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Case No: CR-2019-004456
Case No. CR-2020-003993

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2021

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Case No. CR-2019-004456

IN THE MATTER OF RHINO ENTERPRISES PROPERTIES LIMITED AND ASKWITH INVESTMENTS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) ROBERT NICHOLAS JASON SCHOFIELD
(2) RHINO ENTERPRISES HOLDINGS LIMITED — **Applicants**

- and –

(1) MATTHEW DAVID SMITH
(2) CLARE BOARDMAN — **Respondents**
(the former administrators of the above-named Rhino Enterprises Properties Limited and Askwith Investments Limited)

Case No. CR-2020-003993

And Between:

(1) RHINO ENTERPRISES PROPERTIES LIMITED
(2) ASKWITH INVESTMENTS LIMITED — **Claimants**

-and-

CLYDE & CO LLP — **Defendant**

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Mr Stephen Davies QC and Mr Neil Levy (instructed by **Horwich Farrelly**) for the Applicants in CR-2019-004456 and the Claimants in CR-2020-003993
Mr Tom Smith QC and Ms Hannah Thornley (instructed by **Faegre Drinker Biddle & Reath LLP**) for the Respondents in CR-2019-004456
Mr Joseph Curl QC and Ms Faith Julian (instructed by **DAC Beachcroft LLP**) for the Defendant in CR-2020-003993

Hearing dates: 24 (reading) 25-27 May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The time and date for hand-down is deemed to be 10:30am on 22 September 2021

HH Judge Davis-White QC :

Introduction

1. I have before me primarily two applications, each to strike out a set of proceedings or for summary judgment dismissing those proceedings. The two sets of proceedings are connected. Each set of proceedings was issued on 5 July 2019. The basis of each of the applications is that the claims in question have been settled and released by a settlement agreement. The respondents/defendant in the proceedings before me are not parties to that settlement agreement. However, they say that they are entitled to rely upon the same under the provisions of the Contracts (Rights of Third Parties) Act 1999 (the "1999 Act"). The applicants/claimants in the proceedings say that the settlement agreement does not release relevant liabilities of either the respondents or the defendant.

2. The questions before me, therefore, primarily turn on the construction to be given to the relevant settlement agreement and whether or not it does indeed settle the claims now brought by the two sets of proceedings. Tied up with that issue is a question as to the admissibility of evidence regarding the intentions of the parties which did enter into the settlement agreement. A further issue is raised in one of the sets of proceedings, which is whether the respondents to the proceedings, former administrators appointed under the Insolvency Act 1986, are, in any event, prevented from relying upon the settlement agreement, by reason of the principle in *Ex P James* (1874) 9 Ch App 609.

3. The first proceedings are misfeasance proceedings brought pursuant to paragraph 75 of Schedule B1 to the Insolvency Act 1986, by application under r1.35 of the Insolvency (England and Wales) Rules 2016. The application is brought by Mr Robert Nicholas James Schofield and Rhino Enterprises Holdings Limited ("REHL") (the "Misfeasance Proceedings"). The applicants are each a contributory of one of the two companies concerned. Mr Schofield is a contributory of Rhino Enterprises Properties Limited ("REPL"). REHL is a contributory of Askwith Investments Limited ("Askwith"). I refer to REPL and Askwith together as the "Companies". The claim is brought against the two former administrators of each of the Companies, Mr Matthew Smith and Ms Clare Boardman (the "Former Administrators"). Each of the Former Administrators was, at all material times, a partner in Deloitte LLP.

4. The Misfeasance Proceedings seek, pursuant to paragraph 75(4)(c) of Schedule B1 to the Insolvency Act 1986, contribution by the Former Administrators to the assets of each of the Companies by way of compensation for alleged misfeasance and/or breaches of duty owed by the Former Administrators.

5. I shall need to expand upon the explanation of the Misfeasance Proceedings later in this judgment. However, for present purposes they primarily involve allegations that the Former Administrators wrongly accepted appointment as administrators by reason of their close connection with their appointor, Barclays Bank plc ("Barclays") and that, when in office, they wrongly failed to pursue interest-rate swap claims that each of the Companies is said to have had against Barclays. The swap claims involved alleged mis-selling and LIBOR manipulation. One of the alleged results of the alleged breaches of duty is said to be that certain properties of the Companies were sold in order for debts to Barclays to be discharged. The Former Administrators deny all allegations of wrongdoing and breach of duty. The claims against Barclays were pursued, by legal

proceedings, brought by the Companies (and another company within the same group) after the administrations had ended. Those proceedings ended in the settlement agreement relied upon by the Former Administrators (and by the defendant in the second set of proceedings).

6. In circumstances where the Former Administrators had been discharged, as they had in this case, the Misfeasance Proceedings required the permission of the court before they could be brought (see paragraphs 75(6) and 98 of Schedule B1, Insolvency Act 1986). Such permission was granted, retrospectively, by HH Judge Simon Barker QC (sitting as a Judge of the Chancery Division) on 3 September 2020 (see [2020] EWHC 2370 (Ch)). At that point the settlement agreement had not been disclosed to the Former Administrators. It was not relied on before HH Judge Simon Barker QC. As I shall go onto explain, the Former Administrators at that point relied, unsuccessfully, upon release clauses in the relevant company voluntary arrangements pursuant to which the administrations had come to an end.

7. By their application dated 27 November 2020, the Former Administrators seek (among other things) (a) an order that the claim against them (which is technically an application) be struck out under CPR r3.4(2)(a) on the basis that the Particulars of Claim disclose no reasonable grounds for bringing the claim and/or (b) that summary judgment be entered in their favour under CPR r24.2 on the basis that the applicants have no real prospect of succeeding on the application.

8. Mr Stephen Davies QC, leading Mr Neil Levy, appears for the applicants in the Misfeasance Proceedings. The Former Administrators are represented by Mr Tom Smith QC, leading Ms Hannah Thornley.

9. The second proceedings are by way of Part 7 claim form brought by the Companies (the "C&C Claim"). Those proceedings were originally brought in the Business List but were later transferred to the Companies and Insolvency List so that they could be case managed together with the Misfeasance Proceedings. They are brought against Clyde & Co LLP ("C&C"). C&C was instructed to act as lawyer by the Former Administrators for the purpose of giving advice regarding the swaps claims that the Companies might have against Barclays. There is a dispute as to the extent to which C&C entered into a contract of retainer with the Companies, as opposed to the Former Administrators personally, and as to whether it owed duties in tort, and fiduciary duties, to the Companies, whether (if at all) alternatively or additionally to duties owed to the Former Administrators.

10. The claims brought in the C&C Claim will, again, need to be expanded upon later in this judgment. However, for present purposes they involve allegations that C&C wrongly accepted appointment by the Former Administrators, by reason of its being in a position where its duties to the Companies conflicted with its interests arising from a connection with Barclays. In addition, it is said that C&C failed to pursue, and/or to take relevant steps in connection with the pursuit of, and/or to give proper advice regarding the pursuit of the Companies' claims against Barclays.

11. By an application notice dated 28 September 2020, C&C sought (among other things) an order that the claim be struck out under CPR r3.4(2) and/or summary judgment be entered under CPR r24.2(a) on the grounds set out in the evidence filed with the

application notice. By a further application notice dated 18 November 2020, C&C sought further orders including an order that the claim be struck out and/or summary judgment on the grounds set out in the second witness statement of Mr Langley, "i.e. all claims brought in these proceedings have been released".

12. The basis of the September application was a case that (a) C&C did not owe any duty to the Companies as pleaded at any relevant time; further or alternatively, (b) there was no breach of duty; further or alternatively, (c) there was no relevant causal loss in that the Companies pursued the claims in relation to the swaps post administration and Mr Schofield had sufficient opportunity to prevent sales of the Companies' properties and chose not to do so, further or alternatively, (d) the claim is an abuse of process, on a proper application of the principle in *Aldi Stores Ltd v WSP Group* [2007] EWCA Civ 1260, on the basis that it should have been pursued at the same time as the swaps claims against Barclays.

13. By Order of ICC Judge Barber dated 4 December 2020, the strike out/summary judgment part of the September application, other than the abuse of process argument based upon the *Aldi* principle, was adjourned to be dealt with on the handing down of what has now become this judgment. By an email of 28 May 2021, Mr Curl, counsel for C&C gave notice that the abuse of process argument was not being pursued before me.

14. The November application of the Former Administrators relied upon the settlement agreement that I have referred to. That settlement agreement only became available to C&C in September 2020 and to the Former Administrators in November 2020, in each case following discussions and the agreement of confidentiality terms between those parties and Barclays.

15. The November application of C&C also relied upon what has been described as the principle in the case of *Jameson v Central Electricity Generating Board* [2000] 1 AC 455. For present purposes the principle can be described as being, at its core, that where a party reaches a settlement against one or more of several joint tortfeasors which fully compensates him for any loss, then no cause of action survives against any other joint tortfeasor in respect of the same loss. It was clarified at the commencement of the hearing that C&C no longer relied upon this principle as a basis for any strike out/summary judgment application before me.

16. Mr Stephen Davies QC, leading Mr Neil Levy, appears for the Companies in the C&C Claim. Mr Joseph Curl QC, leading Ms Faith Julian, appears for C&C.

17. For convenience, and although the claimants in the C&C Claim are not identical to the applicants in the Misfeasance Proceedings, I refer to those claimants and applicants collectively as the "Claimants". Where necessary this term should be taken to refer to the claimants or the applicants (or both) as the context requires.

18. For completeness, I should mention that also to be dealt with following the handing down of this judgment are applications of the Claimants dated 11 December 2020, in both proceedings, seeking determinations in relation to various issues relating to legal professional privilege. The case management of these issues is a consequence of an order of Mr Justice Adam Johnson dated 25 February 2021.

19. I am grateful to all Counsel for their written and oral submissions and assistance in this case. I also record my gratitude to the transcribers, Opus 2, and to the various firms of solicitors involved. In particular, the electronic bundle was of particular assistance and proved, if proof were needed, that time and money spent in its preparation can be well spent and save time and cost later.

The Settlement Agreement

20. The settlement agreement, which is relied upon both by the Former Administrators and C&C, is a settlement agreement dated 1 December 2015 and made between (1) Rhino Enterprises Limited ("REL"), (2) REPL, (3) Askwith and (4) Barclays (the "Settlement Agreement"). For convenience I shall refer collectively to the first three parties to the Settlement Agreement as the "Rhino Settlement Companies".

21. The primary drafting of the Settlement Agreement was carried out by Clifford Chance LLP, then solicitors to Barclays and whose name appears on the settlement agreement. Collyer Bristow LLP was the firm of solicitors acting in the proceedings (and the negotiations leading to the Settlement Agreement) for the relevant Rhino Settlement Companies.

22. The Settlement Agreement, as its recitals make clear, was to settle a dispute involving two elements. The first involved financing extended by Barclays to REPL and Askwith in 2007 and 2008 in the form of two loans and associated interest rate swap products. The second involved the implementation by REL and REPL of an "opco/propco structure." The Settlement Agreement also settled then extant proceedings brought in the Commercial Court by REL, REPL and Askwith against Barclays (the "Barclays Proceedings"). Those proceedings had been brought in 2014 after the termination of the administrations of each of the Companies. Those proceedings encompassed (among other things) the swaps claims that the Former Administrators and C&C had considered during the course of the relevant administrations. Pursuant to the Settlement Agreement, the Barclays Proceedings were discontinued with no order as to costs. The Settlement Agreement records that the Agreement was reached following a mediation on 30 November 2015.

23. The Settlement Agreement released various claims. It also extended the right to enforce certain of its terms to the "Parties' Affiliates", as defined by the Settlement Agreement. That extension was effected pursuant to the Contracts (Rights of Third Parties) Act 1999. The Former Administrators and C&C each say that they are entitled to enforce the relevant clauses under the Settlement Agreement pursuant to these provisions. They also say that the Settlement Agreement has the effect of releasing the claims now brought against them. This is denied by the Claimants.

24. Because the Settlement Agreement has to be read as a whole, and given the submissions that I have heard, I set out the main relevant provisions which have been referred to before me in a Schedule to this judgment.

25. I should add that the settlement agreement is subject to confidentiality terms. Barclays and the parties before me all agreed that the settlement figure which Barclays was required to pay the Rhino Settlement Companies should be disclosed to me, but on the basis that the precise figure would not be mentioned in open court nor set out by me in any judgment. I was not addressed on the issue of whether I should issue a short

"closed" addendum to this judgment dealing with this aspect (see notes in the White Book at e.g. 40.2.6) and will invite supplementary submissions on this question at the hearing which is to take place regarding matters consequential on this judgment.

The Companies and Associated Parties

26. At all material times the position has been (and remains) as follows. The Companies formed part of a group of companies owned and controlled by Mr Schofield, the first applicant in the Misfeasance Proceedings (the "Rhino Group"). REPL and REL are wholly-owned subsidiaries of REHL, the second applicant in the Misfeasance Proceedings. Mr Schofield holds something in the region of 86 per cent of the shares in REHL. Askwith is also a member of the Rhino Group.

27. By letter of claim dated 29 May 2013, REPL and Askwith had asserted claims against Barclays.

28. In July 2013, a default occurred under an interest-rate swap facility between REPL and Barclays, due to a failure by REPL to meet a due payment. Following this, Barclays terminated a swap facility with REPL and an interest rate swap facility with Askwith. It also issued demands for payment of sums due following the closing out of such facilities. In addition, Barclays made demand upon REL as guarantor.

29. On 14 August 2013, Barclays, as qualifying floating chargeholder, appointed the Former Administrators as administrators of each of (1) REL; (2) Askwith and (3) REPL.

30. Initially, the Former Administrators engaged Pinsent Masons LLP to provide them with legal advice and services. Pinsent Masons LLP was a firm on the Barclays' panel of solicitors. The Former Administrators also engaged C&C to provide advice regarding the potential claims against Barclays as regards the swaps. According to its evidence, C&C was not on Barclays' panel of solicitors. The Former Administrators say that they received advice that the prospects of success of the swaps claims was about 40% and that they did not regard it as being in the interests of creditors to pursue such claims. Further, and in any event, they say that they lacked funding to pursue such claims. However, they did agree standstill agreements with Barclays so that the claims against Barclays did not become statute-barred under the Limitation Act 1980.

31. The Former Administrators came to the view, as regards each company in administration, that the first objective of administration (rescuing the company as a going concern: see paragraph 3 of Schedule B1 to the Insolvency Act 1986) was not reasonably practicable of achievement. As required, they then went on to pursue the second objective in the hierarchy of objectives, that of achieving a better realisation for the company's creditors as a whole than if the company were to be wound up (without first being in administration).

32. In December 2013, Collyer Bristow, then solicitors for Mr Schofield, wrote complaining that the administrators had wrongly accepted that Barclays was entitled to some £20.9 million, wrongly rejected re-financing proposals by Mr Schofield and wrongly decided to sell properties of the Companies. They warned that proceeding with the sales could cause the Former Administrators to be liable for breach of duty.

33. However, in pursuit of the second statutory objective of administration, certain properties of the Companies were sold, which the Claimants assert amounts to about 90% of the value of the Companies' property portfolios prior to administration. The proceeds of sale were used to repay Barclays and other secured creditors. The sale proceeds of the properties were in the region of £24.4 million. After payment of secured liabilities of other lenders, the sums paid to Barclays reduced its claim to about £663,000.

34. Following the sale of properties, Mr Schofield suggested that the relevant companies exit administration through company voluntary arrangements, with the support of Barclays. Company voluntary arrangements (the "CVAs") for each relevant company were approved under the statutory procedure on 25 June 2014. Control of the Companies passed back to the directors under the terms of the CVAs on 1 August 2014. The administrations determined on 13 February 2015 and the Former Administrators were then discharged pursuant to the provisions of Schedule B1 to the Insolvency Act 1986.

35. The Barclays Proceedings were commenced in 2014 with particulars of claim being served on 29 January 2015. As I have said, they were compromised at a mediation which commenced on 30 November 2015.

The claims against Barclays, compromised by the Settlement Agreement

36. The following details are taken from the Points of Claim and the summary of them (prepared for the purpose of paragraph C1.1 of the Commercial Court Guide) in the Barclays Proceedings. They accordingly represent the case asserted in those proceedings against Barclays. I do not need to explore the extent to which they were contested by Barclays.

37. Until 2007, REL owned a portfolio of properties (the "REL Portfolio"). The properties were in Birmingham, two addresses in Leeds and one address at Walthamstow, London. REL used the REL Portfolio for document storage facilities, archiving, waste paper management and shredding services, sub-rental receipts and commercial parking (the "Operating Business").

38. During 2007, REL was incentivised and persuaded by Barclays to change its bankers from Yorkshire Bank plc to Barclays. As part of that move, REL was advised by Barclays to create a new business structure so that a new company would own the REL Portfolio, to which company the portfolio would be transferred and thereby the REL Portfolio would be separated from the Operating Business. This advice was duly followed. REPL became the company holding the REL Portfolio. REL then continued to carry on the Operating Business, paying rent to REPL. This change in business structure is what has been referred to as the "Opco/Propco Structure". The implementation of the structure was, at least in part, said by Barclays to facilitate lending by Barclays to the group through a loan to REPL.

39. Following various discussions, in June 2007, Barclays confirmed that it was prepared to loan a sum of up to £16 million to REL/REPL. That eventually became an offer of a loan to REPL of up to £16 million together with a long term step-up swap (the "Rhino Swap"), which offer was accepted and the loan and Rhino Swap entered into on or about 14 December 2017. The Opco/Propco Structure, itself a condition of the overall

deal, was also implemented. The loan was secured over REL's assets and the shares in REL and a number of group cross-guarantees were put in place with regard both to the loan and the associated swap.

40. In 2008, REPL was considering acquiring a new property in London (Victoria Way). Barclays proposed to advance some £7.8m to Askwith to buy the property. On that basis, Askwith entered into an interest rate swap (the "Askwith Swap"). The loan and Askwith Swap were entered into in July 2008.

41. In the Barclays Proceedings, the claimants' case (in summary) was that:

(1) the Askwith and Rhino Swaps were each mis-sold as being unsuitable, ill-advised and ultimately causing the insolvency of REL and REPL and Askwith;

(2) Barclays was said to have realised that, but for the Swaps, the businesses of the relevant companies were healthy and profitable and hence Barclays planned an exit from the relationship by forcing asset realisations and formal insolvency;

(3) In October 2009, Mr Schofield discovered that for over a decade, REL's finance director (Ms Bellan) had slowly been defrauding the claimants, by about £1.3million.

(4) Barclays then required Mr Schofield (1) to inject £5million; (b) to procure the sale of REL's business or (3) to place REL and REPL into administration. As a consequence, a large portion of REL's business was sold in July 2010 at a considerable undervalue.

(5) In November and December 2010 the claimants entered into deeds restating the loans and confirming the same. The circumstances in which this occurred amounted to economic duress.

(6) The claimants' solicitors served notice rescinding the swaps in July 2013. Barclays rejected the notices. It proceeded to terminate the Swaps and made demands for payment of the remaining outstanding borrowing by Askwith and REPL and swap closure costs. The companies were then placed into administration without proper grounds.

(7) The claims made were as follows:-

(a) The loans and Swaps were referenced to LIBOR. Implied representations were made by Barclays that its participation in setting LIBOR was honest. Such representations were relied upon by the claimants in entering into the transactions. The representations were false in that Barclays was engaged in LIBOR manipulation. They were made fraudulently, alternatively, negligently. Alternatively the representations were implied terms of the Swaps, which were breached by the LIBOR manipulation.

(b) The Opco/Propco restructuring was carried out in reliance on advice that the restructuring would be beneficial and an implied representation that the Bank was in a position to advise. The representations were false and made negligently.

(c) False representations were made regarding the suitability of, and the protection afforded by, the REPL Swap. The representations were made negligently. The representations were relied upon. Contractual and common law duties to advise competently regarding the Swaps were also broken.

(d) As regards rescission of the swaps, restitution of sums paid under the swaps (£9.8 million) or damages in lieu of rescission were claimed. As regards the restructuring, had that not taken place it was said that REL would have had properties worth no less than £39.1 million, REPL and Askwith claimed compensation for the costs incurred as a result of entering into the Swaps, alternatively the difference between those costs and the costs of suitable Swaps.

42. Paragraph 99 of the relevant Particulars of Claim made clear that the claimants reserved their rights in respect of all and any claims that they might have against the Former Administrators and that they did not for the time being seek to make any claim against them in the proceedings.

The disputed evidence of Mr Schofield

43. There is evidence regarding the Companies' intentions and beliefs regarding pursuit of claims against the Former Administrators and C&C which it said were made known to Barclays and which is relevant in construing the Settlement Agreement. There is a dispute as to whether this evidence that the Claimants rely upon in the applications before me is admissible.

44. The Claimants say that a crucial fact known to Barclays, before and at the time of negotiation of the Settlement Agreement, is highly relevant, namely the intention of the relevant Rhino companies to bring proceedings separately against the Former Administrators and C&C. As I understand it, it is said by the Claimants that such evidence goes so far as to be evidence that it was agreed by Barclays that any proceedings against Barclays, and settlement of the same, would not encompass the proposed proceedings against the Former Administrators and C&C. The Former Administrators and C&C say that the evidence does not go so far as the Claimants have submitted that it does and that it is not admissible on the question of construction of the Settlement Agreement.

45. The evidence in question is to be found in the witness evidence of Mr Schofield and that of Mr Mark Dennis, formerly a partner in Knights Plc, now a partner in Horwich Farrelly Limited, each firm successively being solicitors for the Claimants. As I understood matters, Mr Davies accepted that Mr Mark Dennis' evidence on the point did not add to Mr Schofield's evidence. This was because the source of Mr Dennis' evidence on the point was Mr Schofield. At the relevant times, Mr Schofield's solicitors had been Collyer Bristow. Accordingly, I need only consider Mr Schofield's evidence. Further, it seems to me that I should assume that the case puts the matter at its highest from the point of view of the evidence that Mr Schofield is able to give himself.

46. Mr Schofield's evidence is that between 2013 and the mediation on 30 November 2015, he attended various meetings with Barclays and he took every opportunity to complain about the conduct of the administration, asserting that the Former Administrators were not acting "correctly" and that they had caused the Companies to incur significant

losses. On every occasion, he says, he was informed by Barclays (or more accurately, by those acting for Barclays) that the Former Administrators had acted/were acting independently of Barclays and that if there was a complaint about losses flowing from their actions this was not for Barclays to deal with and that Mr Schofield (and/or the Companies) should instead take action against the Former Administrators and their advisors.

47. He also says that, as regards the Settlement Agreement:

> "*So far as REPL, Askwith and REL were concerned, it was never the intention that the Settlement Agreement would include losses caused by the Former Administrators or C&C; or that it would operate to release the Former Administrators from liability under a misfeasance claim brought by contributories; or that it would operate to release C& C from liability under a professional negligence claim brought by the Companies*."

48. He gives a number of detailed examples of the sorts of communications with Barclays that I have referred to earlier. Going directly to them, they can be summarised as follows.

49. At a meeting on 11 September 2013 with officials of Barclays, he says that he was told by them (in particular by a Mr Alagar, then UK Head of Restructuring at Barclays) that what the Bank had done was legal and normal but if Mr Schofield/the Companies felt that the Former Administrators had acted "incorrectly" then "*we should take that up with them and it was nothing to do with the Bank.*"

50. At a meeting on 4 March 2014, Mr Schofield says that he told Mr Smith (then one of the administrators) that he would be looking to bring a claim against the Former Administrators after resolution of the Barclays Claim.

51. On 5 March 2014, Mr Schofield says that he received a phone call back from a Mr Donal Delahunt of Barclays. Among other complaints about or connected to the Former Administrators (such as they were not independent and nothing more than a crucial part in Barclays' process for stifling claims), he says that he complained that the Former Administrators were handling the administrations in breach of their duties and that they were simply carrying out Barclays' bidding. He says that Mr Delahunt reacted by denying that this was the case and that if Mr Schofield felt that the Former Administrators were not behaving correctly, this was nothing to do with Barclays, was outside Barclays' control and that any complaints should be directed at the Former Administrators who were independent of Barclays and agents of the court.

52. The mediation which resulted in the Settlement Agreement, took place on 30 November 2015. Mr Schofield's evidence on the point is as follows:

> "*20. The discussions…were mainly a negotiation/haggling regarding an amount for a settlement. Mr Delahunt, just as he had done in our telephone call on 5 March 2015, said that, whilst he denied any knowledge of any improper conduct by the* [Former] *Administrators, never mind playing any part in it, any such complaints or claims should be brought against the administrators. This was the basis and understanding in the mediation on which we settled the Barclays Claim. Barclays*

> *were washing their hands/distancing themselves from any such involvement in or responsibility for the actions of the* [Former] *Administrators.*
>
> *21. My clear recollection is that all parties to the Settlement Agreement operated on the basis that Barclays were prepared to settle the Barclays Claim but not any claims we might have against the* [Former] *Administrators. I confirm that no discussion took place at any time with Barclays about also settling our claims against the* [Former] *Administrators. Barclays' position was unequivocal-that was nothing to do with them-it was exclusively a matter for us. My own motivation in settling with Barclays on behalf of my companies was so that I could get them back on an even keel and then pursue the* [Former] *Administrators and their advisors. We wanted to recover the losses caused by the* [Former] *Administrators having sold almost all of the Companies' assets to pay Barclays when they should have pursued Barclays for having mis-sold the swaps (which had brought about the Companies' downfall).*"

53. The position of the Former Administrators and C&C regarding the admissibility of this evidence can be stated fairly shortly:

(1) The evidence is not part of the objective "background facts" known to the parties but rather evidence of what the parties (or Mr Schofield) meant or intended by the Settlement Agreement. As such it is inadmissible evidence of prior negotiations, involving evidence of the subjective intention of the parties.

(2) To the extent that the evidence is sought to be relied upon as identifying the object of the Settlement Agreement it is either inadmissible or of no weight because of the detailed and unambiguous terms of the Settlement Agreement.

The current sets of proceedings

54. There is a close overlap between the heads of loss claimed against Barclays in the earlier proceedings, on the one hand, and those claimed against the Former Administrators in the Misfeasance Proceedings and against C&C in the C&C Claim, on the other hand. The following is very much a shortened version of the main elements of the claims but I have of course taken into account the full statements of case.

55. In the Particulars of Claim in the Misfeasance Proceedings the claim is summarised at paragraph 5 as follows:

> "*5. In these proceedings Mr Schofield and REHL allege that by causing REPL to sell 2 properties and* [Askwith] *to sell 3 properties in 2014, the Respondents in their capacity as joint administrators ("JAs") breached a fiduciary or other duty in relation to REPL and/or* [Askwith] *or have been guilty of misfeasance and they should be ordered to contribute such sum as the court considers appropriate to the property of REPL and/or* [Askwith] *by way of compensation."*

56. Among other matters, the Particulars of Claim go on to assert that:

(1) Barclays has a strong informal control over Deloitte such that where partners in Deloitte are appointed administrators over a company with a serious and substantial claim against Barclays, members of Deloitte are either contracted not to litigate against Barclays or cannot pursue the same without fear or favour and/or the appropriate independence (defined in the Particulars of Claim as "Litigation Disability").

(2) The Former Administrators appointed C&C to advise/act with regard to the claims against Barclays in circumstances where C&C was not a firm with an expertise in swaps mis-selling claims and itself had recently acted for Barclays in a $111 million bank loan facility to a Bermuda-based insurance management provider.

(3) In breach of fiduciary duties owed to each of the Companies, the Former Administrators, accepted their appointment. The Companies should be placed into the position they would have been had competent independent administrators been appointed instead.

(4) Having accepted office, the Former Administrators acted in breach of their fiduciary and other duties, including statutory duties, in the conduct of the administrations because they were tied to a particular outcome, namely achieving what is defined as "Barclays' Interest". Barclays' Interest is said to be the short-term full recovery by Barclays of its debt without set-off or counterclaim, at the expense of the longer term interests of other creditors and shareholders.

(5) They also acted in breach of their fiduciary (and other) duties in a number of detailed respects including by wrongly instructing C&C to advise on the merits, by wrongly relying on C&Cs advice and in authorising C&C to write various letters.

(6) The measure of loss is to be assessed on the basis that, had the Former Administrators acted properly throughout (or had competent independent administrators been appointed) the sale of the properties would not have taken place and the Companies would have retained their properties and the benefit of the settlement with Barclays. The loss is therefore the loss of the various properties and the net income which would have been derived from them if not sold, calculated at about £18.7 million, alternatively and in any event the costs and expenses incurred by the Former Administrators in investigating the swap claims and instructing C&C.

57. As regards C&C, the Particulars of Claim largely reflect those in the Misfeasance Proceedings, but tailored to a claim against C&C.

58. The claim is one for breach of contract, negligence and/or breach of fiduciary duty in acting as a solicitors for and advising the claimant companies (REPL and Askwith) in relation to the dispute with Barclays.

59. Among other things, the statement of case asserts:

(1) C&C were retained by the Former Administrators acting as agents for and on behalf of the Companies and accordingly the retainer was by the Companies.

(2) C&C owed each Company a contractual duty of reasonable skill and care; an equivalent duty to act with reasonable care and skill at common law in the tort

of negligence; and a fiduciary duty of loyalty and fidelity requiring C&C not to place itself in a position of conflict between duty and self-interest and to act with single-minded loyalty to the Companies.

(3) These duties were breached by C&C in accepting instructions from the Former Administrators and continuing to act and in thereafter being influenced by Barclays' (and their own self-) interests and/or in wrongly failing to carry out various steps but also in wrongly failing to give proper advice.

(4) Had C&C not acted in breach of duty, the Companies would have been rescued as going concerns, the swaps claims being pursued whilst enabling the Companies to retain their properties pending resolution, and a settlement with Barclays would have been achieved that would have enabled the Companies to retain their properties and to finance ongoing liabilities from trading income and/or support from Mr Schofield.

(5) The Companies should therefore be compensated for the loss of the relevant properties in a sum calculated at £18.7 million and for the costs and expenses charged by C&C in investigating the swaps claims.

The application for permission to bring the misfeasance proceedings

60. The application for retrospective permission to bring misfeasance proceedings came before HH Judge Barker QC in March 2020. For the purposes of that application only, the Former Administrators did not challenge the application on the basis that it was meritless. However, Mr Davies, who appeared then, as he did before me, for the contributories, also conceded that if permission were to be granted it would still be open to the Former Administrators to seek summary judgment under CPR Part 24 on the basis that the application is totally without merit.

61. C&C, who were not, of course, parties to this application, have, before me, taken objection to the manner in which certain of the evidence was put forward (or the content of certain of the evidence put forward) by the contributories on that application. In the skeleton argument before me, C&C describe the position as being one where there was a "*highly coloured and incomplete presentation of the factual position*" relating to C&C. Although initially suggesting that this had resulted in HH Judge Barker QC's judgment containing matters adverse to C&C which were set out as if they were (or are) facts rather than unproven allegations, as I understood it, Mr Curl ultimately accepted that the judgment itself did not contain relevant findings of fact of this nature and that all that the learned Judge decided was that there was a case to be investigated.

62. Other than noting C&C's position, it does not seem to me that there is anything at this stage that I need say further on this point which is not immediately relevant to the issues that I have to decide.

63. One of the main issues before HH Judge Barker QC was whether the Former Administrators were entitled to rely upon a release clause in the relevant CVAs under which the administrations had come to an end. The clause in question was in the following terms:

> "*Each Creditor and the Companies*[1] *will release and undertakes not to bring a claim against the Administrators, their firms, fellow members, partners and employees, the legal and other professional advisors to the Administrators, and their fellow members, partners and employees from any Liability (whether present, future, prospective or contingent) arising in connection with : (a) their acts, omissions or defaults as administrators or advisors since the Administration Date; and/or (b) the preparation, negotiation and implementation of the Arrangement or any matter ancillary to the Arrangement*".

64. As regards the ability of the Former Administrators to rely upon that clause, HH Judge Barker QC concluded that it was not appropriate to determine that question at the permission stage. It was sufficient that he was able to say that it was realistically arguable that the CVAs (and indeed, any CVA) is not a contract, that the Contract (Rights of Third Parties) Act 1999 does not apply to a CVA and that the CVAs in this case were not enforceable by third parties and that, as they fall outside the category of persons bound by the CVA under s5 of the Insolvency Act 1986, the Former Administrators could not directly enforce it. Further, the clause was possibly ineffective in equity as a provision intended by the Former Administrators to secure a personal benefit outside the scope and statutory purpose of a cva. Finally, the contributories were not prevented from bringing their misfeasance applications by reason of their having voted in favour of the CVAs or on the basis that the CVAs bound the relevant companies. They had, held the Judge, no role in making the CVA and were not affected by the CVA nor the release contained in it (assuming it to be valid).

The issues before me

65. As I have indicated, the main issue before me is one of construction. The parties were agreed that, in the case of the claims now brought against each of the Former Administrators and C&C, if the claims are released by the Settlement Agreement on the basis (a) the claims fall within the defined term of the "Claims" released and (b) that the Former Administrators or C&C fall within the term "Affiliates", being the persons released, then the relevant persons will be able to take advantage of the release pursuant to the 1999 Act.

66. Section 1 of the 1999 Act, so far as relevant, provides:

> *" 1. **Right of third party to enforce contractual term.***
>
> *(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—*
>
> *(a) the contract expressly provides that he may, or*
>
> *(b) subject to subsection (2), the term purports to confer a benefit on him.*
>
> *(2)Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.*

[1] That is, REL, REPL and Askwith.

> *(3)The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.*
>
> *(4)This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract*."

67. In this case, clause 8 of the Settlement Agreement, conferring the right to rely upon clauses 2 and 3 on "the Parties' Affiliates" complies with s1(1)(a) of the 1999 Act, provided of course that the Former Administrators or C&C (as the case may be) fall within the definition of "Affiliate". Clause 8 also meets the requirements of s1(3) of the 1999 Act in expressly identifying sufficiently the non-parties entitled to rely upon the Settlement Agreement.

68. The Former Administrators also submit that if the relevant claims against them are subject to clauses 2 and 3 of the Settlement Agreement and released, then the fact that the misfeasance proceedings are brought by contributories and are not in form proceedings brought by one of the relevant Companies does not put the contributories in a better position for these purposes than the Companies. If the clams are released as against (or by) the Companies, then the contributories cannot assert the claims in misfeasance proceedings. This is because paragraph 75 of Schedule B1 to the Insolvency Act 1986 (similarly to s212 Insolvency Act 1986) does not create a new cause of action, but merely a procedural mechanism by which the underlying cause of action vested in the Company may be enforced (see, in the s212 context *Re Eurocruit Europe Limited (In Liquidation)* [2008] Bus LR 146 at [24] and *Lightman & Moss on the Law of Administrators and Receivers of Companies* (6th edn, 2017). I did not understand this proposition to be challenged.

The Law: (1) strike out/summary judgment

69. I could not detect any difference between the parties on the applicable principles of law regarding strike out/summary judgment. To some extent these mirror those considered by HH Judge Barker QC in the different context of whether to grant permission to bring the Misfeasance Proceedings.

70. I was referred to the well-known passages and cases contained in the White Book. For present purposes I can gratefully adopt the summary set out in the skeleton argument of Mr Smith and Ms Thornley.

71. For present purposes, the main parts of that summary are as follows.

> *"(i) Strike out*
> *27. The Court's power to strike out a statement of case is found in CPR r 3.4. CPR r 3.4(2)(a) provides that the Court may strike out a statement of case if it appears to the Court that "the statement of case discloses no reasonable grounds for bringing or defending the claim".*
>
> *28. Where the court strikes out a statement of case it may make any consequential order it considers appropriate: CPR r 3.4(3).*

29. Statements of case that are amenable for strike out include those that raise an unwinnable case, where the continuance of the proceedings is without any possible benefit to the respondent and would therefore be a waste of resources for all parties: Harris v Bolt Burdon [2000] CP Rep 70 (CA), [27] (Sedley LJ). The Court should be certain that the claim is bound to fail: Richards (t/a Colin Richards & Co) v Hughes [2004] PNLR 35, [22] (per Peter Gibson LJ).

(ii) Summary judgment
30. CPR r 24.2 gives the Court the power to order summary judgment on the whole of a claim if: (a) it considers that the claimant has no real prospect of succeeding on the claim; and (b) there is no other compelling reason why the case should be disposed of at a trial.

31. The applicant for summary judgment must identify any provision in a document on which the applicant relies and/or state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim and that the applicant knows of no other reason why the disposal of the claim should await trial: PD 24, para 2(3).

32. Once the applicant for summary judgment has adduced credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial: White Book (2021) para 24.2.5.

(1) No real prospect of succeeding
33. The first limb requires the judge to exercise his judgment in his discretion and assess the prospects of success of the relevant party; while "it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for": Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1, [158] (per Lord Hobhouse).

34. The principles applicable to determining an application for summary judgment were set out by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15], and this formulation was approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2010] Lloyd's Rep IR 301, [24] (Etherton LJ):

> *"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8][;]*
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman[;]*
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10][;]*
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
> *vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*
>
> *(2) No other compelling reason*
> *35. Compelling reasons have included where not all the parties in multi-party proceedings had pleaded their cases (Iliffe v Feltham Construction Ltd [2015] EWCA Civ 715, [2015] CP Rep 41, [72] (Jackson LJ)), or where the case is a test case (AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098, [35] (Etherton LJ)).*
>
> *(iii). The relationship between strike out and summary judgment*
> *36. There is substantial overlap between summary judgment under CPR Pt 24 and the power to strike out a statement of case under CPR r 3.4. Many cases will often come within both parts of the CPR and there is no exact dividing line between CPR r 3.4 and Pt 24: White Book (2021) para 3.4.2.*
>
> *37. Moreover, though the tests use different language, there is considerable overlap between the two: Independents Advantage Insurance Co v Personal Representatives of Cook [2004] PNLR 3, [8] (Chadwick LJ)."*

72. In this case, to a lesser or greater extent, each of the parties invited me to "grasp the nettle" and make relevant decisions following the approach referred to by Lewison J (as he then was) in the *Easyair* case at paragraph (vii) cited above, referring to the *ICI* case.

The Law: (ii) Interpretation of contracts

73. I was referred to a number of passages from Lewison on "*The Interpretation of Contracts*" (7th edn, 2020) as well as a number of the leading authorities.

74. A convenient summary is contained in the judgment of Jacob J in *Global Display Solutions Limited v NCR Financial Solutions Group Limited* [2021] EWHC 1119 (Comm). That judgment was much relied upon by Mr Davies for two propositions: first, that it is necessary to carry out a unitary exercise involving an iterative process which involves not just a consideration of the words of a contract but a consideration of the same against the relevant background knowledge and the commercial consequences of competing constructions; secondly, that in some cases it may be necessary (as Mr Davies submits that it is in this case) to identify precisely the disputes which have been settled. His submission was that although, in general, the parties' negotiations are inadmissible as an aid to construction of an agreement, they are relevant and admissible to assist in ambiguity of phraseology in the agreement or to identify the disputes the parties intended to resolve.

75. Turning to the judgment of Jacob J in the *Global Display* case the key passage is set out in paragraphs [316] to [321]:

> *"[316] The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J. in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd [2018] EWHC 163 (Comm), which is quoted in Chitty on Contracts 33rd edition paragraph 13-047:*
>
> > *"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. 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. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. 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. Interpretation is a unitary exercise; 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. This unitary exercise involves an iterative process by which each*

> *suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."*

[317] This summary is a synthesis of the principles that have been authoritatively stated in a trilogy of Supreme Court decisions in the past 10 years: Rainy Sky SA v Kookmin Bank [2011] UKSC 50; Arnold v Britton [2015] UKSC 36; Wood v Capita Insurance Services Ltd. [2017] UKSC 24.

[318] In Rainy Sky, Lord Clarke described the exercise of construction as being essentially a "unitary exercise" in which the court must consider the language used and ascertain what a reasonable person, with the relevant background knowledge, would have understood the parties to mean. 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. Where the parties have used unambiguous language, the court must apply it: Rainy Sky paragraphs [23] and [25].

[319] Whilst this unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. This is clear from the judgment of Lord Neuberger in Arnold v Britton [and what] *he said at paragraphs [15] – [22]. At paragraph [20], Lord Neuberger said:*

> *"Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party".*

[320] In Wood v Capita, Lord Hodge set out the applicable principles following Rainy Sky and Arnold v Britton as follows:

"[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 focused 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 drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 *WLR 1381, 1383H1385D and in Reardon Smith Line Ltd v Yngvar HansenTangen (trading as HE Hansen – Tangen) [1998] 1 WRL 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.*

[11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900, para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. 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 (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299, paras 13, 16); 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: the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language

> *in the contract, so long as the court balances the indications given by each.*
>
> *[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 ALL ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of the disputed provisions."*

> *[321] There is discussion in the case-law as to the circumstances in which consideration of the factual matrix or context may lead to an interpretation of words which is not, according to conventional usage, an "available" meaning of the words or syntax which the parties had actually used, and the correction of an obvious drafting mistake by interpretation. I consider that argument in context below*."

The submissions - outline

76. The key question is as to the meaning to be given to clauses 2 and 3 of the Settlement Agreement, which are the clauses which can be relied upon by non-parties, provided they are "Affiliates" of the Parties under clause 8. As the release in clause 2 only operates in favour of the Parties and their Affiliates, a determination that the claims brought against the Former Administrators or C&C fall within these clauses will in effect also determine whether clause 8 bites.

77. The Former Administrators and C&C (for present purposes I shall refer to them collectively as the "Defendants") submit that the claims asserted in this case against each of the Former Administrators and C&C fall within the very wide definition of

"Claim" (and as containing within it the autonomous concept of "Liability"). I did not understand this to be disputed.

78. The real issue is whether each of the Defendants fall within the term "Released Party". That term is also a defined term and, for present purposes, the Defendants will only be encompassed by that term (and will only be able to rely upon clauses 2 and 3 under clause 8) if they are "Affiliates".

79. "Affiliate" includes "Parents" or "Subsidiaries" of a Party (and also Subsidiaries of any of its Parents) plus its "Employees" or those of its Parents, its Subsidiaries and its Parents' Subsidiaries. For these purposes, "Employees" has a very extended scope encompassing: any former, present or future directors, officers, employees, shareholders and agents.

80. The Former Administrators submit that they fall within the definition of "Employee" both as former "officers" and former "agents". C&C say they fall within the definition as former "agents".

81. Both Defendants submit that the wording of the Settlement Agreement is clear and there is no ambiguity.

82. Mr Davies and Mr Levy make a raft of submissions. Taking them out of order they are in summary:

(1) Neither the Former Administrators nor C&C fall within the definition of "Employee" which, in particular, they say, includes only "insiders", that is not persons "imposed" upon the Companies (as were the Former Administrators) nor persons who are under the control of the relevant Company.

(2) If (1) is incorrect, then the Settlement Agreement, on its proper construction, amounts to an agreement between two camps: Barclays and the relevant Rhino companies. The release by Barclays was of the Rhino Settlement Companies and their Affiliates and the release by the Rhino Settlement Companies was of Barclays and its Affiliates. However, the Rhino Settlement Companies neither released their own Affiliates nor the Affiliates of any other Rhino company (the "Two Camps Submission"). In oral submissions, a variant was put forward by the Claimants, namely that no Rhino Settlement Company released its own Affiliates, even if it did release both the Affiliates of Barclays and the Affiliates of the other Rhino Settlement Companies.

(3) Finally, if (1) and (2) are incorrect, the true position is that the Settlement Agreement was simply not dealing with any settlement of claims as between the Rhino Settlement Companies and the Former Administrators and/or between the Rhino Settlement Companies and C&C. Any such claims were simply outwith the Settlement Agreement.

(4) If (1) to (3) are incorrect, the Former Administrators cannot rely on any release (if otherwise granted) by reason of a proper application of the principle in *Ex P James*.

83. I have well in mind that the Claimants' submissions, summarised in the preceding paragraph, were made in the reverse order to that which I have put forward and that I

need to consider each of them in the round. However, as indicated, I have to start somewhere and it seems to me that the best starting point is the words of the Settlement Agreement themselves.

The Definition of "Employee"

84. Key here are the terms "agent" and "officer".

85. The starting point is that administrators act as agents of the company in relation to which they are appointed by virtue of paragraph 69 of Schedule B1 to the Insolvency Act 1986, which provides:

> "*69. In exercising his functions under this Schedule the administrator of a company acts as its agent*".

86. Furthermore, as a starting point, it seems to me that an administrator naturally falls within the term "officer" of a company.

87. In *Re X Company Limited* [1907] Ch 92, Parker J had to consider whether a voluntary liquidator was an "officer" of a company. This was in the context of a section of the Companies Act, 1900 that, in default of the lodging of a contract in writing constituting the title of allottees to an allotment of shares, duly stamped (under the Stamp Act), within the time provided for, "every director, manager, secretary or other officer of the company who is knowingly a party to the default" was liable to a fine. Parker J decided that the voluntary liquidator was such an "officer" for the purposes of the statutory provision in question. In the course of argument he is recorded as commenting that the only question was whether the voluntary liquidator was an officer of the company and that, "He has all the powers of the company subject to certain statutory limitations".

88. In *Re Home Treat Lim*ited [1991] BCC 165 a question arose as to whether a memorandum of association of a company had been altered (as it had been thought to have been) to enable it to carry on the business that its administrators had been continuing. Harman J on the particular facts thought it right to make an order protecting the administrators under what was then s727 Companies Act 1985 (see now s1157 of the Companies Act 2006) enabling the court to relieve certain categories of person either in proceedings for negligence, default, breach of duty or breach of trust or in circumstances where such proceedings were anticipated as possible. The category of such persons was, "an officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company)". Harman J considered that an administrator was, for the purposes of that section, an "officer" of the company:

> *"…Mr Brisby submits to me that an administrator appointed by the court to conduct the business of the company with a view to a better realisation of its assets or indeed, as in this case, with a view to the survival of the undertaking or part thereof as a going concern, must surely, even more than a liquidator, be a person properly within the context an officer of the company. Mr Brisby puts it that on the words of the English language, an administrator plainly holds an office; that is certainly correct. He is an officer of the court; that is undoubtedly correct. He is also, by conducting the business of the company, as it seems to me, an officer of the company. He is appointed under sec. 8(2) of the Insolvency Act*

> *1986 by an order directing that the affairs, business and property of the company shall be managed by the administrator.*
>
> *It seems to me quite clear that the word "officer", which merely means somebody who holds an office, and an office in relation to the company, can apply to an administrator. That is so although he is also an officer of the court, there being in that context no conflict of duties between his duty as officer of the company and his duty as an officer of the court. In both capacities his duties are to manage the business and property of the company for the better effecting of the purpose for which the court made the order, in the interests of the creditors and it may be eventually of the contributories of the company."*

89. For C&C, Mr Curl and Ms Julian submit that C&C are clearly "agents" so far as they are asserted by the Claimants to have been engaged by them and to have failed to carry out certain acts on their behalf. In my view there are difficulties with accepting this as covering the entire ground. First, C&C asserts that it was not engaged by the Companies, but by the Former Administrators personally. Although, for the purposes of the applications before me, C&C were content to assume that C&C were engaged by the Companies, as asserted by the Claimants, I have to be alive to the fact that this may not be established. Secondly, the alleged breach of duties seem to me clearly to encompass not only breaches of duties arising in the context of agency but also advisory duties, as solicitors. On this second point, I should make clear that Mr Curl did not accept that the statement of case against his client does separately plead duties at common law or fiduciary duties arising independently of a contract between C&C and each of the Companies. I am against him on that. It seems to me that the pleading that the duties said to be owed by C&C to the Companies arise from their engagement by the Former Administrators leaves open whether the effect of such engagement was a contract between C&C and the Companies or not. Even if I was wrong, I would have given the Claimants an opportunity to put forward amendments to make this clear. In my judgment, although it is true that the Claimants rely upon a contractual relationship between them and C&C, they also rely upon fiduciary and common law duties arising from their engagement by the Former Administrators which arise independently of any contract between the Companies and C&C. However, and in summary, my main concern was that it may not be clear that solicitors engaged to give advice (and not to act vis a vis third parties) are properly, or commonly, referred to as "agents". Mr Curl's submission was, in summary, that even if the contractual element of the retainer was not (in each case) with the relevant Company but with the Former Administrators, nevertheless C&C were overall retained to act as agents for the company. That agency relationship is the one, he says, that gives rise to all the duties that are alleged to be owed (and to have been broken) by C&C and any advice sought or given is simply part of the overall agency relationship. I see the force of that submission but it does not seem to me right to determine that issue without full evidence and a trial.

90. The two main submissions of the Claimants are that:

(1) The term "Employee" also encompasses a number of terms which are all "insiders". Both "agent" and "officer" are to be construed as part of that genus of "insiders".

(2) The term "Affiliate" encompasses a number of terms which are all "insiders". "Employee" as the last term within that list, is to be construed in accordance with that genus as only including "insiders".

91. Enlarging upon his use of the term "insiders", Mr Davies submitted that this meant someone in the organisation who either controls or is controlled by that party and that what it does not include is external providers of professional services to the parties nor to "external property agents, storage agents, [or other] commercial agents".

92. I am not persuaded by this general submission.

(1) First, the distinction between "employee" and "outside contractor" may be one that is difficult to apply in any given factual situation and may turn (at least in part) on the degree of control exercised rather than there being control in the one case and none in the other.

(2) Secondly, the words preceding "agent" in the definition of "Employee" do not seem to me to show a genus where the company is necessarily "in control" of the person: shareholders are not controlled by the company of which they are shareholders. Further, if the concept of "insiders" is expanded to include persons controlling the company (such as shareholders) then administrators clearly fall within that description. Finally, I do not consider that a clear line is capable of being drawn between those "imposed" upon the company and those appointed "internally", which seemed to be a thread of Mr Davies' submissions. First, administrators may be appointed by the directors in certain circumstances (and such appointment is treated as being by the company). Secondly, the identity of shareholders is not controlled by the company, except in very limited circumstances. In broad terms, a change in shareholder comes about because of a transfer effected by, or succession resulting from the change of status of, a shareholder and usually the company has a very limited ability to refuse to give effect to such transfer/succession.

(3) Finally, on the genus point, it does not seem to me that "agent" is the sort of general phrase which would properly take its meaning from the context of the words that preceded it in this case or that it is unclear what it means. The submission of Mr Davies as to genus is of course further weakened to the extent that "officer" has the meaning ascribed to it by the Former Administrators. Mr Davies suggested that there is a parallel with the case of *Watchorn v Langford* (1813) 3 Camp 422; 170 ER 1432 (referred to in Lewison at [7.148]) where the question was whether, in a list of insured items in an insurance policy, "linen" meant, in effect, domestic items such as clothes and household linen (e.g. table cloths), or could mean linen purchased for investment. In the context, the court decided the former because the word was preceded by "household furniture" and succeeded by the words "wearing apparel". Accordingly, "The linen must be the "household linen or apparel"". However, that was a case where there was a clear genus of surrounding words and one where the word itself (linen) was well capable of carrying two meanings as a matter of natural usage. In my judgment neither is the case here. Indeed, a major difficulty with Mr Davies' submission is in identifying precisely what he says <u>is</u> covered (and not covered) by the term "agent" in the definition of "Employee".

93. I also reject Mr Davies' submission that "Employee" in the term "Affiliates", takes its context from the preceding words. In my judgment, "Employee" is a defined term and the term "Affiliate" should be read as if for "Employee" there were written out in long hand the list of things defined within the term "Employee". As I have said, in my judgment there is no "genus" preceding "agent" which can be used to identify a more

limited meaning to be given to "agent", as put forward by Mr Davies, rather than its normal wide meaning.

94. I also do not consider that the use of the words "Affiliate" and "Employee" as the defined terms themselves colour the words that are then used to define the defined terms in question. In particular, it seems to me that "shareholder" is clearly not within the normal meaning of "employee" yet that is part of the definition of "Employee". I do not therefore consider that the use of the word "Employee" itself somehow limits the meaning of the word "agent". Similarly, I reject the idea that the term "Affiliate" of itself colours the words used to define that term. Thus, Mr Davies submitted that C&C were not, in the ordinary meaning of the word, an "affiliate" of either of the Companies. However, the key issue, in my judgment, is whether they were "agents".

95. It is submitted by Mr Davies that it is clumsy to use the term "Employee" as the defined term and to use the term "agent" as part of the definition. Had the intention been to include legal advisers within that term then, it is submitted, they would have been described as such. In my judgment, this submission fails if the term "agent" is clear, which, in my view, it is.

96. Finally in this context, reliance is placed by Mr Davies upon clauses 6.2, 6.3 and 6.5 of the Settlement Agreement to show that (a) when legal advisors are intended to be covered they are expressly identified; (b) if legal advisors are included within the term "agents" then the deployment of the words "legal advisors" would be redundant in those clauses and (c) clause 6.3 demonstrates that the agents, experts and advisers are external persons, not "insiders" and thus not falling within the definition of "Employees".

97. As regards these points. First in clause 6.2, an advisor (expert, legal or otherwise) is not necessarily acting as agent in the advisor capacity (see further discussion below). Thus the words in that clause are not redundant because they are not necessarily covered by the word "agent" in the definition of "Employee". Even if they are covered I refer to my second and third points below. Secondly, clause 6.5 draws a distinction between "Parties" and "legal advisors". Whether or not legal advisors fall within "Employees", the term legal advisor is clearly narrower than "Employee" and there is no redundancy. Thirdly, Clause 6.3 may raise the spectre of a risk of redundancy because the word "agents" is used in that clause in addition to "Employees" and the latter term already encompasses "agents". However, this may simply be "belt and braces". After all, it is difficult to see how or why the word "agents" as it appears in the term "Employees" can or should have a different meaning from that of the extra word "agent" in clause 6.3 or in what way the word "agents" is to be given a different meaning in each case. In light of this, it is difficult to draw any conclusion that "legal advisors" is necessarily excluded from the term "agent" in the term "Employees", unless they are not agents. Fourthly, the Settlement Agreement was clearly perfected late at night after a day of mediation. There is clearly a slip in clause 3, as I consider further below. If there is some redundancy in clause 6.3 that does not to me indicate anything other than an abundance of caution in drafting rather than confirming that the wide definition of "Employee", encompassing "agents", should be given some special restricted meaning, contrary to the natural wide meaning of the word "agents".

98. As I shall go on to explain, my view is that the normal wide meaning of "agent" was used on purpose to try and ensure that there was no risk of so-called ricochet claims

arising. In this respect the identity of the persons released is only part of the picture. The other part of the picture is the "Claims" released. The answer to Mr Davies' point that if the term "agents", within the definition of "Employees" includes, for example, property agents, storage agents, or other commercial agents, this cannot have been intended, is that they would only be included as released in relation to "Claims" as defined under the Settlement Agreement. There is good commercial logic for such a release based on the risk of ricochet claims. If, for example, property agents had given negligent advice in part affecting the timing of the sales in the administration, why would the Settlement Agreement not release such claim to assist in preventing such persons bringing contribution proceedings against Barclays? In my judgment, the natural wide meaning of "agents" advocated for by the Former Administrators and C&C (subject to the question of whether C&C were in fact agents) therefore makes perfect commercial sense.

99. Mr Davies and Mr Levy had a number of further reasons as to why the term "agent" should not cover the Former Administrators and why the term "officer" would not cover the Former Administrators, as set out in their skeleton argument.

100. First, it was submitted that if the parties had intended that the Former Administrators should fall within the definition of "Employee" they would have been expressly identified within that definition. However, in my judgment, if the wording of the definition is clear, there would be no need to name the Former Administrators expressly. Indeed, it could as cogently be said that had proceedings against the Former Administrators been intended to be matters that could be pursued notwithstanding the Settlement Agreement this could have been spelled out in the definition of "Claims" as it was in relation to the relevant two year loan facility, claims in relation to which were excluded from the definition. In short, this submission is in effect dependent on a conclusion that the Settlement Agreement does <u>not</u> include within its scope claims against the Former Administrators. It simply identifies a manner in which the Settlement Agreement could have been drafted otherwise to bring them within the scope of the settlement. As the Settlement Agreement is in my view clear and does encompass the Former Administrators the submission goes nowhere.

101. Secondly, Mr Davies submits that the Former Administrators had already obtained their statutory release on 13 February 2015. He says that with that release already achieved it is objectively unlikely that the parties intended that the Settlement Agreement should release the Former Administrators again. In my judgment this ignores two points. First, that if the parties wished to include a release in the widest possible terms then there would be every reason, on a belt and braces basis, to ensure that the Settlement Agreement itself operated a release. Secondly, a statutory release is not a complete release. It simply imposes a filter of court permission before proceedings may be commenced against the former officeholders. As such, it is in any event an unsatisfactory release from the point of view of Barclays. The point can also be turned on its head. If the parties considered that a release had been obtained and it was effective then there was no reason for the Rhino Settlement Companies to contest a repetition of a release that had already taken effect.

102. Mr Davies' third point picks up the limited nature of the statutory release under paragraph 98(4)(b) of Schedule B1 to the Insolvency Act 1986. He submits that it is unlikely that the parties would intend that the Settlement Agreement should operate so

as to remove the court's jurisdiction to permit proceedings against the Former Administrators to go ahead. In that respect he relies upon what HH Judge Simon Barker QC said in the permission application in this case at paragraphs [101]-[109] of his judgment. Those paragraphs were dealing with the question of whether the Former Administrators, in negotiating and putting forward a CVA which released them from liability, were potentially acting in breach of fiduciary duty and/or outwith the proper purposes of the power conferred upon them and/or that the release clause in the CVA was not permitted within the scheme laid down by the Insolvency Act 1986 for the operation of CVAs. In my judgment, these considerations are entirely different to those before me. Further, the release in this case is related to the "Claims" as defined and is not a general release of the Former Administrators of the sort contained in the relevant CVAs. The spectre raised before HH Judge Barker QC by Mr Davies of the wide spread effect of the release under the CVA does not arise in the case of the release under the Settlement Agreement, which is less far reaching. In the former case, Mr Davies postulated "a carte blanche exclusion which protected an administrator from misuse of the company's money for personal benefit, such as gambling or a holiday, during the course of the administration." In the case of the Settlement Agreement this spectre does not arise because the release is not so wide. Further, it is something that can be seen to be in the interests of Barclays to procure.

103. Mr Davies' fourth point is that Barclays had voted in favour of the CVAs which contained the wide release clauses (as said, they are in wider terms than the effect of any release in the Settlement Agreement, assuming it applies to the Former Administrators). Barclays must therefore have known that the Former Administrators were released (and at the stage of the Settlement Agreement being entered into the release clauses in the CVAs had not been challenged). In my judgment, the short answer is that, as with the case of the statutory release, Barclays was likely to wish to ensure on a belt and braces basis that it was covered. It is highly unlikely that Barclays would simply assume the release clauses in the CVAs effected that aim. Indeed, the fact that the efficacy of the releases in the CVAs has subsequently been challenged shows just why a belt and braces approach would be likely to be taken. Indeed, turning Mr Davies' point on its head, it might just as powerfully be argued that the Companies and Mr Schofield would agree to a release for the Former Administrators under the Settlement Agreement because they thought that one was already in place in wider terms, not least given that the contributories had voted in favour of the CVAs containing such terms.

104. Finally, Mr Davies submitted that the Former Administrators were not within the genus of "insiders" as they are imposed as a temporary measure by creditors. I have already dealt with this submission. I accept that in this case the Former Administrators were appointed by creditors. Theoretically, administrators may be appointed by the company's directors. As I have said, I am unable to detect any ambiguity in the definition of "Employee" which permits the drawing of a line between "insiders" or "outsiders" and in any event do not accept that the "insider"/"outsider" dichotomy as drawn by Mr Davies can be made to fit within that definition. For completeness, I should add that I cannot see any significance in the submission that administrators are imposed as a "temporary" measure. I am not sure that they are so appointed and in any event directors and officers may be appointed as a temporary measure.

105. I turn to consider the position of C&C as agents. As I have said, I had concerns about whether C&C can, in all respects, be characterised as "agents". The complaints against C&C encompass both failing to act vis a vis third parties but also failures in the advice given or not given to the Former Administrators/the Companies.

106. It is trite law (see Article 1 of *Bowstead and Reynolds on Agency* (22nd edn, 2021) that:

> "*Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation."*

107. I also note Article 1, sub-paragraph 4:

> *"A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."*

108. At this stage I should assume, as at least being arguable with a real prospect of success, an agency relationship between the Companies and C&C, whether or not there was any contractual retainer by the Companies. For the purposes of the applications before me, C&C must also be assumed to have tendered advice to the Companies (though C&C deny advice being given by it to anyone other than the Former Administrators) and it must be assumed that such advice (or lack of it) gave rise to breaches of relevant duties. Although I accept that, at the end of the day, it may be held that the entire relationship between the Companies and C&C can properly be classified as one of agency for the purposes of the Settlement Agreement and the definition of "Employee", I do not consider that I can reach that conclusion at this stage on the evidence before me. I consider it arguable, with a real prospect of success, that alleged acts or omissions by C&C regarding the giving of legal advice (rather than taking steps vis a vis third parties) do not amount to acts or omissions as agent and to that extent would not, in any event, strike out claims against C&C in that respect.

109. Some matters complained of, with regard to C&C, are, however, what would be typical acts or omissions of an "agent". Do these bring C&C within the term "agents" as part of the definition of "Employee"? In my judgment, they do as regards such matters. I do not consider that it is arguable with a real prospect of success that the relationship of C&C with the Companies in relation to steps C&C is alleged to have failed to take or taken inadequately is other than one of agency, such that C&C falls within the word "agent" forming part of the definition of Employee, Affiliate and therefore Released Party.

110. I have re-considered the issue of the meaning of "Employee" in the light of the further matters considered below but they do not cause me to change my views.

The Two Camps Submission

111. As developed in their skeleton argument, the submission of Mr Davies and Mr Levy was that the Settlement Agreement releases claims between the "two camps", that is

between the Rhino Settlement Companies and their affiliates on the one hand (the "Companies' Camp") and between Barclays and its affiliates (the "Barclays Camp" on the other hand). This was said to follow from:

(1) The language used in the Settlement Agreement; and

(2) The contrary argument of the Former Administrators and C&C is irreconcilable with the language of the Settlement Agreement, would produce absurd results and is not justified by their submission that it would avoid so-called "ricochet" claims. and

112. The submissions of the Former Administrators and C&C are the reverse mirror image of the submissions of the Claimants.

113. Turning first to the language of the Settlement Agreement it is noticeable that the four parties to it (the three Rhino Settlement Companies and Barclays) are identified as four separate parties. There is no express identification of them as two camps for the overall purposes of settlement.

114. Clause 2.1 contains the full and final settlement clause. Mr Davies submits that the submissions of the Defendants create an absurdity whereas the Two Camps submission means that the clause operates without difficulty. He says that the claims settled are the claims "any Party" has or may have against "any other Party or against any other Released Party". The Defendant's approach is, he says, to replace "Released Party" with "the Parties and their Affiliates" which makes no sense or, as he puts it, would be to destroy its meaning both as a matter of language and legal efficacy: "A party cannot reach a full and final settlement with itself". He reaches this conclusion by submitting that the Defendants' submission amounts to a clause which reads:

> "This Agreement is made in full and final settlement of all Claims any party has or may have against any other Party or against any other [the Parties and their Affiliates]".

115. I do not accept the premise. True it is that "Released Party" includes "the Parties and their Affiliates". However, to read the clause correctly does not involve simply inserting the words "the Parties and their Affiliates" into clause 2 in place of the words "Released Party". The release in clause 2.1 is of claims one Party (Party A) has or may have against "any other Party" (Parties B, C or D) or "any other Released Party". The "other" Released Parties can only be the Affiliates of the Parties (i.e. the Affiliates of Parties A, B, C and D), the actual Parties (Parties A-D) are mentioned earlier and it is Released Parties other than those Parties that are encapsulated by the phrase "any <u>other</u> Released Party" (emphasis supplied). As a matter of language and legal efficacy clause 2.1 therefore makes sense and is capable of operation as a matter of language and legal efficacy.

116. Mr Davies then submits that the use of "other" in the two places it is used in clause 2.1 demonstrates that the parties were intending the releases to operate between the Two Camps. If, in my example, Party A is Barclays then the release by Barclays operates in favour of the other Parties (Parties B, C and D), the Rhino Settlement Companies, and the "any other Released Party" is the Affiliates of the Rhino Settlement Companies (but not the Affiliates of Barclays). Similarly, submits Mr Davies, if "any Party" (Party A

in my example) is "the Rhino Settlement Companies" then the release of the other Party (Party D) is of Barclays and of the "any other Released Party" is of Barclay's Affiliates.

117. I have two difficulties with this latter analysis. First, nowhere in the Agreement can one see any basis for saying that "any Party" means a number of Parties with separate claims (in Mr Davies' example, Parties A-C, the Rhino Settlement Companies). On the face of the language, Party A releases Parties B, C & D, Party B releases Parties A, C and D and Party C releases Parties A, B and D. This gave rise to Mr Davies' alternative, fall back position that the Agreement did work as a Four Camp settlement agreement (or, as I would prefer to say, four party agreement with each party releasing the others). However, retaining the separate strand of argument regarding the meaning of "any other Released Party" from the Two Camps analysis, he submitted that even in that scenario, each Party only released other Parties' Affiliates and not its own Affiliates. This is the second difficulty that I have with Mr Davies' analysis of clause 2.1. In my judgment the wording of 2.1 is clear. The phrase "any other Released Party" will include the Affiliates of all parties, not just the Affiliates either of the other Camp (in a Two Camps scenario) or the Affiliates of the other Parties. Quite simply, if the clause had the meaning contended for by Mr Davies then the ending words of the clause (at least in the four party scenario that I consider to correctly reflect the language of the Settlement Agreement) would have said this expressly (for example, by replacing "any other Released Party" with "any of its Affiliates"). The ability to use the concept of a Party's own Affiliates where the Parties wished to is, for example, demonstrated by Clause 3.2. Put another way, Mr Davies' construction seems to me to involve re-writing rather than construing the clause.

118. Mr Davies then turns to clause 3.1. He submits that it is a nonsense for a Party to agree a release and discharge of itself. In my judgment, it may be that the word "other" has been left out before "Released Parties" and that would readily be implied (especially given clause 2.1). Alternatively, to the extent that the clause is a confirmation by Party A that Party A is released and discharged, it is simply confirming that that is the effect of the Settlement Agreement and that each Party releases the other Parties and (all) Affiliates of all Parties.

119. Similar submissions are made by Mr Davies in relation to clause 3.2 and in my judgment the answer is along the same lines. The first part of the clause is clearly not intended to be an agreement that a Party will not sue itself. The second part of the clause is also clearly not intended to be an agreement that steps will be taken to prevent an Affiliate suing itself. If, as Mr Davies submits, the clause is not intended to effect "internal releases" it is difficult to see how it can be construed as meaning that a Party (Party A) should <u>not</u> be required to take steps to prevent one of its Affiliates bringing a relevant claim against another of its Affiliates.

120. I note that clause 3.3 refers to clause 3.1 when it should probably refer to clause 3.2.

121. As regards clause 3.4, Mr Davies submits that the clause does not contemplate and would not operate if the "First Party" (as there defined) is sued by its own Affiliate. I accept that the clause only bites in the situation where an Affiliate of one party (Party A) brings proceedings against any other party (any of Parties B, C or D) or against any of that other party's Affiliates. I do not however accept that the clause bears out the Two Camps theory. On its natural reading, any of the Rhino Settlement Companies

could be the "First Party" and if one of its Affiliates brought proceedings in relation to a Claim against another Rhino Settlement Company then, on the face of it, that other, second Rhino Settlement Company, could rely on clause 3.4. Further, I do not accept that the clause is inconsistent with a Party releasing its own Affiliate under the other provisions of the Settlement Agreement. Clause 3.4 is dealing with a particular situation: that of a Party bearing some responsibility to avoid the consequence that its own Affiliates have not themselves released Claims against other Parties or the other Parties' Affiliates.

122. Finally, in this context, Mr Davies relies upon clause 7.2. He submits that the Defendants' submissions result in a situation where clause 7.2 would amount to a representation and warranty at one and the same time that it had taken advice from its own legal advisors but not relied upon anything said or done by those legal advisors in entering into the Settlement Agreement. He says that the reference to "Released Party" in that clause must be to the counterparty to the Action and its Affiliates. I disagree. It seems to me likely that legal advisors would not be Relevant Parties because they would not be acting as agents in tendering advice about the Settlement Agreement itself.

123. I turn now to the issue of whether a construction of the Settlement Agreement involving one Party giving an "internal release" to its own Affiliates is something that produces absurd results. In my judgment, the results are not absurd. Further, and in any event, the Settlement Agreement is clear so that there is no room to re-write it and no room to favour an alternative possible construction. Mr Davies points to claims that Barclays might wish to bring against its employees or that each of the Rhino Settlement Companies might wish to bring against its own Employees (e.g. Ms Bellan the finance director of REL). It seems to me that the release of such claims may simply have been the price the parties were prepared to pay on each side to ensure that the relevant facts and matters, in terms of putative legal proceedings, were concluded so far as possible. I note that there had been adequate time to take other proceedings if they were thought to be appropriate. I also note that it is at the least arguable (and possibly even clear) that some of the claims identified (e.g. claims for reimbursement of sums overpaid to lawyers in the Barclays Proceedings) would not fall within the release, because they do not fall within the term "Claims".

124. Finally, in this context, and in their skeleton argument, Mr Davies and Mr Levy refer to clause 9.5 and suggest that it is a pointless warranty if clauses 2 and 3 are to be construed as contended for by the Defendants. It seems to me that it is in part further belt and braces but in part, and on any view, covering something different insofar as it is confirming the non-existence of other proceedings or notified claims. It was also suggested that this clause must be read as meaning "other" Released Parties because of the intention that the Companies would bring proceedings against the Former Administrators and C&C as they have done. Of course, the other way of looking at the clause is that it confirms that that course had been ruled out as part of the settlement achieved by the Settlement Agreement.

125. I turn now to Mr Davies' submissions that the alleged commercial purpose and common sense behind the interpretation of the Settlement Agreement put forward by the Defendants is a smokescreen with no substance.

126. First, it is submitted that the concept of releasing one's own Affiliates is unconventional and without precedent. I do not accept this. There is evidence before me from Ms Moore and Mr Langley pointing to their experience of settlement agreements being worded to attempt to bring all litigation in relation to particular subject matters to an end and for that purpose to attempt to prevent "ricochet" claims by third parties (which is wide enough to cover "Affiliates"). In addition, I note that in *Heaton v AXA Equity and Law Life Assurance Society plc* [2002] UKHL 15; [2002] 2 AC 329, Lord Bingham in terms referred to the question of protection from ricochet claims in paragraph [9] as follows:

> *"(5) If B, on compromising A's claim, wishes to protect himself against any claim against him by C claiming contribution, he may achieve that end either (a) by obtaining an enforceable undertaking by A not to pursue any claim against C relating to the subject matter of the compromise, or (b) by obtaining an indemnity from A against any liability to which B may become subject relating to the subject matter of the compromise"*

127. Here, the Settlement Agreement apparently takes both courses identified by Lord Bingham, again on a belt and braces approach.

128. Mr Davies submits that internal releases are not necessary because the risk of ricochet claims caused by a Party's own Affiliates is prevented by clauses 3.2 and 3.4. However, on a belt and braces basis, I can see that there remains common good sense in covering as much ground as possible. A Party may not have sufficient resource or muscle to achieve clause 3.2. Clause 3.4 might be difficult to operate if the relevant Party has financial difficulties. Clauses 2.1 and 3.1 operating as a release of a Party's own Affiliates is an obvious starting place to prevent (at least some) ricochet claims.

129. Secondly, Mr Davies submits that the Civil Liability (Contribution) Act 1978 would not be applicable anyway so that in the postulated scenario Affiliates, (that is, for present purposes the Former Administrators and C&C), could not pursue Barclays for contribution in any event. The short answer to this point is that the Settlement Agreement will sensibly prevent claims being brought, even if, at the end of the day, they fail. I consider that the risk of contribution claims is a real one and it cannot be said at this stage that any such claim would be so hopeless as to be struck out such that there is no commercial purpose in seeking to prevent such proceedings being brought in the first place.

Mr Schofield's evidence regarding the scope of the settlement

130. I now turn to the question of the admissibility of the evidence of Mr Schofield regarding what I can briefly summarise as being his statements to Barclays that he was dissatisfied with the actions/omissions of the Former Administrators and Barclays' response that Barclays had no responsibility for (or liability in respect of) the actions or omissions of the Former Administrators. Mr Davies submitted that such evidence was admissible (a) in construing the Settlement Agreement because it was part of the facts known to the Parties rather than any part of negotiating the Settlement Agreement and (b) to enable the Court to determine what disputes had been settled by the Settlement Agreement. I must therefore consider whether this evidence is admissible and, if so, for what purpose(s) and whether it changes any conclusions that I have reached looking

at the text itself in isolation (though also having taken into account the general background of the apparent commercial purpose underlying certain of the clauses).

131. Mr Davies put forward four propositions as follows:-

(1) Evidence of previous communications between the parties is admissible if part of the relevant background, whereas statements made actually in the course of negotiation are not admissible for the purpose of drawing an inference as to the meaning of the contract.

(2) Not all statements made in a negotiation meeting are necessarily part of the negotiation of any resulting settlement agreement. To put it another way, statements which are extraneous to the negotiation, something that the parties agree are not being negotiated, does not fall foul of the extrinsic evidence rule.

(3) Looking at cases concerning settlement agreements, evidence is admissible in determining the scope of what is being settled.

(4) On questions of admissibility, disputes between the parties in contradistinction to claims by third parties, are treated differently. When a third party seeks to upset or take a benefit of an agreement on the grounds that the parties intended it to mean X, the courts have looked at subjective intention on grounds of fairness, because it is not one of the parties who is trying to take the advantage or the benefit. It is not one of the negotiators, it is a stranger to the negotiation process.

132. Taking the sub-paragraphs above, Mr Smith, whose submissions were adopted by Mr Curl in this area, submitted that:

(1) Proposition (1) is not contentious. The Defendants would rather adopt the words in *Lewison on the Interpretation of Contracts* at paragraph 3.43:

> *"Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties."*

(2) As regards proposition (2), the approach to be taken is that set out in the third proposition of Lord Hoffmann in *ICS v West Bromwich Building Society* [1998] 1 WLR 896:

> *"The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear."*

(3) As regards proposition (3), the relevant case law (and especially *Dattani v Trio Supermarkets Ltd* [1998] I.R.L.R. 23) demonstrates that the evidence in such cases is admitted where there is a very limited written agreement and so further evidence is required to establish what the terms of the actual agreement are.

(4) As regards proposition (4), this is not accepted and there is no authority to support it. Indeed, it is against the overriding principle that a contract is to be interpreted objectively and absent subjective (even common subjective) intention.

133. On the question of whether the relevant evidence of Mr Schofield is admissible as confirming an independent objective fact: viz. that he and/or his companies wished to sue the Former Administrators and/or C&C, it seems to me that the evidence falls foul of the basic rule that evidence of previous negotiations and expressions of subjective intention are not admissible. This position is not altered by the praying in aid of the responses of Barclays over time. The matter seems to me most stark in relation to the overall statement of Mr Schofield that it was never the intention of the Rhino Settlement Companies that the Settlement Agreement would compromise claims against the Former Administrators and C&C. The examples of discussions that he says took place are all supposed to make out that proposition. The example of what was said at the mediation (said to be simply a repetition of what had been said before on both sides), again seems to me to be a prime example of facts falling within the exclusionary rule. Otherwise, construction arguments would always be opened up to evidence of the parties' negotiations on the basis that a party's position in negotiations was an "objective fact" falling within the exclusion to the exclusionary rule. In this case I consider the position is as described by Mason J regarding the case before him in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*, referred to in *Lewison on the Interpretation of Contracts* paragraph 3.49:

> "*In truth the evidence is not evidence of surrounding circumstances; it is evidence of antecedent oral negotiations and expectations of the parties and as such it cannot be used for the purpose of construing the words of a written contract intended by the parties to comprehensively record the terms of the agreement which they have made."*

134. Mr Davies submitted that the case was stronger for admission because Barclays and the Rhino Settlement Companies were *ad idem*. I am far from clear that that was the case but if it was that may be a reason for invoking rectification. Mr Davies submitted that that was unnecessary, but I was left unclear in the light of his submissions that rectification remained a necessary route to relief in any case.

135. I do not consider that the fourth proposition of Mr Davies is correct, essentially for the reasons given by Mr Smith. If a contract is to be construed objectively, the same rules should apply whether the materials used for construction are sought to be employed as against the direct parties, those put in a very close position to being parties under the 1999 Act or even third parties (such as the Inland Revenue) which might have an interest in the effect of a contract. In other words, the contract cannot mean different things depending upon who is relying upon it and accordingly the materials permitted to be used in construing it cannot differ depending on which person is seeking to rely upon it. Accordingly, Mr Davies' submission regarding his fourth proposition does not alter my view of the application of his first and second propositions.

136. If I am wrong about the question of admissibility on the basis of the case that it is evidence of an objective background fact known to the parties, I do not consider that the material is very strong in context and compared with the clear wording of the Settlement Agreement itself. That Settlement Agreement does not, in my judgment,

give rise to any ambiguities in any event such as would enable reliance to be placed on background facts to assist in resolving any ambiguity.

137. That leaves the question of whether the relevant evidence of Mr Schofield is admissible under the principle of cases such as *Dattani*. That principle is, in my view, that set out in *Lewison* at the start of paragraph 3.93 which is that:

> " *But evidence of pre-contractual negotiations is admissible .... to elucidate the general object of the contract*".

138. *Dattani* was a case where the facts were very different from those confronting me. There, the express terms of the written settlement agreement were wholly unclear as regards the scope of what was being settled. In summary, in that case an ex-employee brought a claim for unfair dismissal in the tribunal. A settlement was entered into. The question was whether the settlement encompassed a claim for unpaid wages (subsequently brought in the county court) as well as the unfair dismissal claim. The only written evidence of the agreement was two documents. The first was a piece of paper produced by the tribunal and headed: "Decision of the industrial tribunal, held at London (North) on 9 November 1992." Under another heading, "Decision," and after the details of representation and the composition of the tribunal, it was stated: "This case has been settled on the basis that the [company] pay [Mr. Dattani] the sum of £5,000 at the rate of £1,000 per month, the first payment to be made on 16 November 1992. [Mr. Dattani] remains free to return to the tribunal should the sum agreed not be paid within the agreed time limits." The only other contemporaneous document relevant to the compromise was a handwritten document addressed to Mr. Dattani. It was dated 9 November 1992 and signed by a Mr. Kanabar. It stated: "In consideration of your accepting the sum of £5,000 from [the company] in settlement of your claim for unfair dismissal by [the company] in five instalments of £1,000 per month I as director of [the company] hereby personally guarantee payment of each of the said sums of £1,000."

139. The unpaid wages claim could have been brought in the Tribunal but was not, although unpaid wages were referred to in the context of the unfair dismissal claim.

140. The Court of Appeal allowed into evidence statements by Counsel involved in the Tribunal proceedings confirming that the settlement was only about the unfair dismissal proceedings. It was held to be highly relevant and to assist in determining the scope of what had been compromised.

141. In my judgment, the extrinsic evidence as to the scope of the compromise was only allowed into evidence because the written evidence of the agreement in that case was ambiguous and unclear. I do not accept Mr Smith's submission that it was permitted in to determine what the terms of the settlement were rather than as a means of construing the settlement reached. However, I do accept the submission that in a case such as that before me, the evidence is not admissible because the Settlement Agreement allows of no ambiguity.

142. The Settlement Agreement is in very wide detailed terms, prepared by lawyers, and is clearly intended to effect the widest possible releases in relation to the "Claims" and "Liabilities" identified. The scope of what was being agreed or the object of the

Settlement Agreement is clear. The facts in this case are far removed from the facts of *Dattani.*

143. I go on to consider the position on the basis that I am wrong on this question of admissibility. As I read the judgment of Jacobs J in *Global Display*, he was able to avoid determining the question of admissibility on the basis that evidence, the admissibility of which was disputed, going to the issue of scope of the agreement reached did not affect his construction of the agreement before him. As will be seen, I have reached a decision on admissibility but also reach a similar conclusion to Jacobs J in the event that I am incorrect regarding admissibility.

The subject matter of the settlement

144. In this case, the Settlement Agreement, in my judgment, is clear. Claims and Liabilities are settled and released in the widest of terms as between the Parties to the Agreement and steps are taken to bring in "Affiliates" in the widest term possible. There are no express terms excluding from settlement the claims now sought to be brought against the Defendants (as there was, for example, in relation to the 2 year Barclays' loan). Such a wide settlement makes complete commercial sense.

145. As I understood him, Mr Davies' submissions were to the effect that Mr Schofield's evidence made clear that claims of Rhino Settlement Companies against the Former Administrators and C&C were agreed not to be part of the settlement and so it is not even appropriate for me to consider the terms of the Settlement Agreement. I disagree that the evidence is that clear (not least in the case of C&C). However, even if it is to that effect, I do not consider that the evidence can be used in this manner. In my judgment, the evidence, if admissible, is admissible to assist in construing the Settlement Agreement and its detailed terms. It is not admissible as, for example, showing a collateral contract that the particular claims are excluded from the Settlement Agreement.

146. Given my conclusions as to the obvious commercial purpose of the Settlement Agreement and the clarity of the terms used, I conclude that Mr Schofield's evidence, assuming, against my determination, that it is inadmissible, is not strong enough to alter the conclusions that I have reached regarding the wording of the Settlement Agreement. This is not least because the Settlement Agreement cannot easily be construed to exclude claims against the Former Administrators and C&C.

147. I turn to consider whether the release of the Former Administrators is affected by the principle in *Ex P James*.

***Ex p James* (1879) 9 Ch. App 609**

148. The principle in *ex p James* has most helpfully been summarised comparatively recently by David Richards LJ in *Lehman Bros Australia Ltd v MacNamara* [2021] Ch 1, [35]:

> *"[35] The principle established by the decision of the Court of Appeal in Ex p James is that the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers. The principle applies*

> *to a failure to act, as much as to positive acts: see In re Hall; Ex p Official Receiver [1907] 1 KB 875, a decision of this court. As a public authority and given its role in society, the court is expected to apply standards to its own conduct which may go beyond bare legal rights and duties. A specific example is a sale of property made by the court in accordance with its powers: Else v Else (1872) LR 13 Eq 196. Trustees in bankruptcy, liquidators in compulsory liquidations and administrators are all officers of the court. In the case of administrators, this is expressly provided by paragraph 5 of Schedule B1. As such, they are acting on behalf of the court and they will accordingly be held to these standards by the court."*

149. The Claimants say that, if they fail on all other points against the Administrators, and the effect of the Settlement Agreement, on its true construction, is that the Former Administrators are released from any liability now asserted in the Misfeasance Proceedings, then the principle in *Ex P James* applies. Further, they say that as the application of the principle rests on fairness, the question of its application cannot be determined on this application, at least insofar as the Court is asked to determine the point in favour of the Claimants. As regards this issue, David Richards LJ said in the *Lehman Bros* case at [69]:

> "*[69] The application of the principle in Ex p James in any case will critically turn on the particular facts of that case."*

150. As regards fairness, it was said in the Skeleton Argument for the Claimants that the release was not intended, the Former Administrators did not know of the terms of the Settlement Agreement (until November 2020) and cannot have relied upon them such as to make it unfair to prevent them relying on such terms and that permitting reliance upon the same by the Former Administrators would be inconsistent with the statutory regime for their discharge and release from liability.

151. The Former Administrators submit, first that the *Ex p James* principle does not apply in circumstances such as these, that is where the Former Administrators are no longer officers of the court and the agreement on which they seek to rely was not one entered into by them but one that was negotiated after the conclusion of the administration by the then directors of the relevant companies. Secondly, they submit that if, contrary to their primary position, the *Ex P James* principle is capable of applying, fairness does not prevent the Former Administrators relying upon the provisions of the Settlement Agreement and that there are no further facts required or capable of being found which will change the position and the court should "grasp the nettle" and decide the point now rather than leaving it an issue for trial.

152. As regards the question of whether the principle applies to a former officer of the court, the general position is that the rationale of the rule would point against its application. That flows from all the relevant statements as to the reason that the principle applies, including, by way of example, the dicta of David Richards LJ cited earlier in this judgment.

153. However, it is possible to see circumstances in which the relevant events said to give rise to the principle occurred at a time when the former officeholders were officers of

the court. In such a situation, Lewison J (as he then was) left open the question of whether the principle applied in the case of *Re Agrimarche Limited (In creditors' voluntary liquidation)* [2010] EWHC 1655 (Ch); [2010] BCC 775. In that case, voluntary liquidators (formerly administrators) sought directions as to the valuation of call options in commodity futures contracts. One of the issues related to call options contracts that had not been exercised but which expired after the commencement of the administration, but before the company went into liquidation. The question was whether the principle in *Ex p James* required such contracts that "were in the money" to be treated by the voluntary liquidator as if the options had been exercised on the expiry date. There were certain call options that were "in the money" at the time of such expiry but where the options had not been formally exercised. (That is, where the price of the physical commodity exceeded the strike price, so that the holder of the options would make a profit). The issue was whether an email from an employee of the company sent at about the time of the administration gave creditors the impression that nothing needed to be done to crystallise their claims such that it would be unfair to apply the strict contractual position. Lewison J (as he then was) found that it was not unfair to value the call options in question according to the contractual position, that is that they had not been exercised.

154. On the question of "fairness" he held that it was not unfair to apply the strict contractual position primarily because it could not be said to be unfair to give effect to a non-existent promise made by a person without the authority of the officeholder, on which no-one had been shown to have relied and to do so in a way which would give a greater benefit to the option holder in question than he would have been led to expect (see paragraph [24]).

155. Lewison J went on to consider whether the principle in *Ex p. James* could apply:

> *"[25] I have not needed to embark on the question whether the principle in Re Condon, Ex p. James is excluded anyway on the ground that the liquidation is a creditors' voluntary liquidation. The Court of Appeal has decided that the principle does not apply to a liquidator in a creditors' voluntary liquidation on the ground that he is not an officer of the court: Re T H Knitwear (Wholesale) Ltd [1988] 4 B.C.C. 102; [1988] Ch. 275. The liquidation in the present case is such a liquidation. On the other hand the events which, at least potentially, bring the principle into play took place during the currency of the administration; and the administrators were officers of the court: Insolvency Act 1986 Sch.B1 para.5. In Re TH Knitwear (Wholesale) Ltd Slade L.J. said that in view of the uncertainty inherent in the principle, it should not be extended. Nevertheless, it would be odd if moving from administration to creditors' voluntary liquidation radically altered the standard of conduct to be expected of the office-holder, particularly where there is no change in the identity of the office-holder. But whether that is so can be left to a case in which it matters*."

156. I can see that there may be an argument that even if the identity of the officeholders changes, the "equity" of the *Ex P James* point could in the circumstances considered by Lewison J "run" with the company and the relevant insolvency regimes (administration transitioning into voluntary liquidation and also bearing in mind that, least now, a distribution could theoretically be made in the administration itself), even

if the particular officeholders raising the question with the court (voluntary liquidators) are not officers of the court themselves.

157. However, in the case before me the position is very different. True it is that the Former Administrators seek to rely upon a contractual exemption from liability that they might otherwise have incurred whilst officers of the court. However, the contract in question was not one that they negotiated nor had any hand in and was, indeed, a contract entered into by the relevant companies after the administration had come to an end. Whatever the precise boundary of the circumstances in which the *Ex p James* principle may apply to former officeholders by virtue of things that occurred in the insolvency regime at a time when they were officers of the court, it seems to me clear that the principle should not be stretched to circumstances such as apply in this case. Accordingly, I hold that the principle does not apply in the circumstances before me. As Mr Smith and Ms Thornley say in their note on this point:

> " [the] *basis and rationale for the rule equally does not apply to persons once they cease to be officers of the Court. At that point, they are no longer acting on behalf of the Court, are not representative of the Court and their conduct cannot be said to reflect on the Court*."

In this case, I can add, nor did the contract on which they rely, come about by any intervention by them as officers of the court or in the course of the administration, when they were officers of the court.

158. In *Re Blackheath Heating & Consulting Engineers Limited* (1985) 1 BCC 99,378, Harman J was considering the invocation of the *Ex p James* principle in the context of a failure to register a charge within the time laid down by the then Companies Acts, with the result that the security was avoided against the liquidator and creditors but the underlying unsecured liability remained in place, unless the court granted an extension of time to do so. Mr Registrar Bradburn had granted such an extension. Harman J set aside the order. In so doing he was of the view that there was no unfair conduct within the *Ex p James* principle were the voluntary liquidators to be given the benefit of the legislation avoiding the charge against them. He also considered that the principle did not apply to voluntary liquidators, they not being officers of the court. He went on to say:

> "*...it is extremely doubtful that the rule applies at all to cases where there has been dealing between parties well before the inception of the bankruptcy or liquidation. It is not, so far as I know, the case that there has ever been an attempt to reopen, on the ground that it was unfair and unworthy, a transaction made between a bankrupt and a creditor substantially before the bankruptcy's inception. Mr Evans-Lombe* [Leading Counsel for the creditor] *submits that that is in truth the same as the "no right of proof" point, and I follow his argument to that extent. But, as it seems to me, it is also a wider point than that, and the fact is that the court will not undertake a roving investigation into all dealings between the parties prior to the inception of liquidation or bankruptcy and say "Oh well. there was unfair conduct there: an advantage has accrued and that should not be allowed to prevail". In my judgment, the rule in Ex parte James does not apply to cases of dealing arising prior to any liquidation or bankruptcy under the doctrine of relation back*"

159. In my judgment, the same applies (*mutatis mutandis*) to a transaction entered into between a third party and the company after the relevant insolvency regime has come to an end.

160. In case I am wrong as to the application of the *Ex p James* principle, I go on to consider the question of fairness as applied by the principle on the basis that, contrary to my view, it is capable of applying in this case.

161. First, I am satisfied that the submission that to allow the Former Administrators to rely on the Settlement Agreement would be inconsistent with the statutory regime for discharge and release from liability is a bad one. Indeed, if correct it seems to me that the submission would be based upon an independent jurisdictional ground for not permitting reliance on the Settlement Agreement, rather than being a factor in exercising a discretion. The discharge and release provisions of Schedule B1 to the Insolvency Act 1986 provide the filter of permission of the court before misfeasance proceedings may be brought. They do not in my judgment impinge upon freedom of contract. If relevant parties reach a valid contractual agreement which contains an otherwise valid contractual release of officers of the court, I do not see why that is invalidated by the statutory regime in Schedule B1. As I understand it, in oral submissions, Mr Davies broadly accepted this point.

162. So far as the question of intention is concerned, if there was a relevant common intention then rectification is a possibility as is variation of the contract by agreement under clauses 8.1 and 9.8 of the Settlement Agreement. If the parties were not *ad idem* and there was no common intention sufficient to give rise to rights to rectify, I cannot see any unfairness in former officers of the court relying upon contractual rights conferred upon them by a valid contract *ex hypothesi* freely entered into by other persons at a time when there was no relevant insolvency regime in place. Indeed, as the earlier discussion about ricochet claims demonstrates, there is a serious risk that to hold that the release is invalid would be unfair to Barclays. An alternative, that the release of the former officers of the court is ineffective but that, out of fairness to Barclays, those officers should also lose any right of contribution against Barclays (and possibly others), would be grossly unfair, rather than fair, to the Former Administrators. The key factor that is relevant is the one mentioned in relation to the above discussion about the extent of the *Ex p James* principle. The Former Administrators were not parties to the Settlement Agreement. It was not entered into in the course of the administration but after that regime had come to an end and the Former Administrators had vacated office. In those circumstances, there is no unfairness in the Former Administrators relying upon the terms of the Settlement Agreement. Thus, whether the analysis is that there is no unfairness or that the *Ex p James* principle does not apply, the same basic factors point to the same conclusion, that is that there is no reason why the Former Administrators cannot rely upon their contractual rights in this case.

163. I am also satisfied that there are no further circumstances that can be relied upon which might change this assessment. I do not consider that further examination of the evidence regarding the alleged "mistake" or "intention" in this case would change the position. Accordingly, I consider that it is appropriate to "grasp the nettle" and decide this issue at this stage.

Conclusions

164. The Former Administrators are released by the Settlement Agreement from the claims asserted against them in the Misfeasance Proceedings. The latter are to be struck out or the subject of summary judgment in favour of the Former Administrators.

165. C&C are released from claims asserted against them for breach of duty whilst acting as agents. Again, there will either be a striking out and/or summary judgment in favour of C&C. The proceedings against them can however at this stage continue as regards alleged breaches of duty to advise (rather than breaches of acts or omissions vis a vis third parties as agents). A trial will be necessary to determine whether such alleged breaches fall within an overall appointment of C&C as "agents" or not, or are otherwise prevented by the Settlement Agreement on the facts.

166. To the extent that the parties are able to do so, they should agree a draft order for submission to me as soon as possible. In any event, there will have to be a further hearing to deal with the other matters that I have to deal with. To the extent not agreed, I will extend the time for appealing so that it starts to run 21 days from an Order being made on the two primary applications before me and will reserve all consequential matters (including permission to appeal) to the further hearing which can (subject to any further submissions) be heard remotely. In the event that an agreed form of Order is not submitted by 4pm on 22 September 2021, I am likely to direct the drawing up of an order to encapsulate the above.

Schedule
The Settlement Agreement

THIS AGREEMENT is made on 1 December 2015
BETWEEN:

(1) RHINO ENTERPRISES LIMITED, a company incorporated in England and Wales (registered no. 02549545), whose registered office is at Regent Buildings, Regent Street, Leeds, LS2 7QA **("REL");**

(2) RHINO ENTERPRISES PROPERTIES LIMITED, a company incorporated in England and Wales (registered no. 06435732), whose registered office is at Regent Buildings, Regent Street, Leeds, LS2 7QA **("REPL");**

(3) **ASKWITH INVESTMENTS LIMITED,** a company incorporated in England and Wales (registered no. 02065212), whose registered office is at Regent Buildings Regent Street, Leeds, LS2 7QA **("Askwith");** and

(4) **BARCLAYS BANK PLC,** a company incorporated in England & Wales (company number 01026167) whose registered address is at I Churchill Place, London, El SHP (**"Barclays").**

INTRODUCTION:

(A) The dispute between the parties arises out of (i) financing extended by Barclays to two companies, REPL and Askwith, in 2007 and 2008 respectively in the form of two loans and in relation to the associated interest rate swap products; and (ii) the implementation by REL and REPL of an opco/propco structure.

(B) Following a mediation on 30 November 2015 (the **"Mediation"),** the parties have agreed to settle the dispute on the terms set out in this Agreement.

THE PARTIES AGREE as follows:

l. **INTERPRETATION**

1.1 In this Agreement:

"Action" means the proceedings in the High Court of Justice, Queen's Bench Division, Commercial Court under reference 2014 Folio No. 1191;

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

"Business Day" means….

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

"Dispute" means any dispute arising from or connected with this Agreement, including, without limitation, non-contractual disputes and disputes regarding the existence, validity or termination of this Agreement or the consequences of its nullity;

"Documents" means [ ];

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

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

"Notice" means [ ]

"Parent" means a person in respect of whom a company is a Subsidiary, and includes the Parent of a Parent, no matter how many times removed;

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

"Proceedings" means any legal, arbitral, administrative, regulatory or other action or proceedings;

"Released Parties" means the Parties and their Affiliates;

"Subsidiary" means a company

(i) in which another person directly or indirectly holds or controls a majority of the voting rights,

(ii) in respect of which another person has the right to appoint or remove a majority of the directors, or

(iii) over which another person has the right to exercise a dominant influence by virtue of the company's constitution or a contract, or does in fact exercise a dominant

influence, and includes a Subsidiary of a Subsidiary, no matter how many times removed;

1.2 In this Agreement, a reference to:

1.2.1 a statutory provision [ ]

1.2.2 a person [ ]

1.2.3 a company [ ]

1.2.4 the singular [ ]

1.2.5 a time of day [ ]

1.2.6 a clause or schedule [ ]

1.3 The obligations of REL, REPL and Askwith contained in this Agreement are joint and several.

2. SETTLEMENT

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

2.2 The Action shall be discontinued by all Parties by consent with no order as to costs. On the date of this Agreement, the form of order in Schedule 1 shall be signed by the solicitors acting for each of the Parties in the Action and delivered to the solicitor acting in the Action for Barclays. Barclays shall procure that, as soon as practicable thereafter, Barclays' solicitors take all steps necessary to enter that order in the Action.

3. COVENANT NOT TO SUE

3.1 Each Party agrees that the Released Parties are released and forever discharged from all Claims.

3.2 Each Party agrees that it will not bring any Proceedings against any Released Party in relation to a Claim or otherwise assert a Claim against any Released Party. Further each Party will take all steps necessary (including, without limitation, by the payment of money) to ensure that none of its Affiliates brings any Proceedings or asserts a Claim against any Released Party.

3.3 Each of the Parties agrees that if it takes Proceedings or asserts a Claim in breach of clause 3.1 above, damages are not an adequate remedy and, accordingly, that injunctive or other similar relief is appropriate to restrain that breach.

3.4 If, contrary to clause 3.2 above, an Affiliate of any Party (the First Party) brings Proceedings in relation to a Claim or otherwise asserts a Claim against another Party (the Second Party) or an Affiliate of the Second Party, the First Party shall pay on demand to the Second Party, or, if requested by the Second Party, to the relevant Affiliate, a sum equal to the costs (including, without limitation, legal costs), losses, liabilities, expenses and payments incurred or made by the Second Party or the relevant Affiliate in connection with or arising from the defence of, or otherwise responding to that Claim,

including, without limitation, any sum due on a judgment or award given against that the Second Party or the Affiliate and any payment made in settlement or that Claim. A certificate signed on behalf of the Second Party (or, if payment is to be made directly to the Affiliate, the Affiliate) shall, except in the case of manifest error be conclusive as to the amount of any costs, losses, liabilities, expenses and payment incurred or made in connection with or arising from the defence of,. or otherwise responding to, that Claim.

4. **SETTLEMENT TERMS**

4. Barclays shall, within seven days of the date of this Agreement, pay the sum of [ ] to the Claimants by way of bank transfer to: [Bank Details]

5. **NO ADMISSION**

[ ]

6. **CONFIDENTIALITY**

6.1 Subject to clauses 6.2 and 6.3 below, no Party (including its Employees) shall disclose divulge or otherwise communicate to any third party the existence or terms of this Agreement, the Claims or any negotiations or correspondence relating to this Agreement except:

6.1.1 to their professional advisors provided that any such person is subject to professional obligations to maintain the confidentiality of the information;

6.1.2 to the extent that disclosure is required by any applicable law or regulation having the force of law;

6.1.3 pursuant to an order of any Court of competent jurisdiction;

6.1.4 to the extent that disclosure is necessary to enable or facilitate the enforcement of this Agreement;

6.1.5 to the extent that disclosure is necessary to comply with audit or regulatory requirements; or

6.1.6 with the prior written consent of all Parties.

6.2 All Parties shall procure that no Employee or advisor (whether expert, legal advisor or otherwise) acts otherwise than in accordance with the obligations set out in this clause.

6.3 The Parties agree that they, and their Employees, agents, experts and advisors shall make no public statement about the Action save that any Party may issue the following statement if approached by media outlets for comment: [ ]

6.4 For the avoidance of doubt, the Parties may not make any statements to third parties in relation to a Claim, the existence and/or terms of this Agreement and/or the discontinuance of the Action, or any negotiations, correspondence or drafts in relation to any of the same other than as agreed in clause 6.3 above.

6.5 The Parties and their legal advisors agree to return the Documents to the Party who disclosed them originally within seven (7) days of this Agreement.

7. ENTIRE AGREEMENT

7.1 This Agreement constitutes the entire agreement between the Parties relating to its subject matter, and supersedes and extinguishes any prior undertakings, representations, warranties, conditions and arrangements of any nature, whether in writing or oral, relating to that subject matter.

7.2 Each Party represents and warrants that it has conducted such enquiries and taken such advice as it considers necessary in order to enter into this Agreement and that, in doing so, it has not relied on anything said or done, or not said or not done, by or on behalf of any Released Party except to the extent that it is set out expressly in this Agreement In particular, each Party acknowledges and agrees that it was not induced to enter into this Agreement by any representation or statement made by any Released Party, and that it has not relied on any such representation or statement. Each Party also accepts that the other Parties or their Affiliates may have information relevant to the Claims or this Agreement that it has not disclosed and, that neither the existence of such information nor any statement or representation made by a Released Party gives any grounds to vitiate this Agreement, to claim damages or to seek any other relief.

8. THIRD PARTY RIGHTS

8.1 The Parties' Affiliates may enforce the terms of clauses 2 and 3 of this Agreement subject to and in accordance with this Agreement and the provisions of the Contract (Rights of Third Parties) Act 1999. The Parties may by agreement entered into in accordance with clause 9.8 below rescind or vary this Agreement without the consent of those Affiliates.

8.2 Subject to clause 8.1, a person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce any term of this Agreement.

9. GENERAL

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9.5 Each Party warrants to the other Parties that, as at the date of this Agreement, no Proceedings (other than the Action) arising out of or connected with any Claims have been commenced, are pending or, to the best of its knowledge, are contemplated against any of the Released Parties.

……

9.8 No variation, waiver or other amendment of this Agreement shall be effective or enforceable unless made in writing and signed by or on behalf of the Parties.

10. NOTICES

[ ]

11. GOVERNING LAW

[ ]

12. JURISDICTION

[ ]

13. COUNTERPARTS

[ ]