Neutral Citation Number: [2019] EWHC 1962 (Ch)

Case No: BL-2018-001491

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE
ROYAL COURTS OF JUSTICE

APPEAL AGAINST THE ARBITRATION AWARD OF MR ARTHUR D. HARVERD DATED 23 MAY 2018

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23/07/2019

Before :

MR MICHAEL GREEN QC

(sitting as a Deputy Judge of the Chancery Division)

- -

Between :

(1) ANDREW MARTIN
(2) NICHOLAS GREENE
(3) COBAN 2017 LLP (formerly named STRUTT & PARKER LLP)

Appellants / Defendants in the Arbitration

- and -

MICHAEL HARRIS

Respondent / Claimant in the Arbitration

- -
- -

Mr Michael Jones (instructed by **Clyde & Co. LLP**) for the **Appellants**
Ms Elspeth Talbot Rice QC (instructed by **Harcus Parker Limited**) for the **Respondent**

Hearing date: 27 June 2019

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MR MICHAEL GREEN QC:

Introduction

1. This is an appeal against an arbitration award made by Mr Arthur D. Harverd (the **Arbitrator**) as sole arbitrator on 23 May 2018 (the **Award**). The Appellants claim to be entitled to appeal pursuant to section 69 of the Arbitration Act 1996 (**s.69**) and clause 22 of the Partnership Agreement dated 25 October 1989 (the **1989 Agreement**) on certain questions of law arising out of the Award.

2. Before it incorporated as an LLP in May 2008, the Third Appellant, now called Coban 2017 LLP but previously Strutt & Parker LLP (**S&P)** carried on business as an unincorporated partnership under the terms of the 1989 Agreement (the **Former Partnership**). Until his retirement in 1993, the Respondent to this appeal, Mr Michael Harris, was a partner in the Former Partnership together with, amongst others, the First and Second Appellants, Mr Andrew Martin and Mr Nicholas Greene.[1]

3. In very broad terms, the principal issues that were before the Arbitrator were:

   (1) Whether Mr Harris is entitled to an indemnity from the Appellants in respect of Capital Gains Tax (**CGT**) for which he may be liable by reason of his receipt of the Compensation Sum, which was a sum payable to him pursuant to the 1989 Agreement, the amount of which was ultimately agreed between the parties in a settlement agreement concluded in April 2013; and

   (2) Whether such an indemnity, if found to exist, includes any penalties that may be charged by HMRC in respect of that CGT liability.

4. In the Award, the Arbitrator found in favour of Mr Harris on both issues, ordering the Appellants to indemnify Mr Harris for any CGT liability payable on the Compensation Sum together with interest and any penalties charged.

5. The Appellants say that the Arbitrator erred in law in the Reasons for the Determination that he gave in respect of the Award (the **Reasons**). They have identified what they say are three questions of law that require determination in this appeal:

   (1) **Question 1**

   How are the terms of the agreement reached between the parties on 29 April 2013 properly to be ascertained, and in particular is it necessary to look beyond the two letters comprising the formal offer and acceptance in circumstances where, as here, the terms have been negotiated and agreed sequentially?

[1] By a Deed dated 8 November 2016, the Appellants agreed to perform all the obligations of Mr Harris' partners in the Former Partnership.

(2) **Question 2**

On a true construction of the agreement reached by the parties on 29 April 2013, is Mr Harris' claim to an indemnity for CGT under para.(c)(v) of Part III of the Schedule to the 1989 Agreement in respect of the Compensation Sum encompassed within, and precluded by, the words of settlement contained in that April 2013 agreement?

(3) **Question 3**

On a true construction of para.(c)(v) of Part III of the Schedule to the 1989 Agreement, does the indemnity for CGT contained therein extend to cover penalties charged by HMRC in respect of the tax liability in question?

6. I did not understand Ms Talbot Rice QC for Mr Harris to be disputing that these are the issues to be determined on this appeal. She does however submit that Question 1, namely the ascertainment of the terms of the settlement agreement, is a question of fact that is not open to challenge on this appeal. I will deal with that point in the course of this judgment.

Factual Background

7. The background facts are largely undisputed and I take them from the Arbitrator's Reasons.

8. As stated above, Mr Harris retired from the Former Partnership in May 1993. The terms of his retirement in the 1989 Agreement included an entitlement to an annuity in the form of a share in the Former Partnership's profits. This entitlement continued to apply even after S&P had been incorporated as an LLP in 2008.

9. On 1 May 2010, however, it is common ground that S&P restructured in a manner which constituted a "*Dissolution*" for the purposes of the 1989 Agreement. This in turn triggered the provisions of paragraph (c) of Part III of the Schedule to the 1989 Agreement which by sub-paragraph (i) provided for the replacement of Mr Harris' entitlement to a share of S&P's profits with a lump sum payment, called the Compensation Sum, that was meant to be in an amount sufficient to enable Mr Harris to purchase an annuity that would provide an income equivalent to that being received immediately prior to the dissolution. Sub-paragraph (c)(i) of Part III of the Schedule to the 1989 Agreement provided as follows[2]:

> "In the event of the dissolution of the Firm (other than in the circumstances mentioned in sub-paragraph (vi)) then any Retired Partner[3], in substitution for his right to any profit share or annuity, shall be entitled to have paid to him the Compensation Sum. The Compensation Sum shall be such a sum of capital as shall be certified by the Firm's Accountants to be sufficient to enable the Retired Partner concerned to buy from an Insurance Company of repute an Appropriate

[2] This takes effect pursuant to clause 18(d) of the 1989 Agreement.
[3] Mr Harris is a Retired Partner as so defined.

> Annuity such Accountants for such purpose acting as experts and not as arbitrators and their decision being final."

Sub-paragraphs (c)(ii), (iii) and (iv) of Part III of the Schedule contained provisions for the identification of the Appropriate Annuity and the cooperation of the Retired Partner with the requirements of the Accountants.

10. The sub-paragraph that has since become central to the dispute is sub-paragraph (c)(v) of Part III of the Schedule to the 1989 Agreement (**sub-para. (c)(v)**) which provides for the following tax indemnity in relation to the Compensation Sum (underlining added):

> "The Partners shall indemnify each Retired Partner and each widow of a Retired Partner who has died against any liability to capital gains tax to which he or she may become subject <u>as a result of the receipt by him or her of the Compensation sum [sic] and any interest which may be payable on or in respect of any such capital gains tax</u> unless the Partners shall have requested such Retiring Partner or widow to pay the same and he or she has failed to do so within 30 days of the receipt of such request; provided that such Retiring Partner or widow shall at the expense of the Partners take such steps as the Partners may reasonably require to have any assessment to capital gains tax in respect of such receipt set aside or modified."

11. Following the dissolution, discussions began with a number of Retired Partners including Mr Harris in relation to S&P's and the Former Partnership's ongoing obligations to them. The other Retired Partners were apparently content to accept a fixed annuity payable in monthly instalments rather than a lump sum Compensation Sum. However, Mr Harris, as was his right, preferred to be paid the Compensation Sum as provided for in sub-paragraph (c)(i) of Part III of the Schedule. Accordingly, a process was instigated to determine the amount of the Compensation Sum and discussions took place over several months between Mr Harris and the Appellants. S&P's Accountants, Grant Thornton, were instructed to calculate the Compensation Sum due to Mr Harris, acting as experts in accordance with sub-paragraph (c)(i) of Part III of the Schedule.

12. Mr Harris also raised another issue that he wanted taken into account in the determination of the total amount due to him. The Arbitrator described this issue in paragraph 6 of the Reasons in the following terms:

> "6. Mr Harris informed Mr Martin that he believed that certain deductions from his annuity payments had been wrongfully made in the past and he wanted the deducted sums to be returned to him. These related to interest payments on a medium term loan ("MTL") from Barclays Bank Plc and capital repayments. Mr Martin obtained an Opinion dated 25 January 2013 on the said deductions from Mr Philip Jones QC of Serle Court, Lincoln's Inn. The Opinion was not entirely conclusive because there was little evidence then available and it was difficult to advise on who had the better case. So much depended on what exactly was said by whom and in what context. Inter alia, it was not clear that the wording contained in a letter from Mr Harris dated 7 April 1993 represented his agreement to the deductions. Mr Jones stated:

> "*If he did agree to these terms, it seems to me that he can have no complaint about the deduction of interest to 2008. The position in relation to the capital contributions is less straightforward but I think Strutt & Parker has the better case. The position in relation to the deductions after 2008 is much more problematic. I would say the chances are 50/50.*""

In other words, Mr Harris was claiming that he had been underpaid his annuity by reason of wrongly deducted interest on the Former Partnership's MTL in respect of two distinct periods: (a) 1998-2008; and (b) 2009 and 2010. He was also claiming that capital repayments on the MTL had been wrongly deducted from his annuity payments in respect of the period 1998-2008. The validity of these deductions was in doubt but these were settled pursuant to the settlement agreement eventually reached with Mr Harris, as described below.

13. Grant Thornton first calculated the Compensation Sum on 29 October 2012. There then followed discussions with Smith & Williamson who were the accountants acting on behalf of Mr Harris. In their final report dated 18 January 2013, Grant Thornton determined that the total Compensation Sum due to Mr Harris, including lost interest of £902.07 was a sum of £512,740.93, calculated as follows:

> "1 May 2010 to 30 April 2013
>
> | | |
> |---|---|
> | (in respect of unpaid Partnership Annuity) | £177,818.15 |
> | 1 May 2010 to 30 April 2013 | |
> | (in respect of lost interest) | £902.07 |
> | 1 May 2013 onwards | |
> | (in respect of compulsory purchase annuity) | £564,020.71 |
> | Compensation payment made on 13/12/2011 | (£30,000.00) |
> | Compensation payment made on 11/12/2012 | (£200,000.00)[4] |
> | **Balance compensation payment due** | **£512,740.93"** |

14. Prior to the Compensation Sum being determined the parties had already begun discussing the other disputed amounts, which Mr Harris referred to in his witness statement for the Arbitration as a "*shopping list*". This term was picked up by the Arbitrator and he used it a number of times in the Reasons. However it is important to bear in mind that this was not a term that Mr Harris had used at the time in his correspondence with the Appellants.

[4] These compensation payments had been made on account of the Compensation Sum due.

15. That correspondence was referred to in the "Chronology" section of the Reasons (paragraphs 33 to 56) and included the following (I should add that most of the letters between the parties were headed "**WITHOUT PREJUDICE**"):

(1) On 17 December 2012, Mr Tom Richardson on behalf of S&P[5] wrote to Mr Harris with an "*update as to where things are with the calculation of your compensation sum, past claims etc.*" Under the heading "**Settlement Agreement**", Mr Richardson said (underlining added):

"It occurs to me in all of this that there will need to be some written agreement between us when we have all the figures in to agree we are dealing with a full and final settlement of all claims.

I have written to the Firm's Solicitors today suggesting that they draft this. We will keep it as simple as possible and I would expect that to be ready in the New Year as well."

(2) On 22 December 2012, Mr Harris replied to Mr Richardson's letter of 17 December 2012 and in that letter stated (underlining added):

"I note that you are asking the Firm's solicitors to draft a written agreement. Will you please ensure that this includes any indemnity on behalf of the Firm in respect of any tax arising from the Firm to me."

(3) On 18 January 2013, Grant Thornton produced their revised computation of the Compensation Sum, as described above.

(4) On 12 March 2013, Mr Richardson wrote a handwritten letter to Mr Harris in which he said (underlining added):

"2. Councel [sic] opinion 25 Jan 2013

Deductions from annuity payments

I can't get at this but the helpful news is it says we owe you another £42,947 on top of GT Letter payments. I am trying to track down solicitor to send to you direct but he is in Reading. Will keep trying

3. Contract

I did mention this a few months ago but it turns out we don't need one as the '89 agreement is not being varied which is at least one blessing."

On the same day, Mr Richardson sent to Mr Harris the Opinion of Mr Philip Jones QC dealing with the alleged overpayments.

(5) On 15 March 2013, Mr Harris responded to the letters of 12 March 2013 referring to the sum of £42,937 and a further figure of £83,412. He also stated:

[5] Mr Richardson was a senior member of S&P and was handling the discussions with Mr Harris at this time

"Has the proposed Agreement between us been prepared by the Firm's solicitors and can I please see it? If not please ask them to prepare it straight away."

(6) On 19 March 2013, Mr Richardson responded to Mr Harris' letter of 15 March 2013 in which he said (underlining added):

"Your second paragraph refers to the proposed Agreement between us.

Can I repeat what was in my previous letter, which is we are now advised by Counsel that we do not need an Agreement between us. The wording of the '89 Agreement is clear enough it seems and it is merely a matter of us paying the sum that Grant Thornton advise in their expert opinion."

(7) On 11 April 2013, Mr Harris wrote to Mr Richardson a letter in which he set out the amounts agreed and not agreed. He said (underlining added):

"1. Smith & Williamson are happy with Grant Thornton's advice regarding the calculation of the compensation sum of £741,838.86.

They are however not in agreement about the subsequent calculation of the interest on this amount since 1st May 2010. This matter needs to be resolved between us.

2. I note that you are prepared to pay £42,937 to me in respect of the MTL interest wrongly deducted from my previous profit share payments in respect of the financial years ended 30th April 2009 to 30th April 2010. Thank you.

3. In return I agree to forego any claim for repayment of the other approximately £250,000 deducted from my profit share between 1998 and 2008 to the extent that the deducted MTL relates to the Partnership's savings of interest payments if [sic] would otherwise have had to make to Barclays.

4. However, the £83,412 that was deducted from my profit share during this period of time on account of the Partnership's capital repayments to Barclays under the refinanced loan should be reimbursed to me.

It was never intended that capital repayments would be included in the MTL calculations. I am also not estopped by convention from making a claim in this regard as I only became aware in October 2012 that this had in fact been done.

…

5. I suggest the immediate way forward is as follows:-

a. You pay me now the outstanding balance of the Compensation Sum of £511,838.86 (being £741,838.86 less the amounts already received on account of such entitlement in the amount of £230,000).

b. You pay me now £42,937 with respect to the wrongly deducted MTL for the financial years ended 30th April 2009 and 30th April 2010.

c. You agree to reimburse me for the £83,412 deducted without my knowledge or consent with reference to the capital repayments made by the Partnership between 1998 and 2008.

d. We discussed the amount of interest that you should pay on the Compensation Sum from 1st May 2010 until the date I receive payment.

…

I hope that we can now bring this matter to a closure swiftly and am at your disposal for a meeting to discuss the last outstanding point(s)."

(8) On 16 April 2013, Mr Richardson responded to Mr Harris' letter of 11 April 2013. The Arbitrator held that this letter did not form part of the contract between the parties. In the letter, Mr Richardson said as follows (underlining added):

"Thank you for your letter of 11th April 2013 and thank you also for your agreement to points 1, 2 and 3 in your letter.

Turning to paragraph 4 and the £83,412 while I don't want to comment on what you say I do understand your position…

Turning to your paragraph 5d…

Rather than meet again I thought I would try to put a proposal to you. On a Without Prejudice basis and without accepting any liability in paragraph 2 and 3 below, I would be prepared to ask the Partners to make the following payments to you on the basis that we are agreed that in accepting these payments we also accept that they are in full and final settlement of any claims you may have against the Firm under the 1989 Agreement or otherwise.

1. The Compensation Sum of £511,838.86

2. Past payments of £42,937 plus £83,412.

3. A compensation payment of £50,000 in full and final settlement of any other claims you may feel you have in connection with any interest that may be due on any part of the claim, any costs you have incurred, or any other sums you may feel are due to you.

I have got a Board meeting on Wednesday 24th April. If you felt able to write back to me accepting the above, which I hope is a fair interpretation of your letter of 11th April 2013, then I will take the Firm's instructions with my personal recommendation to proceed on this basis."

(9) On 22 April 2013, Mr Harris wrote to Mr Richardson. This letter was said by the Arbitrator to be Mr Harris' "*counter-offer*" (I assume on the basis that the 16 April 2013 letter was an "*offer*"). Mr Harris said as follows (underlining added):

"Thank you for your letter of 20th April [sic].[6] The only outstanding point between us is the interest on the sums due, and my costs for dealing with the whole issue.

…

I have calculated the interest I would have earned if I had merely put the monies due into my appropriate bank account, as opposed to investing it in more sensible avenues as I had done with my other funds. The minimum sum I have arrived at on this basis is £64,412.

My costs to date, less the £5,000 you have paid me, amount to a further approximately £10,000.

I would be prepared to settle for these amounts as an attempt to resolve this matter on the basis that after your meeting on the 24th April the total sum is immediately transferred to my bank account at…

To conclude the sums I am prepared to settle for are:-

1. Compensation Sum £511,838.86
2. a. Past payments £42,937
   b. Past payments £83,412
3. Compensation Payment £74,412

Total payable £712,599.86 say £712,600.

In respect of all claims."

(10) On 29 April 2013, Mr Richardson replied to Mr Harris' letter of 22 April 2013. This letter was said by the Arbitrator to be S&P's acceptance of Mr Harris' counter-offer. He said (underlining added):

"I have recommended that the final proposal in your letter is accepted in full and final settlement of all claims between us as you propose in your letter. I have pointed out that there is very little between us now and we all need to move on.

That advice has been accepted and the payment outlined in your letter will go directly into your nominated bank account this week."

(11) S&P paid the sum so agreed to Mr Harris shortly thereafter.

[6] There is no such letter and I raised with Counsel whether this was a mistaken reference to the 16 April 2013 letter, which would appear likely. They could not confirm. This was not referred to in the Award and I will assume that, given its contents, it should have been a reference to 16th April.

(12) From August 2014, the tax treatment of these payments became an issue and Mr Harris asserted that he was liable for CGT on a substantial part of the sum because he had effectively made a capital disposal of the right to receive an annuity from S&P. Ms Talbot Rice QC submitted that it was always anticipated that there would be CGT due on the Compensation Sum, although this does not appear from the correspondence; nor was it found to be so by the Arbitrator. In any event, Mr Harris claimed that the Appellants were liable under the tax indemnity in sub-para. (c)(v) and that this had not been released by the settlement agreement.

(13) The disagreement as to the enforceability of the tax indemnity led to the Arbitration which was commenced by Notice dated 9 November 2016.

The Arbitration

16. Clause 22 of the 1989 Agreement provided for "*any dispute, difference or question*" arising between the Partners and/or Retired Partners to be subject to arbitration. The last sentence of clause 22 read as follows:

> "Any award of an arbitrator or arbitrators shall be subject to appeal to the English Courts on points of law."

17. In his Amended Statement of Claim for the Arbitration dated 16 November 2017, Mr Harris sought the following relief:

(1) A declaration that he is liable to CGT as a result of his receipt of the Compensation Sum;

(2) An order requiring the Appellants to indemnify him in relation to such CGT liability as agreed with, or determined by, HMRC or, if applicable, the tribunal or court following an appeal, together with interest and any penalties on that tax;

(3) An order requiring the Appellants to pay his costs of and occasioned by the arbitration.

18. There was a hearing on 24 and 25 April 2018 at which the Arbitrator heard evidence from Mr Harris and Mr Richardson and had oral submissions from Ms Talbot Rice QC and Mr Jones on behalf of their respective clients. On 23 May 2018, the Arbitrator delivered his Final Award Part I, together with the Reasons. The Award was as follows:

(1) A declaration that Mr Harris is liable to CGT as a result of his receipt of the Compensation Sum.

(2) An order that the Appellants shall indemnify Mr Harris in relation to such CGT together with any interest on that tax.

(3) A further order that the Appellants shall indemnify Mr Harris in respect of any penalties that HMRC may charge on the CGT that is to be paid PROVIDED that a copy of this Final Award Part I is delivered to HMRC within a specified time agreed by the parties or, if not so agreed, as ordered by me.

19. As to the costs, these were reserved for later consideration. On 18 October 2018 the Arbitrator delivered his Final Award Part II in which he ordered the Appellants to pay the entirety of Mr Harris' assessed costs and he ordered an interim payment on account of those costs in the sum of £110,000. The assessment was deferred until after the outcome of this appeal.

The Appeal; points of law and/or fact

20. The Appellants appeal in respect of the three questions set out in paragraph 5 above. Section 69 of the Arbitration Act 1996 provides for appeals on points of law:

> "69. (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except –
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> (a) with the agreement of all other parties to the proceedings, or
>
> (b) with the leave of the court.
>
> (3) Leave to appeal shall be given only if the court is satisfied –
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award –
>
> (i) the decision of the tribunal on the question is obviously wrong, or
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> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
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> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
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> …
>
> (7) On an appeal under this section the court may by order –
>
> (a) confirm the award,
>
> (b) vary the award,

(c) remit the award to the Tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

21. Appeals from arbitration awards can only be on questions of law. Clause 22 of the 1989 Agreement provided for the agreement of the parties to appeals on "points of law"; this appeal is therefore within s.69(2)(a) and the Appellants did not need permission to appeal. That this was the basis of the appeal proceeding to a substantive hearing before me was made clear in the Order of Arnold J dated 4 March 2019. Accordingly, the threshold tests for permission to appeal set out in s.69(3), including whether the decision is "*obviously wrong*" or is a "*question of general public importance*" are not relevant. If I am persuaded that the Arbitrator erred in law, I must so find and I have jurisdiction under s.69(7) to remit the matter back to the Arbitrator or, if I considered it inappropriate so to remit it, I can set aside the Award.

22. It is not always easy to separate out issues of law and fact, and some issues can be of mixed law and fact. Ms Talbot Rice QC submitted that the identification of the terms of the settlement agreement (ie Question 1) is a question of fact, that cannot be reviewed on appeal. She also submitted that, if the Arbitrator correctly stated the legal principles involved, his application of those legal principles wrongly cannot be the subject of an appeal. The latter point arises in respect of the interpretation of the settlement agreement, ie Question 2.

23. On these points, Ms Talbot Rice QC filed a short Supplemental Skeleton Argument dated 11 July 2019 together with three new authorities that were not cited at the oral hearing on 27 June 2019. I did not give permission for this to be filed; nor had I invited the parties to file further submissions on this issue. I sought the Appellants' response to this turn of events and, by a letter of Clyde & Co LLP dated 12 July 2019, they objected to me taking the Supplemental Skeleton Argument into account but also proceeded to answer the points made therein, succinctly and aptly. In the circumstances, I have considered these further submissions and authorities and my conclusions on these issues are set out below.

24. It is clear that judicial restraint must be exercised in considering an appeal from an arbitration award. One of the purposes of severely restricting the right of appeal from an arbitration award is to uphold the process that the parties have chosen for their dispute resolution and for there to be finality for such process. The Courts are therefore reluctant to interfere in an arbitration award where the process has been conducted fairly and where the tribunal has answered the questions put to it with reasons. In relation to the merits of the dispute, it is only when a tribunal seriously errs in law so as to affect the outcome that the Courts may be prepared to intervene.

25. I was urged by Ms Talbot Rice QC not to try to find fault with the Award and to read it in "*a reasonable and commercial way, expecting as is usually the case, that there*

will be no substantial fault to find with it." – see *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd* [2015] EWHC 3405 (Comm) at para. 2.

26. Ms Talbot Rice QC also referred to the decision of Moulder J in *Fehn Schiffahrts GmbH v Romani Spa* [2018] 2 Lloyd's Rep. 385 in which she said at paras. 13 and 14 (underlining added):

> "13. The court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law. In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages: (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute; (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, <u>but also the identification and interpretation of the relevant parts of the contract</u>, and the identification of those facts which must be taken into account when the decision is reached; (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.[7]
>
> 14. Stage (2) of the process is the proper subject matter of an appeal under the Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another."

27. This led Ms Talbot Rice QC to submit that once the Arbitrator has ascertained the law correctly, the application of that law to the facts that have been found falls within the last stage of the decision-making process and is not the proper subject of an appeal. However, that is rather undermined by the last sentence of paragraph 14 of the judgment of Moulder J where it is clear that a wrong application of the law to the facts. *A fortiori*, it seems to me, is where it can be shown that the Arbitrator has applied the wrong principles of law despite having set out the correct principles. It is

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[7] Paragraph 13 appears to be a direct quote from the judgment of Mustill J (as he then was) in *Finelvet A.G. v Vinava Shipping Co Ltd, The Chrysalis* [1983] 1 WLR 1469 at 1475. After setting out the three stage process, Mustill J went on to say (underlining added):

"In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; <u>and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principles which he had stated</u>."

also interesting that Moulder J referred not only to interpretation of the contract but also the "*identification…of the relevant parts of the contract*" as being matters falling within stage 2, the ascertainment of the law.

28. Ms Talbot Rice QC's Supplemental Skeleton Argument focused on the entry in the White Book at Vol 2, p.770 para. 2E-266.1 (which was cited to me at the hearing) and which states: "*An error of law does not exist because the tribunal applies the correct principle wrongly".* This bold statement is said to be supported by a number of authorities, one of which was supplied to me – *Benaim v Davies Middleton* [2005] EWHC 1370. This is a decision of HHJ Peter Coulson QC (as he then was) which in part dealt with an application for permission to appeal under s.69. At paragraphs 107 and 108, the learned Judge says as follows:

> "107. At para.29(1) of Arbitration Law the learned editors express the view that, for the purpose of the 1996 Act, an error of law arises where the arbitrator errs in ascertaining the legal principle which is to be applied to the factual issues in the dispute, and does not arise if the arbitrator, having identified the correct legal principle, goes on to apply it incorrectly. The decision in *Northern Elevator Manufacturing v United Engineers (Singapore)* [2004] 2 S.L.R.494[8] is cited in support of that proposition. I respectfully agree with and adopt that analysis.
>
> 108. Furthermore, there can be no error of law if the arbitrator reached a decision which was within the permissible range of solutions open to him. In *The Matthew* [1990] 2 Lloyds Rep 323 Steyn J (as he then was) said:
>
> > "The arbitrators plainly erred in their approach on this aspect, yet it must be borne in mind that their decision was not one of pure law, it was a question of mixed law and fact. In such a situation their error in approach is not by itself decisive. It is still necessary to consider whether their actual decision in all the circumstances falls outside the permissible range of solutions open to arbitrators."
>
> As the passage makes quite clear, that reasoning applies specifically to findings of mixed fact and law."

29. Ms Talbot Rice QC submitted that this statement was supported by Butcher J in *A v. B* [2018] EWHC 2310. However, in paragraph 26 of that Judgment, while there is reference to a part of paragraph 107 of *Benaim*, it is cited without comment on the basis that this was part of the Charterers' submissions in that case. The other two cases cited in the White Book – *ASM Shipping Ltd of India v TTMI Ltd of England (No. 3)* [2009] 1 Lloyds Rep 293 and *Coal Authority v Davidson* [2008] EWHC 2180 – were concerned with permission to appeal and therefore the higher test of "*obviously wrong*".

30. In my view the statement in the White Book goes too far and needs to be caveated, as it is not wholly supported by the authorities that are relied upon. As is clear from Mustill J's decision in *The Chrysalis* (see footnote 7 above), if the tribunal correctly

[8] This Singaporean case was the original case referred to in the White Book note at para. 2E-266.1

states the law but then does not apply those legal principles correctly, that could be an indication that the tribunal did not properly understand the legal principles that it had stated. The mere fact of setting out accurately the broad legal principles that are applicable cannot make the decision immune from challenge on appeal. The "*permissible range of solutions*" referred to by Steyn J in *The Matthew* was specifically dealing with how the Court should deal with the intermediate situation of a mixed law and fact question.

31. I do not believe that this causes any real problem in the resolution of the issues in this appeal. I will only consider whether the Arbitrator erred in law in the way he dealt with both the identification of the terms of the settlement agreement and the interpretation of those terms.

Question 1: The terms of the settlement agreement

32. The Arbitrator held that the only two relevant contractual documents were Mr Harris' 22 April 2013 "*counter-offer*" and Mr Richardson's 29 April 2013 "*acceptance*". In paragraphs 32 and 33 of the Reasons, the Arbitrator said:

> "32. I prefer Ms Talbot Rice's contention that it is the above-mentioned two letters of counter-offer and acceptance that are the relevant documents in this case…
>
> 33. In summary, I find that Mr Harris' counter-offer of 22 April 2013 amounting to £712,600 "*in respect of all claims"* and Mr Richardson's acceptance dated 29 April 2013 "*in full and final settlement of all claims between us*" need to be analysed and interpreted in order to understand precisely the scope and extent of their agreement…"

33. It is not disputed that the parties reached an agreement in writing but that the terms were not contained in a single written document. The terms were agreed sequentially, during the course of negotiations, with certain items being agreed along the way until finally there was agreement on all the terms. As the Arbitrator recognised, there were certain abbreviated terms used in the last two letters that "*would be difficult to understand those terms without reference to prior communications*" [para. 31 of the Reasons]. I respectfully agree with that and consider that, in this case, there is a very fine distinction between the process for ascertaining the terms of the contract and its interpretation. Both tasks are directed at the same issue which is to determine what was actually agreed between the parties.

34. It is interesting in this respect to ask why there is so much resistance from Mr Harris to looking at the letter of 16 April 2013. Mr Richardson's letter of 16 April 2013 contained an offer from S&P to pay the agreed sums of money:

> "on the basis that we are agreed that in accepting these payments we also accept that they are in <u>full and final settlement of any claims you may have against the Firm under the 1989 Agreement or otherwise</u>."

If the underlined section is a term of the settlement agreement, then Mr Harris clearly would be in some difficulty in asserting that his claim to an indemnity under sub-para. (c)(v) survives and is enforceable.

35. In Mr Harris' "*counter-offer*" of 22 April 2013, he states that "*the only outstanding point between us is the interest on the sums due, and my costs for dealing with the whole issue*". He then goes on to argue for a "*Compensation Payment*" of £74,412 as opposed to the £50,000 that was offered by Mr Richardson. In other words, Mr Harris was, on the face of it, agreeing to everything else in Mr Richardson's letter of 16 April 2013. He then used the curious phrase at the end – "*In respect of all claims*." While Ms Talbot Rice QC has argued on his behalf that this was a reference to all the "*claims*" that he had already made (his "*shopping list*") which would not include the tax indemnity, there is nothing in Mr Harris' letter that indicates he is disputing that the payment of the monies would be in "*full and final settlement of any claims [he] may have against the Firm under the 1989 Agreement or otherwise*."

36. As if to clarify that point, in Mr Richardson's final letter of 29 April 2013, he said that he was recommending accepting the "*final proposal*" in the 22 April 2013 letter "*in full and final settlement of all claims between us as you propose in your letter*." It seems to me to be wholly artificial to rule out the 16 April 2013 letter from consideration as to whether it formed part of the relevant contractual documentation, simply because the later two letters technically constituted a "*counter-offer*" and "*acceptance*". If it is necessary to look at the 16 April 2013 letter for the purpose of interpreting the 22 and 29 April 2013 letters, then it is odd not to look at it to see if its terms were actually agreed by Mr Harris and so formed part of the contract.

37. Mr Jones on behalf of the Appellants submitted that the way that the Arbitrator decided to exclude the 16 April 2013 letter from the concluded contract was erroneous in law. In particular, he submitted, the Arbitrator wrongly rejected the principles to be derived from the Court of Appeal case of *Golden Ocean Group Ltd. v Salgaocar Mining Industries Ltd* [2012] 1 WLR 3674 (***Golden Ocean***) and should have looked beyond the two documents of counter-offer and acceptance to ascertain the terms of the agreement.

38. Mr Jones first referred to *Brogden v The Directors of the Metropolitan Railway Company* (1877) 2 App Cas 666 in which Lord Cairns LC said this on contract formation:

> "My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form."

39. Mr Jones also referred to *Halsbury's Laws of England, Vol 22 (2012)/3 Formation of Contract*, para. 264 under the heading "Counter-offers" in which it is stated:

> "Frequently the terms of a counter-offer are not spelt out in a single communication, but are to be gathered from the previous negotiations between the parties, including any previous offers and counter-offers"

The authority for that statement in the footnote included the *Brogden* case.

40. The main authority relied upon was *Golden Ocean* which was an appeal from Christopher Clarke J (as he then was). Before looking at the important passages from the judgment of Tomlinson LJ (with whom Rix LJ and Sir Mark Waller agreed), it is necessary to put those passages in context. It was an appeal from the refusal of Christopher Clarke J to set aside permission to serve the defendants out of the jurisdiction. Therefore the Court only had to be satisfied that the claimant had a good arguable case. The particular issue was whether there was an enforceable guarantee pursuant to s.4 of the Statute of Frauds 1677, as amended, in circumstances where the guarantee could only be identified by reference to a number of emails and documents and was not contained in one document. It is therefore a very different case from this appeal but there were comments of general application in Tomlinson LJ's judgment that are, I consider, pertinent to this case.

41. In paragraphs 10 to 14, Tomlinson LJ recorded the history of the negotiations and the emails that had passed between the parties (as set out by Christopher Clarke J), noting that this was not an uncommon way for charterparties to be negotiated and agreed. Then in paragraph 22 Tomlinson LJ said this (underlining added):

> "22. The conclusion of commercial contracts, particularly charterparties, by an exchange of e-mails, once telexes or faxes, in which the terms agreed early on are not repeated verbatim later in the exchanges, is entirely commonplace. It causes no difficulty whatever in the parties knowing at exactly what point they have undertaken a binding obligation and upon what terms. As Mr Young pointed out, it is often a matter of happenstance, or, metaphorically, the pressing of a button, whether a sequence of e-mails manifests itself in a single document as a thread or string of e-mails or in a series of individual documents…If I have correctly understood the nature of the e-mail string or thread at B106–108, the exercise of ascertaining that a guarantee has been agreed in writing and discovering its terms involves reference to only two documents, the document at B106–108 and the e-mail of 2 February 2008 sent on 4 February 2008. I can see no reason why the contract of guarantee so identified should not be regarded as an agreement in writing for the purposes of the Statute of Frauds. For the avoidance of doubt however my conclusion is not dependent upon the circumstance that, as it happens, it is here necessary to look at only two documents. Subject to the requirement of signature to which I shall return, <u>I can see no objection in principle to reference to a sequence of negotiating e-mails or other documents of the sort which is commonplace in ship chartering and ship sale and purchase.</u> Whether the pattern of contract negotiation and formation habitually adopted in other areas of commercial life presents difficulty in adoption of the same approach must await examination when the problem arises. Nothing I have said is intended to discourage the obviously sensible practice of incorporating a guarantee either in a readily identifiable self-standing document or otherwise

providing for it as part of the terms of a formally executed document. The Statute of Frauds must however, if possible, be construed in a manner which accommodates accepted contemporary business practice. The present case is not concerned with prescribing best or prudent practice. It is concerned with ensuring, so far as is possible, that the adoption of usual and accepted practice cannot be used as a vehicle for injustice by permitting parties to break promises which are supported by consideration and upon which reliance has been placed.

42. In paragraph 29 of the judgment, Tomlinson LJ quoted from Christopher Clarke J's judgment with approval and made it clear that they were actually deciding the point rather than simply saying the claimant had a good arguable case (underlining added):

> "29. The judge expressed his conclusion on this point [2011] 1 WLR 2575, para 57:
>
> > "I do not accept that, if an agreement has been made in writing, there is some limit to the number of documents to which reference is permissible. If there is said to have been an agreement in writing the court is entitled to look at those documents which are said to constitute the agreement, however many they may be. In contracts made in the manner in which the present contracts are said to have been made, that involves looking at more than two documents (one of offer and one of acceptance), both because the terms of the charterparty and of the memorandum of agreement were negotiated sequentially and because, in negotiations of the 'Accept/except' type the last offer, which may only except one small item (such as whether a sum should be paid in seven as opposed to five days), will not be intelligible without reference to the preceding offers and counteroffers."
>
> I agree with the judge. Furthermore I consider that his conclusion is not simply "well arguable" but also correct and that we should so decide. I do not consider that his conclusion frustrates the purpose of the Statute of Frauds. The purpose of the Statute of Frauds is not, as Mr Kendrick submitted, to prevent the court considering continuing negotiations. The purpose of the Statute of Frauds is rather, in part, to prevent the court having to resolve disputes as to oral utterances. In the present case it is in fact necessary to look at very few documents, arguably only two, in order to identify a clear agreement. Subject to Mr Kendrick's other points and subject to proof of authority at trial, it would I think be a serious blot on our commercial law if SMI could here avoid liability because its obligation is to be found written in two documents rather than in one."

43. Whether the Court or the Arbitrator should look outside the last two documents of so-called counter-offer and acceptance of course depends on the particular facts of the case. What *Golden Ocean* shows is that modern contract negotiation by email of the "*accept/except*" type may require the Court or Arbitrator to look at preceding offers and counter-offers in order to understand what terms the parties actually agreed.

44. The Arbitrator however rejected the approach advocated in *Golden Ocean* seemingly on the basis that it was confined to charterparties. At paragraph 30 of the Reasons, the Arbitrator said this (underlining added):

> "Mr Jones asserted that *Golden Ocean* was analogous to the circumstances in this case in that in his letter of 22 April 2013 in response to Mr Richardson's earlier offer, Mr Harris stated that the only outstanding points between them were the interest on the sums due and his costs for dealing with the whole issue. <u>However, Ms Talbot Rice observed that contracts formulated by sequential emails are only employed in charter party contracts where, as the court noted, this procedure is commonplace.</u> She restated that in this case the two relevant documents which constituted the offer and acceptance were Mr Harris' counter-offer of 22 April 2013 and Mr Richardson's acceptance of that counter-offer on 29 April 2013."

The Arbitrator then went on to say that he preferred Ms Talbot Rice QC's contention as to the relevant documents but provided no further analysis.

45. In her oral submissions, Ms Talbot Rice QC accepted that she had not argued before the Arbitrator that it is only charterparties that can be formulated by sequential emails. Therefore, the reference to such a submission in the Reasons was incorrect. That appears to have been the only basis on which the Arbitrator rejected the general statements as to contract formation in *Golden Ocean* and, as such, was plainly an error of law on his part. Ms Talbot Rice QC did however fairly point to the other bases on which *Golden Ocean* could be distinguished, namely that it was centrally concerned with whether there was an "*agreement in writing*" for the purposes of the Statute of Frauds 1677 and the fact that it arose on an application to set aside permission to serve out. Nevertheless, the Arbitrator distinguished *Golden Ocean* on an erroneous basis and I find that he was wrong to have done so. The legal principles derived from *Golden Ocean* are, in my view, applicable to the contract made in this case.

46. Even so, it does not necessarily follow that the Arbitrator was bound to conclude that the terms of the contract must include those set out in the 16 April 2013 letter. Ms Talbot Rice QC argued that it is not permissible to trawl back through emails and letters and to cherry-pick terms that can be said to be included in the final contract. She says that if the Appellants are allowed to rely on the 16 April 2013 letter as forming part of the contractual documents, then Mr Harris should be able to rely on his letter of 22 December 2012 in which he requested that any written settlement agreement that is drawn up should include his tax indemnity. Nearly 3 months later however, when he was told that a written settlement agreement was not needed as the 1989 Agreement was not being varied, Mr Harris did not mention the tax indemnity again. Ms Talbot Rice QC says that this was because he thought the 1989 Agreement was being implemented and that he would be able to rely on the tax indemnity.

47. The main point relied upon by Mr Harris is that his letter of 22 April 2013 was a rejection of the offer contained in Mr Richardson's letter of 16 April 2013. The letter of 22 April 2013 is self-contained with all relevant terms of the counter-offer included and there is no need, so Ms Talbot Rice QC submitted, to look at the 16 April 2013 letter, even for the purposes of construction (reliance was placed on *Prenn v Simmonds* [1971] 1 WLR 1381). The Arbitrator found as a matter of fact that the

contract was contained in the 22 and 29 April 2013 letters and this is therefore unappealable.[9]

48. I do not think that the Arbitrator actually made a finding that the 22 April 2013 letter was a rejection of the terms offered in the 16 April 2013 letter. Rather, because of his erroneous view that *Golden Ocean* was restricted to charterparties, he was persuaded to take a somewhat technical and formalistic approach to the concept of offer and acceptance and to decide that he could only look at the last two documents in the sequence to ascertain the terms of the contract. In the circumstances of this case, which is one of the "*accept/except*" variety referred to in *Golden Ocean*, I consider that he was wrong as a matter of law to have adopted that approach.

49. In my judgment, in a case of this sort, the manner by which the terms of the contract are ascertained is intrinsically bound up with the process of interpretation. The overriding task for the Arbitrator and the Court is to determine what was actually agreed between the parties or, to go back to Lord Cairns' words in *Brogden*, to find where there was "*consensus*". The now well-known principles of contractual interpretation (which I deal with below) – "*what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant*" – are directed at what the parties agreed as much as what they meant. Where there is one document in which all the terms are contained, there is no issue as to what those terms are; the only issue is interpretation. But where there is an agreement in writing but it is not contained in one single document, it seems to me that a similarly objective test should be employed. By that, I mean that to ascertain the terms of the contract, the test should be what a reasonable person with all the relevant background knowledge would have understood the parties to have agreed.

50. Adopting such a test, I do not consider that a reasonable person looking at the letters of 16 and 22 April 2013 would conclude that the latter was a rejection of the former. The 22 April 2013 letter made it expressly clear that there was one "*outstanding point*" from the 16 April 2013 letter that was not yet agreed, the quantum of interest and costs (the principle that sums were payable in such respects had already been agreed) but that everything else in that letter was agreed. The use of the phrase "*In respect of all claims*" requires reference to the earlier letter (as the Arbitrator seemed to recognise) to understand its meaning and whether it is a reference back to the "*full and final settlement of any claim*" term in the 16 April 2013 letter. The same exercise is required in respect of Mr Richardson's use of the term "*full and final settlement of all claims between us*" in his letter of 29 April 2013.

51. The three letters are inextricably linked and it is artificial to exclude the 16 April 2013 letter from the process of ascertaining what was actually agreed between the parties. To draw a line after the 16 April 2013 letter and restrict consideration of the terms of the contract to the other two letters is not how a reasonable person would look at this matter. Mr Harris only disputed one point of quantum from the 16 April 2013 letter and seemingly agreed to everything else which would include the basis on which the

[9] In her supplemental skeleton argument, Ms Talbot Rice QC also referred to another decision of HHJ Peter Coulson QC (as he then was) in *Council of the City of Plymouth v D R Jones (Yeovil) Ltd* [2005] EWHC 2356, paras. 26 and 39-40 but, as Clyde & Co LLP pointed out, the relevant finding of fact in that case was that the parties had not been operating under a mutual mistake. I therefore do not find it of much assistance.

offer was made, namely in "*full and final settlement of any claims [Mr Harris] may have against the Firm under the 1989 Agreement or otherwise.*" In my judgment, that was a term of the settlement agreement.

Question 2: Construction of the settlement agreement

52. In relation to the construction of the agreement, the Arbitrator confined himself to construing the terms contained in only the 22 and 29 April 2013 letters, on which I have held he was wrong. But in any event, Mr Jones submitted that the Arbitrator approached the issue of the proper construction of the agreement wrongly in that he relied on findings that he made as to the subjective intentions of the parties and Mr Harris, in particular.

53. The interpretation of the terms of a contract is primarily a question of law – see for example Moulder J's decision in the *Fehn Schiffahrts* case in paragraph 26 above where she described it as being in stage 2 of the arbitrator's decision (as did Mustill J in *Finelvet*). There may be issues of fact that have to be determined in order to establish the factual matrix or the relevant background knowledge that would reasonably have been available to the parties. In that sense it could be said to be a question of mixed fact and law. But the issue as to interpretation in this case seems to me to be one of pure law.

54. As I have set out above, Ms Talbot Rice QC submitted that as the Arbitrator had correctly set out the well-established legal principles of contractual interpretation, his application of those legal principles cannot be challenged on appeal, I think because they are said to be within the stage 3 part of the Award. While I agree that the Arbitrator should be given a certain amount of latitude in determining what the reasonable person would understand the contract to mean, if the Arbitrator does not actually apply those legal principles properly then it is open to the Court to conclude that his interpretation was wrong in law.

55. As Mr Jones pointed out, the Arbitrator ran into difficulty from the outset in the way that he framed this issue. In paragraph 12 of the Reasons, he described the issue as (underlining added):

> "Issue 1
>
> Whether Mr Harris intended to release the Third Respondent from its obligation to indemnify him against any capital gains tax arising from the receipt of the Compensation Sum together with any interest thereon."

Mr Jones had suggested at the Arbitration hearing that the issue should be redrafted but the Arbitrator decided not to, saying in paragraph 13:

> "During the hearing Mr Jones suggested that Issue 1 should be expressed differently, namely whether Mr Harris is entitled to claim an indemnity under paragraph (c)(v) of Part III of the Schedule to the 1989 Deed in respect of his receipt of the Compensation Sum notwithstanding the terms and effect of the settlement agreement."

The Arbitrator did not explain why he preferred his formulation. When I asked Ms Talbot Rice QC whether she agreed with the Arbitrator's formulation of the issue, she said that he should not have referred to Mr Harris' intention and it should simply have read: "whether Mr Harris released the Third Respondent…".

56. Having set out the issue in those terms, the Arbitrator's Reasons concentrated on Mr Harris' subjective state of mind and evidence and not on the relevant objective test as to whether the terms of the settlement agreement effected a release of the tax indemnity. There is no dispute that the subjective intentions of the parties are irrelevant on the question of interpretation. The Arbitrator was referred to all relevant decisions on this including: *Rainy Sky SA v Kookmin* [2011] 1 WLR 2900 at paras 19-20; and *Arnold v Britton* [2015] AC 1619 in which Lord Neuberger of Abbotsbury PSC said at paragraph 15 (underlining added):

> "That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) <u>disregarding subjective evidence of any party's intentions</u>."

See also Lord Hoffmann's comment in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 in paragraph 39:

> "English law…mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be."

57. The Arbitrator seems to have assumed that a release of the tax indemnity would constitute a variation of the 1989 Agreement; or at least to have assumed that that was how Mr Harris looked at the matter. When Mr Harris was told that there was no need for a solicitor drafted settlement agreement because the 1989 Agreement was not being varied (see Mr Richardson's handwritten letter of 12 March 2013), the Arbitrator thought that this was a significant moment and he found that Mr Harris thereafter believed that the tax indemnity would remain enforceable. While I find it difficult to understand why a release of the tax indemnity through a full and final settlement of all claims constitutes a variation to the 1989 Agreement – it merely precludes a claim being brought under any clause of the unvaried 1989 Agreement – perhaps of more significance is the Arbitrator's focus on what Mr Harris considered to be its effect.

58. The Arbitrator explained his conclusions on this in paragraph 60 of the Reasons (underlining added):

> "60. <u>I accept Mr Harris' evidence that he considered the tax indemnity to be a settled matter</u> about which there was no dispute and need not be mentioned

again because he was informed that the 1989 Deed applied and the Deed contained the indemnity. There was no indication that the Deed was being varied and it was not. Accordingly, I find that he did not release the indemnity in his counter-offer of 22 April 2013 because the indemnity was not within the scope of the items that he was claiming from the firm. I am satisfied that had a written agreement been prepared Mr Harris would have insisted that it included the indemnity and that he would not have signed the agreement if the indemnity was excluded."

59. The Arbitrator also concentrated on Mr Harris' so-called "*shopping list*" of claims and therefore what he meant when he referred to "*in respect of all claims*". That however was looking at the matter from one party's perspective. Some examples from the Reasons are as follows (underlining added):

> "69. The Compensation Sum and the two past payment items in Mr Harris' counter-offer exactly matched those in Mr Richardson's letter of 16 April 2013. Only the "compensation payment" was different, both in terms of scope and amount. Mr Richardson perceived his offer of £50,000 under this heading as a wrap up sum in full and final settlement of any other claims that Mr Harris may have felt were due to him, including interest and costs. But Mr Harris' counter-offer of £74,412 under this heading comprised only amounts for two specified items, namely £64,412 for interest and £10,000 for costs. I find that Mr Harris' "compensation payment" left no room for any amounts that could be considered as a general sweep up of any other sums that Mr Harris may have felt were due to him, hence a release from the indemnity could not have been included in the "compensation payment" part of the counter-offer.
>
> 70. I find that when Mr Harris stated the amount he was prepared to settle for "in respect of all claims" it related only to claims that he considered were due to him from Strutt & Parker excluding the indemnity. This would mean, for example, that Mr Harris could not later request more money for the Compensation Sum or for the past deductions, or contend that he wished to re-instate the claim for £250,000 which he had foregone in respect of certain deductions in the period 1998-2008. I find that the indemnity was outside the scope of the counter-offer as it was not mentioned and there was no dispute about it. The indemnity remained in force and was an obligation on the part of Strutt & Parker to pay to HMRC any capital gains tax that would be assessed on the Compensation Sum. I find that the expression "*in full and final settlement of any claims*" and "*in respect of all claims*" were not intended to settle the indemnity issue. Mr Harris' counter-offer was in respect of sums already owed to him and was not a release of Strutt & Parker's obligation to pay the capital gains tax under the indemnity which at the time of the settlement agreement was an unknown amount, as it is today. I am satisfied that the counter-offer was restricted to the items on Mr Harris' shopping list.
>
> …

> 72. I do not find that it was Mr Harris' responsibility to "carve out" the indemnity in his counter-offer. From his perspective the indemnity remained in place as the 1989 Deed was not being varied. I find that the onus was on the firm to have indicated that its acceptance of the counter-offer included a release from the indemnity, if that was its intention, but there were no express words releasing Strutt & Parker from the indemnity. I am satisfied that Mr Harris would never have agreed to the release under these circumstances. Hence I find that the meaning of Mr Harris' words in his counter-offer "*in respect of all claims*" meant everything other than the indemnity".

60. The Arbitrator also appears to have relied on the subjective intentions and evidence of Mr Richardson in construing the settlement agreement. After quoting from Mr Richardson's evidence that there was no discussion at any material time about CGT, the Arbitrator said at paragraph 78 of the Reasons (underlining added):

> "78. I find that the natural inference from Mr Richardson's evidence is that his "sweep up" offer of £50,000 and his subsequent agreement to Mr Harris' counter-offer of £74,412 under the same heading could not have been intended to release Strutt & Parker from the indemnity because the indemnity was clearly not in Mr Richardson's contemplation when he accepted the counter-offer. Hence his "*full and final settlement*" stipulation did not include a release from the indemnity."[10]

61. There is, at the very least, in these paragraphs from the Reasons, a reliance on the parties' subjective intentions rather than a purely objective assessment of what the settlement agreement actually meant. The Arbitrator's conclusion that the indemnity was the only matter not being settled (see last sentence of paragraph 72 of the Reasons) was heavily based on his findings as to Mr Harris' intentions in respect of the "*shopping list*" and there being no variation to the 1989 Agreement. This was a fundamental error of law according to a number of clear Supreme Court authorities.

62. Ms Talbot Rice QC submitted that it was unfair and wrong to read the Reasons and conclude that the Arbitrator had construed the agreement based on Mr Harris' subjective intention. She points to paragraph 28 which contains a reasonable summary of the legal principles of contractual construction and to paragraph 71 in which the Arbitrator said this:

> "71. Applying the standard that is derived from the legal authorities to which my attention was drawn, I hold that a reasonable person in possession of the relevant background and context, giving the words their ordinary and

[10] I should add that I was surprised to hear from Ms Talbot Rice QC during her submissions that everyone knew throughout the negotiations that CGT would be payable in respect of the Compensation Sum. If that was so, one would have expected the tax indemnity to feature prominently in the negotiations and in particular in relation to the quantification of the Compensation Sum. The Arbitrator made no findings in such respect – indeed the passage in paragraph 78 rather suggests that he thought otherwise – and I do not take this into account in this judgment.

> natural meaning and employing commercial common sense, would conclude that the indemnity was still in force. The value of the indemnity was, and remains, uncertain and awaits an assessment by HMRC. There have been suggestions that the capital gains tax liability may range somewhere between £80,000 and £270,000, but whatever the eventual figure may be, it is likely to be a material amount. I agree with Ms Talbot Rice's observation that it would be unrealistic to believe that anyone would relinquish the benefit of the indemnity before knowing its value."

63. While I can see that the Arbitrator does try to tie his conclusion to the objective test, the paragraph comes between paragraphs 70 and 72 set out above which make clear reference to Mr Harris' subjective intentions. I therefore am not convinced that the Arbitrator did apply the correct legal principles and disregarded what he found were the parties' subjective intentions.

64. In any event, I have already held that the Arbitrator was wrong to have excluded the 16 April 2013 offer letter from the relevant contractual documentation. On the basis that it does contain terms of the settlement agreement in that it was accepted by Mr Harris except for one small point, S&P were only prepared to make the payments if it was agreed that these were "*in full and final settlement of any claims you may have against the Firm under the 1989 Agreement or otherwise*". Clearly, those words are apt to include any claim under the tax indemnity which is a claim under the 1989 Agreement. Ms Talbot Rice QC suggested that by his letter of 22 December 2012, Mr Harris had preserved his right to claim under the tax indemnity. But I do not see how that sentence in a letter some 4 months before can survive the wide words of release in the 16 April 2013 letter.

65. I am also very much persuaded by the fact that the tax indemnity under sub-para. (c)(v) is specifically linked to the settlement of the Compensation Sum which was payable pursuant to sub-paragraph (c)(i) of Part III of the Schedule. Liability under the tax indemnity was only in respect of the Compensation Sum and that had been the main focus of the dispute and ultimate settlement. It is not as though this is a wholly disconnected claim that might have arisen at some indeterminate point in the future.

66. Furthermore, the reference to "*in respect of all claims*" in Mr Harris' letter of 22 April 2013 and "*full and final settlement of all claims between us*" can only sensibly and reasonably be construed as referring back to the claims identified in Mr Richardson's letter of 16 April 2013. This was a condition that Mr Harris did not demur from in his letter of 22 April 2013.

67. Ms Talbot Rice QC sought to suggest that "*claims*" should be narrowly defined by reference to Mr Harris' "*shopping list*", even going so far as to say that they must be "*debt claims*" that had already been asserted. The Arbitrator did not make such a finding and I reject the suggestion. She also placed substantial reliance on *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 in particular for the proposition that even very wide words of release can still be limited by the context. In that case, the House of Lords, by a majority (Lord Hoffmann dissenting) held that employees of BCCI who accepted a payment and signed an agreement in "*full and final settlement of all claims.. of whatsoever nature that exist or may exist*" against BCCI, had not actually released so-called "stigma" claims, which could not realistically have been considered a possibility at the time that the agreements were

signed. I make the obvious point that Mr Harris' potential claim under the tax indemnity was apparent from the face of the 1989 Agreement. I do not consider that the case is of much assistance in construing this particular settlement agreement. However I do think that it is significant that the House of Lords emphasised that there are no special rules of interpretation applicable to a general release.

68. In conclusion therefore, I hold that:

(1) The Arbitrator erred in law in the way he sought to construe the settlement agreement by taking into account the parties' subjective intentions;

(2) The settlement agreement included the terms proposed by Mr Richardson in his 16 April 2013 letter save for the one point of disagreement as to the figure to be paid for interest and costs;

(3) The settlement agreement was a general release of "*any claims* [Mr Harris] *may have against the Firm under the 1989 Agreement or otherwise*" and that includes any claim that Mr Harris may have under the tax indemnity in sub-para. (c)(v).

69. Mr Jones invited me to set aside the Award if I was to find in the Appellants' favour and not to remit the matter to the Arbitrator. Under s.69(7) of the Arbitration Act 1996 I have to be satisfied that it would be inappropriate to remit the matter back to the Arbitrator for reconsideration if I was minded to set aside the Award. I do not think that Ms Talbot Rice QC was submitting that it would be appropriate in these circumstances to remit the matter to the Arbitrator. In my view, it would be a waste of time and money to remit the matter and therefore inappropriate to do so. I will set aside the Award.

Question 3: Penalties

70. In the light of my conclusions above, this question no longer arises. In case the matter goes further, and because I heard argument on the point, I will shortly state my conclusions on it.

71. The indemnity in sub-para. (c)(v) referred to:

> "any liability to capital gains tax to which he or she became subject as a result of the receipt by him or her of the Compensation Sum and any interest which may be payable on or in respect of any such capital gains tax."

There is no mention of penalties that may become payable in respect of that CGT liability.

72. There are several potential penalties that could in theory become payable. I do not see that a liability to penalties can sensibly be said to be within the phrase "*liability to* [CGT]" in sub-para. (c)(v).

73. Ms Talbot Rice QC submitted that penalties could be regarded as in the nature of interest and the use of the words "*on or in respect of any such* [CGT]" is an indication that "*interest*" included penalties as interest is payable "*on*" CGT whereas penalties are paid "*in respect of*" CGT. I do not think that the word interest can reasonably be construed as including penalties as they are each distinct heads of liability.

74. The Arbitrator's conclusion on this issue does not appear to deal with it on the basis of construing sub-para (c)(v) (despite the way he framed this issue in paragraph 12 of the Reasons). Instead the Arbitrator said this in paragraph 92 of the Reasons:

> "…I hold that…the [Appellants] are liable to pay any such penalties because of their obligation to indemnify Mr Harris in respect of any [CGT] that is assessed. Any penalties would arise from a failure on the part of the [Appellants] to acknowledge Mr Harris' right to the indemnity and pay the tax at the date specified by HMRC either directly or by transferring funds to Mr Harris for him to pass on to HMRC."

75. Ms Talbot Rice QC interpreted this paragraph as the Arbitrator concluding that, as any penalties would have been caused by the Appellants' breach of contract, they are liable for them by way of damages for breach of contract. Apart from the fact that damages for breach of contract were not being claimed in the Arbitration, it seems to me that this was a conclusion not properly open to the Arbitrator. There are no penalties chargeable because of a third party's failure to acknowledge a separate tax indemnity and so there are real causation issues in respect of a claim for damages in such respect. Furthermore, there is no evidence that Mr Harris has actually been assessed to any penalty in respect of the CGT payable on the Compensation Sum and therefore he has not suffered any loss as yet.

76. I therefore conclude that the Arbitrator was wrong in law in deciding either that sub-para. (c)(v) covered penalties or that the Appellants were liable to pay the penalties by way of damages for breach of contract.

Disposition

77. For the reasons set out above:

(1) I allow the Appellants' appeal on the three Questions of law that formed the subject-matter of this appeal; and

(2) I order that the Award be set aside as I am satisfied that it would be inappropriate to remit the matters in question to the Arbitrator for reconsideration.

78. I am prepared to hear the parties at a convenient time on costs or any other matters consequential on this judgment if agreement cannot be reached.