Neutral Citation Number: **[2023] EWHC 3136 (Ch)**

Case No: BL-2022-001290

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

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

Date: 11/12/2023

Before :

Deputy Master Lampert

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Between :

(1) Abdullah Nasser Bin Obaid	**Claimants**
(2) Oh-Na Real Estate Company Limited (a company incorporated in the British Virgin Islands)	
(3) Taqa Investment Company (a company incorporated in the Kingdom of Saudi Arabia)	
- and –	
(1) RLS Solicitors Limited t/a RLS Law	**Defendants**

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William Edwards (instructed by **Baker & McKenzie LLP**) for the **Claimants**
Richard Liddell KC (instructed by **Edesia Law Limited**) for the **Defendants**

Hearing date: 27 January 2023

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APPROVED JUDGMENT

Deputy Master Lampert:

INTRODUCTION

1. This is a claim by which the Claimants claim damages for professional negligence and/or equitable compensation from the Defendant, a firm of solicitors.

2. The claim was issued by Claim Form dated 11 August 2022. The Defendant acknowledged service on 15 August 2022 but has yet to file a defence to the claim.

3. The Defendant, by an application dated 7 October 2022, made under CPR rule 3.4(2)(a) and/or CPR rule 24.2, seeks an order to strike out and/or summarily dismiss the Claimants' claims on the grounds that they are captured by the contractual release provisions of a Settlement Deed dated 19 June 2019 (the "Settlement Deed").

4. The Settlement Deed settled certain claims and proceedings between the Claimants (referred to in the Settlement Deed as the "ANBO Parties") and Dr Khalid Abdullah Al-Hezaimi, OFY Limited and Latifah Assets Limited (both companies registered in the British Virgin Islands) (referred to in the Settlement Deed as the "KAH Parties"). The settled claims included proceedings under Case Number HC-2017-001893 (the "Previous Proceedings") between the ANBO parties as claimants and the KAH parties as defendants.

5. The question which arises on the application before me is whether clause 4 of the Settlement Deed headed "RELEASE, DISCHARGE & WAIVER OF CLAIMS AND INDEMNITY AGAINST CLAIMS/PROCEEDINGS" ("Clause 4") operates to prevent a claim being brought against the Defendant who acted jointly for the Second Claimant and OFY Limited in connection with a property transaction underlying a fraud which the Claimants accused Dr Al-Hezaimi of perpetrating upon them and which was the subject of the Previous Proceedings.

BACKGROUND TO THE SETTLEMENT DEED

6. This is not the first time that Clause 4 of the Settlement Deed has been considered by the Court and much of the summary which follows is taken from the judgment of Joanne Wicks KC sitting as a Deputy Judge of the High Court [2022] EWHC 2460 (Ch) in claim BL-2020-001547 between the same parties to the Previous Proceedings.

In those proceedings the Judge determined that the Settlement Deed did not settle, release or waive certain claims including claims which were deleted from the Particulars of Claim by amendment. For the sake of completeness, I should also mention that the Settlement Deed was also the subject of a Part 8 Claim BL-2019-002025 between the parties to the Previous Proceedings in which Clare Ambrose sitting as a Deputy High Court Judge gave declaratory relief [2020] EWHC 1564 (Ch) in relation to an issue which is of no relevance to the present claim and the application before me.

7. The Second Claimant ("Oh-Na") and the Third Claimant ("Taqa") are companies under the control of the Mr Bin Obaid, the First Claimant. OFY Limited and Latifah Assets Limited are or were companies in the control of Dr Al-Hezaimi.

8. Mr Bin Obaid and Dr Al-Hezaimi are businessmen and former business partners who were involved in various business ventures together including a medical equipment business in Saudi Arabia and Egypt known as United Industrial Medical & Plastics Co ("UIMP") and a bone tissue bank in Saudi Arabia. Their relationship fractured and they, and their respective companies, have been involved in various proceedings in England and Saudi Arabia, including the Previous Proceedings. The various proceedings involve serious allegations on both sides of fraud and corruption.

9. In the Previous Proceedings Mr Bin Obaid claimed that he and Dr Al-Hezaimi had agreed that Dr Al-Hezaimi would invest in English properties using Mr Bin Obaid's money and that these properties would be held in an offshore company, namely Oh-Na, of which Mr Bin Obaid was the majority shareholder. He accused Dr Al-Hezaimi of perpetrating a fraud on him, as a result of which the properties, which were said to be worth more than £35 million, came to be held by OFY Limited and Latifah Assets Limited, which are companies owned by Dr Al-Hezaimi.

10. The Particulars of Claim in the Previous Proceedings identified a number of payments made by Mr Bin Obaid or Taqa to Dr Al-Hezaimi (or a company called Global Real Estate Portfolios Ltd, on his behalf) for the purpose of investing in English real property. Nine payments totalling approximately £31.56 million were said to have been made for the purpose of funding the purchase of 125 apartments in the Assembly Development in Manchester. The claim alleged that the properties and any rental

income or surplus monies from the funds advanced belonged to the Claimants beneficially and they claimed a declaration to that effect, an order to transfer title, damages and equitable compensation, and an order for accounts and enquiries, interest and further and other relief.

11. By their Defence the KAH Parties denied the claims. They contended that the payments set out in the Particulars of Claim were not made for the purpose of investing in English properties for the Claimants' benefit but were for other purposes. In particular, four of the payments alleged to have been made for the purpose of the Assembly Development were said to have been made for purposes relating to UIMP including payment of Dr Al-Hezaimi's salary and expenses. The KAH Parties contended that none of the payments relied upon by the Claimants was made for the purpose of investing in property and that the properties in issue belonged to the KAH Parties.

12. The Particulars of Claim in the Previous Proceedings were subsequently amended. The amendments were substantial and deleted reference to five of the payments relied on in relation the Assembly Development (adding two others).

13. Thereafter the KAH Parties served an amended Defence and Counterclaim which distinguished between the payments pleaded in the original Particulars of Claim (called the "Original Payments") and those in the amended Particulars of Claim (the "APoC Payments"). The KAH Parties contended that all but three of the APoC Payments were made as salary or reimbursement of expenses due to Dr Al-Hezaimi, two payments were said to have been made in respect of the purchase of Dr Al-Hezaimi's stake in UIMP and the final payment was said to have been made to purchase Dr Al-Hezaimi's shares in an Egyptian business called R.Kareem Medical Co. The counterclaim contended that if the two APoC payments were not made for the purpose of Mr Bin Obaid purchasing Dr Al-Hezaimi's shares in UIMP, then Mr Bin Obaid was liable to pay for those shares under the terms of a sale agreement. Secondly, the KAH Parties claimed damages for breach of an alleged agreement which Mr Bin Obaid said had been made orally in Cairo.

14. Various other proceedings were commenced in Saudi Arabia between one or more of the Claimants and one or more of the KAH Parties.

15. The trial of the Previous Proceedings commenced before Falk J (as she then was) on 12 June 2019. Before the conclusion of the trial the claim was compromised, and the Settlement Deed was entered into.

THE PRESENT CLAIM

16. The following is a summary taken from the Particulars of Claim.

17. The Claimants' allege that in late 2012 or early 2013 an oral agreement was reached between Mr Bin Obaid and Dr Al-Hezaimi, that property investments would be made using an off-shore company of which Mr Bin Obaid would be the majority shareholder, along with his two sons; Mr Bin Obaid would provide the funds required for the investments; and Dr Al-Hezaimi would manage the day to day operations of the off-shore company. The effect of the agreement was that Dr Al-Hezaimi was to act as Mr Bin Obaid's agent and owed him such duties as an agent owes to his principal.

18. Dr Al-Hezaimi organised the incorporation of Oh-Na as the off-shore investment vehicle. Dr Al-Hezaimi originally held the majority of the shares in Oh-Na, but those shares were transferred to Mr Bin Obaid in September 2014. Mr Bin Obaid, his sons and Dr Al-Hezaimi were the directors of Oh-Na at the material time.

19. The Claimants allege that Mr Bin Obaid agreed with Dr Al-Hezaimi that he would purchase a tower block in Brighton Marina using Oh-Na as the purchase vehicle. Ms Sandra Rankine of the Defendant was instructed by Dr Al-Hezaimi to act jointly on behalf of Oh-Na and OFY Limited (one of the KAH Parties) in connection with the purchase. It is alleged that Ms Rankine took instructions solely from Dr Al-Hezaimi and at no point took instructions from the board of Oh-Na which was (apart from Dr Al-Hezaimi) unaware that the Defendant was instructed to acquire the Brighton Marina properties in the joint names of Oh-Na and OFY.

20. In connection with that transaction, it is alleged that on 6 January 2015 Mr Bin Obaid transferred approximately £14.5 million to Dr Al-Hezaimi of which £11.3 million was paid over to the Defendant and credited to its client account in the name of Dr Al-Hezaimi alone. Prior to the payment of those funds to the Defendant there had been an email exchange between Ms Rankine and Dr Al-Hezaimi about the source of the

funds for the transaction. It is alleged by the Claimants that the explanation given was untrue and, on its face, wholly implausible and suspicious. The Brighton Marina transaction ultimately did not proceed.

21. In May 2015 Mr Bin Obaid agreed with Dr Al-Hezaimi that he would acquire a substantial interest in the Assembly Development, namely the leases in Block B and the freehold to the entire development, with Oh-Na as the purchase vehicle for the transaction. The purchase was to be funded partly from the funds which Mr Bin Obaid had previously provided for the Brighton Marina transaction.

22. The Defendant was instructed to act jointly for Oh-Na and OFY in respect of the acquisition and again took instructions solely from Dr Al-Hezaimi. It is alleged that Mr Bin Obaid and the board of Oh-Na (apart from Dr Al-Hezaimi) were unaware that the Defendant was instructed under a joint retainer. It is further alleged that, unbeknown to Mr Bin Obaid, Dr Al-Hezaimi instructed the Defendant to act on behalf of Latifah Assets Limited in relation to the acquisition of the freehold of the Assembly Development.

23. On 17 May 2015 Dr Al-Hezaimi transferred £3 million to the Defendant which was again credited to a client account in Dr Al-Hezaimi's name and described as completion monies. The £3 million is alleged to have formed part of the sum provided by Mr Bin Obaid on 3 January 2015. Mr Obaid paid further sums totalling £1,224,974 to Dr Al-Hezaimi which were paid over to the Defendant together with the remainder of Mr Bin Obaid's 6 January 2016 payment. The Claimants allege that it was again incumbent on the Defendant to ascertain Oh-Na's or Mr Bin Obaid's interest in those funds but that, so far as they are aware, the Defendant did not do so.

24. On 9 July 2015 contracts were exchanged by which Oh-Na and OFY agreed to purchase 62 and 63 flats respectively and Latifah agreed to purchase the freehold of the Assembly Development. Deposits were payable on exchange, and it is alleged that the funds used to pay those deposits were the funds in the Defendant's client account paid to Dr Al-Hezaimi by Mr Bin Obaid. The contractual position was therefore that Oh-Na, OFY and Latifah were each to acquire an interest in the Assembly Development, despite the agreement between Mr Bin Obaid and Dr Al-Hezaimi that Oh-Na would acquire the entirety of those interests.

25. On 9 July 2015 the Defendant sent client care letters in respect of the Assembly Development transaction to Latifah (in respect of the freehold purchase) and Oh-Na and OFY jointly (in respect of the leasehold properties). It is alleged that the terms applicable to Oh-Na were not known to its board, save for Dr Al-Hezaimi.

26. The Claimants contend that in view of the joint retainers in relation to both the Brighton Marina transaction and the acquisition of the Assembly Development it was incumbent upon the Defendant to ascertain the nature and extent of Oh-Na's (or Mr Bin Obaid's) interest in the funds paid to the Defendant's client account which they failed to do. It is alleged that at no time did Mr Bin Obaid or Oh-Na's board sanction or approve the structure and that the Defendant did not have authority to exchange contracts in the form that was exchanged on 9 July 2015. It is further alleged that the entire deposit was paid using funds which were beneficially Oh-Na's (alternatively, Mr Bin Obaid's).

27. It is alleged that Dr Al-Hezaimi subsequently instructed the Defendant that Mr Bin Obaid no longer wished to acquire the leasehold titles in the Assembly Development through Oh-Na and that OFY would acquire all of these properties. This was not a decision that had been taken by Mr Bin Obaid or the board of Oh-Na, who were unaware of the instruction to the Defendant. On the basis of this instruction the Defendant negotiated a variation of the contract to remove Oh-Na as purchaser. It is alleged that the Defendant at no point sought or obtained Oh-Na's instructions or sought to understand the basis of which Oh-Na was purportedly giving up its rights as a purchaser and that the Defendant did not have authority to exchange the supplemental contract dated 10 February 2016 by which Oh-Na was removed as purchaser.

28. In March 2016 Mr Bin Obaid allegedly paid Dr Al-Hezaimi the sum of £1,716,300 which was said to be due as purported marketing commission. That sum was also paid over to the Defendant and credited to the client account in the name of Dr Al-Hezaimi.

29. In April 2016 Dr Al-Hezaimi told Mr Bin Obaid that a final sum of approximately £11 million was due in respect of the acquisition of the Assembly Development properties. On 13 April 2016 Mr Bin Obaid transferred the sum of £11,263,000 to Dr

Al-Hezaimi of which £11,262,975 was paid over to the Defendant. Emails between Ms Rankine and Dr Al-Hezaimi in relation to the source of the funds are said to contain an explanation that was untrue and, on its face, wholly implausible and suspicious.

30. On 6 September 2016 a Saudi Arabian law firm instructed by Mr Bin Obaid emailed the Defendant seeking information in relation to him and Oh-Na and indicating that they held a suspicion of fraud. It is said that there was no response to that email, nor was any attempt made to contact Oh-Na in relation to it.

31. In June 2017 the Previous Proceedings were commenced by the Claimants against the KAH Parties and included the claim that the acquisition of the freehold and leasehold interests in the Assembly Development were acquired by OFY and Latifah with monies provided by Mr Bin Obaid and were beneficially Oh-Na's property. As I have already said, the Previous Proceedings were settled by the Settlement Deed.

32. The present claim alleges that the Defendant owed Oh-Na an implied contractual duty to exercise the degree of skill and care to be expected of a reasonably competent firm of solicitors and a tortious duty co-extensive with the implied contractual duty. It is alleged that those duties required the Defendant to take Oh-Na's instructions and act in accordance with them; to ascertain Oh-Na's beneficial interest in the funds remitted to it and Oh-Na's instructions in respect thereof; to pass on to Oh-Na information obtained in the course of the retainer which a reasonably competent solicitor should know might indicate a breach of the duties owed by Dr Al-Hezaimi to Oh-Na and/or Mr Bin Obaid; and that if the Defendant had information indicating that a fraud was being perpetrated on Oh-Na and/or Mr Bin Obaid then it was obliged to disclose that information to them. The Claimants also allege that the Defendant owed fiduciary duties to serve Oh-Na faithfully and loyally; not to prefer the interests of any other person over those of Oh-Na; not to allow the performance of its obligations to Oh-Na to be influenced by its relationship with another client; not to put itself in a position of conflict and to cease to act if it found itself in a position of conflict such that it could not fulfil its duty to one client without being in breach of its obligations to another client.

33. The claim alleges that the Defendant breached those duties and that but for those breaches of duty and/or trust, the acquisitions would not have completed in the names of OFY and Latifah and either would have completed in Oh-Na's name or not been completed at all, or the funds paid by Mr Bin Obaid would have been returned to him.

34. Oh-Na's losses are said to comprise its costs of investigating the fraud said to have been perpetrated by Dr Al-Hezaimi and the legal and professional fees paid in respect of the Previous Proceedings.

35. I should make clear at this point that the allegations of fraud made against Dr Al-Hezaimi and the KAH Parties, which the claim before me relies upon, have not been tested before the Court. The Settlement Deed explicitly states at clause 5:

"*This Deed is entered into in connection with the compromise of disputed matters as well as in light of other considerations. It is not, and shall not be represented or construed by the Parties or by any third party as an admission of liability or wrongdoing on the part of any Party to this Deed or any other person or entity.*"

TERMS OF THE SETTLEMENT DEED

36. The parties to the Settlement Deed are the Claimants and the Defendants in the Previous Proceedings. The Claimants are together described as the "ANBO Parties" and the Defendants are together described as the "KAH Parties" Each Claimant and Defendant is referred to as a "Party" and collectively as the "Parties".

37. The recitals to the Settlement Deed under the heading "Background" provide as follows:

"(1) The Parties have been in dispute in relation to the beneficial ownership of the real property and money described below as the Identified Assets.

(2) The Parties wish to fully and finally resolve those disputes on the terms of this Deed."

38. The Identified Assets comprised various properties including the Assembly Development and cash amounts which were to be split 78.8% to the Claimants and 21.2% to the KAH Parties.

39. The Settlement Deed contained the following definitions which are material to this case:

"*"Affiliate" means (i) any natural person related directly or by marriage to any Party; or (ii) any company, partnership or other entity which currently, or from time to time, directly or indirectly is controlled by any of the Parties, where control means having the ability to exercise decisive influence on the entity or company whether by ownership, the right to use all or part of the assets of a company or entity, rights in respect of the composition, voting or decisions of the company or entity or otherwise; or (iii) any Agent of any Party*".

"*"Agents" means each of the officers, employees, directors, shareholders, agents and professional advisers of the Parties or any of them and all such individuals and entities which held any such positions at the date of this Deed*".

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

40. By clause 3.1 of the Settlement Deed the parties "*acknowledge[d] and agree[d] that KAH Parties are the legal and beneficial owners of the KAH Assets and the ANBO Parties are the beneficial owner of the ANBO Assets*".

41. Clause 4 of the Settlement Deed provides as follows:

"*4.1 Each of the Parties agrees, on behalf of themselves and their respective Affiliates:*

4.1.1 that this Deed shall constitute full and final settlement of all Claims against each of the other Parties and their respective Affiliates

4.1.2 covenants and undertakes, and shall procure that each of their Affiliates covenants and undertakes, that

(A) they shall not make or maintain any Claim against any of the other Parties or their respective Affiliates;

(B) they shall not at any time sell, assign or otherwise purport to transfer any Claim against any of the other Parties or their respective Affiliates;

(C) they shall not in any way support, encourage, incite, maintain, assist, cause or procure any person or entity who is not bound by the terms of this Deed to assert, institute or continue any Claim against any of the other Parties or their respective Affiliates; and

(D) they shall not make any non-party or third party application in relation to a Claim."

42. "English Proceedings" are defined as the Previous Proceedings.

43. By clause 11.1 it is agreed that:

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

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

45. Clause 13 provides that:

"*No terms of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 of England and Wales by a person who is not a party to this Deed, save for the Affiliates of the Parties who are expressly permitted to enforce the provisions of clause 4 above*."

THE STRIKE OUT APPLICATION

46. For the purpose of the application, I am required to assume that the facts pleaded in the Particulars of Claim are true and can be proved at trial. Thus, I must assume that the Defendant acted and/or omitted to act in the manner which is alleged by the Claimants.

47. As I have already said, the Defendant has yet to file a Defence to the claim. Instead, the application before me was made by Application Notice dated 7 October 2022 by which the Defendant seeks an order that the claims be struck out or summarily dismissed pursuant to CPR Rule 3.4(2)(a) and/or CPR Rule 24.2. They assert that there are no reasonable grounds for bringing the claims, which stand no real prospect of success because the claims are caught within the contractual release provisions in clause 4 of the Settlement Deed. The Defendant states its belief that there is no other reason why the disposal of the claim should await trial.

48. The application is supported by the witness statement dated 7 October 2022 of Mr Michael McPhun of Edesia Law Limited who act for the Defendant. The witness statement summarises the Previous Proceedings and the circumstances in which the Settlement Deed came to be entered into which I have summarised above. I also note Mr McPhun's evidence that the Defendant herein was put on notice of a potential claim against it, prior to the signing of the Settlement Deed, in letters dated 22 September 2017, 5 October 2017 and 24 January 2019. However, the claim alleged initially was narrower than the claim now made, as it appears from the letter dated 22 September 2017 that Oh-Na reserved the right to bring a claim as a result of the Defendant having continued to act for OFY in relation to the Assembly Development after being put on notice in September 2016 that Oh-Na was alleging fraud in relation to the transaction and after the Previous Proceedings had been issued.

49. The Claimants' evidence in response to the application is contained in the witness statement of Mr Hugh Lyons of Baker & McKenzie LLP, the Claimants' solicitor, who also acted for the Claimants in the Previous Proceedings. Mr Lyons's account of the Previous Proceedings and the circumstances in which the Settlement Deed came to be entered into does not differ significantly from the account given by Mr McPhun. That provides the factual background against which the Settlement Deed falls to be construed.

50. Mr Lyons's witness statement goes further and at paragraphs 26 – 35 sets out the background to the negotiation of the Settlement Deed which he says "*may also be relevant as an aid to construction*". He also exhibits the witness statements, written submissions and transcripts from the trial of the claim before Ms Wicks KC in which the construction of the Settlement Deed was considered. The thrust of Mr Lyons's evidence is that the position of the Defendant was not in fact considered in the course of the negotiations. He then goes on to say that "*If it had been suggested at any time by the KAH Parties that the Claimants would need to release claims against RLS as part of the overall deal, that would have needed to be 'priced in' accordingly*".

51. In his skeleton argument for the hearing before me, Mr Liddell KC, Counsel for the Defendant, stated that whilst the Defendant was content for me to read Mr Lyons's witness statement in full, this was without prejudice to the Defendant's contention that the evidence at paragraphs 26 – 35 of the witness statement (and the related exhibits) are inadmissible on the question of construction of the Settlement Agreement. As will be apparent from the preceding paragraphs, I have read Mr Lyons's witness statement, but I have not read the related exhibits and I was not referred to them in oral submissions. It is clear from paragraph 7 of the judgment of Ms Wicks KC that she considered evidence relating to the negotiation of the Settlement Deed and the parties' subjective understanding of its effect at the time it was executed because it was relevant to a rectification claim brought by the Claimants if its claim in relation to the construction of the Settlement Deed was not successful. The Deputy Judge however made clear that she considered the evidence to be inadmissible on the question of construction of the Settlement Deed and she excluded it from consideration on that issue.

52. The relevant principles are summarised in the judgment of Lord Justice Newey at paragraphs 22 – 25 of *Schofield v Smith* [2021] EWHC 2533 (Ch):

> *"22. While it is generally legitimate to have regard to background (or, in the words of Lord Wilberforce in Prenn v. Simmonds [1971] 1 WLR 1381, the "matrix of fact") when construing a contract, "[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent": see ICS at 913, per Lord Hoffmann.*

23. Often, such evidence would not be helpful. In this connection, Lord Wilberforce said in Prenn v Simmonds at 1384-1385:

> *"By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to."*

24. However, application of the exclusionary rule does not depend on the evidence in question being unhelpful. In Chartbrook, Lord Hoffmann noted in paragraph 41 that the rule "may well mean ... that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended", but he none the less affirmed it, explaining in paragraph 42:

> *"The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."*

25. Lord Hoffmann observed in Chartbrook at paragraph 38 that "[w]hereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute". Echoing that, in Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44, [2011] 1 AC 662 ("Oceanbulk") Lord Clarke drew a distinction between "objective facts and other statements made in the course of negotiations" and said that "objective facts communicated by one party to the other in the course of the negotiations" should be admissible whether or not the negotiations were conducted on a without prejudice basis: see paragraphs 38 and 40. In the same vein, Lord Phillips said in paragraph 48 that "[w]hen construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract".

53. There is no reason in the present case to depart from the usual rules. The factual matrix against which the Settlement Deed is to be construed is not in dispute. Mr Lyons's evidence as to what might have happened had the position of the Defendant

been considered in the course of negotiations is both speculative and highly subjective and may well be disputed by the KAH Parties. Therefore, in my judgment, evidence as to the negotiation of the Settlement Deed is inadmissible on the issue of construction and I therefore have no regard to it.

54. Mr McPhun made a second witness statement dated 14 December 2022 in response to that of Mr Lyons. However, save for setting out the background of the Previous Proceedings and the circumstances in which the Settlement Deed came to be agreed, each of Mr McPhun's witness statements and that of Mr Lyons go well beyond the scope of giving evidence and into the territory of making submissions. I have therefore had little regard for their evidence beyond those background matters summarised above which form the factual matrix against which the Settlement Deed is to be construed.

CONSTRUCTION OF THE SETTLEMENT DEED

55. The legal principles regarding interpretation of documents are well established and are plainly stated in the judgment of Lord Nicholls in BCCI v Ali [2002] 1 AC 251 at [26]:

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

56. I was also referred to paragraphs 19 – 21 of the judgment of Lord Justice Newey in *Schofield* and *Maranello Rosso Limited v Lohomij BV* [2022] EWCA Civ 167 at paragraphs 35 – 45 and 58.

57. The parties appear to agree that the issue of construction turns on the definition of "Claim" and whether the Defendant is an Affiliate who falls within the contractual release at clause 4 of the Settlement Deed.

58. Mr Liddell for the Defendant argues that the Defendant is an Affiliate because it was jointly retained by Oh-Nah and OFY in relation to the purchase of the Assembly Development. It is also an Affiliate because it was retained by Latifah in relation to the freehold purchase. An Affiliate includes "*any Agent of any Party*" and an Agent includes "*professional advisers of the Parties or any of them*….".

59. The use of the words "respective Affiliates" is said to be shorthand to describe each and every Affiliate of each and every other Party rather than specifically naming each of the Agents (including professional advisors) of each Party. The Defendant was therefore, on the one hand, an Affiliate of OFY and Latifah and, on the other hand, an Affiliate of Oh-Nah.

60. Mr Edwards on behalf of the Claimants deals with the Affiliate point on a different basis. He argues that the Settlement Deed operated as a compromise of disputes as between two camps, not internally as between members of that camp, and that clause 4 must be constructed in that context. He contends that the Previous Proceedings were between two camps comprising (1) Mr Bin Obaid and companies he controlled (the ANBO Parties); and (2) Dr Al-Hezaimi and the companies he controlled (the KAH Parties). What was being resolved by the Settlement Deed was a dispute between the two camps and not any internal dispute within either of the camps. The Settlement Deed operated on the basis of two camps by dividing the assets between each group of Parties as either ANBO Assets or KAH Assets rather determining how to allocate the assets within each group.

61. Secondly, Mr Edwards submits that even if his first point is wrong, where a person is an Affiliate of more than one Party, what each Party was doing was releasing claims against that person in his capacity as another Party's Affiliate, not in his capacity as that Party's own Affiliate. He says that this follows from the use of "respective" in clause 4 which is not surplusage but an effective provision meaning that each Party does not release Claims against its own Affiliates even if that person is also the Affiliate of another Party. He contends that if the Defendant's construction is correct, once a person is identified as an Affiliate of one Party all claims against it by any other Party are released. That would give rise to an acute conflict of interests between each group and its professional advisors since those advisors would be obtaining the benefit of a release and would have had to advise their respective clients to take independent legal advice before entering into the Settlement Deed. In aid of his construction, Mr Edwards argues that this was not done because no one thought that the Settlement Deed effected such a release.

62. Mr Liddell KC in response submits that both of Mr Edwards arguments run counter to the language of clause 4.1.1 of the Settlement Deed which provides that "*Each of the*

Parties agrees….that this Deed shall constitute full and final settlement of all Claims against each of the other Parties and their respective Affiliates." He contends that the Claimants' interpretation is an artificial concept, and the Settlement Agreement did not differentiate between Affiliates in the manner suggested by Mr Edwards. If the parties had intended only to settle claims between two 'camps' then clause 4.1.1 would have said so.

63. Mr Liddell KC contends that the use of the word "respective" in clauses 4.1.1 and 4.1.2 is arguably redundant or merely emphasises that each party is a separate entity. He says that it does not denote an intention of the Parties to draw a distinction between Affiliates based on which "hat" an Affiliate is wearing as a professional advisor.

64. In my judgment the Settlement Deed read as a whole only operates on the basis of two 'camps' in certain limited but specific respects. Whilst the Parties are grouped into the "ANBO Parties" and the "KAH Parties" (and they could equally have been referred to as the Claimants and the Defendants) this appears to have been primarily for the purpose of dividing up ownership of the Identified Assets between the two sides in the litigation and the mechanism for transferring the Identified Assets from one side to another to reflect the agreed allocation as set out in clause 3 of the Settlement Deed. There are also certain warranties given by the KAH Parties in clause 6 of the Settlement Deed (headed "Warranties and Authority") and clause 7 (headed "Taxation") which provides that the KAH parties will be responsible for the payment of taxes relating to the KAH Assets and the ANBO Parties will be responsible for the payment of taxes relating to the ANBO Assets.

65. However, there are various other provisions in the Settlement Deed where the distinction between the KAH Parties and the ANBO Parties is not made. It is of particular note that clause 6 of the Settlement Deed includes warranties given by "Each of the Parties….to each of the other Parties" (sub-clause 6.1) and by "Each Party…..to each other Party" (sub-clause 6.5) and also includes certain warranties given by the KAH Parties alone (sub-clauses 6.3 and 6.4).

66. It appears to me that the use of the definitions "KAH Parties" and "ANBO Parties" in some respects but not in others signifies that there is a distinction to be made as to

when the Parties are to be grouped together and treated as two camps and when they are each to be treated individually as a Party or one of the Parties.

67. It must follow that since the Parties are not grouped into the "KAH Parties" and "ANBO Parties" in clause 4, the release operates Party by Party rather than by a group of Parties. I therefore reject Mr Edward's argument that the Settlement Deed operates as a compromise between two camps and that clause 4 is to be construed on that basis.

68. In my judgment, as a starting point, clause 4 has the effect of releasing all Claims that a Party has against each of the other Parties regardless of which 'camp' a Party is in. For example, Oh-Na released claims against Mr Bin Obaid, Taqa, Dr Al-Hezaimi, OFY and Latifah, as well as releasing claims against the Affiliates of each of them. This may well mean that the parties to the Settlement Deed are bound by terms which they might not have intended (or, more likely, did not consider) but, as Lord Hoffman stated at paragraph 41 in *Chartbrook Limited v Persimmon Homes Limited and others* [2009] UKHL 38:

> "*....a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining advice and adjudicating disputes*".

69. I turn now to consider the position of Affiliates. On this point I accept Mr Edwards's submission that the use of the word "respective" in clause 4 is not surplusage. The way in which meaning is given to the word is to align each Party specifically with its Affiliates. It is used in sub-clause 4.1 to identify who is giving the release and in sub-clause 4.1.1. to identify who is being released. For example. Party A and Party A's Affiliates agree that the Deed constitutes a full and final settlement of all Claims against Parties B, C, D, E and F and against the Affiliates of Parties B, C, D, E and F. The fact that Party A's Affiliates may include Parties B and C (as in the case of Mr Bin Obaid, Oh-Na and Taqa) or that an Affiliate of Party A might also be an Affiliate of other Parties (as in the case of the Defendant) does not affect the efficacy and operation of clause 4.

70. In my judgment, the use of the word "respective" goes no further than I have outlined above. It does not operate so as to limit the scope of the release of a particular Affiliate to claims against that person in his capacity as another Party's Affiliate as Mr

Edwards contends. That would require a departure from the natural and ordinary meaning of clause 4 that cannot be justified in the circumstances of this case.

71. In *Schofield* the appellant advanced a similar argument to that advanced by Mr Edwards which was rejected by the Court of Appeal at paragraph 45 per Lewey LJ:

> "*Yet more linguistic objections to Mr Davies' interpretation of the Settlement Agreement arise in relation to his submission that REL, Properties and Askwith represent a single "Party" or that a release by one of them of an "Affiliate" of all or two of them was limited to the role of the "Affiliate" in relation to the other(s) of them. "Party" and "Parties" are defined to refer to "a party and the parties to this Agreement", who, on the face of it, are the four companies listed at the beginning of the Settlement Agreement, not Barclays on the one hand and REL, Properties and Askwith together on the other. Nor is there any evident warrant in the terms of the Settlement Agreement for concluding that a release by, say, Properties of a person who is an "Affiliate" of both Askwith and Properties was confined to the person's activities for Askwith, and it is very hard to see how that could work in practice.*"

72. In the same way a release by Oh-Na of the Defendant who is an Affiliate of each of OFY, Latifah and Oh-Na is not confined to the Defendant's activities for OFY and Latifah. As Lewey LJ said: "*it is very hard to see how that could work in practice*" where the Defendant was acting for each of them in connection with the same property transaction (the acquisition of the Assembly Development).

73. I do not accept Mr Edwards's submission that, on the Defendant's construction, the Settlement Agreement operates to release any claim that a party to the Previous Proceedings has against their own solicitors and counsel who acted in those proceedings. He says that would have given rise to a most acute conflict of interest between each party and its professional advisors that would have required each party to take independent legal advice. Such advice was not taken because none of the parties intended the Settlement Agreement to effect that kind of release. I agree with Mr Liddell KC that, in that hypothetical situation, a firm advising in connection with the Previous Proceedings and, ultimately, the Settlement Deed would not benefit from the release on policy grounds and/or because of the common law principle that a party may not rely on their own wrong to secure a benefit. I can however see that omitting to explicitly carve out certain Affiliates from the scope of a release (as has happened in the present case) could give rise to arguments of that nature and may also have consequences which, on the Claimants' case, may be unintended.

74. For the reasons I have given above, in my judgment the Settlement Deed releases the Defendant (as an Affiliate of OFY, Latifah and also Oh-Na) from Claims brought by any of the ANBO Parties. This interpretation also has the effect of avoiding "ricochet" claims which might be brought by the Defendant against one or more of the KAH Parties if the claim against the Defendant is allowed to proceed. This would open up the KAH Parties to further liability arising out of or in connection with the Previous Proceedings which would undermine the full and final settlement of all Claims under the Settlement Deed.

75. Finally, I must consider whether the present claim is a Claim within the meaning of the Settlement Deed. This was an issue that was previously considered by Ms Wicks KC in connection with the Previous Proceedings who said:

> "*The right question is whether any particular claim is a 'claim or cause of action…..arising out of or in connection with' the Main Action. It is necessary first of all to identify the particular cause of action which is being relied on, and then to consider whether that cause of action falls within the definition*".

76. The causes of action asserted in the Particulars of Claim are that the Defendant breached its contractual and tortious duties to exercise the skill and care to be expected of a reasonably competent firm of solicitors and further breaches of fiduciary duty. Those breaches arose primarily in the context of the acquisition of the Assembly Development.

77. As Mr Edwards acknowledges in his submissions, the facts relating to the underlying fraud relied on in the present proceedings were also in issue in the Previous Proceedings. Mr Edwards however submits that the causes of action do not arise because of anything done or not done in the Previous Proceedings; they arise because of breaches of duty committed and causative of loss well before the Previous Proceedings began. Mr Edwards also submits that the present claim is not connected with the Previous Proceedings because the commonality of facts is not enough, and the causes of action asserted are of an entirely different nature.

78. Mr Liddell KC submits that the central plank of the Previous Proceedings was that the Claimants had been defrauded by Dr Al-Hezaimi and that the Assembly Development was bought with monies belonging to the Claimants and should have been registered in the name of Oh-Na rather than OFY and Latifah. The central plank of the current

claim is alleged breaches of duty on the part of the Defendant that resulted in the Assembly Development wrongly being registered in the names of OFY and Latifah. He also points to paragraph 43 of the Particulars of Claim which makes reference to clause 3.1 of the Settlement Deed by which the parties agreed that the Claimants were the beneficial owners of the Assembly Development. The loss claimed in the present proceedings are said at paragraph 41 of the Particulars to comprise the "costs of investigating the fraud perpetrated by Dr Al-Hezaimi, and the legal and professional fees [the Claimants have] paid in relation to the Previous Proceedings. Such costs are said at paragraph 52 to include "*the solicitors' fees and disbursements incurred in the prosecution of the Previous Proceedings in the sum of approximately US$4.85m*" as well as expenses incurred in that connection.

79. In my judgment the present claim clearly arises out of or in connection with the Previous Proceedings. The claim is based upon the same set of facts which resulted in the Assembly Development being bought with the Claimants' money in the names of OFY and Latifah, rather than in Oh-Na's name, and is therefore immutably connected to the Previous Proceedings. That connection is clearly shown in the claim for $4.85m incurred in the prosecution of the Previous Proceedings and associated costs and expenses. It is notable that the Discontinuance Order annexed at Schedule 3 of the Settlement Deed provides for the parties to discontinue the claim and the counterclaim in the Previous Proceedings "*in each case with no order as to costs*". In other words, it was part of the overall settlement that the Claimants would forego their costs in the Previous Proceedings. Those are the same costs now being claimed in the present claim and they must arise out of and in connection with the Previous Proceedings. It would, in my judgment, be plainly wrong to allow the Claimants to proceed with a claim for such costs in the present case because it would open up the possibility of the Defendant making a contribution claim against the KAH Parties for the very sums which, under the terms of the Settlement Deed, they were released from liability to pay.

80. For the reasons set out above, I find that the Settlement Deed operated to release the Defendant, as an Affiliate of OFY and Latifah (as well as Oh-Na), from the present claim which arises out of and in connection with the Previous Claim. The claim shall

therefore be struck out pursuant to CPR Rule 3.4(2)(a) on the basis that the Particulars of Claim disclose no reasonable ground for bringing the claim.

81. Alternatively, under CPR Rule 24.2 there shall be summary judgment against the Claimants on the whole of the claim on the basis that the Claimants have no real prospect of succeeding on the claim and there is no other compelling reason what the claim should be disposed of at trial. In reaching this decision I am mindful of the guidance set out at paragraph 15(vii) of the judgment of Lewison J (as he them was) in *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) in which he stated:

> "*On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up with would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*"

82. In my judgment this is precisely the sort of case that Lewison J was referring and that I should grasp the nettle and decide it. It is a point of construction, and I am satisfied that all of the background evidence has been put before me and the parties have had an adequate opportunity to address it in argument. Indeed, there is no substantive disagreement between the parties on the background facts against which the Settlement Deed is to be interpreted and I cannot see that there is any realistic prospect of further evidence emerging that would have a bearing of the question of construction. Even if there was such a prospect, that is not of itself a good reason to allow the case to go to trial. Therefore, if it is necessary for me to do so, I give judgment in favour of the Defendant on the whole of the claim.