

## DEAL OR NO DEAL?

A salutary lesson was provided to all those involved in negotiations if the “legal formalities” are overlooked. In *Thameside Construction Company Limited v Arthenella Limited* [2011] EWHC 2695(TCC)

<http://www.bailii.org/ew/cases/EWHC/TCC/2011> a dispute arose as to what had actually been agreed when a deal was done between the parties’ Managing Directors personally, as the three day trial date on a construction dispute loomed.

There had been ongoing negotiations between them, following a failed mediation. The Claimant’s MD maintained that at a meeting with his opposite number, the Defendant had agreed a full and final settlement at £275K to be paid by the Defendant. The Claimant’s MD then followed up the discussion with an e-mail setting out his understanding of the deal. However, the next day, the Defendant’s MD disputed this, saying that his counterclaim of £90,000 was to be taken into account.

This dispute as to the different interpretations on the deal, or whether any deal existed had to be decided by the court. Witness statements were prepared and the evidence about the negotiations and the purported agreement had to be examined, including disclosure of documents.

The Judge found in favour of the Claimant, giving prominence to the Claimant’s contemporaneous e-mail following the discussions. This had not been immediately rejected by the Defendant. Also, the deal tallied with a previous written offer made by the Defendant which had not been formally withdrawn.

### **Conclusion**

Whilst without prejudice negotiations between the parties direct may be a way of breaking a log jam, caution must be exercised. The court will examine the evidence as to what the parties’ true intentions were in the settlement discussions. Weight will be given to anything in writing setting out the terms.

### **Action Points**

1. It is recommended that to avoid such problems, negotiations should be expressly “without prejudice” and “subject to contract”. Whilst not magic words, this should emphasise that the negotiations are just that: until a formal settlement document sets out the agreement in writing, there should be no binding or full and final settlement.
2. Lawyers should be involved in preparing the formal settlement document, to avoid the misunderstandings that happened in this case.
3. By making a contemporaneous note of a discussion, this will give a better chance of your understanding being accepted.

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