Neutral Citation Number: [2022] EWHC 2460 (Ch)

Case No: BL-2020-001547

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

Date: 4 October 2022

Before :

Joanne Wicks KC

- -

Between :

(1) ABDULLAH NASSER BIN OBAID

(2) OH-NA REAL ESTATE COMPANY LIMITED

(3) TAQA INVESTMENT COMPANY **Claimants**

- and -

(1) KHALID ABDULLAH AL-HEZAIMI

(2) OFY LIMITED

(3) LATIFAH ASSETS LIMITED **Defendants**

- -

Richard Salter QC and **William Edwards** (instructed by **Baker & McKenzie LLP**) for the **Claimants**
Edward Ho (instructed by **Jones Day**) for the **First and Third Defendants**

- -

APPROVED JUDGMENT

JOANNE WICKS QC sitting as a Deputy Judge of the High Court:

INTRODUCTION

1. By a Settlement Deed dated 19 June 2019 ("**the Settlement Deed**"), the parties settled certain claims and proceedings between them. The questions which arise in these proceedings are (1) as to the extent of the claims settled by the Settlement Deed and (2) whether it should be rectified.

2. The First Claimant, Mr Bin Obaid, and the First Defendant, Dr Al-Hezaimi, are businessmen and former business partners. Mr Bin Obaid is a Saudi Arabian national and is resident in Saudi Arabia. Dr Al-Hezaimi originally trained and qualified as a dental surgeon and was involved in business ventures in the medical field. The ventures in which Mr Bin Obaid and Dr Al-Hezaimi were involved together included a medical equipment business in Saudi Arabia and Egypt known as United Industrial Medical & Plastics Co ("**UIMP**") and a bone tissue bank in Riyadh.

3. The Second and Third Claimants are companies under the control of Mr Bin Obaid; the Second and Third Defendants are or were companies in the control of Dr Al-Hezaimi (the Second Defendant was struck off the BVI Register of Companies in about October 2021).

4. The business dealings between Mr Bin Obaid and Dr Al-Hezaimi were largely informal; often by phone or WhatsApp and large sums of money passed between them with relatively few contractual documents. The relationship fractured and the parties have since been involved in various proceedings both in England and in Saudi Arabia.

5. One such set of proceedings was commenced by the Claimants against the Defendants in this jurisdiction in 2017, under claim number HC-2017-001893 ("**the Main Action**"). Baker & McKenzie LLP ("**Baker & McKenzie**") were the Claimants' solicitors (as they are in the current proceedings); Jones Day were the Defendants' (as they also are in the current proceedings). The Main Action proceeded to a trial before Falk J in June 2019, at which Richard Salter QC and William Edwards appeared for the Claimants and Robert Anderson QC and Andrew Scott appeared for the Defendants. The Settlement Deed was executed on the sixth day of the trial.

6. Between October and December 2019, following the Settlement Deed, various sets of proceedings were commenced in Saudi Arabia by either Mr Bin Obaid or the Third Claimant against Dr Al-Hezaimi ("**the 2019 Saudi Proceedings**"). Dr Al-Hezaimi responded to some of those proceedings by contending that the claims brought in them were settled by the Settlement Deed. There is a dispute between the parties, which I do not need to resolve, as to the extent to which the 2019 Saudi P roceedings remain live or may be revived. In any event, in September 2020 the Claimants commenced this claim for a declaration as to whether the Settlement Deed had the effect of releasing claims in relation to various payments which were originally referred to in the Claimants' pleadings in the Main Action but subsequently removed by amendment and, in the alternative, for rectification of the Settlement Deed so as to provide that claims relating to those payments were not released. The Defendants in turn counterclaim for a declaration that the claims in the 2019 Saudi Proceedings were settled by the Settlement Deed and for indemnities, injunctions and damages for breach of it.

7. Because it is relevant to the rectification claim, I heard evidence relating to the negotiation of the Settlement Deed and the parties' subjective understanding of its effect at the time it was executed. This evidence is, however, inadmissible on the question of construction of the Settlement Deed and I have excluded it from consideration on that issue. I will set out separately below the background to the Settlement Deed, which is part of the context in which it falls to be interpreted, and my findings on the evidence adduced in respect of the rectification claim.

WITNESSES

8. On behalf of the Claimants, I heard oral evidence from Jack Michael Secunda, a solicitor with Baker & McKenzie, and Hugh Jonathan Lyons, a partner of that firm. I also read the witness statement of Abdulrahman AlAjlan, a Saudi Arabian lawyer at a firm associated with Baker & McKenzie. On the Defendants' side I heard oral evidence from Rhys Elis Thomas, a partner in the firm of Jones Day and read two witness statements of Dr Ibrahim Al-Howaimil, Dr Al-Hezaimi's Saudi Arabian lawyer.

9. The three solicitors practising in England, Mr Secunda, Mr Lyons and Mr Thomas, all gave their evidence candidly and with conspicuous care. I have no doubt that each was genuinely attempting to recall, to the best of their ability, the events which led to the Settlement Deed being executed. All frankly admitted when they could not remember particular events or where their memories were hazy. There are some significant differences in recollection between Mr Secunda and Mr Thomas, in particular as to what was said at a particular meeting between them on Tuesday 18 June 2019. I am, however,

completely satisfied that those differences stem from the fallibility of human memory rather than any attempt to proffer an account which better suits their respective clients.

BACKGROUND TO THE SETTLEMENT AGREEMENT

10. The Main Action commenced with an application by Mr Bin Obaid against Dr Al-Hezaimi without notice for proprietary and worldwide freezing injunctions and other relief. The application was supported by an affidavit of Mr Bin Obaid dated 21 June 2017, an affidavit of Mr Lyons dated 23 June 2017 and a witness statement of Mr Lyons dated 28 June 2017. Mr Bin Obaid contended that he and Dr Al-Hezaimi had agreed that Dr Al-Hezaimi would invest in English properties using Mr Bin Obaid's money and that these properties would be held in an offshore company, namely the Second Claimant, of which Mr Bin Obaid was the majority shareholder. He accused Dr Al-Hezaimi of perpetrating a fraud on him, as a result of which the properties (said to be worth more than £35 million) had come to be held by the Second and Third Defendants as Dr Al-Hezaimi's own vehicles. Barling J heard the application.

11. The Claimants put before Barling J draft Particulars of Claim. The draft Particulars identified a number of payments alleged to have been made by Mr Bin Obaid or the Third Claimant to Dr Al-Hezaimi (or to a company, Global Real Estate Portfolios Ltd, on his behalf) for the purpose of investing in English real property or for that and other purposes. Three such payments, totalling over SAR 10 million, were pleaded to have been made for the purpose of funding the purchase of properties in Reading, referred to as the City Tower Development; 11, totalling over SAR 56 million, for the purpose of funding the purchase of

four properties in a block in Manchester called the Smithfield Square Development, and for other unrelated transactions (in respect of which no claim was made) and nine, totalling the equivalent of about £31.56 million, for the purpose of funding the purchase of 125 apartments in a Manchester development known as the Assembly Development. The draft Particulars alleged that the properties and any rental income or surplus monies from the funds advanced by them belonged to the Claimants beneficially and claimed a declaration to that effect, an order requiring transfer of title, damages and/or equitable compensation, an order for accounts and enquiries, interest and further or other relief.

12. Barling J granted proprietary injunctions and a worldwide freezing injunction by order dated 28 June 2017. The various transfers allegedly made by the Claimants were set out in Schedule C to his order. Following Barling J's order, and in accordance with an undertaking given to Barling J, the Claimants issued the claim in the Main Action on 29 June 2017 and served it together with Particulars of Claim in the form of the earlier draft.

13. On 22 September 2017, the Defendants (a) served their Defence and (b) issued an application to set aside Barling J's order on the basis of material non-disclosure.

14. By their Defence, the Defendants denied the Claimants' claims. They contended that the payments set out in the Particulars of Claim were not made for the purpose of investing in English property for the Claimants' benefit, but rather were for various other purposes. In particular, two of the payments alleged to have been made for the purpose of the City Tower Development and four of the

payments alleged to have been made for the purpose of the Assembly Development were said to have been in fact made for purposes relating to the UIMP business, including to pay Dr Al-Hezaimi's salary and expenses, and one of the payments alleged to have been made for the purpose of the Smithfield Square Development was said to have in fact been made on account of Dr Al-Hezaimi's work on the tissue bank. The Defendants contended that none of the payments relied upon by the Claimants were made for the purpose of investing in property and that the properties in issue in the proceedings belonged beneficially to the Defendants.

15. The application to set aside Barling J's order was made on the basis that the Claimants had failed to make any, or any adequate, mention to Barling J of (a) the UIMP business; (b) an agreement between Dr Al-Hezaimi and Mr Bin Obaid by which Mr Bin Obaid agreed to buy out Dr Al-Hezaimi's stake in that business; (c) another dispute including Egyptian court proceedings and (d) the lack of correlation between the payments purportedly made for the acquisition of English properties and the actual amounts paid and the dates of those purchases. In relation to the first of these points, it was the Defendants' contention that as (on their case) the vast majority of the payments made by the Claimants were for the purposes of the UIMP business or for the purchase of Dr Al-Hezaimi's shareholding in it, it was misleading for Mr Bin Obaid to have suggested in his evidence before Barling J that the joint ventures between Mr Bin Obaid and Dr Al-Hezaimi were unrelated or not directly relevant to the financial transactions relied on in the claim. The Claimants opposed the application to set aside Barling J's order and further evidence was filed in relation to that application.

16. On 23 October 2017 the Claimants served Amended Particulars of Claim. The amendments made to the Claimants' case were substantial. In particular, the Claimants deleted reference to

    i) All three of the payments which had been relied on in relation to the City Tower Development (substituting four other payments);

    ii) Seven of the 11 payments which had been relied on in relation to the Smithfield Square Development; and

    iii) Five of the payments which had been relied on in relation to the Assembly Development (adding two others).

    I shall refer to the payments which were deleted by these amendments, as the parties did at the trial, as "**the Deleted Payments**", although I recognise that this shorthand may not fully capture the Defendants' position on these amendments, which was that the Claimants were thereby abandoning any claim to these sums. Mr Salter for the Claimants calculated the value of the Deleted Payments – applying an appropriate exchange rate for those expressed in Saudi riyals – as approximately £11 million. Following the Amended Particulars of Claim, the Claimants were pleading that 14 payments had been made for the purpose of acquiring English property, being seven of those originally identified in the Particulars of Claim plus an additional seven ("**the APoC Payments**").

17. The amendments to the Particulars of Claim were shown with red underlining for additions and struck through with red underlining for deletions. A comparison of paragraph 40 of the Particulars of Claim with the same paragraph in the Amended Particulars of Claim reveals that there was also an alleged

payment on 1 January 2015 in the sum of SAR 5 million which was omitted from the Amended Particulars of Claim but not shown as deleted by being struck through ("**the January 2015 Payment**"). Mr Secunda's evidence is that this deletion was inadvertent and in error and that the Claimants nonetheless maintained their case that this sum had been paid to Dr Al-Hezaimi for the purpose of investing in English property, in their submissions and evidence. The Defendants contend otherwise: they say that the January 2015 Payment formed no part of the Claimants' case after the Amended Particulars of Claim and was not identified in the agreed list of principal issues for the trial.

18. On 17 November 2017, the Defendants served an Amended Defence and Counterclaim. The Amended Defence drew a distinction between the payments pleaded in the original Particulars of Claim – called the "Original Payments" – and the APoC Payments. The Defendants contended that all but three of the APoC Payments were made as payment of salary or reimbursement of expenses due to Dr Al-Hezaimi in respect of his work for the UIMP business. Two of the remaining APoC Payments were made in respect of the purchase of Dr Al-Hezaimi's stake in the UIMP business, and the final one was made in respect of Dr Al-Hezaimi's shares in an Egyptian business called R.Kareem Medical Co. The Counterclaim introduced two alternative cases. First, the Defendants claimed that if the two APoC Payments were not for the purpose of Mr Bin Obaid purchasing Dr Al-Hezaimi's shares in UIMP, then Mr Bin Obaid was liable for the price under the sale agreement. Secondly, the Defendants claimed damages for breach of an alleged agreement which Mr Bin Obaid said (but the Defendants denied) had been made orally in Cairo.

19. The application to set aside Barling J's order was fixed to be heard at a hearing in December 2017. By an order dated 12 December 2017, Miss Amanda Tipples QC, sitting as a Deputy Judge of the High Court, adjourned the determination of the application to trial.

20. By the time of the trial of the Main Action, various other proceedings had been commenced in Saudi Arabia between one or more of the Claimants and one or more of the Defendants ("**the 2018 Saudi Proceedings**").

21. The trial commenced before Falk J on Wednesday 12 June 2019. For the purposes of the trial, the parties agreed a list of principal issues. This included at issue 10:

"*For which purpose(s) were the payments relied upon in the Amended Particulars of Claim made? In particular, and as further set out in the Annex to this List of Issues, were those payments made*

(1) For the benefit of the Claimants, for the purpose of being invested in property in England in the name of [the Second Claimant]?

(2) For the benefit of Mr Al-Hezaimi, as (a) payment of salary and expenses owed to Mr Al-Hezaimi in connection with this work for UIMP; (b) in respect of a sale of a 20% stake in R Kareem to Mr Al-Omar; and/or (c) as payment of the price due on the sale of Mr Al-Hezaimi's stake in UIMP to Mr Bin Obaid?"

The list of principal issues included an annex which set out each party's position in relation to each of the APoC Payments, but said nothing in relation to the Deleted Payments.

22. As I have said, the matters before Falk J at trial included the Defendants' application to set aside Barling J's order. When Mr Bin Obaid was cross-examined on day four of the trial, he was cross-examined first on the without notice application and his understanding of the duty of full and frank disclosure. He was cross-examined specifically about one of the Deleted Payments and also about the January 2015 Payment. Mr Bin Obaid's cross-examination was proceeding when, on day six of the trial, the Settlement Deed was executed and the Main Action concluded.

THE 2019 SAUDI PROCEEDINGS

23. On various dates in 2019, the First and Third Claimants commenced eight sets of proceedings against Dr Al-Hezaimi in Saudi Arabia. Each concerned a payment made by the First and/or Third Claimant to Dr Al-Hezaimi, which was contended in those proceedings to have been paid by way of a loan. Dr Al-Hezaimi disputes that characterisation, contending that each payment was made for the purposes of the UIMP business or the bone tissue bank project.

24. One claim concerned a payment allegedly made on 28 August 2013 ("**the August 2013 Payment**"), which it is agreed was never pleaded in the Main Action.

25. The other seven loan claims concerned payments allegedly made in 2013 and 2014. Each of the payments on which the claim was based was a Deleted Payment. There is some dispute as to exactly what has been said by each side's Saudi lawyers to the Court in Riyadh as to the impact of the Main Action or Settlement Deed on those claims, but I do not need to resolve that issue for the purpose of my decision. It is common ground in these proceedings that this

Court has made no final adjudication of any sort in relation to any of those seven payments. The issue which arises is whether or not they have been settled by the Settlement Deed. The Claimants seek in this action a declaration that, on the true construction of the Settlement Deed, it did not compromise, release, discharge or waive any claim in respect of the Deleted Payments or the August 2013 Payment, and in particular did not do so in respect of those seven claims. The Defendants in turn counterclaim for a declaration that these seven claims were fully and finally settled by the Settlement Deed and for consequential relief.

26. As I have indicated above, there is a dispute between the parties as to whether the 2019 Saudi Proceedings, or any of them, remain live or capable of being revived, but I do not need to resolve that issue for the purpose of my decision in this action.

TERMS OF THE SETTLEMENT DEED

27. The Settlement Deed begins with some recitals, under the heading "Background":

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

28. The Identified Assets comprise certain properties and bank balances and the effect of clause 3.1 and Schedule 1 of the Settlement Deed is to divide these properties and cash (together with any rent or interest thereafter accruing)

between the parties, reflecting an allocation of 78.8% to the Claimants and 21.2% to the Defendants. The Settlement Deed provided for the stay of the Main Action, subsequent discontinuance of the claim and counterclaim, and release of each party from undertakings previously given.

29. By clause 4 of the Settlement Deed:

> *"4.1 Each of the Parties agrees, on behalf of themselves and their respective Affiliates:*
>
> *4.1.1 that this Deed shall constitute full and final settlement of all Claims against each of the other Parties and their respective Affiliates*
>
> *4.1.2 covenants and undertakes, and shall procure that each of their Affiliates covenants and undertakes, that*
>
> *(A) they shall not make or maintain any Claim against any of the other Parties or their respective Affiliates;*
>
> *(B) they shall not at any time sell, assign or otherwise purport to transfer any Claim against any of the other Parties or their respective Affiliates;*
>
> *(C) they shall not in any way support, encourage, incite, maintain, assist, cause or procure any person or entity who is not bound by the terms of this Deed to assert, institute or continue any Claim against any of the other Parties or their respective Affiliates; and*
>
> *(D) they shall not make any non-party or third party application in relation to a Claim."*

30. "Claim" or "Claims" is defined to mean:

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

"English Proceedings" are defined as the Main Action.

31. By clause 11.1 it is agreed that:

> "*This Deed constitutes the entire agreement and understanding between the Parties in respect of the subject matter of this Deed."*

32. The Settlement Deed, and any disputes arising out of it, are governed by English law.

CONSTRUCTION OF THE SETTLEMENT DEED

33. The legal principles regarding interpretation of documents like the Settlement Deed are well-known and not in dispute. As Lord Nicholls said in *BCCI v Ali* [2002] 1 AC 251 at [26]:

"*The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made."*

BCCI v Ali itself concerned a general release and confirms that there is no special rule of interpretation for such releases: see also *Schofield v Smith* [2022] EWCA Civ 824 at [19]-[21].

34. The parties agreed that the critically important provision in the Settlement Deed is the definition of "Claim" and that the dispute between them really comes down to the meaning of the phrase "*arising out of or in connection with (i) the English Proceedings…*". The question is whether that phrase captures claims relating to the Deleted Payments and in particular, the claims in the 2019 Saudi Proceedings.

35. For the Claimants, Richard Salter QC and William Edwards of Counsel argue that it is plain that the definition of "Claim" does not effect a general release or global settlement of all disputes in relation to the parties' wider relationships. They contend:

    i) that the reference to "the English Proceedings" is most naturally interpreted as a reference to the Main Action as it stood at the date of the

Settlement Deed, not 20 months earlier prior to the Amended Particulars of Claim;

ii) that the second operative part of the definition – *"(ii) any claim for rental payments or other proceeds of the Identified Assets arising prior to the date of this Deed*" – is closely linked to the first. The fact that it applies to income/proceeds arising from, but only from, the Identified Assets is, they say, a very strong pointer to the first operative part being similarly limited;

iii) that the use of the phrase "*for the avoidance of doubt…*" shows that the parties intended that which follows to be the case even without the following words, but included them to avoid uncertainty;

iv) that the recitals are a further strong pointer to the meaning of the definition, being limited to a settlement of disputes about the beneficial ownership of the Identified Assets which had been acquired by use of the APoC Payments;

v) that reliance may be placed on the absence of any provisions similar to those in clause 4 (by which the parties acknowledge and agree their beneficial entitlements and then provide a mechanism for ensuring that title is vested in the relevant person) for any assets or matters other than the Identified Assets; and

vi) that it is relevant that there is no reference to the Deleted Payments in the Settlement Deed. Had there been an intention to release claims in

relation to the Deleted Payments, there would have been clear identification of them and an express release in relation to them.

36. For the Defendants, Edward Ho of Counsel contends that there are four reasons why claims to repayment of the Deleted Payments were settled by the Settlement Deed:

i) First, because claims in respect of the Deleted Payments were formally abandoned in the course of the Main Action and not reasserted before the Settlement Deed was concluded. Against that background, such claims are claims "*arising out of or in connection with*" the Main Action: they once formed part of the Main Action and only did not continue to do so at the time of the Settlement Deed because they had already been abandoned;

ii) Secondly, because (a) the application to set aside Barling J's order was still in dispute at trial; (b) an integral part of that application was the true nature and purpose of the Deleted Payments and (c) since the nature and purpose of the Deleted Payments was in issue at the trial, claims to them are claims "*arising out of or in connection with*" the Main Action;

iii) Thirdly, the true nature and purpose of the APoC Payments was in issue at the trial and a critical part of establishing that nature was for the court to understand, and making findings about, the parties' wider relationship, in particular concerning the UIMP business; the purpose of the Deleted Payments was relevant to this enquiry and findings about them would illuminate the parties' relationship and the credibility of Mr Bin Obaid and Dr Al-Hezaimi's evidence: consequently, claims to the

Deleted Payments are claims "*arising out of or in connection with*" the Main Action;

iv) Fourthly, the Agreed List of Principal Issues for the trial in the Main Action identified as an issue whether it was agreed that Dr Al-Hezaimi would be reimbursed for his expenses and paid a salary for his work in relation to UIMP and whether particular payments were made for that purpose; the Deleted Payments are, with one exception, payments which Dr Al-Hezaimi contends were made in respect of the UIMP business: thus if the Defendants can prove that factual contention, they will fall within the ambit of clause 4.1.1 of the Settlement Deed.

37. I agree with Counsel that the answer to this question of construction rests primarily on the meaning of the words used in the definition of "Claim". I agree with Mr Ho that the recitals to the Settlement Deed are of little assistance. They tell the reader that the parties wish to fully and finally resolve the disputes which form the subject-matter of the Main Action "*on the terms of this Deed*". What they do not tell the reader is what the terms of settlement are intended to be. The definition of "Claim" is clearly wider than simply the matters in issue on the pleadings in the Main Action at the time of the trial: the question is how much wider this definition goes, and on that the recitals are silent.

38. In my judgment, when considering the scope of the definition of "Claim", it is important to ask the right questions. The relevant questions are not: do the Deleted Payments "*arise out of*" the Main Action, or are the Deleted Payments "*connected with*" the Main Action? If those were the right questions then I would agree with Mr Ho that the Deleted Payments could be said to be

"connected with" the Main Action, even if they did not "arise out of it" once the Particulars of Claim had been amended. Not only had they once been pleaded but been removed from the scope of the proceedings, they continued to feature in the evidence as relevant to the application to set aside Barling J's order and generally as to the parties' credibility, the nature of their relationship and the purpose for which payments were made to Dr Al-Hezaimi.

39. However, in my judgment those are not the right questions to ask. The right question is whether any particular claim is a "*claim or cause of action…arising out of or in connection with*" the Main Action. It is necessary first of all to identify the particular cause of action which is being relied on, and then to consider whether that cause of action falls within the definition.

40. The claims made in the 2019 Saudi Proceedings are all claims by Mr Bin Obaid or the Third Claimant that Dr Al-Hezaimi owes money because a loan was made to him. I do not consider, as an ordinary matter of language, that such claims can be said to "*arise out of or in connection with*" the Main Action. A claim which is made within the Main Action would arise out of it. A claim which depends for its existence on something which was done in the Main Action: for example, a claim that a witness had given perjured evidence in the Main Action, or a claim by one party that it was entitled to sue the other for costs incurred in dealing with the Main Action, would "*arise out of"* or at least be "*in connection with*" the Main Action. I take the view that a claim that one or more of the Deleted Payments had been made to Dr Al-Hezaimi for the purpose of investment in English property on Mr Bin Obaid's behalf would "*arise out of*

or in connection with" the Main Action because such a claim had been made in the Particulars of Claim but was subsequently abandoned.

41. But in my judgment a claim to be repaid monies lent is not a claim which arises out of or in connection with the Main Action. The claims which were removed by amendment from the Particulars of Claim in the Main Action were claims that the Deleted Payments had been made to enable Dr Al-Hezaimi to acquire English properties for the benefit of Mr Bin Obaid: it was those deleted claims which continued to feature in the evidence on the set aside application and generally at the trial. Those claims were not claims that any of the Deleted Payments had been made by way of a loan to Dr Al-Hezaimi. Claims based on the contention that a Deleted Payment had been made to Dr Al-Hezaimi as a loan never formed a cause of action pleaded in the Main Action, did not feature in the evidence in the Main Action and did not feature in the list of principal issues for the trial. Such a claim is not in my view connected with the Main Action, nor would it arise out of it.

42. As to the January 2015 Payment, this payment was relied upon by the Claimants in the Main Action as having been made to Dr Al-Hezaimi for the purpose of the purchase of English properties. As I have indicated above, the parties are at odds as to whether that claim was ever effectively removed from the Main Action. Consistently with what I have held above in relation to the Deleted Payments, any fresh claim based on the contention that the January 2015 Payment was made to Dr Al-Hezaimi for the purpose of the purchase of English property would arise out of or in connection with the Main Action and has been settled by the Settlement Deed. A claim that the January 2015 Payment was a

loan would not fall within the definition of Claim in the Settlement Deed, but would be entirely at odds with the position taken by the Claimants in these proceedings, namely that the claim to the assets purchased with the January 2015 Payment remained a live one at the trial and until the settlement was effected.

43. The August 2013 Payment falls into a somewhat separate category. No claim relating to this payment was pleaded in the Main Action. The Defendants' pleaded case is that the August 2013 Payment was made for purposes relating to the UIMP business and it therefore arose out of or in connection with the matters in dispute in the Main Action. In argument, the case was put rather differently. Mr Ho submitted that <u>if</u> the August 2013 Payment was a payment made for purposes relating to the UIMP business, then any claim to it was released by the Settlement Agreement, for the same reasons as given in relation to the Deleted Payments at paragraph 36(iv) above. For the Claimants to obtain the declaratory relief that they seek, he submitted, the Claimants must prove that it was <u>not</u> made for purposes relating to the UIMP business, which they have not done.

44. The claim regarding the August 2013 Payment in the 2019 Saudi Proceedings is a claim for repayment of a loan. In my judgment, for the reasons given above, a claim to be repaid monies lent is not a claim which "*arises out of or in connection with*" the Main Action. Consequently this claim was not settled by the Settlement Deed.

45. I therefore conclude that the Claimants are entitled to a declaration that the claims in the 2019 Saudi Proceedings were not settled or released by the terms of the Settlement Deed.

46. I do not, however, consider it right to grant the wider declaratory relief sought by the Claimants, in the terms sought. Any claim that a Deleted Payment, the January 2015 Payment or August 2013 Payment was made by way of loan would not be caught by the definition of "Claim", but I do not consider it possible to say that no claim in respect of those payments could ever arise out of or in connection with the Main Action: it would depend on the precise nature of the claim.

RECTIFICATION

47. In light of my determination on the construction of the Settlement Deed, the Claimants' claim for rectification of it does not arise, but it is nevertheless right that I should address it. What follows is therefore premised on the assumption that I am wrong about the construction of the Settlement Deed, and that its effect, as drafted, is to capture claims concerning the Deleted Payments, and in particular those made in the 2019 Saudi Proceedings, within the definition of "Claim". In that scenario, the Claimants contend that the following words should be added to the definition, in the part of it in brackets following reference to "the English Proceedings":

"*and excluding any claim or cause of action in relation to those payments included in the original Particulars of Claim reference to which was deleted by the Amended Particulars of Claim*".

Legal Principles

48. Rectification is an equitable remedy which allows the Court to amend the terms of a written contract or other document which, by mistake, does not reflect the intentions of both parties, or one of them, at the time it was executed. The Claimants claimed (a) rectification on the basis of common mistake and, in the alternative (b) rectification for unilateral mistake.

Rectification for Common Mistake

49. The leading case in relation to rectification for common mistake is now *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [2020] Ch 365. Giving the judgment of the Court, Leggatt LJ summarised its conclusion at [176] as follows:

"*…before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same intention with regard to the relevant matter, but also that there was an 'outward expression of accord' – meaning that, as a result of communication between them, the parties understood each other to share that intention."*

The requirement to show an actual common intention (as opposed to an objective intention, as would be perceived by a reasonable person observing the parties' communications) is

"rightly a demanding test to satisfy and one which affords appropriate respect to the primacy of the final, agreed, written terms of a contract."

50. Furthermore, because it is natural to presume, where parties have agreed a written contract, that the document is an accurate record of their agreement, "*convincing proof*" is needed for rectification, although the standard of proof remains the usual civil standard: *Joscelyne v Nissan* [1970] 2 QB 86 at p.98, *FSHC* [46].

51. In *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch), Mann J dealt with the issue as to whose intention was relevant for these purposes, deriving the principles from the authorities at [198]:

"(a) One is looking for the person who in reality is the decision maker in the transaction in order to find intentions in relation to rectification.

(b) In the case of a company that person will usually be the person with authority to bind the company.

(c) Someone who is not a person with power to bind can nonetheless be treated as the decision maker if that is the reality on the facts.

(d) The intention of a 'mere negotiator' may be relevant if it is shared with the actual decision maker; but, as it seems to me, that is because the intention has become that of the actual decision maker.

(e) Where a person who would normally be expected to be the decision maker (such as the board of a company) leaves it to a negotiator to negotiate a deal and produce a contract by instructing solicitors, on

the understanding that the decision maker would do a deal on those terms, then the negotiator's intention is the relevant one, either because that person is the decision maker, or, if that description is not apt, because the technical decision maker has simply adopted the intentions of the negotiator…"

Rectification for Unilateral Mistake

52. In *FSHC*, the Court of Appeal summarised the law in relation to unilateral mistake as follows:

"[103] *It has come to be accepted that the jurisdiction to rectify a written contract is not limited to cases where there was a common mistake and that in certain circumstances rectification may be granted even though at the time of execution of the contract only one of the parties was mistaken about its terms or effect. The development of the modern doctrine stems from the approval in* A Roberts & Co Ltd v Leicestershire County Council *[1961] Ch 555 of the following statement of principle in* Snell's Equity *(25th Edn, 1960) at 570:*

'… a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included.'

[104] *The precise scope of this principle remains controversial. But there is no doubt that it covers at least a case, such as the facts found in* Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd *[1981] 1 WLR 505, where the parties had a common intention that each had communicated to the other but one party before executing the contract realised that the document did not give effect to that intention and changed their mind without telling the other party.*

[105] *The recognition of this principle is consistent with the traditional rationale of rectification for common mistake and gives effect to the same underlying equity. In the case of common mistake it is inequitable for a party to the contract to seek to apply the contract inconsistently with what that party knew to be the common intention of the parties when the written contract was executed. The doctrine of unilateral*

> *mistake extends this principle to the situation where a party seeks to apply the contract inconsistently with what that party knew the other party believed to be the common intention of the parties when the written contract was executed.*
>
> [106] *In* Holaw (470) Ltd v Stockton Estates Ltd *(2001) 81 P&CR 29, para 41, Neuberger J summarised the law in what were then uncontroversial terms as follows:*
>
> *'Rectification of a bilateral document can be obtained in two types of case. The first is where the party seeking rectification can establish that both parties to the document had an intention that it should contain something different from that which it actually contains, that that intention had been communicated between the parties before execution of the document, and that the intention was shared by both parties up to the time that they executed the document. The second type of case is where the party opposing the claim for rectification appreciated that the document departed from what had previously been negotiated between the parties, and that the other party was under a misapprehension, and the first party, though aware of this, forbore from drawing his attention to the error.'"*

53. In *CBPE* Capital *Fund VIIIA LP v Taranissi* [2021] EWHC 2855 at [106], HHJ Matthews, sitting as a Judge of the High Court, analysed the principles at work as "*a kind of estoppel*":

> *"... A is mistaken. B knows of A's mistake, and in equity comes under a duty to draw it to A's attention, but does not. B's failure to speak is treated as a representation (ie that there is no mistake) on which A relies to his detriment by executing the document concerned. B is estopped from asserting that the document correctly records the agreement…*

54. As in a case of rectification for common mistake, the person making the relevant mistake must be the decision-maker, and not simply a negotiator: *George Wimpey v VI Construction Ltd* [2005] EWCA Civ 77 at [48].

55. In *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119, Jacobs J considered the state of mind required of the other party to the transaction, who opposes rectification. He said:

> "[445] *It was common ground that the requirements for unilateral mistake are those set out in* Thomas Bates and Sons Ltd v Wyndhams (Lingerie) Ltd *[1981] 1 WLR 505:*
>
> *(1) One party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain;*
>
> *(2) The other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of A;*
>
> *(3) B has omitted to draw the mistake to the notice of A;*
>
> *(4) The mistake was calculated to benefit B.*
>
> [446] *Again, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself: see* Bates *at 521.*
>
> [447] *Whilst 'sharp practice' is not required, it is necessary that the party who is opposing rectification should actually be aware that the other party is mistaken: ie there must be actual knowledge. However, actual knowledge extends to the situation where that party wilfully shuts his eyes to the obvious, or wilfully and recklessly fails to make such enquiries as an honest and reasonable man would make: see* Commission for the New Towns v Cooper (Great Britain) Ltd *[1995] Ch 259, 281.*
>
> [448] *It was common ground that where there was actual knowledge, it was not necessary that the relevant party should be dishonest. There was, however, disagreement between the parties as to whether, in a case where it was alleged that a party had wilfully shut his eyes to the obvious…a finding of dishonesty was required…*
>
> [458] *I therefore conclude that unless actual knowledge of the mistake can be shown, dishonesty is on current authority a necessary requirement for a case of rectification for unilateral mistake. Whilst this dichotomy may appear anomalous, in practice (as Blackburne J indicated in paragraph [79] of his judgment in* Wimpey*), a case where one party knows that the other is labouring under a mistake as to the contract terms, but does nothing to alert him, will usually be a case of dishonesty anyway."*

56. Although, again, the standard of proof remains the balance of probabilities, as Jacob J said in *Global Display*, above, at [446], convincing proof is required to counteract the cogent evidence of the parties' intention as shown by the instrument which they have executed. Where dishonesty is alleged, it is in any

event a fair starting point (though no more than a starting point) that dishonesty is inherently improbable and that cogent evidence is required to establish it: *Bank St Petersburg PJSC v Arkhangelsky* [2020] 4 WLR 55 at [117].

Findings of Fact

57. The trial of the Main Action started on Wednesday 12 June 2019. Mid-morning on Friday 14 June, there was a short break in the proceedings. Up to that point, Falk J had been dealing with opening submissions and applications; Mr Bin Obaid was about to be called as a witness. During the break, the prospect of settlement was raised between the parties' solicitors. After the break, Mr Anderson asked the court for some time and the court did not sit again that day (although the parties returned to court at 3.30pm to tell Falk J that the negotiations had not at that stage borne fruit).

58. During the Friday negotiations, the focus was on the assets in dispute in the Main Action – which came to be called the Identified Assets in the Settlement Deed – and how they would be divided between the parties. Lists of the assets were prepared and approximate values put on them; the total "pot" was believed to be about £40 million. By Friday evening, the discussions and offers were expressed by reference to how much of the total asset pot would be retained by the Defendants. The Claimants were at £8 million; the Defendants were at £9 million.

59. The discussions between the solicitors continued by email over the weekend. On Saturday 15 June at 17:19, Mr Thomas emailed Mr Lyons to say that, subject to verification, the total "pot" appeared to have gone down to approximately £37.7 million. He said he was struggling to get Dr Al-Hezaimi to go lower than

£9 million, but asked for Mr Lyons' views on the potential for settling at £8.25 million, on the basis of the reduced "pot". Following further exchanges, by email of Sunday 16 June at 17:22, Mr Thomas confirmed that, having spent a long time discussing matters with his client, he could go to £8.25 million if Mr Lyons had authority to agree that. By email of 22:59 that evening, Mr Lyons responded to say that, on a personal level, Mr Thomas' efforts over the previous few days had been much appreciated, but that he was instructed to reject the offer. There had also been an email exchange between Counsel earlier that day, but that too had failed to bring resolution.

60. On Monday 17 June the trial resumed; Mr Bin Obaid was called and cross-examined for the whole of that day. Mr Thomas confirmed to Baker & McKenzie that he was content for instructions on settlement to be taken from Mr Bin Obaid despite the fact that he was giving evidence.

61. On Tuesday 18 June, Mr Lyons did not initially attend court as he had a commitment on another case. Primary responsibility for conducting settlement negotiations on the Claimants' side therefore fell on Mr Secunda. It is apparent that there was a first conversation between Mr Secunda and Mr Thomas that day before the Court sat at 10.45am, with Mr Anderson thanking Falk J for the time afforded to the parties. I find that in that conversation, two things happened. First, the parties reached £8 million as the amount of the assets which would be retained by the Defendants from the total assets and it is that division (expressed as a percentage rather than an amount) which is reflected in the final Settlement Deed. Secondly, it became apparent that there was a significant difference between the parties as to the basis of settlement, which had not

previously been communicated. The Claimants were anticipating that the settlement would be only of the Main Action: Mr Secunda's evidence, which I accept, is that his instructions, before he had the conversation with Mr Thomas, were that Mr Bin Obaid would only settle at £8 million if it were only the Main Action which was settled. On the other hand, the Defendants had been approaching the discussions on the basis that the settlement would be a global settlement of all disputes, including the 2018 Saudi Proceedings, about which none of the English lawyers knew very much. When Mr Secunda, during this first conversation on 18 June, made clear that his clients were offering to settle only the Main Action, this came as a complete shock to Mr Thomas: he contacted his team back at the office and said that the settlement was probably off and spent a long time speaking to Dr Al-Hezaimi on this point. He explained Dr Al-Hezaimi's reaction:

"*my client had reacted very adversely to what he –- what he perceived as a change – a complete – a significant change to the scope of the settlement and had become quite emotional about it*."

62. At 11:30 that morning (whilst Mr Bin Obaid's cross-examination was continuing), Mr Thomas sent Mr Secunda an email:

"*Jack, following our discussion this morning, do you think you could get, from Mr Umair or Dr Turki* [Mr Bin Obaid's advisers], *a list (or at least an understanding) of the non-UK claims which your client wishes to maintain? (Assuming you can do so without seeking instructions, which may not be a correct assumption). It would be helpful to get an understanding of that. From our perspective our primary concern is to avoid the situation where we settle*

the current dispute, and your client immediate pursues substantially overlapping claims in Saudi Arabia or elsewhere. It may be helpful to understand the scope of the other claims, and whether there are particular claims that your client is concerned to preserve." (emphasis in original).

What Mr Thomas was then envisaging was that it might be possible to express the settlement as a global settlement of all claims, save for those particularly identified as to be excluded.

63. Later that morning, Mr Thomas asked Mr Secunda to step out of the court room and they had a further conversation. Mr Thomas made clear that his client's position was that the settlement should be a global one, and Mr Secunda replied by saying that if that was the case, the Defendants would have to give up everything in England – i.e. they would not be able to retain the £8 million of assets otherwise available to them.

64. At the lunch adjournment, Mr Thomas and Dr Al-Hezaimi went for a long walk through Holborn. I accept Mr Thomas' evidence that the discussion was about the effect of the Claimants' position on the 2018 Saudi Proceedings. Having given it more thought, Dr Al-Hezaimi concluded that he was the "net" claimant in the 2018 Saudi Proceedings (i.e. that his claims against the Claimants were worth more than the Claimants' claims against him) and that therefore it made no sense for him to pay anything to achieve a global settlement which included the 2018 Saudi Proceedings. Mr Thomas was therefore instructed that he could concede the global settlement point.

65. At 13:29 that afternoon, Mr Thomas let Mr Secunda know that he was heading back up in the lift in the Rolls Building and available to have a further

discussion. There was a further conversation between Mr Thomas and Mr Secunda, in the hallway outside the court room ("**the 1.30pm meeting**"). What was said during this conversation is a critical part of the evidence on the rectification claim, and I shall set out my findings below.

66. At 14:30, Mr Thomas sent Mr Secunda (copied to Mr Lyons) an email from the back of the court room whilst the evidence was continuing, marked "without prejudice and subject to contract":

"*Jack, Hugh*

Just to follow up on our discussions a moment ago, here is what I believe is agreed, subject to agreeing documents:

- *Our client will [receive]/retain £8M, comprising cash and real estate. (We previously discussed our client retaining Brighton, Reading, Smithfield Square, and cash for the balance – those we should discuss the precise balance of assets to ensure that the transaction is structured efficiently).*

- *Mutual release of claims arising in the English proceedings – proceedings to be discontinued with no order as to costs.*

- *OFY/Latifah corporation tax liability to be assumed pro rata according to parties' share of the settlement assets – therefore 8/37.7 (21.22% from the Defendants.*

Our client will want an order that your client agrees strict confidentiality provisions – and potentially delivery up of documents in these proceedings. I did not raise this but I assume that it should not be controversial.

If you confirm your agreement, STC, I will step out and circulate a short draft term sheet. I think we should aim to document and execute this settlement very quickly…"

67. It is apparent from this email that at the 1.30pm meeting, Mr Thomas and Mr Secunda had agreed that there was not to be a global settlement of all claims between the parties and that the Defendants' share of the assets would not, therefore, be reduced from the £8 million figure previously discussed.

68. Mr Bin Obaid's cross-examination continued that afternoon, but at the end of the court day, Falk J was told by Counsel that terms had been agreed for the disposal of the proceedings, which were to be "*papered*" overnight.

69. In fact there was never a "*draft term sheet*" prepared, as Mr Thomas' email envisaged. Rather at 20:34 that evening, Mr Thomas sent Mr Lyons and Mr Secunda what he called "*a fairly rough working draft*" of the Settlement Deed. In this draft, the definition of "Claim" was, Mr Thomas says, taken from a settlement agreement he had previously prepared on an unrelated matter. It read:

"'*Claim' or 'Claims' means all and any claim or cause of action (other than arising out of a breach of this Agreement) of any kind (including without limitation by way of correspondence, allegation, defence, counterclaim or set off and/or for any fees, costs or expenses) in any jurisdiction whether under English or foreign law, whether civil or criminal in nature, arising out of or in*

connection with (i) the English Proceedings (including for the avoidance of doubt any orders for the payment of costs); or (ii) and claim for rental payments or other proceeds of the Identified Assets arising prior to the date of this Agreement."

70. At 22:30 on 18 June, Mr Secunda emailed Mr Thomas with some "*high level comments*" on the draft. These were shown tracked on the draft and included the insertion of the reference to counterclaims in the "avoidance of doubt" part in parentheses.

71. The recitals were added by Mr Thomas in a draft provided at 00:52 on the morning of Wednesday 19 June. At 08:57 that morning, Mr Secunda circulated a marked-up version of the draft with comments from his firm and the Claimants' counsel. The marked-up version added at the end of the definition

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

A comment bubble showed that this had been "*Inserted at Richard's* [i.e. Mr Salter's] *request*". In a draft timed at 11:29 on 19 June, the word "*direct*" was deleted by Mr Thomas and in a draft timed at 12:37 on 19 June, circulated by Jones Day, Mr Salter's addition was again slightly amended to refer to "*an overlap with the claims in the English Proceedings*." The definition of "Claim" was then in the form in which it appears in the executed Settlement Deed.

72. Mr Thomas' evidence was that he considered the process of drafting to be part of the negotiation; that the scope of the release could be rendered in many

different ways and that he had tried to express that scope in the widest way possible consistent with what had been discussed in terms of settlement of the Main Action only. He deliberately intended that the definition of "Claim" should capture the Deleted Payments, which he considered it open to him to attempt to achieve. I accept that evidence.

73. On the other hand, Mr Secunda and Mr Lyons both say that they believed that the only claims being released by the Claimants were those in respect of the APoC Payments, not the Deleted Payments. I also accept that evidence.

The 1.30pm meeting

74. I now turn to the detail of the 1.30pm meeting. This is important, because Mr Secunda's recollection is that during this conversation, when he and Mr Thomas spoke about settling only the English proceedings, Mr Thomas said, with a wry smile and a jokey tone, words to the effect that this "*meant everything in the Particulars and Amended Particulars, right?*" and that Mr Secunda replied in the same jovial tone along the lines of "*We're only talking about the APOC here*". Mr Thomas then smiled and said words to the effect of "*worth a try*". Mr Secunda says that he took that to mean that Mr Thomas understood, or thereby agreed, that only claims in relation to the APoC Payments were to be released.

75. Mr Lyons does not recall being told about this part of the conversation between Mr Secunda and Mr Thomas. He explained that the hearing was in full flow by the time he returned from his other engagement, so there was little opportunity for a detailed discussion. He said that, during the course of this case, when Mr Secunda had told him about the conversation, he "*had one of those moments where you kind of go 'Oh yes. I did know that, didn't I? So I have a sort of tickle*

memory…", but no positive recollection. On the other hand, he says he is confident that at no stage during the subsequent negotiations on the evening of 18 June or the morning of 19 June did the parties discuss whether the release covered the APoC Payments or the Deleted Payments.

76. Mr Thomas does not recall the conversation in the hallway outside the courtroom. He does, however, have a recollection that at some point he and someone from Baker & McKenzie had a conversation about the Deleted Payments as opposed to a claim for monies in the APoC and they had conveyed that the Claimants did not want to release any claims to the Deleted Payments. He located this conversation as having taken place after his walk with Dr Al-Hezaimi and it seems likely that it was during the 1.30pm meeting. His evidence is that he had not at that stage discussed with his client the question whether claims to the Deleted Payments would be settled and had assumed that the release would extend to everything to do with the Main Action, which Mr Thomas treated as including the Deleted Payments. He recalled a subsequent discussion in which he had discussed the Claimants' position with Counsel and his client.

77. I accept that Mr Secunda has an apparently specific memory of this particular part of the conversation but on the balance of probabilities I find that the exchange did not occur as he remembers. I prefer the evidence of Mr Thomas, namely that the question of the Deleted Payments was raised in such a way as to convey the Claimants' position that they did not wish to release any claims in respect of them, but without Mr Thomas communicating that his client agreed with that position. That is for the following reasons:

i) In context, it seems unlikely that Mr Thomas would have been the one to raise this issue, or to have done so in a jokey tone, as something of a "try-on". The scope of the release was a serious matter and Mr Thomas had just had a number of difficult conversations with his client about whether or not the settlement would encompass the 2018 Saudi Proceedings. The exchange as recalled by Mr Secunda would only make sense if Mr Thomas had gone into the conversation knowing that the Claimants were expecting the Deleted Payments to be carved out of the settlement agreement and with instructions to see if he could improve the Defendants' position. However, there is no evidence of any prior discussion about the release extending to the Deleted Payments and I accept Mr Thomas' evidence firstly, that he had not discussed this issue with Dr Al-Hezaimi before the 1.30pm meeting and secondly, that there was a subsequent discussion with his client and Counsel about the point.

ii) Mr Lyons' "tickle memory" is in my judgment consistent with knowing that the issue had been raised and not corroborative of the full details of Mr Secunda's account.

iii) If the conversation had progressed as Mr Secunda recalls, I think it unlikely that the 14.30 email from Mr Thomas would have been written as it was, or at least it would have prompted a response from Mr Secunda clarifying that any claim to the Deleted Payments would have been carved out of the release. The reference in the email to "*Mutual release of claims arising in the English proceedings*" was, in context,

ambiguous: the Claimants considered the Deleted Payments to fall outside the Main Action, but the Defendants saw them as part of it.

iv) Most significantly, if the conversation had taken place as Mr Secunda recalls, I do not consider that Mr Thomas would have drafted the first draft of the Settlement Agreement, and in particular the definition of "Claims" as he did. The gist of the alleged agreement was that the release should be confined to the causes of action pleaded in the APoC. Yet the definition of Claims is clearly broader than that. Mr Thomas' evidence, which I accept, is that he would not have proposed drafting in these terms if there had been agreement that the Deleted Payments were to be excluded from the scope of the release: in fact he believed, having discussed the matter with counsel, that the wording put forward was broad enough to capture the Deleted Payments and was pleasantly surprised when Baker & McKenzie did not require a comprehensive rewrite. On the other hand he says, and I accept, that he did not think "Crikey, we've got away with this". That thinking process is in my view consistent with the issue having been raised, but not settled in the way which Mr Secunda's account would suggest.

Rectification: Conclusion

Rectification for Common Mistake

78. In my judgment, the evidence indicates that Mr Bin Obaid was the relevant decision-maker on the Claimants' side, although he had the benefit of advice from others in his entourage, as well as legal advice from Baker & McKenzie. Dr Al-Hezaimi was the relevant decision-maker on the Defendants' side.

79. In those circumstances it is somewhat surprising that I heard no evidence directly from Mr Bin Obaid himself, as the person bringing the claim for rectification, to evidence the alleged common intention that the definition of "Claim" should exclude claims relating to the Deleted Payments. Mr Lyons was cross-examined on the extent to which he took decisions without reference to Mr Bin Obaid, and it is clear from his evidence that he took instructions from his client on the key points of the settlement, even if he did not consider it appropriate to take him through the drafts line by line. In my judgment he would not have taken a decision on the scope of the release of claims, and specifically on whether or not claims to the Deleted Payments should fall within the release, without reference to his client. As Mr Salter was at pains to point out, the Deleted Payments represented a very substantial sum of money and the question whether they fell within or outside the scope of the release was not a trivial matter. In that circumstance, Mr Salter's argument that it is sufficient to consider only Mr Lyons' intention, because a solicitor has authority to settle a claim on which he or she is instructed, seems to me to miss the point. Whatever the scope of Mr Lyons' actual or ostensible authority, he was not in fact the relevant decision-maker for the purposes of considering a rectification claim: that was Mr Bin Obaid.

80. There is scant evidence as to what Mr Bin Obaid intended the Settlement Deed to say about release of claims relating to the Deleted Payments but I am satisfied that the relationship between Mr Lyons and Mr Secunda on the one hand, and their client on the other, was such that their understanding of the scope of the release – i.e. that it did not capture any claims relating to the Deleted Payments

– would have been communicated to Mr Bin Obaid and formed the basis on which he chose to enter into the Settlement Deed.

81. On the Defendants' side, Mr Thomas' evidence was that he discussed the Claimants' wish to exclude claims concerning the Deleted Payments from the scope of the release with Dr Al-Hezaimi. There is no evidence as to whether he communicated to his client his aims in drafting the definition of Claim or whether Dr Al-Hezaimi understood him to have achieved them, although Mr Thomas did recall a telephone conversation with his client at his hotel, who was concerned that the apparently abandoned claims to the Deleted Payments could be relitigated. Nevertheless it is clear, in light of my findings set out above, that there could have been no common intention that claims relating to the Deleted Payments were excluded from the scope of the release, because that was not what Mr Thomas believed the effect of the Settlement Deed to be and, in so far as Dr Al-Hezaimi had any intention on the matter at all, it is probable that he shared his solicitor's view of the drafting.

82. I mention briefly an argument of Mr Ho, namely that clause 11.1, the entire agreement clause in the Settlement Deed, would tend to show that no basis for rectification could have arisen because the parties intended to be bound by the document in the material respects regardless of prior or other intentions: see *Phillips Petroleum Co UK Ltd v Snamprogetti Ltd* [2001] EWCA Civ 889 at [32]. It was not Mr Ho's submission that the mere inclusion of an entire agreement clause in a contract or deed would prevent a claim to rectification arising: such an argument was rightly rejected by Christopher Pymont QC, sitting as a Deputy High Court Judge, in *Surgicraft Ltd v Paradigm Biodevices*

Inc [2010] EWCA 1291 at [70]-[74]. His was the more limited argument that the inclusion of the entire agreement clause should be given evidential weight in considering the parties' intentions. On my findings, this issue does not arise but for completeness I should record that the presence of the entire agreement clause in this case throws no light on the parties' actual intentions and I have no evidence to suggest that its inclusion was given any particular thought in the drafting process.

83. As I have said, on the facts as I have found them, there was no common intention shared by the parties about the scope of the release and whether it extended to claims concerning the Deleted Payments. Furthermore, in light of my findings, in particular as regards the 1.30pm meeting, there was no outward expression of accord between the parties that claims relating to the Deleted Payments should be excluded from the scope of the release in the Settlement Deed.

84. I therefore conclude that the claim to rectification for common mistake would have failed, had my decision on the proper construction of the Settlement Deed been different.

Rectification for Unilateral Mistake

85. In my judgment the basis of a claim for rectification for unilateral mistake is not made out.

86. If (contrary to my determination) the effect of the Settlement Deed was to settle claims relating to the Deleted Payments, then Baker & McKenzie and, through them, Mr Bin Obaid, were labouring under a mistaken view of the meaning of the definition of Claim. But Mr Thomas, let alone Dr Al-Hezaimi, did not know

and had no reason to think that they were labouring under that mistake. In my judgment it cannot be said that Mr Thomas or his clients wilfully shut their eyes to something obvious, or that they wilfully or recklessly failed to make the enquiries that an honest and reasonable person would. Mr Secunda had raised the Claimants' wish to exclude claims relating to the Deleted Payments from the release, but Mr Thomas had given no assurance that that was agreed, and the drafting of the Settlement Deed from the start involved a definition of Claim which patently extended beyond the claims in the Amended Particulars of Claim. Mr Thomas viewed, and in my judgment was right to view, the process of working up the drafts of the Settlement Deed as an ongoing negotiation: not as to the essential commercial terms of the deal, such as the £8 million retention of assets by the Defendants or the absence of a global settlement of all claims, but as to the detail of the scope of the release and other matters. Mr Bin Obaid was represented by highly experienced solicitors and leading and junior counsel. Mr Thomas and his clients were entitled to expect them to take their own view on the effect of the drafts and to advise their clients accordingly. They acted entirely appropriately in the context of this large-scale commercial litigation being waged between sophisticated and well-advised parties.

87. Consequently, the claim to rectification for unilateral mistake would equally have failed, had my decision on the question of construction been different.

CONCLUSION

88. I therefore conclude:

(1) That on the true construction of the Settlement Deed, it does not settle, release or waive claims that the Deleted Payments or the January 2015 Payment or the

August 2013 Payment were loans to Dr Al-Hezaimi, including the claims made to that effect in the 2019 Saudi Proceedings;

(2) The claims to rectification (on the basis of a common mistake or a unilateral mistake) do not arise, but, if they had, they would have failed.