By far the majority of cases settle, but ensuring the settlement you thought you had agreed is accurately reflected in a settlement agreement can be more complicated than it first appears. What are the pitfalls to watch out for during and after the negotiations?

What settlement means

Settlement means that the parties to a dispute have decided to put an end to that dispute. The parties can agree to settle their dispute at any time, including before proceedings are commenced and even after trial before the judgment is handed down. Negotiating a settlement Settlement negotiations, if pursued by the parties in good faith, are usually considered to be on a 'without prejudice' basis. This means that the detail of the negotiations cannot usually be used in court as evidence of any admissions by either party, unless it becomes necessary to ascertain whether a settlement has been reached. If the parties choose to mediate, discussions in the course of that mediation are also treated as being without prejudice.

While negotiations are taking place, it is important to ensure that you do not inadvertently enter into a binding agreement before the terms of the deal have been finalised. Ensure that all correspondence is not only headed 'without prejudice', but is also headed 'subject to contract' until you have approved the final terms of the settlement. The 'subject to contract' wording is used to indicate that the parties do not intend any terms agreed to become binding until a formal written document is signed.

If proceedings are not yet underway, keep in mind limitation. The clock does not stop ticking just because you are trying to negotiate a settlement. Consider entering into a standstill agreement to stop the limitation period from running while negotiations are on-going.

Formalising a settlement

Once a settlement has been reached, it may be formalised and documented:

- in an email or letter, or
- in a settlement agreement or deed, and/or
- in a consent order or judgment, if formal proceedings have already started. If the settlement is documented in this way, the agreement can be enforced within the existing proceedings rather than having to start new proceedings to enforce.

The settlement agreement

In order to have as much certainty as possible, document your deal in a settlement agreement. A settlement agreement is
a contract just like any other, so the usual requirements for a valid agreement apply. In the context of settlement, the key requirements are that there must be:

1. **Consideration** – often in the form of a monetary settlement, but can be in the form of an exchange of promises (consider making the settlement by deed, rather than by a simple contract, if there is no clear consideration passing between the parties to the settlement – eg where a parent company is contracting on behalf of a subsidiary which is not a party).

2. **Certainty of terms** – if an issue in the dispute is not dealt with, or if the terms are not sufficiently clear, then the contract may be difficult to enforce; the court will attempt to give effect to the parties’ agreement, but it will not go so far as to re-write it for them.

3. **Intention to create legal relations** – in other words, it must be clear that the parties intended to achieve a final and binding settlement of their dispute.

**Ten key settlement considerations**

The terms of any settlement will be specific to the circumstances of each particular dispute, but there are certain key points which apply in any settlement, and which should be carefully considered in addition to the legal requirements above, to ensure that the agreement deals clearly and explicitly with every detail of the proposed deal:

1. **Parties** – only those who are party to the agreement will be obliged to comply with its terms. Provide a clear description of the parties involved and think about who should be bound by it. For example, is there any person or party potentially connected with the dispute that should be included as a party to the agreement? Where proceedings have been started, are there other co-claimants or co-defendants and, if so, are they prepared to be included in the settlement and bound by it? Defendants should try to ensure all claimants and potential claimants are tied in, and a defendant who wants to prevent a claimant from suing an associated company or officer after the settlement should provide that such entities may also rely on the settlement agreement (either by making them parties or pursuant to the Contracts (Rights of Third Parties) Act 1999). Such entities should be identified in the settlement agreement by name, as a member of a class or as falling within a particular description.

2. **Indemnities and undertakings** – if there is a risk that the claimant will bring proceedings against a third party in relation to the same loss, and that third party may in turn seek a contribution from the defendant, the defendant should seek an undertaking from the claimant that it will not bring such proceedings, and an indemnity against any liability to which it might become subject as a result of the claimant bringing such a claim.

3. **Scope of settlement** – be clear about what is being settled, and consider carefully which claims the settlement agreement covers. For example, if you want to make sure you cover existing, unknown and future claims, use wording such as, “full and final settlement of all claims which the parties have or may have against each other arising from [specific event]”. If you only want to settle a more narrow issue in dispute, say so.

4. **Payment** – a settlement will usually be on the basis that one of the parties makes a payment. It is important to specify to whom and by whom the payment is to be made (particularly where there are numerous parties), by what method and to which account, in which currency and by when. Consider whether you want to make a provision for interest on late payments and ensure you have checked the tax position on any payment.

5. **Legal costs** – you or the other party may well have incurred solicitor or barrister costs, court fees or costs of third parties such as experts. If you have agreed that one party will pay the other’s legal costs, it is important to deal with this specifically in the settlement agreement. If the dispute has been settled for a specific amount, but there has been no mention of costs, an agreement as to costs cannot be inferred. Try to agree the amount to be paid in respect of costs – although if you are unable to, it is possible to apply to the courts to decide this, whether proceedings have commenced or not.

6. **Confidentiality** – most parties would prefer the settlement agreement to be confidential. Ensure you include an express confidentiality provision in the settlement agreement, whilst permitting certain necessary exceptions (for example, pursuant to an order of the court or limited to the parties’ respective auditors, insurers and lawyers). If proceedings have commenced and you would like to ensure that confidentiality is maintained, the agreement will need to be referred to in the schedule to a Tomlin order rather than a consent order. Ensure that there is no reference to sensitive terms either in
the body or schedule of the Tomlin order and make sure that your reference to the separate agreement identifies it with sufficient certainty. Where the matter is high profile or of interest to a particular industry, it is also sensible to agree some form of public statement/press release, particularly where the actual settlement terms are confidential.

7. Governing law and jurisdiction – as with any contract, it is important to consider the governing law and jurisdiction of the contract, so that it is clear how to resolve any disputes that arise. If any of the parties is based abroad, include a process agent clause as well so that you are able to serve proceedings on that party without the need for further formalities.

8. Consents – if consent from a third party (such as an insurer) is needed, make sure you obtain it in good time.

9. Execution – ensure that the person who will be signing the settlement agreement has authority to bind the party he or she represents, and if the settlement is by way of deed, that any formalities for execution of deeds are complied with.

10. Logistics – if there are any practicalities to be dealt with prior to signing of the agreement (for example, documents being served, counterparts being executed), ensure they are done promptly. Do not forget any follow-up, such as filing a consent order with the court and/or informing the court that any trial date can be vacated.

Final review

After a hard-fought negotiation process, it can be easy to overlook elements of the deal when drafting the settlement agreement, but it is important to carefully review your settlement agreement before signing it to make sure that all elements have been captured. Where there has been a mistake in the signed agreement, it is possible to apply to the court for rectification, but this is a difficult process so getting it right in the first place will save a lot of trouble down the line.