Settlement agreements, unknown claims, and finality

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The *Khanty-Mansiysk Recoveries Limited v Forsters LLP* decision

1. There is a cautionary principle when interpreting settlement agreements that a court should be slow to infer that a party has agreed to compromise unknown claims. But the Court of Appeal has re-emphasised that where plain words, and the background context, indicate that the parties intended to achieve finality, that principle will be displaced: Khanty-Mansiysk Recoveries Ltd v Forsters LLP [2018] EWCA Civ 89 (7 February 2018).

3PB's Analysis

2. **The Facts.** The claimant[1] brought a claim in negligence against its former solicitors (**"the Solicitors"**), valued in excess of £70m, alleging negligent advice when acting for it in the acquisition of shares of a Russian company that owned lucrative exploration rights over an oil field. The alleged result of that negligence was that the transfer of the company's shares had never been effective under Russian law.

3. The Solicitors argued that the claim was caught by a settlement agreement, which provided a complete defence. That agreement had been entered into during the course of earlier proceedings in which the Solicitors had claimed unpaid fees for the same transaction. The sole defence raised in those earlier proceedings related to the *amount* billed by the Solicitors. No counterclaim had been brought, and no allegation of negligence had been made. Indeed the fact that the transaction had not been effective to transfer shares was not then known.

4. **The settlement clause.** The compromise was in full and final settlement of all or any 'Claims' or possible Claims, "*whether or not in the contemplation of the Parties*". It also contained a covenant not to sue "*in connection with or in relation to (either directly or indirectly) the Claims*".

5. At its widest (so far as relevant here), the definition of "Claims" included:

   "*any… potential counterclaim… or potential right of set off… of any kind or nature whatsoever, whether known or unknown… arising out of or in connection with the Action or the invoice dated 1 July 2010*"

6. At first instance the judge concluded that the present claim was caught by the settlement agreement. The Claimant appealed.

7. **The Court of Appeal.** Adopting familiar principles, the Court of Appeal recognised that the most important aspect of contractual interpretation is loyalty to the text (at [21]), and that there were no special rules for interpreting settlement agreements (at [24]).

8. But two guiding principles could be drawn from previous authority[2] and the background context. First, *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. That principle will have greatest force in cases where (as in Ali) the legal remedy was not known to exist as a matter of law at the time of agreement. Its force was more limited here, where the performance of legal services inevitably involved the possibility of those services being defectively performed. In any event, the language of the contract was plain enough to encompass unknown claims (at [30]-[32]).

9. Secondly, the background context of a settlement agreement will often be that the parties wish to wipe the slate clean, and achieve

[1] The claim was in fact brought by an assignee of the original purchaser, although that does not affect the issues discussed here, and is ignored for simplicity.

[2] BCCI v Ali [2001] UKHL 8, [2002] 1 AC 251 (HL)

finality. It is inherent in that, that one or other of the parties will carry the risk of compromising unknown claims. They had done so here (at [23],[27]).

10. Perhaps of most interest is the Court's reasoning as to why the intended negligence claim '*arose out of or in connection with the [original] Action or the invoice dated 1 July 2010*', and was thus a compromised '*Claim'*. The invoice related for the very same work now complained of. Had the negligence claim been raised at the time of the original action for the Solicitors' fees it would, as a matter of law, have precluded the Solicitors from recovering their fees if the work that they had done had been useless.[3] The negligence claim would therefore have operated to reduce or extinguish the claim for fees (at [31],[38]-[39]).

Impact of the Decision

11. The Court of Appeal has reaffirmed the cautionary principle set out in BCCI v Ali. The wider and more far-reaching a settlement clause, the clearer the wording should be. But so long as the wording is clear enough, parties may of course settle and protect against unknown claims. The principle of finality may indeed be an important factor pointing towards that conclusion.

12. For practitioners, it is advisable to adopt a comprehensive and meticulous approach to drafting settlement agreements especially the scope of release wording.

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[3] Heywood v. Wellers [1976] QB 446