Neutral Citation Number: [2022] EWCA Civ 1667

Case No: CA 2021 003236

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
HHJ KEYSER QC, SITTING AS A DEPUTY HIGH COURT JUDGE
[2021] EWHC 2452 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2022

Before:
LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between:

MARANELLO ROSSO LIMITED	**Claimant/ Appellant**
- and -	
(1) LOHOMIJ BV **(2) BONHAMS 1793 LIMITED** **(3) BONHAMS & BUTTERFIELDS AUCTIONEERS CORPORATION** **(4) EVERT LOUWMAN** **(5) EDWARD LEE** **(acting on behalf of the Estate of Robert Brooks)** **(6) JAMES KNIGHT** **(7) ANTHONY MACLEAN**	**Defendants/ Respondents**

- -
- -

Justin Fenwick KC, Tim Chelmick and **Usman Roohani**
(instructed by **Mishcon de Reya LLP**) for the **Appellant**

Simon Colton KC (instructed by **Morrison & Foerster (UK) LLP**)
for the **First and Fourth Respondents**

Orlando Gledhill KC and **Oliver Butler**
(instructed by **RPC**) for the **Second, Third and Sixth Respondents**

Matthew Collings KC (instructed by **Kastle Solicitors**) for the **Fifth Respondent**

Robert Weekes KC and Luka Krsljanin
(instructed by **Foot Anstey LLP**) for the **Seventh Respondent**

Hearing dates: 21, 22 and 23 June 2022

- -

Approved Judgment

This judgment was handed down remotely at 12 noon on Wednesday 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

Lord Justice Phillips:

1. This appeal raises the familiar issue of whether an agreement for the settlement of "all and any claims" between the parties (whether or not known to them at the time), had the effect of compromising claims in fraud and dishonesty (and, in the present case, conspiracy), notwithstanding that claims of that nature were not expressly mentioned in the agreement.

2. On 6 September 2021 HH Judge Keyser QC ("the Judge") summarily dismissed all of the claims brought by the appellant ("MRL") against the respondents (and dismissed an application to amend those claims), save for one claim in conversion against the fourth respondent ("Mr Louwman"). The Judge held that:

    i) all of MRL's claims in existence on 31 July 2015, including claims for conspiracy to injure by unlawful means and dishonest assistance, were compromised by a settlement agreement made between the parties on that date ("the Settlement Agreement")[1]; and

    ii) even had they not been compromised, MRL's claims for breach of fiduciary duty, breach of a duty of good faith and dishonest assistance (being the alleged unlawful means used in the alleged conspiracy) had no real prospect of success; and

    iii) freestanding claims arising after the Settlement Agreement (including for breach of the Settlement Agreement) were not credible.

3. MRL appeals the Judge's decision with permission granted by Arnold LJ. By ground 1, MRL contends that (i) on a proper construction, the Settlement Agreement did not compromise claims for unlawful means conspiracy, and/or (ii) it is realistically arguable that the respondents are precluded from relying on any such compromise by reason of the "sharp practice" principle. Grounds 2 to 5 challenge the Judge's findings that the unlawful means alleged were not reasonably arguable, and only arise for decision if MRL succeeds on ground 1. Ground 6, directed primarily at the dismissal of the post-Settlement Agreement causes of action, asserts that the Judge erred in conducting, in effect, a mini-trial.

The essential facts

4. In section D of his reserved judgment the Judge set out an extensive factual narrative. The following summary, sufficient for the purposes of the appeal, is drawn largely from that account.

5. MRL, a Guernsey company, was incorporated in 2013 for the purpose of purchasing Stelabar SpA ("Stelabar"), a San Marino company that owned a collection of classic cars comprising 33 Ferraris (including a very valuable Ferrari 250 GTO) and 38 Abarths, then maintained in the Violati Maranello Rosso Museum ("the Collection"). An option to purchase the share capital of Stelabar, granted to Graham Sullivan, Roy

[1] The Judge also granted summary judgment on counterclaims brought by the respondents (except the fifth respondent) for an indemnity pursuant to clause 3.2 of the Settlement Agreement in respect of costs and damages they had incurred or suffered by reason of MRL's breach of the Settlement Agreement in bringing the claims found by the Judge to have been compromised. There is no separate challenge to that aspect of the Judge's order.

Hilder and one other (the beneficial owners of MRL), was transferred to MRL by early 2014. MRL's intention was to on-sell the cars in the Collection at a profit, believing that, if auctioned separately, they would realise as much as €150m.

6. On 9 April 2014, pursuant to the option, MRL entered an agreement with the owners of Stelabar for the sale and purchase of the entire issued share capital of that company for €80m, MRL paying a non-refundable deposit of just over €2m on exchange and agreeing to pay the balance on 29 May 2014 ("the SPA").

7. At the time it entered the SPA, MRL was in negotiations with two well-known auction houses, RM (a leading vintage car auctioneer in the USA) and the second respondent ("Bonhams") as to the mechanism for financing the purchase of Stelabar and the most advantageous way to sell the cars, but had not reached agreement with either. By 19 May 2014 MRL had reached agreement in principle with RM whereby RM would purchase all but one of the cars on 29 May 2014 for €74m (thereby enabling MRL to pay the balance of the price due to Stelabar) and would then auction the cars (setting a reserve price for each car valued at over €1m), retaining €80m of the proceeds and an agreed percentage fee. The balance of the proceeds would be paid to MRL, generating, in effect, a risk-free profit.

8. Nonetheless, MRL's preference was to contract with Bonhams, having been advised that the best place to auction the cars was in the UK and given Bonhams' reputation as the leading vintage car auctioneer in this country. Negotiations took place between Mr Sullivan, Mr Hilder and Ben Walmsley (a solicitor at Spring Law) on behalf of MRL and Robert Brooks, a former chairman of Bonhams (whose estate is the fifth respondent) and the seventh respondent ("Mr MacLean", then a non-executive director of Bonhams, on behalf of Bonhams. Bonhams proposed to raise finance for the purchase of the Collection from the Louwman Group, which carries on business in the automobile industry and is controlled by Mr Louwman.

9. On 22 May 2014 Mr MacLean confirmed to MRL by email (copied to Mr Brooks) that (1) a company in the Louwman Group would make funds available to MRL, subject to contract, to assist in acquiring Stelabar and (2) Bonhams would sell the cars in the Collection by public auction at the Goodwood Revival meeting in September 2014 or as might otherwise be agreed. The email went on to say that the above was subject to confirmation that, with immediate effect, the Louwman Group and Bonhams would have exclusive worldwide rights on the transaction and that neither MRL nor Mr Sullivan (or any associate) would enter discussions with anyone else and would immediately terminate discussions with RM.

10. That evening Mr Walmsley provided the requested confirmations on behalf of MRL, and thereafter MRL broke off discussions with RM, giving rise to what MRL describes as the Exclusivity Agreement.

11. MRL maintains that Mr MacLean's email of 22 May 2014 evidenced that Bonhams was proposing, subject to contract, to purchase the cars from MRL and then to auction them on similar terms to those agreed in principle with RM. As the Judge observed, the email does not so state, proposing instead that a member of the Louwman Group would make funds available to MRL (not Bonhams) to purchase Stelabar and that Bonhams would then sell the Collection at auction. That proposal was in due course broadly accepted by MRL and implemented as follows:

i) On 29 May 2014 MRL executed a Facility Agreement with the first respondent ("Lohomij"), a company in the Louwman Group based in the Netherlands, by which Lohomij agreed to provide MRL with a loan facility of €90m (repayable in full at the end of the year) for the purpose of acquiring Stelabar. MRL also agreed to pay Lohomij an arrangement fee of €10m, to pay fixed interest of €3.6m and to sell the cars through Bonhams.

ii) On the same date MRL executed a Debenture in favour of Lohomij by way of security for the loan and Mr Sullivan provided a personal guarantee.

iii) MRL immediately drew down the loan and completed the purchase of Stelabar pursuant to the SPA.

iv) On 30 June 2014 MRL, Lohomij and Bonhams entered an agreement ("the Commercial Agreement") providing for the sale of the cars, expressed to have retrospective effect to 29 May 2014. It was agreed that the cars would be consigned to be sold by Bonhams (or one or more of its affiliates) at one or more sales to be determined by Lohomij and Bonhams in their discretion. 10 identified cars were to be sold without reserve price by the third respondent ("B&B"), Bonhams' USA affiliate, at Quail Lodge, California, on or about 14 August 2014. Otherwise reserve prices were to be determined by Lohomij and Bonhams, in consultation with MRL, but the former were entitled to determine that cars valued under £1m be sold without a reserve price.

v) Also on 30 June 2014 MRL entered an agreement with B&B ("the Consignment Agreement") for the consignment to B&B of the 10 cars to be sold at Quail Lodge.

12. The auction duly took place at Quail Lodge on 14 August 2014. The 10 cars were sold for a total of US$59.95m, including what was then a world record sum of US$34.65m for the Ferrari 250 GTO. MRL asserted that the total realised was far less than assurances that had been given by Mr Brooks and projected values provided by RM, alleging that this was due to misconduct in the conduct of the auction by Bonhams, B&B and Mr Brooks. For the purposes of determining the applications before him, the Judge proceeded on the assumption that those allegations were well-founded.

13. Further cars were sold over the following months, including 17 at the Goodwood Revival on 13 September 2014. On 31 December 2014 the term for repayment of the outstanding balance of €56.46m was extended until 31 May 2015. A further 14 cars were sold by the end of March 2015, but 25 remained unsold and, in aggregate, in the region of €35m remained outstanding under the Facility Agreement.

14. On 13 April 2015 Spring Law sent a pre-action protocol letter to Bonhams setting out MRL's claim for in excess of £20m "for negligence and breach of contractual and common law duties relating to the significant losses suffered by MRL directly resulting from Bonhams promotion and conduct of the [auction at Quail Lodge]". The gist of the claim was that Bonhams had acted in breach of duty by (i) insisting that all 10 cars be sold without reserve; (ii) failing to allow sufficient time to promote the sale of the cars; (iii) failing to contact parties previously in negotiation with MRL to buy the cars; and (iv) selecting Quail Lodge as the venue for the auction (as opposed to a venue in or around London).

15. Although the proposed claim was framed in negligence and breach of duty, the letter made numerous broader assertions of duress, bad faith, illegality and that Bonhams had acted in its own interest rather than that of its principal, MRL. In particular, MRL alleged that:

    i) Bonhams owed MRL a "special duty of care as experts and specialist auctioneers of vintage cars and as MRL's agents. The unique circumstances of the transaction whereby a significant shareholding in Bonhams is held by the same beneficial owners as [Lohomij], MRL's secured lender, means that MRL was beholden to Bonhams in a way that they would not have been with any other auctioneer". The letter also referred to "the connected relationship between Bonhams and Lohomij".

    ii) "Bonhams … forced MRL into a position where they had no option but to rely on Bonhams as to the timing and strategy of the sales process. There was no doubt that any expert in this field would recommend a reserve price". The letter also alleged that "MRL was coerced into agreeing a sale of the Cars without reserve and in the USA".

    iii) "…Bonhams were engaged in a dispute with a Mr Wexner who would have been the buyer of many of the Cars at much higher prices…Bonhams withheld this crucial information from MRL".

    iv) "Mr Brooks…proposed to Mr Sullivan that a mutual contact who was present in California be asked to bid on [the Ferrari 250 GTO] and he would be financed if required if successful. Such practice is unlawful in California and Mr Brooks withdrew his proposal the morning of the Auction…".

    v) "…Bonhams were solely motivated by the publicity that would be generated for Bonhams itself in selling the Cars without reserve and in the USA… Bonhams went against their own recommendation in selecting the USA, the simple rationale being that it suited their own purposes and not those of the client". The letter also alleged that "Bonhams …merely cherry-picked the Cars that suited its own purposes best for promotion of itself in the USA. Bonhams has under-valued the remaining cars…" and that "the disaster [the outcome of the auction] for MRL still netted in excess of US$6m for Bonhams in fees".

16. It is noteworthy, in passing, that the pre-action protocol letter acknowledged that the "transaction" entered on 29 May 2014, pursuant to which the Collection was transferred to MRL (and not Bonhams), funded by Lohomij pursuant to the Facility Agreement, was "entered into in good faith on substantially the same basis as the offer [in Mr MacLean's email of 22 May 2014]". There was no suggestion that Bonhams and Lohomij had changed the basis of the transaction at the last moment, MRL merely noting that it had protested "at the introduction by [Lohomij] of a larger premium on the loan".

17. On the same day Spring Law sent a second letter to Bonhams, marked "without prejudice", proposing two bases on which MRL's claim could be settled with Bonhams (and Lohomij, to the extent required or requested by Lohomij). Each proposal required that Bonhams procure that Lohomij waive interest on the loan

accrued since 1 January 2015 and would be in full and final settlement of claims against Bonhams and all related parties.

18. Following negotiations (during which, Mr Sullivan asserts, Mr Brooks stated that he would "fucking destroy" Mr Sullivan), MRL, Bonhams, B&B and Lohomij entered the Settlement Agreement. The Recitals (which formed part of the Settlement Agreement by virtue of clause 1.2) included the following:

> "(D) MRL has: (a) made numerous allegations as regards the conduct of [Bonhams] (and its Agents) in relation to [the Commercial Agreement] and particularly as regards the promotion and execution of the Auction; and (b) threatened to issue legal proceedings. All of the allegations are denied by the Bonhams Parties.
>
> (E) Lohomij has agreed to extend the maturity of the Facility and grant various other amendments to the Facility and Bonhams 1793 has agreed to vary the terms of [the Commercial Agreement] in certain respects in favour of MRL. In connection with those amendments, the Parties have, subject to the terms of this Agreement, agreed to settle MRL's claims against the Bonhams Parties and/or Lohomij and/or any of their Affiliates or Agents relating to, arising from or otherwise connected with the initial acquisition of the Collection and its financing, the sale of the Collection, or the 30 June Agreement, including all claims alleged in Spring Law's letter to [Bonhams] dated 13 April 2015."

19. Clause 3 provided as follows:

> "3.1 The Parties agree (for themselves and on behalf of each of their Affiliates and Agents) that this Agreement shall constitute full and final settlement, and irrevocable and unconditional waiver and release, of all and any Claims.
>
> 3.2 MRL covenants and undertakes in favour and for the benefit of each of the Bonhams Parties, Lohomij and their Affiliates and Agents that:
>
> (A) they shall not make or maintain, and shall procure that none of their Affiliates or Agents make or maintain, any Claim against any of the Bonhams Parties, Lohomij and/or any of their Affiliates and/or Agents…
>
> and MRL will indemnify, and keep indemnified, the Bonhams Parties, Lohomij and their Affiliates and Agents against all costs and damages (including interest and reasonable legal costs and disbursements) incurred as a result of any breach of this clause 3.2."

20. The "Claims" settled by clause 3.1 were defined in clause 1.1 as follows:

> "'Claims' means all claims, causes of action, rights or other interests (whether present, actual, prospective or contingent, whether or not

> known to the Parties at the date of this Agreement, and whether arising in contract, tort, under statute or otherwise), in any jurisdiction by MRL and/or any of its Affiliates or Agents against the Bonhams Parties and/or Lohomij and/or any of their Affiliates or Agents which relate to, arise from, or are otherwise connected with, the initial acquisition of the Collection and its financing, the sale of the Collection and/or the 30 June Agreement, including all claims alleged in Spring Law's letter to [Bonhams] dated 13 April 2015, and which in each case relate to the existence or occurrence of facts, matters or circumstances at or prior to the date of this Agreement, but excluding for the avoidance of doubt, any claims that the Bonhams Parties and/or Lohomij and/or any of their Affiliates or Agents may have against MRL and/or any of its Affiliates or Agents"

21. Clause 6 provided:

> "The Parties covenant with each other (for themselves and on behalf of each of their Affiliates and Agents) not to do or say anything which is harmful to the reputation of any of them or which may lead a person to cease to deal with any of them."

22. Clause 8.2 provided:

> "Each Party shall at all times act in good faith in exercising their rights and undertaking their obligations under this Agreement in order to ensure that this Agreement is fully and properly implemented and that the Parties receive the full benefit and effect of the provisions of the Agreement."

23. Clause 13 contained an "Entire Agreement" clause, but provided that it would "not exclude any liability for (or remedy in respect of) fraudulent misrepresentation".

24. Also on 31 July 2015 Lohomij and MRL entered an Amended Facility Agreement, pursuant to which Lohomij agreed to advance further funds to MRL, to extend the repayment date of the outstanding balance of €38.45m until 31 December 2015, and to waive the facility fee of €13.6m. Clause 8 provided for Bonhams to continue to be involved in the sale of the 13 remaining unsold Cars. Clause 9 provided:

> "[MRL] acknowledges that the Cars comprise Charged Property (as defined in the Debenture) and accordingly acknowledges, in accordance with Clause 7.2(A) of the Debenture, that no disposition of any of the Cars or any other car in the Collection shall take place without the prior written consent of the Lender such consent not to be unreasonably withheld."

25. MRL thereafter made efforts to sell the remaining 13 cars, Lohomij's consent being required for each sale. In that regard, on a number of occasions Lohomij sought advice from the sixth respondent ("Mr Knight"), a specialist in classic cars at Bonhams. Two cars were sold on 25 August 2015 for €515,000, but 11 cars remained unsold when the loan became repayable on 31 December 2015. A number of further extensions were granted, the final one being to 2 December 2016.

26. MRL contends that, during and after the above period, Lohomij unreasonably refused to consent to a number of sales in breach of the Amended Facility Agreement and Lohomij and Bonhams were also in breach of the Settlement Agreement. The Judge summarised the claims as follows:

> "a) In June and July 2016 Bonhams and Lohomij sabotaged a proposed sale of four vehicles, by disclosing to the prospective buyer that they were subject to a debenture and leading it to believe that the vehicles were likely to be repossessed and to become available at a lower price;
>
> b) In November 2016 a proposed sale of a valuable car collapsed because of Lohomij's persistent and unreasonable refusal to consent to the sale;
>
> c) In June 2017 a transaction involving the sale of a total of four vehicles and a refinancing of the existing debt was abortive because Lohomij refused to consent, subsequently justifying its decision on the specious ground that the proposed sale was at an undervalue."

27. MRL was in default of its payment obligations to Lohomij from 3 December 2016 onwards, but Lohomij did not take steps to enforce its security rights over the remaining cars or call-in Mr Sullivan's personal guarantee. It was not until 20 June 2018 that Lohomij appointed receivers over secured property including the cars. On 9 November 2018, before the receivers had sold any of the cars, MRL repaid the outstanding balance of the loan of €17.1m, raised in part from the sale to Mr Sullivan of 3 of the cars for €21m, €15.3m of which was paid to MRL in cash.

28. In the meantime, on 12 November 2017, Mr Sullivan and Mr Hilder had met Mr MacLean. Their evidence (firmly disputed by Mr MacLean) is that Mr MacLean told them (a) that Bonhams had always intended to auction some of the cars in the United States in order to boost its presence there and so increase its value ahead of a prospective sale of its business, (b) that Bonhams had never intended to auction the premium cars in the UK, (c) that this is why they did not enter into the Commercial Agreement at the same time as entering into the Facility Agreement, because Mr Brooks knew that Mr Sullivan would never agree if he knew the truth, and (d) that the Quail Lodge auction was conducted illegally. MRL asserts that the above conversation revealed that the wrongdoings it had alleged in the Spring Law Letter in April 2015 were part of a dishonest conspiracy.

These proceedings

29. MRL commenced these proceedings on 20 May 2020, the Claim Form alleging that all the respondents were party to a conspiracy to injure MRL by unlawful means. The Particulars of Claim were dated on 17 September 2020 but, for the purposes of the application before him, the Judge rightly considered the draft Amended Particulars of Claim which had been served on 4 May 2021. The Judge helpfully summarised the gist of the allegation of an unlawful means conspiracy to injure as follows:

> "1) The purpose of the conspiracy included: (a) to further the interests of Bonhams, at the expense of the interests of

> MRL, by selling several of the premium Cars, including the Ferrari 250 GTO, at auction in California; (b) to prevent MRL from repaying the moneys due under the Amended Facility Agreement by refusing to consent to sales and by preventing MRL from refinancing the debt; (c) as stated by Mr Brooks "on multiple occasions", to "destroy" Mr Sullivan and thereby MRL; (d) to force MRL to sell Cars to Lohomij's or Bonhams' associates or preferred collectors, by refusing to consent to proposed sales by MRL and thereby damaging MRL's reputation in the classic car market. (Paragraph 117)
>
> 2) All defendants except B&B are said to have been privy to the combination from at least May 2014. B&B is said to have been involved in the conspiracy only at the stage of the decision to sell the 10 Cars at the [Quail Lodge] Auction and in the carrying out of that sale. Facts said to evidence the conspiracy include both the events prior to the Settlement Agreement and the matters of complaint relating to the attempted sales thereafter. (Paragraphs 117 and 119)
>
> 3) The defendants are said to have intentionally injured MRL by, in particular: (a) forcing it to accept the terms of the Facility Agreement, which altered the prior agreement as to the nature of the transaction; (b) forcing it to accept the last-minute change to the terms of the Commercial Agreement, whereby 10 premium cars were to be sold at the Auction; (c) carrying out the Auction in a manner contrary to MRL's interests; (d) forcing MRL to abandon its claims against Bonhams and enter into the Settlement Agreement; (e) thereafter, sabotaging MRL's attempts to sell the remaining Cars and to refinance the debt to Lohomij. (Mr Louwman's retention of one Car, which is the sole cause of action not subject of the present applications, is also relied on as injury caused by the conspiracy.) (Paragraph 120)"

30. In relation to the period before the Settlement Agreement, the unlawful means alleged by MRL were summarised by the Judge as follows (all but the last three being asserted as freestanding causes of action, MRL accepting that those three were effectively compromised by the Settlement Agreement):

> "1) Breach of the Exclusivity Agreement by Bonhams: The breach is said to consist of the facts (a) that the "transaction between Bonhams, Lohomij and MRL" was not, as it was agreed it would be, on substantially the same terms as the deal agreed with RM, (b) that the Cars were not sold, as it was agreed they would be, at a single auction at the Goodwood Revival or such other venue as might be agreed, and (c) that the 10 Cars sold at the Auction were sold without reserve. (Paragraphs 26 and 123)
>
> 2) (Alternatively) Fraudulent or negligent misrepresentation: If the Exclusivity Agreement was not a contract, it comprised

representations (presumably, by Mr MacLean and/or Mr Brooks acting as a servant or agent of Bonhams) that were fraudulently, alternatively negligently, made and were relied on by MRL. (Paragraph 124)

3) Breach of fiduciary duty and/or a duty of good faith by Bonhams (and, possibly, Mr MacLean and Mr Brooks) in respect of the making of the Commercial Agreement: MRL avers that, by reason of the Exclusivity Agreement in May 2014, Bonhams owed to MRL a fiduciary duty (and/or a duty of good faith) to act in its best interests as its agents in the transaction and/or to obtain the best price for the Collection (Paragraphs 28 and 45). Bonhams' change of position between 27 June and 30 June 2014 amounted to a breach of fiduciary duty and/or a breach of the duty to negotiate in good faith, because Bonhams was seeking to profit from the fact that, in compliance with the Exclusivity Agreement, MRL had terminated its negotiations with RM and so had no alternative but to contract with Bonhams. (Paragraph 125) (The same paragraph alleges that Mr MacLean and Mr Brooks were in breach of fiduciary duty and/or a duty of good faith, but there is no plea that they owed such duties.)

4) Dishonest assistance by Lohomij and/or Mr Louwman in Bonhams' breach of fiduciary duty: The dishonest assistance took the form of insistence that the sale of the Cars should take place in California and not in London, when it knew that a sale in London would achieve the highest price. (Paragraph 126)

5) Breach of fiduciary duty by Bonhams, Mr Brooks and/or B&B in agreeing to sell Cars at the Auction: The act of "accepting instructions" to sell the Cars at the Auction is said to constitute a breach of fiduciary duty because (a) there was a conflict between Bonhams/B&B's interests and those of MRL and (b) there was a conflict between Lohomij's interests and those of MRL. (Paragraph 127: the plea is against not only Bonhams but also Mr Brooks and B&B as those who conducted the Auction, but there is no express plea that Mr Brooks and B&B owed to MRL a fiduciary duty or as to the basis of such a duty.)

6) Breach of fiduciary duty by Bonhams, Mr Brooks and/or B&B in the conduct of the Auction: The various matters complained of in the conduct of the Auction were, it is said, "deliberately designed to harm MRL and so amounted to a deliberate breach of fiduciary duty". (Paragraph 128)

7) Breach of contract by Bonhams in respect of the conduct of the Auction: The matters of complaint were a breach of Bonhams' implied contractual duty under the Commercial Agreement to act with reasonable skill and care, honestly and/or in good faith. (Paragraphs 45 and 129)

> 8) Negligence by Bonhams, Mr Brooks and/or B&B in the conduct of the Auction: The matters of complaint constituted negligence. (Paragraph 129)
>
> 9) Breach by Bonhams of the Commercial Agreement: Bonhams was in breach in that it failed to set a reserve price for cars valued at over £1 million (contrary to clause 2.6), it failed to keep MRL informed of offers and expressions of interest (contrary to clause 6), and it failed to sell 43 of the remaining Cars at the Goodwood Festival (contrary to clause 2.3) (Paragraph 130)."

31. MRL anticipated the obvious defence to the above claims by asserting, at paragraph 66 of the Amended Particulars of Claim, that the Settlement Agreement did not settle any claims in dishonesty, fraud or conspiracy.

32. As for the period after the Settlement Agreement, the Judge summarised MRL's claims (also relied upon as unlawful acts for the purposes of the alleged conspiracy) as follows:

> "…MRL avers that Lohomij was in breach of clause 6 (reputational damage etc) and clause 8 (good faith) of the Settlement Agreement in respect of refusal of consent to Sales 1, 2 and 3 and attempts to prevent MRL refinancing. (Paragraph 132)
>
> …MRL avers that by its conduct in respect of Sales 1, 2 and 3 Lohomij was in breach of (i) clause 9 of the Amended Facility Agreement, (ii) an implied term of the Amended Facility Agreement that Lohomij would not prevent and/or interfere with any proposed sale of the Cars and/or would act in good faith and/or (iii) its common law duty not to interfere with the release or potential release of the security. (Paragraphs 67A and 134)
>
> …MRL avers that, by reason of Mr Knight's intentional overvaluation and undervaluation of Cars in respect of Sales 2 and 3, (i) Bonhams was in breach of clauses 6 and 8 of the Settlement Agreement and (ii) Bonhams and Mr Knight procured Lohomij's breach of the Amended Facility Agreement. (Paragraph 135)."

Ground 1(i): the scope of the Settlement Agreement

The issue

33. The respondents relied upon the Settlement Agreement as having released all of MRL's claims brought against them in these proceedings which were in existence as at 31 July 2015. They referred to the very wide definition of the term "claims", encompassing all causes of action, whether or not known to the parties, limited only by reference to the defined subject matter. That subject matter was the acquisition of the Collection and its financing, the sale of the Collection and/or the Commercial Agreement, including all claims alleged in Spring Law's pre-action protocol letter: it was not in dispute that all of MRL's claims related to that subject matter.

34. MRL contended, to the contrary, that the Settlement Agreement, interpreted in the light of the authorities, did not release any of its claims in dishonesty, fraud and/or conspiracy, asserting that such unknown claims would only have been released if that was "spelt out" or there was otherwise some specific indication that claims of that nature were included in the settlement. MRL further asserted that there was no such specific indication in the present case. All of the respondents disputed both of those assertions. Mr Brooks went further, contending that, even if claims in fraud and dishonesty were not released without express reference, that exception did not extend to claims for conspiracy. As the Judge did not accept that contention (as set out below) Mr Brooks' estate pursues that alternative argument by way of Respondent's Notice on this appeal.

The authorities

35. In *Bank of Credit and Commerce SA (In Liquidation) v Ali (No.1)* [2002] 1 AC 251; [2001] UKHL 8 the House of Lords considered whether a widely worded general release between employer and employee, expressed to include all claims that "may exist", prevented the employee from seeking damages for the stigma of having worked for an employer, subsequently found to have been operating a dishonest and corrupt business. It was recognised that the possibility of a "stigma" claim could not have been anticipated at the date of the release.

36. Lord Nicholls explained the issue which arose as follows:

> "23. The circumstances in which this general release was given are typical. General releases are often entered into when parties are settling a dispute which has arisen between them, or when a relationship between them, such as employment or partnership, has come to an end. They want to wipe the slate clean. Likewise, the problem which has arisen in this case is typical. The problem concerns a claim which subsequently came to light but whose existence was not known or suspected by either party at the time the release was given. The emergence of this unsuspected claim gives rise to a question which has confronted the courts on many occasions. The question is whether the context in which the general release was given is apt to cut down the apparently all-embracing scope of the words of the release."

37. The House of Lords was unanimous (although Lord Hoffmann dissented in the result) in holding that that question was one of construction of the general release according to usual principles, there being no special rules of interpretation applicable to a general release. Lord Bingham of Cornhill (with whom Lord Browne-Wilkinson agreed) stated as follows:

> "8. I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of

> the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896,912-913 apply in a case such as this.
>
> 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 this is his intention ...
>
> 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…
>
> 17…Some of the cases, I think, contain statements more dogmatic and unqualified than would now be acceptable, and in some of them questions of construction and relief were treated almost indistinguishably. But I think these authorities justify the proposition advanced in paragraph 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this…"

38. Lord Nicholls did not refer to any caution required when construing a general release according to usual principles, but emphasised that the scope of the release would frequently be construed as being circumscribed by the subject-matter of the compromise:

> "26. [T]here is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. 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. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?
>
> 27. That said, the typical problem, as I have described it, which arises regarding general releases poses a particular difficulty of its own. Courts are accustomed to deciding how an agreement

should be interpreted and applied when unforeseen circumstances arise, for which the agreement has made no provision. That is not the problem which typically arises regarding a general release. The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made. For instance, a mutual general release on a settlement of final partnership accounts might well preclude an erstwhile partner from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed accounts.

28. This approach, however, should not be pressed too far. It does not mean that, once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances in which release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed … Echoing judicial language used in the past, that would be regarded as outside the "contemplation" of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not "under consideration".

29. This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which

> the release was given. The generality of the wording has no greater reach than this context indicates."

39. Lord Clyde also did not refer to Lord Bingham's cautionary principle, emphasising instead at [78] that the exercise of construing a contract is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances. At [79] he added as follows:

> "Such guides to construction as have been identified in the past should not be allowed to constrain an approach to construction which looks to commercial reality or common sense. If they are elevated to anything approaching the status of rules they would deservedly be regarded as impedimenta in the task of construction. But they may be seen as reflections upon the way in which people may ordinarily be expected to express themselves. Generally people will say what they mean. Generally if they intend their agreement to cover the unknown or the unforeseeable, they will make it clear that their intention is to extend the agreement to cover such cases. If an agreement seeks to curtail the possible liabilities of one party, he, if not both of them, will generally be concerned to secure that the writing clearly covers that curtailment."

40. Lord Hoffmann, although dissenting in the result, also considered that the ordinary principles of construction were applicable. At [55] he emphasised that what were called "rules of construction" no doubt reflected what in most cases the parties would have intended by using such language, but that the generality with which they were expressed and their insensitivity to context made them rigid and often productive of injustice. He further explained as follows:

> "60. My Lords, the lesson which I would draw from the development of the rules for construing exemption clauses is that the judicial creativity, bordering on judicial legislation, which the application of that doctrine involved is a desperate remedy, to be invoked only if it is necessary to remedy a widespread injustice. Otherwise there is much to be said for giving effect to what on ordinary principles of construction the parties agreed…
>
> 62. The disappearance of artificial rules for the construction of exemption clauses seems to me to be in accordance with the general trend in matters of construction, which has been to try to assimilate judicial techniques of construction to those which would be used by a reasonable speaker of the language in the interpretation of any serious utterance in ordinary life…"

41. The majority of the House of Lords held that the general release in *BCCI v Ali* did not encompass the employee's stigma claim as such a claim could not be regarded as having been within the contemplation of the parties, Lord Nicholls emphasising at [35] that such a claim was not even recognised as a matter of law when the release was signed.

42. Subsequent cases have discussed the proper approach to the construction of releases where the claims later advanced were not only unknown to the claimant at the date of the release (as in *BCCI v Ali*), but were also claims in fraud or dishonesty. *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) concerned a general release contained in a settlement agreement arising out of claims for breach of warranty in a share purchase agreement. In so doing, Moore-Bick LJ (sitting as a judge of the Commercial Court) discussed (obiter), whether the release would cover claims in fraud:

> "207. Two points of particular importance on which all of their Lordships [in *BCCI v Ali*] were agreed emerge from the speeches. The first is an insistence that the same approach is to be adopted when construing a general release as when construing a contract of any other kind. No special rules apply. The second is the emphasis which all their Lordships placed on the importance of the context in which the release is given. However wide the language in which it is cast, it is always necessary to understand the context in which a release was agreed in order to decide what the parties intended its true scope to be.
>
> 208. The context in which the release is given will inevitably vary from case to case. I accept that the court should be cautious in coming to the conclusion that a person has given up rights of which he was not and could not have been aware, but it may be clear having regard to language used and the context in which the agreement was made that that is indeed what was intended. … The release [in this case] is not worded in very general terms or in terms which suggest that the parties intended to waive all claims of any kind that might subsequently be discovered. … On the other hand, the expression 'current, past and future claims … that MAN may have, or may otherwise have had', together with the exclusion in paragraph 4 of environmental and taxation claims, strongly suggests that the parties did intend to compromise claims of which MN was still unaware.
>
> 209. Mr. Kendrick submitted that the parties cannot have intended to compromise claims for misrepresentation or breach of warranty based on fraud, both because of the fact that they were grounded in fraud and because they were claims whose existence was unknown at the time. In my view, having regard to the context in which the parties entered into the settlement agreement and the language in which they expressed themselves, it was their intention that Western Star should be discharged from any further liability under section 4.1 of the Share Purchase Agreement, whether the possibility of a claim was known to MN at the time or not. I find it more difficult to say that they intended to release Western Star from liability for claims arising out of its own fraud, however. I am satisfied that neither party had the possibility of fraud in mind. As Rix LJ said in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483 at page 512, fraud is a thing apart because parties contract with one another in the expectation of honest dealing.

> Moreover, the manner in which fraud is treated in Article 12 of the Share Purchase Agreement reinforces the conclusion that the parties in this case regarded it as giving rise to fundamentally different considerations. If, therefore, Mr. Ellis's knowledge is to be imputed to Western Star so as to render any of the representations not only false but fraudulent, I do not think that the settlement agreement was intended to deprive MN of its right to pursue a claim in respect of them."

43. In *Satyam Computer Services v Upaid Systems Limited* [2008] EWCA (Civ) 487; [2008] 2 All ER (Comm) 465 the Court of Appeal considered, again on an obiter basis, whether claims based on the forgery of documents would have been released by a settlement agreement had that agreement covered claims arising from the agreement pursuant to which the documents were issued. Lawrence Collins LJ (with whom Waller and Rimer LJJ agreed) noted at [79] that the House of Lords in *BCCI v Ali* had held that there were no special rules of interpretation applicable to a general release, which was to be construed in the same way as any other contract. At [80] he further noted that that decision was not concerned with claims based on fraud and referred to the (obiter) view of Moore-Bick LJ in *MAN Neufahrzeuge AG v Ernst & Young* [2005) EWHC 2347 (Comm) that the release in that case did not apply to claims based on fraud because neither party had the possibility of fraud in mind, and fraud was a thing apart because parties contract with one another in the expectation of honest dealing. In respect of Satyam's contention that the settlement agreement was a termination of the whole relationship between the parties and, as such, must have been intended to release unknown claims, including those based on fraud, Lawrence Collins LJ stated:

> "84. I do not accept this submission. I would agree that the exclusion clause cases should not be automatically imported into the area of releases, but that is not what either Moore-Bick LJ did in the *MAN Neufahrzeuge AG* case, or what Flaux J did in the present case. Lord Bingham said (*Bank of Credit and Commerce International (in liquidation) v Ali* (at [10]) that 'a long and … 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.' Lord Browne-Wilkinson agreed, and Lord Clyde (at [86]) expressed substantially the same view. It seems to me to be clear that the same principle must apply to fraud-based claims. 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…."

44. I agree with the Judge's understanding, expressed at [94] and [97], that neither Moore-Bick LJ nor Lawrence Collins LJ was suggesting any departure from the application of the ordinary principles of contractual construction in the case of fraud claims. Rather, consistently with those principles, they recognised that part of the commercial context to be taken into account was that parties would generally proceed on the basis of honest dealing and would not readily release unknown claims in respect of the fraud of their counterparty. Both decisions reflect that the specific release under consideration did not demonstrate an intention to settle claims in fraud. As the claims in *Satyam* were based on the fact that assignments had been forged, the release would have only been effective in respect of such claims if express words had been used: that 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.

45. The Judge, in his detailed and comprehensive survey, referred to several subsequent decisions, mostly at first instance, which re-iterate that ordinary principles of construction are to be applied to releases, recognising that the fact that the claims in question were unknown and/or are claims in fraud is an important aspect of the context in considering whether the parties intended by their agreement to release such claim, but that it may nonetheless be determined from the wording and other aspects of the context, taken together, that a release was indeed intended. I consider it is necessary, for present purposes, to refer only to *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204, in which the Court of Appeal considered whether a contractual release applied to claims based on an unlawful means conspiracy which were sought to be added by amendment. Asplin LJ (with whom Hamblen LJ and Nugee J agreed) stated:

> "44. It was agreed that the 2014 Releases must be construed in accordance with the principles in *Arnold v Britton* [2015] AC 1619. Those principles were endorsed by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173. As Lord Hodge explained at [10] of his judgment, the court must ascertain the objective meaning of the language which the parties have used and in doing so 'must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.' He also reiterated the principle that the interpretation of contracts is a unitary exercise, stated that the process is an iterative one and added at [12]:
>
> > 'To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.'
>
> …

> 49. It seems to me that the definition of 'Claims' in clause 2(a) viewed in the context of the Revised Redress Offer as a whole and clause 2(a) in particular, and in the light of its relevant factual context, is extremely wide and is sufficient to include the claim of unlawful means conspiracy. 'Claims' are defined to include 'all complaints, claims and causes of action in any way connected to the sale of the IRHPs' (emphasis added). The language used is broad and unambiguous and it seems to me to be inescapable that it is sufficiently wide to include the claim as pleaded in the proposed amended pleading which contains numerous references to the sale of the IRHPs and their effects upon the Appellants."

The Judgment

46. The Judge took as the starting point, and examined in detail, the "clear, precise, wide-ranging and comprehensive" language of the Settlement Agreement ([111-112]) and noted that that language, in a professionally drafted document, was fully considered and of a "high order". He held that the wording of the release "tends to show that the draftsman, and therefore the parties, "meant business" and were seeking to draw a line under events up to the date of the Settlement Agreement".

47. The Judge next stated at [113] that the text of the Settlement Agreement must be interpreted in the context of the factual matrix, noting that it included the contents of the Spring Law letter (expressly referred to in the recitals to the Settlement Agreement), the financial connection between Bonhams and Lohomij and matters concerning the negotiation and agreement of the various contracts.

48. The Judge concluded at [114] that all of the claims MRL was then seeking to advance (save for freestanding claims relating to the period after July 2015):

> "…clearly fall within the scope of the release according to its natural meaning. All of them relate to, arise from or are connected with one or more of MRL's acquisition of the Collection, the financing of the acquisition, the Commercial Agreement, and the sale of the Collection. All of them, including the claims in conspiracy, dishonest assistance and breach of fiduciary duty, relate to facts, matters or circumstances existing or occurring prior to or at the date of the Settlement Agreement."

49. The Judge further stated at [115] that none of the factual matrix indicated that the text of the Settlement Agreement ought to bear any other meaning than is given by a plain reading of the unambiguous wording. On the contrary, he held, the contents of the Spring Law letter (with its allegations of breach of agency duties, illegality and duress and references to connections with and influence over Lohomij) and the fact that Lohomij was a party to the Settlement Agreement reinforced that interpretation.

50. In the light of the above, the Judge accepted at [116] Bonhams submission to the following effect:

> "(a) that it is unrealistic of MRL to contend that an allegation of a conspiracy between Bonhams and Lohomij to target MRL was

> objectively outside the scope of the parties' contemplation when the Settlement Agreement was made and (b) that allegations that the matters complained of were not merely negligent but deliberate wrongdoing were precisely the sort of allegation which, viewed objectively, the parties would be looking to prevent. Further, the release expressly extended to unknown claims relating to the subject matter specified in the definition of "Claims" and MRL thereby took the risk that the element of bad faith might be worse than it then believed."

51. At [117] the Judge rejected MRL's contention that, in the absence of express words releasing claims based on fraud or dishonesty, the release was not to be taken to extend to any such claims, including in particular the claim that there was an unlawful means conspiracy, stating:

> "First, there is no rule of law requiring that express words referring to claims based on fraud or dishonesty be used if a release is to extend to them. As a matter of common sense, in the absence of such words one will not readily conclude that a reasonable person would understand a release to refer to such claims. However, if the normal principles of construction lead to the conclusion that the release does indeed extend to such claims, the conclusion must be respected. Parties are entitled to reach such an agreement if they choose to do so, and it is no business of the court to obstruct their expressed intention. Second, the words of the release seem to me to be unequivocal and unambiguous and to evince a plain intention to omit nothing and leave no loopholes. Third, the absence of express words referring to deliberate wrongdoing or dishonesty is explicable not only by the very comprehensive words actually used but by the way in which the release is framed by reference to subject matter rather than specific causes of action…"

52. The Judge further rejected MRL's contention that, even if the Settlement Agreement precluded it from advancing claims based on matters pre-dating August 2015, it was nevertheless entitled to rely on unlawful means employed after July 2015 in support of an allegation of an unlawful means conspiracy ongoing after that date. At [121] the Judge pointed out that only one conspiracy and one combination was alleged, and that combination was alleged to pre-date the Settlement Agreement, albeit that some of the unlawful means alleged post-dated the Settlement Agreement, entailing that any claim in that regard related to matters prior to July 2015 and was therefore released. MRL does not challenge that aspect of the Judge's reasoning.

53. The above reasons supported the Judge's conclusion, expressed at both [109] and [123], that the Settlement Agreement effected a release of all of the claims now brought by MRL in these proceedings, except for those based on freestanding causes of action arising after July 2015.

54. The Judge also considered, but did not accept, Mr Brooks' further argument that, even if there were a principle requiring express words to include fraud-based claims within the scope of a release, such a principle could not avail MRL in respect of the claim for unlawful means conspiracy as fraud or dishonesty is not a necessary ingredient of

such a conspiracy. After considering whether that proposition gained support from the authorities, the Judge concluded at [118(3)] that the way to cut through the issues was as follows:

> "…first, by keeping firmly in mind that Lord Bingham's cautionary principle is not a rule of law and does not alter the method of construing contracts; second, by remembering, in line with Lawrence Collins LJ's suggestion in the *Satyam Computer Services* case, that the question is not whether certain pre-defined categories of claim are outside the scope of the release but whether these particular claims are outside its scope…"

MRL's arguments on appeal

55. MRL contends that the Judge, despite referring extensively to *BCCI v Ali* and the other modern authorities on contractual construction, adopted too literalist an approach to construing the Settlement Agreement, reaching the "bald" conclusion that the wording of the release covered fraud, dishonesty and conspiracy because (as per the Judge's second point in [117]) its words were unequivocal and unambiguous, evincing a plain intention to omit nothing. MRL submits that the Judge failed to apply the cautionary principle identified by Lord Bingham in *BCCI v Ali* (as adopted and applied in cases considering fraud and dishonesty) by taking the wording as the starting point and examining whether there was anything in the factual matrix which undermined the literal meaning, rather than starting from the position that parties would not readily agree to settle unknown fraud and dishonesty claims and looking to see whether there was a clear objective basis for finding that they had nonetheless so agreed in this case.

56. In that context MRL submits that there was nothing in the Settlement Agreement, nor in the factual matrix, that indicated that the parties had fraud, dishonesty or conspiracy claims in contemplation when they entered the release. The only reference to fraud in the Settlement Agreement was in the "entire agreement" clause, which expressly excluded fraudulent misrepresentation from its ambit, indicating (submits MRL) that the parties did not intend to exclude such future claims. Further, the Spring Law letter clearly and expressly advanced claims for breach of contract and breach of duty and did not mention fraud, dishonesty or conspiracy.

57. MRL further submits that the Judge was wrong to regard the fact that the release was framed by reference to a defined subject matter as explaining the absence of express reference to releasing claims in fraud, dishonesty and conspiracy. Even where so framed, MRL argues, the expectation of honest dealing would apply, such that the parties should not be taken to have intended to include fraud claims within the release unless it was clear, either from the words used or the context, that the parties so intended.

Discussion

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 Service 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.

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.

60. In view of my conclusion, it is unnecessary to consider the Respondent's Notice served by Mr Brooks' estate. I would simply add that I agree with the Judge that, as there is no rule of construction in relation to the release of fraud and dishonesty claims, the question of whether conspiracy claims are to be viewed in the same light does not arise. In each case the question is one of construction of the relevant release according to ordinary principles, the nature of the claim (in broad rather than technical terms) being one aspect of the context to be considered, an aspect that will vary in importance from case to case.

Ground 1(ii): sharp practice

61. MRL contended that, even if its claims in existence as at 31 July 2015 were, as a matter of construction, covered by the release in the Settlement Agreement, that release should not be given effect because the respondents must be taken to have been aware (for the purposes of the applications before the Judge) that they had conspired together to injure MRL by unlawful means and that MRL was unaware of that conspiracy. In those circumstances, MRL argued, for the respondents to have sought a release of all claims (including claims in fraud and conspiracy) amounted to sharp practice which was an affront to the conscience of the court and should not be given effect.

62. In *BCCI v Ali* both Lord Nicholls and Lord Hoffmann referred to the possibility that, even if a release covered a claim on its true construction, it might not be given effect

if a party had sought, by way of sharp practice, to exclude liability for a claim he knew about but which was unknown to the other party. Lord Nicholls stated:

> "32. 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."

63. Lord Hoffmann explained the exception as follows:

> "69. … On a principle of law like this, I think it is legitimate to go back to authority, to Lord Keeper Henley in *Salkeld v Vernon* 1 Eden 64, 69, where he said: 'no rule is better established than that every deed obtained on suggestio falsi, or suppressio veri, is an imposition in a court of conscience.'
>
> 70. In principle, therefore, I agree with what I consider Sir Richard Scott V-C [2000] ICR 1410, 1421 to have meant in the passage in paragraph 30 of his judgment which I have quoted (ante, paragraph 11), and with Chadwick LJ, that a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so. On the other hand, if the context shows that the parties intended a general release for good consideration of rights unknown to both of them, I can see nothing unfair in such a transaction.
>
> 71. It follows that in my opinion the principle that a party to a general release cannot take advantage of a suggestio falsi or suppressio veri, in other words, of what would ordinarily be regarded as sharp practice, is sufficient to deal with any unfairness which may be caused by such releases. There is no need to try to fill a gap by giving them an artificial construction"

64. The Judge accepted that there was, at least arguably, a "sharp practice" principle, and held that it was not necessarily confined to general rather than specific releases, but held that it was not arguable that it applied in the present case:

> "119. …If there is any unconscionability, it seems to me rather to lie with MRL's attempt to make substantially the same complaints under a very slightly different guise—and, moreover, when by the Settlement Agreement it freely gave up the opportunity of learning more about the background to the self-interested conduct of which it

> complained. Its complaints regarding the acquisition of the Collection, the financing of that acquisition, the Commercial Agreement and the sale of the Collection were all settled for substantial value in a contract reached by commercial parties with equal bargaining positions and legal representation. And that settlement expressly included a release of unknown claims in circumstances where MRL had (on its own case) objective grounds of knowledge of deliberate wrongdoing by the Bonhams Defendants and a combination involving Lohomij. Yet now it seeks to sue for precisely the same matters because of what it says is new information concerning the defendants' motivations for doing the very things previously complained of. I regard this as a simple attempt to avoid the effect of a commercial contract freely entered into, and I unhesitatingly reject the suggestion that equity should relieve MRL of the consequences of its contract."

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.

Conclusion on ground 1

68. I would therefore dismiss ground 1 of the appeal. As I understand that Asplin and Arnold LJJ are in agreement with that outcome, grounds 2 to 5 of the appeal do not require determination.

Ground 6: did the Judge conduct a mini-trial?

69. The Judge noted at [19] that, on an application for summary judgment, the court must not conduct a "mini-trial", and will be mindful that full disclosure has not yet taken place and that there might be more evidence to come. He further recognised that where there are disputed questions of fact, the court will not generally attempt, on a summary judgment application, to determine where the probabilities lie. Neither party disagreed with these uncontroversial propositions, being amongst those summarised by Lewison J in *Easyair Ltd Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

70. MRL contends that the Judge nonetheless did conduct a mini-trial, producing a 157 page judgment which went much further in assessing the merits of conflicting evidence than was appropriate on a summary judgment and strike-out application, including failing to take into account or even rejecting evidence adduced by MRL. Although that general complaint is made in relation to the whole of the judgment, ground 6 alleges appealable errors only in relation to the post-Settlement Agreement causes of action. MRL does not challenge the substantive merit of any of the Judge's findings, arguing instead that he should not have embarked on the exercise of considering the post-Settlement Agreement claims at all but should have left them to trial.

71. The claims in question, made against Lohomij, Bonhams and the sixth respondent, Mr Knight (who advised Lohomij on valuation), related to sales that were proposed (on three occasions) in respect of four cars in the Collection and an additional car that was not part of the Collection. I have already reproduced the Judge's summary of the claims at [26] and [32] above. MRL contends that the Judge's wrongful approach led him to:

    i) make findings of fact which were not properly open to him; and

    ii) decide that it is not reasonably arguable that Lohomij, as a secured lender, owed duties (i) not to prevent or interfere with a disposition, (ii) to act in good faith and (iii) not to interfere with the release or potential release of security.

72. Ground 6 also contained an assertion that the Judge was wrong to decide that claims against Lohomij for breach of clause 6 of the Settlement Agreement and breach of clause 9 of the Amended Facility Agreement were not reasonably arguable. That contention was not pursued in MRL's skeleton argument or at the hearing of the appeal: in particular it was accepted that clause 9 could not have been breached because Lohomij was at no time asked formally to consent to a sale of cars over which it had security. MRL instead focused on its contention that there was an implied term in the Amended Facility Agreement that Lohomij would not prevent or interfere with MRL's attempts to effect such sales.

    <u>The challenge to the Judge's fact-finding exercise</u>

73. At the start of his consideration of these claims at [173] the Judge stated:

> "I have not conducted a mini-trial. However, the issues on this part of the case turn in large measure on the plausibility of MRL's factual case. Therefore a critical appraisal of the evidence is required, and it is necessary to refer to the statements of case and the evidence in considerable detail."

74. MRL contends that the Judge went too far in dismissing aspects of the evidence it adduced and ended up doing precisely what he had disclaimed, namely, conducting a trial of factual issues. However, two of the three examples given by Mr Fenwick KC, for MRL, of the Judge's allegedly improper approach related to the pre-Settlement Agreement period.

75. His third example (and the only one in relation to the post-Settlement Agreement causes of action) was a finding of the Judge at [306] that, contrary to the written evidence of Mr Sullivan and Mr Hilder, Mr Schlumpf of Bonhams was not present at a meeting on 6 July 2016 at which he was alleged by MRL to have told proposed purchasers of the four cars ("Sale 1") that MRL owed €38m to Lohomij and that Lohomij now required immediate repayment otherwise it would foreclose and repossess the four cars. Mr Fenwick submitted that the question of whether someone was present at a meeting (and what occurred there) was pre-eminently a matter for trial and that the Judge's finding, rejecting the evidence of two witnesses, was not appropriate on a summary judgment application, reached in the absence of disclosure and without examination of any of the relevant witnesses.

76. The Judge's decision in this regard was not, however, a simple rejection of one piece of evidence, but was part of an overall finding that MRL's case as to what happened in relation to Sale 1 was internally inconsistent, factually incorrect, fanciful and developed subsequent to its amended case in order to salvage an untenable position. In particular, Mr Schlumpf was originally alleged to have made comments to and within the hearing of the proposed purchasers on 2 June 2016, but MRL's case that such comments derailed Sale 1 was demonstrably wrong because the parties signed heads of terms after that meeting. MRL's case then changed (as developed in the statements of Mr Sullivan and Mr Hilder, not by way of pleading) to assert that Mr Schlumpf's comments were made partly on 2 June and partly at another meeting on 6 July 2016. However, email correspondence before the meeting suggested that Mr Schlumpf did not intend to be there and an email from Mr MacLean after the meeting (copied to Mr Schlumpf) did not record Mr Schlumpf as one of the attendees. The Judge addressed the above matters (amongst others) at [304-308] as follows:

> "304. First, the case pleaded in APOC, according to which all of the conduct complained of took place on the occasion of a single meeting on 2 June 2016, is inconsistent with Mr Sullivan's own evidence advanced on these applications.
>
> 305. Second, what makes sense in the context of an allegation of a single meeting on 2 June 2016 (that is, that the conduct of Mr Louwman, Mr Schlumpf and Mr MacLean on that occasion caused FR-G to change its position) becomes implausible when the conduct is said to have occurred at two meetings some five weeks apart. MRL does not allege that FR-G pulled out of Sale 1 after the first meeting but only after the second meeting— indeed, the Heads of Terms were

> actually executed by both parties shortly after the meeting of 2 June 2016—so the inference that the alleged collapse of Sale 1 was due to Mr Louwman's conduct becomes fanciful.
>
> 306. Third, I am entirely satisfied that the revised case is factually incorrect, because Mr Schlumpf was not at the meeting on 6 July 2016. On this point there is a conflict between the evidence of Mr Sullivan and Mr Hilder, who say that he was present, and that of Mr MacLean and Ms Volf, who say that he was not. But MRL's case on this point has been inconsistent, to the extent that it appears to be trying to find a way to salvage an original and untenable case, and the documents show the position clearly enough. On the morning after the meeting, Mr MacLean's email to Mr Louwman, which was copied to Mr Schlumpf, identified those present at the meeting and they did not include Mr Schlumpf. Further, Mr Schlumpf had not intended to be at the meeting, as is shown by an email that he sent to Mr MacLean on Thursday 30 June 2016, expressing "Best wishes and success for next Wednesday's meeting." Therefore, if Mr Schlumpf and Mr MacLean said what they are alleged to have said at the same meeting, that must have been the meeting on 2 June 2016. That is actually consistent with APOC, but it is inconsistent both with Mr Sullivan's evidence and MRL's Reply and with the case being advanced that Sale 1 fell apart in the aftermath of what they are alleged to have said, as the Heads of Terms were signed after that meeting.
>
> 307. Fourth, MRL's revised case is also factually incorrect in stating that FR-G changed the proposed terms after the meeting on 6 July 2016 (Reply, paragraph 55; Mr Sullivan's first statement, paragraph 128). Mr MacLean's email to Mr Louwman on the morning after the meeting records that it was at the meeting itself that Mr Rickert made it known that FR-G's clients wanted a price reduction or some other alteration of the terms. This also renders it implausible to contend, as MRL does in its Reply and in Mr Sullivan's witness statement, that Sale 1 collapsed after and in consequence of what was said at the meeting on 6 July 2016 and that the ensuing negotiations followed the collapse of Sale 1.
>
> 308. Fifth, the whole premise of MRL's case concerning interference in Sale 1 is fanciful, not to say absurd [for 3 reasons the Judge proceeds to develop in detail]."

77. In my judgment the Judge was fully entitled, for the reasons he gave, to reject the assertion that Mr Schlumpf was present at the meeting on 6 July 2016. MRL's case in that regard was belated, internally inconsistent, contrary to the contemporaneous records and made little sense on its own terms. It was a clear example of a factual assertion which was capable of being rejected on a summary basis as being inherently incredible and/or without substance: see, for example, *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]. The Judge was not bound to abandon his critical faculties: *Calland v Financial Conduct Authority* [2015] EWCA Civ 192 at [29].

78. Whilst the Judge did indeed conduct an unusually extensive review of the evidence and reached numerous conclusions in relation to MRL's factual case in relation to the proposed sales of the four cars, MRL has not identified any example of the Judge over-stepping the proper bounds of his role in determining a summary application.

The Judge's rejection of an implied term that Lohomij would not interfere with the Sales

79. By paragraph 67A of the draft Amended Particulars of Claim MRL sought to add the following averment:

> "It was an implied term of the Amended Facility Agreement that Lohomij would not prevent and/or interfere with any proposed sale of the Cars and/or would act in accordance with an implied duty of good faith. Further or alternatively, Lohomij as a lender was precluded from interfering with the release (or potential release) of the security at common law."

80. MRL does not pursue on this appeal the contention that Lohomij owed a duty at common law, but does assert that the Judge was wrong to refuse permission to make the amendment in respect of the implied contractual terms as to interference and good faith.

81. The Judge held that it was not reasonably arguable that either term should be implied. In respect of the term prohibiting interference, he held at [309]:

> "1) In *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, the Supreme Court confirmed and approved the traditional approach to the implication of terms. A term will be implied into a contract only if it is necessary to give business efficacy to the contract (in the sense that, without the term, the contract would lack commercial or practical coherence) or—which will often amount to the same thing—if the term is so obvious that it "goes without saying". A term will not be implied if it is incapable of clear expression, or if it is unreasonable or inequitable, or if it contradicts an express term of the contract.
>
> 2) MRL has not pleaded any matters that are said to justify the implication of the term contended for.
>
> 3) The Amended Facility Agreement is a detailed and carefully drafted commercial agreement between sophisticated parties who were both represented by lawyers. Clause 9 of the Amended Facility Agreement makes express provision in respect of dispositions of the Cars as Charged Property. Clauses 7 and 8 made provision regarding the sale of the Cars; I refer in particular to clause 7(c), set out above. The implied term contended for by MRL is neither necessary nor obvious. The contract works perfectly well without it.
>
> 4) An implied term that Lohomij would not prevent or interfere with a proposed sale of the Cars is unarguable for three further reasons.

> First, clause 9 of the Amended Facility Agreement gives Lohomij an express right to prevent or interfere with a sale, that is, by withholding consent to it. The implied term contended for would be inconsistent with the express terms of the contract. Second, an implied term preventing Lohomij from interfering with a sale is impossibly vague. By way of example, MRL has not suggested that Mr Schlumpf's mere presence at meetings was an unlawful interference, although he was present only to represent the interests of Lohomij as secured creditor. It is unclear at what point his contribution to meetings would constitute interference. Third, Mr Schlumpf's remarks, if made as alleged, and whether they were helpful or not, did no more than assert Lohomij's rights under the Amended Facility Agreement and the Debenture, because MRL was in default after 30 June 2016. It is impossible, in my view, to see the justification for the implication of a term that would prevent Lohomij, at a meeting at which it was properly represented as secured creditor, from stating its entitlements as secured creditor."

82. As to the implied term of good faith, the Judge held at [310] as follows:

> 1) "There is no general principle of good faith in English contract law. See Chitty on Contracts, 33rd edition, paragraph 1-044 and the cases there cited.
>
> 2) No grounds for the implication of a term of good faith in the Amended Facility Agreement have been pleaded and, for reasons already discussed, general principles regarding the implication of terms do not justify such an implication.
>
> 3) The relationship between MRL and Lohomij was both debtor-creditor and chargor-chargee. That relationship is sufficiently regulated by the express terms of the contract between them and by the applicable equitable principles. See *Yorkshire Bank Plc v Hall* [1999] 1 WLR 1713, per Robert Walker LJ at 1728; *Morley v Royal Bank of Scotland Plc* [2021] EWCA Civ 338, per Males LJ at [59]-[64]. The equitable principles applicable to Lohomij's status as chargee include its obligation to exercise its powers as chargee for proper purposes and in good faith. Nothing to do with Sale 1 involved the exercise of powers under the security, although Lohomij could have exercised them once MRL went into default; the equitable principles were not engaged."

83. MRL contends that it is arguable that the terms for which it contends should be implied on the basis that they are an obvious requirement of a lender prior to being formally requested to consent to the sale of security: it would undermine the obligation not to withhold consent unreasonably if a lender could act so as to prevent a sale reaching a point where such consent could be requested. MRL contends that the Judge should not have rejected the existence of such terms at the summary stage.

84. In my judgment the Judge was right to reject the proposed implied terms for the reasons he gave. The obligations of Lohomij as secured lender are set out

compendiously in the Amended Facility Agreement, supplemented by equitable principles applying to the manner in which a chargee must deal with secured property. Whilst it is superficially attractive to suggest that a lender must not inappropriately "interfere" with negotiations for the sale of security at a prior stage to the issue of its consent arising, that is no more so than in the case of any third party who improperly interfered in the business of another. The lender would not be exercising any right as lender and, like any third party, would potentially be liable for wrongfully interfering with business if the conditions of that tort were met. Short of replicating such a tort, it is difficult to see, let alone define, the content of the obligation not to interfere. If the obligation does no more than replicate the tort which would be committed by anyone who interfered, it would seem to be unnecessary to imply a term to that effect.

Conclusion on ground 6

85. The Judge summarily dismissed the post-Settlement Agreement claims on the basis that they were not reasonably arguable either as a matter of law or on the facts. MRL has failed to show that he was wrong in either respect, whether because of his general approach to the application or otherwise.

Conclusion

86. I would dismiss the appeal.

Lord Justice Arnold:

87. I agree.

Lady Justice Asplin:

88. I also agree.