Neutral Citation Number: [2024] EWCA Civ 612

Case No: CA-2022-002087

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Joanne Wicks KC sitting as a Deputy High Court Judge
[2022] EWHC 2460 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 June 2024

Before :

LORD JUSTICE NUGEE
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE SNOWDEN

- -

Between :

(1) ABDULLAH NASSER BIN OBAID **(2) OH-NA REAL ESTATE COMPANY LTD** **(3) TAQA INVESTMENT COMPANY**	**Claimants / Respondents**
- and -	
(1) KHALID ABDULLAH AL-HEZAIMI	**Defendant/ Appellant**
(2) OFY LTD	**Defendant**
(3) LATIFAH ASSETS LTD	**Defendant/ Appellant**

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Edward Ho (instructed by **Jones Day**) for the **Appellants**
Richard Salter KC and William Edwards (instructed by **Baker & McKenzie LLP**) for the **Respondents**

Hearing date: 17 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the High Court concerns the construction of a settlement deed settling earlier English High Court proceedings. The dispute is primarily between two individuals, Mr Abdullah Bin Obaid and Dr Khalid Al-Hezaimi, the other parties being companies associated with one or other of them.

2. In 2017 Mr Bin Obaid brought a claim against Dr Al-Hezaimi in England. These proceedings were settled in the course of the trial by a settlement deed dated 19 June 2019 (**"the Settlement Deed"**).

3. Later in 2019 Mr Bin Obaid brought a number of claims against Dr Al-Hezaimi in Saudi Arabia. Dr Al-Hezaimi defended those claims by asserting, among other things, that they had been released by the Settlement Deed. That depends on whether they are "Claims" as there defined, which in turn depends on whether they are "claims … arising out of or in connection with" the earlier English proceedings. Dr Al-Hezaimi says that they are. Mr Bin Obaid says that they are not, and brought these proceedings for a declaration to that effect.

4. This issue was tried by Ms Joanne Wicks KC sitting as a Deputy High Court Judge (**"the Judge"**). She agreed with Mr Bin Obaid and made a declaration accordingly. Her judgment, handed down on 4 October 2022, is at [2022] EWHC 2460 (Ch) (**"the Judgment"**).

5. Dr Al-Hezaimi appeals with permission of Lewison LJ. He appeared by Mr Edward Ho. Mr Richard Salter KC and Mr William Edwards appeared for Mr Bin Obaid.

6. For the reasons that follow I prefer the submissions of Mr Salter and would dismiss the appeal.

Facts

7. Mr Bin Obaid is a Saudi Arabian national and a businessman. It is not disputed that between 2013 and 2016 he transferred (or caused the 3rd claimant to transfer) substantial sums to Dr Al-Hezaimi, mostly in Saudi Arabian Riyals (**"SAR"**) although a few payments were in sterling or Euros. The 3rd claimant is a Saudi company largely owned by Mr Bin Obaid called TAQA Investment Company (**"TAQA"**).

8. In 2017 Mr Bin Obaid brought proceedings in England in the High Court against Dr Al-Hezaimi (**"the 2017 proceedings"**). His case, as set out in his initial Particulars of Claim, was that he had orally agreed with Dr Al-Hezaimi to invest in the English property market using an offshore corporate vehicle of which he (Mr Bin Obaid) would be the majority shareholder; he would provide the funds required and the investment would be managed by Dr Al-Hezaimi. He listed 24 payments which he or TAQA had made to Dr Al-Hezaimi (or in 2 instances to a property developer), which can be summarised as follows:

    (1) In paragraph 19 he listed 3 payments in SAR made by him or TAQA to Dr Al-Hezaimi between 11 November 2013 and 18 December 2013, totalling some

SAR 10m (equivalent to about £1.65m) (**"the 2013 transfers"**). These transfers were said to have been made in order to fund the purchase of 8 apartments in a development in Reading.

(2) In paragraph 31 he listed 11 payments, of which one was a transfer of €1.2m and the others were in SAR, made by him or TAQA to Dr Al-Hezaimi or to an English developer called Global Real Estate Portfolios Ltd (**"GRE"**) between 29 May 2014 and 20 November 2014, totalling some SAR 56.5m (equivalent to about £9.75m) (**"the 2014 transfers"**). These transfers were said to have been in respect of (i) the purchase of 4 properties at a small development in Manchester called the Smithfield Square Development and (ii) "other unrelated transactions".

(3) In paragraph 40 he listed 8 payments, one of £14,526,000 and the others in SAR, made by him or TAQA to Dr Al-Hezaimi between 1 January 2015 and 21 May 2015, the total being equivalent to some £20.3m (**"the 2015 transfers"**). These were said to have been made in order to fund the purchase of 125 apartments in a large-scale development in Manchester called the Assembly Development.

(4) In paragraph 41 he pleaded a further transfer of £11,263,000 made by him to Dr Al-Hezaimi on 13 April 2016 (**"the 2016 transfer"**), making a total, with the 2015 transfers, of some £31.56m, which was said to have been used, at least in part, to purchase the 125 apartments in the Assembly Development.

(5) In paragraph 47 he pleaded a further transfer of £1,716,300 made by him to Dr Al-Hezaimi on 27 March 2016. The claim here was slightly different: it was that the payment had been made in reliance on what was said to be a deceitful representation that that sum was payable as a commission to a marketing company in respect of the Assembly Development, but which it was alleged was not in fact due.

9. With the exception of this last payment (where the claim was a straightforward claim in deceit for repayment of the money and/or damages), Mr Bin Obaid's case was that the properties bought with these funds should have been acquired in the name of the 2nd claimant, a BVI company called Oh-Na Real Estate Co Ltd (**"Oh-Na"**), which was intended to be the offshore corporate vehicle envisaged by his agreement with Dr Al-Hezaimi, but were in fact either acquired in the name of the 2nd or 3rd defendants (two BVI companies called OFY Ltd (**"OFY"**) and Latifah Assets Ltd (**"Latifah"**), each beneficially owned and controlled by Dr Al-Hezaimi), or in some cases, having been acquired in the name of Oh-Na, were sold without authority by Dr Al-Hezaimi, who appropriated the proceeds of sale. On this basis the primary relief claimed was a declaration that the properties, and monies derived from the pleaded transfers, belonged beneficially to one or other of the claimants, and an order requiring title to the properties to be transferred to the claimants, together with damages and/or equitable compensation. In essence the central allegation was of misappropriation of the claimants' money on a grand scale.

10. On the basis of these allegations Mr Bin Obaid and his companies started the proceedings by bringing a without notice application against Dr Al-Hezaimi and his companies for both a proprietary injunction and a worldwide freezing order. On 28 June 2017 Barling J duly made an Order granting such relief. The proprietary

injunction restrained the sale or other disposition of certain specified properties, and also of any personal property in England and Wales acquired directly or indirectly with "the Funds", the latter being defined by reference to a schedule which identified the 2013 transfers, the 2014 transfers "insofar as referable to the purchase of real property in England", and the 2015 and 2016 transfers.

11. Dr Al-Hezaimi's response to Barling J's Order was to apply to discharge it on the grounds of material non-disclosure. His case, as set out in his first affidavit sworn on 22 September 2017 and in his Defence, also dated 22 September 2017, can be summarised as follows:

    (1) He accepted that with one exception (a transfer of SAR 7,200,000 on 29 October 2014) each of the transfers had been made.

    (2) None of the payments were however made pursuant to the oral agreement for investing in English property alleged by Mr Bin Obaid as there was no such agreement. They did have informal discussions about joint investment but none was in fact made as Mr Bin Obaid failed to provide any funds for that purpose.

    (3) Instead most of the payments were connected with a medical business established in Saudi Arabia and Egypt by Dr Al-Hezaimi, Mr Bin Obaid and a Dr Al Atiyah called United Industrial Medical & Plastics Co (**"UIMP"**), being paid either (i) to fund the establishment and development of UIMP, (ii) to remunerate Dr Al-Hezaimi in respect of his work for UIMP, or (iii) to buy out his 30% share in it. That accounted for all but 3 of the payments.

    (4) The 3 remaining payments also had nothing to do with the purchase of English property. Two were made to purchase shares owned by Dr Al-Hezaimi in another business called R Kareem, and the other one in connection with another medical business project for the development of a tissue bank in Riyadh.

    (5) The payments were received by Dr Al-Hezaimi beneficially. He did acquire the properties referred to in the Particulars of Claim but he did so with his own funds (including part of the payments) as he was entitled to do.

12. The basis for the application to set aside or discharge the injunctions (**"the discharge application"**) was that in breach of their obligation of full and frank disclosure the claimants had failed to make any, or any adequate, mention of various matters, namely: the UIMP business; agreements for Mr Bin Obaid to purchase Dr Al-Hezaimi's shares in UIMP; a dispute between them (and Dr Al Atiyah) about the sale and purchase agreements and Dr Al-Hezaimi's exit from the UIMP business; and the lack of correlation between the payments purportedly made for the acquisition of property and the actual payment amounts and dates of the purchases.

13. Mr Bin Obaid responded with a lengthy witness statement dated 6 October 2017 asserting that Dr Al-Hezaimi's explanations were entirely untrue, and that the matters he referred to such as the UIMP business were irrelevant to the proceedings. He did however say that at the time of the application to Barling J he was (as he drew to the Court's attention) unable to expressly identify which payments were made for which purposes, but that with the benefit of further time to review his financial records and disclosure from various third parties, he had been able to establish a very clear

correlation between the payments he had made to Dr Al-Hezaimi and the payments made by the latter to acquire English properties. That, he said, enabled a proprietary claim to be asserted over further properties and the claimants intended to seek permission to file Amended Particulars of Claim in due course.

14. Amended Particulars of Claim dated 20 October 2017 were served on 23 October 2017. These made substantial amendments to the particular payments relied on. Specifically:

    (1) In paragraph 19, all 3 of the original 2013 transfers were deleted; 4 new payments from 10 June 2013 to 23 November 2015 were substituted as payments made in order to fund the purchase of the Reading properties.

    (2) In paragraph 31, 7 of the original 11 2014 transfers were deleted, leaving 4 of them as having been paid for properties in the Smithfield Square development.

    (3) In paragraph 40, 5 of the original 8 2015 transfers were deleted. 1 of the originally pleaded transfers, a payment of SAR 5m by Mr Bin Obaid on 1 January 2015, was simply omitted. I will refer to this as **"the missing payment"**. That left 2 of the original payments, to which were added 2 new payments in 2015, which were said, together with the 2016 transfer, to have been made to purchase properties in the Assembly development.

    (4) No change of substance was made to paragraph 47 (the ostensible commission payment).

    In summary therefore of the 24 transfers originally pleaded, 15 were deleted and 1 omitted. The missing payment seems to have been omitted by mistake as it is referred to in Mr Bin Obaid's witness statement as a claim he still wished to pursue. I will refer to the 15 deleted payments as **"the deleted payments"**. That left 8 of the original transfers on the pleadings, and a further 6 added. There were therefore 14 transfers pleaded in the Amended Particulars of Claim (which I will refer to as **"the APOC payments"**). The total value of the transfers now relied on was said in Mr Bin Obaid's witness statement to be the equivalent of some £35.4m (although that in fact included the missing payment).

15. By Order dated 12 December 2017 Ms Amanda Tipples QC (sitting as a Deputy High Court Judge) adjourned the discharge application to the trial, and gave directions for trial. By then it appears that the questions on the discharge application were (i) costs and (ii) any claim on the cross-undertaking, as the parties had agreed alternative security for the claimants' claims which led to the injunctions granted by Barling J falling away.

16. The trial started on Wednesday 12 June 2019 before Falk J. During the course of the trial negotiations for a possible compromise began. The trial continued into the morning of 18 June 2019, but the afternoon session was adjourned to allow drafting of a settlement agreement, and the settlement was agreed and signed on 19 June 2019.

The Settlement Deed

17. The Settlement Deed is made between the parties to the 2017 proceedings (Mr Bin Obaid, Oh-Na and TAQA, and Dr Al-Hezaimi, OFY and Latifah) and dated 19 June

2019. It is governed by English law and contains an exclusive jurisdiction clause in favour of the English High Court.

18. Under the heading "Background" it contains two recitals:

> "(1) The Parties have been in dispute in relation to the beneficial ownership of the real property and money described below as the Identified Assets.
>
> (2) The Parties wish to fully and finally resolve those disputes on the terms of this Deed."

19. The term "Identified Assets" is defined in clause 1.1 as meaning

> "the KAH Assets and the ANBO Assets, as defined and set out in Schedule 1, together with any rent or interest accruing on the relevant parts thereof after the date of this Deed".

The reference to the KAH Assets and ANBO Assets is explained below.

20. The substantive compromise was in clause 3.1 which provided that the parties agreed that the KAH Parties (Dr Al-Hezaimi and his companies) were the legal and beneficial owners of the KAH Assets, and that the ANBO Parties (Mr Bin Obaid and his companies) were the beneficial owners of the ANBO Assets. The KAH Assets and ANBO Assets were listed in Schedule 1, which allocated to the KAH Parties and the ANBO Parties respectively various specified properties in Reading, Brighton and Manchester, and also divided between them certain sums of cash held in specified accounts in the UK. Counsel were I think agreed that this cash was all related to the properties or the APOC payments, being either rent, or proceeds of sale, of the properties, or the unused balance of the APOC payments.

21. The remainder of clause 3 contained provisions to give practical effect to this division of the assets. Clause 3.3.2 provided that if the parties identified any other assets "accruing prior to the date of this Deed" in the name of OFY or Latifah they should be distributed to the parties pro rata with the agreed asset allocation.

22. Clause 4 provided for a release in the following terms (so far as material):

> "**4. RELEASE, DISCHARGE & WAIVER OF CLAIMS AND INDEMNITY AGAINST CLAIMS / PROCEEDINGS**
>
> 4.1 Each of the Parties agrees, on behalf of themselves and their respective Affiliates:
>
> 4.1.1 that this Deed shall constitute full and final settlement of all Claims against each of the other Parties and their respective Affiliates;
>
> 4.1.2 covenants and undertakes, and shall procure that each of their Affiliates covenants and undertakes, that:
>
> (A) they shall not make or maintain any Claim against any of

the other Parties or their respective Affiliates;

…"

23. "Claim" was defined in clause 1.1 to mean:

> "all and any claim or cause of action (other than arising out of a breach of this Deed) of any kind (including without limitation by way of correspondence, allegation, defence, counterclaim or set off and/or for any fees, costs or expenses) in any jurisdiction whether under English or foreign law, whether civil or criminal in nature, arising out of or in connection with (i) the English Proceedings (including for the avoidance of doubt any counterclaims in those proceedings and any orders for the payment of costs); or (ii) and [sic] claim for rental payments or other proceeds of the Identified Assets arising prior to the date of this Deed. For the avoidance of doubt, this clause shall not prevent the Parties from pursuing the litigation in other jurisdictions currently pending between them, except to the extent that there is an overlap with the claims in the English Proceedings".

"English Proceedings" meant, as one would expect, the 2017 proceedings, referred to simply as "the proceedings under Claim Number HC-2017-001893".

24. Clause 2 of the Settlement Deed provided for the parties promptly to sign, lodge and have sealed an order staying the proceedings. An Order in the Tomlin form staying the proceedings on terms was duly made on 20 June 2019. Clause 3.3 provided for various consequential matters in the event that the parties did not reach agreement on a mechanism to give effect to the settlement; by clause 3.3(H) one of these was that there should be two further orders, one providing for discontinuance of the proceedings and one providing for release of various undertakings that had been given. In the event the proceedings were discontinued by Order dated 23 July 2019.

The 2019 Saudi proceedings

25. At the time of the Settlement Deed there were already a number of actions that had been commenced on various dates in 2018 by Dr Al-Hezaimi (or others) against Mr Bin Obaid, and vice-versa. This explains the reference at the end of the definition of "Claim" to litigation pending between the parties in other jurisdictions.

26. Between October and December 2019 (that is, after the Settlement Deed had been executed and the 2017 proceedings discontinued), Mr Bin Obaid or TAQA issued a further 8 claims in the Riyadh General Court against Dr Al-Hezaimi (**"the 2019 Saudi proceedings"**). Each sought relief in respect of a payment made to Dr Al-Hezaimi between 28 August 2013 and 21 May 2015 based on the contention that the payment was a loan which had not been repaid.

27. The earliest of these was a payment of SAR 950,000 made on 28 August 2013. This payment had never been referred to in the 2017 proceedings, not being pleaded in either the original Particulars of Claim or the Amended Particulars of Claim. I will refer to this as **"the unpleaded payment"**.

28. The other 7 payments had all been pleaded in the original Particulars of Claim in the 2017 proceedings, but each was one of the deleted payments removed from the proceedings by the Amended Particulars of Claim.

29. In each of his defences in the 2019 Saudi proceedings Dr Al-Hezaimi contended that the payment concerned had been the subject of judicial determination in the 2017 proceedings and/or that any claim in respect of the payment had been released by the Settlement Deed.

The present proceedings

30. In those circumstances Mr Bin Obaid, Oh-Na and TAQA brought a second claim in the High Court in 2020 against Dr Al-Hezaimi, OFY and Latifah for a declaration that the Settlement Deed on its true construction did not compromise or release any claim in respect of the deleted payments or the unpleaded payment, and in particular did not do so in respect of the 8 payments that were the subject of the 2019 Saudi proceedings. There was also a claim for a declaration that the English Court had not made any adjudication of any sort in relation to those 8 payments, but this was admitted by Dr Al-Hezaimi in his Defence, and no issue arises on it.

31. Mr Bin Obaid had an alternative claim for rectification of the Settlement Deed if it did operate to release any of the deleted payments. Given the Judge's decision on construction that claim did not arise but she addressed it in case she were wrong on construction, and rejected it on the evidence. Mr Bin Obaid and his companies sought if necessary to cross-appeal that in their Respondent's notice, but permission was refused by Lewison LJ and there is therefore no issue before us as to the rejection of the rectification claim. I say no more about it.

32. The Judge however largely, although not entirely, accepted Mr Bin Obaid's case on construction. In the Judgment she decided as follows (references here are to paragraphs of the Judgment):

    (1) It was important to ask the right question. This was not whether the deleted payments arose out of the 2017 proceedings, or were connected with them. If that had been the question then she would agree with Mr Ho that the deleted payments could be said to be connected with the 2017 proceedings even if they did not arise out of them [38].

    (2) But that was not the question; the question was whether any particular claim was a claim that arose out of or was connected with the 2017 proceedings. It was necessary to identify the particular cause of action relied on and consider if that claim fell within the definition [39].

    (3) The claims in the 2019 Saudi proceedings were all claims by Mr Bin Obaid or TAQA that Dr Al-Hezaimi owed money on a loan. She did not consider that such claims could be said to arise out of or in connection with the 2017 proceedings. A claim made in those proceedings would arise out of them; a claim which depended for its existence on something done in those proceedings (such as a claim that a witness had given perjured evidence, or a claim for costs) would arise out of or in connection with them. And a claim that one or more of the deleted payments had been made to Dr Al-Hezaimi for the purpose of

investment in English property would also arise out of or in connection with the 2017 proceedings "because such a claim had been made in the Particulars of Claim but subsequently abandoned" [40].

(4) But a claim to be repaid monies lent was not a claim which arose out of or in connection with the 2017 proceedings. The claims removed by amendment were claims that the deleted payments had been made to enable Dr Al-Hezaimi to acquire English properties for the benefit of Mr Bin Obaid: it was those deleted claims which continued to feature in the evidence on the set aside application and generally at the trial. But those claims were not claims that any of the deleted payments had been made by way of loan to Dr Al-Hezaimi. No such claims were pleaded, or featured in the evidence or in the list of principal issues for trial [41].

(5) As to the missing payment, there was a dispute as to whether it had been effectively removed from the 2017 proceedings, Mr Bin Obaid's position being that its omission was inadvertent and it was intended to remain in the claim, and Dr Al-Hezaimi's being that it formed no part of the claim after the amendment to the Particulars of Claim [17]. She did not need to resolve that, as, consistently with the views she had expressed on the deleted payments, any fresh claim based on the contention that it was made for the purpose of the purchase of English property would have been released, whereas any claim that it was a loan would not fall within the definition of Claim in the Settlement Deed (although it would be entirely at odds with the position taken by Mr Bin Obaid in the present proceedings that the claim to assets purchased with it remained a live one at trial) [42].

(6) The claim in relation to the unpleaded payment was also a claim that it was a loan, and hence was not settled by the Settlement Deed [44].

33. She expressed her conclusion as follows:

> "45. I therefore conclude that the Claimants are entitled to a declaration that the claims in the 2019 Saudi Proceedings were not settled or released by the terms of the Settlement Deed.
>
> 46. I do not, however, consider it right to grant the wider declaratory relief sought by the Claimants, in the terms sought. Any claim that a Deleted Payment, the [missing payment] or [the unpleaded payment] was made by way of loan would not be caught by the definition of "Claim", but I do not consider it possible to say that no claim in respect of those payments could ever arise out of or in connection with the [2017 proceedings]: it would depend on the precise nature of the claim."

34. By her Order dated 4 October 2022 she gave effect to the Judgment as follows:

(1) By paragraph 3 she declared that on the true construction of the Settlement Deed it did not settle, waive or release claims that the payments listed in Schedule 1 were loans to Dr Al-Hezaimi, including the claims made to that effect in the 2019 Saudi proceedings. Schedule 1 listed (i) the 15 deleted payments; (ii) the

unpleaded payment in August 2013; and (iii) the missing payment in January 2015.

(2) By paragraph 4 she declared that in the 2017 proceedings the Court made no determination as to the purpose for which any of the payments listed in Schedule 2 was made. Schedule 2 listed the 8 payments which were the subject of the 2019 Saudi proceedings.

Ground of appeal

35. Dr Al-Hezaimi appeals to this Court with the permission of Lewison LJ on a single ground of appeal, which is that the Judge erred in construing the correct ambit of the term "Claim" in the Settlement Deed, and therefore erred in concluding that the Settlement Deed did not fully and finally settle the claims asserted by Mr Bin Obaid and TAQA against Dr Al-Hezaimi in Saudi Arabia by claims issued between 31 October and 9 December 2019.

Scope of appeal

36. In his skeleton argument in support of the appeal Mr Ho had argued that claims in relation to both the deleted payments and the one unpleaded payment in August 2013 were settled by the Settlement Deed. But in oral submissions he abandoned the latter contention. It is therefore now common ground that the claim in relation to the unpleaded payment has not been settled.

37. So far as the missing payment in January 2015 is concerned Mr Salter for his part accepted that any claim in relation to that payment had been released by the Settlement Agreement.

38. We are therefore only now concerned with the claims in respect of the deleted payments. Mr Ho put forward four alternative reasons in his skeleton argument why these claims were "Claims" within the meaning of the Settlement Deed and had been settled accordingly, but he did not pursue the fourth reason orally. The remaining three reasons are in summary:

(1) Claims in respect of the deleted payments were originally pleaded in the 2017 proceedings. They were later formally abandoned. But the fact that they had originally formed part of the action and had then been abandoned meant that claims in respect of the deleted payments were claims arising out of or in connection with the 2017 proceedings.

(2) The discharge application formed part of the 2017 proceedings and had been adjourned to trial. The true nature and purpose of the deleted payments was in issue in the discharge application. Hence claims to the deleted payments were claims arising out of or in connection with the 2017 proceedings.

(3) A central point in dispute at trial was the true purpose of the APOC payments. That dispute depended on placing those payments in the context of the parties' wider relationship, as well as the credibility of the principal witnesses. The true purpose of the deleted payments was relevant to all those things and therefore in issue at trial; hence claims in respect of the deleted payments were claims

arising out of or in connection with the 2017 proceedings.

Applicable principles

39. It is common ground that the critical question in this appeal is the true construction of the definition of Claim in clause 1.1, which I repeat here for convenience, and in particular of the words highlighted below:

> "all and **any claim** or cause of action (other than arising out of a breach of this Deed) **of any kind** (including without limitation by way of correspondence, allegation, defence, counterclaim or set off and/or for any fees, costs or expenses) in any jurisdiction whether under English or foreign law, whether civil or criminal in nature, **arising out of or in connection with (i) the English Proceedings** (including for the avoidance of doubt any counterclaims in those proceedings and any orders for the payment of costs); or (ii) and [sic] claim for rental payments or other proceeds of the Identified Assets arising prior to the date of this Deed. For the avoidance of doubt, this clause shall not prevent the Parties from pursuing the litigation in other jurisdictions currently pending between them, except to the extent that there is an overlap with the claims in the English Proceedings".

40. Subject to one reservation, it is also common ground that the question of construction falls to be decided by the ordinary principles applicable to contractual construction. These are very familiar and there was no dispute about them in the present case, and we were spared citation from the usual well-known authorities in which the principles have been expounded by the Supreme Court. It is not I think necessary to refer to them in any detail. For present purposes it is sufficient to summarise the position as being that a contract is to be interpreted by reference to the way that the reasonable objective reader, armed with the background knowledge reasonably available to the parties, would understand the language they have chosen to use.

41. The one reservation is that Mr Ho referred us to *Bank of Credit and Commercial International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 for the statement by Lord Nicholls at [23] that parties who enter into a general release "want to wipe the slate clean", and submitted that the Judge's interpretation failed to give effect to that basic purpose. I do not think this particular point is of any assistance in the present case. Lord Nicholls was referring to the case where parties enter into a *general* release, that is "an agreement containing widely drawn general words releasing all claims one party may have against the other": see at [22]. As Lord Nicholls says, such a release is often entered into when a relationship between the parties, such as an employment relationship or partnership, has come to an end. In such circumstances the intention is that the release will put an end to all claims between them, and the parties no doubt hope and expect that there will never be any further disputes between them.

42. The present case is not like that. There is no doubt that the effect of the Settlement Deed is only to settle certain claims and to leave the parties free to pursue others. It is therefore not a general release but a release of particular claims. That is apparent from the definition of Claim, and not least from the second sentence which recognises that the parties were already engaged in other litigation and would be free to pursue it as long as it did not overlap with the claims in the 2017 proceedings. Mr Ho said that they

nevertheless wished to "wipe the slate clean" of the issues that they were litigating in England. But this does not seem to me to be of any assistance on the question of construction. If all that is meant by it is that the parties intended to have a full and final settlement of any claim that fell within the definition of Claim (that is, "arising out or in connection with the English Proceedings") it is no doubt true but tells you nothing as to what claims do fall within that definition; if something more is meant, then it seems to me simply to beg the question. The parties undoubtedly intended to settle some claims, and no doubt intended that the Settlement Deed would put a complete end to those claims; but they also intended not to settle other claims, and the question is where they meant the line to be drawn. To say that they meant to wipe the slate clean of claims within the line does not help to identify where the line is.

The construction of the Settlement Deed

43. I have already said that I prefer Mr Salter's submissions. I propose to set out my own reasons for doing so before considering the particular points relied on by Mr Ho.

44. If one assumes the reasonable objective reader to pick up the Settlement Deed and start at the beginning they would come first, after the cover page, date and parties, to the recitals. The usual role of recitals in a deed is to explain the background to the deed and identify what its purpose is, at least in general terms. The recitals in the present case (set out at paragraph 18 above) do exactly that. Although (by clause 1.2(A)) the heading "Background" is for ease of reference only and not to be taken into account in construing the deed, it is an accurate reflection of the two recitals, the first of which refers to the disputes between the parties, and the second of which refers to the wish of the parties to resolve those disputes. That by itself seems to me to indicate that the purpose of the deed in general terms is to settle the particular disputes referred to. These are identified as disputes:

> "in relation to the beneficial ownership of the real property and money described below as the Identified Assets."

So one would expect when one comes to the operative parts of the deed that those are the disputes that are settled, not a rather broader class of disputes.

45. The Judge said (Judgment at [37]) that the recitals were of little assistance, as they tell the reader that the parties wish to resolve the disputes "on the terms of this Deed" but do not indicate what those terms are; and that since the definition of Claim is wider than the matters in issue on the pleadings in the litigation, the question is how much wider the definition goes and on that the recitals are silent. Mr Ho sought to support that reasoning. But for my part I think this underplays the significance of the recitals. Of course it is possible in settling dispute A to settle it on terms that have a broader effect so that dispute B is also settled. But that is a slightly unusual thing to do. Normally when the parties to proceedings agree to settle those proceedings they mean to settle the disputes they have been litigating, and if they wish to have a broader settlement and also compromise other disputes or waive other claims, they usually signal their intention clearly. But when one reads the recitals in the present case, there is no hint that the parties in settling the litigation intended to settle any aspects of their dealings other than those referred to. And the parties have identified what in general terms they were in dispute about – who owned the English properties and the cash associated with them. So even before proceeding any further the reader expects the general effect of

the settlement to be to settle (only) those disputes.

46. The reader then, after some definitions and a provision in clause 2 for an agreed stay of proceedings, comes to clause 3.1, which is the first operative provision in the deed. It is not surprising that this does exactly what the recitals have led one to expect – it divides up the Identified Assets (which by reference to the definitions and Schedule 1 can be seen to comprise specific English properties and cash) in accordance with the split set out in Schedule 1. So there is nothing in clause 3.1 either which suggests that the matters which are settled are intended to be wider than the disputes referred to in the recitals – that is the beneficial ownership of the properties and the cash.

47. The rest of clause 3 is machinery to give effect to clause 3.1. It does not itself change the scope of the split in clause 3.1, but contains provisions designed to implement it. There is one additional provision in clause 3.3.2 which sweeps up other properties which may have been overlooked (see paragraph 21 above) which does potentially extend the scope of the settlement beyond the Identified Assets, but this is entirely in line with the agreed split in clause 3.1 and with the scope of the settlement being to settle disputes about the English properties.

48. The reader then comes to clause 4.1. This is the only other substantive provision of the deed, clauses 5 to 19 being ancillary boilerplate. Clause 4.1 is a full and final settlement clause. Again this is what one would expect in a deed settling particular proceedings: the parties typically first specify how those proceedings are to be compromised and then provide that the compromise is a full and final settlement of the disputes raised in those proceedings. Here Clause 4.1.1 provides that the deed constitutes full and final settlement of all Claims. Of course the precise effect of this turns on what a Claim as defined is; but it is at least a reasonable expectation that the claims which are settled are those that are referred to in the recitals and dealt with by clause 3.1, that is claims that relate to the ownership of the properties and the cash that make up the Identified Assets. It would be slightly surprising to find that the settlement extended to claims relating to other matters which have neither been mentioned in the recitals nor have anything to do with the ownership of the Identified Assets. If that had been the intention, one might have expected there to be a separate substantive provision identifying what other disputes were being settled, rather than this being teased out of a definition of Claims.

49. The reader then goes back to clause 1.1 and the definition of Claim to see what the precise scope of the full and final settlement effected by clause 4.1 is. Here the reader finds that a Claim is a claim arising out of or connected with the 2017 proceedings. Again there is nothing surprising about that, and it is exactly what one would expect. As I have said, if litigation is to be compromised, one would expect the claims in the litigation to be fully and finally settled so that the parties could not re-open the disputes they have been litigating. And because experience shows that it is often possible to devise a claim which although related is not precisely identical to the claims already being litigated, it is also unsurprising to see that the claims which are settled extend to related claims – claims that arise "out of or in connection with" the litigation that is being settled. What this definition of Claim does not do is extend to claims that are not connected to the litigation that is being settled.

50. There are no other relevant provisions in the deed which shed light on the question of construction. Standing back, the reader would to my mind regard this Settlement Deed

as an entirely conventional settlement of particular litigation in which the parties intended to settle, fully and finally, the matters that they had been litigating and related claims but not other matters. And this is supported by the fact that although the language in the definition of Claim is in many respects wide and all-encompassing ("**all and any** claim or cause of action … **of any kind** (including **without limitation** by way of correspondence, allegation, defence, counterclaim or set off and/or for any fees, costs or expenses) **in any jurisdiction whether under English or foreign law, whether civil or criminal in nature**, …"), when it comes to identifying what it is that is being settled, the language is not broad and general but limited. It is confined to claims:

> "arising out of or in connection with (i) the English Proceedings (including for the avoidance of doubt any counterclaims in those proceedings and any orders for the payment of costs); or (ii) an[y] claim for rental payments or other proceeds of the Identified Assets arising prior to the date of this Deed."

Limb (ii) of this is clearly confined to disputes about the particular properties that are Identified Assets. Limb (i) is equally clearly confined to disputes related to the 2017 proceedings – to what the parties have been litigating about.

51. That naturally prompts the question: what were the parties litigating about? Mr Salter said that that was to be determined by looking at the claims made in those proceedings. By that he meant the claims made by either party and hence it includes the counterclaim brought by the defendants – as indeed the words in brackets ("including for the avoidance of doubt any counterclaims in those proceedings") confirm. He invited us therefore to read the words in limb (i) as if they said:

> "any claim … of any kind … arising out of or in connection with **the claims made in** the English Proceedings".

I would treat this as including any matters raised by way of *defence* as well as claims, as a trial of a claim necessarily involves determining any defence to the claim, but I did not understand Mr Salter to seek to distinguish between claims and defences in any event.

52. On that basis I agree with this submission. It seems to me, for all the reasons that I have already referred to, to be both what one would expect from the other provisions of the Settlement Deed – the recitals and the scope of clause 3.1 – and to be an entirely conventional and unsurprising way of settling particular litigation, namely to compromise the disputes that are being litigated but not others.

53. It is also supported by the second sentence of the definition. This provides:

> "For the avoidance of doubt, this clause shall not prevent the Parties from pursuing the litigation in other jurisdictions currently pending between them, except to the extent that there is an overlap with the claims in the English Proceedings".

If one understands the scope of the settlement in the first sentence to be by reference to "the claims made in the English Proceedings", then it follows that other litigation between the parties is not settled except insofar as there is an overlap with such claims.

On this view the second sentence is correctly introduced with the words "For the avoidance of doubt": it clarifies and makes explicit what the effect of the first sentence is.

54. It was suggested in argument that this construction might not fit with the words "(including for the avoidance of doubt … any orders for payment of costs)" as an order for payment of costs is not strictly speaking a claim made in the proceedings. But I do not think this is any reason not to accept this construction. The sense is clear enough: the parties cannot thereafter bring a claim to enforce an order for costs made in the 2017 proceedings. I think that can be easily accommodated within the words "any claim … arising out of or in connection with the claims made in the English Proceedings"; orders for costs can readily be understood as arising out of the claims made in proceedings.

55. The effect of the definition therefore is that the parties have settled the disputes that they were litigating in the 2017 proceedings; and to identify what those disputes were, the way to do it is to look at what the claims and counterclaims in those proceedings were.

56. In summary in my judgement the correct construction of the definition of Claim is as follows. A claim is within the definition, and hence fully and finally settled by the Settlement Deed, if it is a claim arising out of or connected with the matters litigated in the 2017 proceedings, those matters being identified by reference to the claims made (including counterclaims) and defences advanced in the 2017 proceedings.

Application to the facts: the claims in issue

57. I will start therefore by looking at the claims in issue. There was no real dispute about this. The deleted payments were admittedly pleaded in the original Particulars of Claim as examples of transfers of money by Mr Bin Obaid (or TAQA) to Dr Al-Hezaimi (or GRE) as part of the alleged agreement to invest in English properties. But they were taken out of the proceedings by the Amended Particulars of Claim in October 2017 and thereafter no claim was brought which depended on or referred to them at all. The pleaded claims in the Amended Particulars of Claim were limited to the 14 APOC payments (4 payments in respect of the Reading properties (para 19), 4 payments in respect of the Smithfield Square properties (para 31), 4 payments in respect of the Assembly Development in 2015 (para 40) and another in 2016 (para 41), and the payment in respect of ostensible commission (para 47)). The relief sought was a declaration as to the beneficial ownership of the properties and monies referred to; an order for transfer of the legal title; damages and/or equitable compensation (including for deceit); and all necessary accounts and enquiries. None of that relief was concerned in any way with the deleted payments. Nor were any of Dr Al-Hezaimi's counterclaims.

58. Nor were the deleted payments relied on by way of defence to the claims in the Amended Particulars of Claim. Dr Al-Hezaimi's case as pleaded in his Amended Defence was that the APOC payments were (i) salary and/or reimbursement of expenses due to him in respect of his work for the UIMP business (para 25A); (ii) a payment in respect of his shares in R Kareem (paras 26A, 29 and 30); (iii) two payments in respect of his stake in the UIMP business (paras 26A, 36 and 55); and (iv) (in respect of the ostensible commission payment), a finder's fee due to him in respect of finding properties for the UIMP business (para 136).

59. This is subject to one qualification. In his original Defence Dr Al-Hezaimi had unsurprisingly pleaded to the claims made in the original Particulars of Claim, including the payments later deleted. In his Amended Defence he chose to leave in various assertions as to the deleted payments even though no claim was now being advanced in relation to them. So for example in paragraph 25 he had pleaded in his Defence that of the total payments pleaded some £14.9m of the total £42.3m in sterling value had been made for the purposes of the UIMP business, listing the relevant payments. By the time of his Amended Defence all but 4 of these had been deleted from the claim, but he amended paragraph 25 as follows:

> "Of the Original Payments, those which were made for purposes relating to the UIMP Business ~~comprise~~comprised approximately £14.9 million of the £42.3 million total approximate sterling value of ~~the Payments, as follows:~~ the Original Payments set out in the following table. In that table (i) the Original Payments in grey cells and in bold are those in respect of which no claim is pursued in the APOC and (ii) the Original Payments in clear cells are those (only four in number) in respect of which a claim is still pursued in the APOC."

This was followed by a list which included the payments originally pleaded but identifying which ones had been deleted and which were still being pursued. Similarly in paragraph 29, Dr Al-Hezaimi had originally pleaded that two payments sued on had been for payment of his shares in R Kareem, and in the Amended Defence he left this in, although explaining that the claimants had abandoned their claim in respect of one of them; and in paragraph 31 he had originally pleaded that a payment sued on had in fact been paid to him for his work on a tissue bank, and in the Amended Defence he left this in but added that the claimants had abandoned their claim in respect of this payment.

60. In this way the Amended Defence did still refer to the deleted payments and the purposes for which they were made. But I do not see that this makes any substantive difference. The question of the true purpose of the deleted payments was no longer relevant to the pleaded claims. It was not suggested that it gave Dr Al-Hezaimi any defence to the APOC payments, which turned on what *those* payments were for. Strictly speaking I think these parts of the pleading should not have been left in the Amended Defence as, subject to CPR PD 16 para 12.2(1) (which permits a party to refer to a point of law in a pleading), a statement of case should only plead material facts, that is those necessary for formulating a cause of action or a defence as the case may be, and not background material: see *Civil Procedure 2024 (The White Book)*, vol 1, §16.0.1 and the case there cited of *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) at [1] per Leggatt J (as he then was). In practice of course statements of case often contain much more than they should and include quite a lot of background, but this does not mean that this is all in issue on the pleaded claims and defences.

61. So looking at the pleadings, the true purpose of the deleted payments did not form part of either the claims (or counterclaims) or the defences to them. That is clear enough from the pleadings, but is also confirmed by other material we were shown. First there was the agreed List of Principal Issues for trial. This included as an issue "For what purpose(s) were the payments relied on in the Amended Particulars of Claim made?" but, as one would expect, did not include as an issue the purpose for which the deleted

payments were made. Second, Mr Salter told us that no disclosure was given in relation to the deleted payments. Again this is what one would expect: since they were no longer in issue, they would not be issues for disclosure.

62. Third, we were also shown the skeleton opening for the defendants at the trial of the 2017 proceedings before Falk J. This (at para 3) identified the underlying dispute as concerning "payments totalling more than £35 million made by Cs to Ds", and the issue as being "for what purpose and for whose benefit were the payments made?", and (at para 13) identified the Court's principal task as being to determine who was telling the truth about the purpose for which "the payments in issue" were made. The reference to the total of over £35m shows that the payments referred to are the APOC payments, again as one would expect.

63. So it seems clear that by the time of the trial the disputed payments were not among the matters that were the subject-matter of the trial: no claim or counterclaim was brought on them, no defence depended on them. On the face of it therefore it follows that claims in relation to the disputed payments were not settled by the Settlement Deed.

Mr Ho's argument

64. What then is Mr Ho's argument to the contrary? He submitted that the definition should be read as if it said:

> "any claim … of any kind … arising out of or in connection with **the issues that were disputed in** the English proceedings".

The oddity of this is that one would not at first blush think there would be any difference of substance between this formulation and Mr Salter's. The whole purpose of pleadings is to identify what the issues are between the parties, and to see what is disputed and what is not. So if one wants to know what the issues disputed in the 2017 proceedings were, one would again expect to find that by looking at the pleadings. On the face of it, therefore, it should not make any difference whether one focuses on the "claims made" in the 2017 proceedings or the "issues that were disputed" in the 2017 proceedings.

65. But this formulation enabled Mr Ho to submit that the issues disputed in the proceedings went rather wider than the pleaded claims and included matters that were raised in the course of the proceedings even if they were not strictly one of the pleaded issues. That in turn enabled him to argue that the true purpose of the deleted payments was one of the matters raised in the 2017 proceedings, and hence claims in relation to the deleted payments were settled.

66. For reasons already given, I do not accept the premise. I do not think the scope of the Settlement Deed was to settle claims relating to any matters raised in the course of the 2017 proceedings, a much looser and wider class of potential disputes than claims relating to the pleaded issues.

67. But I will nevertheless look at the reasons relied on by Mr Ho as showing that the true purpose of the deleted payments was one of the matters raised in the 2017 proceedings and settled by the Settlement Deed. As set out above (paragraph 38) Mr Ho put forward three reasons why this was so. I will take them each in turn, starting with reason (1).

Reason (1) – deleted payments were abandoned

68. The first reason is that claims in respect of the deleted payments were formally abandoned in the course of the 2017 proceedings; having originally formed part of the proceedings, and been abandoned, claims in respect of the deleted payments are said to arise out of or be in connection with the 2017 proceedings.

69. Mr Ho accepted in the course of his submissions that he was not saying that a claim in relation to the deleted payments was connected with the 2017 proceedings simply because the deleted payments had at one time been pleaded in them. I think he was right to accept that. Once a claim has been dropped from proceedings, that claim is no longer in issue in those proceedings. This seems self-evident and scarcely in need of authority, although Mr Salter was able to point to a judgment of mine in *Libyan Investment Authority v King* [2020] EWCA Civ 1690, [2021] 1 WLR 2659 at [41] where I accepted that once a claim had been deleted from a pleading the facts formerly pleaded in support of it were no longer "in issue" for the purposes of s. 35(5)(a) of the Limitation Act 1980. (That was in fact a judgment in which I dissented in the overall result, but on this point the other members of the Court, Arnold and Floyd LJJ, agreed). It follows that at the time of the Settlement Deed the question of the purpose of the deleted payments was not in issue in the 2017 proceedings, and I do not think the fact that it had originally been in issue makes any difference.

70. However once this point is accepted, I have great difficulty in seeing what Mr Ho relies on. He drew a distinction between a case where a claimant simply removed a claim and what happened here. Here, he said, the claimants originally pleaded the deleted payments; the defendants then explained why those claims were hopeless (both in their defence and in Dr Al-Hezaimi's evidence on the discharge application); and the claimants very shortly after abandoned those claims.

71. If by "abandoned" Mr Ho meant no more than that the claimants chose to delete them from the proceedings, then that is all true, but I do not see why this means that claims in relation to the disputed payments are within the scope of the definition of Claim in the Settlement Deed. If by "abandoned" Mr Ho intended to suggest that the claimants had irrevocably given up any claim based on the deleted payments, then I do not think this is correct. In general a claimant who discontinues a claim is not treated as having irrevocably given up their claim. Hence, as Mr Ho accepted, a claimant discontinuing a claim remains free to start fresh proceedings based on the same claim (subject to obtaining the permission of the Court where required by CPR r 37.8, and subject to the power of the Court to strike out a claim that is an abuse of process). The same must be true of a claimant amending his pleadings to delete certain claims. So the mere fact that the claimants here amended their claim to remove the claims based on the deleted payments does not mean that they abandoned them in the sense of giving up all claims to them. It meant no more than that they had decided not to pursue the claims in the 2017 proceedings.

72. Nor can anything be read into the fact that the claimants dropped the claims after service of Dr Al-Hezaimi's evidence. This cannot be taken as any form of acceptance by the claimants that what he said was correct. The explanation given by Mr Bin Obaid in his witness statement of 6 October 2017 was not that he accepted Dr Al-Hezaimi's evidence – on the contrary he said that Dr Al-Hezaimi's account was "entirely untrue" – but that he had been able with more time and disclosure from third parties to establish

a better correlation between his payments to Dr Al-Hezaimi and the payments made by the latter to acquire the English properties (see paragraph 13 above).

73. So I do not see that there is any particular significance to the circumstances in which the claimants here dropped the deleted payments. At most what can be said is that Mr Bin Obaid accepted that he was not going to seek to establish in the 2017 proceedings that the deleted payments were related to the purchase of English property. But that on the face of it left him free to pursue any other claim in relation to the deleted payments – including the claims he has now made in the 2019 Saudi proceedings that 7 of them were in fact loans. In those circumstances I do not see that the circumstances in which he dropped the deleted payments from the 2017 proceedings means that the true purpose of the deleted payments was even one of the issues disputed in those proceedings, let alone that the Settlement Deed settled any claims in relation to the deleted payments. I therefore do not accept Mr Ho's reason (1).

Reason (3) – the wider relationship

74. It is convenient to take Mr Ho's reason (3) next. This is that the central issue at trial was the true purpose of the APOC payments; that could not be determined in a vacuum but depended on placing the APOC payments in the context of the parties' wider relationship, and the credibility of the principal witnesses; and the true purpose of the deleted payments was important to all of those things and was therefore in issue at trial.

75. I will start with the suggestion that the true purpose of the deleted payments was relevant to Mr Bin Obaid's credibility. That I can readily understand. It was part of Dr Al-Hezaimi's case at trial that the changes to Mr Bin Obaid's case from that presented to Barling J at the without notice stage were important because they cast doubt on his reliability in accounting for the purposes for which payments were made several years earlier under informal arrangements. We were also shown some of the cross-examination of Mr Bin Obaid that took place before the proceedings were settled which shows that such matters were indeed explored with him. For example one of the deleted payments was a transfer of €1.2m made on 8 September 2014. This was originally included in paragraph 31 of the Particulars of Claim, but was dropped in the Amended Particulars of Claim. This was the payment which the defendants said had been made in connection with a tissue bank. In cross-examination Mr Bin Obaid was asked about it, and appears to have accepted that it was connected to the tissue bank, and that it had been withdrawn because it was an incorrect claim to have made, although he said that was the work of the solicitor.

76. All of that was, I accept, potentially relevant to the reliability of Mr Bin Obaid's account and his credibility generally. But I do not think it made, for example, the true reason why the €1.2m was paid one of the issues in the case. A witness can in general be asked about matters that go to his credibility, but it is well established that with certain limited exceptions a party cannot call witnesses to contradict him as to matters of credit or other collateral matters: see *Phipson on Evidence* (20th edn, 2022) §12-14, §12-46. This illustrates that matters that merely go to credit are collateral to the issues in the case. That remains true however much they are explored in cross-examination and however significant they are in undermining a witness's credibility. I do not think that matters that merely go to credit are to be regarded as one of the issues being litigated at trial; nor do I think that a settlement of litigation would normally be regarded as settling other matters that were not the subject-matter of the litigation simply because they had been

raised in cross-examination on an issue of credit.

77. The other aspect of this reason is that the wider relationship between the parties forms part of the background to the APOC payments. Again I accept that that is so – it was Dr Al-Hezaimi's case that the APOC payments were almost entirely referable to the UIMP business and in order to make good that case it was no doubt necessary to go into the relationship between him and Mr Bin Obaid in some detail. It is often necessary when a dispute arises to set the dispute in a wider context, particularly if, as here, the parties' dealings are conducted over a period of years in an extremely informal fashion and are only part of their overall business dealings.

78. But I do not think this means that every aspect of their relationship or of their business dealings generally becomes one of the issues in the case. To take an example, Dr Al-Hezaimi's case was that many of the payments were related to UIMP; if he could show that other payments, including perhaps deleted payments, were payments related to UIMP, that would lend some support to his case that the APOC payments were as well. But that would not mean that the parties were litigating about the other payments, or that the other payments formed part of the claims in the proceedings. One could say that they were part of the background to the claims in issue at trial, but they would still not become the subject-matter of the claims. One would not expect a settlement of the claims in the proceedings to extend to matters of background of this sort. As Mr Salter submitted, the problem with interpreting the Settlement Deed as extending to any background matters that were relied on in the proceedings is that the ambit of the settlement becomes so vague and so broad that it is very difficult to define with any certainty.

79. Mr Ho's submission also sits uncomfortably with the second sentence in the definition of Claim (see paragraph 53 above). On his interpretation this sentence has to operate as a carve-out from the first sentence, and has the effect of allowing other litigation to continue despite the fact that it would prima facie be settled by the first sentence widely interpreted. But a derogation of that sort is not really "For the avoidance of doubt"; one would expect it to be introduced not with those words but with words such as "Notwithstanding the foregoing" or "Nevertheless" or "However" or even simply "But". Mr Ho said that one should not attach too much weight to these words. No doubt if the sense was otherwise clear that might be so. But where the sense is unclear, I think it is a small but definite pointer against Mr Ho's interpretation that the second sentence on his interpretation is not "For the avoidance of doubt" at all.

80. For these reasons I do not accept Mr Ho's reason (3).

Reason (2) – the discharge application

81. Mr Ho's reason (2) is that the true purpose of the deleted payments was an important part of the discharge application, which had been directed to be determined at trial. The foundation of the discharge application was that Mr Bin Obaid had relied on the disputed payments on the without notice application as being payments to acquire English property whereas in fact they had nothing to do with this.

82. But I accept Mr Salter's submission on this. This is that one needs to identify what the Court would have to decide on hearing the discharge application. The question that arose on the discharge application was not what the true purpose of the deleted

payments was. The claimants accepted that they were not in fact for the acquisition of English property as had been suggested to Barling J. The Court in those circumstances would not have to decide what they were for, as that did not matter. What mattered was why the claimants had put them forward wrongly as paid in connection with the English properties. That would depend on such matters as why they did not make further enquiries, why they rushed off to Court without getting all the documents and without having properly considered them and the like: see the summary of the principles by Carr J (as she then was) in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7], in particular at (iv) ("an applicant must make proper enquiries… The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made…") and at (x) ("Whether or not the non-disclosure was innocent is an important consideration…").

83. That seems to me to be right. What was settled by the Settlement Deed included the defendants' claims in the discharge application, that is their claim for costs and their claim for damages under the cross-undertaking (as shown by the agreed order releasing any such claims). Those claims depended on showing that the claimants had wrongly included the deleted payments in the claim (something that was not disputed), and had failed to discharge the duty of full and frank disclosure (something that might involve enquiries as to what Mr Bin Obaid knew or should have known). But that does not mean that the claims in the 2017 proceedings included claims on the deleted payments, and the question whether Mr Bin Obaid had any other claims in respect of the deleted payments was not in issue.

84. In those circumstances I do not think that by settling the claims in the 2017 proceedings – including the defendants' claims to costs and damages under the cross-undertaking – the parties intended to settle all claims of whatever nature in relation to the disputed payments. That is not the natural meaning of claims "arising out of or in connection with the English proceedings".

85. I therefore do not accept Mr Ho's reason (2).

Conclusion

86. I have now considered Mr Ho's three reasons for saying that the true reason for making the disputed payments was one of the issues disputed at trial and hence that any claims based on the disputed payments were settled by the Settlement Deed. I am not persuaded by them. I think Mr Salter is right that the effect of the Settlement Deed was to settle the claims in the litigation (including the claims made by the defendants in the discharge application) and connected claims, and that these did not include claims in relation to the disputed payments.

87. This is not quite the same as the Judge's reasoning but it means that the Judge was right that claims to the disputed payments, and in particular the claims asserted in the 2019 Saudi proceedings that certain of the disputed payments were loans, are not claims arising out of or in connection with the 2017 proceedings, and were not settled by the Settlement Deed. Although the claimants had a Respondent's notice which sought a slightly wider declaration than the Judge's, I think that all they need is the declaration that she made and I would propose to simply dismiss the appeal.

88. This is subject to one minor adjustment that I would make to the Judge's Order. As

appears above (paragraph 34(1)), she declared among other things that the Settlement Deed did not settle claims that the missing payment in January 2015 was a loan. Since Mr Salter accepted that all claims in relation to the missing payment were in fact settled (see paragraph 37 above) I think the Judge's Order should be amended by removing reference to the missing payment. Subject to that I would uphold her Order.

Lady Justice Elisabeth Laing:

89. I agree.

Lord Justice Snowden:

90. I also agree.