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Neutral Citation Number: [2022] EWCA Civ 824

Case Nos: CA-2021-000215
CA-2021-000213
CA-2021-000345

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
His Honour Judge Davis-White QC (sitting as a Judge of the High Court)
[2021] EWHC 2533 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2022

Before:

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE WARBY

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Between:

(1) ROBERT NICHOLAS JASON SCHOFIELD **(2) RHINO ENTERPRISES HOLDINGS LIMITED**	**Applicants/ Appellants**
- and -	
(1) MATTHEW DAVID SMITH **(2) CLARE BOARDMAN** **(the former administrators of Rhino Enterprises Properties Limited and Askwith Investments Limited)**	**Respondents**

And between:

(1) RHINO ENTERPRISES PROPERTIES LIMITED **(2) ASKWITH INVESTMENTS LIMITED**	**Claimants/ Appellants/ Cross-Respondents**
- and -	
CLYDE & CO LLP	**Defendants/ Respondents/ Cross-Appellants**

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Stephen Davies QC and Neil Levy (instructed by **Horwich Farrelly Limited**) for **Mr Schofield, Rhino Enterprises Holdings Limited, Rhino Enterprises Properties Limited and Askwith Investments Limited**
Tom Smith QC and Hannah Thornley (instructed by **Faegre Drinker Biddle & Reath LLP**) for **Mr Smith and Ms Boardman**
Joseph Curl QC and Faith Julian (instructed by **DAC Beachcroft LLP**) for **Clyde & Co LLP**

Hearing dates: 17 & 18 May 2022

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Approved Judgment

Lord Justice Newey:

1. These appeals concern a group of companies ultimately owned and controlled by Mr Jason Schofield. The group includes Rhino Enterprises Holdings Limited ("Holdings"), Rhino Enterprises Properties Limited ("Properties"), Rhino Enterprises Limited ("REL") and Askwith Investments Limited ("Askwith").

2. In 2007, the group was reorganised, adopting what has been called the "Opco/Propco Structure". At the same stage, Barclays Bank plc ("Barclays") provided Properties with a £16 million loan facility and the two companies entered into an interest rate hedging agreement. In the following year, Barclays agreed to lend Askwith £8.56 million and a further interest rate hedging agreement was concluded between those companies. Both the hedging agreements ("the Swaps") were referenced to London Inter-bank Offered Rate (or "LIBOR").

3. In 2013, Barclays demanded payment from Properties, Askwith and (as guarantor) REL. The demands not having been met, on 14 August 2013 Barclays appointed Mr Matthew Smith and Ms Clare Boardman ("the JAs"), who were partners in Deloitte LLP, as joint administrators of REL, Properties and Askwith. The JAs in turn instructed Clyde & Co LLP ("Clyde & Co") to review claims ("the Swap Claims") which Properties and Askwith had advanced to rescind the Swaps and recover compensation from Barclays on the grounds of mis-selling and manipulation of LIBOR.

4. Early in 2014, the JAs sold various properties belonging to Properties and Askwith and used the proceeds to discharge debts thought to be owing to Barclays and other creditors. Thereafter, company voluntary arrangements were approved in respect of REL, Properties and Askwith, with the JAs as the supervisors, pursuant to which control of the companies reverted to their boards in August 2014. The administrations came to an end on 13 February 2015 and the JAs were discharged pursuant to paragraph 98 of schedule B1 to the Insolvency Act 1986 ("the 1986 Act").

5. By then, REL, Properties and Askwith, at the instance of Mr Schofield, had issued a claim against Barclays. Among other things, allegations were made in relation to advice on the Opco/Propco Structure, that the Swaps had been mis-sold and that Barclays had made dishonest representations about LIBOR.

6. The Barclays litigation was settled following a mediation by an agreement dated 1 December 2015. The parties to the settlement agreement ("the Settlement Agreement") were REL, Properties, Askwith and Barclays, but clause 8 provided for the "Parties' Affiliates" to be able to enforce the terms of clauses 2 and 3 of the agreement in accordance with the Contracts (Rights of Third Parties) Act 1999.

7. The proceedings which are the subject of the present appeals were issued on 5 July 2019. In the first place, Mr Schofield and Holdings bring proceedings against the JAs as contributories of, respectively, Properties and Askwith pursuant to paragraph 75 of schedule B1 to the 1986 Act. The JAs are said to have been wrong both to accept appointment as administrators and to have conducted the administrations as they did. Among other things, the JAs are criticised for failing to pursue the Swap Claims.

8. Secondly, Properties and Askwith bring proceedings against Clyde & Co. In broad terms, it is alleged that Clyde & Co ought not to have accepted instructions and that they breached fiduciary or other duties in their assessment of the Swap Claims and views they expressed in relation to them.

9. Having regard to paragraph 75(6) of the 1986 Act, Mr Schofield and Holdings needed to obtain the Court's permission to pursue the misfeasance proceedings against the JAs. An application for such permission was heard by His Honour Judge Simon Barker QC, sitting as a Judge of the High Court, and, in a judgment dated 3 September 2020 ([2020] EWHC 2370 (Ch), [2021] BPIR 144), he held that permission should be granted.

10. A few days later, Clyde & Co obtained a copy of the Settlement Agreement from Barclays, and the JAs were supplied with a copy on 11 November 2020, subject in each case to certain confidentiality conditions. On respectively 18 November 2020 and 27 November 2020, Clyde & Co and the JAs issued applications to strike out the proceedings against them and/or for summary judgment on the ground that any claims against them had been released by the Settlement Agreement.

11. There was a directions hearing before Insolvency and Companies Court Judge Barber on 4 December 2020 and the strike out/summary judgment applications were heard by His Honour Judge Davis-White QC ("the Judge"), sitting as a Judge of the High Court, in late May 2021. Giving judgment on 22 September 2021, the Judge concluded at paragraph 164 that the Settlement Agreement had served to release all the claims asserted against the JAs in the misfeasance proceedings and that the latter were therefore to be struck out or the subject of summary judgment in favour of the JAs. As regards Clyde & Co, the Judge held at paragraph 165 that they had been released from claims for breach of duty "whilst acting as agents", but that the proceedings against them could continue "as regards alleged breaches of duty to advise (rather than breaches of acts or omissions vis a vis third parties as agents)". Orders were accordingly made striking out the misfeasance proceedings in their entirety and striking out the claim against Clyde & Co "insofar as it alleges a breach of duty whilst acting as agents on behalf of [Properties and Askwith]".

12. Three appeals have followed and are before us: by Mr Schofield and Holdings, by Properties and Askwith, and by Clyde & Co. Mr Schofield and Holdings challenge the striking out of the misfeasance proceedings; Properties and Askwith dispute the partial striking out of their claims against Clyde & Co; and Clyde & Co contend that the claim against them should have been struck out completely rather than merely "insofar as it alleges a breach of duty whilst acting as agents on behalf of [Properties and Askwith]". I shall term Mr Schofield, Holdings, Properties and Askwith "the Rhino Appellants" in this judgment.

13. It is also relevant to mention a recent development. On 20 April 2022, REL, Properties and Askwith issued proceedings for the Settlement Agreement to be rectified by the insertion of words which would make it clear that claims against the JAs and advisors engaged by the JAs were not released. REL, Properties and Askwith had noted in a letter to Barclays dated 31 January 2022 that, were this Court to agree with the Judge's interpretation of the Settlement Agreement, Barclays would need to be made a party to any proceedings to rectify the Settlement Agreement and had invited Barclays to agree a variation to the Settlement Agreement instead. Barclays

had, however, rejected this request. It stated in a letter of 25 February 2022 that it "does not consider there to have been any mistake in the Settlement Agreement".

The Settlement Agreement

14. Under the Settlement Agreement, Barclays, while not admitting any liability, agreed to pay a specified sum to REL, Properties and Askwith.

15. Clauses 2 and 3 are of central importance to the present appeals. Clause 2.1 reads:

> "This Agreement is made in full and final settlement of all Claims any Party has or may have against any other Party or against any other Released Party."

Clause 3 provides:

> "3.1 Each Party agrees that the Released Parties are released and forever discharged from all Claims.
>
> 3.2 Each Party agrees that it will not bring any Proceedings against any Released Party in relation to a Claim or otherwise assert a Claim against any Released Party. Further each Party will take all steps necessary (including, without limitation, by the payment of money) to ensure that none of its Affiliates brings any Proceedings or asserts a Claim against any Released Party.
>
> 3.3 Each of the Parties agrees that if it takes Proceedings or asserts a Claim in breach of clause 3.1 above, damages are not an adequate remedy and, accordingly, that injunctive or other similar relief is appropriate to restrain that breach.
>
> 3.4 If, contrary to clause 3.2 above, an Affiliate of any Party (the First Party) brings Proceedings in relation to a Claim or otherwise asserts a Claim against another Party (the Second Party) or an Affiliate of the Second Party, the First Party shall pay on demand to the Second Party, or, if requested by the Second Party, to the relevant Affiliate, a sum equal to the costs (including, without limitation, legal costs), losses, liabilities, expenses and payments incurred or made by the Second Party or the relevant Affiliate in connection with or arising from the defence of, or otherwise responding to that Claim, including, without limitation, any sum due on a judgment or award given against that the Second Party or the Affiliate and any payment made in settlement or that Claim. A certificate signed on behalf of the Second Party (or, if payment is to be made directly to the Affiliate, the Affiliate) shall,

> except in the case of manifest error be conclusive as to the amount of any costs, losses, liabilities, expenses and payment incurred or made in connection with or arising from the defence of, or otherwise responding to, that Claim."

16. Terms used in clauses 2 and 3 are defined as follows by clause 1:

    i) "Party" and "Parties" means "a party and the parties to this Agreement";

    ii) "Released Parties" means "the Parties and their Affiliates";

    iii) "Affiliate" means, "in relation to any person, a Subsidiary of that person, a Parent of that person, any other Subsidiary of that Parent, and an Employee of that person, of its Subsidiaries and of its Parents";

    iv) "Employee" means "any former, present or future directors, officers, employees, shareholders and agents";

    v) "Claims" means "any and all Liabilities arising from or in connection with the facts and matters pleaded in the Statements of Case in the Action, the swaps between [Properties] and Barclays and Askwith and Barclays, the loans made by Barclays, or otherwise arising out of the facts and matters referred to in the Action or the Mediation (including any draft amendments to Statements of Case that have been provided by the Parties, but for which permission of the Court has not yet been granted, or papers, statements or reports produced in connection with the Mediation, whether on a without prejudice confidential basis or otherwise), including, but not limited to, all claims and counterclaims made in the Action, but not including any action Barclays may determine to take in relation to the 2 year loan granted to [Properties] (in administration) by a Term Loan Facility Letter dated 29 July 2014"; and

    vi) "Liability" means "any demand, liability, obligation, complaint, claim, counterclaim right of set-off, right to net, indemnity, right of contribution, cause of action (including, without limitation, in negligence), administrative or regulatory claim or infraction, petition, right or interest of any kind or nature whatsoever, whether in law or equity, direct or indirect, joint or several, foreseen or unforeseen, contingent or actual, accrued or unaccrued, liquidated or unliquidated, present or future, known or unknown, disclosed or undisclosed, suspected or unsuspected, however and whenever arising and in whatever capacity and jurisdiction".

17. The following further provisions of the Settlement Agreement featured in submissions to us:

    i) Clause 1.3 provides for the obligations of REL, Properties and Askwith under the Settlement Agreement to be joint and several;

    ii) Clause 5.1 stipulates that "neither this Agreement nor any related negotiations shall be offered or received in evidence except for the purpose of enforcing this Agreement";

iii) Clause 6, dealing with confidentiality, requires all parties to "procure that no Employee or advisor (whether expert, legal advisor or otherwise) acts otherwise than in accordance with the obligations set out in this clause 6" (clause 6.2), states that the parties agree that "they, and their Employees, agents, experts and advisors shall make no public statement" other than as specified (clause 6.3) and provides for the "Parties and their legal advisors" to return disclosed documents (clause 6.5);

iv) Clause 7.1 records that the Settlement Agreement "constitutes the entire agreement between the Parties relating to its subject matter, and supersedes and extinguishes any prior undertakings, representations, warranties, conditions and arrangements of any nature, whether in writing or oral, relating to that subject matter"; and

v) Clause 9.5 contains a warranty by each party to the others that, "as at the date of this Agreement, no Proceedings (other than the Action) arising out of or connected with any Claims have been commenced, are pending or, to the best of its knowledge, are contemplated against any of the Released Parties".

The issues

18. The issues raised by the parties' submissions can be summarised as follows:

i) Did the Settlement Agreement, correctly interpreted, provide for the JAs and Clyde & Co to be released from claims advanced by the Rhino Appellants? In that connection, Mr Stephen Davies QC, who appeared for the Rhino Appellants with Mr Neil Levy, argued that the Settlement Agreement did not operate to release "Affiliates" of REL, Properties or Askwith from claims by those companies or, if it did, that the JAs and Clyde & Co are not such "Affiliates". A sub-issue relates to the admissibility and significance in the context of interpreting the Settlement Agreement of evidence which Mr Schofield has given;

ii) Was any release of claims against Clyde & Co which the Settlement Agreement effected limited to claims "for breach of duty whilst acting as agents"?

iii) Does (or might) the principle established in *Ex p James* (1874) LR 9 Ch App 609 bar the JAs from relying on any release for which the Settlement Agreement provided?

iv) Should the proceedings be kept alive, albeit stayed, until the rectification claim which REL, Properties and Askwith have brought has been determined?

Interpretation of the Settlement Agreement

General principles

19. In recent years, the Supreme Court and, before it, the House of Lords have discussed contractual interpretation on a number of occasions: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*ICS*"), *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101

("*Chartbrook*"), *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 ("*Wood*"). It can be seen from the authorities that the process involves assessment of "the objective meaning of the language which the parties have chosen to express their agreement" (to quote Lord Hodge in *Wood* at paragraph 10) or, in the words of Lord Hoffmann in *ICS* at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

20. In *Wood*, Lord Hodge said this about how contracts are to be interpreted at paragraph 13:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type."

21. In *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, the House of Lords confirmed that ordinary principles of contractual interpretation apply to releases. At paragraph 8, Lord Bingham, with whom Lord Browne-Wilkinson agreed, endorsed the application to general releases of "the general principles summarised by Lord Hoffmann in [*ICS*]". In paragraph 26, Lord Nicholls said:

> "there is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning

> which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?"

Lord Nicholls added at paragraph 29:

> "Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."

Mr Schofield's evidence

22. While it is generally legitimate to have regard to background (or, in the words of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381, the "matrix of fact") when construing a contract, "[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent": see *ICS* at 913, per Lord Hoffmann.

23. Often, such evidence would not be helpful. In this connection, Lord Wilberforce said in *Prenn v Simmonds* at 1384-1385:

> "By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to."

24. However, application of the exclusionary rule does not depend on the evidence in question being unhelpful. In *Chartbrook,* Lord Hoffmann noted in paragraph 41 that the rule "may well mean … that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended", but he none the less affirmed it, explaining in paragraph 42:

> "The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for

> example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

25. Lord Hoffmann observed in *Chartbrook* at paragraph 38 that "[w]hereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute". Echoing that, in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 ("*Oceanbulk*") Lord Clarke drew a distinction between "objective facts and other statements made in the course of negotiations" and said that "objective facts communicated by one party to the other in the course of the negotiations" should be admissible whether or not the negotiations were conducted on a without prejudice basis: see paragraphs 38 and 40. In the same vein, Lord Phillips said in paragraph 48 that "[w]hen construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract".

26. One of the limits to the exclusionary rule relates to evidence as to the "genesis" and "aim" of the contract. In *Prenn v Simmonds*, Lord Wilberforce said at 1385:

> "It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J. thought so in the *Utica Bank* case. And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go ...
>
> In my opinion, then, … evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 ("*Reardon Smith*"), Lord Wilberforce added at 996 that, "when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties".

27. In *Merthyr (South Wales) Ltd v Merthyr Tydfil CBC* [2019] EWCA Civ 526, [2019] JPL 989 ("*Merthyr (South Wales)*"), Leggatt LJ recognised as established law that "previous documents may be looked at to show the surrounding circumstances and, by that means, to explain the commercial or business object of a contract": see paragraph 52. Leggatt LJ went on, however, in paragraph 54:

> "What is not permissible, as the decision of the House of Lords in the *Chartbrook* case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual

> negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party's intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense."

28. In the present case, the Rhino Appellants seek to rely on evidence given by Mr Schofield. In a witness statement dated 3 February 2021, Mr Schofield explained that it was never the intention of REL, Properties or Askwith that the Settlement Agreement should operate to release claims against the JAs or Clyde & Co. He further said that on a number of occasions between 2013 and the conclusion of the Settlement Agreement he was told by representatives of Barclays that the JAs "had acted / were acting independently of Barclays and that, if the Companies had any complaint about the Administrators' actions or any losses that flowed from their actions, this was absolutely not for Barclays to deal with and that [he] should instead take action against the Administrators and their advisors". Mr Schofield cited in this connection meetings on 11 September 2013 and 4 March 2014, a telephone call on 5 March 2014 and the mediation on 30 November 2015. With regard to the last of these, Mr Schofield said:

> "20. The discussions went on for c.15 hours and was mainly a negotiation/haggling regarding an amount for settlement. Mr Delahunt [of Barclays], just as he had done in our telephone call on 5 March 2015, said that, whilst he denied any knowledge of any improper conduct by the Administrators, never mind playing any part in it, any such complaints or claims should be brought against the Administrators. That was the basis and understanding in the mediation on which we settled the Barclays Claim. Barclays were washing their hands/ distancing themselves from any such involvement in or responsibility for the actions of the Administrators.
>
> 21. My clear recollection is that all parties to the Settlement Agreement operated on the basis that Barclays were prepared to settle the Barclays Claim but not any claims we might have against the Administrators. I confirm that no discussion took place at any time with Barclays about also settling our claims against the Administrators. Barclays' position was unequivocal – that was nothing to do with them – it was exclusively a matter for us. My own motivation in settling with Barclays on behalf of my companies was so that I could get them back on an even keel and then pursue the Administrators and their advisors. We wanted to recover the losses caused by the Administrators having sold almost all of the

> Companies' assets to pay Barclays when they should have pursued Barclays for having mis-sold the swaps (which had brought about the Companies' downfall)."

29. This evidence confirms that Barclays will have been aware when negotiating with Mr Schofield that there was a real possibility of the Rhino group suing the JAs and, perhaps, Clyde & Co. The same point emerges from paragraph 99 of the particulars of claim in the Barclays proceedings, in which the claimants "reserve[d] their rights in respect of all and any claims which they may have against the Administrators". Mr Schofield's evidence is not, accordingly, needed to establish that this fact was known to the parties to the Settlement Agreement.

30. Mr Schofield's evidence also suggests that he did not himself subjectively intend to give up whatever claims there might be against the JAs and Clyde & Co. Evidence to that effect is, however, plainly inadmissible. Such evidence of subjective intent undoubtedly falls foul of the exclusionary rule.

31. Next, Mr Schofield's evidence indicates that Barclays denied liability for conduct of the JAs. It is unsurprising that it should have done so in the course of "a negotiation/haggling regarding an amount for settlement", but in any event evidence to this effect, even if admitted, could not of itself cast any significant light on how the Settlement Agreement should be interpreted.

32. However, Mr Davies argued that Barclays did more than merely deny liability for conduct of the JAs. It also, Mr Davies said, told Mr Schofield that it was not prepared to settle any claim against the JAs and that he should bring any such claim against the JAs. It was thus, Mr Davies submitted, common ground between the parties to the Settlement Agreement that claims against the JAs (and also against advisors instructed by the JAs) were not within the scope of the dispute they were settling. In the circumstances, so Mr Davies maintained, Mr Schofield's evidence is admissible.

33. Mr Davies relied in support of his contentions on *Dattani v Trio Supermarkets Ltd* [1998] ICR 872 ("*Dattani*"), *Heaton v AXA Equity and Law Life Assurance Society plc* [2002] UKHL 15, [2002] 2 AC 329 ("*Heaton*") and *McGill v Sports and Entertainment Media Group* [2016] EWCA Civ 1063, [2017] 1 WLR 989 ("*McGill*").

34. In the first of these, *Dattani*, a claim for unfair dismissal was compromised by an agreement recorded in the briefest of terms in a "decision" issued by the Industrial Tribunal which read as follows:

> "This case has been settled on the basis that the [company] pay [Mr Dattani] the sum of £5,000 at the rate of £1,000 per month, the first payment to be made on 16 November 1992. [Mr Dattani] remains free to return to the tribunal should the sum agreed not be paid within the agreed time limits."

The question arose whether the plaintiff had lost the right to bring County Court proceedings for unpaid wages. The Court of Appeal held that evidence from the counsel involved was admissible to identify the disputes which the parties had been trying to resolve. That, however, was on the basis that the "decision" was "evidence of

what was agreed" rather than the contract itself. Mummery LJ, with whom Butler-Sloss and Swinton Thomas LJJ agreed, said at 884:

> "The critical question is: what claims were compromised? That is a question of the construction of the scope of the contract made between the parties, not a question of the construction of the decision document, save in so far as that document is evidence of the contract. The claim in the industrial tribunal was for unfair dismissal …. The industrial tribunal's decision document, which is evidence of what was agreed, simply says "This case has been settled on the basis …" and then states the basis on which it has been settled."

The Court was not, therefore, concerned with a written agreement, let alone with one as detailed as the Settlement Agreement.

35. In *Heaton*, Lord Bingham explained that, if A compromises a claim against B for £x, A will be unable to maintain a claim against C for the same damage, or at any rate to recover more than nominal damages from C, if the £x "is agreed or taken to represent the full value of A's claim against B": see paragraph 4. However, Lord Bingham went on to observe in paragraph 5 that, "[w]hile it is just that A should be precluded from recovering substantial damages against C in a case where he has accepted a sum representing the full measure of his estimated loss, it is unjust that A should be so precluded where he has not". In that connection, Lord Bingham said in paragraph 5:

> "But A may agree to settle with B for £x not because either party regards that sum as the full measure of A's loss but for many other reasons: it may be known that B is uninsured and £x represents the limit of his ability to pay; or A may wish to pocket a small sum in order to finance litigation against other parties; or it may be that A is old and ill and prefers to accept a small sum now rather than a larger sum years later; or it may be that there is a contractual or other limitation on B's liability to A."

36. In *McGill*, Henderson LJ, with whom Lloyd Jones LJ agreed, saw what Lord Bingham had said in *Heaton* as signifying that subjective considerations could play a part in assessing whether the acceptance of a payment under a compromise was to be taken to represent the full value of the claimant's claim and so to represent a bar to proceedings against other parties. The question in *McGill* was whether a compromise with "the Player" precluded claims against "SEM" and "Bolton". Henderson LJ said in paragraph 100:

> "It is harder to know what weight (if any) the court should attach to the judge's finding at para 127, that [the claimant] saw the real perpetrators as SEM and Bolton, and agreed to take £50,000 to leave the Player alone. On the one hand, subjective considerations of this nature would not sit easily with the essentially objective nature of the question posed by *Jameson [v Central Electricity Generating Board* [2000] 1 AC 455] and *Heaton*. On the other hand, the motivation of a claimant in

> agreeing to accept a sum by way of compromise representing less than the full measure of his estimated loss was clearly regarded as relevant by Lord Bingham in *Heaton* [2002] 2 AC 329, para 5, quoted above. In my judgment, fairness requires that the court should be able to take such motivation into account as part of the factual matrix relevant to the issue whether the claimant has indeed accepted a sum representing the full measure of his estimated loss. The tension between a purely objective approach to this question, and subjective considerations of the kind mentioned by Lord Bingham, may perhaps be rationalised by saying that the court cannot sensibly form a view on the question whether the sum accepted in compromise represented the full measure of the claimant's loss without knowing what it was that the claimant wished to achieve by entering into the compromise."

37. The compromise with "the Player" with which the Court was concerned in *McGill* was to be found in a *Tomlin* order which stated that its terms were "in full and final settlement of all claims arising out of those matters set out in the statements of case", but did not specify that any third parties were to be released. Further, it can be seen from paragraph 101 of his judgment that Henderson LJ's decision did not depend on the view he had expressed in paragraph 100. Henderson LJ said in the first sentence of paragraph 101:

> "In any event, whether or not it is legitimate to take [the claimant's] subjective intentions into account, I am satisfied that, on balance, the *Jameson* argument fails."

38. Like the Judge, I have concluded that the evidence of Mr Schofield on which the Rhino Appellants wish to rely is not admissible. My reasons include these:

i) Evidence as to what Mr Schofield was told by representatives of Barclays in 2013 and March 2014, some months before the claim against Barclays was even issued, cannot possibly cast any significant light on what the compromise embodied in the Settlement Agreement on 1 December 2015 was intended to achieve;

ii) As can be seen from, for example, *Merthyr (South Wales)*, it is not permissible to rely on either what a particular party said during pre-contractual negotiations or "communications which are capable of showing that the parties reached a consensus on a particular point" (to quote Leggatt LJ) for the purpose of drawing inferences about what the contract should be understood to mean. Yet that is exactly what the Rhino Appellants are trying to do. They are attempting to use things said by Barclays, which they suggest gave rise to common ground, to draw inferences about what the Settlement Agreement should be understood to mean;

iii) The matters which the Rhino Appellants wish to establish from Mr Schofield's evidence are not "objective facts" such as were in the minds of Lord Hoffmann in *Chartbrook* and Lord Clarke in *Oceanbulk*. In substance, the Rhino Appellants are relying on what communications between Barclays and Mr

Schofield might reveal as to the intentions of the parties to the Settlement Agreement or, more specifically, whether they intended the Settlement Agreement to derogate from the Rhino companies' ability to sue the JAs or Clyde & Co;

iv) There is no relevant doubt as to the "aim", "object" or "commercial purpose" of the Settlement Agreement. As the recitals to it confirm, the Settlement Agreement was evidently intended to settle the dispute between Barclays and REL, Properties and Askwith. That, however, tells one nothing useful about whether, to safeguard Barclays against contribution claims or otherwise, the Settlement Agreement was designed to release the JAs and Clyde & Co from claims by Rhino companies. In any event, Lord Wilberforce explained in *Reardon Smith* that, when considering "aim", "object" or "commercial purpose", "one is speaking objectively of what reasonable persons would have in mind in the situation of the parties", not of what the parties subjectively intended; and

v) *Heaton* and *McGill* were not concerned with the interpretation of release provisions in a detailed written contract such as the Settlement Agreement, but with whether acceptance of a payment in settlement of a claim should be taken to represent the full value of the claim and so to bar further proceedings against someone else.

Did the Settlement Agreement operate to release "Affiliates" of REL, Properties and Askwith from claims by those companies?

39. The Judge concluded that, correctly interpreted, each party to the Settlement Agreement agreed to release its own "Affiliates", not just those of another party. In that regard, he said this about clause 2.1 of the Settlement Agreement in paragraph 115 of his judgment:

> "The release in clause 2.1 is of claims one Party (Party A) has or may have against 'any other Party' (Parties B, C or D) or 'any other Released Party'. The 'other' Released Parties can only be the Affiliates of the Parties (i.e. the Affiliates of Parties A, B, C and D), the actual Parties (Parties A-D) are mentioned earlier and it is Released Parties other than those Parties that are encapsulated by the phrase 'any other Released Party' (emphasis supplied). As a matter of language and legal efficacy clause 2.1 therefore makes sense and is capable of operation as a matter of language and legal efficacy."

40. Challenging the Judge's view, Mr Davies argued that a "Party's" own "Affiliates" were not released. On that basis, he maintained that, even if the JAs and Clyde & Co are "Affiliates" of one or more of REL, Properties and Askwith (a question to which I shall return later in this judgment), they have not been released from claims by the Rhino Appellants.

41. Mr Davies submitted that references to "Released Party" and "Released Parties" in the Settlement Agreement should be construed by reference to the definition of "Released Parties" (viz. "the Parties and their Affiliates") so that:

i) Clause 2.1 should be read as meaning "This Agreement is made in full and final settlement of all Claims any Party has or may have against any other Party or against any other [Parties and their Affiliates]";

ii) Clause 3.1 should be read as meaning "Each Party agrees that [any other Parties and Affiliates of those other Parties] are released";

iii) The first sentence of clause 3.2 should be read as meaning "Each Party agrees that it will not bring Proceedings against any [other Parties or Affiliates of those other Parties] in relation to a Claim or otherwise assert a Claim against [any other Parties or Affiliates of those other Parties]";

iv) The second sentence of clause 3.2 should be read as meaning "each party will take all necessary steps … to ensure that none of its Affiliates brings any Proceedings or asserts a Claim against any [other Parties or Affiliates of those other Parties]";

v) The first sentence of clause 7.2 should be read as meaning "Each Party represents and warrants that … it has not relied on anything said or done, or not said or done, by or on behalf of any [other Parties or Affiliates of those other Parties]";

vi) The second sentence of clause 7.2 should be read as meaning "each Party acknowledges and agrees that it was not induced to enter into this Agreement by any representation or statement made by any [other Parties or Affiliates of those other Parties]; and

vii) clause 9.5 should be read as meaning "Each Party warrants … that … no Proceedings are contemplated against any of the [other Parties or Affiliates of those other Parties]".

42. Mr Davies maintained that a more literal approach to the Settlement Agreement could not be right as it would involve a party settling claims against itself, releasing itself from liability, agreeing not to bring proceedings against itself, representing that it had not relied on anything said or done by itself and acknowledging that it had not been induced to enter into the Settlement Agreement by any statement made by itself. None of this, Mr Davies said, would make sense. Moreover, one would not usually expect a settlement agreement to effect a release of claims that a party might have against its own officers and agents. On top of that, the Judge's interpretation of the Settlement Agreement would have implications which could not reasonably have been intended. If, for example, Barclays' own "Affiliates" had been released, Barclays would have been prevented from, say, taking internal and/or regulatory measures against employees implicated in the mis-selling alleged in the Barclays litigation or suing an expert for advice given for the purposes of that litigation.

43. Mr Davies further argued that, since the Settlement Agreement was designed to dispose of a dispute between Barclays, on the one hand, and REL, Properties and Askwith, on the other hand, references to "Parties" must be considered to relate to Barclays as one "Party" and REL, Properties and Askwith compendiously as the other "Party". Alternatively, any release by REL, Properties or Askwith of someone who is or was an "Affiliate" of more than one of them must be limited to that person's

activities as an "Affiliate" of the other(s) and would not extend to activities as an "Affiliate" of the company giving the release.

44. Like the Judge, I have not been persuaded. In the first place, Mr Davies' interpretation of the Settlement Agreement runs counter to the way in which the language of the Settlement Agreement would naturally be read. Take clause 2.1. Its terms most obviously suggest that the claims being settled encompass all that any "Party" has against any other "Party" or anyone else within the class of "Released Parties". As the Judge pointed out, "other Released Party" appears to refer to "Released Parties" other than the "Parties", not, as Mr Davies would have it, to "other Parties and their Affiliates". Mr Davies is treating clause 2.1 as if it said something like "all Claims any Party has or may have against any other Party or against any Affiliate of any other Party", but that is not how it was drafted. Further, as Mr Davies accepted, clauses 2.1 and 3.1 can be expected to marry up, but, unlike clause 2.1, clause 3.1 does not include "other" so that merely substituting "the Parties and their Affiliates" for "the Released Parties" would not result in each Party agreeing to release *other* Parties and their Affiliates. Clause 3.1 would rather state in unqualified terms, "Each Party agrees that [the Parties and their Affiliates] are released and forever discharged from all Claims".

45. Yet more linguistic objections to Mr Davies' interpretation of the Settlement Agreement arise in relation to his submission that REL, Properties and Askwith represent a single "Party" or that a release by one of them of an "Affiliate" of all or two of them was limited to the role of the "Affiliate" in relation to the other(s) of them. "Party" and "Parties" are defined to refer to "a party and the parties to this Agreement", who, on the face of it, are the four companies listed at the beginning of the Settlement Agreement, not Barclays on the one hand and REL, Properties and Askwith together on the other. Nor is there any evident warrant in the terms of the Settlement Agreement for concluding that a release by, say, Properties of a person who is an "Affiliate" of both Askwith and Properties was confined to the person's activities for Askwith, and it is very hard to see how that could work in practice.

46. Secondly, I see no real force in the contention that the Settlement Agreement cannot be read literally because that would involve a party purporting to release itself and confirming that it had not relied on things it had itself said and done. Perhaps it might have been preferable for the draftsman to insert "other" at points in the Settlement Agreement, but no difficulty arises. In so far as the Settlement Agreement provides, say, for a "Party" to release *all* "Parties", including itself, the "release" is merely redundant as regards the "Party" giving it. The provision may go further than necessary, but no harm is done.

47. Thirdly, Mr Davies' interpretation of the Settlement Agreement would deny Barclays protection from "ricochet" claims that it would reasonably be supposed that the Settlement Agreement was intended to give it. In *Heaton*, Lord Bingham observed in paragraph 9(5):

> "If B, on compromising A's claim, wishes to protect himself against any claim against him by C claiming contribution, he may achieve that end either (a) by obtaining an enforceable undertaking by A not to pursue any claim against C relating to the subject matter of the compromise, or (b) by obtaining an

> indemnity from A against any liability to which B may become subject relating to the subject matter of the compromise."

In the present case, the Settlement Agreement included both a covenant by each "Party" not to claim against any "Released Party" (and to ensure that none of its "Affiliates" did so) and an indemnity provision. If, however, the Settlement Agreement were construed in the way for which Mr Davies contends, REL, Properties and Askwith would not have undertaken not to bring proceedings against either the JAs or Clyde & Co even if, as the Judge found, they are "Affiliates" since the JAs and Clyde & Co would not be (or would not exclusively be) "Affiliates" of *another* Party. The first sentence of clause 3.2 would bar a "Party" from bringing proceedings against an "Affiliate" of another "Party", but not one of its own. As for the second sentence of clause 3.2, Mr Davies submitted that the Rhino Appellants would not be able to prevent the JAs or Clyde & Co from claiming contribution from Barclays, but that the Rhino Appellants could deduct from the compensation payable to them by the JAs/Clyde & Co such sum as the JAs/Clyde & Co would be entitled to as against Barclays; he denied that the second sentence of clause 3.2 could result in his clients being obliged to discontinue their claims against the JAs/Clyde & Co. It follows that the Settlement Agreement would give Barclays, at most, imperfect protection against one or more of REL, Properties and Askwith suing, say, the JAs and the latter in turn seeking contribution from Barclays. Yet Mr Schofield had made it clear that he might pursue the JAs.

48. Viewing matters objectively, Mr Davies' approach to the Settlement Agreement is unlikely to have reflected Barclays' intentions in this respect. Barclays can be expected to have wished the payment it was to make under the Settlement Agreement to allow it to draw a line under the Rhino companies' complaints. It would therefore have wanted the maximum possible protection against "ricochet" claims and, in particular, to ensure that it was not exposed to the risk of contribution claims by the JAs or Clyde & Co. Whether or not a settlement agreement would usually effect a release of claims that a party might have against its own officers and agents, there was an obvious case for doing so in the present case, where there was good reason to think that REL/Properties/Askwith could mount a claim against one of their own "Affiliates" which would trigger a contribution claim against Barclays.

49. With regard, fourthly, to Mr Davies' argument that, on the Judge's interpretation, the Settlement Agreement would have had unintended consequences because, say, Barclays would have released claims against its own staff and advisors in connection with the subject matter of the Barclays litigation, there is no evidence that this would have been of any real concern to Barclays, especially given the amount of time that had passed since the "Opco/Propco Structure" was adopted and the Swaps were entered into. In any event, it is reasonable to suppose that Barclays was willing to accept the release of such claims as part of the price of obtaining a final resolution.

50. In short, read naturally, the Settlement Agreement involves each "Party" releasing its own "Affiliates" as well as those of other "Parties", and there is no good reason to depart from that interpretation. To the contrary, Barclays is likely to have wanted "Parties'" own "Affiliates" to be released to give it protection against "ricochet" claims.

Were the JAs "Affiliates"?

51. "Affiliate" is defined in the Settlement Agreement in such a way as to include a person's "Employee", and the definition of "Employee" encompasses, among others, "any former … officers … and agents". The JAs contend that, as administrators of REL, Properties and Askwith, they were both "officers" and "agents" of those companies and so are their "Affiliates" for the purposes of the Settlement Agreement. In that connection, Mr Tom Smith QC, who appeared for the JAs with Ms Hannah Thornley, pointed out that paragraph 69 of schedule B1 to the 1986 Act states in terms that, "[i]n exercising his functions under this Schedule the administrator of a company acts as its agent". Citing *Re X Company Ltd* [1907] 2 Ch 92, *Re Home Treat Ltd* [1991] BCC 165, *Re Powertrain Ltd* [2015] EWHC 3998 (Ch), [2016] BCC 216 and *R (Palmer) v Northern Derbyshire Magistrates' Court* [2021] EWHC 3013 (Admin), Mr Smith said that the authorities show that administrators are also "officers".

52. For his part, Mr Davies argued that an administrator is *imposed* on a company, acts primarily in the interests of its creditors and would not normally be referred to as an "affiliate" of the company in question. In the present case, Mr Davies said, the JAs were recognised not to be in the same camp as REL, Properties and Askwith and so the draftsman of the Settlement Agreement could be expected to have identified them specifically as "Affiliates" of those companies had they been intended to be such.

53. In my view, however, the Judge was right to regard the JAs as "Affiliates" within the meaning of the Settlement Agreement. The simple fact is that the JAs were both officers and agents of REL, Properties and Askwith and so they naturally come within the definition of "Employee" and, hence, those of "Affiliate" and "Released Parties". Nor is it odd to speak of the JAs as having been "affiliated" to REL, Properties and Askwith. After all, they had charge of the companies' affairs and acted on their behalf. It was, moreover, crucial to Barclays' protection against "ricochet" claims that the JAs are "Affiliates" and so "Released Parties". Were the position otherwise, there would be nothing at all in the Settlement Agreement to prevent REL, Properties or Askwith from bringing proceedings against the JAs or the JAs from claiming contribution from Barclays. In particular, neither the second sentence of clause 3.2 of the Settlement Agreement nor clause 3.4 would have any application. Since the JAs would not be "Affiliates", the obligation on each "Party" to ensure that its "Affiliates" do not bring proceedings would not bite, and such proceedings therefore not being "contrary to clause 3.2" clause 3.4 could not be in point either.

Were Clyde & Co "Affiliates"?

54. It is Clyde & Co's case that they are "Employees" and thus also "Affiliates" and "Released Parties" because they were "agents" within the meaning of the Settlement Agreement's definition of "Employee".

55. The Judge accepted that Clyde & Co had acted as "agents". He said in paragraph 109 of his judgment:

> "I do not consider that it is arguable with a real prospect of success that the relationship of [Clyde & Co] with the Companies in relation to steps [Clyde & Co] is alleged to have failed to take or taken inadequately is other than one of agency,

> such that [Clyde & Co] falls within the word 'agent' forming part of the definition of Employee, Affiliate and therefore Released Party."

56. Disputing that, Mr Davies argued that, to the extent there is an agency between solicitors appointed by administrators and the company in question, it is one of an unusual nature; that, in the context, "agents" must refer to insiders rather than external legal advisors such as Clyde & Co; and that the drafting of clause 6 of the Settlement Agreement confirms that legal advisors were not to be considered "agents" or "Employees" for the purposes of the Settlement Agreement". With regard to the last of these points, Mr Davies relied on the references in clause 6 to "Employee or advisor (whether expert, legal advisor or otherwise)" (clause 6.2), "their Employees, agents, experts and advisors" (clause 6.3) and "The Parties and their legal advisors" (clause 6.5). It can be seen, Mr Davies said, that, when the parties intended to refer to legal advisors, they did so expressly and that "Employee" was not thought to encompass "advisors" or "agents". As used in the definition of "Employee", Mr Davies submitted, "agents" is designed to cover insiders who are not actual employees such as, say, a consultant who is there on a full-time basis and part of the team, but not technically an employee.

57. In my view, however, Clyde & Co *were* formerly "agents" of REL, Properties and Askwith and so are "Employees", "Affiliates" and "Released Parties" within the meaning of the Settlement Agreement. In the first place, I did not find Mr Davies' attempt to define "agents" convincing. In a strict sense, the word "agent" can be used to refer to a person who has the power to affect a principal's legal relations with third parties (see e.g. *Bowstead & Reynolds on Agency*, 22nd. ed., at paragraph 1-01), but it can also have other meanings. As is noted in *Bowstead & Reynolds on Agency* at paragraph 1-023, "the term is often used of any form of intermediary, or of persons who simply perform functions for others". In the present case, Mr Davies was, I think, right not to suggest that "agents", as used in the definition of "Employee", denotes only people with power to affect others' legal relations, but the alternative meaning he attributes to the term strikes me as both vague and unsupported by the wording of the Settlement Agreement. As a matter of language, it seems to me that the word "agents" is likely to refer to independent contractors who act on behalf of a "Party", regardless of whether they do so on a full-time basis.

58. Secondly, it is clear that Clyde & Co did act on behalf of REL, Properties and Askwith and, moreover, that their involvement extended beyond mere advice. The particulars of claim in the proceedings against Clyde & Co allege a "Retainer … made by [Clyde & Co] with [Properties] and [Askwith]", and there is reference in the pleadings not just to Clyde & Co advising, but also, for example, to their trying to obtain litigation funding for the Swap Claims which Properties and/or Askwith would bring, to their obtaining advice from counsel on the Swap Claims and to their arranging a standstill with Barclays. I note in passing that paragraph 71(c) of the particulars of claim speaks of "solicitors and other professional agents".

59. Thirdly, there was good reason for Barclays to want Clyde & Co to be "agents", and hence also "Employees", "Affiliates" and "Released Parties", for the purposes of the Settlement Agreement. If they were not, the Rhino companies would be free to bring proceedings against Clyde & Co and Barclays could find itself facing a contribution claim in consequence.

60. Fourthly, I do not think the features of clause 6 of the Settlement Agreement on which Mr Davies relied are important. It may well be that experts and advisors, even possibly legal advisors, are not always "agents" within the meaning of the definition of "Employee". On that basis, the references to "experts" and "advisors" are not mere surplusage even on Clyde & Co's case. To the extent, however, that there is repetition (for example, because clause 6.3 refers to both "Employees" and "agents"), that is readily explicable as belt and braces drafting. As the Judge said in paragraph 97 of his judgment:

> "If there is some redundancy in clause 6.3 that does not … indicate anything other than an abundance of caution in drafting rather than confirming that the wide definition of 'Employee', encompassing 'agents', should be given some special restricted meaning, contrary to the natural wide meaning of the word 'agents."

61. In all the circumstances, I agree with the passage from paragraph 109 of the Judge's judgment quoted in paragraph 55 above.

Was the release of claims against Clyde & Co which the Settlement Agreement effected limited to claims "for breach of duty whilst acting as agents"?

62. Despite concluding that Clyde & Co had been "agents" of REL, Properties and Askwith, the Judge did not strike out the proceedings against them in their entirety. As he saw things, it was necessary to distinguish between what Clyde & Co had done as agents and what they might have done in another capacity. He explained in paragraph 108 of his judgment that he considered it "arguable, with a real prospect of success, that alleged acts or omissions by [Clyde & Co] regarding the giving of legal advice (rather than taking steps vis a vis third parties) do not amount to acts or omissions as agent and to that extent would not, in any event, strike out claims against [Clyde & Co] in that respect". The Judge's orders accordingly provided for the claim against Clyde & Co to be "struck out insofar as it alleges a breach of duty whilst acting as agents on behalf of the Claimants".

63. Mr Joseph Curl QC, who appeared for Clyde & Co with Ms Faith Julian, argued that the Judge was mistaken in allowing any part of the claim against Clyde & Co to proceed. His submission was in essence that, once a person is recognised as a "Released Party" within the meaning of the Settlement Agreement, all "Claims" against that person are released, regardless of whether the person's liability is said to have arisen in the capacity that made the person a "Released Party". This, Mr Curl said, is because a "Released Party" is released from all "Claims", "in whatever capacity" they are alleged.

64. I agree. Clauses 2.1 and 3.1 of the Settlement Agreement provide for a "Released Party" to be released from "all Claims"; "Claims" is defined to refer to "any and all Liabilities" arising from or in connection with the relevant matters; and "Liability" is expressly stated to extend to any obligation "however and whenever arising and in whatever capacity". Under the Settlement Agreement, accordingly, someone who is a "Released Party" was to be released from liabilities arising "in whatever capacity". Far from specifying that a "Released Party" is to be released only in respect of

liabilities stemming from the capacity in which he is a "Released Party", the Settlement Agreement does the opposite.

65. Further, it makes good sense for "agents" such as Clyde & Co to be wholly released. First, Barclays would otherwise be vulnerable to contribution claims in respect of proceedings brought against an "agent" on the footing that the liability related to conduct in another capacity. Secondly, it might be extremely difficult to decide whether any particular claim arose as an "agent" or on another basis.

66. In this particular respect, therefore, I part company from the Judge. It seems to me that, correctly construed, the Settlement Agreement released Clyde & Co from all relevant claims, not just from liability for breach of duty when acting as an "agent".

The principle in *Ex p James*

67. As David Richards LJ (with whom Patten LJ and I agreed) noted at paragraph 35 in *Lehman Bros Australia Ltd v MacNamara* [2020] EWCA Civ 321, [2021] Ch 1:

> "The principle established by the decision of the Court of Appeal in *Ex p James* is that the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers."

68. After examining the case law, David Richards LJ concluded in paragraph 68:

> "The court will not permit its officers to act in a way that it would be clearly wrong for the court itself to act. That is to be judged by the standard of the right-thinking person, representing the current view of society. If one were to pose the question 'would it be proper for the court to act unfairly?', only one answer is possible. It is interesting to note that fairness was introduced by some judges in the cases dealing with *Ex p James* at a comparatively early stage, but in general 'fairness' as a test in substantive, as opposed to procedural, law has grown significantly since many of those cases were decided. In so far as it involves a broader test than, say, dishonourable, it reflects a development in the standards of conduct to be expected of the court and its officers."

69. Before the Judge, Mr Schofield and Holdings argued that, if (contrary to their case) the Settlement Agreement on its true construction operated to release the JAs from the claims advanced in the misfeasance proceedings, the principle in *Ex p James* meant that the JAs could not place reliance on that release. The Judge, however, decided that there was no reason why the JAs could not rely on their contractual rights under the Settlement Agreement: see paragraph 162 of the judgment.

70. Before us, Mr Davies focused on the rectification claim which REL, Properties and Askwith have now issued. It would be wrong, he said, for the JAs, as officers of the

Court, to have the proceedings against them struck out on the strength of the existing terms of an agreement which stands to be rectified in circumstances where fresh proceedings against the JAs would be time-barred. One of the matters on which Mr Davies relied in support of the contention that the principle in *Ex p James* is in point was the fact that the discharge from liability afforded to an administrator by paragraph 98 of schedule B1 to the 1986 Act is expressly stated not to prevent the exercise of the Court's powers under paragraph 75 of schedule B1 (i.e. the misfeasance provision). That the Settlement Agreement would give the JAs a wider release than Parliament has provided for is, Mr Davies said, a relevant consideration in the context of *Ex p James*.

71. As, however, Mr Smith pointed out, the JAs did not instigate the Settlement Agreement and had long since ceased to be administrators by the date of the Settlement Agreement. For their part, the Rhino companies entered into the Settlement Agreement freely and with the benefit of legal advice, and accepted the payment from Barclays for which the Settlement Agreement provided. Further, it was apparent from its terms that the Settlement Agreement provided for enforcement by third parties and contained wide releases which Barclays could be expected to have hoped would protect them from "ricochet" claims, to which, however, it would be exposed if the JAs were precluded from relying on the Settlement Agreement. On top of that, I can see nothing in paragraph 98 of schedule B1 to the 1986 Act, or elsewhere in the statutory scheme, which could make it wrong for the JAs to invoke the Settlement Agreement.

72. In the circumstances, I agree with the Judge that, as matters stood before him, the *Ex p James* principle could not assist the Rhino Appellants. A right-thinking person could not have thought it wrong, or unfair, for the JAs to stand on their contractual rights under the Settlement Agreement.

73. Does the launch of the rectification proceedings make a difference? I do not think so. Plainly, it cannot show the Judge's assessment of the position to have been erroneous since the claim for rectification was not yet in existence when the matter was before him. In any case, I can see no unfairness in the JAs seeking to uphold the Judge's decision in their favour when (a) no application had been made for rectification until very recently and (b) the significance, if any, of the *Ex p James* principle can be reassessed if and when, the Court having ordered rectification, the JAs ask to have new misfeasance proceedings disposed of summarily as time-barred.

Should there be a stay while the rectification claim is determined?

74. Mr Davies submitted that, if their other grounds of appeal were rejected, the right course would be to allow the Rhino Appellants' appeals so that the proceedings could be stayed while the rectification claim is resolved.

75. I do not agree. As I have already explained, it seems to me that, correctly construed, the Settlement Agreement operated to release the claims which the Rhino Appellants have advanced against the JAs and Clyde & Co and, in all the circumstances, I do not think it would be right for us to set aside the Judge's orders in case REL, Properties and Askwith succeed in the rectification proceedings which they have only just issued. The Rhino Appellants knew by the end of November 2020 that the JAs and Clyde & Co were maintaining that the claims against them had been released by the

Settlement Agreement. It was open to them at that stage to make an application for any necessary rectification either in a new claim or by seeking to join Barclays as a party to the existing proceedings. The directions hearing on 4 December 2020 might have provided a convenient occasion on which to raise the rectification issue. At any rate, steps could have been taken to apply for rectification before the strike out/summary judgment applications came on for hearing or, failing that, at least before judgment was given on them. In the event, however, no application for rectification was made until April of this year, nearly a year after the hearing before the Judge and about seven months after the Judge had given judgment. In effect, the Rhino Appellants elected to run the risk of the arguments on the interpretation of the Settlement Agreement being determined against them. They are not now entitled to have the Judge's orders set aside, and the proceedings against the JAs and Clyde & Co stayed indefinitely, against the possibility that they might succeed in a rectification claim that they could perfectly well have instituted earlier. Mr Davies submitted that there would be no prejudice to the JAs or Clyde & Co if we adopted the course he proposed, but, apart from anything else, the JAs and Clyde & Co would be left with the claims against them hanging over their heads for an indeterminate period.

Conclusion

76. I would dismiss the Rhino Appellants' appeals, but allow that of Clyde & Co. In my view, the Judge was right to dispose summarily of the misfeasance proceedings against the JAs, and the claim against Clyde & Co should also have been disposed of summarily in its entirety and not just "insofar as it alleges a breach of duty whilst acting as agents on behalf of the Claimants".

Lord Justice Arnold:

77. I agree.

Lord Justice Warby:

78. I also agree.