# A reasonable settlement? A reaffirmation of principles

**MICHAEL KING - DIRECTOR, DRIVER TRETT GLASGOW AND DIALES QUANTUM EXPERT APPEARED AS QUANTUM EXPERT IN THE TECHNOLOGY AND CONSTRUCTION COURT IN APRIL 2017 ON BEHALF OF THE CLAIMANTS. HE LOOKS AT ONE ASPECT OF THE CASE WHICH DEALS WITH THE SETTLEMENT OF CLAIMS WITH THIRD PARTIES AFFECTED BY THE CONSTRUCTION WORKS.**

## Background

125 Old Broad Street is a 26-storey office building with a lower level podium building in the heart of the City of London, it provides 320,000 square feet of category A office space and 6,400 square feet of retail space at ground-floor level.

Between 2006 and 2008 the building, which formerly housed the London Stock Exchange, was redeveloped and the building was clad with storey height curtain walling.

Between 2008 and 2012, seventeen of the glass panels shattered due to nickel sulphide inclusions. The building was clad in scaffolding as an emergency measure and was eventually re-glazed between 2012 and 2013.

As a result of the glazing failures, and subsequent re-glazing works, some of the building tenants and adjacent occupiers raised claims for business interruption, loss of profit, and disruption.

These claims were negotiated and settled by the building owners in the sum of £792,785.77. Subsequently this sum was then sought from the defendants as part of the court action.

## The Issue

Settlements between parties in the construction and engineering industries are a commonplace event. These occur at all levels between contractor, subcontractor, designer, employer, and third-parties.

In the recent case of 125 OBS Nominees v Lend Lease Construction (Europe) Ltd, the judge, Mr Justice Stuart-Smith, reaffirmed the principles which apply where one party settles a claim with another party and then seeks to recover that amount from a third-party.

As Mr Justice Stuart-Smith noted, the applicable principles of law were usefully summarised by Mr Justice Ramsey in Siemens Building Technology FE Ltd v Supershield Ltd [2009] EWHC 927 (TCC) as follows:

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(1) For C to be liable to A in respect of A's liability to B which was the subject of a settlement it is not necessary for A to prove on the balance of probabilities that A was or would have been liable to B or that A was or would have been liable for the amount of the settlement.
(2) For C to be liable to A in respect of the settlement, A must show that the specified eventuality (in the case of an indemnity given by C to A) or the breach of contract (in the case of a breach of contract between C and A) has caused the loss incurred in satisfying the settlement in the manner set out in the indemnity or as required for causation of damages and that the loss was within the loss covered by the indemnity or the damages were not too remote.
(3) Unless the claim is of sufficient strength reasonably to justify a settlement and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant eventuality or breach of contract. In assessing the strength of the claim, unless the claim is so weak that no reasonable party would take it sufficiently seriously to negotiate any settlement involving payment, it cannot be said that the loss attributable to a reasonable settlement was not caused by the eventuality or the breach.
(4) In general if, when a party is in breach of contract, a claim by a third party is in the reasonable contemplation of the parties as a probable result of the breach, then it will generally also be in the reasonable contemplation of the parties that there might be a reasonable settlement of any such claim by the other party.
(5) The test of whether the amount paid in settlement was reasonable is whether the settlement was, in all the circumstances, within the range of settlements which reasonable people in the position of the settling party might have made. Such circumstances will generally include:
(a) the strength of the claim;
(b) Whether the settlement was the result of legal advice;
(c) The uncertainties and expenses of litigation;
(d) The benefits of settling the case rather than disputing it.
(6) The question of whether a settlement was reasonable is to be assessed at the date of the settlement when necessarily the issues between A and B remained unresolved. "

[Settlements] occur at all levels between contractor, subcontractor, designer, employer, and third-parties.

The judge, in 125 OBS, also noted that in such circumstances the court encourages reasonable settlements, particularly where strict proof would be very expensive, and also that the test of reasonableness is generous reflecting the fact that the paying party has put the other in a difficult situation by its breach.

It was also noted that a claim would have to be so weak as to be obviously hopeless before its settlement could be considered unreasonable.

Also of significance was the re-emphasis that the evidential burden of proving unreasonableness of any settlement falls upon the defendant. This principle is set out in two cases.

(1) In Mander v Commercial Union Assurance [1998] Lloyds Rep IR93 Mr Justice Rix stated that:

"The brokers (Commercial Union) submit that the settlement agreement was unreasonable. I suspect that in the circumstances the evidential burden of that is on the brokers....."

(2) Similarly, in BP plc v AON [2006] EWHC 424 Comm Mr Justice Colman noted that:

"...the fact that the terms of the settlement were entered into upon legal advice establishes, at least, that those terms were prima facie reasonable. It is then for the Defendant to displace that inference by evidence to the contrary, by establishing for example, that some vital matter was overlooked".

In conclusion, wherever you find yourself in the industry hierarchy, it is important to remember the established principles in Siemens Building Technology FE Ltd v Supershield Ltd [2009] EWHC 927 (TCC). These set out the framework that any party should adopt when considering the implications of settling claims, which it may ultimately seek to pass on to a third party. These principles endorse the post-civil justice reform stance of encouraging mediation and settlement, which diverts work from the already busy court system. ■

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