Neutral Citation Number: [2021] EWHC 3447 (Ch)

Case No: BL-2021-000352

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 22/12/2021

Before :

DEPUTY MASTER BOWLES

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Between :

(1) Abner Solland **(2) Grazyna Solland**	**Claimants**
- and -	
(1) Michael Watkins **(2) The Estate of Michael Vivian Shine**	**Defendants**

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Romie Tager QC (instructed by **Ince Gordon Dadds LLP**) for the **Claimants**
Jonathan Cohen QC (instructed by **PCB Byrne LLP**) for the **Second Defendant**
The First Defendant did not attend and was not represented

Hearing date: 24 August 2021

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Approved Judgment

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

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DEPUTY MASTER BOWLES

Deputy Master Bowles:

1. By a Claim Form, issued on 26th February 2021, with Particulars of Claim attached, the Claimants, Abner and Grazyna Solland (Mr and Mrs Solland), brought these proceedings against the First Defendant, Michael Watkins (Mr Watkins), and the Second Defendant, the Estate of Michael Vivian Shine (the Estate). The proceedings sought, as against Mr Watkins, an account of profits, to include an alleged bribe of £450,000 and an arrangement fee of £112,000, and, as against both Mr Watkins and the Estate, damages for fraud and conspiracy and equitable compensation for the Defendants' alleged breach of fiduciary duty and dishonest assistance. The Claimants assert that their overall losses, arising from the Defendants' alleged misconduct, are in the order of some £6M.

2. The claims brought against Mr Watkins and the Estate arise out of a joint venture agreement entered into between the Claimants (described in the Particulars of Claim as experienced property developers at the high end of the market) and Michael Vivian Shine (Mr Shine), in respect of the purchase, development, fitting out and sale of a property at 22 Upper Grosvenor Street (compendiously referred to in the Particulars of Claim as 'the Project'). The relevant details of those claims are set out later in this judgment, at paragraphs 14 to 33.

3. Mr Shine died in April 2020, domiciled in Israel. He had been, prior to his death, one of the principals in Michael Shine & Partners, a law firm with offices in Israel, Zurich and London and which he had founded in 1977.

4. At the date of the issue of these proceedings, no application had been made for probate in respect of Mr Shine's estate and, in consequence, by application dated 17th March 2021 a direction was sought that Mr Shine's son, Alon Shine (Alon), be appointed to represent the Estate in these proceedings. Because Alon is resident in Israel, at 11 Hasadnaot Street, Herzliya, Pituach, permission was, also sought, in that application, to serve these proceedings upon him, out of the jurisdiction, at that address. By his order, dated 22nd March 2021, Deputy Master Nurse made the appointment sought and, correspondingly, gave permission for service out.

5. It is that latter decision which, by application notice, dated 5th May 2021, has been questioned before me and it is to that latter decision that this judgment relates.

6. By that application, the Estate sought orders, pursuant to CPR11, that the court had no jurisdiction in respect of the Estate, that the permission granted by Deputy Master Nurse, dated 22nd March 2021, to serve proceedings on the Estate, out of the jurisdiction, be set aside, that the Claim Form and the service of the Claim Form and Particulars of the Claim on the Estate be set aside and that the Claimants pay the estate's costs of the Claim and of the application notice.

7. The witness statement of Mr Trevor Mascarenhas (Mr Mascarenhas), in support of the application, dated 5th May 2021, identified three issues which, it was said, entitled the Estate to the orders sought.

8. Firstly, it asserted that, in obtaining permission to serve out of the jurisdiction (granted on a without notice application, in the usual way), Mr and Mrs Solland, had acted in serious and deliberate breach of their duty of full and frank disclosure, in failing to draw

the attention of the Deputy Master to (at least) the fact that they had entered into a written agreement with Mr Shine (the Indemnity Agreement), pursuant to which they indemnified and waived any claims they might have against him.

9. Secondly, it asserted that the Indemnity Agreement was a complete answer and presented an absolute bar to the claims brought in these proceedings.

10. Thirdly, it asserted that, even if the Indemnity Agreement was not a complete answer to the current claims, there was, nonetheless, no serious issue to be tried, on the basis of the existing Particulars of Claim, which Particulars were substantially defective.

11. In the event, as the application was pursued, it became clear that, although criticisms were made of the Particulars of Claim, in Mr Mascarenhas' evidence, those criticisms were not pursued as a separate ground for setting aside the service of the Claim Form and Particulars of Claim, or for the court declining jurisdiction.

12. In regard to the first issue, in addition to exhibiting the documents to which, in his contention the court's attention should have been drawn (namely the documents identified and discussed at paragraphs 22 to 27 of this judgment) Mr Mascarenhas, also, exhibited a run of correspondence with the Claimants' solicitors, commencing on 31st March 2021, to which there had been no substantive response, in which the Second Defendant's solicitors had drawn attention both to the waiver said to arise from those documents and to the Claimants' obligation, even after an order for service out had been obtained, to revert to the court in respect of material bearing upon the grant of the order for service out.

13. Importantly, in respect of the allegation of the Claimants' breach of their duty of full and frank disclosure, Mr Jonathan Cohen QC, for the Estate, made clear, both in his skeleton argument and in the course of his oral submissions, that, it was not his contention, or submission, that the decision not to draw attention to the Indemnity Agreement, although, as it appears from the evidence, deliberate, was made with any conscious intention to mislead the court. I see no reason whatsoever to take any other, or different, view and, accordingly, I approach this application on the clear footing that the Claimants and their advisers did not, when applying to serve out of the jurisdiction, in any way intend to mislead the Deputy Master.

14. The Claimants' pleaded case is that, in 2014, Mr Watkins was retained to procure mortgage finance and an equity partner in respect of the Project and that, in that capacity, he owed them fiduciary duties. Mr Watkins introduced Mr Shine, who was already well known to the Claimants, as a potential equity partner, and, in due course, on 5th March 2015, the Claimants and Mr Shine, by their respective corporate entities, entered into a joint venture agreement, in respect of the Project.

15. Under the terms of the joint venture agreement, 22 Upper Grosvenor Street (the Property) was to be (and was) purchased by a company, Solland Mayfair Ltd (subsequently re-named Solland 3M Mayfair Ltd), which would, then, implement the Project. The issued share capital was to be (and was) divided equally between the Claimants' corporate vehicle, Solland UGS Ltd, and Mr Shine's corporate vehicle, 22 Upper Grosvenor Street Ltd (22UGS).

16. The underlying basis of the transaction was that Mr Shine would, via 22UGS, invest £3.8M in the Project, that those monies would bear interest at 25% per annum, during the pendency of the Project, and that, on completion of the Project and following repayment of all loans, interest and expenses (including the £3.8M and accrued interest due to Mr Shine, via 22UGS), the net profits of the Project would be divided equally between the Claimants and Mr Shine, by their respective entities.

17. The Claimants plead that, in the course of the negotiations leading, ultimately, to the joint venture agreement, Mr Watkins sought to introduce himself as an investor in the Project to the extent of the £100,000 introduction fee, to which he was entitled in respect of his introduction of Mr Shine, but that Mr Solland refused to agree to his participation in that manner. They further assert and plead that, at the time when the joint venture agreement was under negotiation, Mr Shine, or his legal practice, Michael Shine & Partners, was holding a sum of £150,000 on behalf of Mr Watkins and that, without the permission of Mr and Mrs Solland and in despite of their knowledge that Mr Solland had refused to entertain Mr Watkins as an equity investor, Mr Shine and Mr Watkins, nonetheless, agreed that Mr Watkins could participate as an investor by applying his £150,000 and, perhaps, his £100,000 introduction fee towards the sum of £3.8M that Mr Shine, by 22UGS, was investing in the Project.

18. In regard, specifically, to the £150,000, the Claimants plead that it afforded Mr Watkins the opportunity to secure the benefits of an investment of that sum in the Project, by way of interest and profits and 'represented a bribe or the equivalent of a bribe' offered by Mr Shine to Mr Watkins in order to influence the advice given by Mr Watkins to Mr and Mrs Solland in respect of their choice of Mr Shine as a suitable joint equity partner, and/or in respect of the terms of Mr Shine's participation in the Project.

19. In regard to Mr Watkins' £100,000 introduction fee, the Claimants plead that if, as has been alleged by solicitors acting for Mr Watkins, Mr Shine had agreed that that fee be treated as an investment in the project then that would have constituted a further secret investment and a breach of Mr Watkins' fiduciary duties with the dishonest assistance of Mr Shine.

20. In respect of both of the foregoing matters, the Claimants further plead that had they been aware of these secret investments then they would not have entered into the joint venture agreement but would have negotiated a more advantageous agreement with an alternative investor; the Topland Group, which had also been introduced to the Claimants by Mr Watkins.

21. In the event, however, the Claimants, as they plead, had to 'carry through the Project', which, then, fell into difficulties, resulting, it is said, in their having to secure additional funding and to 'buy out' Mr Shine's interest in the Project.

22. That 'buy out' was effected by an agreement dated 2nd August 2017 (the August Agreement), subsequently novated and amended by a deed dated 20th October 2017 (the Deed), whereby Mr and Mrs Solland, by Solland UGS Ltd, purchased Mr Shine's shares in 22UGS and whereby the monies which had been advanced by Mr Shine, through 22UGS, including interest and, as pleaded by the Claimants, including, specifically, Mr Watkins £150,000 investment, were repaid to Mr Shine.

23. By clause 9.3 (c) of the August Agreement, Mr and Mrs Solland contracted that, on completion, they would deliver a duly executed Mutual Indemnity in the form annexed at schedule 1 to that agreement. Clause 2.2 of the Mutual Indemnity, as set out in schedule 1 of the August Agreement, provided as follows:

> 'Abner Solland and Grazyna Solland hereby covenant with Michael Vivian Shone that they shall at all times hold harmless and keep fully indemnified the Shine Indemnified Persons in respect of all liabilities, actions, proceedings, claims, demands, taxes and duties and all associated interests, penalties and costs and all other costs and expenses whatsoever for or in respect of which the Shine Indemnified Persons may be (or may be alleged to be) or become liable in respect of the Company and/or the Sale Shares and/or the Property (as defined in the SPA) arising following the Completion Date (as defined in the SPA) in respect of the period after the Completion Date.'

24. The Shine Indemnified Persons were defined, in the Mutual Indemnity, as Mr Shine and a Mr Mor Assayag, together with their respective heirs, assigns, personal representatives and estates. The Company was defined in the Mutual Indemnity as 22UGS. The Sale shares were defined in the August Agreement as the ONE HUNDRED ordinary shares in 22UGS, constituting the entire allotted and issued share capital of that company. The Property was defined, in the August Agreement, as the leasehold interest held by Solland 3M Mayfair Ltd in 22 Upper Grosvenor Street.

25. Clause 3.13 of the Deed amended the Mutual Indemnity. Clause 2.2 of the amended Mutual Indemnity substantially replicated clause 2.2 of the August Agreement. However, a new clause 2.3 was added, which provided:

> 'Each party (inclusive of any companies owned or controlled by them) hereby agrees that subject to Completion and the provisions set out in the SPA, they waive all claims whatsoever against the other Parties and the Shine Indemnified Persons and the Solland Indemnified Persons in respect of the property situated at 22 Upper Grosvenor Street …and anything whatsoever related directly or indirectly to the redevelopment of the said property and its fixtures fittings and contents'.

26. The Solland Indemnified Persons were defined in the amended Mutual Indemnity as Mr and Mrs Solland and their respective heirs, assigns, personal representatives and estates. The SPA was defined, or identified, as the August Agreement. The date for Completion of the August Agreement, as amended and novated, was 20th October 2017. Completion took place on that day. The Mutual Indemnity was also executed on 20th October 2017.

27. The Mutual Indemnity, as amended by the Deed and as executed by Mr and Mrs Solland and Mr Shine on 20th October 2017 is referred to in the Estate's 5th May application as the Indemnity Agreement and is central (in particular the new clause 2.3) to the resolution of the application.

28. Reverting to the Claimants' pleaded case, Mr and Mrs Solland's contention is that following completion of the August Agreement, as novated and amended by the Deed, and following the purchase by Solland UGS Ltd of the 22UGS shares and the repayment, with the agreed interest of the monies advanced by Mr Shine, through 22UGS, a sum of £450,000 was paid by Mr Shine to Mr Watkins.

29. The Claimants plead that that payment represented, or included, Mr Watkins return on his secret investments in the Project, whether that investment was £150,000, or, also, included, his £100,000 introduction fee.

30. They plead, further, that the sum of £450,000 paid to Mr Watkins represented the value of the bribe that Mr Shine had given to Mr Watkins, that Mr Watkins was in breach of fiduciary duty in accepting that bribe, that Mr Shine dishonestly assisted in that breach, that their conduct amounted to, or constituted, fraud at common law and that they, or, in Mr Shine's case, his estate, are liable to pay £450,000, the value of the bribe, to the Claimants and are further liable in damages to the Claimants for that fraud.

31. In the alternative, they plead that Mr Watkins was in breach of fiduciary duty and dishonest in making the secret investments, whether of £150,000, or to include the £100,000 introduction fee, that Mr Shine dishonestly assisted in the secret investments, that Mr Watkins is liable to pay equitable compensation to the Claimants in respect of his breach and that the Estate is liable to pay equitable compensation in respect of Mr Shine's dishonest assistance in the breach.

32. By way of further alternative, the Claimants plead that the agreements entered into between Mr Watkins and Mr Shine in respect of the £150,000 investment and, if it be the case, the £100,000 introduction fee and the implementation of those agreements constituted, or amounted to the implementation of an unlawful means conspiracy designed to damage the Claimants' commercial interests, among other things, by depriving them of the loyal and disinterested advice of Mr Watkins, in respect of the Project.

33. As to damages/equitable compensation, the Claimants assert that but for the misconduct of Mr Shine and Mr Watkins, as pleaded in the Particulars of Claim, they would not have entered into the 5th March 2015 transactions and would not, therefore, have made a loss on those transactions of some £1.5M. Instead they would have entered into a joint venture agreement with the Topland Group, which, they assert, would have given rise to a profit from the venture of at least £2.6M. Additionally, the Claimants assert further indirect losses arising from the fact that the difficulties with the Project had left them without the funds to complete another project at 98 Park Lane which, otherwise, would have been brought to the market in January 2018 and would, thereafter, have reaped a net annual income of circa £550,000. That annual loss is said to be continuing.

34. The Claimants' application to serve out and for the appointment of Alon to represent the Estate was supported by a first witness statement of Mr Philip Graham Cohen (Mr Cohen), a partner in the Claimants' solicitors, dated 17th March 2021. That witness statement sought to outline the Claimants' claims. Although it referred to the 'buy out', it did not refer, in terms, to the August Agreement or the Deed; more specifically it made no mention at all of the Mutual Indemnity, whether in its original, or its amended form.

35. Materially to the current application, the witness statement explained that the Claimants' knowledge that Mr Watkins had invested £150,000 in the Project, via Mr Shine, derived from an admission made by Mr Watkins to Mrs Solland, at a meeting on 30th September 2016, which had, in its turn, been put to Mr Shine at a meeting at the Langham Hotel on 23rd January 2017.

36. In response to Mr Mascarenhas witness statement, dated 5th May 2021, in support of the current application and, in particular, in response to the points identified by Mr Mascarenhas, as set out in paragraphs 8 and 9 of this judgment, Mr Cohen filed a further witness statement, dated 7th July 2021.

37. In that witness statement Mr Cohen drew attention to the fact, already set out, that what he termed Mr Watkins' illicit investment had been known to the Claimants since 2017 and asserted that it had not occurred to the Claimants that the Mutual Indemnity had any bearing upon the claims sought now to be brought against Mr Watkins and the Estate.

38. He explained that the Mutual Indemnity had been considered both by himself and by leading counsel at the time when the Particulars of Claim were being drafted and that neither he nor leading counsel had considered either clause 2.2 or 2.3 of the Mutual Indemnity as being relevant to the claims pleaded in the Particulars of Claim, or as capable, as contended by Mr Mascarenhas, of barring those claims. In his eyes, the clauses in question were, as he termed it, standard 'boiler plate' provisions of the type ordinarily to be found in a share sale agreement.

39. Mr Cohen pointed out, also, that it was, in his view, significant that the Shine Indemnified Persons had not included Mr Watkins, as might have been expected, he said, to be the case if the intention had been to exclude claims arising out of the arrangements or dealings between Mr Shine and Mr Watkins in respect of Mr Watkins investment in the Project, and, further, that, if such claims had been intended to be excluded, the waiver in clause 2.3 of the Mutual Indemnity would have expressly included claims in fraud or breach of fiduciary duty.

40. In determining this application, it seems to me that the correct approach is first to determine whether, as contended on behalf of the Estate, the Mutual Indemnity is, or provides, a complete bar to Mr and Mrs Solland's claims. If that is the case, then Mr and Mrs Solland will have failed to establish an essential requisite of any successful application for service out and, correspondingly, to satisfy the requirements which must be met before the English court takes, or accepts, jurisdiction over a defendant resident outside the jurisdiction. The court would not have jurisdiction in respect of their claims, the permission to serve out and the Claim Form, itself, would fall to be set aside and the question as to whether the Claimants, or their advisers, had been in breach of their duty of full and frank disclosure, such as to warrant the setting aside of service out on that ground, would become redundant, or otiose.

41. The so-called merits test, in respect of jurisdiction, requires that in relation to the foreign defendant there is a serious issue to be tried; that is to say a substantial question of fact, law, or both. The test is the same test as for summary judgment, namely whether the claim in question has a realistic prospect of success.

42. In an appropriate case, as explained, in the context of Part 24, by Lewison J, as he then was, in **Easy Air Limited v Opal Telecom Limited [2009] EWHC 339 (Ch)** at paragraph 26 (vii), where a short point of law or construction arises and where that point is determinative of the claim, the court should, as Lewison J put it, grasp the nettle and decide the point. If a party's claim is bad in law, he, or she, will have no realistic prospect of succeeding on that claim, or, in a case such as this, of establishing a serious issue to be tried, and the sooner that is determined the better.

43. Whether a case is appropriate for such a determination will, as further explained in **Easy Air**, in the same paragraph, depend upon whether there is evidence before the court such as to show that material is likely to exist and be available at trial which might cast a different light on the matter to be determined. If there is such evidence, then it cannot be said that the claim, or defence, has no realistic prospect of success, or that there is, or is not, a serious issue to be tried and the matter in question would, in that context, not be susceptible of summary determination and would not, therefore, afford a bar to a successful application to serve out.

44. That said and as, again, made clear in **Easy Air**, citing **ICI Chemicals & Polymers Limited v TTE Training Limited [2007] EWCA Civ. 725** at paragraph 14, it is not good enough, in respect of an issue of construction, to simply argue that the case should be allowed to go to trial, or, correspondingly, that permission should properly be granted to serve out, 'because something may turn up which would have a bearing' on that question. The burden, as explained by Moore-Bick LJ, in **ICI Chemicals**, lies with the party, contending that the circumstances in which the document came to be written are relevant to its construction and, in particular to point to a construction that the document would not naturally bear, to provide such sufficient evidence of those circumstances as to enable the court to see that, if those circumstances are established, they might reasonably bear upon the outcome.

45. The same point was reiterated, by Jacob LJ, in **Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] EWCA Civ. 397**. It is only where there are reasonable grounds for supposing that a fuller investigation of the facts as to the background might make a difference to construction that the court should decline to construe a contract on a summary judgment application, or, as here, upon an application to serve out.

46. In this case, although Mr Tager QC, for Mr and Mrs Solland, submitted, at some length, that this was not an appropriate case for the court to make a final determination in respect of the construction of the Mutual Indemnity, on the footing that evidence might be available at a trial which might make cast a different light upon what might otherwise be its proper construction, he was not able to point to any evidence such as to afford reasonable grounds that that might be the case.

47. Mr Tager QC suggested that evidence of the circumstances, or negotiations, or discussions which led up to, or given rise to, the August Agreement, the Deed and the Mutual Indemnity might cast light upon the construction of the Mutual Indemnity. He could not, however, identify any such evidence. Nor, in any event, would evidence of the discussions, or negotiations, leading to the August Agreement, the Deed and the Mutual Indemnity be admissible as an aid to construction. In the end, his submission amounted to little more than that something might turn up.

48. In the event, therefore, I am satisfied that the court can and should engage in the determination of the proper construction of the Mutual Indemnity and should not accept Mr Tager's invitation to decline that task.

49. The principles applicable to the construction of the terms of a written contract, or instrument, have been the subject of considerable discussion and explanation in the higher courts in recent years and were not in any substantial dispute before me. Those principles apply equally to all classes of contracts, save, perhaps, in respect of exclusion

clauses. Most particularly, as is clear from the decision of the House of Lords, in **BCCI v Shah [2002] 1 AC 251**, there are no special rules, or principles, applying to settlement agreements, or deeds of release.

50. The court's task is to determine the objective intention of the parties and does so by a consideration of the words used by the parties in the context of all facts and matters known to the parties at the time when, in this case, the Mutual Indemnity was entered into. The task is, as it has been put, objective and contextual, but context is only relevant when it bears upon the objective interpretation of the contract, or instrument, in question and in most cases that objective interpretation will be gleaned from the language of the contract, or instrument, itself. The court must disregard the subjective intentions of the parties and the negotiations between the parties giving rise to the concluded agreement. It is not the task of the court to strain the natural and ordinary meaning of the words used to protect one of the parties from and improvident, or bad, bargain.

51. In this case, therefore, the court must disregard the evidence of Mr Cohen, in his second witness statement, as set out in paragraph 37 of this judgment, to the effect that Mr and Mrs Solland did not contemplate that the Mutual Indemnity would affect their rights against Mr Watkins, or the Estate. That evidence is no more than evidence of subjective intention.

52. Correspondingly and as already stated, the court must disregard evidence of any of the negotiations, or discussions, which led up to the August Agreement, the Deed, or the Mutual Indemnity, even if, which is not the case, there was before the court any evidence of the content of such discussions, or negotiations.

53. The court is, otherwise, tasked with the determination of the objective intent of the parties, as disclosed in the Mutual Indemnity, set in its context, in accordance with the principles that I have out lined in paragraph 49 of this judgment.

54. In making that determination, guidance as to the application of those principles, in the context of a waiver, or release, of claims, but not as to the application of those principles to particular facts and circumstances, can be derived from the authorities, helpfully drawn to my attention by both counsel; Mr Tager QC, for the Claimants, and Mr Jonathan Cohen QC, for the Estate.

55. As already foreshadowed, the leading authority in respect of the construction of contractual releases is **BCCI v Shah**. It establishes, perhaps most trenchantly at paragraph 26 of the speech of Lord Nicholls and in the dissenting speech of Lord Hoffmann, that a release is no more than a contractual term, that there is no room for any special rules in respect of the construction of a release, even a general release, and that the reason this is so is because there is no occasion for the existence of such rules. It establishes, further, that, given appropriate words and context, there is no reason why a contractual release should not extend to claims which were unknown at the date of the release and of which the person granting the release could not be, or have been, aware.

56. In this regard, Lord Nicholls explained, at paragraph 27 of his speech, that, in the context of a desire to achieve finality, the wording of a release will commonly make plain that the release in question is not, simply, or merely, intended to be confined to

known claims, but, rather, is specifically intended to extend to claims which might later come to light.

57. That approach, however, should not, as Lord Nicholls put it, in paragraph 28, be pressed too far. The apparent generality of a release may well be limited by context and by the court's consideration of the type of claims to which the release, however widely drawn, may have been directed. A widely worded release, in the context of the settlement of partnership accounts, might be limited to claims arising in respect of the business of the partnership. The question to be answered is what claims, or types of claims, the parties may have had in contemplation at the time when the release was entered into.

58. In a similar cautionary vein, Lord Bingham, while endorsing, at paragraph 8 of his speech, the proposition that a release is to be construed in the same way as any other contractual provision and while confirming, at paragraph 9, that an appropriately worded release could operate to release a party from claims that the releasing party was not at the date of the release aware and could not have been aware, drew attention, at paragraph 10, to what he termed a salutary line of authority to the effect that in the absence of clear language the court would be slow to infer that a party intended to surrender rights and claims of which he was not aware and could not have been aware.

59. That passage, in Lord Bingham's speech, has been the subject of judicial consideration in a number of subsequent cases. I agree, however, with Mann J, in **Brazier v News Group Newspapers Limited [2015] EWHC 125 (Ch)**, that Lord Bingham and Lord Browne-Wilkinson (who agreed with the speech of Lord Bingham) were not intending to identify a rule, or presumption, that parties cannot be taken to have settled unknown claims, such as to call for specific, or special language, in order to negative that rule, or presumption. Rather, they were doing no more than to point out the need for particular caution in ascertaining the intention of the parties in respect of unknown claims.

60. In the same vein, I agree, with respect, with HH Judge Keyser QC, in **Maranello Rosso Limited v Lohomij BV [2021] EWHC 2452 (Ch)** (a judgment handed down after the hearing in this case, but helpfully drawn to my attention), in particular paragraphs 91(3) and (4), that, in the context of a decision of the House of Lords, specifically eschewing any special rules for the construction of settlement agreements, or releases, Lord Bingham was not intending, in paragraph 10 of his speech in **BCCI v Ali**, to lay down, or set out, a new principle of construction applicable to such agreements. The passage was, as Judge Keyser QC put it, a useful distillation of judicial wisdom admonishing the court to caution before concluding that a release having the apparent effect of releasing unknown claims was, in context, really intended to have that effect.

61. In regard to the settlement of claims embracing fraud, or dishonesty, which were not, specifically, touched upon in **BCCI v Ali**, I have seen nothing in the cases cited to me to suggest that any special principles, or rules, apply to the construction of releases, or settlements, in cases of fraud, or, in particular, that, to achieve a release, in such a case, nothing else but express words will do. As Judge Keyser QC pointed out, at paragraph 97, in **Maranello Rosso**, the existence of such a principle would be completely contrary to the entire tenor of the speeches in **BCCI v Ali**.

62. It may well be that, in a particular context, or in particular circumstances, express words will be required before the court will conclude that fraud claims, or their ilk, are to be excluded from the subject matter of a release. I am satisfied, however, that the correct

approach, in any case, is that formulated by Lawrence Collins LJ, as he then was, in **Satyam Computer Services Limited v Upaid Systems Limited [2008] EWCA Civ 487**, at paragraph 85, namely that the court should not consider, in the abstract, whether the release in question is intended to cover unknown claims, or fraud based claims, but whether, on its proper construction, having regard to language and context, the release was intended to apply to the particular claims which are sought to be advanced in a particular case.

63. In **Satyam**, for example, the claims sought to be brought, based upon forged assignments of intellectual property, were so far outside the purview of the parties, as at the date when they entered into a settlement agreement designed to bring to an end their business relationship, as not to be caught by the terms of that agreement in the absence of explicit language bringing the claims within the scope of that agreement.

64. By contrast, in **Marsden v Barclays Bank [2016] EWHC 1601**, a settlement agreement which did not explicitly advert to the settlement of claims in deceit was, nonetheless, held to release such claims. Potential claims in deceit had been raised in the negotiations leading to the settlement agreement and, in that context, a settlement agreement settling 'all causes of action which arise directly or indirectly…' was held not merely to be wide enough but clearly intended to encompass such claims.

65. In the present case, the starting point is and has to be the words of clause 2.3 of the Mutual Indemnity, as set out in paragraph 25 of this judgment.

66. The waiver created by that provision purports to waive 'all claims whatsoever …in respect of the property situated at 22 Upper Grosvenor Street' and to waive 'anything whatsoever related directly or indirectly to the redevelopment of the said property and its fixtures fittings and contents'. Although limited to claims in respect of the Property and to claims related directly or indirectly to the redevelopment of the Property, within the ambit of those limitations the waiver is widely drawn, such as to embrace 'anything whatsoever' related to the redevelopment of the Property.

67. I have no doubt at all that, as a matter of language, Mr and Mrs Solland's claims in respect of Mr Shine's alleged illicit and dishonest participation in the funding of the redevelopment of the Property falls well within the language of the waiver and the limitation on claims created by the waiver. It seems to me, quite simply, that a claim in respect of the funding of the purchase and redevelopment of the Property is inevitably related, whether directly, or indirectly, to the redevelopment of the Property and that there is, as a matter of language very little more to be said.

68. Mr Tager QC sought to argue, taking his cue from the reference in the waiver to fixtures, fittings and contents, that the waiver related only to the physical redevelopment of the Property and did not embrace the purchase, funding and sale of the Property.

69. I cannot accept that submission as materially affecting the width of the waiver. Even if the words 'the redevelopment of the said property' were confined to the physical redevelopment of the Property, the language of the waiver would still extend to claims relating directly, or indirectly, to that physical redevelopment and claims arising, therefore, out of the funding of the physical redevelopment, or the parties investment in the physical redevelopment, such as the claims now sought to be brought, would still be caught by the waiver.

70. I am, in any event, not persuaded that the words 'the redevelopment of the said property' should be limited, in the way suggested by Mr Tager QC. It seems to me, looking at the language of the waiver as a whole, that the first part of the waiver, waiving all claims in respect of the Property, was apt and was intended to deal with claims relating to the physical state of the property and that the wider language used in the second part of the waiver; 'anything whatsoever related directly or indirectly to the redevelopment of the said property' was intended to embrace claims arising out of the broad process of the redevelopment and to include, therefore, claims, as between the parties, arising out of the purchase of the Property, the funding of the redevelopment of the Property and the ultimate crystallisation of the Project, by the sale of the Property.

71. That, one way or another, the waiver was intended to operate in respect of claims other than claims limited to the 'bricks and mortar' of the redevelopment, as it was put, seems to me to be made further clear on a consideration of the respective roles of Mr and Mrs Solland, on the one hand, and Mr Shine, on the other. Mr and Mrs Solland were the active developers. Mr Shine was a financial partner, who, as I understand it, played no role in the actual works of redevelopment.

72. In that context, it seems clear to me that the waiver, as it related to Mr Shine and the Shine parties, cannot have been intended to deal, only, with claims in respect of the physical aspects of the redevelopment but must have been intended to waive wider claims and, in particular, financial claims relating to the redevelopment.

73. It remains to consider, however, whether, notwithstanding the apparent width of language, in respect of claims falling within the ambit of the waiver, the waiver was, nonetheless, not intended to apply to claims founded in fraud, or dishonesty.

74. I am satisfied that, in the circumstances and in the context of the particular facts of this case, the waiver was not intended to exclude such claims.

75. Although the transaction of which the waiver forms a part was, in form, the purchase of Mr Shine's shares in 22UGS, it was, in substance and as Mr and Mrs Solland acknowledge in their pleading, a 'buy out' of Mr Shine's interest in the redevelopment, intended to bring their business relationship to an end.

76. That that was recognised by the parties seems to me to be self-evidently clear both from the wide language of the waiver, in respect of claims falling within it, and from the circumstances in which it came into being.

77. As to the language, the use of the phrases 'all claims whatsoever' and 'anything whatsoever, in relation to the subject matter of the waiver,' suggests, objectively, the desire for finality which one might expect to find in an agreement entered into at the termination of what had, latterly, been an unsuccessful business relationship and, correspondingly, the intention that, to create that finality, all claims and cross-claims, without apparent exclusion and, including, potentially, therefore, any claims in fraud, or dishonesty, should be brought to a close.

78. As to circumstances, it is noteworthy that clause 2.3 of the Mutual Indemnity does not appear in the August Agreement, but was only added in as one of the variations provided for by the Deed. The obvious inference is that the parties recognised, or came to recognise, that the share purchase agreement, in addition to regulating the purchase

of the shares in 22UGS, was intended to bring an end to the business relationship between Mr and Mrs Solland and Mr Shine and that, far from clause 2.3 being mere 'boiler plating', it was, in fact, specifically designed to reflect that fact and to create a closure in respect of all potential claims between the parties.

79. As explained by Lord Nicholls, in **BCCI v Ali**, where parties, as here, seek finality, they will, commonly, do so, by way of a general release of all claims, even including unknown claims.

80. In this case, however, the claims said to have been settled by clause 2.3 of the Mutual Indemnity were not unknown claims. They are claims advanced in respect of facts which, as set out at paragraphs 35 and 37 of this judgment, have been known to Mr and Mrs Solland since 2015 and which were put to Mr Shine in January 2017, only months, therefore, before the Deed was executed in October 2017.

81. In that context, it is hard to see any basis for the contention that these known claims should not have been intended to be embraced by the wide form of words used by the parties, in clause 2.3 of the Mutual Indemnity and every reason to think, looking at the matter objectively, that it was, in fact, in respect, at least, of the Shine Indemnified Parties, these particular claims that the parties had in mind when agreeing the terms of the waiver.

82. Mr Tager QC submitted that, had that been the parties' objective intention, then they would have specifically so provided. I see the matter the other way. It seems to me that where, in the circumstances surrounding a settlement, there are known potential claims, whether embracing dishonesty, or otherwise, that the parties do not intend to be included within and dealt with by the settlement, then the objective likelihood is that the parties will reserve from the matters the subject of the settlement those that are not.

83. In this case, therefore, the expectation, or likelihood, looked at objectively, is that the wide general words used by the parties to define the subject matter of the waiver would have been made subject to a reservation of any claims arising from, or in respect of Mr Watkins involvement with Mr Shine in the investment made in the Property.

84. In the absence of such a reservation and given the context in which the waiver was entered into I am satisfied that the parties objective intention was that such claims, whether or not embracing dishonesty, were intended to be waived.

85. I am not deflected from that view by the point, raised by Mr Cohen, in his evidence, and argued by Mr Tager QC, that the fact, that the waiver does not exclude Mr Watkins from suit, in respect of the so-called illicit investment, and, correspondingly, does not preclude Mr Watkins from joining Mr Shine as a joint tortfeasor, under the Civil Liability (Contribution) Act 1978, indicates, or shows, that the waiver was not intended to embrace claims arising out of that investment. The fact that the waiver does not protect Mr Shine from a contribution claim by Mr Watkins does not seem to me to be material to the question as to whether, as between Mr and Mrs Solland and Mr Shine, such claims were precluded.

86. The consequence of all of the foregoing is that the waiver provisions of the Deed provide a complete answer to Mr and Mrs Solland's claims, that there has not, therefore, been shown a serious claim to be tried and that, in that circumstance, the court cannot

take, or accept, jurisdiction in respect of those claims. The further consequence is that both the Claim Form and the order for service out must be set aside.

87. In the light of that determination and, as set out in paragraph 40 of this judgment, it is not necessary to determine, additionally, whether, assuming that jurisdiction had existed, the service of the Claim Form should be set aside on grounds of non-disclosure. The question having been fully argued, however, it may be helpful to the parties if I indicate the view that I would have reached, had such a determination been necessary.

88. The first matter for consideration is the manner in which the point should be addressed. Mr Tager QC submitted, in effect, that the question was all or nothing; that either the waiver provided a complete bar and should, therefore, have been disclosed, or it did not and, therefore, need not have been disclosed.

89. With respect, I do not think that that is the right way of going about it.

90. Had those advising Mr and Mrs Solland believed that the waiver provided a complete bar to their claims, then the failure to refer to the waiver in the application for service out would have been an egregious and deliberate breach of duty calling for serious penal sanctions. As earlier set out, however (paragraph 13 of this judgment), it is not contended by the Estate that that is what occurred.

91. What is alleged, accepting that, in the perception of Mr and Mrs Solland and their advisers, the waiver, although known about and considered, was not fatal to their claims, is that, nonetheless, Mr and Mrs Solland were duty bound to inform the court of the waiver, as being a contractual document which, whatever their own view, they should have appreciated to be relevant to the decision to be taken by the judge adjudicating the application for service out, by reason, at the least, of the possibility, or prospect, that it might be fatal to the claims being advanced.

92. In respect of this question, as in respect of the construction of the waiver, both counsel took me to a considerable body of authority. I do not consider, however, that it is necessary, in determining whether the Claimants complied with their duty of full and frank disclosure, to enter into any more detailed analysis of those authorities than is set out hereafter.

93. The duty of full and frank disclosure, arising in respect of applications made unilaterally and without notice, is a judge made duty of very long standing. It has been described, in **Knauf GMBH v British Gypsum Limited [2002] 1WLR 907**, at paragraph 65, and by Burton J, in **Masri v Consolidated Contractors International Company SAL [2011] EWHC 1780 (Com)**, at paragraph 58, as constituting a 'golden rule' whereby an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion and as giving rise to a 'heavy duty of candour and care'.

94. Inevitably, the detailed requirements of the duty have been considered extensively in authorities going back well over one hundred years.

95. The leading current authority in respect of the duty remains, however, **Brink's Mat Limited v Elcombe [1998] 1 WLR 1350**. What I take from that case, in particular from the judgment of Ralph Gibson LJ, at 1356F to 1357F, is that the material facts which

are to be placed before the court are those facts which the judge dealing with the application needs to know in dealing with the application. Materiality is to be determined by the court and not by any assessment of the facts by the applicant, or his, or her, legal advisers.

96. The duty carries with it a duty of investigation in respect of potentially material facts and, in consequence, the duty is a duty to disclose both known material facts and those which would have been discovered, or uncovered, by proper enquiry, or investigation. The proper extent of those enquiries will be determined by a consideration of all the circumstances; to include the urgency of the situation and the time available for the making of enquiries and to include, also, the nature of the case and the nature of the order that the applicant seeks to be made.

97. Whether the fact not disclosed is of sufficient materiality to justify, or require, the immediate discharge of the order in question will depend upon the importance of the non-disclosed fact to the matters to be determined by the judge on the application. Where the non-disclosure is material, the fact that the breach of duty is innocent, in the sense that the non-disclosed fact was unknown to the applicant, or seen by the applicant as irrelevant, is important but must be tempered by a recognition that it is for the applicant both to properly enquire and, also to give careful consideration to the case being presented. There remains, always, a discretion in the court, notwithstanding proof of material non-disclosure, to elect not to discharge the order in question, or to replicate the order.

98. To this should be added Balcombe LJ's explanation, at page 1358 C to E, of the purpose of discharging an order for non-disclosure and conversely, the purpose of the retention by the court of a discretion not to discharge, notwithstanding non-disclosure. Discharge is warranted both to deprive the applicant of an advantage improperly obtained and as a reminder to those making unilateral applications of the extent of their duty and of the consequences of failure. The rule, however, must not become an instrument of injustice and, for that reason, albeit to be exercised sparingly, there must be a jurisdiction, in appropriate cases, to retain the order in question.

99. In this context, while it is no answer to an application, based upon non-disclosure, that the non-disclosure in question would not have made any difference, in the sense that, with that disclosure, the same order would have been made (see paragraph (5) of the guidance approved by Christopher Clarke J, at paragraph 102 of his judgment, in **OJSC ANK Yugraneft v Sibir Energy plc [2008] EWHC 2614 (Ch)**, adopted by Bryan J, at paragraph 92 of his judgment, in **The Libyan Investment Authority v J P Morgan Markets Limited [2019] EWHC 1452 (Comm)**), that fact may very well be relevant in determining whether, notwithstanding non-disclosure, the order under attack will not, as a matter of discretion be discharged (see: Burton J, in **Network Telecom (Europe) Limited v Telephone Systems International Inc.[2004] 1 ALL ER (Comm)**, at paragraphs 64 and 65).

100. That fact, if a fact, will, however, be considered among a number of other relevant circumstances. A deliberate decision, as in **Libyan Investment Authority**, not to draw, in that case, a limitation issue, to the attention of the court, or, as in **Knauf**, not to draw attention to a jurisdiction clause, may, but not will (see: Burton J, in **Masri**, at paragraphs 67 and 68) lead to the discharge of the order in question, notwithstanding the lack of any intention to mislead. Conversely, a so-called innocent non-disclosure,

meaning, in this context, the non-disclosure of a fact not known to the applicant, will not necessarily preclude, or prevent, the court from setting aside the order. The court will assess the degree of culpability in each individual case

101. In the case of a deliberate, or conscious, non-disclosure, the court will have serious regard to the clear duty upon the applicant to place all matters that the court might regard as material before the court and not to seek to limit that material to that which an applicant, or his, or her, advisers might consider relevant. In the case where the relevant non-disclosed fact was not known to the applicant, the fact that the material fact was not known to the applicant will be tempered by the obligation upon the applicant to make proper enquiries and by the court's view as to his, or her, compliance with that duty.

102. More generally, as set out and reinforced in the guidance approved and adopted by Bryan J in **The Libyan Investment Authority**, at paragraph 92, the discretion to relieve a defaulting applicant from the ordinary consequence of that default, namely the setting aside of the order made on the application, is to be exercised sparingly, having regard to the need to protect the administration of justice and to uphold the public interest in requiring full and fair disclosure. Accordingly, while the court must not, in the exercise of what is, in large part, a penal jurisdiction, act disproportionately to the 'offence' and can weigh the merits of the application against the extent, or culpability, of the default, the court should not allow that exercise to undermine the policy objective which underlies the default position.

103. Given that the discretion not to discharge a particular order is the exercise of a relieving jurisdiction, it seems to me, further, as I think it did to Bryant J, in **The Libyan Investment Authority** (paragraph 110), that the stance taken by the party seeking relief from the usual consequences of a material non-disclosure is a relevant factor in determining culpability and, correspondingly, in determining whether or not relief should be granted from the normal consequences of the default.

104. An acknowledgment of error, or misjudgement, and, inferentially, an acknowledgment of the respect to be given to the duty of full disclosure, will, as I see it, go some way to mitigating the initial culpability. An applicant who brazens it out, will not give the court any confidence that a lesson has been learnt and that the deterrent purpose of the duty of full disclosure does not require the discharge of the order in issue.

105. Reverting to the question of materiality, itself, there can be found suggestions in the authorities that a differential approach to materiality, may be applied, as between one form of unilateral application and another. In particular, the suggestion has been made that, where injunctive relief, having immediate adverse consequences to the absent respondent, is sought, a higher standard of material disclosure is required. Conversely, there is to be found a considerable body of authority acknowledging that an application for service out, having, as it does, the consequence of bringing a foreign respondent within the jurisdiction of the English Court, is, as it has been termed, the exercise of an exorbitant jurisdiction and that, in consequence, a high duty of candour is required by those seeking to invoke that jurisdiction.

106. The correct approach, however, is that already set out, by reference to **Brink's Mat**, at paragraph 95 of this judgment and pithily, reiterated by Bryant J, at paragraph 94 of his judgment in **The Libyan Investment Authority**. 'The duty of full and frank

disclosure extends only to those issues which can be said to be material to the decision which the judge has to make on the application'.

107. In the context of an application to serve out, helpful guidance was given by Toulson J, as he then was, in **MKG Japan Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm)**, at paragraphs 23 to 32 (set out at paragraph 97 in **The Libyan Investment Authority**).

108. In such a case, the focus of the inquiry is upon whether the court should assume jurisdiction over the dispute. The court needs to be satisfied that there is a serious issue to be tried, that there is a good arguable case that the English court has jurisdiction to hear it and that England is the appropriate forum.

109. The question, therefore, in the case of any application for service out, is whether there has been non-disclosure of material going to one, or more, of those issues. Because it is for the court to determine materiality, in a case where the court considers that relevant material has not been disclosed, the fact, that the applicant took a different view and acted in good faith in not putting forward the material in question, is not an answer to the non-disclosure, although it may well affect the court's decision as to what to do in the light of the non-disclosure.

110. The applicant, however, is under no duty to include material in his, or her, application, which does not go to the issues which has the judge has to determine and which, therefore, have no bearing on those issues. It follows that material which goes to the general merits of the claim, as opposed to what Coulson J termed the 'merits threshold' do not have to be disclosed. The court, at this stage, is not concerned as to the question as to who will win the claim, but as to whether there is a serious claim to be tried.

111. In this case, I have, in this judgment, already determined that, by reason of the waiver and on its true construction, Mr and Mrs Solland have failed to establish that there is a serious case to be tried. It is, in consequence, self-evident that the Mutual Indemnity, which contained the waiver, was a document which was material, indeed, fundamental, to that issue and as to whether the 'merits threshold' was met. The failure, therefore, to disclose the Mutual Indemnity was, without question, a failure of disclosure of a high order. It was a document determinative both of the application to serve out and of the underlying claim and, as such, there can be no doubt at all that it should have been disclosed to the court on the application to serve out.

112. Correspondingly, there can be no doubt at all that the disclosure of the waiver, even when accompanied by any and all of the arguments which might have been put forward in support of the suggestion that the waiver was not intended to preclude the current claims, would have affected the mind of the Master dealing with the application. Whether the court, exercising its discretion with its eyes open, would have granted the permission sought, leaving the ambit of the waiver to be argued out on a challenge to the jurisdiction, or whether the court would have felt able to decide that issue there and then, it cannot be in doubt that the existence and impact of the waiver would have been central to the court's decision as to service out and that the waiver was not something, therefore, that the party making the application could, properly, have failed to disclose.

113. The fact, as I accept, that the failure to disclose was innocent, in the sense that, although deliberate and intended, it arose out of a genuine belief that the Mutual Indemnity was

mere 'boiler plating' and irrelevant to Mr and Mrs Solland's claims, does not, having regard to the authorities mentioned in this judgment, provide Mr and Mrs Solland with much assistance. Their duty and that of their advisers was to draw the court's attention to facts that the court might think material to the determination of the 'merits threshold', not to edit, or limit, the facts provided to the court in line with their own assessment of relevance. That, however, is what, albeit unintentionally, occurred.

114. It is, frankly, hard to see how this came about. Mr and Mrs Solland have an extremely able and experienced legal team, both as to solicitors and counsel. They were, so far as I am aware under no pressure of time in the making of the application for service out. The language of the waiver was, as set out at paragraph 66 of this judgment, plainly of sufficient width to embrace the claims that Mr and Mrs Solland sought to bring. Even giving full weight to the explanations given to the court by Mr Cohen, in his 7th July 2021 witness statement, as set out at paragraphs 37, 38 and 39 of this judgment and the arguments that Mr Tager QC has advanced in respect of construction, it should, with respect to Mr and Mrs Solland's legal team, have been obvious that the waiver was something that the court would want to consider in determining whether there was a serious claim to be tried.

115. One can only conclude that, notwithstanding their ability and experience, Mr and Mrs Solland's legal team overlooked, on this occasion, the width and extent of their obligations under the 'golden rule' and were blinded to those wider obligations by the view that they had formed as to the construction and, therefore, relevance of the waiver. That was a serious misjudgement.

116. It was, I am afraid, a mistake compounded, as I see it, by the approach which has been adopted by Mr and Mrs Solland and their advisers to the current application.

117. As set out at paragraph 12 of this judgment, the question of non-disclosure was raised with the Claimants at a very early stage; the suggestion being that the Claimants should return to court and ask the court to reconsider the application for service out with the benefit of the complete information, rather than proceeding to serve an improperly obtained order. That suggestion was not taken up.

118. There was some debate before me as to the period within which the obligation to give full and frank disclosure subsists and, in particular, whether it extended beyond the date of service of the Claim.

119. My concern, however, is not as to the technical resolution of that question, but as to the attitude adopted by the Claimants, when properly confronted with, as I find, the obviously correct contention that they had failed, in making their application to serve out, to comply with their obligations to the court.

120. What I do not find, either at that stage, when an opportunity for the Claimants to reconsider whether they had acted correctly arose, or, at any stage in the course of this application, is any indication that the Claimants have, to use the vernacular, taken on board the fact that they have acted in serious breach of their duty to the court. It is one thing to make a mistake. It is another, when confronted with the mistake, to fail to face up to that fact. Unfortunately, that is what the Claimants and their advisers have failed to do.

121. It would have been open to the Claimants, when faced with the current application to accede, at least in respect of the question of non-disclosure, to the application. It would have been open to them, even if not conceding the application, to acknowledge their mistake and to seek the indulgence of the court in respect of the order permitting service out. They did neither of those things.

122. There is nothing in Mr Cohen's evidence, nor was there in Mr Tager QC's submissions, to suggest that the Claimants have appreciated the serious nature of their error and nothing, therefore, to give the court the confidence that a lesson has been learnt and that the usual consequences of a serious failure of disclosure need not apply.

123. The only recognition to be found, at all, within Mr Tager's skeleton submissions, as to the possibility that the court's saving discretion might be required to be exercised in his favour, is to be found in the passage of his skeleton argument, at paragraph 23, which asserts, in effect, that if the court reaches a conclusion that the waiver should have been disclosed, but does not conclude that the waiver is a complete bar to the claim then, as he puts it, '(t)his is plainly a case where there is no point in setting service aside …'. That passage, unfortunately, wholly fails to reflect, or recognise the weight to be given to the 'golden rule'.

124. In the result, I am satisfied that had the court not determined that the waiver provides a complete bar to Mr and Mrs Solland's claims and had the court not determined, therefore, that there was not a serious claim to be tried, this would not have been a case where the court could, in accordance with principle, relieve the Claimants from the consequences of their non-disclosure. The right course would have been to set aside the order giving permission to serve out.

125. In the event, however and as set out at paragraph 86 of this judgment, this is not a Claim where the court can take, or accept, jurisdiction and the Claim Form and the order for service out must, accordingly, be set aside.