Neutral Citation Number: [2016] EWHC 3727 (Comm)

Case No: CL-2014-001023 and CL-2015-000610

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2016

**Before** :

**MR JUSTICE KNOWLES CBE**

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**Between :**

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| **(1)Vincent Aziz Tchenguiz** | **Claimants** |
| **(2) Rawlinson and Hunter Trustees S.A.** | |
| **(3) Vincos Limited** | |
| **(4) Euro Investments Overseas Inc** | |
| **- and -** | |
| **(1) Grant Thornton UK LLP** | **Defendants** |
| **(2) Stephen John Akers** | |
| **(3) Hossein Hamedani** | |

**And Between:**

| | |
|---|---|
| **(1) Robert Tchenguiz** | **Claimants** |
| **(2) Rawlinson and Hunter Trustees S.A.** | |
| **-and-** | |
| **(1) Grant Thornton UK LLP** | **Defendants** |
| **(2) Stephen John Akers** | |
| **(3) Hossein Hamedani** | |
| **(5) Jóhannes Rúnar Jóhannsson** | |

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**Christopher Hancock QC, Romie Tager QC, Jonathan Crystal, Charlotte Tan and Katharine Stock** (instructed by **McGuire Woods London LLP**) for the **VT Claimants**
**Alain Choo Choy QC and John Robb** (instructed by **Stephenson Harwood LLP**) for the **RT Claimants**
**Adrian Beltrami QC and James MacDonald** (instructed by **Simmons & Simmons LLP**) for the **First, Second and Third Defendants in both sets of proceedings**
**Robert Miles QC, Jeremy Goldring QC, Stephen Robins and Tom Gentleman** (instructed by **Travers Smith LLP**) for the **Fifth Defendant in the second set of proceedings**

Hearing dates: 5, 6 and 7 October 2016

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# Judgment Approved by the court

## Mr Justice Knowles:

## Introduction

1. Mr Vincent Tchenguiz and Mr Robert Tchenguiz are brothers. They are businessmen and investors. They have brought two separate sets of proceedings ("the VT Proceedings" and "the RT Proceedings").

2. Rawlinson and Hunter Trustees S.A., the Second Claimant in both sets of proceedings, is trustee of Tchenguiz family trusts. The Third Claimant in the VT Proceedings ("CBG") is an adviser to one of those trusts, the Tchenguiz Family Trust ("the Trust"). The Fourth Claimant and the companies identified in the Schedule to the Claim Form in the VT Proceedings are described as property and investment companies ultimately owned by the Trust. The terms "VT Claimants" and "RT Claimants" have been used by all parties to describe the Claimants in the VT Proceedings and the RT Proceedings respectively.

3. Each of the VT Proceedings and the RT Proceedings involve claims against Grant Thornton UK LLP ("Grant Thornton") and two partners of that firm, Mr Akers and Mr Hamedani (together with Grant Thornton, "the GT Defendants"). These claims are alleged to arise from what is alleged to have been their involvement in an investigation ("the Investigation") by the Serious Fraud Office ("SFO") into Mr Vincent Tchenguiz and Mr Robert Tchenguiz and others.

4. In the course of the Investigation, in March 2011 a search warrant was executed (including at CBG's offices) and arrests of Mr Vincent Tchenguiz and Mr Robert Tchenguiz were made. The Investigation was ended in 2012, without any allegation of criminal conduct or other wrongdoing being continued or advanced against Mr Vincent Tchenguiz or Mr Robert Tchenguiz.

5. The particular claims or causes of action the VT Claimants or the RT Claimants contend they have are in conspiracy and for malicious procurement and execution of the search warrants and malicious prosecution. Damages are claimed by way of remedy, including aggravated and exemplary damages.

6. A fuller summary of the dispute, albeit as directed to one Defendant (the then Fifth Defendant) in particular and the VT Proceedings in particular, is available at [2016] EWHC 865 (Comm) [6]-[23]. In their written argument on this hearing, the VT Claimants summarise their case in the VT Proceedings as follows:

> "The [VT] Claimants maintain that they are the victims of a serious and far-reaching conspiracy, whereby the GT Defendants, together with the Fifth Defendant … made numerous false allegations of criminal misconduct against VT and his family's trust's companies … to the SFO, instigating a major investigation into their affairs. This, in turn, led to VT's arrest …, searches of his home and business premises and seizure of his personal and business property …. One of the objects of the conspiracy was to force the [VT] Claimants into a disadvantageous settlement of various proceedings pending in this Court and in Iceland. The Defendants succeeded in that

> objective. Given the significant personal and commercial pressure brought to bear upon them, by an agreement dated 17 September 2011 (the "Settlement Agreement"), the [VT] Claimants (other than CBG) agreed to release certain claims."

7. With the exception of CBG the VT Claimants (but not the RT Claimants) are parties to an agreement entitled "Settlement Agreement" with Kaupthing Bank hf ("Kaupthing") which contains various releases as part of an overall compromise. The Settlement Agreement was one of a number of agreements dated 17 September 2011.

8. Kaupthing was at all material times in an insolvency proceeding in Iceland. Mr Jóhannsson, the Fifth Defendant in the RT Proceedings, is also sued in relation to what is alleged to have been his involvement in the Investigation. He was appointed to the Resolution Committee and then to the Winding Up Committee of Kaupthing.

9. Mr Jóhannsson was a Defendant to the VT Proceedings too until (as summarised below) he applied for summary judgment ("the First Application"). He was successful in that application for the reasons given in my judgment dated 20 April 2016 ("the First Judgment"). Like the GT Defendants, Mr Jóhannsson was not a party to the Settlement Agreement but relies on the Contracts (Rights of Third Parties) Act 1999 to enforce terms of the Settlement Agreement as a third party.

10. On the present hearing, the GT Defendants seek summary judgment in the VT Proceedings, and the GT Defendants and Mr Jóhannsson seek summary judgment in relation to one of the claims (known as the Somerfield Proceeds Claim) in the RT Proceedings.

## Approach to summary judgment

11. The Court may only proceed by way of summary judgment where it is entitled to do so in accordance with the applicable rules and established principles. The rules and principles were not materially in dispute.

12. I mention five points that have particular bearing in this case.

13. The first is a point that I expressed in the First Judgment. If the VT Claimants are not entitled to advance the claims they do in the VT Proceedings because they have agreed not to, then if the matter proceeds to trial one of the things that it was agreed should not happen will have happened, and that damage will have been done. It is important that the Court is prepared to deal with this aspect at this stage if it properly can.

14. The second point is that the summary judgment procedure is not a form of mini trial. However that does not mean the Court should refuse to scrutinise closely the question whether a claim should not have been made because it demonstrably has no foundation.

15. The third point is that I recognise that the allegations made are of a very serious nature. That circumstance highlights the importance of declining summary judgment where the test for summary judgment is not met, and of granting summary judgment where the test is met.

16. The fourth point is that I have borne closely in mind the fact that some of the argument arises in areas of law that are (in some respects at least) still developing. In these circumstances it has been important to look closely to see whether the respects in which the law is developing have an ultimate bearing on the case.

17. The fifth point is that I have also borne in mind throughout that the VT Claimants and the RT Claimants contend that there are material documents disclosed by the SFO that, because of certain prohibitions, they cannot at present rely on but which they may wish to rely on at a trial.

## The Settlement Agreement

18. The Settlement Agreement contained these elements in summary (in this paragraph when I refer to the VT Claimants I leave aside CBG for the moment):

    (a) Mutual representations and warranties of authority.

    (b) Representations and warranties by the VT Claimants to Kaupthing and others (including what were defined as the "Kaupthing Released Parties") that save with respect to what were defined as "Specified Disputes" they were not aware of any fact or matter that gave rise to or might give rise to a cause of action by any of the VT Claimants against Kaupthing and others (including the Kaupthing Released Parties).

    (c) Representations and warranties by Kaupthing to the VT Claimants that again save with respect to what were defined as "Specified Disputes" it was not aware of any fact or matter that gave rise to or might give rise to a cause of action by any of Kaupthing and others (including the Kaupthing Released Parties) against any of the VT Claimants.

    (d) An acknowledgement of each party that "it has been represented by legal counsel of its own choice throughout all negotiations preceding the execution of this Settlement Agreement and that it has executed this Settlement Agreement with the consent and advice of such legal counsel".

    (e) Provisions bringing proceedings in Iceland and in London to an end after the parties to the Settlement Agreement had entered into a restructuring agreement.

    (f) Mutual releases by the VT Claimants of Kaupthing and others, and by Kaupthing of the VT Claimants, from any claim arising out of what was defined as "the Dispute" (effectively, any dispute subject to certain qualifications, but including the Specified Disputes).

(g) Mutual releases by the VT Claimants of Kaupthing Released Parties, and by Kaupthing of what were defined as "TFT [i.e. Trust] Released Parties", from any claim arising out of the Specified Disputes, subject to certain qualifications.

(h) Various further mutual covenants and indemnities.

19. The Appendix to the First Judgment set out, at Part 1, the matters recited by the parties at the commencement of the Settlement Agreement. Part 2 of that Appendix set out some of the terms defined in the key clauses set out in the main body of the First Judgment. I do not repeat that Appendix in this judgment, but I do set out below for convenience the most material clauses.

20. Clause 7 of the Settlement Agreement was in these terms:

> "7.1 Subject to the provisions of this Clause 7, to the fullest extent permitted under law, each of the TFT Parties releases Kaupthing and each of the Kaupthing Parties from, and, as against Kaupthing and each of the Kaupthing Parties, waives, any claim or cause of action arising out of or in relation to the Dispute, whether known or unknown, howsoever and whenever arising, and whether presently existing or arising in the future.
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> 7.2 Subject to this Clause 7, to the fullest extent permitted under law, each of the TFT Parties releases each and any of the Kaupthing Released Parties from, and, as against each and any of the Kaupthing Released Parties, waives, any claim or cause of action arising out of or in relation to the Specified Disputes whether known or unknown, howsoever and whenever arising, and whether presently existing or arising in the future.
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> …
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> 7.4 This Clause 7 may be enforced by Kaupthing, the Kaupthing Parties and any Kaupthing Released Party, whether or not it is a party to this Settlement Agreement, subject always to the terms of this Settlement Agreement including, for the avoidance of doubt, but not limited to, Clauses 14 and 15."

21. "Dispute" was defined by the parties to the Settlement Agreement as follows:

> " 'Dispute' means all actual or potential claims, controversies, demands or causes of action based upon any act or failure to act, or the existence or non-existence of any fact, matter, condition, circumstance or allegation at any time prior to the execution of this Settlement Agreement, including, but not limited to, the Specified Disputes…"

22. The definition then continued with these words ("the Qualification"):

> "… but, for the avoidance of doubt, shall not include any dispute or claim arising out of or in connection with this Settlement Agreement or its subject matter or formation (including non-contractual disputes or claims) or in connection with the Restructuring Agreement or the Related Documents

including in relation to any dispute or claim arising out of or in relation to the same or the subject matter or formation thereof (including non-contractual disputes or claims). For the further avoidance of doubt, any actual or potential claims, controversies, demands or causes of action based upon any act or failure to act, or the existence or non-existence of any fact, matter, condition, circumstance or allegation at any time after the execution of the Settlement Agreement are not within this definition."

23. "Specified Disputes" were defined as follows:

" 'Specified Disputes' means all actual or potential claims, controversies, demands or causes of action based upon any act or failure to act, or the existence or non-existence of any fact, matter, condition, circumstance or allegation at any time on or prior to the execution of this Settlement Agreement concerning:

(i) the TFT Icelandic Claim and the TFT London Claim;

(ii) the provision of the Pennyrock Loan by Kaupthing and the provision and validity of the security provided in relation to the Oscatello Liabilities and the Pennyrock Loan, including but not limited to any facts or issues giving rise to rights to terminate the Existing Security Documents and/or to take any other steps on the basis of a default under the Existing Security Documents existing prior to the execution of this Settlement Agreement and any such existing rights;

(iii) Kaupthing's enforcement of that security including, but not limited to, the appointment of Receivers over shares or other property within the TFT Group and/or the appointment of directors to the board of any company within the TFT Group;

(iv) Kaupthing's capacity to enter into any legal agreement or other arrangement with any or all of the TFT Parties executed prior to the execution of this Settlement Agreement;

(v) any transaction between Kaupthing and its subsidiaries and the TFT Released Parties entered into prior to the execution of this Settlement Agreement;

(vi) investigations carried out or actions taken by any authorities in relation to any of the TFT Parties or the affairs of Kaupthing or its counterparties;

(vii) the provision of any documents or information to any authority;

(viii) any claims between Kaupthing and Kaupthing's subsidiaries and the TFT Released Parties arising prior to the execution of this Settlement Agreement;

(ix) Kaupthing's accounts, internal management of Kaupthing and actions taken by the management of Kaupthing prior to the execution of this Settlement Agreement;

(x) the actions taken by the Receivers or present and former directors appointed by Kaupthing or the Receivers;

(xi) the TFT Group's accounts, internal management and actions taken by the management of the TFT Group prior to the execution of this Settlement Agreement; and

(xii) the collapse of Kaupthing;

but, for the avoidance of doubt, shall not include [there then followed, again, the Qualification]."

24. The "Kaupthing Released Parties" were defined as follows:

> " 'Kaupthing Released Parties' means any and each of the former directors of Kaupthing and Kaupthing Subsidiaries, former employees and consultants of Kaupthing and Kaupthing Subsidiaries, former members of the Resolution Committee of Kaupthing, former members of the Winding-Up Committee of Kaupthing, the Receivers, Grant Thornton UK LLP and/or Grant Thornton (British Virgin Islands) Limited together with their present and former employees, partners, directors and officers to the extent of their involvement in the activities of the Receivers, former directors appointed by the Receivers, present and former advisers to Kaupthing and all present and former employees, consultants, partners and directors of such advisers."

And the "TFT Released Parties" were defined as follows:

> " 'TFT Released Parties' means any and each of former employees, consultants, directors and officers of each member of the TFT Group, former employees, consultants, directors and officers of [the Second Claimant], former employees, consultants, directors and officer of ITGL, former employees and consultants of [Mr Vincent Tchenguiz], present and former advisers to each member of the TFT Group, present and former advisers to [the Second Claimant], present and former advisers to ITGL, present and former advisers to [Mr Vincent Tchenguiz], present and former employees, consultants, directors and officers of any and all advisers referred to herein."

25. The "Receivers" were defined as:

> " 'Receivers' means any and each receiver appointed by Kaupthing over shares or other property within the TFT Group, including without limitation, Stephen Akers and Mark McDonald."

## Interpretation of the Settlement Agreement

26. The first question of interpretation is to what extent are Grant Thornton, Mr Akers and Mr Hamedani "Kaupthing Released Parties"? This first question did not arise on the First Application. The question involves a number of arguments.

27. The definition has, as the VT Claimants themselves describe it in written argument, a 'general "advisers" limb'. Kaupthing was the party who contracted with the VT Claimants (save CBG) by the Settlement Agreement. Grant Thornton were "advisers to Kaupthing". "Advisers to Kaupthing" (and partners in those advisers) are "Kaupthing Released Parties".

28. The limitation "to the extent of their involvement in the activities of the Receivers" does not accompany the reference to "advisers to Kaupthing" in the definition of "Kaupthing Released Parties". Further it is not a natural reading of the definition to read down the definition so that "present and former advisers to Kaupthing" excludes Grant Thornton simply because Grant Thornton has already been mentioned. Grant Thornton were not the "Receivers", Mr Akers and Mr McDonald were. In a release provision in a receivership context it is unsurprising to find a reference to the firm whose partners were appointed receivers following immediately after a reference to those partners. The words "to the extent of their involvement in the activities of the Receivers" can be understood in that context.

29. The overall language may not be elegant but where, as here, Grant Thornton were also advisers to Kaupthing, no reason has been suggested for why they should be the one adviser that the parties should be intending not to benefit from the release, without the parties saying so. Comprehensive references to "present and former advisers" appear throughout the definition of "TFT Released Parties" too.

30. It is suggested by the VT Claimants that the factual matrix of the Settlement Agreement supports a construction that includes the GT Defendants in a limited role only, by reason of their involvement in the facts underlying the TFT London Claim. Recital Q to the Settlement Agreement refers to the parties having "agreed terms for the full and final settlement of [two claims, one of which is defined as the TFT London Claim] and for the restatement and amendment of [a loan known as] the Pennyrock Loan, including provisions for new security to be provided in relation to the Pennyrock Loan".

31. But, as to this, the definition of "Kaupthing Released Parties" contains no signal that it is concerned to limit the release to those involved in the facts underlying the TFT London Claim. The inclusion of "all present and former advisers to Kaupthing and all present and former employees, consultants, partners and directors of such advisers" illustrates the point. The definition of "Specified Disputes" included (at (i)) "claims, controversies, demands or causes of action" concerning the TFT London Claim as just one of twelve specified subject areas of dispute. Subject areas (vi) and (vii) included … "investigations carried out or actions taken by any authorities in relation to any of [the VT Claimants, CBG apart] …" and "the provision of any documents or information to any authority".

32. The VT Claimants argue that the release will only be available to a person where that person was acting in a specified capacity. However when the parties wished to

limit release, waiver or indemnity to a particular capacity in which a person was acting, they said so expressly but did not do so here. Thus the definition of "ITGL" in the Agreement, and clause 8.3 of the Agreement, referred to Investec Trust (Guernsey) Limited "in its capacity as the former trustee of [the Trust] only" and "in its capacity as trustee of [the Trust]". The presence of the words "to the extent of their involvement in the activities of the Receivers" in the definition of "Kaupthing Released Parties" in one part of the clause does not dislodge the sense that the parties did not intend the release to be limited to a particular capacity elsewhere in the clause.

33. The second question of interpretation is one that did arise on the First Application. The VT Claimants maintain their argument that the Settlement Agreement does not compromise the type of claims alleged in the VT Proceedings. I addressed this at paragraphs [33]-[49] of the First Judgment. I have reviewed what I said there and remain of the same view.

34. Among other things, I highlighted that the parties had chosen to use language directed to subject area rather than cause of action. In the specified subject area of investigations or actions by authorities, the Investigation would plainly be in the parties' minds, and in that connection an allegation of misconduct or deliberate wrongdoing would be what, objectively, the parties would have in contemplation as likely to be asserted in any attempt to ground a claim against (here) the GT Defendants.

35. I expressed the view that it is not easy to see on what other basis a claim by the VT Claimants against the GT Defendants concerning the Investigation could be asserted. Mr Hancock QC suggests breach of confidence and defamation. I accept those as possible bases. But I hold to the assessment that, in light of the Investigation, at least among the very types of allegation the parties, viewed objectively, would be looking to prevent in the present case would be allegations of misconduct or deliberate wrongdoing. As I said, these are the types of allegation that, regardless of merit, readily have an impact on reputation, cost and time.

36. The VT Claimants also maintain their argument that the claims fall within the Qualification. I addressed this at paragraphs [50]-[53] of the First Judgment. I have reviewed what I said there and remain of the same view.

37. The VT Claimants urge that the alleged facts are different for the GT Defendants as against those for Mr Jóhannsson "in particular due to the GT Defendants' driving and active role in the relevant conspiracy throughout the relevant period" and say that the Court cannot reach a view on facts at this stage. But my reference point here is the Particulars of Claim. What I said at paragraph [51] of my First Judgment in relation to the case against Mr Jóhannsson applies to the case against the GT Defendants.

## Alleged illegality and the Settlement Agreement

38. On the First Application Mr Romie Tager QC had argued for the VT Claimants that the Settlement Agreement could not be enforced as it was tainted by or founded on

illegality in the form of the conspiracy alleged by the VT Claimants. My decision was that the argument failed.

39. Since then the law on illegality has been explained or developed further by the Supreme Court in Patel v Mirza [2016] UKSC 42; [2016] 3 WLR 399. In light of that decision the argument on illegality was made in greater depth on this present application. Indeed, on this application illegality was the first main ground advanced by the VT Claimants in asking me to refuse summary judgment to the GT Defendants. The argument was put for the VT Claimants by Mr Christopher Hancock QC with the greatest skill.

40. In the First Judgment my decision was that the central answer to Mr Tager QC's argument was that Mr Jóhannsson's reliance on the Settlement Agreement in response to the claims in the VT Proceedings did not involve him relying on illegality. The Settlement Agreement was not illegal, and nor was its object or purpose (the compromise of claims) illegal, and nor was performance of it illegal. Mr Jóhannsson invoked the Settlement Agreement as a compromise of claims that there had been illegal conduct.

41. My focus on whether there was reliance on illegality owed much to Tinsley v Milligan [1994] 1 AC 340, a decision now overtaken by Patel v Mirza (above). It is obviously appropriate to examine matters again.

42. Mr Hancock QC adds the submission that in saying that the object of the Settlement Agreement was to compromise claims I rewrote the pleaded case of the VT Claimants. Mr Hancock QC emphasises that the real purpose of the Settlement Agreement must be taken (for summary judgment purposes) to be that which it is pleaded to have been, namely to further the conspiracy. The VT Claimants allege that the Settlement Agreement itself was the object of the illegal conspiracy alleged. More precisely the alleged object of the alleged conspiracy is not compromise but compromise on terms favourable to the Defendants. In these circumstances, it is argued, the Settlement Agreement is an illegal or unlawful agreement.

43. But to my mind there are crucial distinctions. The Settlement Agreement is not itself illegal, and nor was its object, purpose or performance. A contract for, say, insider dealing would be itself illegal because insider dealing is illegal. That was the contract in Patel v Mirza (above): see at [12]. An agreement by two parties to deceive the public by making it look as though the market was prepared to pay a premium for shares when it was not, would be itself illegal because that deception is illegal. That was the contract between the (both complicit) contracting parties in Scott v Brown, Doering, McNab & Co [1892] 2 QB 724. The Settlement Agreement, by contrast, is not illegal. The object of the Settlement Agreement is not illegal even if the object of the conspiracy was the Settlement Agreement.

44. Mr Hancock QC draws on a proposition to be found in Chitty on Contracts 32nd ed. Vol 1 para 16-022 that normally a compromise of an illegal contract will be unenforceable. But the Settlement Agreement compromised claims (disputed allegations of conduct) not illegal contracts.

45. The illegality doctrine is of course concerned with the public interest: see Patel v Mirza (above) at [174] and Les Laboratoires Servier v Apotex [2015] AC 430 at

[25] and [28]). It is specifically concerned with acts that have the "legal character" of criminal acts and what have been called quasi-criminal acts: see Les Laboratories Servier at [28]. The contract in Patel v Mirza had that character; the Settlement Agreement does not. From that point of departure (which was not there in issue) Patel v Mirza explains and develops the consequences. In the present case the contract does not reach the point of departure.

46. To say that the Settlement Agreement is the object to which illegal activity (such as conspiracy) is directed is to describe a legal contract said to be achieved by illegal means, or a legal contract said to be used for illegal means. There, the law may well set the contract aside or award damages at the suit of an innocent victim because of the illegal means. But that is by way of remedy for the cause of action in conspiracy, not by reason of the illegality doctrine.

47. It is crucially significant that the VT Claimants do not ask the court to set aside the relevant contract. The Settlement Agreement no doubt has its advantages for them, including no doubt because of its interconnection with other agreements that were entered into at the same time. What the VT Claimants seek is to prevent its enforcement against themselves. They ask the Court not to hold them to their side of this contract whilst the other parties to the contract remain held to their side of the contract.

48. Mr Hancock QC submits that remedies of setting aside or of disallowing enforcement are cumulative but I do not, with respect, agree that that provides an answer. The remedies (if that is the right word for both) have different foundations, and in this context the engagement of the illegality doctrine is fundamental to the latter.

49. In considering the consequences of attaching the illegality doctrine to a contract by treating the contract as illegal rather than legal, it is further useful to take the situation where an innocent party does not wish either to set aside the contract or to prevent its enforcement. If the law treated a legal contract as illegal because it was achieved by illegal means that would impose consequences on the innocent party that the innocent party could not elect to avoid. The innocent party would be entitled to enforce the contract, but only until he learned of the illegality; after that he too cannot enforce the contract further because it is illegal and he now knows it.

50. Thus the innocent party would not be able to proceed with the contract even where it was important to him to do so (as where the compromise also had its advantages for him or was not so favourable to those in the position of the Defendants after all). But if the contract is recognised as remaining as what it is, a legal contract achieved by illegal means, the innocent party has the choice of enforcing it or calling for it to be set aside. However much the behaviour of the wrongdoer is to be deprecated, there is no place for the innocent party to be entitled to call for the provisions of a legal contract that are in his favour to be enforced while the others that are not to be refused enforcement.

51. The scheme I have sought to describe is one that retains respect for the law. The analysis has to be a close one. The law does not simply say "fraud unravels all", and nor in fairness does Mr Hancock QC. I have nothing but admiration for the quality

of the argument he put, but must find against the VT Claimants on this aspect of the case.

## Alleged unconscionability and "sharp practice"

52. If the Settlement Agreement does on its true interpretation compromise the claims in the VT Proceedings, Mr Tager QC argued on the First Application that the present case is one in which the GT Defendants are, nonetheless, unable to rely on the release. This is because there has been, say the VT Claimants, "sharp practice".

53. The VT Claimants maintain that Kaupthing (the contracting party to the Settlement Agreement) and the GT Defendants knew, and knew that the VT Claimants did not know, that the VT Claimants had a good claim against the GT Defendants that would be compromised by the Settlement Agreement. Kaupthing and the GT Defendants kept that knowledge to themselves, say the VT Claimants, when the Settlement Agreement was being entered into.

54. In BCCI v Ali [2002] 1 AC 251 at [32]-[33] Lord Nicholls said:

> "*Sharp practice*
>
> 32. Thus far I have been considering the case where both parties were unaware of a claim which subsequently came to light. 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.
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> 33. … I prefer to leave discussion of the route by which the law provides a remedy where there has been sharp practice to a case where that issue arises for decision. That there is a remedy in such cases I do not for one moment doubt."

55. Lord Hoffmann said at [69]-[71] in the same case:

> "69. … A transaction in which one party agrees in general terms to release another from any claims upon him has special features. It is not difficult to imply an obligation upon the beneficiary of such a release to disclose the existence of claims of which he actually knows and which he also realises may not be known to the other party. There are different ways in which it can be put. One may say, for example, that inviting a person to enter into a release in general terms implies a representation that one is not aware of any specific claims which the other party may not know about. That would preserve the purity of the principle that there is no positive duty of disclosure. ….

> 70. In principle, therefore, I agree with what I consider Sir Richard Scott V-C [2000] ICR 1410, 1421 to have meant in the passage in paragraph 30 of his judgment which I have quoted (ante, paragraph 11), and with Chadwick LJ, that a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so. On the other hand, if the context shows that the parties intended a general release for good consideration of rights unknown to both of them, I can see nothing unfair in such a transaction.
>
> 71. It follows that in my opinion the principle that a party to a general release cannot take advantage … of 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."

56. On the First Application I said that Lord Nicholls and Lord Hoffmann confined their words to a general release. On the present application Mr Hancock QC described what was involved as a pure doctrine of equity, in an area of law that was in its infancy. Mr Hancock QC argues that the doctrine is not confined to a general release. The reason for the reference to general release in the House of Lords is, he submits, because that is the context in which the argument would tend to arise.

57. I am still left with the need to reach a conclusion on whether the present case is arguably of the type Lord Nicholls and Lord Hoffmann described. My conclusion remains that it is not. Lord Nicholls and Lord Hoffmann were referring to general releases not because of context but 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. "A transaction in which one party agrees in general terms to release another from any claims upon him has special features" (Lord Hoffmann, above).

58. The present case is one of a specific release of claims. So far as is material for these proceedings, the parties to the Settlement Agreement focussed on areas to which they applied the term "Specified Disputes", and of which investigations and actions by authorities was one. 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.

**CBG**

59. CBG was not a party to the Settlement Agreement. Summary judgment was nonetheless sought by Mr Jóhannsson on the First Application, and granted on the material then before the Court.

60. The GT Defendants now seek summary judgment against CBG. The VT Claimants have now put in further evidence in the form of a second witness statement of Michael Watson, a director and Group Chief Financial Officer of CBG, dated 24 August 2016.

61. The VT Claimants' case is that CBG was an adviser to companies within the Trust. On the First Application I found, first, nothing to show that the loss that was asserted was in fact arguably incurred by CBG itself. Second, I held that no arguable basis for a claim in conspiracy by CBG had been shown to me.

62. On the first aspect (loss by CBG), the second witness statement of Michael Watson is of little help. I highlight the following points in particular:

    (a) The witness statement brings in reference to a loan from CBG to Aztec Acquisitions Limited which finds no reference in the losses pleaded in the Particulars of Claim.

    (b) The witness statement does offer a calculation for time wasted by CBG's management, but this is calculated by reference to salary (a liability regardless of the search of its premises). No attempt is made to show that any amount was not earned by CBG over the period of disruption caused by the search that would otherwise have been earned.

    (c) The witness statement does attribute redundancy costs (including larger ex gratia payments) as a cost to CBG but does not explain or document these, or their relationship to the search of its premises, to any satisfactory degree. I am entitled to bear in mind that this is a second attempt, and it is by someone in Mr Watson's position with all the access to information that must be available to a director and Group Chief Financial Officer.

    (d) The witness statement refers to fees paid by CBG for legal, strategic, investigation, reputation management, and technology services, but again (and again this is a second attempt, and from someone in Mr Watson's position) does not explain or document these, and their relationship to what CBG says was wrongly done to CBG, to any satisfactory degree.

    (e) The witness statement seeks to explain an assertion in a previous witness statement made by Mr Watson that "there was a cost resulting from the inability to market and re-let [commercial premises in Park Lane] of £728,532". Mr Watson had previously said that CBG was a licensee of the premises that recharged the cost to other companies owned by the Trust. Mr Watson now says that the cost asserted is the rent and associated costs for a 15 month period until the premises were surrendered to the landlord. He does not show why the premises were not surrendered (or re-let) in that period, or how CBG (a licensee) was liable for rent. Also importantly, he does not say CBG's ability to re-charge ceased, or explain why it did if it did.

63. On the second aspect, I have gone through the Particulars of Claim again and still I cannot find a coherent case in conspiracy involving an intention to injure CBG. CBG has not sought to revisit its Particulars of Claim since the First Application.

64. There is then the question of access to SFO documents. Neither of the two aspects to which I have referred are realistically capable of improvement by access to SFO documents. Responsibility for the deficiencies in respect of those aspects rests with CBG itself.

65. In all the circumstances I find CBG to have no real prospect of succeeding on the claim it has brought or allowed to be brought in its name as Third Claimant to the VT Proceedings, and there is no other compelling reason why the case should be disposed of at a trial. The GT Defendants are entitled to summary judgment against it.

## The Somerfield Proceeds Claim in the RT Proceedings

66. TDT (the Tchenguiz Discretionary Trust) is another Tchenguiz family trust. Before the Second Claimant became its trustee, Investec Trust (Guernsey) Limited and Bayeux Trustees Limited (together, "Investec") were its trustees. R20 Limited ("R20"), itself owned by TDT and with Mr Robert Tchenguiz as a director, was TDT's investment adviser.

67. By their Amended Particulars of Claim the RT Claimants defined what were termed "the Scotts Agreement" and "the Somerfield Proceeds" as follows:

> "… Investec, R20 and [Mr Robert Tchenguiz] were concerned to protect TDT's rights arising from an arrangement (the "Scotts Agreement") which [Mr Robert Tchenguiz] considered to have been agreed on 7 April 2008 between … the then CEO of Kaupthing (acting on behalf of Kaupthing and [another]), and [Mr Robert Tchenguiz] (acting on behalf of R20) whereby, in consideration of [Mr Robert Tchenguiz] (on behalf of R20) recommending to the trustees of the TDT the proposed sale of [an equity interest in] Somerfield [owner of the supermarket business] to the Co-operative [Group Limited], the relevant TDT Companies would receive their share of the proceeds of that sale ("the Somerfield Proceeds") free of any repayment obligation to Kaupthing, whether pursuant to the Oscatello [loan] facility or [two profit participating loans from Kaupthing subsidiaries]."

68. The RT Claimants then alleged, at paragraphs 129 to 131 of their Amended Particulars of Claim:

> "129. The Icelandic Somerfield Claim (ie [a] claim to the Somerfield Proceeds based on the Scotts Agreement) was quantified in the Icelandic [insolvency] proceedings [of Kaupthing] …at approximately £153.5 million (including interest to 22 April 2009).
>
> 130. By reason of the commencement of the Investigation of the SFO on 15 December 2009 and [an] unjustified assertion of fraud against Investec in [proceedings commenced by Kaupthing against Investec in the British Virgin Islands: ["the BVI Somerfield Proceedings"], Investec (without notice to or consultation with [Mr Robert Tchenguiz] or R20) proceeded unilaterally to settle the BVI Somerfield Proceedings and the Icelandic

> Somerfield Claim, in the circumstances described at paragraph [42] above [i.e. by a settlement agreement defined as the June 2010 Settlement Agreement].
>
> 131. But for the … torts [of the GT Defendants, Kaupthing and Mr Jóhannsson] as aforesaid Investec would not have sought unilaterally to settle TDT's claim to the Somerfield Proceeds. By reason of the … wrongdoing [of the GT Defendants, Kaupthing and Mr Jóhannsson] therefore, TDT has lost a real and substantial chance of succeeding on its claim on more favourable terms than those contained in the June 2010 Settlement Agreement. [The Second Claimant] as trustee of the TDT has suffered loss accordingly."

69. In her ninth witness statement made on 23 September 2016 Ms Nicole Martin, in-house Legal Counsel to the RT Claimants, said this:

> "I believe that the only valid explanation for this narrative (and for the SFO's failure until after the Guernsey trial in June 2012 to appreciate the full nature and implications of Investec's role in the business of TDT) is that Investec and Grant Thornton must have come to some sort of arrangement during early 2010 and before settlement of the Somerfield Proceedings in June 2010, to the effect that Investec would co-operate with Kaupthing's, Grant Thornton's and the [Oscatello] Joint Liquidators' efforts to recover money by all possible means from TDT and from [Mr Robert Tchenguiz] (including by handing over information and by adopting stances favourable to Kaupthing and the [Oscatello] Joint Liquidators in civil proceedings in which it was involved), while Grant Thornton would use its influence with the SFO to try to implicate [Mr Robert Tchenguiz] and exonerate Investec."

(Oscatello, mentioned earlier, was a BVI company formerly held or controlled by TDT.)

70. This passage had been quoted in full and described as "plausible" in the RT Claimants' skeleton argument for the present application. On the hearing of the application Mr Choo Choy QC, Leading Counsel for the RT Claimants, straightforwardly, and properly, said he was not placing reliance on the passage, including as any "causation mechanism".

71. The RT Claimants have not been able to show any evidential foundation that would allow it to make the allegation that Investec was influenced by the Investigation in deciding to settle TDT's claim to the Somerfield Proceeds.

72. As to the allegation that there was "an unjustified assertion of fraud" against Investec and which influenced Investec to settle, as it is put at paragraph 130 of the Amended Particulars of Claim, the true facts are clear now. First, the assertion of fraud was on advice from Leading Counsel and Solicitors with expertise in the field. Second, the suggestion that "an unjustified assertion of fraud" caused Investec to settle is a speculation, and one that has been made without any evidence from or attributable to Investec.

73. The Court has been provided with the contemporaneous advice that Investec in fact received from (separate) Leading Counsel in the period leading to its settling TDT's claim to the Somerfield Proceeds. The documentation shows unequivocally that Investec (as trustee to the TDT) was advised that TDT's case was without merit and would fail. In the course of argument Mr Choo Choy QC realistically accepted that the advices were to be treated as bona fide advices sought and received. The advices are detailed, cogent, and repeated over time.

74. Mr Choo Choy QC valiantly sought to build something from the fact that another firm, Herbert Smith Freehills, questioned the settlement, and that it was done quickly, without prior sanction from the Guernsey Court, and when Investec knew they were about to be replaced as trustees. These do not amount to even circumstantial evidence that Investec settled not because of the advice it had that its case was without merit but because of the Investigation or an unjustified assertion of fraud.

75. Consistently, Investec itself said this to the Royal Court of Guernsey in written submissions signed by its Advocate for a hearing on 20 April 2015:

> "The decision to settle the claim was taken on the advice of City solicitors … and with the benefit of three pieces of written advice from leading Counsel, the last of which (dated 3 June 2010) advised that urgent steps should be taken to settle the litigation and that continuation of the proceedings was not a proper use of trust monies".

76. The Somerfield Proceeds Claim demonstrably has no foundation and should never have been brought.

## Conclusions

77. The GT Defendants are entitled to summary judgment in the VT Proceedings. This concludes (counterclaim apart) the VT Proceedings, subject to appeal.

78. In the RT Proceedings, the GT Defendants and Mr Jóhannsson are entitled to summary judgment on the Somerfield Proceeds Claim.

79. It has not, in the event, proved necessary for me to address an argument by the GT Defendants to the effect that the VT Claimants are not entitled to reargue points on which they failed as against Mr Jóhannsson on the First Application. It is better, I think, in the present context to have taken the opportunity (as I have) to reconsider points with the benefit of fresh argument. Had I reached a different conclusion on any point I would have said so, agreeing with Mr Hancock QC that it would be my duty to do so.

80. I am grateful to all Counsel, and the teams supporting them, for their arguments.