

## Why settle for less?

The High Court has recently considered some of the principles governing Tomlin Orders, and how the confidentiality of the underlying settlement agreement fits with contemporary expectations and rules of transparency.

The first Tomlin Order properly-so-called was made in [Dashwood v Dashwood](#) [1927] WN 276. Having stayed proceedings on consensual terms, Tomlin J issued Practice Note [1927] WN 290 describing the principles he sought to embody.

The idea was simple and ingenious, and is now familiar. The Court's Order simply stays proceedings. Annexed to the Order is a schedule setting out the terms of whatever compromise had been reached, but that schedule does not form part of the Court's order and is not registered or enforceable as such. The settlement becomes a supervening set of obligations which it is open to the parties to enforce by restoring the existing proceedings, for which permission is given to apply. To that extent only, proceedings remain 'alive'.

[CPR40.6](#) (and para.22.11 of the [Chancery Guide](#)) now deals with the ways in which claims may be resolved by consent.

As consensual agreements, a schedule to a Tomlin Order should be construed as a commercial contract and not as a judgment. Like other contracts, a Tomlin's schedule is amenable to an application for rectification. The Courts would be very slow to interfere, say, to vary the schedule which is assumed to embody what the parties agreed and intended to agree (see [Community Care North East v Durham County Council](#) [2010] EWHC 959 (QB)). A compromise could potentially be rendered void for mutual mistake (see [The Great Peace](#) [2002] EWCA Civ 1407).

In 2020 the High Court has twice considered matters arising from claims which were concluded (or intended to be concluded) in this way.

In [SP v Barbara Hewson](#) [2020] EWHC 499 (QB), the appellate Court found that the Court below had been wrong to revive a claim under the 'liberty to apply' provision, lifting the stay, where the applicant intended to make new allegations in a harassment claim. New allegations would require a new claim. These were not the 'proper grounds' or 'good cause' required to lift a stay.

In [Zenith Logistics Services \(UK\) Ltd v Coury, and UUU v BBB](#) [2020] EWHC 774 (QB) the Court considered (in *Zenith*) an appeal against a Master's decision (contrary to the parties' shared wishes) not to keep a Tomlin Order's schedule confidential, and (in *UUU*) an application to register an Order which was 'Tomlin' in form but which went further in expressing the principal Order itself to be a 'Confidential Consent Order' and included undertakings given to the Court and recorded in a schedule.

Warby J noted that *"Transparency is a key feature of litigation in a democratic society, and open justice has long been recognised as a cardinal principle of English law"* (para.37). This transparency is achieved partly by permitting public access to court documents (see [see CPR5.4C](#)).

Although the terms of settlement are scheduled to the Order, they are not part of the Order and *"any consent order or judgment will form part of the court record which is available for subsequent*

*scrutiny. For example, the schedule to a Tomlin order, whilst not strictly part of the immediately enforceable court order, is part of the court record. If the normal form of Tomlin order is utilised, a direction from the court could be obtained to the effect that the schedule to the order 'be not released' to any party other than the parties or their advisers."* (Foskett on the Law of Compromise, 9<sup>th</sup> Ed., at 10-31).

There are, however, competing considerations. On the one hand, *"in my view to ask, without more, whether the Schedule is or is not "an order" or "part of an order" is to set up a false dichotomy, and risks semantic confusion. The answer depends on the context in which one is asking the question. In at least two senses it is clear that the Schedule to a Tomlin order is part of a Court order. First, the Schedule is an integral part of a document which is approved, sealed and issued by the Court, in the exercise of the judicial power of the state. That being so, as the Master rightly held, the Schedule forms part of the 'order'..."* (para.59).

However *"The precise words of the White Book are to be noted: 'not part of the order as such'. So too are the exact words used by Ramsay J in Community Care...: 'The terms of the schedule are not an order made by the court'"* (para.60).

*"When parties submit an order in this form, or the classic form of Tomlin order, they are not seeking to 'engage the coercive powers of the Court', as the Master put it. They are seeking no more than the exercise of some simple case management powers following a compromise of the claim. If the order is made in this form, the requirements of transparency are fulfilled: the order will be publicly accessible, and it will reflect the entirety of what the Court has done, namely to grant an agreed application to stay the proceedings on terms that the parties may apply to enforce the settlement agreement"* and *"a decision to refer to those terms rather than set them out in the Schedule is not a derogation from open justice. The open justice principle does not require parties to make their settlement agreements public. Nor do they require parties who wish to seek a stay of proceedings on Tomlin terms to incorporate in an order the details of an agreement which they have stipulated should be kept private or confidential"* (paras.65-66)

*UUU* considered a provision whereby one of the parties had given enforceable undertakings to the Court. *Those* were provisions which *were* open to be scrutinised.

Although the body of a Tomlin Order is open to public inspection, if parties wish to keep the terms of their settlement private, they may do so without transgressing principles of transparency or the right of inspection arising under the CPR, and *"this Court should not demand to see a settlement agreement which the parties have designated as confidential"* (para.67). The settlement terms in *Zenith* were not contained in a schedule in the usual way but elsewhere, confidentially, and validly so. The Order itself, however, staying the claim and giving permission to apply, remained available for inspection.