Briefing

BURGES SALMON

Dispute Resolution

Non-Binding Agreements - *David Frost v Wake Smith & Tofields Solicitors*

When is failing to document a settlement at mediation negligent?

Clients rely upon their solicitors to document agreements in legally binding terms. If an agreement is reached and reduced to writing but turns out not to bind the parties, can the client claim against the solicitor for negligence?

The Court of Appeal decision in *David Frost v Wake Smith & Tofields Solicitors* [2013] EWCA Civ 1960 provides a cautionary reminder of why it is always preferable to document any terms agreed by clients in a legally binding agreement as soon as possible. If this is not possible, solicitors may owe a duty to explain the non-binding nature of the agreement to their client.

Pitfalls of a non-binding agreement

- No deal despite a signed document - is the client unaware that he is not legally protected?
- Disagreement on whether the agreement is binding. What are *"Heads of Terms"* anyway - can one side try to escape the deal after it is done?
- Deal 'subject to contract' - how long and how expensive is it going to be to perfect the drafting?
- The unexpected point. Will an overlooked issue (for example, tax on damages) arise preventing the deal being done which could have been wrapped up at the time?
- The lost relief of settlement - it can be distracting and demoralising to go back to an issue you thought was resolved.

Frost v Wake Smith

The case concerned two brothers who reached an agreement at mediation, David and Ron Frost, who had been in business together for about 20 years. Their business interests, which were primarily in property development and management, had become intertwined in a complex and opaque manner. Their relationship broke down and they became entangled in a long and acrimonious dispute over how to separate their interests.

Eventually the brothers sought legal representation and it was ultimately agreed that they should mediate their dispute. At the mediation, the brothers agreed on certain terms and David Frost's solicitor, Mr Serby, was left to reduce these to writing while the brothers went out separately for dinner. Upon their return, the brothers signed a document which set out what they had agreed in principle.

This was not, however, a legally binding agreement. It contained elements that were uncertain and which indicated that the agreement was yet to be finalised, such as undefined terms; no accurate description of relevant properties; failure to deal with the charges over those properties; and incomplete treatment of the tax consequences. Further, a jointly-owned company (through which the brothers had conducted their business) was the legal owner of several of the properties included in the agreement, yet the company was not included as a party to the agreement. As a result, the agreement failed to satisfy the requirements of the Law of Property (Miscellaneous Provisions) Act 1989, thus rendering it legally unenforceable.

David Frost had left the mediation believing that an enforceable agreement had been reached and Mr Serby had said nothing to disabuse him of this belief. However, Ron Frost subsequently raised a number of issues and difficulties, which ultimately resulted in the brothers going to a second mediation to resolve them.

Years later, David Frost brought proceedings against Mr Serby's firm, claiming that he had been negligent for not ensuring that a legally binding agreement was entered into at the end of the first mediation.

The Judge at first instance found that the solicitor owed David Frost no such duty of care; Mr Serby was not under an obligation to conclude a binding agreement at the first mediation because the parties had not at that stage reached a final agreement, and due to the complexity of the issues involved, a binding agreement would have been impossible to achieve. The Court of Appeal agreed with this finding and dismissed David Frost's appeal.

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The solicitor's real duty

The real failing in this case (which David Frost did not actually plead in his claim) lies in the fact that Mr Serby failed to advise his client at the end of the mediation that the agreement that had been reached was only an agreement in principle and that much remained to be done, discussed and agreed before this agreement in principle could mature into an enforceable contract.

Despite dismissing the appeal, the Court of Appeal made it clear that it would normally be part of a solicitor's duty to advise his client, especially a lay client, of the nature of the process of mediation and of the status of any agreement reached as a result. In the same way it is likely to be part of the solicitor's duty to advise any client whether or not an agreement is legally binding and, if not, how much more work is required to make it so.

Mediations can be long and tiring, often resulting in the parties negotiating into the night. If an agreement is reached late in the day, there may be little appetite to document the terms agreed in a legally binding agreement, there and then. However, it is always best practice to achieve this where it is possible to do so.

In the event that it is not possible to conclude a legally enforceable agreement at the mediation, at the very least, solicitors must make sure that their clients understand that significant additional work may be required to conclude the settlement. They should also make clear whether a binding agreement has or has not been reached.

Contact

Please contact Andrew Burnette or Georgina Shaw in our Dispute Resolution team if you would like more information or advice in relation to the issues discussed in this article or in relation to professional negligence or mediation in general.

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