Neutral Citation Number: [2019] EWHC 2331

Case No: 8362 of 2017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street, Birmingham B4 6DS

Date: 29 August 2019

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

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Between :

Colin David Poole	**Applicant**
- and -	
(1) Lloyd Edward Hinton (as trustee in bankruptcy of Colin David Poole)	**Respondent**
(2) Peter Edward Carroll	

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- -

Robert Mundy (instructed by **George Green LLP**) for the **Applicant**
Elaine Palser (instructed by **Charles Russell Speechlys LLP**) for the **1st Respondent**
William McCormick QC and **Marc Brittain** for the **2nd Respondent**

Hearing date: 21 May 2019

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Judgment Approved by the court for handing down (subject to editorial corrections)

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HHJ WORSTER :

1. **Introduction**
On 18 December 2014 Mr Carroll issued a claim against Mr Poole for various relief. The brief details of the claim include the following:

> *The Claimant's claim against [Mr Poole] is for:*
>
> *(1) Compensation for fraudulent breach of trust and fiduciary duty in dishonestly applying or causing to be applied the sum of £9,750,000 being money belonging to [Claims Direct plc] to his own use, and in deliberately and dishonestly concealing that fact.*

The claim is pleaded out in greater detail in the Particulars of Claim, a copy of which is in bundle 3 at page 5. I return to that document later in this judgment. Mr Carroll brings the claim as the equitable assignee of Claims Direct plc. Claims Direct is joined as 2nd Defendant because of the equitable assignment, but no relief is sought against the company.

2. The claim was served on Mr Poole on 25 March 2015. He sent an acknowledgement of service to the Court on 8 April 2015 and prepared a defence, a copy of which is in bundle 1 at page 31. In it Mr Poole denies fraud, and raises a number of other matters including limitation and that the claim is caught by the terms of a Settlement Agreement which he had entered into with Mr Carroll and a number of others in June 2008.

3. Mr Poole sent his defence to the court and to Mr Carroll. Mr Carroll received his copy, but the copy for filing was returned in the post on 9 June 2015. Mr Poole's explanation is that whilst Mr Carroll issued the claim using a Chancery Division form, it had in fact been issued in the Queen's Bench Division. His acknowledgement of service and defence had been sent to the Chancery Division.

4. Having received his defence back in the post, Mr Poole immediately sent a second copy to the Court. However, by the time the Court received it judgment in default had been entered on the claim for £9.75M together with compound interest. The total judgment sum is £21,210,657.52. Mr Poole immediately applied to set that default judgment aside. However, before that application could be heard, Mr Poole was declared bankrupt on the Petition of HMRC. Mr Hinton is his trustee in bankruptcy. Mr Carroll then applied to stay the claim, so that the application to set aside the default judgment has never been heard.

5. Four creditors have sought to prove their debts in the bankruptcy. The claims of HMRC (£1,311,936) and ACE (£15,500) have been admitted and are not in issue. The claim of the Claims Direct Franchisee Group of £75M was rejected by the liquidator. These proceedings concern Mr Carroll's claim for the £21M odd for which he obtained judgment in default.

6. Having taken advice, the trustee in bankruptcy admitted Mr Carroll's claim. Mr Poole has appealed that decision to the Court. On 11 February 2019 District Judge Shorthose ordered the trial of three preliminary issues:

(a) Whether the Court should go behind the default judgment and enquire into the validity of Mr Carroll's debt.

(b) The validity of the asserted assignment to Mr Carroll.

(c) The effect of the compromise agreement dated June 2008 upon Mr Carroll's claim.

7. **Going behind the default judgment**

This first issue is relatively straightforward. Mr Hinton sets out his position in a witness statement he made on 8 March 2019. His practice has always been to look at the basis of a judgment in default where the debtor raises concerns. That is what he did in this case, and he accepts that the Court is free to do so on this application. Mr McCormick QC did not try and persuade me that I should not look at the merits of the claim, and obviously Mr Mundy's position was that I should. He submitted that the Court could go behind the judgment because there was a bona fide allegation that no real debt was due.

8. There is no need for me to set out the detailed arguments Mr Mundy deploys in his skeleton argument on this issue. Suffice to say that the evidence I have read as to the circumstances of the default, and the issues which are raised on the defence Mr Poole prepared and sent to the Court, satisfy me that Mr Poole's application to set aside had very good prospects of success. Mr Poole raises bona fide issues of substance. If he is right, there is no debt. In those circumstances it would be wrong for the Court not to review those matters upon an application such as this.

9. The real dispute is as to the second and third preliminary issues. These are essentially questions of construction, but they require some introduction. If either is decided in Mr Poole's favour, that determines the appeal in his favour.

10. **The background**

In 1999, Mr Poole practised as a solicitor trading as Poole and Co. His firm had a vetting agreement with Claims Direct. Poole and Co would "vet" claims which Claims Direct had been asked to deal with. There was no written agreement, but the parties had worked on that basis for some time.

11. Mr Poole was appointed as a Director of Claims Direct on 20 June 2000. On 5 July 2000 he agreed to sell Poole and Co's vetting business to Claims Direct for £9.75M. On 12 July 2000 Claims Direct floated on the London Stock Exchange. On 1 September 2000 the sale of the vetting business was completed.

12. The claim brought by Mr Carroll against Mr Poole arises from this sale. Mr Carroll characterises it as a fraud on the shareholders of Claims Direct. His case on the facts is that Claims Direct could have terminated what was a 3 month rolling agreement with Poole and Co without paying the £9.75M, and that the transaction was a sham. Mr Poole denies that, and sets out his case in the defence I refer to above [1/35]. There is a lot more to the argument than that brief description, but the detail of the allegations Mr Carroll makes and Mr Poole's case on the point are not directly relevant to the issues I have to determine.

13. By this time Mr Poole had become the Chief Executive of Claims Direct. Not long after flotation, the share price of Claims Direct fell sharply, and in July 2002 it went into administrative receivership. There was a creditors voluntary liquidation on 31 January 2003. All this led to litigation. In particular, a claims management company called Judica pursued litigation on behalf of shareholders of Claims Direct on no win no fee agreements.

14. Mr Carroll had been a franchisee of Claims Direct. In 2004 he became the Managing Director of Judica. He represented hundreds of shareholders of Claims Direct who were bringing claims against Mr Poole and other former directors of Claims Direct. Mr Carroll did not have a claim in his own right, nor did he bring these claims as an assignee. His role might be described as that of a claims manager.

15. In June 2008 four former directors of Claims Direct entered into a "Settlement Agreement" with a number of shareholders who were bringing claims against them. Mr Poole was one of those former directors, and the shareholders included a substantial number who had been represented by Judica and Mr Carroll. They are referred to in the Settlement Agreement as the "Judica Claimants". I return to the relevant clauses of that agreement below, but Mr Poole's case on this application is that the claim Mr Carroll now seeks to bring is caught by the terms of that settlement agreement. Mr Carroll's case is that it is not. Whilst Mr Hinton expressed himself to be neutral on the application, in her submissions on his behalf Ms Palser tended to support Mr Carroll's construction of the Settlement Agreement. This is the third issue DJ Shorthose ordered be tried.

16. There are numerous references in the evidence and in the submissions to matters which may go to credit. Mr Mundy refers to the nature of the litigation Mr Carroll was involved in against a Ms Kynaston, and to the extended and general Civil Restraint Orders made against Mr Carroll by the court. The evidence also includes reference to the disqualification undertaking Mr Poole gave in 2008, to his being struck off the Roll in 2011, and to the findings made by Norris J about the sale of Poole and Co's vetting business in the Directors Disqualification proceedings brought against his co-director Mr Sullman. Given the nature of the issues I have to determine, none of that assists me. Nor is it necessary to look at the evidence surrounding the limitation defence.

17. The next relevant event is the Deed of Assignment between Claims Direct plc and Mr Carroll dated 3 July 2009 [1/83]. It is upon this assignment that Mr Carroll relies when making his claim for £9.75M and interest. The scope and meaning of that assignment are the subject matter of the second issue DJ Shorthose ordered to be tried. Logically that is the next issue to determine.

18. **The Assignment**
The relevant terms of the Deed are as follows:

> *WHEREAS:*
>
> ...

(2) ***Potential claims can be advanced by the Assignor against various parties including****:*

(a) ***its own*** *Associated Companies,* ***Agents****, Bankers, Insurers, Brokers and Professional Advisors* ***for matters arising out of the operation of its business including its insurance, underwriting and funding arrangements;***

(b) *against the Insurers, Underwriters and Brokers arising out of their failure to honour their contractual obligation to the Assignor and Medical Legal Support Services Limited*

(c) *Bankers and their Agents arising out of their failure to recover monies due to the Assignor and [MLSS] from Panel Solicitors and Insurers, Underwriters and Brokers*

These claims are collectively referred to as "the Claims"

[emphasis added]

(3) *The Assignor has agreed with the Assignee to assign to it the entire benefit of the Claims for the consideration hereinafter appearing*

NOW THIS DEED WITNESSETH as follows:

1. *In consideration of the sums referred to at paragraph 2 below the Assignor hereby assigns to the Assignee all right, title and interest in the Claims including but without prejudice to the generality of the foregoing the right to recover all monies, assets or interests of whatever nature derived from or connected whether directly or indirectly to the Claims together with any costs and interest as may be derived from the Claims and to hold the same unto the Assignee absolutely.*

2. *The consideration for the Assignment shall be:*

2.1 [£1]

2.2 The payment by the Assignee to the Assignor within 14 days of receipt by the Assignee or on its behalf of £350,000 derived from any action taken with regard to the Claims, whether by compromise … or by determination of the Court

2.3 The payment by the Assignee to the Assignor within 14 days of receipt by the Assignee or on its behalf of 40% of all or any sums derived from the Claims, whether by compromise … or by determination of the Court PROVIDED THAT the Assignee shall be entitled to deduct, prior to any such payment

2.3.1 [costs]

2.3.2 [the £350,000]

3. The Assignee covenants that:

3.1 It will keep the Assignor and the Joint Liquidators fully informed of all proceedings or any action it takes in relation to the Claims.

3.2 It will take no steps to compromise or settle any action it may take arising from or linked directly or indirectly with the Claims without securing the consent of the Joint Liquidators to such settlement, such consent not to be unreasonably withheld.

3.3 It will instruct its solicitors to provide the Joint Liquidators on demand with reports on progress in connection with the Claims and expressly waives privilege in that respect … against the Joint Liquidators and shall further irrevocably instruct its solicitors that prior to any compromise on the Claims being effected, the terms of sub-paragraph 3.2 above requires its solicitors to secure the consent of the Joint Liquidators.

19. By clause 5 Mr Carroll provides an indemnity to Claims Direct in respect of costs and other claims arising from the conduct of the claims and agrees that he will not hold himself out as an agent of Claims Direct. Clause 6 is a prohibition upon Mr Carroll assigning his rights under the Deed.

20. There are two parts to Mr Mundy's submissions.

(1) Firstly that this is not an assignment of all claims, but only of the claims which fall within the three classes of claim identified in the recitals at (2)(a-c). If that is right, the parties agree that the only class of claim into which Mr Carroll's claim might fall is 2(a): a claim against … *Agents … for matters arising out of the operation of its business*.

(2) Secondly that Mr Carroll's claim does not fall within class 2(a). That is for two reasons. Firstly, that whilst a director may act as an agent of a company, and Mr Poole was a Director of Claims Direct, he was not acting as its agent when the company bought (and he sold) Poole and Co's vetting business; he was Claims Direct's counterparty. Secondly, Claims Direct's business was one of managing claims, and the purchase of the vetting business was not a matter arising out of the operation of that business.

21. Mr McCormick QC submits that:

(1) The assignment is an assignment of all claims, but that in any event;

(2) Mr Carroll's claim falls within class 2(a). The claim is against an agent of Claims Direct, and it is for a matter arising out of the operation of its business. That is sufficient to bring it within Class 2(a).

22. The relevant principles of contractual interpretation were not in issue. Of particular assistance is this passage from the judgment of Lord Hodge in *Wood v Capita* [2017] UKSC 24 @ [10]:

> *The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focussed solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.*

23. The assignment is plainly a formal document and was entered into by a liquidator. I do not know who drafted it or in what circumstances, but it reads as a document which will have had the input of lawyers.

24. The language of the assignment bears two possible constructions. The first is that the intention is to assign all and any claims. Key to this construction are the opening words of recital (2) "*Potential claims can be advanced including …".* This first reading emphasises these opening general words. They describe what is essentially an unlimited class of claims. The three more closely defined classes of claim at sub-paragraphs (a-c) of the recital are to be read as examples of the wider group of potential claims, but not an exclusive list of the potential claims. The use of the word *"including"* suggests that there are potential claims other than those identified at sub paragraphs (a-c) and that this is not an exhaustive list. Or to put it another way, the general words are not limited by the sub-paragraphs which follow them. Hence the closing words *"These claims are collectively referred to as "the Claims""* are to be read as referring back to the general opening words, and the effect of the recital is that the assignment assigns the rights in all potential claims.

25. When I read this clause it seemed to me curious that a draftsman should go to the trouble of identifying three classes of claim by reference to specific groups of people and areas of activity if that were not to serve some purpose beyond illustration. Mr McCormick QC's submission was that the clause was poorly drafted, and that you did not need all these words, but that that did not mean that you ignored the words which went before. He rightly emphasised the need to read the document as a whole and not to engage in an overly semantic approach. He submitted that the opening words were to be given their ordinary meaning and that there was nothing in the clause which required that they be cut down by what followed.

26. Mr McCormick QC referred to the ejusdem generis principle, and to the application of that principle in the circumstances summarised by the editors of Chitty on Contracts 33rd ed (2018) at paragraph 13-103:

> *Where specific words follow general words instead of preceding them, the House of Lords has held as a general rule, the generality of the earlier should not be restricted by the insertion of the subsequent words, which may be regarded simply as examples of what was meant by the general words. Similarly, even if the specific words precede the general words, they may be regarded as examples of what is comprehended in the general words.*

27. The House of Lords decision relied upon for that proposition is *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175. In that case a charterparty provided for demurrage subject to the following exception clause:

> *Should the vessel be detained by causes over which the charterers have no control, viz, Quarantine, ice, hurricanes, blockade, clearing the steamer after the last cargo is taken over, etc., no demurrage is to be charged …"*

28. In the event the vessel was delayed by a general dock strike over which the charterers had no control. The House of Lords determined that the initial general words of the exception clause were not controlled by the subsequent specific words and that the charterers were protected from liability for demurrage.

29. At page 182 Viscount Cave considered whether the opening general words were defined and limited by the specific words which followed them, or whether they were simply added in order to provide examples of what was meant by the general words. The structure of the clause was, of course, different to the recital in this case. In particular the draftsman had used the expressions "*viz*" and "*etc*.". Viscount Cave considered the use of those two expressions together and concluded that the intention was to give examples of the general words, and by the use of the expression "etc" to show that those examples were not intended to cover the whole ground. Viscount Finlay at 187 also found the use of the expression "*etc*" to be significant.

30. Mr Mundy's submission is that the decision in *Ambatelios* is not in point. In that case the House of Lords had to consider whether general opening words, which of themselves were clear, were cut down by the specific words which followed. His submission is that the exercise here is a different one. What I have to determine on a reading of the whole clause is whether the expression "*these claims*" in the closing words of recital (2) refers back to the opening words, or to the 3 classes of claim identified in sub paragraphs (a-c). He contends for the latter. On this reading, the opening words "*Potential claims can be advanced by the Assignor against various parties including …"* are to be seen as words of introduction, and the closing words *These claims are collectively referred to as "The Claims"* as referring back to the three classes of claim set out under sub paragraphs (a-c).

31. Mr Mundy set out six reasons for adopting that approach. I hope he will forgive me for summarising what he said. He starts by looking at the language and then at the context.

    (1) What do the words "*these claims*" refer back to? He suggested that the reader would be looking for some sort of prior defined or identified group. The opening words did not look like a definition, for they left the class of claims unlimited. The obvious source of such a definition were the three "neatly fenced" claims which followed.

    That submission is reinforced by the use of the word "collectively". It might refer to all potential claims, but the more natural reading of that word is that it points to some defined groups of claims, which might be collected together for the purposes of the deed and defined as "the Claims".

(2) What purpose do the words of sub-paragraphs (a-c) serve unless they are there to define the claims to be assigned? They do not read as a list of the examples of all the potential claims that may be brought, but a rather more considered and limited group of claims. Mr Mundy explored the structure of the sub-paragraphs, pointing out the overlapping nature of some. He submitted that this read like a definition.

(3) Allied to that is the point that if the intention had been to assign all and any claims to Mr Carroll, it would have been a simple matter to say just that.

32. Mr Mundy then looked at the broader context of the assignment. He submitted that it was highly unlikely that the liquidator would have intended to assign all and any claims. Why leave Mr Carroll to realise all the company's claims? A liquidator might be expected to take a class by class approach and to pursue the straightforward "good" claims himself. Moreover there were some claims that only a liquidator could bring. It would not be possible to assign these.

33. I am not really assisted by that last point. Mr McCormick QC submitted that there was nothing in it; that wide assignments were entirely proper; that a liquidator might not have the time or the funds to pursue claims, however good they were; and (I observe) the terms of the assignment make provision for a substantial return on claims successfully brought by Mr Carroll. Office holder claims were not capable of being assigned, and Mr McCormick QC submitted that they would not be covered by this assignment. It is important that I do not become involved in speculating about the background to the assignment; the exercise is one of construction.

34. However I regard the points Mr Mundy makes about the construction of the document as well founded. The words "*these claims*" suggest to the reader a reference back to some defined group of claims, rather than all and any potential claims. The sub-paragraphs of recital (2) read like a definition rather than as a list of examples.

35. Mr McCormick QC and Ms Palser were right to emphasise the use of the word "including". Mr McCormick QC's argument was put simply and persuasively. Ms Palser submitted that "*including*" was a strong word. But the use of that word is explained by characterising the opening words of recital (2) as words of introduction to sub-paragraphs (a-c) rather than as a definition. I agree with Mr Mundy that the canon of construction illustrated by the decision in *Ambatelios* is not in point. The question is what do the words "*these claims*" refer back to. As I read them, they refer back to the three defined classes of claims identified in sub-paragraphs (a-c). This is not an assignment of all and any potential claims.

36. The second limb of the argument is whether Mr Carroll's claim falls within class 2(a); in other words that it was a claim against one of Claims Direct's … *Agents … for matters arising out of the operation of its business including its insurance, underwriting and funding arrangements.*

37. Mr Mundy's starting point is that Claims Direct did not assign to Mr Carroll claims against directors. He accepts that a director may act as a company's agent, but the two things are different. Simply being a director does not make you the agent of the

company for all purposes. He submits that for Mr Carroll's claim to come within this class of claim, the director (Mr Poole) had to be acting as an agent of Claims Direct when he undertook the sale which gives rise to it. Or to put it more broadly, that the claim is against an agent for something he did (or did not do) as an agent. It may be that there is a claim against Mr Poole for breach of his director's duties in relation to this sale, but if he was not acting as an agent how is the claim said to be brought against an agent?

38. Mr Mundy also submits that the claim Mr Carroll brings is not a claim for matters arising out of the operation of the assignor's business. His point is that Claims Direct engaged in insurance, underwriting and funding arrangements (as the assignment itself confirms) and some claims management. He refers to the description of how that business operated at paragraph 8 of the judgment of Norris J in *SSBERR v Sullman and Poole* [2008] EWHC (Ch) 3179, a copy of which is in bundle 5 at page 33. That was its business. In contrast, this was the purchase of Poole and Co. It was not something arising out of the operation of the business.

39. Mr McCormick QC submits that to come within this class of claim is a two stage process. The first question is whether this an action against one of the classes of people listed? He submits that Mr Poole was a Director and so he was an agent of the company. He puts the matter this way in his skeleton argument: directors are agents of a company and so the ordinary usage of the word "agents" includes directors. The second question is whether this is a claim which arises out of the operation of the business? Again he submits that it is. He disagrees with Mr Mundy's submission that the agent must have been acting as the company's agent in relation to the matters which give rise to the claim. Mr McCormick QC submits that it is sufficient that he was in fact an agent. The language of the assignment does not require more.

40. Taking those points in reverse order. I do not see the need to restrict the phrase "*operation of its business*" in the way Mr Mundy suggests. Insurance, underwriting and funding were indeed the day to day "business operation" of Claims Direct, but the words "*arising out of the operation of its business*" are relatively wide. Here Claims Direct was purchasing Poole and Co's vetting business to bring that operation in house. The vetting process was linked to its day to day business, and bringing that process in house can be seen as a matter arising from the business. Mr McCormick QC makes the point by way of another example of a matter arising out of the operation of a business – his example is of a baker buying an oven for use in his bakery. I agree with Mr McCormick QC on this part of the argument.

41. I return to the first point and to whether there needs to be some link (my word) between the capacity of the potential defendant (here the agent) and the subject matter of the claim. I remind myself that this is a question of construction and of ascertaining the intention of the parties. Reading the opening words of recital (2) and sub-paragraph (a) together, I am struck by the use of the word "*for*". What is assigned is a claim against an agent **for** matters arising out of the operation of the business. The ordinary meaning of those words suggests that the claim is brought against that agent for something he did (or failed to do) as an agent.

42. The alternative would seem a little odd. For example, the Defendant may be an agent in some circumstances, but is to be sued for something unconnected with his role as

an agent. The words might bear that meaning if read literally, but in the context of the assignment of claims, where the capacity and duties of the potential defendant are of relevance, and where the nature of the claims is also defined, it is more natural to read the two parts of the definition together rather than to adopt the two stage process advocated by Mr McCormick QC.

43. The requirement of a linkage is made express in sub-paragraphs (b) and (c) by the use of the word "*their*". The point was not raised before me, but it cuts both ways. It might be argued that the absence of the word in sub-paragraph (a) shows an intention that there is to be no such link. Or it might be said that I can look at the other sub-paragraphs of recital (2) to see what the general scheme of the assignment is, and that it would be odd if claims against agents and bankers were dealt with on one basis under (a) and upon a different basis under (c).

44. Is Mr Carroll's claim against Mr Poole a claim against an agent arising out of the operation of Claims Direct's business? Mr McCormick QC submitted that this was a claim against an agent for breach of his duties to the company in relation to the sale. His focus was not on his role as the vendor of the business of Poole and Co, but on his duties as the director (and so agent) of Claims Direct in causing the sale to go through to his considerable personal benefit.

45. I note that the Particulars of Claim plead the claims against Mr Poole on the basis of his fiduciary duties as a Director of Claims Direct; see paragraph 11 and following; bundle 3 page 5. The claim is put on the basis of fraud or deceit, a dishonest breach of trust, breach of fiduciary duty and unjust enrichment. Agency is not alleged, and the duties of an agent per se are not relied upon.

46. Mr McCormick QC's approach is that the word "*Agent*" in the assignment would include a director. The point Mr Mundy makes is a fine one, but he is right to say that whilst a director may be an agent of a company, he might not be. Consequently I should not read the word "*Agent*" in the assignment as necessarily including a director without more. If the director was acting as an agent for the purposes of the matters giving rise to the claim, then the claim against him would be caught by the definition of "the Claims" but if he were not then it would not be.

47. It follows that the claim was not validly assigned.

48. **The Settlement Agreement**
Again the issue is one of construction. Once again the relevant principles are not in issue. Those of particular relevance can be summarised briefly by reference to the judgments in *Rainy Sky* and *Wood v Capita*:

(i) *The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding*

circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

Lord Clarke in *Rainy Sky* @ [21].

(ii) The subjective intentions of the parties are irrelevant; see *Rainy Sky* @ [19];

(iii) *Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause …; and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest … Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.*

Lord Hodge in *Wood v Capita* @ [11]

(iv) The court is not aware of the negotiations that led to the Settlement Agreement; they are not relevant to the task of interpreting that agreement; see

Lord Hodge in *Wood v Capita* @ [28]

(v) *Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended.*

Lord Hodge in *Wood v Capita* @ [28]

49. The Settlement Agreement begins by identifying the parties to it. The first group of parties are the "Claimants". These include the group of Claimants called the "Judica Claimants". The Judica Claimants were shareholders of Claims Direct plc who had brought claims against Mr Poole and other directors of the company. As their name suggests, they had been represented by Mr Carroll's company Judica Limited. Mr Carroll was not one of the listed Judica Claimants, but both he and Judica Limited were made parties to the agreement. Wynne Edwards and Marshall Ronald, who were the representatives of other Claimants, were also added as parties.

50. The second group are the "Defendants". These are Mr Poole, Mr Sullman and two other directors of Claims Direct plc. Three other directors were also made parties, and together with the Defendants are referred to as the "Directors".

51. Recital H provides as follows:

> *The Claimants have brought proceedings against, among others, the Directors of some of them, arising from the flotation of Claims Direct … in July 2000. These proceedings are set out in Schedule 4 and are referred to herein as the "Proceedings".*

Schedule 4 lists the various claims by reference to the Claimant, Defendant, date and place of issue and claim number.

52. Recital J provides that:

> *The parties to this Agreement have agreed a full and final settlement of the Proceedings on the terms set out herein*

53. Clauses 1 and 2 of the agreement provides for money to be paid by the Claimants to Curry Popeck, a firm of solicitors who had been:

> *… instructed on behalf of the Claimants to oversee the preparation and implementation of this Agreement on their behalf including the receiving of the Settlement Sum and to warrant that Peter Carroll and/or Judica are authorized to enter into this agreement on behalf of the Claimants.*

54. Clause 3 provides that:

> *The terms of this Agreement are in full and final settlement of the Proceedings including damages, interest, costs, uplifts, fees and disbursements including without limitation ATE insurance premiums, and any taxes whatsoever which either the Claimants or their representatives and agents may have to pay in relation to such sums.*

55. Clause 4 provides that:

> *In consideration of payment of the Settlement Sum, the Claimants on behalf of themselves, their successors and assigns, hereby release and discharge the Defendants … from any and all liabilities and obligations in respect of the Proceedings whether past, current and/or future and whether currently existing or arising in the future, arising out of or in any way connected with the Proceedings.*

56. By Clause 5 the Claimants confirmed that they withdrew all allegations of fraud against the Defendants. Clause 6 provided that following payment of the Settlement Sum, the Claimants would consent to the dismissal of the Proceedings. Clause 7 was Curry Popeck's warranty that Mr Carroll and Judica were authorised to sign the agreement on behalf of the Claimants.

57. Clause 9 provides that:

> *The Claimants … Judica and Peter Carroll expressly warrant and represent that they are not aware of any other actions or claims issued or to be issued against the Directors concerning … Claims Direct save for* [an identified claim] *and to the extent that Peter Carroll has indicated an intention to*

commence private prosecution proceedings against the Directors, or some of them, he undertakes not to take any steps in this regard and not to assist or encourage any other person in this regard.

58. Clause 10 is the important clause for the purposes of this application:

> *Wynne Edwards, Judica, Marshall Ronald, [Curry Popeck] and* ***Peter Carroll*** *each undertake and confirm that they* ***will not*** *represent or* ***assist, whether by way of formal contract or retainer or otherwise, any other individual, company****, partnership or group of individuals,* ***or their representatives, in any actions or claims whatsoever against the Directors,*** *or assist in or involve themselves in, any third party investigations or activities involving the Directors whether regulatory or otherwise, save as may be required by law or statute.*
>
> [emphasis added]

59. Clause 17 provided that the agreement be construed in accordance with the laws of England and Wales and by clause 18 that the agreement and its schedules were the entire agreement.

60. Mr Poole's case is that clause 10 bars Mr Carroll's claim. By pursuing the claim as an assignee in circumstances where the assignment provides that the liquidators take the first £350,000 and 40% of the proceeds, he is assisting another person in an action or claim against one of the Directors.

61. Mr Mundy submits that:

(1) This is an agreement which appears to have been drafted with the assistance of lawyers.

(2) Clause 10 is widely drawn and deliberately so. The word chosen is "*assist"*.

(3) The use of *"or otherwise*" he accepts is to be read ejusdem generis with "*formal contract*" and "*retainer*" and so relates to the arrangement between Mr Carroll and the person he is assisting.

(4) The list of those who might be assisted is wide; and includes "*any other individual, company …*". Claims Direct and its liquidators are caught.

In his skeleton argument he summarises his position in this way. It does not matter who the claim is brought by. What matters is who the claim is brought against. He submits that Clause 10 says that expressly, for by that clause Mr Carroll was prohibited from assisting others in any actions or claims whatsoever against the Directors.

62. At the heart of the argument Mr Mundy deploys, is that it would be perverse if Clause 10 prohibited Mr Carroll from assisting the liquidators bringing claims against Mr Poole in the company's name (which it does), but allowed him to take an assignment

of the company's claims and bring a claim in his own name on terms which provide that the liquidator is a substantial beneficiary of any success.

63. I see Mr Mundy's point, but I have difficulty construing the clause as he suggests. Clause 10 contemplates Mr Carroll representing or providing assistance to **others**. Mr Carroll's case is that he is bringing his own claim as the equitable assignee of Claims Direct. There is nothing in the language of the Settlement Agreement which contemplates Mr Carroll bringing a claim of his own, whether as assignee or otherwise, or prohibits him from doing so.

64. Mr Mundy did not suggest that this was not to be seen as Mr Carroll's claim. His "assistance" argument is not defeated by the lack of any direct prohibition on Mr Carroll bringing his own claim. The effect of his argument is that if such a claim assists another, then it is prohibited. He would accept that it requires a broad reading of the word *"assist"*, but the nature and language of the agreement justify that.

65. The language of the prohibition in clause 10 is of importance. The prohibition applies to assistance "*in any action or claim*". The word "*whatsoever"* refers to the action or claim, not to the assistance. Is paying the liquidator the first £350,000 and a share of 40% thereafter assisting **in** a claim? It may have the effect of getting in the company's debts and benefitting the liquidation, but it strains the words somewhat to say that it is assistance **in** a claim.

66. I can see that the result of construing the clause as Mr McCormick QC submits allows Mr Carroll to get around the prohibition on assistance. But construing the assistance provision to prevent Mr Carroll from bringing his (assigned) claim is inconsistent with the absence of any prohibition on him bringing a claim. The counter-argument is that such a claim would not be prohibited because it was Mr Carroll's claim, but only because it amounted to the assistance of an "other" contrary to clause 10. But again that puts something of a strain on the ordinary meaning of the words.

67. Where a clause bears two potential meanings, I should look not only at the language being used, but at all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Given those matters, how would this clause have been understood? To my mind this is the key to the construction of this clause. Mr Carroll and Judica had been representing and assisting the Judica Claimants, and Mr Edwards and Mr Ronald had been performing a similar function for other Claimants. That is the plain and obvious context to the drafting of clause 10. The intention is to stop Mr Carroll doing the same sort of thing again. It was aimed at what I have described as his activities as a claims manager. Hence the words *"…represent or assist … in an action or claim".*

68. That approach is also consistent with the central purpose of the Settlement Agreement, which is to settle the Proceedings brought by the Claimants; see Recital J. The Proceedings were a series of identified claims brought by named persons. The warranties by the claims managers (as I have described them) are obtained as a part of that settlement and reflect their role in the Proceedings. But there is nothing to prevent the claims managers bringing claims of their own, whether as assignees or otherwise. It cannot properly be said that the intention of the agreement was to bring total peace between Mr Carroll and Mr Poole.

69. Mr Mundy submits that this gives rise to a result which fails to accord with commercial sense (or business common sense). I appreciate that as events have happened, it allows Mr Carroll to sidestep the assistance provision, but in the context of an agreement which would have been negotiated to some extent, I cannot assume too much. This may be a bad bargain. It may be that the issue of assignment was considered and a decision made not to deal with it. It may be that it was not considered at all. I cannot say, and it would be wrong to speculate.

70. Finally Mr Mundy submitted that if I was against him on the construction point, it was open to the Court to imply a term to avoid the commercial incoherence that results. Whilst I can see that the outcome is not entirely satisfactory, that is not an uncommon situation when agreements fail to cater for all eventualities. Leaving to one side the arguments as to the correct approach to the implication of terms in these circumstances, I do not regard the agreement as commercially incoherent nor the result as an absurdity. Mr McCormick QC submits that such an implied term (whatever its terms may be) is neither necessary to give business efficacy to this agreement nor so obvious that it should be implied. I agree.

71. **Conclusion**
I find for Mr Poole on the assignment point, and consequently his appeal succeeds. I will hand this judgment down on a date to be fixed. If the parties intend to be represented by Counsel then they should identify dates when they are available and contact the listing officer to fix a date within the next 7 days. If the minute of order is agreed and there are no live applications I would agree to dispense with any attendance upon receipt of a draft minute of order signed on behalf of the parties. Otherwise any application can be made on handing down. May I thank Counsel for their considerable assistance.

20.6.19