Neutral Citation Number: [2021] EWHC 1450 (Ch)

Case No: HC-2016-001314

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

Rolls Building
7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 28/05/2021

Before :

MASTER KAYE

- -

Between :

ANTHONY ROBERT COLLIVER	**Claimant**
- and -	
(1) JONATHAN PAPWORTH	**Defendants**
(2) SIMON CHARLES PAPWORTH	

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- -

Thomas Graham (instructed by **SBP Law Solicitors**) for the **Claimant**
Peter Shaw QC (instructed by **Strain Keville LLP**) for the **Defendants**

Hearing dates: 8 March 2021

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Approved Judgment

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

. Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand down is deemed to be 28 May 2021

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Master Kaye :

1. On 8 March 2021 the Defendants' application dated 16 July 2020 for permission to amend their Defence ("**the Defendants' application**"), the Claimant's application dated 15 October 2020 to amend his particulars of claim ("**the Claimant's application**") and the CCMC in relation to the above matter were all listed before me with a combined time estimate of 1-day.

2. Each application was supported by a witness statement from the party's solicitor exhibiting amongst other things the proposed amended statement of case for each of the applications. The Claimant's evidence was both in support of his application and in opposition to the Defendants' application. Notably none of the parties themselves have provided any direct witness evidence in support of either set of proposed amendments.

3. I have also had the benefit of detailed skeleton arguments and oral submissions from both counsel for which I am grateful. Although I do not set out every argument or submission made by each counsel, I have considered them and carefully taken them into account.

4. The Claimant's proposed amendments are said to be consequent upon the Defendants' amendments and would only be pursued if the Defendants' application were successful. The Defendants' application was therefore heard first and, in the event, took the entire 1-day allocated for both applications and the CCMC. A further day has been fixed to address the Claimant's application, if necessary, and the CCMC. Hopefully in light of the time taken addressing the underlying background of the claim and defence those matters can be progressed more quickly.

5. The claim was issued on 27 April 2016. The particulars of claim are also dated 27 April 2016. The Claim was served at the end of June 2016. The Defences of the First and Second Defendants are dated 16 September 2016. There has not yet been a CCMC. The parties agreed a stay for ADR and participated in an unsuccessful mediation in late 2018. Thereafter the claim was listed for a CCMC in February 2019 but subsequently vacated by the parties due to the proposed amendments by the Defendant. It is the application relating to those amendments that this judgment relates to over 2 years later.

6. In January 2019, having changed counsel, the Defendants indicated that they intended to seek permission to amend their defence to rely on a Deed of Agreement dated 22 September 2010 referred to below. The draft amended defence was provided in May 2019. In August 2019 the Claimant raised queries in relation to the proposed amendment. Correspondence continued between the parties with a view to trying to agree the amendments. In October 2019 the Claimant indicated a willingness to agree the amendments to the Defences on terms that permitted him to amend the particulars of claim. The Claimant had not yet provided a draft of the proposed amendments despite five months having passed since receipt of the draft amended defence. There matters rested until March 2020.

7. In March 2020 there was a further attempt to reach agreement on the terms on which the Defendants would be permitted to amend. On 3 April 2020, 11 months after receiving the draft amended defence, the Claimant finally provided a draft amended particulars of

claim. On 27 April 2020 the Defendants rejected the proposed amendments to the particulars of claim. The Claimant's position remained that they would only consent to the Defendants' proposed amendments if he were permitted to amend too. Despite other arguments raised in submissions that essentially remains the Claimant's position today.

8. Three months later the Defendants' application was issued on 17 July 2020 – 18-months after they had first identified their intention to amend and over a year after they had provided the draft amendments to the Claimant. The CCMC and the Defendants' application were listed together on 27 October 2020. Despite the position reached in April 2020, the Claimant did not issue his application to amend until 15 October 2020 less than two weeks before the date fixed for the CCMC and determination of the Defendants' application. Given the relationship between the applications and the potential effect on the CCMC, the hearing on 27 October was vacated, and a combined hearing was relisted with a 1-day time estimate on 8 March 2021. As it transpires that was a wholly inadequate time estimate. By the time judgment is handed down on the Defendants' application it will be close to 2½ years since the Defendants first intimated an intention to amend.

9. Procedurally therefore although the claim was issued in April 2016, 5 years ago, the claim is at an early stage. No directions timetable has yet been fixed and there is no trial date, and any trial is now unlikely to be before late 2022. That will be some 12 years after the events in issue and some 6 years after the claim was issued. That is far from satisfactory.

10. However, given where we are, there has not yet been any disclosure or witness evidence. Since the claim pre-dates PD51U there was no initial disclosure. Neither party has yet descended into the ring and served any direct witness evidence from the Claimant or Defendants themselves in support or opposition to these applications. There is therefore no additional risk caused by the proposed amendments of any out of sequence work on investigation, disclosure or witness statements that might impact adversely on any trial timetable.

Background

11. In October 2002 the Claimant, the Defendants, who are brothers, and Carolyn Elliot set up a company called Integrated Support Systems Ltd ("ISS"). The Claimant and Defendants each held 30% of the shares and were the directors. Carolyn Elliot held 10% of the shares. ISS developed, sold, and supported computer software used in the care home industry.

12. In late 2009 Advanced Computer Software Group ("ACS") and then Coldharbour Systems Ltd ("Coldharbour") offered to buy ISS. The shareholders rejected these offers.

13. The relationship between the Claimant and, at least, the first Defendant appeared to have soured. In February 2010 the first Defendant emailed the Claimant, the second Defendant and Carolyn Elliot proposing either a sale of ISS or a split such that either the Defendants bought out the other shareholders or the Claimant bought out the other shareholders.

14. On 12 February 2010 a meeting took place to discuss the possible sale of the Claimant's shares in ISS. An agreement in principle was reached that the Claimant would sell his shares in ISS to the other shareholders for £500,000 and would cease to have any further

involvement with ISS. The Claimant pleads that this was only an agreement in principle and no binding contract was entered into in February 2010. The Defendants' unamended defence describes the outcome of the meeting in February 2010 as a firm but non-contractual agreement. The proposed amended Defence seeks to characterise the outcome of the meeting on 12 February 2010 as contractually binding. The Claimant says that if the amendment is allowed it permits the Defendants to withdraw an admission that the 12 February 2010 did not result in a contractually binding agreement. As set out below, the Defendants currently plead a later agreement in June 2010. The Defendants say that in reality whether or not there was a binding contractual agreement on 12 February 2010 is simply a question of legal analysis/construction of what the trial judge determines occurred as a matter of fact on 12 February 2010.

15. The negotiations between the parties continued. The Claimant says that a broad plan about how to achieve the separation and sale was agreed in principle and subject to contract by the third week in February 2010. Negotiations continued. As the first Defendant was not able to borrow the full £500,000 from ISS's bank various alternative options were identified.

16. The Defendants current defences plead that a binding contractual agreement was reached in an exchange of emails concluding on 15 June 2010 by which the Claimant would sell his shareholding for £500,000 but with £100,000 of the sum deferred for 12 months.

17. On 15 June 2010 the Defendants incorporated Caresys Software Ltd (Caresys) into which they transferred their 60% shareholding in ISS. Their intention was to use Caresys to purchase the Claimant's shares.

18. A share sale agreement (**SSA**) drafted by solicitors was eventually finalised and entered into on 7 July 2010. Pursuant to the SSA the Claimant sold his 30 shares to Caresys for £500,000 receiving £100,000 on completion, £300,000 by 31 July 2010 and a final £100,000 within a year. He resigned as a director. The SSA did not contain any overage provisions or similar in relation to any subsequent sale of ISS.

19. As part of the overall separation between the Defendants and the Claimant they still had to resolve the position in relation to their joint pension scheme.

20. Consequently, in September 2010, discussions took place between the Claimant and Defendants about how to untangle their pension scheme to allow them to finalise their separation. Following negotiations, a Deed of Agreement was entered into on 22 September 2010 ("**the Deed of Agreement"**).

21. The Deed of Agreement concerned the sale of the Defendants' interests in the pension scheme. However, the Defendants argue that the scope of the Deed of Agreement is broader and relates to not just the pension scheme but the entirety of the separation between the Claimant and the Defendants. At clause 3.2 it records that in February 2010 the Claimant sought to sell his shares in ISS which share sale was completed in July 2010. It further records that as part of the Claimant's sale of his shareholding in ISS he would buy out the Defendants from the pension scheme. Included at clause 9 is a general release as follows:

> "Each of the Parties hereto acknowledges and agrees…that this deed is in full and final settlement of, and each Party hereby releases and forever

> discharges, all and/or any actions, claims, rights, demands and set offs….whether or not presently known to the parties, that they…ever had, may have or hereafter can, shall or may have against the other Parties arising out of or connected with [ISS] and/or the [the pension scheme] and/or their positions as shareholders and or directors of [ISS] ….and/or any agreement between or act by the Parties..and any other matters arising out of or [in] connection with the relationship between the Parties" ("**the Release**")

22. The Release is clearly very broad and, on its face, incorporates a release of all claims including unknown claims including those arising out of or connected with ISS.

23. The Defendants now seek permission to rely on the Deed of Agreement and the Release in relation to the Claimant's claims. The Claimant opposes that amendment because he says it is withdrawal of an implied admission, but he also opposes it unless he is permitted to amend to plead that the Deed of Agreement was procured by fraudulent misrepresentation and should be rescinded.

24. In the meantime, on 6 July 2010, ACS had made an offer to purchase the share capital of Caresys for £3m plus 1 million share options in ACS which was accepted by the Defendants and Carolyn Elliot. Heads of Agreement were entered into on 9 July 2010. On 30 September 2010 Caresys was sold to ACS.

25. The Claimant alleges that the first Defendant fraudulently misrepresented the position in respect of any sale of ISS to a third party on at least three occasions between February 2010 and July 2010. In particular the Claimant says that he asked the first Defendant in late May or early June whether there were any specific plans to sell ISS and was told there was nothing pending at that time. He says that he raised the issue in June 2010 when considering the offers made by the Defendants to purchase his shares and again says the first Defendant said there was nothing in the offing. Finally, the Claimant says that he asked the first Defendant again about his plans for any sale of ISS in late June/early July 2010. He says that the Defendant changed the subject and gave no indication of an intention to sell. By way of the application to amend the particulars of claim the Claimant seeks to rely on a further misrepresentation about a possible sale of the shares in ISS said to have been made by the first Defendant on 10 September 2010 in advance of the Claimant entering into the Deed of Agreement. This would appear to provide support for an argument that there was some linkage between the SSA and the Deed of Agreement.

26. The first Defendant admits conversations with the Claimant in late May or early June but does not admit the content. He cannot recollect the conversation in mid-June and positively denies the conversation in late June/early July.

27. The Claimant says that the first Defendant deceitfully failed to disclose and/or concealed information about the sale to ACS even though the Claimant was still a director and shareholder at the time. He relies on what the parties describe as the Meta Letter of 28 April 2010. The Claimant says this letter was disclosed to him anonymously after the sale of his shares. The sale to ACS on 30 September 2010 was at a higher price per share than the sale of his shares to the Defendants in July 2010. He therefore claims damages for and/or an account of profits arising from the misrepresentations and/or breaches of fiduciary duty and believes the claim is now worth in excess of £1.5m.

28. The Defendants deny any fiduciary duty was owed to the Claimant and thus any breach. They deny the alleged misrepresentations were made or relied on. The Defendants say that the Claimant had decided in February 2010 that he wished to leave ISS and sell his shares and no longer be involved in its management.

29. The Defendants say that the Meta Letter is not evidence of a possible sale to ACS but of attempts to raise capital in part to pay for the Claimant's shares. The Defendants say that the subsequent discussions with ACS were not disclosed to the Claimant because he had made it clear that he did not want to be involved with ISS any more when the agreement was reached on 12 February 2010.

30. After the Claimant found out about the sale to ACS on 30 September 2010, he and the first Defendant discussed his concerns in late 2010. A further exchange of emails took place in early 2012.

31. On 10 August 2012 the Claimant's then solicitors Miramar Legal sent a letter of claim to the Defendants. On 29 September 2012 Strain Keville responded on behalf of the Defendants. The letter of response refers to and relies on the Deed of Agreement and in particular the Release.

32. It was not until April 2016, 3½ years later and hard up against limitation, that the claim was issued. At that time Miramar Legal continued to represent the Claimant. Despite the letter of response and its reliance on the Deed of Agreement and Release, perhaps surprisingly, neither the claim nor the particulars of claim raised the Deed of Agreement or the Release, any additional claim for fraudulent misrepresentation nor pleaded a claim in rescission. The claim and particulars of claim were served on 29 June 2016.

33. The Defence was served on 16 September 2016. Perhaps even more curiously, despite the letter of response the Defendants also did not plead the Deed of Agreement or the Release. Mr Shaw says that having been given notice of the argument that the Release provided a substantive defence to the entire claim the Claimant could and should have sought rescission of the Deed of Agreement, as he does now by his proposed amendment. However, he provides no explanation for the failure of the Defendants to plead a defence they now say may be a knockout blow.

34. Mr Graham says it was not for the Claimant to plead the Deed of Agreement despite the letter of response because on their analysis of the Release it would not preclude a claim in fraud. He submits that the Defendants were right not to plead the Deed of Agreement or Release given his analysis. This seems to suggest that the Claimant made a choice not to plead the additional fraudulent misrepresentation and rescission at the time he issued.

35. Although there are other amendments in the proposed amended defence the Claimant resists only two. First, the Defendants seek to plead that a contractually binding agreement was entered into with the Claimant on 12 February 2010. Having pleaded at paragraph 6 of the defence that the 12 February 2010 meeting gave rise to "a firm agreement (all be it not contractually binding)" the Defendants now seek permission to plead instead:

> "On that occasion the parties entered into a binding legal agreement for the sale of the Claimant's shares in ISS for the sum of £500,000. The timing of the completion of the purchase was dependent on when the

> purchase monies could be raised. Whilst the completion date was not determined the parties had agreed for a sale at the agreed price…"
>
> "It is averred that what did exist following the meeting on 12 February 2010 was a binding legal agreement (albeit that certain details were to be subsequently determined)." ("**Paragraph 6**")

36. The Claimant argues that this is the withdrawal of an express admission and should not be permitted. The Defendants say that the issue for the trial judge will be the legal construction of what took place at the meeting and it will ultimately be for the trial judge to determine whether a binding agreement was reached.

37. The second amendment the Claimant objects to relates to the Deed of Agreement and Release. The Defendants seek to add in a new section to the Defences at paragraphs 43 to 46 by which they plead that without prejudice to the rest of the Defence, the Deed of Agreement and the Release released all claims between the parties and consequently that the Claimant is contractually precluded or estopped from bringing his claim. As I say a knockout blow if right.

38. The Defendants' evidence supporting the application to amend consists of the proposed amended Defence and a short statement from the solicitor saying that new counsel, Mr Shaw, had advised the Defendants that the defences needed to be amended. However, the proposed amendments were provided in May 2019, 9 years after the events in question and 7 years after they were first raised in the letter of response in 2012. There is no explanation for this.

39. The Claimant says the amendment should not be permitted. He argues that the Release cannot exclude his claim for fraudulent misrepresentation because fraud/unknown claims cannot be excluded without express terms. On that basis it should not be allowed as it has no prospect of success. However, he also argues that the amendment if permitted should only be permitted if he also has permission to amend his claim to plead that the Deed of Agreement should be rescinded on the grounds of fraudulent misrepresentation. It is the Claimant's case that he was further misled when negotiating the terms of the Deed of Agreement about the ACS negotiations and the purpose of the Release. In any event the Claimant argues that the amendment to plead the Deed of Agreement and Release is the withdrawal of an implied admission that the claim is not contractually excluded.

Jurisdiction

40. The Defendants' application is an application to amend for which permission is needed and it therefore governed by CPR17.3. The Claimant's application would be governed by CPR17.4 as limitation issues are said to arise and therefore different considerations apply.

41. The legal principles for an amendment application are fairly well established and can be stated simply. Whether to allow an amendment is ultimately a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Thus, the court must deal with all cases justly and at proportionate costs which includes ensuring that cases are dealt with expeditiously and fairly whilst allotting an appropriate share of the court's resources to any particular case.

42. Applications to amend involve the court striking a balance between any injustice to the applicant if the amendment is refused and injustice to the respondent if it is allowed. The court must therefore have regard to all the circumstances before granting permission.

43. The factors that may be relevant for consideration are case specific and it is not helpful to look at the particular facts or circumstances in other authorities rather than general propositions that arise from those authorities against which specific facts can be considered.

44. The test to be applied on an application to amend is similar to that applied on summary judgment. An amendment should be refused if it is clear that it has no real prospect of success. The applicant must therefore demonstrate that the amendment has a more than merely fanciful prospect of success and carries some degree of conviction. It is therefore necessary to consider whether the Paragraph 6 amendment and Deed of Agreement and Release amendments have a real as opposed to fanciful prospect of succeeding. At the stage of considering the proposed amendments the test imposes a comparatively low burden or bar and the question is whether it is clear that the proposed amendment has no prospect of success.

45. The court should reject an amendment seeking to raise a version of facts that is inherently implausible, self-contradictory, or not supported by contemporaneous documents and the court should reject an amendment if it can say with confidence that the factual basis of the proposed amendments is fanciful and entirely without substance.

46. However, it is no part of my role on this application to engage in a mini-trial or determine contested factual matters. Where any issue turns not on a narrow legal argument or a question of construction but on what will be contested factual evidence or where a factual enquiry is necessary because determination of the issue involves mixed questions of fact and law and it cannot therefore be said with confidence that the proposed amendments are fanciful or without substance it seems to me that the low burden or bar will have been met.

47. In this case there is no direct evidence from any of the parties to the discussions and negotiations which form the background to this claim, much of which it appears may have been oral and occurred 11-years ago. It is always necessary to be cautious not to conduct a mini trial or seek to delve to deeply into the merits of a claim or defence beyond that which is necessary to form a view on the amendments but there is limited scope to do so in this case.

48. The claim has not been progressed with any particular diligence or energy and as I have noted the CCMC is yet to take place and it is procedurally therefore at an early stage.

49. I remind myself that so far as the Paragraph 6 amendment is concerned the facts to which the amendment relates will remain in issue and will need to be determined at trial whether the proposed amendment is allowed or not.

50. So far as the application to amend involves consideration of withdrawal of an admission, whether express or implied, this is governed by CPR 14.

51. CPR PD 14. 1 (5) provides that “the permission of the court is required to amend or withdraw an admission”.

52. CPR PD 14, para 7.2 provides:

> "In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including—
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
>
> (g) the interests of the administration of justice."

53. The question of whether or not and if so on what terms a party should be permitted to withdraw an admission is therefore an exercise of the court's discretion having considered all the circumstances. This includes considering the overriding objective and the need to deal with cases justly and at proportionate costs taking into account the matters identified in CPR 1.1(2) and those identified in CPR14.

54. It is therefore convenient to consider the question of withdrawal of admissions when considering the exercise of discretion more broadly after consideration of whether the proposed amendments have no prospect of success.

The Release:

55. The Claimant's claim raises claims of fraudulent misrepresentation which it is said induced the Claimant into entering into the SSA in July 2010 and separately he alleges breach of fiduciary duty by the Defendants in relation to the possible sale of ISS. Mr Graham seeks to argue that the pleaded breach of fiduciary duty is a fraud claim and so the amendment sought by the Defendants to plead the Deed of Agreement and the Release should be considered in that context. I accept that a claim for dishonest abuse of a fiduciary position can amount to fraud, but it has to be pleaded. Not every breach of fiduciary duty is fraudulent. In this case the structure of the claim is such that the claim of breach of fiduciary duty is pleaded as a separate claim to the claim in fraudulent misrepresentation. It is set out in paragraphs 25 to 28. It sets out the alleged fiduciary

duties including the obligation to give disclosure and the alleged breaches of those duties concluding at paragraph 28:

> "In the premises, the Defendants' failure to disclose the said dealings with ACS to the Claimant, further or alternatively to forward the said correspondence to the Claimant was a breach of such fiduciary duties."

56. Mr Shaw submits that the breach of fiduciary duty claim as advanced in those paragraphs is a free-standing alternative claim to the fraud claim and relies on non-fraudulent breaches of fiduciary duty as set out in paragraph 27. The Claimant alleges that the failure to disclose correspondence and dealings with ACS was a breach of those duties. Mr Graham argues that the Defendants failure to disclose their secret negotiations with ACS involved both deception and dishonesty, the key elements of fraud. This was he says dishonest abuse of a fiduciary position. However, the pleaded allegations do not to my mind go that far.

57. Mr Shaw argues that it is not clear from the Claimant's proposed amendment whether he intends to abandon the allegations of non-fraudulent breach and just rely on fraud. Unless the Claimant positively disavows any non-fraudulent breach Mr Shaw argues that that claim will remain. Thus, he argues that even if Mr Graham were correct on his analysis of the authorities in relation to Releases and the exclusion of fraud, the Release would still be capable of excluding the non-fraudulent claims and should be permitted to at least that extent.

58. To clarify the position Mr Graham seeks to amend the particulars of claim to add in the words "(and, for the avoidance of doubt, dishonest)" to paragraph 28. Mr Shaw is critical of that amendment saying that it lacks particulars but that is for another day.

59. I do not accept the claim for breach of fiduciary duty as currently pleaded in paragraphs 25 to 28 clearly encompasses a fraud claim on its face and/or is and can only be a claim for dishonest breach of fiduciary duty. The allegations are those of non-disclosure which may be part of the building blocks of a claim for dishonest breach of fiduciary duty, but I am not persuaded that paragraphs 25 to 28 as currently framed set out a claim that can only be a claim in fraud. As Mr Shaw submits it appears to be a relatively standard pleading of non-fraudulent breach of fiduciary duty arising from non-disclosures. Indeed, Mr Graham's own proposed amendments make clear that there is at least some doubt, and it is clearly open to Mr Shaw on this application to argue it does not. This application is of course considered in the context of the unamended claim, so the additional words sought on amendment by the Claimant are not present.

60. The bar which the Defendants need to overcome is low. They have to be able to satisfy me that their proposed amendment is more than merely fanciful. Mr Graham on the other hand so far as the Defendants' proposed amendments are concerned has a much higher hurdle to overcome to persuade me that the amendment has no prospect of success.

61. Even if Mr Graham is right about the inability of a party to a release to exclude fraud without the clearest possible words, he does not argue that a release cannot exclude a non-fraudulent breach – instead he seeks to argue that the breach of fiduciary duty as pleaded can be brought within fraud. It seems clear that the claim as currently drafted in respect breach of fiduciary duty enables Mr Shaw to argue that there is a more than a merely fanciful argument that the Release could exclude claims for non-fraudulent

breaches of fiduciary duty and that the breaches of fiduciary duty as currently pleaded are non-fraudulent.

62. The Claimant's position (which assumes that the fiduciary duty claim is also a fraud claim) is that the amendments to plead the Deed of Agreement and the Release have no real prospects of success because as a matter of law the Release could not exclude liability for fraud including fraudulent/dishonest breach of fiduciary duty unless it did so expressly, and it would require the clearest possible language. Mr Graham says that the Release was procured by the same fraud that is relied on in the claim as presently formulated. Again, this appears to suggest some linkage between the SSA and the Deed of Agreement. The Claimant was unaware of the fraud at the time the Deed of Agreement and Release were entered into and consequently the Release cannot exclude that claim.

63. Releases are to be interpreted in the same way as other contractual provisions. The relevant legal principles may be summarised as follows:

64. There are no special rules of construction that govern a release of liability. The ordinary principles of contractual construction apply – *BCCI v Ali*; [2002] 1 AC 251*; MAN Nutzfahrzeuge AG v Freightliner Ltd*; [2005] EWHC 2347 (Comm).

65. Mr Graham argues that the court must have due regard to the purpose of the contract and the circumstances in which it was made relying on *BCCI v Ali* Lord Bingham [10]:

> "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."

66. He submits that the law protects a person who is the victim of "sharp practice" in agreeing a release clause, "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." [*BCCI v Ali* Lord Nicholls [26]].

67. He argues that the Deed of Agreement was not part of or connected with the SSA and had wholly different subject matter. He submits that it was negotiated separately several months later. He relies on the fact that the Release was included in a solicitor-drafted Deed of Agreement to replace a simple document drafted by the Claimant and entered into eight days before the sale to ACS which the Claimant had not been told about. He therefore argues that there was concealment when negotiating the Release which clearly amounted to 'sharp practice' as defined by Lord Nicholls. He therefore argues that the Defendants' Release argument is bound to fail and so permission should not be given to amend the defence.

68. However, Mr Graham also himself seeks to amend to plead a fraudulent misrepresentation in September 2010 in respect of the SSA and the sale of shares to ACS which appears to provide some basis for arguing that both the Claimant and the Defendants saw the negotiations leading to the Deed of Agreement as part of the same overall transaction.

69. Mr Shaw cites Lord Bingham at [8] and [9] saying that it is clear that the release clause in *BCCI v Ali* did not expressly seek to exclude claims that were unknown of at the time of the release.

70. I preferred Mr Shaw's analysis of *BCCI v* Ali. It seems to me that Lord Bingham simply made it clear that one has to objectively ascertain the intentions of the parties and give effect to them even if that includes the release of unknown claims. Such an exercise it seems to me requires a factual enquiry.

71. However, Mr Graham further relies on *MAN*, in which Moore-Bick LJ held *obiter* that a release clause covering "all current, past and future claims" which the Claimant "has or may otherwise have had" against the Defendant was not effective to preclude a claim in fraud. Moore-Bick LJ cited the judgment of Rix LJ in *HIH Casualty & General Insurance v Chase Manhattan Bank* [2001] EWCA Civ 1250 that fraud is "a thing apart" because parties' contract with one another in the expectation of honest dealing. However, importantly Moore-Bick LJ referring to *BCCI v Ali* said that the same approach should be adopted in construing a general release as construing any other kind of contract and no special rules applied. He emphasised the importance of context saying at [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."

72. Mr Shaw therefore argues that applying these principles the language of the Deed of Agreement and the context in which the Release was entered into will determine whether it is effective to preclude subsequent claims based on fraud. He submits that the authorities provide no support for any contention by the Claimant that fraud claims may only be excluded if expressly referred to.

73. In considering the scope of a release (especially if is contended that it applies to claims unknown at the time of the release and/or fraud) special regard is to be had to the factual context of the release and matters known to the parties at the time when construing the meaning to be given to the words used – *BCCI v Ali; Marsden v Barclays Bank* [2016] EWHC 1601 (QB). Here Mr Shaw says it is significant that the circumstances in which the Deed of Agreement and Release were negotiated were part of the separation between the Claimant and the Defendants and the sale of the Claimant's shares.

74. Mr Shaw submitted that where the release is intended to apply to unknown claims, it will need to be expressly stated in order to be effective – *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487.

75. Both counsel relied on *Satyam* in particular Lawrence Collins LJ at [82] to [85]:

> 82…Where the claims in question were based on fraud or involved allegations of dishonesty, very clear and specific language in a settlement agreement was required to settle such claims or exclude their subsequent pursuit, a fortiori if they were unknown at the time that the settlement agreement was entered into. The claims in Texas (whether

> ultimately they proved well-founded or not) involved allegations of fraud and forgery against Satyam. The wording of clauses 2.3 and 2.4 of the Settlement Agreement, even if otherwise capable of applying to claims arising under the Assignment Agreement, was not sufficiently clear or specific to exclude those claims.
>
> 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.

76. Thus, Mr Graham argues that 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, and that the same principle applies to fraud-based claims. He argues that the Release does not expressly or specifically exclude claims based on fraud or allegations of dishonesty, let alone use "the clearest possible specific language" to do so. It would have been possible for it to state in terms that the release included any claims based on fraud or dishonesty, but it did not do so.

77. He submits that nothing short of the use of the word fraud would have been sufficient to exclude fraud in this case. Whilst he accepts that the Deed of Agreement says it relates to the shareholder relationship and the original SSA he argues that this does not go far enough to meet the requirements set out in *Satyam*. He says that since the Deed of Agreement did not mention fraud or the facts giving rise to the alleged fraud it would have to be a special case for the Release to be found to exclude fraud if it did not do so on its terms which it did not. It needed to be clear to the Claimant what was intended. To succeed on this argument the Defendants would have to be able to show that the Claimant knew of and intended to release the fraud claims.

78. Mr Shaw, however, argues that the release in issue in *Satyam* was not a provision that sought to prevent a party from suing for unknown claims. He submits that the ratio from the decision is that whether unknown claims or claims based on fraud are prevented by the release is a matter of construction of the clause. He submits that the proper approach is not to ask two separate questions – (i) does the release apply to unknown claims and (ii) does it apply to fraud claims; but rather look at the clause in its context.

79. Mr Shaw argues that there is no separate special rule concerning claims based on fraud. There is no requirement that any release must expressly state that it precludes claims based on fraud – *Satyam; Marsden;*

80. Although Mr Shaw seeks to rely on *Marsden* in addition on this particular issue, that was a decision in which it was said that the misrepresentations were known about in

advance of the relevant clause being entered into. Other than further general support for the principles derived from the authorities that context is all, I did not derive any additional assistance from this.

81. Mr Shaw argues that the release may be reference to subject matter, as here, by reference to the SSA, rather than a cause of action - *Tchenguiz v Grant Thornton LLP* [2016] EWHC 865 (Comm).

82. Finally, Mr Shaw argues that the court should be slow to reject the ordinary meaning of a contract term merely because of imprudence even ignoring the wisdom of hindsight. He says that the words are clear, the Deed of Agreement covers the SSA, and the parties could have excluded fraud claims.

83. I note that as Lord Neuberger said in *Arnold v Britton* [2015] AC 1619 at [20], the purpose of interpretation is to identify what the parties have agreed and not what the court thinks they should have agreed. It seems to me that when interpreting the Release against that background it is necessary to consider it in context.

84. Mr Graham seeks to persuade me that there is a special, absolute rule that can be discerned from the authorities in claims involving fraud or unknown claims because fraud is "a thing apart", the consequences of which are that where the Defendants knew that the Claimant had a claim and kept it from him when entering into the Release, the Release defence is unarguable and entirely fanciful. That presupposes in Mr Graham's favour that the evidence will be as he says it will be and seemed to me to necessarily be a mixed question of law and fact and one that could not be determined on an application to amend.

85. I prefer Mr Shaw's overall analysis of the authorities. It seems clear to me that authorities to which I have been referred do not exclude the possibility of excluding fraud claims or unknown claims by the Release. Context is all in construing the Release. Further, it seems to me that the breach of fiduciary duty is arguably not a claim in fraud, and it is certainly arguable that a non-fraudulent claim could be excluded by the Release.

86. I should not and indeed cannot, given the absence of any evidence at all from the protagonists, embark on a mini trial. If, as I find, it is, the proposed amended defence relying on the Release is more than merely fanciful prospects of success and needs to be considered in context such that a factual enquiry is necessary Mr Shaw overcomes the low bar necessary to allow the amendment subject to consideration of the exercise of discretion and of course the issue of admissions. Any such factual enquiry would need to be undertaken at trial.

87. Mr Graham is seeking to impermissibly short circuit the need for the trial judge to consider the factual evidence against the legal framework to determine whether in the context of the relationship and arrangements between the Claimant and Defendants, the Release impermissibly excludes claims in fraud/unknown claims. It also seems to me that as set out above on the claim as currently drafted it is certainly arguable that the claim for breach of fiduciary duty is not a claim that could not be excluded by the Release in any event.

88. I am therefore satisfied subject to consideration of the exercise of discretion that the amendment to plead the Release in respect of both the fiduciary duty claim and the fraud claims overcomes the low bar required on an application to amend.

Admissions:

89. Two different admissions are alleged by the Claimant, an express admission in relation to the Paragraph 6 amendment and an implied admission in relation to the Deed of Agreement and Release amendment.

Paragraph 6

90. In relation to Paragraph 6 Mr Graham argues that the Defendants seek to make amendments to change the nature of the contract on which they rely from a written one to an oral one and further seek to change the date of the contract from June 2010 to 12 February 2010. This he argues is a clear withdrawal of an express admission as to the date and nature of the contract and should be refused.

91. He submits that it is not good enough for the Defendants to say that Mr Shaw's view of what occurred 11 years ago is different to previous counsel in the absence of any evidence from the Defendants explaining what they say happened in February 2010.

92. Mr Graham submits that the withdrawal of an express and totally unambiguous admission concerning the meeting on 12 February would mean that the Claimant would have to address, factually and legally, an entirely new allegation, involving an oral contract in February 2010. This is over 3 months earlier than the 15 June 2010 written contract which Defendants rely on in their 2016 Defences. He argues that the entire case has proceeded on the basis of the 15 June 2010 allegation and that there is irremediable prejudice to the Claimant as memories will have deteriorated.

93. No reason or justification for the change has been provided, other than the change of counsel. There has been no relevant material change of underlying circumstances, such as new evidence which was not previously available. He concludes that it is just a tactical legal move.

94. He points in addition to the failure to amend paragraph 29 which is therefore no longer consistent with the proposed amendment of Paragraph 6. This he says highlights the problem with the withdrawal of the Paragraph 6 admission.

Release Admission

95. In relation to the Release Mr Graham argues that the amendment to plead the Deed of Agreement and Release would involve withdrawal of an implied admission in the 2016 Defences that the claims in the Particulars of Claim were not contractually prohibited.

96. He argues that the Defendants should be bound by the current defences. He points to the fact that the current defences were pleaded in September 2016.

97. The only reason given is new counsel having considered the defences afresh now wants to run an argument which the Defendants raised in pre-action correspondence but did not choose to plead in their Defences five years ago.

98. He submits that had the Defendants set out their defences based on the Release and the Deed of Agreement there would have been time for the Claimant to plead the misrepresentation without having to now seek to amend in the face of an argument about limitation. I note that the original defences were served on 16 September 2016 and that limitation would have expired on 22 September 2016 so in theory there was just under a week before limitation expired. However, I also note that the Claimant did not choose to plead rescission of the Deed of Agreement in its claim at the outset when the Release had been put squarely in issue in the letter of response in 2012. Further, speed has not been a feature of the Claimant's approach to date.

99. Mr Shaw accepts that there is no explanation other than change of counsel. However, in relation to the Paragraph 6 amendment he argues that the change is one of the legal characterisation of the events that took place in February 2010 only. Ultimately, he says it is a matter for the trial judge to determine the legal characterisation of what happened in February 2010.

100. So far as the Release is concerned, he says it was a point that the Claimant was on notice of before he issued his claim. He chose to issue and serve at the end of limitation and to not plead the rescission claim that he now wants to advance. That is of course a matter for the Claimant's application, but Mr Shaw raises it as part of the circumstances to be considered in relation to the question of the withdrawal of the admission.

101. Mr Graham argues that if there is any explanation other than a change of counsel, it has not been advanced, relying on *Bayerische Landesbank v Constantin Medien AG* [2017] EWHC 131 (Comm), Popplewell J [63]

> "if a party seeks to withdraw an admission it is incumbent on that party to explain why he no longer contends that that which has been admitted is true".

and Popplewell J's citation at [52] from David Steel J in *American Reliable Insurance v CNA Insurance Company Ltd* [2008] EWHC 2677 (Comm) he concludes that there can be no basis for permitting the Defendants to resile from the admissions.

102. However, it seems to me that the key passage in the *Bayerische* was the passage at [54]. Having cited a passage from the decision of Ward LJ in the Court of Appeal in *Woodland v Stopford and ors* [2011] EWCA civ 266 [26], at [53] on which Mr Shaw relies, Popplewell J continued at [54]

> "It is apparent from that passage that each case turns on its own facts; all the circumstances of the case must be taken into account; Rule 14.1(5) confers a wide discretion; and that the fullness or adequacy of an explanation for the withdrawal of an admission is not a threshold condition, but one which may have greater or lesser importance depending on all the other circumstances of the case."

103. Thus, it seems to me, as it did to Popplewell J, in *Bayerische* that ultimately the question of whether a party should be permitted to withdraw an admission should be seen against the background of all the circumstances of the case and a balancing of the discretionary factors in CPR 14.

104. Turning therefore to the balance of the discretionary factors in CPR 14 and the questions of overall discretion, Mr Graham argues they weigh heavily in favour of refusing to allow the withdrawal of both admissions. In addition to the points made more generally in relation to the merits of withdrawing the admissions as set out above and the absence of any explanation or evidence he made the following additional points:

105. Contrary to the overriding objective, the proposed amendments would be disproportionate, because they would significantly increase legal and procedural complexity, evidence, and costs. A whole new arena of dispute would be opened up in relation to the Release argument.

106. However, in relation to the Paragraph 6 amendment this did not seem to me to be a strong factor in his favour. The proceedings are at an early stage albeit now 11 years after the events that occurred. No CCMC has taken place and neither party has undertaken disclosure or prepared their witness evidence. The events of February 2010 are the events of February 2010 and in so far as both the Claimant and the Defendants are seeking to recall what occurred at that time they were always going to have to do so. There is no new arena of dispute in relation to the factual position – the witnesses can only give the evidence they can give about what they say happened in February 2010. Both parties have to date simply pleaded a particular legal characterisation of those events.

107. I agree with Mr Shaw in the sense that those facts will be whatever they turn out to be and ultimately the legal characterisation of what occurred in February 2010 is a matter for the trial judge having heard the evidence tested at trial and considered the legal arguments advanced as to the appropriate legal characterisation of those events.

108. I am not persuaded that the Paragraph 6 amendment of the withdrawal of the admission is permitted is going to increase complexity, legal costs or the amount of evidence that is necessary.

109. So far as the Release is concerned the Claimant's argument for not permitting the Defendant to resile from what he argues is an implied admission is again hampered by the fact that despite the claim relating to matters that occurred in 2010 and the claim having been issued in 2016 no progress has been made procedurally.

110. There would be no out of sequence disclosure or witness evidence. As such it seems to me that whilst the Release amendment would add some additional evidence about the circumstances in which the Release and Deed of Agreement came to be entered into, which may have some effect on the overall costs and on the complexity of the issues for the court to consider, that is simply a factor in the overall balancing exercise.

111. Against that factor I weigh in the balance that it was a known defence at the time the claim was issued. The Claimant made a decision not to plead the claim in rescission and the additional fraudulent misrepresentation at a time when they could not have known in advance that the Defendants would not rely on the Release. The Claimant chose to issue close to limitation. He should therefore have considered carefully and ensured that he raised any claims he might have. The converse is, as Mr Graham says, that the Defendants should also have pleaded the Release in their defence at the time.

112. Mr Graham argues that no new evidence has come to light. However, that is just one of a number of factors to consider and that is also two edged so far as Mr Graham is concerned since the Claimant was on notice of the possible defence from 2012.

113. He argues that the prejudice to the Claimant is patent as unless the Claimant is also allowed to amend the Claimant would be deprived of a defence to the Release claim which he would have been able to deploy without any limitation argument had the Defendants pleaded out the Release and Deed of Agreement amendment earlier.

114. He argues that the prejudice to the Defendants is by contrast is only that they would be required to continue with the Defences they put forward in 2016 in circumstances where they must (and in his view correctly so), have chosen not to plead out the Release and Deed of Release. The Defendants are therefore the authors of any prejudice they might suffer.

115. Finally, he argues that the withdrawal of the admissions and permission to amend would involve a disproportionate use of the courts resources and since he argues there are no real prospects of success for the amendments and so as a matter of discretion the court should refuse permission. On this issue I have of course already determined that subject to the question of discretion and withdrawal of the admissions the amendments have a more than merely fanciful prospect of success.

116. However, it seems to me that Mr Graham protests too much. Whilst these proposed amendments are late if measured against the timing of the events that they relate to, they are not late in the context of these proceedings.

117. As I have identified, despite the proceedings being on foot for 5 years there has not yet been a CCMC and consequently there is no risk of out of sequence working in relation to disclosure or witness evidence. There is no trial date. The CCMC was last adjourned due to the late issue of the Claimant's application to amend.

118. It seems tolerably clear from the Claimant's evidence that the additional burden of disclosure and witness evidence is not going to be heavy if the amendment in relation to the Release is permitted. The evidence provided in opposition to the Defendants' application sets out the detail of allegations of additional misrepresentations including dates without apparent difficulty.

119. So far as Paragraph 6 is concerned that appears to me to add nothing in terms of disclosure and witness evidence since the same matters will still have to be canvassed on either version of the Defences.

120. I note Mr Graham's suggestion that there will be irremediable prejudice to the Claimant as memories deteriorate. That of course will be a problem for all parties in this case whether the amendments are permitted or not. Even when the proceedings were issued the witnesses were looking to recall events that had by then taken place 6-years previously. By the time this case goes to trial it will now be 12 years after the events in question. It does not appear to me that the application to amend adds any additional difficulty for either the Claimant or the Defendants given the stage of the proceedings. Against the history of the progress of this claim it does not seem to me to be a significant factor in his favour in all the circumstances.

121. I accept that in allowing the Defendants to resile from the implied admission in relation to the Release, the Defendants may have a complete defence to the claim if Mr Shaw is able to successfully argue the Release excludes the Claimant's claim. However, if that is the correct legal analysis on the facts then that is the answer. If Mr Graham is right, then the Release will not exclude a claim for fraud or for unknown claims.

122. Although the Release and Deed of Agreement post-date the events of July 2010 it is clear to me that they are part of a continuum after July 2010 that form part of the background to the relationship between the parties and the overall arrangements to separate their affairs for the reasons set out above. This does not appear to me to be a series of isolated events as seems clear from the Claimant's own evidence in opposition and in support of his own application.

123. When I therefore consider the factors in CPR 14, I take into account the matters raised by the Claimant, but it seems to me that in this case the balance weighs in favour of giving permission to the Defendants to withdraw the admissions.

124. As Popplewell J identified this is ultimately a question of discretion taking into account all the circumstances. Here I have already concluded that Mr Shaw has overcome the low bar necessary to persuade me that the proposed amendments have a more than merely fanciful prospect of success.

125. Mr Shaw candidly accepts that the only reason put forward for wanting to withdraw the admissions is change of counsel but that is not ultimately conclusive, it is for the court to take a view in the round having weighed up all the factors.

126. As I have set out this claim has not been progressed with any sense of urgency by the Claimant. It is now 5 years since it was issued and no CCMC has taken place. Indeed, this entire amendment process has taken over two years and was derailed further by the Claimant's very late issue of its application to amend in October 2020.

127. Submissions about the lateness of the amendment should be considered in that light and particularly in circumstances where the Claimant knew of the Release and Deed of Amendment defence before he issued. He has had the draft of these amendments, both the Paragraph 6 amendment and the Release amendment since May 2019 nearly 2 years ago. Those matters weigh against the Claimant in this case.

128. The prejudice to the Claimant in relation to the Paragraph 6 amendment does not seem to me to be significant. Even without the amendment ultimately the legal analysis of the facts could result in a conclusion that there was a contractual arrangement in February 2010. Allowing that alternative to be pleaded does not change the factual evidence or disclosure that either party will give on that issue. The legal analysis of what each party understood in February 2010 or indeed June 2010 will be ultimately a matter for the trial judge. The trial judge will also have to assess the evidence in relation to the context in which the Deed of Agreement and Release were entered into.

129. Judges are familiar with the difficulties of assessing evidence that relates to matters that occurred many years ago which as I say was always going to be an issue in this case. Nothing in the evidence in opposition supports any suggestion of additional prejudice to the Claimant by the delay in the amendment which as I note has been pending now for

over 2 years and in relation to the Release was in any event something the Claimant was aware of in 2012.

130. The prejudice to the Claimant on the Release amendment has to be weighed against the prejudice to the Defendants. I do not accept that the only prejudice to the Defendants is that they would have to rely on the defences they served in 2016. If they have a complete defence to the claim as a result of the Release which I have concluded is not fanciful, they should not be precluded from pursuing it if it is arguable in the circumstances of this case.

131. It seems to me that the Claimant is to some extent the author of his own difficulties, if any, having issued at the end of limitation and not having pleaded a known claim to rescind. Of course, it would have been better if the Defendants had pleaded this defence in September 2016 but that does not mean they should be precluded from doing so now.

132. In considering all these matters I also consider the overriding objective and the need to deal with cases justly efficiently and proportionately. Mr Graham seeks to suggest that this risks being satellite litigation and a disproportionate use of the court's resources. In that regard I note that Claimant's position was, for some time, that they would agree the Defendants' amendments if the Defendants would agree the Claimant's amendments. That does not seem to me to be a principled approach that justifies two days of court time these applications will have taken by the time they are concluded. Mr Graham argues it is the Defendants' strategic manoeuvring, but it seems to me that it is both parties who are looking to obtain a strategic advantage from the other and this is a neutral factor as between them.

133. Amendments pursuant to CPR 17.3 will usually be permitted at an early stage of a claim (and this is an early amendment in that sense) if they meet the threshold of prospects of success because they are more than merely fanciful, and the court concludes as an exercise of its discretion to permit the amendment. Here there is a double exercise of discretion having regard to CPR 14 as well as the court's broad discretion in relation to amendments pursuant CPR17.3.

134. Taking all those matters into account and for all the reasons set out in this judgment I am satisfied that the contested amendments satisfy the threshold test and cannot be said to be unarguable or entirely fanciful and that the court should exercise its discretion having regard to the factors set out in CPR 14 to permit the Defendants to resile from the express admission in Paragraph 6 and the implied admission in respect of the Release. Further in exercising my discretion and my case management powers, taking into account what each party says is the injustice and prejudice to the Defendants if the amendments are not permitted and the injustice and prejudice to the Claimant if the amendments are permitted, and stepping back and considering those matters in the round, including consideration of the overriding objective and the need manage cases efficiently, justly and proportionately, for the reasons I have set out in this judgment, the balance weighs in favour of allowing the amendments as a matter of discretion.

135. However, the Defendants permission to amend in the form proposed seems to me to need to be subject to a further amendment to paragraph 29 to make it consistent what is now pleaded in Paragraph 6. I would invite them to propose a suitable amendment and seek to agree it with the Claimant before I come to deal with the order and any consequential matters.

136. I will address any order and consequential issues after I have determined the Claimant's application to amend.