had jurisdiction despite the lack of an express adjudication clause in the settlement agreement.

The judge began by considering whether the settlement agreement fell within the Construction Act 1996. He held that it did, because the settlement agreement provided for some works (required for sign-off of the basement warranty), but noted that the effect of section 104(5) of the Construction Act 1996 was that where the dispute concerned other matters that were not construction operations, there was no implied right under the Construction Act 1996 to adjudicate. In this case, as the dispute concerned the timing and/or acceptability of the provision of the basement warranty, there was therefore no implied right to adjudicate.

The judge then looked at the adjudication clause in the original contract, which he noted referred to "any dispute arising under the contract" rather than wider wording sometimes used such as "arising out of or in connection with the contract". This meant that the issue was whether the settlement agreement could be seen as a variation of the original construction contract. The judge concluded that this was the case, as the settlement agreement drew on the terms of the original contract and then varied the original mechanism for determining the final sum due. This meant that it was possible to rely on the adjudication clause in the original contract.

The judge rejected an argument that the "entire agreement" clause included in the settlement agreement prevented reference to the original terms, on the basis that it could only be sensibly interpreted as referring to the termination of the original agreement, not replacing the original agreement. Similarly, the judge rejected an argument that the standard governing law and jurisdiction clauses included in the settlement agreement meant the parties agreed that disputes had to be addressed by the court and that adjudication was excluded.

Based on the above the judge held that the adjudicator had jurisdiction and that the decision would be enforced.

For more information, see:

- *Legal update, Settlement agreement was variation of construction contract so adjudicator had jurisdiction (TCC)*.
- *Practice note, Adjudication: a quick guide*.
- *Adjudication toolkit*.

INTERPRETING A SETTLEMENT AGREEMENT AND GLOBAL SETTLEMENT

A more complex settlement agreement (which involved a claim relating to another settlement agreement) gave rise to different issues, and was decided a month later, in *Dragados UK Limited v Port of Aberdeen [2025] CSOH 37*. This concerned works under a contract entered into in 2016 based on the NEC3 ECC contract for works to expand the harbour at the Port of Aberdeen. The project did not run smoothly and in 2020 the parties entered into a settlement agreement. In addition to payment of an agreed sum in settlement of earlier claims, Dragados, the contractor, remained responsible for certain design packages and what was referred to as the "Contractor Design To Complete" (CDTC).

In that respect, the contractor had an existing agreement with Arup for design services but the settlement agreement also envisaged that the employer might elect to enter into a direct agreement with Arup for design services beyond the CDTC. However, if that did not happen, the contractor would continue to operate the existing Arup agreement but would have no liability for design and costs beyond the CDTC. There was also an indemnity by the employer to the contractor in respect of sums which might be payable by the contractor to Arup in respect of such services beyond the CDTC.

In early 2021, the contractor was informed that the employer would not enter into a direct agreement with Arup and that no instructions would be issued.

In June 2022, the contractor and Arup entered into a separate settlement agreement, based on a global settlement sum. The contractor asserted that around £1.2m, paid as part of the global settlement sum with Arup, should be paid by the employer under the indemnity included in their settlement agreement.

GLOBAL SETTLEMENT

The first issue considered by the judge was whether the global settlement with Arup meant the contractor could not claim part of that settlement sum from the employer as it was not possible to identify that sum from the agreement with Arup. This is not an uncommon situation, and by way of example, two earlier decisions took different approaches to this issue. For more information, see *Lumbermens v Bovis Lend Lease [2004] EWHC 2197 (Comm)Opens in a new window* and *Enterprise Oil Ltd v Strand Insurance Co Ltd [2006] EWHC 58 (Comm)*.

The judge held that the fact that the liability which might have been the subject of the indemnity was subsumed into a greater settlement sum and did not have an attributed value did not prevent a claim, as long as the court could determine a value based on the agreement with Arup, subject to verification and ensuring costs were reasonable.

INTERPRETING THE AGREEMENT

The judge then had to address the more difficult question of whether, based on its true interpretation, the indemnity in clause 7.8.4 of the settlement agreement between the contractor and the employer, applied in the circumstances. The judge began by looking at the agreement as a whole but concluded that the other provisions did not assist and that it was necessary to look only at clause 7.

In this context, clause 7.8 provided that, following completion of the CDTC, the obligation of the contractor to "operate the Arup Existing Appointment" in order to achieve the completion of the Complete Works Design other than the CDTC was to be "in accordance with the instructions of the Employer" and the contractor was required to "administer the Arup Existing Appointment ... in accordance with the instructions of the Employer or the Project Manager only".

The judge considered the meaning of the word "only" and whether there was a distinction between the words "administer" and "operate" but did not think this made much of a difference. Similarly, he did not find the parties' respective arguments based on commercial sense helpful, as he thought both arguments made commercial sense. In essence, the contractor argued that these provisions required it to act in accordance with any instructions which might be issued but otherwise left it free to operate or administer the Arup Existing Appointment as it saw fit so long as it proceeded towards the overall aim of achieving the completion of the Complete Works Design. The employer argued that as it was the employer in a project that was already in serious trouble, these provisions put it in a position to control how, when and by whom any further necessary work, after completion of the CDTC, was to be done.

The judge therefore focused on how the words would be understood by the hypothetical reasonable reader who was familiar with the background circumstances. The decisive factor was held to be the reference to instructions from the employer or project manager with regard to design services beyond the CDTC. It was held that this was not just a general reference to a wider obligation to comply with instructions but was included with the effect that the indemnity only applied if such instructions were in fact issued. As it was common ground no such instructions were issued, the claim based on the indemnity failed.

This decision relates to bespoke wording used to address a very specific situation, but it is useful in demonstrating the process a court would undertake when interpreting a settlement agreement. In that respect, settlement agreements are interpreted on the same basis as any other contract and the focus will be on the words used and the overall context.

For more information about contract interpretation, see *Practice notes, Contracts: interpretation* and *Settlement: construction of settlement agreements and consent orders*.

For more information about multi-party settlements, see *Practice note, Settlement of disputes involving multiple parties*.

CONCLUDING THOUGHTS

Adjudication is a popular way of resolving disputes in the construction industry, but it is important to recognise that unless there is an express contractual provision it will be necessary to demonstrate that the Construction Act 1996 applies and that the dispute concerns construction operations. Whether or not that is the case, as demonstrated by *Eco Homes*, will depend on the facts and the nature of the dispute. Any uncertainty can be addressed by including an express adjudication clause in the settlement agreement.

The importance of clear drafting is also highlighted by the *Dragados* case, where the parties clearly made an effort to address a complex situation in their drafting amid some uncertainty as to how matters may develop following execution of the agreement. This is often the case when a settlement is reached during the course of a project and where it governs how any future works will be undertaken. This case is also a good example of the issues that can arise in multi-party situations, where a party seeks to recover from one party amounts paid under a settlement agreement with a third party, as well as the consequences of entering into a wide global settlement. As always, the challenge is to consider carefully what may or is likely to happen and to then draft the settlement agreement so that it is as clear as possible in addressing possible eventualities. No doubt that is easier said than done.

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