CONSTRUCTION AND ENFORCEABILITY OF SETTLEMENT AGREEMENTS

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I. INTRODUCTION

The paradigm problem: emergence of a new claim after a settlement agreement has been concluded.

Two key questions:

(1) Does the agreement on its true construction cover (and thereby preclude) the new claim?

(2) Assuming the new claim is covered by the agreement, is there any basis for setting aside or otherwise circumventing the agreement?

II. CONSTRUCTION

The leading case is ***BCCI v Ali*** [2000] ICR 1410 (CA); [2002] 1 AC 251 (HL).

The decision in *BCCI –v- ALI*

Claims by former employees against BCCI for stigma damages (which were at the time of the relevant settlement agreements unknown to the law) were not compromised by releases given by the employees in the following terms:

> "*The [employee] agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the [employee] has or may have or has made or could make in or to the industrial tribunal, except the applicant's rights under [the bank's] pension scheme*."

Note Lord Bingham's cautionary principle (at [10] and [17]):

> "*[10] a long and in my view salutary line of authority shows that, in the absence of clear language,* ***the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware***"
>
> *"[17] I think these authorities justify the proposition advanced in paragraph 10 above and provide* ***not a rule of law but a cautionary principle*** *which should inform the approach of the court to the construction of an instrument such as this. I accept, as my noble and learned friend, Lord Hoffmann, forcefully points out, that authorities must be read in the context of their peculiar facts. But the judges I have quoted expressed themselves in terms more general than was necessary for decision of the instant case, and* ***I share their reluctance to infer that a party intended to give up something which neither he, nor the other party, knew or could know that he had***."

Subsequent Application

As to subsequent application of Lord Bingham's 'cautionary principle', compare the following cases:

Kazeminy v Siddiqi [2012] EWCA Civ 416:

The settlement agreement compromised:

> "*all and any claims … that the Claimants have or may have against the Defendants, whether past, present or future and whether or not known or contemplated at the date of this Settlement Agreement arising under or in any way connected with … any dealings between the parties concerning loans to or investments in [the commercial venture] by the Claimants or by any person whatsoever*".

This clause did not encompass claims [connected with dealings between the parties concerning loans to the Claimants by another person] which were acquired by one party by assignment after the settlement. The context of the agreement showed that the parties were directing their minds solely to claims arising between them as original parties.

Khanty-Mansiysk Recoveries Limited v Forsters LLP [2016] EWHC 583 (Comm), Eder J:

A settlement agreement was made in December 2012 to compromise a claim by a firm of solicitors (Forsters LLP) against a company (Khanty-Mansiysk) for payment of unpaid fees (amounting to £75,000) in respect of work done by the solicitors for the company in connection with the company's acquisition of a Russian oil exploration entity (Yugra). At the time of the settlement agreement, the only dispute between the parties was whether the time billed by the solicitors had all been spent on work for the company (as opposed to work for another participant in the project).

The settlement agreement compromised:

> "*any claim … whether known or unknown, suspected or unsuspected, however and whenever arising … whether or not such claims are within the contemplation of the Parties at the time of this Agreement arising out of or in connection with the [settled action] or the [solicitors' invoice for work allegedly done]*".

This agreement precluded the company from suing the solicitors for damages for £70 million for negligence and breach of contract when the company subsequently discovered that it had never effectively acquired the shares in Yugra as a matter of Russian law.

Eder J (at [39]): the wide words of the settlement agreement could not be cut down by Lord Bingham's cautionary principle. Whilst the claim which materialised was not known or suspected at the time of the Settlement Agreement, "*the objective bystander could not and would not have said that a claim for damages for breach of contract and/or negligence [against the solicitors] was impossible*". This was therefore "*not a case like BCCI where the claim was, in effect, an 'unknown unknown'*".

Other cases declining to apply the cautionary principle so as to allow later claims to be pursued in the face of a settlement agreement include: ***Priory Caring Services v Capita Property Services*** [2010] EWCA Civ 226; ***Marsden v Barclays Bank*** [2016] EWHC 1601 (QB); and ***Teva Pharma v Astrazeneca*** [2017] EWCA Civ 2135.

Claims for Fraud

The principles applicable to construction of exclusion clauses apply by analogy to settlement agreements: ***MAN v Freightliner*** [2005] EWHC 2347 (Comm) and ***Satyam Computer Services v Upaid Systems*** [2008] 2 CLC 864.

The key principle (in this context) is that fraud is a thing apart: if a party wishes to exclude liability for fraud, that intention must be expressed in clear and unmistakeable terms on the face of the contract. General words, however comprehensive, will not serve: the language used must be such as will alert a commercial party to the extraordinary bargain he is invited to make (***HIH v Chase Manhattan*** [2003] 2 Lloyd's Rep 61).

In each of ***MAN v Freightliner*** and ***Satyam Computer Services v Upaid Systems***, the release was (despite its wide wording) construed as not encompassing claims for fraud.[1]

MAN v Freightliner at [202]:

> "*all current, past and future claims including claims for interest and/or costs that MAN may have, or may otherwise have had, against Western Star in connection with (whether directly or indirectly) the indemnities, the covenants, representations and warranties of Western Star Trucks Holdings Ltd in the Share Purchase Agreement and any Ancillary Agreement will be fully and finally settled, waived and discharged*."

Satyam Computer Services v Upaid Systems at [23]:

> "*each of the Upaid Parties on the one hand and the Satyam Parties on the other hand, hereby irrevocably and unconditionally release, acquit, exonerate and forever discharge the other and each of their respective past and present heirs, ... successors, affiliates, officers, directors, shareholders, employees, attorneys, agents and representatives from any and all debts, liabilities, claims, obligations, ... actions, causes of action, judgments, damages, expenses and demands of any sort, either in law or equity, that they had, now have, or hereafter can, shall or may have, from the beginning of time until the execution of this Agreement or hereafter*"

However, compare ***Tchenguiz v Grant Thornton UK LLP*** [2016] EWHC 865 (Comm); [2016] EWHC 3727 (Comm) and ***Marsden v Barclays Bank*** [2016] EWHC 1601 (QB): in each of these cases, the settlement agreement was construed as encompassing claims for fraud even though it did not expressly provide for the release of fraud claims. In both cases, allegations of deliberate wrongdoing or deceit were an integral part of the background to the respective settlement agreement.

III. UNCONSCIONABILITY

A principle of unconscionability, derived from ***BCCI v Ali***, applies to settlement agreements. However, the precise ambit and scope of this principle is unclear.

In ***BCCI v Ali***, the Court of Appeal held that although claims for stigma damages were within the scope of the releases, it would be unconscionable for BCCI to rely upon the releases where it knew, and knew that the employees did not know, of its corruption and dishonesty.

See Chadwick LJ at [81]:

> "*I would hold that, where (i) the releasee, say A, knows of facts which give rise to a claim (whether or not he believes that claim to be well founded as a matter of law), (ii) A deliberately conceals those facts from the releasor, say B, in circumstances where A knows or believes that B cannot discover them for himself, and (iii) B does not know of those facts, then A cannot rely*

[1] See also ***Hyundai Marine v Houlder Insurance*** [2015] EWHC 378 (Comm) (fraud claim not precluded by settlement agreement).

on a general release from B as a defence to a claim based on those facts, notwithstanding that as a matter of construction the words of the release would include all unidentified claims. A cannot rely on the general release because, in the circumstances described, it would be unconscionable for him to do so."

And Sir Richard Scott V-C at [5]:

> "*the question is whether a comparable approach is applicable here*" – to that taken in equitable estoppel cases, where the question is whether "*in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared*".

In the House of Lords, see Lord Nicholls at [32]:

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

And Lord Hoffmann at [70] – [71]:

> "*[70] In principle, therefore, I agree ... with Chadwick LJ, that* ***a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim****. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so.* ***On the other hand, if the context shows that the parties intended a general release for good consideration of rights unknown to both of them, I can see nothing unfair in such a transaction***."
>
> "*[71] It follows that in my opinion the principle that a party to a general release cannot take advantage of ... what would ordinarily be regarded as sharp practice, is sufficient to deal with any unfairness which may be caused by such releases. There is no need to try to fill a gap by giving them an artificial construction*."

As to subsequent application of this principle, see the following cases:

Satyam v Upaid [2008] 2 CLC 864:

Lawrence Collins LJ at [87]: An allegation of sharp practice is a very serious one which requires to be specifically pleaded and proved; inappropriate to determine such an allegation on assumed facts.

Tchenguiz v Grant Thornton UK LLP [2016] EWHC 865 (Comm); [2016] EWHC 3727 (Comm):

See Knowles J at [57]-[58]:

> "*Lord Nicholls and Lord Hoffmann were referring to general releases … because that was where the law might have to recognise a limit, effectively to freedom of contract. Lord Hoffmann expressly did not propose any wider principle than one that engaged where there was a release in general terms. … The present case is one of a specific release of claims. … Each party, with the benefit of legal advice, took the risk that they might be giving up a claim that another party knew of but they did not.* ***The law allows that freedom where the release is not a general release****. The bargain that is the Settlement Agreement stands in accordance with its terms*."

Brazier v News Group Newspapers [2015] EWHC 125 (Ch):

See Mann J at [98]:

> "*This is therefore not a case of a claimant knowing nothing of a claim, and knowing nothing of a concealment of it, and requiring equitable relief from the consequences of what would otherwise be a compromise. This is a case of a claimant knowing he had a claim, being uncertain of the extent of the claim, believing (and averring) that there had been concealment (which assumes knowledge of the claim on the part of the defendant) and nonetheless compromising the claims. While the concealment alleged can itself be branded as sharp practice (or worse)* ***it was not sharp practice in relation to the compromise*** *because the claimant was not ignorant of the concealment. In effect, it was all part of the compromise*."

Yukos Hydrocarbons Investments Limited v Cleanthis Georgiades [2020] EWHC 173 (Comm):

The unconscionability principle was not engaged where the agreement was made for valuable consideration "*between sophisticated parties, who were free to reach a commercial agreement as to the allocation of risk and [was] drafted with the benefit of legal advice*" (at [226]).

Further (at [250]):

> "*The factual circumstances in which the principle referred to above in BCCI v Ali will operate are not spelt out in the dicta, bearing in mind that this was not the principle which was relied upon in reaching the decision in that case and that the remarks were obiter. In my view for the principle to apply, there would have to be a finding that when entering into the release the party being released has deliberately withheld details of the existence of the claim. This I infer is what is meant when the term "suppressio" is used. In my view on the evidence before the court, the evidence does not establish that there was such a deliberate withholding by the defendants*."

The principle was also held to be inapplicable in cases concerning the settlement of interest rate swap claims: see ***Marshall v Barclays Bank*** [2015] EWHC 2000 (QB) and ***Elite Property Holdings Ltd v Barclays Bank*** [2016] EWHC 3294 (QB).

IV. SETTING ASIDE/AVOIDANCE OF A SETTLEMENT AGREEMENT

(A) Misrepresentation

Collateral misrepresentations may impeach a settlement agreement: ***Gilbert v Endean*** (1878) 9 Ch D 259 (CA); *Foskett on Compromise*, 8th edn, at [4-37] and [4-42] to [4-50].

Misrepresentations in the averments of fact made by a party in advancing its claim (e.g. in its statements of case or witness statements) may also found a claim for misrepresentation to impeach a settlement agreement: ***Zurich Insurance v Hayward*** [2015] EWCA Civ 327 (CA); [2017] AC 142 (SC).

Zurich Insurance v Hayward:

A settlement agreement could be set aside for fraudulent misrepresentations made in the claimant's statements of case, witness statements and accounts given to medical experts. The fact that the defendant did not believe those misrepresentations did not preclude it bringing a misrepresentation claim to set aside the agreement; the settlement had nevertheless been induced by the misrepresentations

in that they had influenced the defendant's mind in deciding whether or not to settle and if so, in what amount.

Lord Clarke at [22]:

> "*Zurich was suspicious of Mr Hayward but no very clear allegations were, or could be, made. However, it is not in dispute that Zurich did as much as it reasonably could to investigate the position before the settlement. The evidence was not as good from its point of view as it might have hoped but the fact is that Zurich did not know the extent of Mr Hayward's misrepresentations. The case was settled at a time when the only difference between the experts was the likely duration of future loss. The figure agreed was about half way between the respective opinions of the experts. It was not until the advent of [the new evidence] that Zurich realised the true position. Hence, as the judge expressly found, the amount of the settlement was very much greater than it would have been but for the fraudulent misrepresentations made by Mr Hayward. The small amount ultimately awarded by the judge, which is not challenged, shows the extent of the dishonest nature of the claim. I am not persuaded that the importance of encouraging settlement, which I entirely agree is considerable, is sufficient to allow Mr Hayward to retain moneys which he only obtained by fraud*."

Lord Toulson at [71]:

> "*Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it. He achieved his dishonest purpose and thereby induced them to act to their detriment by paying almost ten times more than they would have paid but for his dishonesty. It does not lie in his mouth in those circumstances to say that they should have taken the case to trial, and it would not accord with justice or public policy for the law to put the insurers in a worse position as regards setting aside the settlement than they would have been in, if the case had proceeded to trial and had been decided in accordance with the corrupted medical evidence as it then was*."

However, the SC did not analyse in detail the contractual allocation of risk in the settlement agreement and the extent to which that impacted upon the defendant's ability to impeach the settlement for fraudulent misrepresentation arising out of the very averments underlying the claimant's case.

This explains the divergence in view between the CA and the SC. See in the CA:

Underhill LJ at [16] – [20]:

> "*[16]. … In deciding to settle the defendant takes the risk that those statements are in fact untrue (or, to put it more accurately, would not be proved at trial) and pays a sum commensurate with his assessment of that risk. He could have taken the case to trial in order to disprove the statements in question; but by settling he agrees to forgo that opportunity and he cannot reserve the right to come back later for another attempt. If it were otherwise no settlement would be final.*
>
> *[17] … the defendant, by entering into the settlement, necessarily implicitly agrees not thereafter to seek to have it set aside on the basis that the statements made in support of the claim were false; another way of putting that would be that he agrees not to rely on them for the purpose of deciding whether to settle. …*
>
> *[19] … If it is in any case sufficiently apparent that the defendant intended to settle notwithstanding the possibility that the claim was fraudulently advanced, either generally or in*

some particular respect – the paradigm being where he has previously so asserted – there can be no reason in principle why he should not be held to his agreement even if the fraud subsequently becomes demonstrable. … It cannot be right that a defendant who has made an allegation of fraud against the claimant but decided in the end not to have it tested in the court should be allowed, whenever he chooses, to revive that allegation as a basis for setting aside the settlement. It may stick in the throat that the claimant can retain the reward of his dishonesty, but the defendant will have made the deal with his eyes open to the possibility of fraud, and there is an important public interest in the finality of settlements.

[20] … it is in my view necessarily implicit in the settlement agreement that the employers, and Zurich, gave up the right to have it set aside if they were subsequently in a position to prove the identical dishonesty already alleged."

Briggs LJ at [32] – [33]:

"*[32] Nor is there anything contrary to conscience in holding a person to a contract made in order to deal with the risk that a statement which he believes to be untrue and even fraudulent may nonetheless persuade someone else, even a judge. The contract is made with his eyes open about the probable untruth of the statement. His contract is a form of risk management, and there is no reason why he should be enabled to walk away from it merely because that risk later diminishes or disappears.*

[33]. … If the principle contended for were correct, almost any litigant could say that he was influenced to settle a case for more than it was worth because of a fear that the judge might believe his opponent, even though he did not. To be able to treat as an actionable misrepresentation the opponent's statement of his case merely because of such an everyday apprehension would expose almost any settlement to subsequent attack if fresh evidence became available. … The public policy which encourages settlement of litigation would be gravely undermined if, in effect, dissatisfaction on either side led, with or without later forensic research, to the settlement being impugned on the ground that the opponent's case contained a misrepresentation which, without being believed, influenced the terms of settlement."

This decision has been criticised: see e.g. Davies and Day, *A mistaken turn in the law of misrepresentation* [2019] LMCLQ 390.

(B) Duress

In addition, it may be possible to impeach a settlement agreement on grounds of economic duress: ***Ting v Borelli*** Supreme Court of Bermuda, 5.12.2007; Bermuda Court of Appeal, 28.11.2008; [2010] UKPC 21; 79 WIR 204 (PC)

***Ting v Borelli*:**

Mr Ting was the former Chairman and CEO of Akai Holdings, whose collapse was the largest in Hong Kong history.

The settlement agreement concluded on 30 December 2002 between Akai's Liquidators, Blossom, Costner and Mr Ting provided that the Liquidators:

"*irrevocably covenant not to sue or otherwise pursue any claims against Mr Ting, Blossom or Costner for any and all past, present and future rights, claims, demands, debts, causes of action and suits at law or in equity of any kind or nature whatsoever whether presently known or*

unknown howsoever or wheresoever (including any rights and claims in but not limited to Hong Kong, Bermuda, PRC and any other competent jurisdiction) arising out of or in connection with Akai ... and/or [its] Liquidators."

The Liquidators subsequently sought to bring claims against Mr Ting for breach of fiduciary duty and embezzlement. They contended that (i) the claims were not covered by the settlement agreement, as a matter of construction; (ii) it would be unconscionable for Mr Ting to rely upon the settlement agreement to preclude the claims; and (iii) the settlement agreement was liable to be set aside for fraudulent non-disclosure by Mr Ting.

Construction Argument:

The Bermuda CA (overturning the Chief Justice) held that the settlement agreement precluded the Liquidators' claims. See Auld LJ at [43] - [45]:

> *"The facts known to the Liquidators would or should have alerted all but the most inexperienced, incompetent and naïve liquidators practising at this commercial level that there was a real likelihood that Mr Ting had been concerned in the fraudulent trading of Akai to his own great advantage. … given what the Liquidators knew of Mr Ting's behaviour, any reasonable, experienced and competent body of liquidators acting at the time of the settlement agreement with the benefit of legal advice would have known or at least contemplated or suspected that what had been revealed thus far was merely the tip of an ice-berg."*

Unconscionability Argument:

The Bermuda CA (overturning the Chief Justice) held that it would not be unconscionable for Mr Ting to rely upon the settlement agreement. See Auld LJ at [74]: there was no scope for application of Lord Hoffman's principle in circumstances where "*the fact that Mr Ting was possibly concealing from the Liquidators grounds for claims against him was built into the Agreement*".

Fraudulent Non-Disclosure Argument:

There is no general obligation of disclosure in the context of settlement agreements (***Turner v Green*** [1895] 2 Ch D 205; ***Wales v Wadham*** [1977] 1 WLR 199). However, a fiduciary is obliged to disclose his own wrongdoing to his principal: ***Item Software v Fassihi*** [2005] ICR 450. This duty can only be released with the fully informed consent of his principal, which requires the fiduciary to make full and frank disclosure of all material facts to the principal (*Snell's Equity*, para 7-015).

It is an unresolved question whether a fiduciary is obliged to disclose all misdeeds as a pre-requisite to securing a binding compromise agreement with his principal. In ***Horcal v Gatland*** [1984] IRLR 288, Goff LJ said at 290:

> *"[the company's] argument, that a director is under a duty to disclose any breach of duty on his part before an agreement of the kind in the present case was entered into, could lead to the extravagant consequence that a director might have to make what [the director's counsel] called a 'confession' as a pre-requisite of such an agreement*".

This passage was cited (without confirming its correctness) by Arden LJ in ***Item Software v Fassihi*** at [57]:

"*This observation … expresses the philosophy that the law should not impose a duty of disclosure where that would be contrary to the expectations of the parties. It would be difficult to disagree with the logic and good sense of this approach*."

See also ***Re A Company*** [2004] EWHC 638 (Ch), David Donaldson QC (sitting as a Deputy Judge of the High Court):

"*when a director is negotiating a severance package he is known and accepted to be acting uniquely in his own interest, a position incompatible with any fiduciary duty*".

In ***Ting v Borelli***, the Bermuda CA (overturning the Chief Justice) held that Mr Ting owed no duty of disclosure when negotiating the settlement agreement. See Auld LJ at [61] – [62]:

"[61] … *Any duty of disclosure of which Mr Ting could be in breach could not have arisen if my construction of the Agreement stands, namely that the objective intention – the mutual contemplation – of the parties was that, in exchange for Mr Ting withdrawing his objection to the Scheme of Arrangement, the Liquidators would give up unknown claims against him for fraudulent dealing and misappropriation of Akai's assets of whatever nature and of whatever magnitude. In such an end-game, the words in clause 3 of the Settlement Agreement, "any and all past present and future claims … of any kind or nature whatsoever whether presently known or unknown howsoever or wheresoever", cannot or should not reasonably have been understood by the parties as leaving the Liquidators free to ignore that undertaking on later discovering undisclosed causes of action*."

"[62] *In my view, if parties enter into a compromise agreement under which A, as a matter of construction, effectively releases B from potential "any and all claims of any kind or nature whatsoever" unknown to A in exchange for valuable consideration from B, there is no legal room for A to avoid that contract by claiming a breach by B of a duty of disclosure as to any such claim*."

<u>*On appeal to the Privy Council:*</u>

On the Liquidators' appeal to the PC, the PC held that the settlement agreement was voidable for economic duress. See Lord Saville, giving the judgment of the Board, at [34]-[35]:

"*Duress is the obtaining of agreement or consent by illegitimate means. … The Board is of the view that in the present case the Liquidators entered into the Settlement agreement as the result of the illegitimate means employed by [Mr Ting], namely by opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the Liquidators from investigating his conduct of the affairs of Akai Holdings Ltd or making claims against him arising out of that conduct. As the Board has already observed, by adopting these means [Mr Ting] left the Liquidators with no reasonable or practical alternative but to enter into the Settlement Agreement*."

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