Neutral Citation Number: [2024] EWCA Civ 833

Case No: CA-2023-002371

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
THE HONOURABLE MR JUSTICE FREEDMAN
[2023] EWHC 2401 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2024

Before :

LORD JUSTICE BEAN
LORD JUSTICE PHILLIPS
and
LORD JUSTICE SNOWDEN

- -

Between :

(1) KEVIN RALPH WILLIAM RILEY
(2) PAULINE CHRISTIANE RILEY — **Appellants**

- and -

NATIONAL WESTMINSTER BANK PLC — **Respondent**

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- -

Hugh Sims KC and Stefan Ramel (instructed by **Debello Law**) for the **Appellants**
Paul Sinclair KC and Laurie Brock (instructed by **TLT LLP**) for the **Respondent**

Hearing dates : 25 & 26 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. Mr and Mrs Riley appeal from the decision of Freedman J dated 29 September 2023 granting National Westminster Bank PLC ("the Bank") reverse summary judgment on the Rileys' claim against the Bank for fraudulent misrepresentation. The judge decided that the claims against the Bank had been compromised and released by a Settlement Deed of 12 November 2014.

2. The judge went on to hold, however, that had this compromise and release not been effective, the Rileys' claims would not have been barred by limitation. The Bank challenges that finding by way of Respondent's Notice.

The facts

3. I adopt with gratitude the narrative of the facts contained in the judgment of Freedman J.

4. On 24 January 1997, the Rileys incorporated Riley (Holdings) Limited ("RHL") a building development company, of which Mr and Mrs Riley were the directors and Mr Riley the sole shareholder. In or about 2004, RHL acquired a site, River Crescent, on the banks of the river Trent, two miles east of Nottingham. The site had permission for high-quality residential development. The Rileys also incorporated another company, NDA (Nottingham) Limited ("NDA"), operating as the Nottingham Design Academy. NDA was a subsidiary of RHL.

5. In 2005, the Bank, which was part of the Royal Bank of Scotland ("RBS") group, made a series of loans to RHL to cover refinance of RHL's purchase and the costs of development. The lending totalled £26.5m and was advanced against a RICS valuation which valued the development at £41m.

6. On 9 December 2008, the Bank facilities were replaced by an on-demand loan of £32m referenced to LIBOR ("the 2008 Facility"). The Bank had recently agreed to restructure and/or renew the Riley Group's facilities for 12 months.

7. In the second half of 2009, the management of the RHL banking connection was transferred from mainstream banking to the Bank's Global Restructuring Group ("GRG"). Although there was no formal handover to GRG, RHL and the Rileys understood at the time that the purpose of the transfer to GRG was to facilitate a 'restructuring'.

8. Between 2009 and 2012, the Appellants say, the Bank repeatedly made representations to them and to RHL that it was intending to restructure the 2008 Facility, support RHL, and rehabilitate it, in order to return it to mainstream banking in a satisfactory condition. The Appellants and RHL relied on the representations by engaging in on-going dialogue with the Bank about restructuring throughout this period and causing substantial monies to be paid into RHL. The Rileys allege that, if they had known the Bank's true agenda towards them, RHL would have sought and obtained alternative refinance with other lenders and would have avoided insolvent administration.

9. The Appellants' case is that the Bank's representations were untrue and were known to be untrue, or were made with reckless indifference to their truth or falsity. They allege

that the Bank was from at least February 2009 pursuing a different agenda which it concealed from them and RHL. It involved the designation of RHL as "non-core" business, and the termination of relationships of customers so classified over a 5-year time span expiring in 2013. This entailed a strategy of exiting the relationship, by no later than 2013 if possible, by an ultimate disposal of the River Crescent development, and further property charged in connection with the 2008 Facility if possible, to the Bank's subsidiary, West Register (Property Investments) Limited ("West Register"); and, pending exit, deriving significant financial benefit from the relationship.

10. In March 2012, the Bank served a series of demands for repayment of the 2008 Facility and connected loans and then placed RHL into administration on 2 April 2012.

The Nabarro correspondence

11. During the course of 2013 Nabarro LLP, solicitors, sent three letters to the Bank on behalf of the Appellants, dated 1 February, 3 May and 21 November 2013 (together, the "Nabarro letters"). It is important to note the contents of these documents in connection both with the construction of the Settlement Deed and the issue of limitation. The letters were written on behalf of the Appellants and NDA, but not RHL, which was by this stage in administration.

12. The 1 February 2013 letter of Nabarro included allegations which can be summarised as follows:

(i) the purpose of the letter was to "place on record, the inappropriate and cavalier way in which RBS, as agent for [the Bank], has dealt with our clients culminating in the administration of [RHL]." It accused RBS, as agent of the Bank, of "irrational, precipitous decisions, misstatements, malpractice and poor customer service";

(ii) it expressly stated that the complaints identified were not an exhaustive list and that investigations continued;

(iii) the Bank caused a valuer to be used which was alleged to have a significant conflict of interest. The River Crescent development of RHL was then sold for £21m which the Rileys believed to have been at an undervalue, and the sale of RHL was to West Register, the Bank's investment property company;

(iv) RHL was forced into an insolvency process when it was not insolvent. This caused RHL to go into administration "on misconceived grounds". As a result, it was alleged that Nabarro's clients had suffered significant loss and damage to their interest in NDA.

13. The 3 May 2013 letter of Nabarro included the following allegations:

(i) RHL had been placed into administration "without good reason" and the Bank had "destroyed the value and reputation of RHL" thereby causing Nabarro's clients to suffer "significant loss and damage";

(ii) The Bank had "destroyed the value of the NDA" through "irresponsible, negligent and reckless conduct";

(iii) A swap sold to RHL and partly funded by the NDA was in breach of RBS/the Bank's statutory duty.

(iv) there was criticism of the approach taken to West Register, stating that "given the increasing public concern in relation to West Register, our clients are concerned that this was a thinly disguised ploy by RBS/Natwest to take on to its books, an incredibly profitable asset at a cut price".

14. The letter made repeated allegations of "irrational and irresponsible decisions, misstatements, malpractice and poor customer service".

15. The 21 November 2013 letter of Nabarro continued with similar themes. It referred to LIBOR manipulation and connected this to RBS. By its final paragraphs it contrasted what the Bank had stated in its response dated 28 May 2013 in relation to GRG with what (it was said) GRG had actually done, including (allegedly) "putting a viable business into administration at a time when our clients had put significant funds into making the River Crescent apartments suitable for rental and producing a substantial income." It stated that "our clients have a legitimate claim against the Bank for losses caused by the Bank's actions and inactions"; and repeated a request for a meeting with the Bank to resolve matters, to set the record straight and avoid litigation.

The Tomlinson Report

16. On 25 November 2013, four days after the 21 November 2013 letter, a report by Dr Lawrence Tomlinson into “Banks' lending practices: treatment of businesses in distress” ("the Tomlinson Report") was published. Dr Tomlinson was described on the front page as “Entrepreneur in Residence at the Department for Business, Innovation and Skills”.

17. As the judge noted:

> “(i) The Foreword referred to the need for banks to "remove bad debt from their books, to downsize parts of their portfolio and rid themselves of risky lends". It suggested there was evidence that RBS was "unnecessarily engineering a default to move the business out of local management and into their turnaround divisions, generating revenue through fees…and devalued assets" and that the Bank was extracting "maximum revenue" from businesses which was a "key contributing factor to the business' financial deterioration". The Introduction alleged that GRG was not being used as a turnaround division but as a profit centre for the Bank.
>
> (iii) Section 3 of the Report summarised Dr Tomlinson's "findings" including that:
>
> > (1) RBS artificially distresses an otherwise viable business and through their actions puts it on a journey towards administration, receivership, and liquidation.

(2) Once transferred into the business support division of the Bank the business is not supported in a manner consistent with good turnaround practice and this has a catalytic effect on the business' journey to insolvency…..…[It] became very clear, very quickly that this process is systematic and institutional…[T]his suggests an element of intent in the Bank's decision to distress those businesses.

(iv) The fourth section:

(1) suggested the Bank looked to engineer defaults by manipulating re-valuations;

(2) reported evidence that no business entering GRG had come back into local management;

(3) reported a perception of an intention by the Bank to purposefully distress businesses to put them into GRG and then take their assets for West Register at a discounted price;

(4) suggested that the Bank should be more transparent if there was an entire sector that the Bank was no longer "in" and wanted to get rid of customers;

(v) Among other things, section 5 alleged there were few examples of businesses going into GRG and returning into local management and suggested that GRG charged excessive fees, including by requiring independent business reviews.

(vi) Section 6 contained several complaints about West Register including the Bank's alleged conflict of interest and the alleged deliberate undervaluation of property then acquired by West Register at a discounted price.

(vii) The conclusion stated that the findings of the report "clearly show heavy handed, profiteering and abhorrent behaviour of some of the Banks towards businesses…it is undeniable that some of the banks, RBS in particular, are harming their customers through their decisions and causing their financial downfall."

18. The Appellants were well aware of the Tomlinson Report. Mr Riley wrote to his MP the day after its publication referring to the Report and to the UK banking industry being "an international laughing stock of fraud and corruption".

19. The Bank contested the allegations in the Tomlinson Report, and denies them in these proceedings, but in raising the defence of limitation it says that the Appellants had the knowledge in order to plead fraud and wrongdoing of the Bank at the latest from the publication of the Tomlinson Report.

20. The judge found that Mr Riley had also been carrying out his own research into allegations of misconduct by GRG in November and December 2013. In particular, Mr

Riley sent an email on 20 December 2013 which showed that he had done research into the identities and roles of various people connected with GRG and had reviewed articles on a website which included allegations of "systemic institutionalised fraud" inside GRG, and referred to an alleged strategy by the Bank to shift billions of pounds of commercial property assets from its books.

The Settlement Deed

21. A year after the Nabarro letter of November 2013, the Rileys and the Bank entered into a Settlement Deed. By this time the Rileys' total debt under the facility agreements and personal guarantee was a sum of £2,716,180.17. The parties agreed that instead payment could be made either of an early settlement sum of £1,100,000 within a year of the Settlement Deed or a deferred settlement sum of £1,250,000 plus interest with arrangements for monthly payments, minimum annual payments and a final payment. As the judge observed, either of these options involved a very substantial reduction in the indebtedness of the Rileys to the Bank.

22. Clause 7 of the Settlement Deed ("Clause 7") stated as follows:

> "7.1 The terms of this Deed and payment of the Settlement Sum are in full and final settlement of, and each Borrower hereby releases and forever discharges, any and/or all actions, claims, rights, demands, disputes and set-offs or other matters, whether in this jurisdiction or any other, whether or not presently known to the Parties or the law, and whether in law or equity, that it may have or hereafter can, shall or may have against the Bank or any Connected Party of the Bank arising from, out of or in connection with (i) the Facility Agreements, the Personal Guarantee or the Legal Charge; (ii) NDA; or (iii) Riley Holdings and all properties owned or formerly owned by Riley Holdings (collectively the "Released Claims").
>
> 7.2 The Borrowers agree that they will not bring or commence any proceedings whatsoever in any jurisdiction against the Bank or any Connected Party or of the Bank arising out of or in any way connected with the Released Claims save for the purposes of enforcing their rights under this Deed."

23. As the judge observed, the terms of the settlement agreement are in extremely wide-ranging terms. He noted in particular that the release refers to:

(a) "any and/or all actions, claims, rights, demands, disputes and set-offs";

(b) "whether or not presently known to the Parties or the law" (in other words, it refers expressly to unknown claims);

(c) "that it may have or hereafter can, shall or may have against the Bank or any Connected Party" (in other words, it refers to present and future claims);

(d) ……."arising from, out of or in connection with (i) the Facility Agreements, the Personal Guarantee or the Legal Charge; (ii) NDA; or (iii) Riley Holdings and all properties owned or formerly owned by Riley Holdings."

24. Clause 7.2 widens the effect of the definition of Released Claims by an obligation not to bring "any proceedings whatsoever" in any jurisdiction "arising out of or in any way connected" with the Released Claims.

25. The Settlement Deed provided for a standard "entire agreement" clause which excluded claims in non-fraudulent misrepresentation. Clause 13(2) reads:

> "The Parties expressly agree that they will not have any right of action in relation to any statement or representations made by or on behalf of any other Party in the course of any negotiations which preceded the execution of this deed, unless such statements or representations were made fraudulently".

Events of 2015-2022

26. As already noted, administrators of RHL had been appointed on 2 April 2012. The company was wound up, dissolved, and struck off the register of companies on 3 June 2015. All remaining rights and interests of RHL vested in the Crown as *bona vacantia.*

27. In 2014 the Financial Conduct Authority had issued a Final Requirement Notice to the Bank and other companies in the RBS Group. The terms of the notice included asking Promontory Financial Group (UK) Ltd to form a view on the RBS group's treatment of small and medium enterprise ("SME") customers who had been referred to GRG, in particular the validity of the allegations about GRG made by customers and reported on by (among others) Dr Tomlinson. The papers before the judge and before this court include the Promontory Report. It appears that a summary of this report was published by the FCA in late 2016 and the full report in February 2018.

28. The Promontory Report was considerably more restrained than the Tomlinson Report had been in its criticisms of GRG. It did, however, state that the Bank had established a "non-core" division following the global financial crisis for those of its assets which were no longer considered core to the Bank's business and lending model; that one of the key purposes of the non-core Division was to run down or "manage down" such assets over a five-year period; and that as such its internal strategy was to seek an exit from such assets and customers by the end of 2013. The Appellants contend that this report, together with other documents that came to their attention at about the same time, revealed to them for the first time that the Bank's representations to them had been false and made dishonestly.

29. On 6 September 2018 the Appellants' present solicitors, Debello Law, wrote to the Bank on behalf of the Rileys, RHL and NDA. The letter was nine pages long. It raised a variety of complaints concerning the treatment of the Rileys and their companies by the Bank. Under the heading "cause of action" it alleged that "as a direct consequence of irrational, precipitous decisions, misstatements, malpractice and poor customer service on the part of RBS the value in RHL and NDA has been decimated, our clients threatened with criminal prosecution for late filing of accounts or NDA, and their

business relationships with higher educational authorities severely compromised and in some cases, ruined". It continued by saying that:-

> "Our client's position, broadly, is that RBS was culpable of systematic and institutional behaviour in artificially distressing their business and pushing them towards liquidation. Evidence is now available, post the Settlement Agreement, to substantiate these claims and on this basis our clients' intention is now to (1) make an application to the court to set aside the Settlement Agreement and (2) instigate legal proceedings against RBS."

30. They drew the Bank's attention to the judgment of the Supreme Court in *Hayward v Zurich Insurance Company PLC* [2017] AC 142; [2016] UKSC 48. This letter made no reference, at least expressly, to the existence of the non-core division within the Bank or what was later said to be the importance of that issue to the proposed claim in fraudulent misrepresentation. However, that issue featured prominently in the pre-action protocol letter sent on behalf of Mr and Mrs Riley by Debello Law more than three years later, on 23 November 2021.

The present claim

31. By a deed of assignment dated 6 October 2022 between the Solicitor for the Affairs of the Duchy of Lancaster, as nominee of the Crown, and Mr Riley ("the Assignment Deed"), there was assigned to Mr Riley the benefit of a claim in misrepresentation and deceit against the Royal Bank of Scotland and the Bank in respect of statements made to RHL about a development loan facility including statements following the referral of the case to the Bank's GRG in 2009. By clause 2 of the Assignment Deed Mr Riley agreed that any funds recovered in respect of the assigned claim would be applied in accordance with the terms of the prior Liquidation of RHL, in particular concerning settlement of its creditors.

32. The following day the Rileys issued the present claim. It alleges that the Bank had made various representations (the "Alleged Representations") which were false and dishonest as follows:

> (i) First, the representations that the Bank was willing and intended to support the Riley Group with a view towards returning it to mainstream banking were false and dishonest, because in fact the Bank wished and/or intended to 'exit' the relationship by 2013 and to profit from the Riley Group in the meantime.
>
> (ii) Second, the representation that the Bank did not intend the River Crescent Development to be sold to West Register was false and dishonest because a sale of the development to West Register was the Bank's intention throughout.
>
> (iii) Third, the representation that the Bank had credit approval for and/or intended to release the sum of £100,000 to one of RHL's creditors, Clegg Construction ("Clegg") if RHL signed a standstill agreement with Clegg was false and dishonest because the Bank had no such approval and/or intention.

33. The Appellants say that the falsity and dishonesty of the Alleged Representations only became apparent to them following the entry into the public domain from 10 October

2016 onwards (that is to say, within the six years before issue of the claim) of various documents relating to the activities of GRG. In particular, they rely on emails, manuals and other internal documents which, they say, show that GRG was (or was regarded or treated as) a "profit centre" for the Bank whose aim or purpose was to extract value from (rather than to rehabilitate and/or support) customers and that West Register was one vehicle through which the Bank sought to do so by acquiring 'distressed' assets at an undervalue.

34. The Appellants place particular reliance on the Promontory Report a summary of which was published by the FCA in November 2016, and which was published in full in February 2018. They say that it revealed for the first time the significance of the Bank's non-core Division in terms of setting or determining GRG's strategy towards a customer.

35. The Appellants maintain that they knew nothing of the core and non-core business categorisation by the Bank until after they saw the Promontory Report in 2018. They say that it was this that triggered Mr Riley's realisation that the Bank had made the fraudulent misrepresentations which underlie the current action.

36. The Bank denies the claim on every level. It denies the allegations of mistreatment. In any event, it denies that the alleged representations (or any of them) were made or were relied on by the Appellants. Falsity and dishonesty are denied, as are causation and loss. Even assuming all of the foregoing, the Bank says that the claims have been compromised by the Settlement Deed and/or are time-barred.

37. It is denied (as appears to be alleged) that the principal purpose of and/or the Bank's principal lending strategy with respect to assets within the Bank's non-core Division was to run down those assets over a period of 5 years and to seek to exit the business within that time.

38. On limitation, the Bank draws attention to the fact that the Promontory Report did not substantiate many of the allegations in the Tomlinson Report. In particular, it stated that:

> (i) RBS did not set out to artificially engineer a position to cause or facilitate the transfer of a customer to GRG; …
>
> (ii) There was not a widespread practice of identifying customers for transfer for inappropriate reasons, such as their potential value to GRG rather than their level of distress; …
>
> (iii) There was no evidence that an intention for West Register to purchase assets had been formed prior to the transfer of the customer to GRG.

39. The Bank also draws attention to the following points (among others), namely:

> (i) The "widespread inappropriate treatment" referred to in the Promontory Report was of a much lower order than that alleged by Dr Tomlinson.
>
> (ii) There was no evidence that assets were systematically undervalued or valuations manipulated to achieve a transfer to GRG.

(iii) There was no evidence that when West Register acquired assets it paid clearly below market price or that West Register made "huge profits" as alleged by the Tomlinson Report.

(iv) Debello's letter of 6 September 2018, despite being sent after, and expressly referring to, the Promontory Report, did not articulate any case based on, or even make any reference to, the Bank's non-core division. On the contrary, it largely repeated the content of Nabarro's February 2013 Letter.

40. On 23 January 2023 the Bank served a defence and counterclaim 84 pages in length. On the same day, however it applied for an order striking out the Particulars of Claim, alternatively granting the Bank summary judgment on the claim and on its counterclaim. The orders were sought on the basis that the claim had been compromised by the Settlement Deed and/or was time-barred and accordingly had no real prospect of success. The application for summary judgment on the counterclaim was on the basis that the Claimants had acknowledged the debt in writing and had no real prospect of successfully defending the counterclaim. We were not addressed separately on the counterclaim.

The RHL argument

41. RHL was not a party to the Settlement Deed. It is therefore submitted on behalf of the Appellants that even if their personal claims for fraudulent misrepresentation were compromised by the Settlement Deed, those derived from RHL were not. The reason why RHL was not a party to the Settlement Deed was because it had gone into administration. It was not therefore under the control of the Appellants.

42. It is argued that the claim brought on behalf of RHL by Mr Riley pursuant to the Assignment Deed (pleaded as being worth £93m) falls outside and/or is not covered by clause 7 of the Settlement Deed, since RHL was not a party to that Deed. In this regard the Rileys submitted that Mr Riley did not even hold the claim assigned to him in his personal capacity, but as trustee for the purpose of applying any proceeds for the benefit of the creditors of RHL. The main creditor of RHL was (and remains) the Bank, but Mr and Mrs Riley were also creditors in much smaller amounts.

The decision of the judge

43. The judge held that having regard to the totality of the Nabarro correspondence, the Tomlinson Report and the research undertaken by the Appellants there was what he described as a “published belief” on their part that they had been the victims of deliberate malpractice by the Bank to obtain their properties for itself and in so doing not to back their business. Against that background, he held, the Settlement Deed was intended to deal with claims in fraud whether known or not known. He held that there is no requirement that a clause intended to bar fraud claims must expressly refer to fraud claims. He said:-

> “84. If there was, years later, a discovery relating to the non-core business, it provided a particular way of pleading a claim in fraud. The ability to plead the fraud in that specific way was no more than an aspect of what was believed to be a deliberate attempt to destroy the business of the Claimants. It does not

> support the argument that the release of a claim could not have been intended until the alleged discovery. On all the information before the Court, I conclude that the instant claim in fraud was barred by the Settlement Deed. The Settlement Deed was intended to deal with claims in fraud whether known or not known. The argument to the contrary has no real prospect of success nor is there any other compelling reason for the argument to proceed."

44. The judge turned next to the argument on behalf of the Rileys that the equitable sharp practice doctrine prevented the Bank from relying on its own wrongdoing. It was suggested that the Bank had committed a fraud on the Rileys of which they had no knowledge and that it had been sharp practice for the Bank, having knowledge of the fraud, to sit by while the Rileys entered into an agreement discharging the liability of the Bank. After consideration of the cases of *Bank of Credit and Commerce International v Ali* [2002] 1 AC 251; [2001] UKHL 8 and *Maranello Rosso Ltd v Lohomij BV and Ors* [2022] EWCA Civ 1667, the judge said:

> "92. Applying this to the instant case, I have found above that the construction point is such that the claims made in the instant case are barred by the wide terms of the Settlement Deed. The Claimants believed that they were aware of, and had alleged, deliberate misconduct on the part of the Bank. In particular, they alleged that the Bank had engineered a situation of driving a profitable company into insolvency and creating the possibility of an associated company of the Bank being able to acquire its assets at a very advantageous price. This was a case where the Claimants had chosen not to investigate further the full background of the claims but chose to settle all claims as therein defined for very valuable consideration. The unconscionability in those circumstances would be of the Claimants in seeking to avoid the release to rely on wrongdoing and fraud in the same transactions and relationships which had been the subject of their complaints in the many months leading up to the Settlement Deed. On the facts of this case, for the same reason set out by Phillips LJ in *Maranello* at para. 67, having settled unknown claims which extended to fraud, there was no scope to find that the Bank was guilty of sharp practice in relation to the existence of such a claim. It follows that the sharp practice argument has no real prospect of success nor is there any other compelling reason for the argument to proceed."

45. The judge then dealt with the alternative submission that the Settlement Deed had been procured by fraud. The judge held at [100] that this argument suffered from the same circularity as the complaint of sharp practice. In circumstances where the parties have, as a matter of construction, agreed to settle all claims, including unknown claims in deceit, it was circular to seek to revive them by saying that the Bank had represented that there were no such claims.

46. Finally before turning to limitation, the judge dealt with the RHL argument, which seems to have occupied a far smaller proportion of the hearing below than it did before us. He said:-

> "110. In my judgment, the answer to this point is that the claim is not brought by RHL. The claim is brought by Mr Riley. It is a claim which was acquired by Mr Riley as a result of the assignment. Nevertheless, the claims that are barred by reason of the Settlement Deed include future claims, which are any claims which the Claimants "may have or hereafter can, shall or may have against the Bank". As a result of the assignment, the Claimants acquired this claim which comes with the definition of Released Claims contained in Clause 7 of the Settlement Deed. It therefore follows that the argument that this is a claim of RHL and falls outside the Released Claims is fallacious. It has no real prospect of success nor is there any other compelling reason for the matter to be tried, and so the strike out and summary judgment application must succeed also as regards the claims brought pursuant to the Assignment Deed. It is suggested that there could have been a clause inserted to say that such a claim was included. A redacted agreement in an unrelated matter has been provided which contained such a clause. This was after the conclusion of the oral agreements but with the consent of the Court. Such a clause could have been provided, but there is no reason, in my judgment, why the failure to include such an express provision was significant, let alone that it might have had the effect that Mr Riley would be able to prosecute a claim arising out of a subsequently acquired assignment. The plain words are to contrary effect."

47. Accordingly, having rejected all the arguments put forward by the Rileys in opposition to the claim for summary judgment, the judge held that the Particulars of Claim should be struck out and the Rileys' claim dismissed. This strictly made it unnecessary for him to deal with the limitation defence but, having had the benefit of full argument, he did make findings on that subject. He held:-

> "122. Having considered the evidence as a whole, the real question is whether the Claimants have raised sufficient evidence and/or argument to amount to a real prospect of success in respect of the defence to the time bar allegation. The arguments in favour of the Bank appear to be quite strong. There is much to be said in favour of the argument that the inferential case was made out by 2014, alternatively by June 2015 when RHL was dissolved (as regards the RHL assigned claims), alternatively by 7 October 2016 (six years prior to the commencement of proceedings) that the Bank was making representations regarding supporting the business of the Claimants when it had no intention of doing so. If and insofar as the case depended on knowledge of the non-core business categorisation, there is reason to believe by 2014, alternatively

by June 2015 the time of RHL's dissolution (as regards the RHL assigned claims), alternatively by 7 October 2016, the Claimants and/or RHL (up to its dissolution) could with reasonable diligence have discovered that categorisation.

123. Nevertheless, for the purpose of a summary judgment/strike out application, the Claimants have a real prospect of success of being able to resist the limitation arguments. The following arguments of the Claimants require a trial in order to be evaluated fully, namely:

(i) without the non-core business categorisation, they could not plead the specific case which they now have pleaded, and the very similar inferential case might not have been available to the level required for Counsel to plead such a case, bearing in mind the strictures applying in respect of a claim in fraud;

(ii) they did not have knowledge of the non-core business categorisation until the dissolution (as regards RHL) or 7 October 2016 or thereafter, and nor could they with reasonable diligence have made that discovery. They could not reasonably have been expected to find the 2009 Accounts or the 2013 HM Treasury Report, or, if they did, to have drawn the same inferences about the non-core business categorisation prior to 7 October 2016.

124. It is not that the Court concludes that this was the case, but rather applying the law regarding summary judgment and/or strike out as set out by Lewison J in EasyAir Ltd v Opal Telecom Ltd above that this is a case which does require further investigation at a trial. Without restricting the ambit of the reasons for this, they include the following:

(i) Fraud claims are frequently based on inferences. The published pronouncements of Mr Riley prior to the time of the Settlement Deed indicate that he believed that he and his wife and their businesses had been the victims of the Bank's fraud. If it is the case that the Claimants did not know at that stage about the non-core business point, it appears that Mr Riley got there through the broad picture of the Nabarro correspondence, the Tomlinson Report and their other enquiries.

(ii) Despite this, there is a substantial argument that as a matter of inference, fraud could not have been pleaded without knowledge of the non-core categorisation. If it was an available inference, it is worth noting that Nabarro in their wide-ranging allegations did not expressly allege the deceit now relied upon or the inferential case said to be available with reasonable diligence (albeit that their letters were

before the publication of the Tomlinson Report). The point made for the Claimants is about the danger of having "a high standard for pleadings of fraud and yet at the same time apply a low threshold under s.32". This is a point which should not be determined finally without a fuller investigation.

(iii) There are questions which have been raised as to how far Counsel could plead a case in deceit on the basis of the Tomlinson Report (combined with the matters set out in the Nabarro correspondence) and with such other inquiries as were made. This gave rise to a belief on the part of the Claimants that they had been the victims of fraud. Nevertheless, there is a serious question which is not fanciful as to whether there was a sufficiently credible basis for a pleading of inferential fraud if the Claimants did not know of the non-core business point.

(iv) It may be that there was a sufficiently credible basis, but in order to reach a conclusion in respect of questions of actual and constructive knowledge and involving inferences to be drawn by references to inquiries which ought to have been carried out, there are dangers in reaching a summary conclusion without a fuller investigation.

(v) There are questions as to whether further inquiries could with reasonable diligence have been made which would have given rise to finding out about the non-core business point whether by reference to the 2009 accounts or the Treasury Report or otherwise. Although it appears that this could have been discovered, a deeper understanding of all the relevant circumstances is required in order to reach a conclusion with the exercise of reasonable diligence, the Claimants would have discovered the non-core business differentiation.

125. In the light of all of these matters, I should have ordered a trial if the only question were the Limitation Issue. In the event, that is not necessary because of the conclusion on the Settlement/Release Issue. There is no contradiction in the result because the issues address different questions. In respect of construction, it was accepted by all parties that it lent itself to summary disposal (subject to the sharp practice point, which has been considered above). Even if this had not been accepted, the particular question of construction in this case is appropriately resolved summarily. I shall assume for this purpose that at the time of the Settlement Deed, the Claimants were unable to plead the fraud claim as now formulated. The Settlement/Release Issue stands to be resolved against the Claimants bearing in mind my conclusions about the wording of the Settlement Deed and the factual context as set out above. There is an abundance of

> uncontroversial evidence, on which to conduct the iterative exercise of construction required in this case moving between the clear and wide words used and the factual context including all the background matters referred to above.
>
> 126. The matters which arise for consideration on the Limitation Issue are not the same as those which arise on the Settlement/Release Issue. The Limitation Issue is about the precise knowledge, actual and constructive, of the Claimants taking into account the professional duties attaching to pleading the precise fraud claim now made. The Settlement/Release Issue involves an assessment of the scope of the settlement under the Settlement Deed, both by reference to the terms of the settlement and the factual context against which it was made. For the reasons set out above, I am satisfied that the Settlement/Release Issue lends itself to summary judgment/strike out."

Grounds of appeal

48. The Claimants sought permission to appeal to this court on 5 grounds:-

> "Ground 1: The judge erred in concluding that the Appellants did not have a real prospect of establishing at trial that the sharp practice principle rendered it unconscionable for the Respondent to rely on the release in the Settlement Deed in relation to the Appellants' fraud claims against the Respondent.
>
> Ground 2: The judge erred in concluding that application of the sharp practice principle was capable of being summarily determined in the Respondent's favour. The scope of the principle is a developing area of the law and ought not to be determined on a strike out/summary judgment application on assumed facts.
>
> Ground 3: In addition or in the alternative, the judge erred in concluding that the Appellants did not have a real prospect of establishing at trial that the release clause in the Settlement Deed should have been construed as not including the above mentioned claims.
>
> Ground 4: In addition or in the alternative, the judge erred in concluding that his conclusions as to the proper construction of the Settlement Deed, and/or on the sharp practice principle, precluded a finding that the fraud induced the Settlement Deed, since inducement is a question of fact which does not solely depend on the interpretation of the Settlement Deed.
>
> Ground 5: Further in any event, the judge erred in concluding the Appellants did not have a real prospect of establishing at trial that the RHL assigned claims were not released in the Settlement Deed."

49. On 8 February 2024 Newey LJ granted permission to appeal, writing:-

> "Despite the judge's careful judgment, the appeal has a real, as opposed to fanciful, prospect of success. Ground 5 strikes me as the most obviously promising from the Appellants' point of view, but, with a degree of hesitation I have concluded that it is appropriate to permit the Appellants to pursue all their grounds of appeal."

50. By their Respondent's Notice dated 21 February 2024 the Bank sought to argue that the order striking out the claims and granting summary judgment in the Bank's favour should be upheld on the additional ground that the Rileys' claims were statute barred.

The parties' submissions on the Settlement Deed

51. Although Mr Sims placed Ground 5 in the forefront of both his oral argument and the written skeleton argument (perhaps because Newey LJ had described it as being the most promising ground of appeal) it is logical to consider grounds 1-4 first.

52. The Appellants submit that "there are strong policy reasons" why, where one party is the victim of an unknown fraud which is known to the other party (the fraudster), but concealed from the victim and which is not reasonably capable of being uncovered and pleaded before an agreement settling a dispute is entered into, a generally worded release in the agreement should not preclude the victim from being able to pursue their claim in fraud where facts are subsequently identified which enable such a claim to be brought.

53. The case is put on the basis that between 2009 and 2012 the Bank made repeated representations to Mr and Mrs Riley and RHL that it intended to restructure the 2008 facility, support RHL and rehabilitate the company back to mainstream banking. These representations were fraudulent because the Bank had internally designated RHL as "non-core business" by 2009 and had resolved to divest itself of such business by 2013 at the latest. During that period the Bank intended to derive financial benefit from an RHL connected company spending millions to fit out apartments at River Crescent to create significant rental income (thereby enhancing the value of the bank's security), and from the receipt of rental income from letting unsold units, as well as charging fees. This, it is said, was fraudulent conduct of a different kind from anything alleged in the Nabarro letters.

54. Mr Sims referred us to the decision of the House of Lords in *BCCI v Ali*. Mr Ali and a number of colleagues had been made compulsorily redundant by BCCI in 1990. Each of them signed an agreement in the usual form accepting a termination payment from BCCI "in full and final settlement of all or any claims .. of whatsoever nature exist or may exist" against the bank. In 1991 the bank went into insolvent liquidation. Wide publicity was given to the corrupt and dishonest manner in which its business had been conducted. When the liquidators sought to recover loans made to the employees, the employees counterclaimed for what have become known as stigma damages. The House of Lords held by a majority that when the settlement agreements had been entered into neither party could realistically have supposed that a claim for stigma damages was a possibility and that accordingly the parties could not be held to have intended the releases to apply to such claims.

55. Lord Bingham of Cornhill said:-

> "9. A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention. ... [It] is no part of the court's function to frustrate the intentions of contracting parties once those have been objectively ascertained.
>
> 10. But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."

56. Mr Sims laid emphasis on the second of these two paragraphs. It seemed to me that he was less comfortable with the final sentence of the first.

57. Mr Sims cited *Satyam Computer Services v Upaid Systems* [2008] EWCA Civ 487; [2008] 2 CLC 864. In that case there had been a widely worded settlement agreement in an intellectual property dispute. It was subsequently alleged that the signatures of two of the claimant company's former employees on documents filed in connection with a patent application had been forged. The defendant alleged that as a consequence of the allegations of forgery it was forced to settle patent infringement proceedings in Texas on unfavourable terms. It brought proceedings in Texas against the claimant for damages. The claimant commenced proceedings in England arguing that the Texas claim was being brought in breach of the settlement agreement. Flaux J held that the wording of the settlement agreement did not exclude the Texas claims. This court upheld his decision.

58. Lawrence Collins LJ, after referring to the speech of Lord Bingham in *BCCI v Ali,* said:-

> "84... If a party seeking a release asked the other party to confirm that it would apply to claims based on fraud, it would not, in most cases, be difficult to anticipate the answer.
>
> 85. It is not, I think, very helpful to consider whether the release/covenant not to sue applies in the abstract to unknown claims, and then separately whether it applies to fraud-based claims. The true question is whether on its proper construction it applies to claims of the type made in the Texas proceedings, namely that, unknown to Upaid when the Settlement Agreement was entered into, Upaid was supplied by Satyam with forged assignments. To that question it seems to me that there is only one possible answer. In my judgment, express words would be necessary for such a release. ……………"

59. The Appellants also rely on the equitable sharp practice principle. In *BCCI v Ali* Lord Nicholls of Birkenhead said at [32]:-

> "Thus far I have been considering the case where both parties were unaware of a claim which subsequently came to light. Materially different is the case where the party to whom the release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this. In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy."

60. Before the judge and before us the Bank relied strongly on the decision of this court in the *Maranello* case, to which I shall return later. Mr Sims argued that it was distinguishable and that the judge was wrong to rely on it. He submitted that *Maranello* is not authority for the proposition that, in all cases where claimants choose to settle rather than to investigate further, the unconscionability test cannot be met. If a claimant could not with reasonable diligence have ascertained enough to bring the fraud claim they wish to bring, the choice not to investigate further cannot render unobjectionable what would otherwise be viewed as unconscionable sharp practice by the fraudster. Mr Sims relied in this context on the judge's finding, when dealing with the limitation defence at paragraph 124 of his judgment, that the Appellants had a real prospect of showing at a trial that they could not with reasonable diligence have uncovered sufficient material to justify pleading the case in fraud prior to 2018.

61. Turning to Ground 5, concerning the claims assigned by RHL to the Rileys, the Appellants' skeleton argument says at [32]:-

> "There is no suggestion in the evidence adduced that when settling the parties had turned their minds to the rights of third parties over which they had no control, or to the possibility the Rileys might acquire from a third party rights which they may then seek to enforce against the Bank. The wording of the release does not include the word "acquire". The wording of clause 7.1, taken with the recitals and the background known to the Parties, would not suggest that it was contemplating the release would extend to a situation where the Borrowers would acquire a fresh claim arising from a future event which had yet to occur e.g. a future assignment for fresh consideration. In a very real sense this was a cause of action which did not arise until after the date of entry into the Settlement Deed and would not be expected to be captured (cf. the decision in *Maranello* [2021] EWHC 2452 (Ch) at first instance at [109], where HHJ Keyser QC concluded causes of action arising after the date of entry into the settlement in that case were not settled). The wording adopted was instead directed at the more common problem of a potential liability between the parties to the settlement arising out of past events, some of which might be said to include claims which were uncertain or contingent or which might arise in the future. If the release clause was intended to deal with the more unusual situation of a bank seeking to protect itself from company claims

> assigned to that one person, but not otherwise, then express words should have been used to spell out that unusual release."

62. Mr Sims strongly relied on the decision of this court in *Kazeminy v Siddiqui & Ors* [2012] EWCA Civ 416. The case concerned a settlement agreement entered into between Mr Siddiqui and Mr Kazeminy as well as various companies represented by each of them. The ultimate question was whether the settlement agreement encompassed claims of a third party, Mr Grano, and a company controlled by him, Centurion Holdings LLC, which Mr Grano and Centurion had assigned to Mr Kazeminy after the settlement agreement. The settlement agreement was in wide terms, covering claims "past, present or future" and "whether or not known or contemplated at the date of this settlement agreement arising under or in any way connected with" any dealings between the parties to the Deed. It was held that the settlement agreement did not prevent Mr Kazeminy from bringing the claims which had been assigned to him subsequently by Mr Grano and Centurion.

63. On limitation, the Appellants support the reasoning and findings of the judge. They argue that the facts about the classification of RHL as non-core business and the malign intentions of the Bank which that classification involved were not known to them until the Promontory Report was published in 2018. Until then, they had suspicions of fraud, but they did not have solid evidence on which to plead fraud. They rely on the observation of Lord Clarke in *Zurich Insurance Co plc v Hayward* that "as I see it, it is difficult to envisage any circumstances in which mere suspicion that a claim is fraudulent would preclude unravelling a settlement when fraud is subsequently established."

64. Mr Sims submits that the judge was right to find that (if he had not struck out the claim) the Appellants would have had a real prospect of success in being able to resist the limitation arguments; without the non-core business categorisation they could not have pleaded the specific case which they have now pleaded, bearing in mind the strictures applying in respect of a claim in fraud; and that there was a serious question to be tried as to whether there was a sufficiently credible basis for pleading fraud if the Appellants did not know of the non-core business point.

The Respondent's submissions

65. Mr Sinclair asked us to note that the appeal on grounds 1-4 proceeds on a much narrower basis than the Appellants' case before the judge. There is no challenge to the judge's actual conclusion that the context for the Settlement Deed included allegations of deliberate wrongdoing, and that at the time of the Settlement Deed the Rileys believed that they and their businesses had been the victims of fraud (see paragraphs 39-41, 70-71 and 79-80 of the judgment). It is not correct, therefore, to say that the Nabarro letters did not allege dishonesty. One of the letters, for example, referred to LIBOR manipulation by the Bank.

66. Mr Sinclair submits that the recent decision of this court in *Maranello* is strikingly similar to the present case. The claimant company had been incorporated in order to purchase a company called Stelabar SpA which owned a collection of classic cars. The claimant required both financing for the purchase and assistance from the auctioneers Bonhams to sell the cars. Bonhams made arrangements for an auction at which some of the cars were sold at what the claimants alleged were seriously unsatisfactory values.

The claimants' solicitors sent a pre-action protocol letter to Bonhams alleging negligence and breach of contract and making assertions of duress, bad faith and illegality but did not explicitly allege dishonesty.

67. A settlement agreement was reached in wide terms but making no explicit mention of fraud. The claimants later alleged that, subsequent to the settlement, they had been given new information about Bonhams' conduct and intentions which, it was said, revealed for the first time that the wrongdoing previously identified had been part of a dishonest conspiracy. The claimants issued proceedings arguing that the settlement agreement was not a bar to claims in dishonesty, fraud or conspiracy; and argued that in any event the defendants were precluded from relying on the compromise because of the "sharp practice" principle. Nevertheless the claim was dismissed on a summary basis in the High Court and an appeal to this court was also dismissed.

68. In answer to Ground 5 Mr Sinclair supports the concise reasoning of the judge in paragraph 110 of the judgment. Clause 7.1 of the Settlement Deed explicitly included claims which the Rileys "may have or hereafter can, shall or may have against the Bank": this, he submits, includes those which were in due course acquired by the Rileys. It is unrealistic to argue that because the settlement deed describes Mr and Mrs Riley as "the Borrowers" it was only intended to capture claims which they have or might have *qua* 'borrowers' and not in some other capacity such as a trustee or assignee. Mr Sinclair also argues that even if there were any doubt about the proper construction of Clause 7.1 the matter is put beyond doubt by Clause 7.2 which widens the scope of the settlement still further.

69. As to *Kazeminy*, that case did not lay down any novel or general principles. Mr Grano had claims against Mr Siddiqui which were entirely separate from those made by Mr Kazeminy. The key clause made no specific reference to either Mr Grano or his company Centurion. Mr Siddiqui was forced to argue that the words "claims... in any way connected ... with any dealings between the parties concerning loans to or investments in the Defendants by ... any person whosoever" were apt to refer to loans and investments made by Mr Grano. This is in contrast to the present case where Clause 7.1 did refer specifically to RHL. Moreover, in the Kazeminy case there was no provision equivalent to Clause 7.2 of the Settlement Deed.

70. Having supported the judge's conclusions in dismissing the Rileys' claims, Mr Sinclair takes issue by way of Respondent's Notice with his findings, strictly *obiter*, on limitation. The judge should, it is said, have concluded that the existence and significance of the Bank's "non-core" Division or the classification of RHL as a non-core business were clearly not essential elements of a potential claim in fraud, without which those claims could not properly have been pleaded. An analysis of the Particulars of Claim supports the view that they were not essential. At most, the non-core points can be said to improve the Rileys' central case that the Bank did not have the intentions in relation to its customer which it had represented. The Rileys' own case is that the Bank's contemporaneous behaviour towards them, about which Nabarro had made most vociferous complaint in 2013 was only readily explicable if the Bank had wished to place RHL into distress with a view to making profit, and to exit the relationship rather than support RHL.

71. Mr Sinclair submits that the very recent decision of this court in *Persons Identified in Schedule 1 v Standard Chartered PLC* [2024] EWCA Civ 674 strongly supports the

Bank's position on limitation. In the leading judgment, Newey LJ refers to previous authorities including *BCCI*, *Three Rivers DC v Bank of England* (No. 3) [2003] 2 AC 1, *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) and *Sofer v Swiss Independent Trustees SA* [2020] EWCA Civ 699. At [44]-[49] Newey LJ said:-

> "44. As already noted, a barrister has a professional obligation not to include an allegation of fraud in a statement of case without "reasonably credible material which establishes an arguable case of fraud". Both that rule and the requirement for a pleading to be verified by a statement of truth help to protect defendants against unwarranted allegations of fraud.
>
> ...
>
> 47. There is, of course, a line of authority to the effect that, if it is to be alleged that fraud or dishonesty is to be inferred, the primary facts must be pleaded and such as to "tilt the balance": see *Sofer* and *Kekhman*, following Lord Millett in *Three Rivers*. I do not think, however, that it is always incumbent on a claimant to support an allegation of fraud or dishonesty with additional "primary facts", let alone to detail the evidence it might call to prove it. Suppose, say, that a claimant brought a misappropriation claim on the strength of information from a whistle-blower with personal knowledge of the relevant events. The claimant might be in a position to detail the alleged dishonesty without inviting any inference of dishonesty. In such a case, there can be no requirement to specify "primary facts" capable of "tilting the balance".
>
> 48. That is by no means to say that there is no need for particularisation where an allegation of dishonesty is made. To the contrary, in *Three Rivers* Lord Hope emphasised the "need for particulars to be given" to explain the basis of an allegation of bad faith or dishonesty, that an allegation of fraud, dishonesty or bad faith "must be supported by particulars" and that "[t]he other party is entitled to notice of the particulars on which the allegation is based". The serious nature of an allegation of fraud or dishonesty makes proper particularisation especially important.
>
> 49. However, the Courts also need to beware of imposing such onerous pleading requirements as to make it impractical to bring meritorious fraud claims, particularly given the limited information that might initially be available to a victim. [He referred to Lord Bingham's speech in *Medcalf v Mardell*, and continued:] Neither should a claim brought on such a basis be vulnerable to being struck out for want of particulars or, as SC plc might put it, for failing to disclose on its face a solid evidential foundation. Again, Phillips LJ posited in the course of argument a case in which an apparently reliable bank official told a customer that he had been defrauded of £1 million. The

> customer should be able to bring proceedings to recover the money even if he can as yet provide only limited information about how the fraud was effected. If the circumstances are such that a freezing order is desirable or a limitation period is expiring, it may be especially important that a claim can be issued at once, without waiting for further information to be obtained. In Sales J's words, "a measure of generosity in favour of a claimant" is to be allowed."

Discussion

The Settlement Deed

72. Freedman J put the case in a nutshell when he said that allegations of deliberate wrongdoing formed the backdrop to the Settlement Deed. The Nabarro letters in 2013 went much further than merely alleging poor treatment by the Bank of its customers. There was, for example, a reference to LIBOR manipulation, by its nature an allegation of deliberate misconduct. In the letter of 3 May 2013 Nabarro referred to their clients' concern at a "thinly disguised ploy" by RBS/Natwest to take on to its books an "incredibly profitable" asset at a cut price. The same letter accused the Bank of not approaching negotiations in good faith. The tenor of the correspondence was that the Bank's scheme was to distress businesses, to put them into GRG and then take their assets for West Register at a discounted price. The Appellants relied on the Tomlinson Report as exposing "fraud and corruption" and referred to it as being autobiographical. For my part, I think that a layman's overview of the Tomlinson Report might be that Dr Tomlinson considered that the Bank, in particular GRG, were behaving as asset-strippers.

73. The "non-core business" allegations raised expressly for the first time in 2021 add very little to the thrust of the case put in the Nabarro letters and the Tomlinson Report in 2013. At most they are evidence to strengthen the central allegation of dishonest conduct which the Rileys had been making for years.

74. I accept the submissions of the Respondent that the present case is strikingly similar to *Maranello,* which is binding on this court. *Maranello* makes it clear that the decision of this court in *Satyam* should not be read as support (even obiter) for the proposition that express words are always, or even generally, required to release a claim in fraud. The court held that in the *Maranello* case itself, the contention that an allegation of a conspiracy between Bonhams and Lohomij to target MRL was objectively outside the contemplation of the parties when settling was unrealistic. An allegation that the matters complained of were not merely negligent but deliberate wrongdoing was precisely the sort of allegation which the parties to the settlement agreement would be looking to prevent. In releasing unknown, as well as known claims, relating to the subject matter specified, MRL had taken the risk that the element of bad faith might be worse than it then believed. The same, in my view, can be said of the Rileys in the present case.

75. The following passages in the judgment of Phillips LJ are of particular assistance:-

> "58. In my judgment there is no merit in the suggestion that the Judge's approach to construction of the Settlement Agreement

was overly-literalist or otherwise wrong, for the following reasons:

i) The Judge undertook a detailed and careful consideration of both the wording of the relevant clauses and the factual matrix, reaching the conclusion that both pointed to the release covering all claims relating to the subject matter in existence as at its date, including those now alleged by MRL. In so doing, he carried out the unitary exercise identified and explained in *Wood v Capita Insurance Services Ltd* [2017] AC 1181; [2017] UKSC 24 by Lord Hodge at [12], it being unimportant whether the Judge started "with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract".

ii) In the course of the above exercise, the Judge (as he was both entitled and obliged to) had regard to the nature of the drafting, placing particular weight on the text due to the fact that it was formal and high quality. His detailed consideration of the precise words used by the parties reflected the approach adopted by Asplin LJ in *Elite*, as did his conclusion.

iii) The Judge had full regard to the "cautionary principle", reflected in his recognition in [117] that, in the absence of express words one will not readily conclude that a reasonable person would understand a release to refer to fraud or dishonesty claims. His reference in that paragraph to the words of the release being "unequivocal and unambiguous" and evincing a plain intention to omit nothing and leave no loopholes was not the sole justification for his decision, but was the second of three reasons for rejecting the submission that the absence of express words was determinative against the release of claims in fraud. The first reason was that the absence of express words was not determinative given that he had already reached the conclusion, on ordinary principles of construction, that fraud was included in the release (see [116]), and that there was no rule of law that it should be determinative. The third was that the release was framed in terms of subject matter, further explaining why express words were not necessary to incorporate claims in fraud. Again, that third reason was expressed to be an element in the Judge's overall assessment, not a determinative factor. (emphasis added)

59. I am also in full agreement with the Judge's conclusion as to the proper construction of the Settlement Agreement, essentially for the reasons he gave, but perhaps looking at matters in a different order as follows:

i) I would start by considering the nature of the dispute which was being settled. The Spring Law letter, although framing claims in terms of breach of contract and negligence, made

> clear and express allegations amounting to breach of fiduciary duty by Bonhams in its role as agent for MRL. The letter asserted repeated and deliberate steps taken by Bonhams to profit considerably at MRL's expense, including accusations of illegality and duress, to which can be added evidence that Mr Brooks had threatened to "destroy" Mr Sullivan. The connection between Bonhams and Lohomij was referenced numerous times, the clear implication being that that link had been or could be used to prejudice MRL's position. Combined with the assumption in the without prejudice letter that Bonhams could procure agreement by Lohomij and the subsequent joinder of Lohomij as a party to the Settlement Agreement (recognising that no separate allegations had been made against it), it was clearly envisaged that Lohomij might be said to be liable for MRL's alleged wrongdoings.
>
> ii) In that factual and commercial context, the widely worded release of all claims, no matter the cause of action, arising out of the above matters would naturally and obviously include claims that Bonhams' actions amounted to deliberate and dishonest breaches of fiduciary duty in combination with others, including in particular Lohomij. I consider that to be the case with full regard to any cautionary principle that applies. To apply the test referred to in Satyam, if the parties, on entering the Settlement Agreement, had been asked whether MRL could thereafter bring claims for the matters referred to in the Spring Law letter, but reformulated as being part of an unlawful means conspiracy, the answer would surely have been that they could not. It would have been uncommercial and surely not intended that MRL would benefit from the waiver of a fee of €13.6m and the extension of its loan facility from Lohomij, but remain free to pursue the very same accusations merely by recasting them as having been unlawful acts carried out in combination.
>
> iii) It is true that the Settlement Agreement contained a standard "entire agreement" clause which excluded claims in fraudulent misrepresentation from its scope. Such a clause addresses a very different question than the scope of the release. But in any event, as Arnold LJ pointed out in the course of argument, the inclusion of that clause demonstrates that the parties were perfectly able to exclude fraud from the scope of the provisions if they intended to do so.
>
> iv) It follows, in my judgment, that the proper unitary exercise of construing the Settlement Agreement leads to the inevitable conclusion that claims in fraud, dishonesty and conspiracy were released."

That is in my view closely analogous to the present case.

76. I accept Mr Sims' submission that there are strong policy reasons why, where one party was an innocent victim of a concealed fraud, which was not reasonably capable of being discovered before a settlement agreement was reached, a generally worded release may not preclude the innocent victim from pursuing the claim in fraud. But there are also strong policy reasons why settlements should be upheld. It is of the nature of a settlement agreement which covers all present or future claims, known or unknown, that a party may be giving up a potential cause of action of which he is not aware. As Lord Bingham said in *Medcalf v Mardell,* it is no part of the court's function to frustrate the intentions of contracting parties once those have been objectively ascertained.

77. Turning to the grounds of appeal based on "equitable sharp practice" I agree entirely with what Phillips LJ said in *Maranello* at [65] to [67]:-

> "65. MRL argues on this appeal that the Judge's reasoning failed to recognise the (necessarily assumed) fact that the respondents knew that they had unlawfully conspired against MRL and that MRL was unaware of that conspiracy. MRL contends that several of the factors referenced by the Judge, such as MRL "freely" giving up the opportunity to learn more about the background, the substantial value obtained by MRL and the equality of bargaining power, are all undermined by the assumed fact that the respondents were taking advantage of the ignorance of their victim. MRL's submission is that the full background should properly be examined at a trial and that the application of the sharp practice principle (itself a developing area of law and equity) could then be considered in the light of the full facts.
>
> 66. In my judgment MRL's contention fails to address the core of the Judge's reasoning, namely, that it was not arguable that it was unconscionable for the respondents to rely on the release as having settled claims in fraud and conspiracy. This is not a case where the respondents knew that MRL had claims of which it was totally unaware and took advantage of that ignorance by obtaining a release which settled those claims surreptitiously. As the Judge explained in some detail, MRL was fully aware, and had alleged, that Bonhams had damaged MRL by acting (deliberately) in breach of its duties as agent, leveraging its connection with Lohomij to do so. MRL had chosen not to investigate the full background to that wrongdoing and the extent to which the respondents had acted together, but chose to settle those claims for very valuable consideration. Far from it being unconscionable for the respondents to rely on the release, it was obviously unconscionable for MRL to seek to avoid the release by re-asserting the very same factual contentions, but arguing that they were unlawful acts pursuant to a conspiracy. I see no basis for overturning the Judge's decision in that regard.
>
> 67. I would add that, where a release is construed as covering unknown claims in fraud, dishonesty and conspiracy relating to a defined subject matter (as in this case), such construction entails a finding that the parties mutually intended to settle such

> claims. That would seem to leave little scope for a finding that one of the parties was guilty of sharp practice in relation to the existence of such a claim."

78. The judge was right to find at [92] of his judgment that:-

> "The Claimants believed that they were aware of, and had alleged, deliberate misconduct on the part of the Bank. In particular, they alleged that the Bank had engineered a situation of driving a profitable company into insolvency and creating the possibility of an associated company of the Bank being able to acquire its assets at a very advantageous price. This was a case where the Claimants had chosen not to investigate further the full background of the claims but chose to settle all claims as therein defined for very valuable consideration. The unconscionability in those circumstances would be of the Claimants in seeking to avoid the release to rely on wrongdoing and fraud in the same transactions and relationships which had been the subject of their complaints in the many months leading up to the Settlement Deed. On the facts of this case, for the same reason set out by Phillips LJ in Maranello at para. 67, having settled unknown claims which extended to fraud, there was no scope to find that the Bank was guilty of sharp practice in relation to the existence of such a claim. It follows that the sharp practice argument has no real prospect of success nor is there any other compelling reason for the argument to proceed."

79. Mr Sinclair is right to submit that the decision of the judge does not set a "dangerous precedent". The Rileys believed that they had been deceived by the Bank, and that the Bank had engaged in a "thinly disguised ploy" to further its own interests at its customer's expense, but nevertheless freely entered into a settlement agreement which extended to unknown claims. The only "dangerous precedent" would be set in allowing them to re-open that bargain.

The claims assigned by RHL

80. The arguments put forward by the Appellants under Ground 5 included the rhetorical question: suppose that the claims of RHL had not been assigned by the Duchy of Lancaster to Mr Riley but instead had been sold by the administrators to a third party? Surely, Mr Sims argued, such a claim would not be barred by the Settlement Deed to which RHL was not a party? Alternatively, what if the administrators had been persuaded to bring a claim in the name of RHL directly? Mr Sims submitted that the position was all the clearer because Mr Riley held the claim not for himself but as trustee and that (if that was the case), and as pointed out in the course of argument by Snowden LJ, he could be replaced as such trustee by the court pursuant to section 41 of the Trustee Act 1925.

81. The short answer to this point is that the claim is not brought by the administrators of RHL, nor by any third party assignee of RHL, nor by a replacement trustee, but by Mr Riley. It is true to say that it is a claim that was acquired by Mr Riley as the result of an assignment. Nevertheless the terms of the Settlement Deed, in particular the definition

of "Released Claims", bar *any* claims which Mr or Mrs Riley may have or hereafter can, shall, or may have against the Bank. The whole point of the Settlement Deed was that the Rileys would pay a significantly reduced sum, over an extended period, in full and final settlement of their personal liability to the Bank, and would not and could not reverse or in any way undermine the finality of that arrangement by themselves bringing any subsequent proceedings against the Bank in relation to RHL. That is precisely what the Rileys now seek to do by these proceedings, including in relation to the RHL claim. That fact that proceedings could theoretically be brought by a third party is no answer to the clear application of Clause 7 to the claim that is brought, both in terms of its express wording and its clear intent in context.

82. I do not consider that the Appellants can derive any support from the decision in *Kazeminy.* I accept the submissions of Mr Sinclair that *Kazeminy* lays down no general principle and is distinguishable on the facts on several grounds. Mr Grano was an investor who had claims against Mr Siddiqui separate from those brought by Mr Kazeminy. Neither Mr Grano nor his company was mentioned at all in the key clause of the Settlement Agreement. There was, moreover, no equivalent in that case of Clause 7.2 of the Settlement Deed with which we are concerned. The Respondent correctly submits that in the present case, where Clause 7.1 did refer explicitly to RHL, the conclusion that the settlement covered future claims assigned to Mr Riley by RHL is inexorable.

83. The argument that the present claim, in so far as it was acquired by the 2022 assignment, somehow falls outside the Released Claims is fallacious, and I agree with the judge that it has no prospect of success. It is therefore unnecessary to consider what the position might have been if the assignment had been to a third party independent of the Rileys.

Limitation

84. It is therefore strictly unnecessary to deal with the Respondent's Notice. However, since it was argued fully before us, I should deal with it briefly. It is the one issue in the case on which I reach a different conclusion from that of the judge.

85. Paragraph [704] of the Code of Conduct of the Bar of England and Wales lays down that a barrister must not draft any statement of case or other document containing "any allegation of fraud" unless he has clear instructions to make such allegation and has before him reasonably credible material which, as it stands, establishes a *prima facie* case of fraud.

86. It is common ground between Mr Sims and Mr Sinclair that the critical question on limitation is whether the Rileys, at any date earlier than 7 October 2016 (six years before issue of the claim) had in their possession reasonably credible material which, as it stood, established a *prima facie* case of fraud. It is also common ground that for these purposes a report such as that produced by Dr Tomlinson may be taken into account. In *Medcalf v Mardell* Lord Bingham of Cornhill said:-

> "... at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. I could not think, for example, that it

> would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public enquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay."

87. I bear in mind, as I have in considering the Rileys' appeal, that the judge was considering whether the claim should be struck out and dismissed on a summary basis. But on a question of whether the material available to the Rileys in 2013-14 satisfied the ethical test laid down by the Bar's Code of Conduct, I cannot agree with the judge's view at paragraph [124] of his judgment that this was an issue which required further investigation at a trial. The judge was entitled to say that whether the Rileys could have expected to find the 2009 accounts of the Bank or the 2013 report by HM Treasury, and whether in those or other respects the Appellants could with reasonable diligence have found out more about the practices of the Bank, were issues not suitable for summary resolution. But the kernel of Mr Sinclair's case on limitation at the summary stage is more basic than that. It is that even if counsel had been asked to draft a claim in (say) early 2014 based only on the Rileys' instructions, the three Nabarro letters and the Tomlinson Report, that would have provided quite sufficient reasonably credible material to plead a case in deceit against the Bank.

88. The judge's acceptance that an inference of fraud could at least arguably not have been pleaded without knowledge of the non-core categorisation is a conclusion which puzzles me. The three members of this court are in as good a position as the judge was to assess whether a case in deceit could properly have been pleaded on the strength of the Tomlinson Report added to the contents of the Nabarro letters. My view is that it could. (Of course, the Bank robustly rejected Dr Tomlinson's findings and the Appellant's allegations, but that is beside the point. The issue is not whether on the evidence then available the Appellants were more likely than not to win at a trial.)

89. I do not think it necessary to dwell on this issue because, like the judge's views, mine are unnecessary to the disposal of the appeal.

Conclusion

90. I would accordingly dismiss the appeal, essentially for the reasons given by Freedman J in his meticulous and comprehensive judgment to which I would pay respectful tribute.

Lord Justice Phillips:

91. I agree.

Lord Justice Snowden:

92. I also agree.