Neutral Citation Number: [2016] EWHC 865 (Comm)

Case No: CL-2014-001023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2016

Before :

MR JUSTICE KNOWLES CBE

Between :

(1) Vincent Aziz Tchenguiz
(2) Rawlinson and Hunter Trustees S.A in its capacity as trustee of the Tchenguiz Family Trust
(3) Vincos Limited trading as Consensus Business Group
(4) Euro Investments Overseas Inc suing for itself and as a representative of the companies listed in the schedule to the Claim Form

Claimants

-and-

(1) Grant Thornton UK LLP
(2) Stephen John Akers
(3) Hossein Hamedani

(5) Johannes Runar Johannsson

Defendants

- and-

William Proctor

Third Party

Robert Miles QC, Jeremy Goldring QC and Tom Gentleman (instructed by **Travers Smith LLP**) for the **Fifth Defendant**
Romie Tager QC, David Cavender QC, Jonathan Crystal and Alexander Brown (instructed by **McGuire Woods London LLP**) for the **Claimants**

Hearing dates: 19 and 20 January 2016

Approved Judgment

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

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MR JUSTICE KNOWLES CBE

MR JUSTICE KNOWLES CBE
Approved Judgment

Mr Justice Knowles :

Introduction

1. Mr Johannsson, the Fifth Defendant, was appointed to the Resolution Committee and then to the Winding Up Committee of Kaupthing Bank HF ("Kaupthing").

2. Mr Vincent Tchenguiz ("Mr Tchenguiz"), the First Claimant, is a businessman and an investor. He is a beneficiary of the Tchenguiz Family Trust ("the Trust"). The Second Claimant is trustee of the Trust, and the Third Claimant ("CBG") is an adviser to the Trust. The Fourth Claimant and the companies identified in the Schedule to the Claim Form are described as property and investment companies ultimately owned by the Trust.

3. The Claimants wish to advance claims against Mr Johannsson arising from what they allege to be his involvement in an investigation ("the Investigation") by the Serious Fraud Office ("SFO") into Mr Tchenguiz and others. In the course of the Investigation a search warrant was executed at Mr Tchenguiz's home and at CBG's offices on 9 and 10 March 2011. Mr Tchenguiz was arrested on 9 March 2011. The Investigation was ended on 18 June 2012, without any allegation of criminal conduct or other wrongdoing being continued or advanced against Mr Tchenguiz.

4. The present application concerns the question whether the Claimants are entitled to advance these claims against Mr Johannsson. The question arises because with the exception of CBG the Claimants are parties to an agreement entitled "Settlement Agreement" which contains various releases. It is a question that Mr Johannsson says is appropriate for disposal on a summary judgment application.

5. The Settlement Agreement was one of a number of agreements dated 17 September 2011. Mr Johannsson was not a party to the Settlement Agreement but he relies on the Contracts (Rights of Third Parties) Act 1999 to enforce terms of the Settlement Agreement as a third party.

The Claims

6. The particular claims or causes of action the Claimants contend they have against Mr Johannsson are in conspiracy and for malicious procurement and execution of the search warrants and malicious prosecution ("the Claims"). Damages are claimed by way of remedy, including aggravated and exemplary damages.

7. The circumstances in which the Claims are alleged by the Claimants to arise against Mr Johannsson may be summarised as follows. I have sought to derive the summary as closely as I can from the Claimants' Particulars of Claim. I have not found the Particulars of Claim easy to follow in places. The Claims and the allegations on which they are based are denied by Mr Johannsson.

8. In early 2008 Kaupthing provided a loan of £100 million to Pennyrock Limited ("Pennyrock") and took security for that lending and for lending to Oscatello

Investments Limited ("Oscatello"). The security included charges over shares in BVI registered intermediate holding companies of companies owning ground rent portfolios (the "ground rent-related security"). The ground rent portfolios were already directly or indirectly subject to security in favour of senior lenders.

9. In due course the security taken by Kaupthing was "purportedly" enforced and Mr Johannsson was appointed a director of all or some of the BVI companies. Proceedings were commenced in the Commercial Court to challenge those appointments. Mr Johannsson worked with others on a report dated 9 February 2009 on the security that had been taken for the lending to Oscatello.

10. The Claimants allege that in 2009 Mr Johannsson agreed with others "to instigate, encourage and/or direct an SFO investigation into the collapse of Kaupthing" and Mr Tchenguiz and others. It is alleged they agreed to do so "by making false allegations of criminal conduct or other wrongdoing". The conspiracy alleged in this way is said to include misuse of the SFO's powers under section 2 of the Criminal Justice Act 1987 and the obtaining of information to which Mr Johannsson and others were not entitled.

11. The intention, allege the Claimants, was to cause the SFO to put pressure on various persons including Mr Tchenguiz and enable the obtaining of documents and information from the SFO that might facilitate the realisation of security held by Kaupthing. The Claimants go on to allege that the conspiracy included agreement by Mr Johannsson with others that, to encourage the senior lenders to call in their security, those senior lenders would be given allegations (which were false) of criminal conduct and wrongdoing by Mr Tchenguiz and told that the SFO was or would be looking into matters.

12. A meeting on 29 October 2009 was held with the SFO. Mr Johannsson is not alleged to have attended this meeting but an exchange of information with the SFO followed, and in turn a wider investigation. Mr Johannsson is alleged to have been present at a meeting on 24 March 2010 at which allegations that Oscatello was insolvent by late 2007, a position said to have been "masked", were made, as well as a statement (said to be false to Mr Johannsson's knowledge) that the ground rent-related security taken by Kaupthing was believed to be bogus.

13. Proceedings followed in the Commercial Court and in the District Court of Reykjavik. Mr Johannsson is alleged at this point "either as part of the original conspiracy … or a new conspiracy" to have agreed with others "to make explicit false allegations to the SFO that [Mr Tchenguiz] had acted criminally in particular with respect to [the loan to Pennyrock] with the aim to turn the focus of the [Investigation] firmly towards [Mr Tchenguiz among others]", to include the instigation of a criminal process against Mr Tchenguiz, and to continue making to senior lenders false allegations about Mr Tchenguiz or the SFO's investigation of those allegations.

14. Mr Johannsson's purpose is alleged to have been as before but now to include pressure on Mr Tchenguiz and others to force them to compromise the proceedings in the Commercial Court and the District Court of Reykjavik. Mr Johannsson is alleged to have conveyed something of this threat in August and September 2010. As regards the alleged continued making of false allegations to senior lenders the

purpose is said to have been to make it more likely that some or all of the Fourth Claimant companies would collapse.

15. In a conference call with the SFO on 9 September 2010, in which Mr Johannsson is not alleged to have been a direct participant, false allegations or representations about Mr Tchenguiz' conduct (or that there were good reasons to reach adverse conclusions about his conduct) are alleged to have been made. The suggestion was conveyed (as, it is alleged, was intended by Mr Johannsson and others) that a report had been prepared demonstrating the conduct after full investigation. The SFO were later to read, but not copy, drafts of reports, and this, it is alleged, must have been with the authority of Mr Johannsson, among others. The reports could not have supported the allegations, say the Claimants, because no supporting evidence existed, and Mr Johannsson and others knew this. If there was supporting evidence in the reports it must have been false, say the Claimants, and was introduced into the reports in furtherance of the conspiracy to mislead the SFO.

16. The conduct said to have been alleged against Mr Tchenguiz included the provision of false information, including as to valuation, to Kaupthing, to other banks and to auditors when the loan to Pennyrock was being agreed and the ground rent-related security taken. In addition Mr Tchenguiz was alleged to have wrongly applied the loan to Pennyrock "for his own benefit and to repay debts". The allegations were, it is alleged, repeated later in meetings, with an allegation that Kaupthing had undertaken almost no due diligence in relation to the loan to Pennyrock and taking of the ground rent-related security.

17. The result was, according to the Claimants, an understanding by the SFO that Mr Tchenguiz had deceived Kaupthing in March 2008 to accept the ground rent-related security by his not disclosing the position in relation to the other (senior) security which made it allegedly worthless to Kaupthing. The Claimants allege that Mr Johannsson and others knew that the SFO trusted him and others, or that by reason of lack of its own resources the SFO would accept allegations made by him and others against Mr Tchenguiz.

18. At least some of the intended approaches to senior lenders were carried out, according to the Claimants, including by Mr Johannsson directly or indirectly. Two were "to discuss the false allegations and the SFO investigation". A third was to persuade a lender that it had been misled as to the value of ground rent portfolios and encourage it to obtain a further valuation on a different (Red Book) basis.

19. The Commercial Court heard a jurisdiction challenge by Kaupthing between 9 and 11 February 2011. The application for search warrants by the SFO was soon to follow and the Claimants say the timing is connected.

20. Search warrants in respect of Mr Tchenguiz' home and business addresses were issued by a Judge of the Central Criminal Court on 7 March 2011. The information placed before the Court "mirrored", according to the Claimants "many of the false allegations that had been made, and encouraged" in the course of the alleged conspiracy. The Claimants allege that the information placed before the Court made the following false allegations against Mr Tchenguiz, and the Trust:

> "56.1 The value of the Additional Oscatello and Pennyrock Securities was "widely overstated", because the relevant valuations relied on actuarial values with a 150 year projection of rental income (whereas a 50 years projection was said to represent the "accepted accounting practice").
>
> 56.2 The relevant financial statements were materially overstated.
>
> 56.3 There was only one pool of collateral pledged to Kaupthing … and that this was "double pledged" i.e., as security for both the Oscatello overdraft and the Pennyrock Loan.
>
> 56.4 Substantial senior lending existed that was not disclosed to Kaupthing at the time of the Pennyrock Loan.
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> 56.5 The Pennyrock Loan was made to or for the personal benefit of [Mr Tchenguiz], rather than Pennyrock Limited, or for another TFT company."

21. Mr Johannsson and others are alleged to have intended the continued reliance by the SFO in this respect on what they had heard or read. The execution of the search warrants followed on 9 and 10 March 2011 and the arrest on 9 March 2011. Mr Johannsson and others allowed matters to continue, without correcting the information that the SFO had put before the Central Criminal Court.

22. Kaupthing's jurisdiction challenge was rejected by the Commercial Court. The allegations made to the SFO against Mr Tchenguiz were not made in Kaupthing's Defence when it was in due course filed, signed by Mr Johannsson. Judicial review proceedings were commenced in May 2011 to set aside the search warrants and were heard by the Divisional Court in May 2012. In the meantime correspondence between the SFO and solicitors acting for Mr Tchenguiz and others continued, and further section 2 notices were served. After the hearing before the Divisional Court the SFO gave notice that it was terminating the Investigation. The Divisional Court handed down its judgment in July 2012 quashing the warrants.

23. Between the issue of the judicial review proceedings and the hearing and judgment, the Settlement Agreement was entered into. The Claimants say this about the circumstances of that agreement, at paragraph 65 of the Particulars of Claim:

> "[Mr Tchenguiz] experienced substantial personal, commercial and financial pressure as a result of the Raid, Arrest, and Investigation. The difficulties suffered included cash flow problems, demands on management time, the need to comply with the conditions of bail imposed following the Arrest, the defence of the SFO's criminal allegations, the JR Proceedings, and adverse publicity. As intended by the Individual Defendants, in the face of these difficulties, which were shared in part by the [Trust] and the other [Commercial Court] Claimants, the [Commercial Court] Claimants had no option but to settle the [Commercial Court] Proceedings and the [proceedings before the District Court of Reykjavik] on whatever (or the best) terms that were available."

The Settlement Agreement

24. The Appendix to this Judgment sets out, at Part 1, the matters recited by the parties at the commencement of the Settlement Agreement. Part 2 of the Appendix sets out some of the terms defined in the key clauses set out below in the main body of this judgment.

25. Clause 7 of the Settlement Agreement was then 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.
>
> 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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> 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."

26. "Dispute" was defined by the parties to the Settlement Agreements 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..."

27. 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."

28. "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]."

29. Releases by Kaupthing, including of all of the Claimants in relation to the Specified Disputes, were agreed by Clause 8.

30. A number of promises not to bring proceedings and indemnities against claims were agreed by Clause 9, including those set out in Part 3 of the Appendix to this judgment.

Summary judgment

31. It is important that the Court is prepared to deal with this matter at this stage if it properly can. If Mr Johannsson is right and the Claimants are not entitled to advance the Claims 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. On the other hand 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 principle.

32. Mr David Cavender QC for the Claimants argued that a particular reason for not proceeding by way of summary judgment was the prospect that the Claimants would in due course have the opportunity to inspect or rely on documents held by the SFO. On this I accept the submission of Mr Robert Miles QC, with Mr Jeremy Goldring QC and Mr Tom Gentleman, for Mr Johannsson, that it has not been shown why or how the documents could be relevant to the question that arises on this application, which concerns the Settlement Agreement and which ultimately does not turn on contested questions on fact.

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33. Mr [illegible] Tager QC, with Mr Cavender QC, Mr Jonathan Crystal and Mr Alexander Brown, argues for the Claimants that on its true interpretation the [illegible]ment does not compromise the Claims.

34. Developing this point, Mr Tager QC argues that the Claims should be treated as or in the same way as fraud-based claims, and that that should take them outside the [illegible] releases. He also argues that the releases do not extend to claims the existence of which was not known and could not have been known to the Claimants, and that the Claims meet that description.

35. I approach the present case in line with the passages set out below from the speech of Lord Bingham in Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251; [2001] UKHL 8, and from the judgment of Lawrence Collins LJ in Satyam Computer Services Ltd v Upaid Systems Ltd [2008] 2 CLC 864; [2008] EWCA Civ 487.

36. In BCCI v Ali Lord Bingham said, at [8]-[17]:

> "8. I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give

effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912-913 apply in a case such as this.

9. A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention.

... This seems to me to be both good law and good sense: it is no part of the court's function to frustrate the intentions of contracting parties once those have been objectively ascertained.

10. But 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. ... Some of the cases, I think, contain statements more dogmatic and unqualified than would now be acceptable, and in some of them questions of construction and relief were treated almost indistinguishably. But I think [the] 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."

37. In Satyam v Upaid at [84]-[85] Lawrence Collins LJ (with whom Waller and Rimer LJJ agreed) said:

"... Lord Bingham said [in] *Bank of Credit and Commerce International (in liquidation) v Ali* (at [10]) that "a long and ... 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." Lord Browne-Wilkinson agreed, and Lord Clyde (at [86]) expressed substantially the same view. It seems to me to be clear that the same principle must apply to fraud-based claims. If a party seeking a release asked the

other party to confirm that it would apply to claims based on fraud, it would not, in most cases, be difficult to anticipate the answer.

It is not, I think, very helpful to consider whether the release/covenant not to sue applies in the abstract to unknown claims, and then separately whether it applies to fraud-based claims. The true question is whether on its proper construction it applies to claims of the type made in the Texas proceedings, namely that, unknown to Upaid when the Settlement Agreement was entered into, Upaid was supplied by Satyam with forged assignments. To that question it seems to me that there is only one possible answer. In my judgment, express words would be necessary for such a release."

38. All parties had full legal assistance and advice in drafting and entering into the Settlement Agreement.

39. The definition of Specified Disputes has elements of specificity and elements of generality. The drafting is specific in identifying the subject areas to which it is directed, and in particular "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", and "the provision of any documents or information to any authority".

40. The parties' choice of specific language is significant. As Lord Neuberger of Abbotsbury PSC has observed: "[T]he parties have control over the language they use" and "save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision" (see Arnold v Britton and others [2015] AC 1619; [2015] UKSC 36 at [17]).

41. The Investigation, including the search and the arrest some six months before the Settlement Agreement, are surrounding circumstances that leave no room for doubt that the SFO was one of the "authorities" to which the parties were referring when they used that word. Mr Tager QC canvassed the possibility that tax authorities, company registrars and regulators might be referred to, but those suggestions ignore the context known to the parties.

42. There is no reference in terms to claims based on misconduct or deliberate wrongdoing, but Mr Miles QC is right to note that that reflects the fact that the parties have chosen to use language directed to subject area rather than cause of action.

43. In the subject area of investigations or actions by the SFO, 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 Kaupthing or Mr Johannsson. It is not easy to see on what other basis a claim by the Claimants against Kaupthing or Mr Johannsson concerning the Investigation could be asserted.

44. Parties in the position of the Claimants might not know the facts or detail of what they now allege Kaupthing and Mr Johannsson did, but they would appreciate that by including in the drafting "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", and "the provision of any documents or information to any authority" they were putting out of reach claims in that subject area if and when they found out more.

45. Indeed it is only realistic to note that, in light of the Investigation, 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. These are the type of allegation that, regardless of merit, readily have an impact on reputation, cost and time.

46. Lawrence Collins LJ asked in Satyam v Upaid what the answer would be if a party seeking a release asked the other party to confirm that it would apply to claims based on fraud. As he said, in most cases it would not be difficult to anticipate the answer. The present case is different to most cases. In the present case if the party seeking a release asked the other party to confirm whether the release in relation to claims against them concerning investigations and the like by authorities would apply to allegations of misconduct or deliberate wrongdoing the answer to be expected would be yes. This is because the other party would realise that an end to any prospect of an allegation of that type was important to securing the agreement to the Settlement Agreement (and to the other agreements also entered into) by the party seeking the release.

47. It was moreover in the context described above that the parties chose, by Clause 7.2, to state expressly that the Specified Disputes were released where "unknown" and not simply where "known".

48. I consider the Qualification in the next section of this judgment. Subject to that, in my view the Settlement Agreement on its true interpretation compromises the Claims. In context the words used by the parties in the Settlement Agreement are sufficiently express, and the interpretation sought by Mr Johannsson does not rest on inference.

49. Generally speaking it is important for it to be possible for parties to be able, if this is what they wish, to achieve a compromise that puts the past behind them and gains certainty for the future. So far as material, that is what, in my judgment, the parties to the Settlement Agreement did in the present case.

The Qualification

50. Mr Tager QC argues that where the Claims relate to matters that postdate the Settlement Agreement that takes them outside the terms of the releases. On this argument some element of the Claims is saved by the reference in the Qualification to "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 …".

51. By the point of execution of the Settlement Agreement the essential matters alleged for the purpose of the Claims had happened. True, the judicial review proceedings

had not concluded and the Investigation had not been terminated, but on a fair reading of the Particulars of Claim if one takes away matters alleged before September 2011 no case against Mr Johannsson is left that would meet the threshold of real prospect of success required to allow the case to survive the present summary judgment challenge. Allegations of effects after September 2011 resulting from matters alleged before then do not take the Claims outside the releases. Nor do alleged later misdescriptions (alleged for example to have occurred as late as at 9 May 2012) of earlier matters, or failure to correct earlier matters.

52. The Qualification gives rise to a further argument by Mr Tager QC. It excludes "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)". The Claimants say that a settlement was itself one result, intended by Mr Johannsson and others, of the matters alleged by the Claims. They had "no option but to settle the [Commercial Court] Proceedings and the [proceedings before the District Court of Reykjavik] on whatever (or the best) terms that were available".

53. In my judgment the reference in the Qualification to claims or disputes "arising out of or in connection with the Settlement Agreement or its subject matter or formation" does not assist the Claimants. It is directed to enforcement (including enforceability) of the Settlement Agreement. The inclusion of the word "formation" does not cause me to reach a different conclusion. Even if the reference did admit a challenge to the validity of the Settlement Agreement the Claimants do not bring such a challenge.

Alleged "sharp practice"

54. If the Settlement Agreement does on its true interpretation compromise the Claims, Mr Tager QC argues that the present case is one in which the Claimants will nonetheless have a remedy because there has been "sharp practice".

55. The Claimants say that Kaupthing and Mr Johannsson knew, and knew that the Claimants did not know, that the Claimants had a good claim against Kaupthing and Mr Johannsson that would be compromised by the Settlement Agreement. Kaupthing and Mr Johannsson kept that knowledge to themselves, say the Claimants, when the Settlement Agreement was being entered into.

56. In BCCI v Ali 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.

> 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."

57. 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. ....
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> 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."

58. These passages in these speeches address a question of the policy of the law. Lord Nicholls and Lord Hoffmann confined their words to a general release. On this application I must reach a conclusion on whether the present case is arguably of the type they describe. My conclusion is that it is not. Although, as Mr Tager QC points out, there is some general wording used, the releases for "Specified Disputes" are not equivalent to the "general release" under discussion by Lord Nicholls and Lord Hoffmann. They include a specific release of claims in relation to investigations and actions by authorities and provision of documents and information to authorities.

Alleged illegality

59. Mr Tager QC argues that the Settlement Agreement cannot be enforced by Kaupthing, a party to it. He describes it as tainted by or founded on illegality in the form of the conspiracy alleged by the Claimants.

60. If a contracting party cannot enforce the Settlement Agreement then, argues Mr Tager QC, Mr Johannsson cannot be in a better position as a non-contracting party. Mr Tager QC argues that the position is reinforced as regards Mr Johannsson because he is alleged to have been responsible for bringing about a situation in which the Claimants had no alternative but to sign the Settlement Agreement.

61. The central answer to Mr Tager QC's argument is that Mr Johannsson's reliance on the Settlement Agreement in response to the Claims does not involve him relying on illegality. The Settlement Agreement is not illegal, and nor is its object or purpose (the compromise of claims) illegal, and nor is performance of it illegal. Mr Johannsson invokes the Settlement Agreement as a compromise of claims that there has been illegal conduct. Mr Tager QC was not able to show me authority for the proposition that this is impermissible or gives his clients an arguable defence or answer to Mr Johannsson's reliance on the Settlement Agreement.

Breach of fiduciary duty

62. Mr Johannsson's signature appears on the Settlement Agreement as a director of two companies incorporated overseas. The Claimants wish to advance an argument, not part of their statement of case, that Mr Johannsson was in breach of the fiduciary duty owed by a director to those companies. The alleged breach comprised his signing the Settlement Agreement when he would benefit personally from the release and indemnity provisions it contains.

63. The foundations of a claim have not been laid by the Claimants. The duty to which they refer is not owed to the principal Claimants. All the Claimants accept in written submissions that this is not a case where the Settlement Agreement could be rescinded on the ground of alleged breach of the duty. In all these circumstances this aspect of the Claimants' argument does not stand in the way of the relief sought by Mr Johannsson on this application.

CBG

64. CBG was not a party to the Settlement Agreement. Summary judgment is nonetheless sought by Mr Johannsson on the separate basis that it is quite clear the Claims cannot lie between CBG and Mr Johannsson.

65. The Claimants' case is that CBG was an adviser to companies within the Trust. Loss is asserted but the opportunity to show that the asserted loss was in fact arguably incurred by CBG itself has not been taken by the Claimants. In addition, no arguable basis for a claim in conspiracy by CBG was shown to me, and this application was the opportunity for the Claimants to do so. Nor was I shown how documents obtained from or held by the SFO could realistically improve these aspects of CBG's position.

Conclusion

66. Mr Johannsson is entitled to summary judgment against the Claimants. This will include appropriate declarations in relation to the indemnities agreed at Clause 9 of the Settlement Agreement.

APPENDIX

Part 1

"WHEREAS (the terms used below being as defined in this Settlement Agreement)

(A) On 19 December 2007 Kaupthing as lender and Oscatello (a third party not affiliated to Pennyrock) entered into an overdraft facility in the sum of £374 million which was subsequently amended and increased thereafter (the "Overdraft Facility");

(B) On 31 March 2008 Kaupthing as lender, arranger, agent and security trustee and Pennyrock as borrower entered into the Pennyrock Loan;

(C) On various dates between 31 March 2008 and 30 May 2008, companies within the TFT Group provided security to Kaupthing in respect of the Oscatello Liabilities in the form of charges over the shares of certain holding companies of (i) Gen 1, (ii) Gen 2 and (iii) Gen 5 (separate from those charged in respect of the Pennyrock Loan);

(D) On various dates between 31 March 2008 and 30 May 2008, companies within the TFT Group provided security to Kaupthing in respect of the Pennyrock Loan in the form of charges over shares of certain holding companies of (i) Gen 5 (separate from those charged in respect of the Oscatello Liabilities), (ii) Proxima Propco (formerly known as Peverel Propco), (iii) Peverel Opco (now in administration) as well as shares in Pennyrock Limited itself;

(E) On 9 October 2008, the Icelandic Financial Supervisory Authority FME appointed a Resolution Committee of Kaupthing pursuant to Article 5 of Act No. 125/2008 amending the Act No. 161/2002 on Financial Undertaking;

(F) On 10 December 2008, Kaupthing declared a default in relation to the Oscatello Liabilities;

(G) On 13 May 2009 Kaupthing obtained judgment against Oscatello in relation to the Overdraft Facility in the sum of £643,920,235 together with interest, at which date Oscatello was also indebted to Kaupthing under money market loans in the approximate amount of £169,227,574;

(H) Between December 2008 and February 2009 Receivers were appointed over the shares in certain companies at the order of the Resolution Committee in relation to the Oscatello Security Documents;

(I) On 25 May 2009, the District Court of Reykjavik appointed a winding-up committee of Kaupthing;

(J) On 17 July 2009, the Receivers appointed new directors over Villamora Properties Limited, Golden Mist Limited, Frantino Limited, Razita Properties Limited, Bessina Investments Limited, Gold Way Services Limited, Danebury Investments Limited, Zindella Limited, Caprima Limited, and Coralway Properties Limited;

(K) On 30 December 2009, ITGL and EIO submitted a proof of debt for damages arising out of the provision of security and the enforcement thereof in the Icelandic winding-up of Kaupthing;

(L) On 15 March 2010, the Winding-up Committee of Kaupthing notified R&H (to whom the proof of debt had been transferred by ITGL and EIO) that its proof of debt had been rejected;

(M) On 1 July 2010, R&H, EIO and certain of the Chargors issued the TFT London Claim;

(N) The disputed rejection of the proof of debt was referred to the Reykjavik District Court by Kaupthing on 3 August 2010;

(O) The Pennyrock Loan fell due on 4 April 2011 and remains outstanding;

(P) The Parties have agreed to enter into a Restructuring Agreement on the date hereof pursuant to which, amongst other things, an Amended and Restated Pennyrock Loan is being entered into;

(Q) The Parties have agreed terms for the full and final settlement of the TFT Icelandic Claim and the TFT London Claim and for the restatement and amendment of the Pennyrock Loan, including provisions for new security to be provided in relation to the Pennyrock Loan. The parties wish to record those terms of settlement, on a binding basis, in this Settlement Agreement, the Restructuring Agreement and the Related Documents."

Part 2

"**Existing Security Documents**" mean the Pennyrock Loan Facility Agreement, the Pennyrock Security Documents and the Oscatello Security Documents.

"**Kaupthing Parties**" means any Kaupthing Subsidiary, present members of the Resolution Committee of Kaupthing, present members of the Winding-Up Committee of Kaupthing, current directors of Kaupthing and Kaupthing Subsidiaries, present employees and consultants of Kaupthing and Kaupthing's Subsidiaries, and present directors appointed by the Receivers.

"**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.

"**Related Documents**" means the documents entered into in accordance with this Settlement Agreement and the Restructuring Agreement, including the Amended and Restated Pennyrock Loan and the Security Documents as defined therein, the ARA dated on or about the date hereof, the VT Guarantee dated on or about the date hereof, the Deed of Confirmation dated on or about the date hereof, the Supplemental Share Charge dated on or about the date hereof and the Oscatello Security Documents.

"**TFT Group**" means the TFT and its assets and subsidiaries owned or controlled directly or indirectly, legally or beneficially by the trustee of the TFT and/or any such assets and/or subsidiaries, and, for the avoidance of doubt includes without limitation Pennyrock and any subsidiaries owned or controlled directly or indirectly legally or beneficially by Pennyrock and the Chargors and any subsidiaries owned or controlled directly or indirectly legally or beneficially by any and each of the Chargors.

"**TFT Icelandic Claim**" means the claim filed by ITGL and EIO in the claim registry of the Winding up Committee of Kaupthing Bank (claim number 20100106- 1131) in December 2009 in respect of the TFT and which was transferred to R&H on or about 14 May 2010, together with the related case before the District Court of Reykjavik (case number X-475/2010).

"**TFT London Claim**" means Claim No. 2010 Folio 773 issued in July 2010 by R&H, EIO and certain of the Chargors in the Commercial Court of the Queen's Bench Division of the High Court of Justice in London against Kaupthing and Oscatello.

"**TFT Parties**" means any and each of R&H, VT, Pennyrock and the Chargors.

Part 3

Clause 9 provides in part:

"9.1 Each of the TFT Parties irrevocably agrees that it will not in any jurisdiction bring or continue proceedings of any kind whatsoever against any of Kaupthing, the Kaupthing Parties or the Kaupthing Released Parties in relation to the Released Claims save as otherwise expressly permitted in this Settlement Agreement.

...

9.5 Kaupthing irrevocably agrees that it will not in any jurisdiction bring or continue proceedings of any kind whatsoever against any of the TFT Parties, any member of the TFT Core Group or any of the TFT Released Parties in relation to the Released Claims save as otherwise expressly permitted in this Settlement Agreement.

...

9.7 If any TFT Party shall be in breach of this Clause 9, that TFT Party shall indemnify Kaupthing, the relevant Kaupthing Party and/or Kaupthing Released Party from and against any costs, expenses, damages and liabilities (including interest and legal costs and

disbursements) which are incurred or suffered by Kaupthing, the Kaupthing Party and/or the Kaupthing Released Party as a result of the breach of this Clause 9.

9.8 If Kaupthing shall be in breach of this Clause 9, Kaupthing shall indemnify the relevant TFT Party, member of the TFT Core Group and/or TFT Released Party from and against any costs, expenses, damages and liabilities (including interest and legal costs and disbursements) which are incurred or suffered by that TFT Party, member of the TFT Core Group and/or TFT Released Party as a result of the breach of this Clause 9.

9.9 Kaupthing shall indemnify any relevant TFT Party and any relevant member of the TFT Core Group from and against any costs, expenses, damages and liabilities (including interest and legal costs and disbursements) which are incurred or suffered by that TFT Party or member of the TFT Core Group as a result of any Kaupthing Party pursuing any claim or cause of action arising out of or in relation to the Dispute against that TFT Party or member of the TFT Core Group.

9.10 Each TFT Party shall indemnify Kaupthing and any relevant Kaupthing Party from and against any costs, expenses, damages and liabilities (including interest and legal costs and disbursements) which are incurred or suffered by that Kaupthing Party as a result of any member of the TFT Core Group pursuing any claim or cause of action arising out of or in relation to the Dispute against that Kaupthing Party.

9.11 Kaupthing shall indemnify any relevant TFT Party, member of the TFT Core Group or TFT Released Party from and against any costs, expenses, damages and liabilities (including interest and legal costs and disbursements) which are incurred or suffered by that TFT Party, member of the TFT Core Group or TFT Released Party as a result of any Kaupthing Party or any Kaupthing Released Party pursuing any claim or cause of action arising out of or in relation to the Specified Disputes against that TFT Party, member of the TFT Core Group or TFT Released Party.

9.12 Each TFT Party shall indemnify Kaupthing, any relevant Kaupthing Party or Kaupthing Released Party from and against any costs, expenses, damages and liabilities (including interest and legal costs and disbursements) which are incurred or suffered by Kaupthing, any relevant Kaupthing Party or Kaupthing Released Party as a result of any member of the TFT Core Group or any TFT Released Party pursuing any claim or cause of action arising out of or in relation to the Specified Disputes against Kaupthing, any relevant Kaupthing Party or Kaupthing Released Party.

9.13 To the extent applicable, this Clause [9] is enforceable by Kaupthing, any Kaupthing Party, any Kaupthing Released Party, any TFT Party, any member of the TFT Core Group and any TFT 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].

..."