Draft settlement agreements with care

Settlement agreements, which are commonly utilised for resolving disputes with multiple claims, should be carefully drafted to avoid future surprises, says STUART JORDAN*, citing a recent court case.

SETTLEMENT agreements are commonly used in our industry, most typically where there are multiple claims and allegations of breach by both parties to a construction contract. A settlement agreement will be used to net all the claims against each other and "clear the decks".

It is, therefore, easy to expect that a settlement agreement, by its nature, will resolve everything in issue between the parties. However, as with any contract, they need to be carefully drafted to make sure that they reflect the parties' intentions – always assuming that the parties have the same intentions. If they don't, one party might have a nasty surprise later on. A recent dispute illustrates the danger:

Here, a property developer Hylgar Properties Ltd (HPL) engaged a fit-out contractor, Dawnvale Café Components Ltd (DCC) to design, supply and install the mechanical works in a commercial development known as The Beacon. HPL paid 40 per cent of the price upfront. The relationship didn't go well, and the contract was terminated around November 2020 with each party accusing the other of having committed repudiatory breach of the contract.

HPL claimed that, at the time of the termination, it had overpaid DCC by $229,000 and it initiated an adjudication (a UK statutory procedure which produces a binding but not final award) to recover that sum. DCC denied liability for that claim and counterclaimed $187,000. The adjudicator found in HPL's favour, deciding that DCC had been the party in repudiatory breach, and awarding HPL the sum claimed, as well as dismissing DCC's counterclaim.

DCC failed to pay the award so HPL issued court proceedings to enforce it. However, the parties got into discussions and they managed to settle the court action on the basis of DCC paying the adjudication award by instalments. This agreement was formalised in a consent order, to which a settlement agreement was attached as a Schedule. The settlement agreement set out the payment instalments and included the following clause:

Jordan ... parties need to consider any grounds for claims.

"This Settlement Agreement shall immediately be fully and effectively binding on the parties. The payment of the Settlement Sum is in full and final settlement of any and all claims the Claimant may have against the Defendant arising from or in connection with these proceedings."

DCC thought that was the end of the matter but, two years later, HPL issued a letter of demand for a further $816,000 in costs and losses arising from repudiatory breach of the contract. This sum included additional build costs, remedial works, costs arising from delayed completion, lost rent and lost profit. HPL threatened to take this claim also into adjudication if DCC did not pay the company.

DCC applied to court for a declaration that HPL may not seek further relief in respect of the established breach of contract because such relief was covered (and therefore settled) by the existing settlement agreement. And separately, DCC asked for an order preventing any new adjudication proceedings for such relief because this had already been determined in an adjudication.

So this was about the meaning and scope of the settlement agreement – in particular what the parties meant by *"full and final settlement..[of all claims]..**arising from or in connection with these proceedings**"*.

DCC submitted that "these proceedings" should be interpreted broadly, to include the underlying dispute generally, including the finding of repudiatory breach and, therefore, all claims arising from that. HPL argued that it was not seeking to reopen the question of the repudiatory breach; it was only seeking additional heads of loss from the established breach – and that these losses were not covered by the settlement agreement.

The court accepted HPL's arguments as a matter of interpretation of the settlement agreement. It found that the reference to "these proceedings" meant the specific enforcement proceedings relating to non-payment of the original adjudicator's award. It did not mean the underlying dispute, the broader relationship between the parties or other potential claims arising from the established breach.

Since the new heads of claim did not overlap with the contract price overpayment award, the court ruled that none of those claims was prevented, by the settlement agreement, from being referred to a new adjudication; and that such an adjudication would not involve "re-adjudication" of questions previously determined.

The lesson is obvious: parties need to think about what they actually are settling. As the judge in this case pointed out, reference to claims arising from or in connection with one or all of "*the contract*", "*the works*" or "*the dispute/s*" might have brought about a different outcome.

Finally, let's consider the added dimension when trying to settle issues in ongoing contracts as opposed to terminated contracts. An "advance final account" is commonly used to draw a line under all accumulated differences (disputed claims, unagreed valuations of variations, defects issues etc.) but they sometimes fail to consider everything that might affect the final price and schedule. As well as being clear about the existing claims and differences, the parties need to consider any grounds for claims as may have arisen at the time of the agreement but have not been claimed; and whether to include these or only such grounds as were identified or reasonably identifiable. ■

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