The Law and Practice of Compromise

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THE LAW AND PRACTICE OF COMPROMISE

WITH PRECEDENTS

by

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"A lean compromise is better than a fat lawsuit."

George Herbert (1593–1633)

FOREWORD TO THE FIRST EDITION

"I'm happy to be able to tell your Lordship that you will not be troubled by this case; the parties have settled their differences." Those words, so welcome to the judicial ear mean much more, however, than an unexpected round of golf for the judge. If it were not that a high proportion of cases are compromised long before they reach court the administration of justice would soon grind to a halt; the courts would be overwhelmed by the volume of work. Moreover, the skilful practitioner, be he barrister or solicitor, who can accurately gauge the strength of his own case and that of his opponent will often be able to save his client great trouble and expense by judicious and timely compromise.

When one realises the importance of these skills, and how much of some practitioners' time is taken up in attempts to settle litigation, it is surprising that there is so little written guidance on the subject. It may look easy, but there is much to learn and many pitfalls.

Mr. Foskett has in his comprehensive and scholarly review covered every aspect of the subject, not overlooking the vital area of professional ethics. The reputation of being a straightforward honest negotiator is worth any number of dubiously achieved settlements.

This is a book which anyone handling litigation would do well to read.

The Right Hon. Lord Lane, A.F.C.,
Lord Chief Justice of England

FOREWORD TO THE FOURTH EDITION

The law loves compromise

It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by court decision. A party who settles forgoes the chance of total victory, but avoids the anxiety, risk, uncertainty and expenditure of time which is inherent in almost any contested action, and escapes the danger of total defeat.

The law reflects this philosophy, by making it hard for a party to withdraw from a settlement agreement, as from any other agreement, and by giving special standing to an agreement embodied, by consent, in an order of the court. Rules of practice are framed so as to encourage settlement, by exposing the substantial loser of an action to a heavy burden of costs and enabling the maker of a reasonable offer, even if the offer is refused, to obtain some protection against that burden.

But there is, as always, a catch. To negotiate a final and binding settlement agreement; to make sure that all necessary matters are covered; to express the terms clearly and unambiguously; to make sure that the agreement is simply and inexpensively enforceable; to advise where one party claims that he has been misled or pressured into making an agreement by the other side; all this may call for as much skill, including legal skill, as fighting the action.

In this, as in other legal fields, there is no substitute for a sound grasp of legal principle, an understanding of the special rules governing the subject matter and a knowledge of the up-to-date case law. That is what this valuable book provides, and that is why a Fourth Edition is so welcome.

If, as is greatly to be hoped, the movement towards settlement of disputes out of court, by mediation or conciliation, gathers pace, the learning which this book contains will become even more relevant and necessary. It is the right book, in the right place, at the right time.

The Right Honourable Lord Bingham of Cornhill
Lord Chief Justice of England

The Law Courts
The Strand
London

June 4, 1996

FOREWORD TO SETTLEMENT UNDER THE CIVIL PROCEDURE RULES

Under the Civil Procedure Rules offers to settle have become one of the most important elements of the civil justice system. The message of the new regime is that you should not be involved in litigation except as a last resort. Protocols will assist in bringing this about.

However, disputes cannot be avoided. What is required is to resolve the disputes when they arise expeditiously and in a sensible and reasonable way. The new rules should help to achieve this. They will enable the parties to take steps to ensure that they can obtain disclosure so as to form a realistic assessment of the merits of a case without litigation. Both sides will be in a position to make realistic offers to settle without having to commence proceedings. A well judged offer to settle should be the turning point in most disputes.

However, to make such an offer will involve a detailed knowledge and understanding of the rules. The same is true of the emphasis which is now placed on ADR. A mistake could have serious repercussions in the form of adverse orders for costs and interest. This is why I am particularly pleased that David Foskett has written this excellent commentary on making settlements under the new rules. He knows the rules as to settlement intimately. This is because he was one of their principal architects. This book provides practitioners with the information they need to make the best use of their new tools. I congratulate David Foskett on this excellent and comprehensive work which I know will be of immense value to practitioners.

The Right Honourable the Lord Woolf
Master of the Rolls

PREFACE

This edition is a little overdue. The demands of judicial life for two of the team and the demands of busy practices for the rest have contributed to an extended period for preparation. However, it has come together and I am grateful to the whole team of contributors for finding the time to update their respective contributions.

As ever there have been some significant developments since the last edition five years ago. The House of Lords has considered the "without prejudice" rule on two occasions (in *Bradford & Bingley Plc v Rashid* and *Ofulue v Bossert*) and the Court of Appeal has addressed the issue of whether "without prejudice" negotiations are admissible on the interpretation of a settlement reached (*Oceanbulk Shipping and Trading SA v TMT Asia Ltd*). Part 36 has been modified very considerably, with the requirement of a payment into court finally removed as from April 2007. The whole section on Part 36 has been revised. It is shorter than its predecessors, largely because the new version of Part 36 is less comprehensive and less prescriptive than previously. The issues that arise are very much the same, but the rules are shorter. The Mental Capacity Act 2005 was implemented in October 2007 and is important in a number of contexts, principally in connection with the settlement of serious personal injury claims. A new Chancery Guide, a number of recent cases (including *Siemens Building Technologies FE Ltd v Supershield Ltd*) in the construction field, a new Practice Statement concerning uncontested proceedings in the Administrative Court, several recent cases in the landlord and tenant and employment law contexts and a number of developments in the law relating to ADR (including *Farm Assist Ltd (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No.2)*) have all contributed to the need for revisions to the text. Unfortunately, the decision of the Supreme Court in the appeal in *Radmacher v Granatino* has not emerged in time to be taken into account in Chapter 24.

I repeat my thanks to the contributors. I should add my thanks to Stephen Lyon of 4, Paper Buildings, for casting his eye over Chapter 25 and to Rosanna Foskett of Maitland Chambers for helping with the research

and proof-reading. I am grateful to the publishers for their continued support and for their tolerance over the delays.

It is impossible to be absolutely sure, but I believe the text is up-to-date as at May 15, 2010.

David Foskett
Royal Courts of Justice
June 1, 2010

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