Settlement agreements and joint tortfeasors – a trap for the unwary?

Settling a claim is often the culmination of months, if not years, of hard work. Unfortunately, the excitement of finally striking a deal can mean that the finer details are overlooked when it comes to drafting the settlement agreement.

The Court of Appeal’s recent decision in Gladman Commercial Properties v (1) Fisher Hargreaves Proctor (2) HEB Chartered Surveyors (3) David Hargreaves (4) Jonathan Paul Thomas Bishop [2013] EWCA Civ 1466 is therefore a salutary lesson for all litigants (and their representatives) in the importance of thinking carefully about what is needed in the settlement agreement before signing on the dotted line.

In Gladman, the Claimant thought that an initial settlement agreement contained an implied provision permitting it to pursue further defendants for losses arising out of the same issues, and found itself sorely mistaken.

The facts

The case arises out of the sale of two properties: a disused fire station and adjoining land which were owned by the Fire Authority and Council respectively, and which were marketed by property consultants Fisher Hargreaves Proctor (FHP) and HEB Chartered Surveyors (HEB) on the joint instructions of the Fire Authority and Council.

In August 2006 Mr Hargreaves, of FHP, and Mr Bishop, of HEB, wrote to Gladman Commercial Properties (GCP), and provided information about the properties including statements that the development was suitable for student/key-worker accommodation and that approximately 600 units could be built on the land.

Relying on the August 2006 letters, GCP contracted to purchase the properties for GBP 4.2 million and GBP 1.8 million respectively. GCP paid a 10% deposit on exchange of contracts but subsequently refused to complete the purchase due to planning difficulties which arose in respect of the proposed redevelopment. In particular, GCP discovered that the properties could not be developed as student or key-worker accommodation and that, in any event, the land could sustain only around 400 units of accommodation.

The first claim

The Fire Authority issued proceedings in May 2009 seeking specific performance. GCP defended the claim and issued a counterclaim, and also joined the Council as a Part 20 Defendant. GCP sought to rescind the contracts and claimed substantial damages (the loss of profit on the development was said to be between GBP 31-39 million) on the basis that the August 2006 letters had contained
fraudulent misrepresentations made by the Fire Authority and Council through FHP, HEB, Mr Hargreaves and Mr Bishop as their sales agents. A week before trial GCP wrote to Mr Hargreaves and Mr Bishop, who were to be witnesses in the trial, stating that if GCP was “unsuccessful in whole, or in part” GCP would bring a claim against them/their firms.

The trial began in March 2011, but was adjourned in April, and again in May, to allow for negotiations. By that point it had run for 15 days, and evidence was still incomplete, although Mr Hargreaves and Mr Bishop had faced intense cross-examination.

The claim against both the Fire Authority and the Council was eventually settled on 30 September 2011, with GBP 2.7 million being paid to GCP “in satisfaction of all claims”. After costs and the deposits GCP recovered GBP 1.318 million by way of net compensation for the alleged misrepresentations.

The second claim
GCP then issued proceedings against FHB, HEB, Mr Hargreaves and Mr Bishop (together, the Defendants), alleging fraudulent misrepresentation based on the August 2006 letters. The allegations against the Defendants were broadly identical to those levelled against the Fire Authority and the Council and, of course, arose out of the same transaction/factual scenario.

The Court granted the Defendants’ application to strike out the second claim on the basis that:

- The Fire Authority, the Council and the Defendants were all joint tortfeasors, such that the settlement agreement with the Fire Authority and the Council had released the causes of action against all of them
- The claim was an abuse of process as GCP could, and should, have brought its claims against the Defendants in the earlier proceedings, and the second claim amounted to unjust harassment of Mr Hargreaves and Mr Bishop, who would be required to give evidence for a second time should the claim against them proceed

In reaching its decision, the Court considered GCP’s argument that the terms of the settlement agreement impliedly reserved its right to pursue the Defendants for the balance of its loss. While the Court acknowledged that, on its proper construction, the settlement agreement did not mean that GCP had received full satisfaction for its loss, it also found that there was no express reservation of any right to pursue the Defendants, nor was any such reservation to be implied, based on the ordinary principles for implied terms in contractual documents.

The appeal
GCP appealed. In dismissing that appeal, the Court of Appeal stated that the conclusion that the Defendants were joint tortfeasors with the Fire Authority and the Council was “plainly correct”. As such, the law was clear that a settlement which expressly releases one joint tortfeasor will release all other joint tortfeasors (in contrast, this position does not apply where there has been a judgment under section 3 of the Civil Liability (Contribution) Act 1978, or to a situation where there are concurrent tortfeasors). On this basis, all causes of action against the Defendants had been released when GCP signed the settlement agreement with the Fire Authority and the Council.

The Court acknowledged that there is an exception to the release rule, namely where the agreement for the release of one or more joint tortfeasors contains a reservation of the claimant’s right to sue the remaining tortfeasors. This exception may be explained on the basis that a settlement containing such a reservation amounts to a covenant not to sue the defendant(s) with whom the settlement is made, rather than a release from liability. The Court also noted that such a reservation may be express or implied.

However, on the facts of the case, the judge had been correct in concluding that the settlement agreement between GCP, the Fire Authority and the Council contained neither an express nor an implied reservation of any right of GCP to pursue the Defendants. The Court of Appeal commented that, as all the parties to the first claim had been legally advised and represented during the (very lengthy) settlement negotiations, it was reasonable to suppose that they had each understood the legal consequences of entering into a settlement with some, but not all, joint tortfeasors. If GCP was correct, and there was an implied reservation of a right to sue the Defendants, that would necessarily mean that the Fire Authority and the Council had given up their claims to specific performance, and had paid a very substantial sum of money to GCP, whilst remaining open to the possibility of contribution claims from the Defendants, should GCP then pursue that reserved right. Such a conclusion was, in the Court of Appeal’s view, “an altogether improbable hypothesis”.

Comment
This case serves as a useful reminder of two important issues for consideration when drafting settlement agreements, and as such is relevant to anyone involved in litigation. Firstly, are there any outstanding claims that the client may want to pursue once the instant litigation has concluded? It is not unknown for parties to use an initial claim to build up a “fighting fund”, so that more complex/valuable litigation can be pursued against a third party, or indeed to hold a claim against a separate defendant “in reserve”. If there is any connection between the claims (for example claims against contractor and architect/designer, solicitor and barrister, insurer and broker, or, as here, principal and agent), the possibility of the defendants being joint tortfeasors must be considered and either dismissed, if appropriate, or otherwise provided for in the settlement agreement.
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Secondly, in this latter regard, think carefully about the terms of the settlement agreement. If there is something that is important to one of the parties, such as GCP’s wish to pursue the Defendants, it should, preferably, be dealt with expressly. Whilst a Court might be willing to imply a “missing” term into an agreement, in the right circumstances, it is better not to take the risk. On the specific issue raised in Gladman, the key point for any defendant, if the question of a reservation of a right to sue another party does arise, is to ensure that a clear indemnity is included in the settlement agreement to protect against any claim for contribution that might be made by the other tortfeasor(s).

Finally, although it can sometimes feel like tempting fate, it is always a good idea to go into any settlement negotiations, whether they are conducted in correspondence, over the telephone, at mediation or otherwise, with a clear idea of what the final settlement agreement may look like. Thinking through a draft in advance may prevent the Gladman scenario striking again.

It is to be noted that there is reference in the Court of Appeal decision to GCP’s Counsel “reserving his ammunition for a higher Court” in respect of the joint tortfeasor issue and it therefore remains a possibility that GCP will pursue a further appeal to the Supreme Court.