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Case No: BL-2022-001727

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHD)

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

Date: 29 September 2023

Before :

Mr Justice Freedman

- -

Between :

(1) MR KEVIN RALPH WILLIAM RILEY
(2) MRS PAULINE CHRISTIANE RILEY

Claimants

- and –

NATIONAL WESTMINSTER BANK PLC

Defendant

- -
- -

Hugh Sims KC and John Virgo (instructed by **Debello Law**) for the **Claimants/Respondents**
Paul Sinclair KC (instructed by **TLT LLP**) for the **Defendant/Applicant**

Hearing dates: 10 & 11 May 2023, Additional written evidence submitted on 19 May 2023

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 29 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Mr Justice Freedman :

I Introduction

1. This is an application on behalf of the Defendant ("the Bank") to strike out the Claim: alternatively for reverse summary judgment in respect of a claim in fraudulent misrepresentation. The Bank also seeks summary judgment on its Counterclaim in respect of the indebtedness said to be due to it by the Claimants under personal guarantees where the indebtedness was amended by provisions in a Settlement Deed dated 12 November 2014 ("the Settlement Deed"). The Claim is for fraudulent misstatements allegedly made by the Bank in 2009-2012 to the Claimants.

2. The application, both in relation to the claim and the counterclaim, is made on two bases. The Bank submits that even on the assumed basis that the pleaded allegations of the Claimants are correct, the claim is bound to fail on two counts, namely:

   (i) the claims have been compromised and released by reason of the Settlement Deed (the "Settlement/Release Issue") and/or

   (ii) if the claims have not been released, they are statute barred (the "Limitation Issue").

II Background to the Settlement/Release Issue and the Limitation Issue

(a) The allegations of the Claimants

3. On 24 January 1997, the Claimants caused to be incorporated Riley (Holdings) Limited ("RHL") a building development company, which they owned and controlled, and which was managed by Mr Riley. In or about 2004, RHL acquired a site on the banks of the river Trent, two miles east of Nottingham, namely "River Crescent". The site had permission for high-quality residential development. In 2005, the Bank made a series of loans to RHL to cover refinance of RHL's purchase and the costs of development. The lending totalled £26.5m and was advanced against an RICS valuation which valued the development (to comprise 134 luxury apartments) at £41m. A subsidiary of RHL was NDA (Nottingham) Ltd ("NDA"), a provider of education services, for which Mrs Riley had a particular responsibility.

4. On 9 December 2008, the Bank facilities were replaced by an on-demand loan of £32m referenced to LIBOR ("the 2008 Facility"). The Bank had recently agreed to restructure and/or renew the Riley Group's facilities for 12 months, those facilities comprising principally: (i) a loan of £32 million to RHL which was repayable on demand ("the Revised Development Loan"); and (ii) a further loan of £4.1 million to RHL. NDA had entered into a cross-guarantee (the "Cross-Guarantee") in respect of RHL's borrowing from the Bank.

5. In the second half of 2009, the management of the RHL banking connection was transferred from mainstream banking to the Bank's Global Restructuring Group ("GRG"). Although there was no formal handover to GRG, RHL and the Claimants understood at the time the purpose of the transfer to GRG was to facilitate a 'restructuring'. Mr Smith was their first relationship manager in GRG.

6. Between 2009 and 2012, the Claimants say that representatives of the Bank repeatedly made representations to the Claimants and to RHL that NatWest was intending to restructure the 2008 Facility, support RHL, and rehabilitate it, in order to return it to mainstream banking in a satisfactory condition: see paragraphs 28-31, 62, 66, 91 and 94 of the Particulars of Claim ("the Representations"). The Claimants and RHL relied on the Representations by engaging in on-going dialogue with the Bank about restructuring throughout this period and causing substantial monies to be paid into RHL from NDA. If they had known the Bank's true agenda towards them, the Claimants say that RHL would have sought and obtained alternative refinance with other lenders and would have avoided insolvent administration: see paragraph 98 of the Particulars of Claim.

7. The Claimants' case is that the Representations were untrue and were known to be untrue or made with reckless indifference to their truth or falsity. They were made in particular by Messrs Smith, Holdsworth and Carmichael, then acting for the Bank through its GRG: see paragraphs 95-97 of the Particulars of Claim.

8. The Claimants' case is that the Bank was from at least February 2009 and throughout the time of the Representations pursuing a different agenda which it concealed from the Claimants and RHL. It involved the designation of RHL as "non-core" business, and the termination of relationships of customers so classified over a 5-year time span expiring in 2013 ("the Exit Strategy"). This entailed:

    (i) a strategy of exiting the relationship, by no later than 2013, if possible, by an ultimate disposal of the River Crescent development, and further property charged in connection with the 2008 Facility, to the Bank's subsidiary, West Register (Property Investments) Limited ("West Register"); and

    (ii) pending exit, deriving significant financial benefit, including in particular from the receipt of (a) payments made by NDA to fund fit out and furnishing of approximately 120 apartments in the River Crescent Development, (b) rents from lettings of the apartments and (c) other fees and charges levied.

9. In March 2012, the Bank served a series of demands for repayment of the 2008 Facility and connected loans and then placed RHL into administration on 2 April 2012: see paragraph 74 of the Particulars of Claim. The assets of RHL were then disposed of by the administrators, and RHL was subsequently struck off.

10. On 6 October 2022, RHL's claims against the Bank, which had been bona vacantia, were assigned by the Duchy of Lancaster, as nominee for the Crown, to Mr Riley: see Particulars of Claim para. 10. RHL, and the Claimants in their personal capacity, claim to have sustained significant losses. RHL's losses are put at over £93 million (or £70 million net of any residual Bank debt): see paragraph 99(a) of the Particulars of Claim. The Claimants' personal losses are put at about £9 million: see paragraph 99(b) of the Particulars of Claim.

11. Insofar as is necessary, the Claimants also seek rescission of the Settlement Deed: see paragraph 101 of the Particulars of Claim. Insofar as necessary, the Claimants rely, in

defence to the Bank's Counterclaim, on the same matters as set out in the Particulars of Claim and plead an equitable set off – see paragraph 110.2 of the Reply and Defence to Counterclaim.

(b) The Nabarro Correspondence

12. During the course of 2013, Nabarro LLP, solicitors, ("Nabarro") sent three letters to the Bank on behalf of the Claimants, dated 1 February 2013, 3 May 2013 and 21 November 2013 (together, the "Nabarro Correspondence"). It is important to note the contents of these documents in connection both with the Settlement/Release Issue and the Limitation Issue. This is because they are said to be relevant to the interpretation of the claims which were settled, being an important aspect of the factual matrix against which the Settlement should be understood. Further, they are said to be relevant to what the Claimants knew or ought with reasonable knowledge to have known for the purpose of the Limitation Issue.

13. The 1 February 2013 letter of Nabarro, which was written on behalf of the Claimants and NDA, but not RHL which was by this stage in administration, can be summarised as follows, namely:

(i) the purpose of the letter was to *"place on record, the inappropriate and cavalier way in which RBS, as agent for [the Bank], has dealt with our clients culminating in the administration of [RHL]."* It accused RBS as agent of the Bank of *"irrational, precipitous decisions, misstatements, malpractice and poor customer service"*;

(ii) it expressly stated that the complaints identified were not an exhaustive list and that investigations continued (paras 2.2 and 12.2).

(iii) it complained of the failure of GRG to release NDA from the cross-guarantee and about a failure to proceed with a proposal put forward by Jones Day in December 2010 which would have enabled the cross-guarantee to be released with consequent damage to the business of NDA which was forced to disclose the cross-guarantee in its accounts. This was said to demonstrate a *"total lack of understanding by RBS as to the fundamental security within its debenture"*;

(iv) it complained about onerous and unreasonable heads of terms for a potential restructuring of the group facilities made on short notice and its effects on NDA especially as regards equity participation (under which West Register an associated company of the Bank would receive a 20% share of the equity in NDA) and the cross guarantee. This affected the financial due diligence undertaken by the financial partners of NDA and in the end led to NDA ceasing to be a very successful business;

(v) it caused a valuer to be used, which in the estimation of the Claimants, had a significant conflict of interest. It ignored the protestations about conflict and relied upon their valuation. The River Crescent Development of RHL was then sold for £21m which the Claimants believe to have been at an undervalue, and the sale of RHL was to West Register, the Bank's investment property company;

(vi) RHL was forced into an insolvency process when it was not insolvent. This caused RHL to go into administration "*on misconceived grounds*" and/or "*on a misconceived basis*". As a result, it was alleged that Nabarro's clients had suffered significant loss and damage to their interest in NDA.

14. The 3 May 2013 letter of Nabarro's can be summarised as follows:

(i) RHL had been placed into administration "*without good reason*" and the Bank had "*destroyed the value and reputation of RHL"* thereby causing Nabarro's clients to suffer "*significant loss and damage*";

(ii) The Bank had "*destroyed the value of the NDA*" through "*irresponsible, negligent and reckless conduct*";

(iii) Following the debt having been serviced until July 2011 through the NDA by investing millions of pounds into the River Crescent Development, the Bank failed to apply sale proceeds from certain apartments for a period of over a year, it ignored the commercial benefit to itself, RHL and the NDA of the funds committed into the development and applied unreasonable levels of charges thereby destroying an extremely profitable business built up over a period of 23 years;

(iv) The Swap sold to RHL and partly funded by the NDA was in breach of RBS/the Bank's statutory duty. There was "*significant criticism of RBS/Natwest employees' actions in relation to the sale of such complex products and the FSA review into the conduct of RBS/Natwest and others*";

(v) there was criticism of the approach taken to West Register, stating that "*given the increasing public concern in relation to West Register, our clients are concerned that this was a thinly disguised ploy by RBS/Natwest to take on to its books, an incredibly profitable asset at a cut price*". (That said, the West Register option was withdrawn);

(vi) Repeated allegations of *"irrational and irresponsible decisions, misstatements, malpractice and poor customer service"*.

15. The 21 November 2013 letter of Nabarro's can be summarised as follows:

(i) It rejected numerous aspects of a report of MCR, insolvency practitioners, who had been appointed to assist RHL with providing profit forecast figures for the Bank in December 2010. It was of concern that the report had been sent to the Bank before the Claimants knew about it. The motives of MCR in producing such a report were questioned, as was the wisdom of the Bank in relying on the report 12 months later in its decision to put RHL into administration.

(ii) It referred at length to the numerous matters referred to in the earlier letters answering the points made by the Bank.

(iii) It referred to LIBOR manipulation and connected this to RBS insisting that the obligations were by reference to LIBOR in the following terms, namely:

> *(vii) "...as you will be aware from the decision of the FSA... on 6 February 2013, RBS along with other banks has been found to have been complicit in the manipulation of various LIBOR rates between January 2006 and November 2010. When the RHL facility was restructured in December 2008, the obligations under the facility, at the insistence of the Bank, were altered to be by reference to LIBOR.*
>
> *(viii) Our clients were entitled to assume, and did assume, that the LIBOR rate being applied to the RHL facility was a genuine benchmark reference rate and not one which was being artificially set by the panel banks. RHL believed, as did our clients, who were funding the arrangements that the LIBOR rate was genuine."*

(iv) By its final paragraphs:

(1) contrasted what the Bank had stated in its response dated 28 May 2013 in relation to GRG with what (it was said) GRG had actually done, including (allegedly) "*putting a viable business into administration at a time when our clients had put significant funds into making the River Crescent apartments suitable for rental and producing a substantial rental."* It stated that "*[a]ccordingly, our clients have a legitimate claim against the Bank for losses caused by the Bank's actions and inactions*"; and

(2) repeated an invitation for a meeting with the Bank to resolve matters including the Swap claim, to set the record straight and avoid litigation.

(c) The Tomlinson Report

16. On 25 November 2013, 4 days after the 21 November 2013 Letter, the Report by Dr Tomlinson into banks' lending practices ("the Tomlinson Report") was published.

17. In short:

(i) The Foreword referred to the need for banks to *"remove bad debt from their books, to downsize parts of their portfolio and rid themselves of risky lends"*. It suggested there was evidence that RBS was *"unnecessarily engineering a default to move the business out of local management and into their turnaround divisions, generating revenue through fees…and devalued assets"* and that the Bank was extracting *"maximum revenue"* from businesses which was a *"key contributing factor to the business' financial deterioration".*

(ii) The Introduction alleged that GRG was not being used as a turnaround division but as a profit centre for the Bank.

(iii) Section 3 summarised Dr Tomlinson's "*[f]indings*" including that:

(1) The bank artificially distresses an otherwise viable business and through their actions puts them on a journey towards administration, receivership, and liquidation.

(2) Once transferred into the business support division of the bank the business is not supported in a manner consistent with good turnaround practice and this has a catalytic effect on the business' journey to insolvency.

…it became very clear, very quickly that this process is systematic and institutional…[t]his suggests an element of intent in the bank's decision to distress those businesses.

(iv) Section 4:

(1) suggested the Bank looked to engineer defaults by manipulating re-valuations;

(2) reported evidence that no business entering GRG had come back into local management;

(3) reported a perception of an intention by the Bank to purposefully distress businesses to put them into GRG and then take their assets for West Register at a discounted price;

(4) suggested that the Bank should be more transparent if there was an entire sector that the Bank was no longer "in" and wanted to get rid of customers;

(v) among other things, section 5 alleged there were few examples of businesses going into GRG and returning into local management and suggested GRG charged excessive fees, including by requiring independent business reviews.

(vi) Section 6 contained several complaints about West Register including the Bank's alleged conflict of interest and the alleged deliberate undervaluation of property then acquired by West Register at a discounted price.

(vii) The Conclusion stated that :

(ix) "…the findings of the report do clearly show heavy handed, profiteering and abhorrent behaviour of some of the banks towards businesses…it is undeniable that some of the banks, RBS in particular, are harming their customers through their decisions and causing their financial downfall."

18. The Bank alleges that the Claimants were in close contact with Dr Tomlinson at the time of his report and therefore at least had full knowledge of the contents of the report. Whilst the Bank denies the allegations in the Tomlinson report, it says that the Claimants had the knowledge in order to plead fraud and wrongdoing of the Bank at the latest from the publication of the Tomlinson Report. The following is apparent from the evidence, namely:

(i) The Claimants were aware of the Tomlinson Report shortly after its publication. Mr Riley wrote to his MP the day after publication referring to the Tomlinson Report and to the UK banking industry as "*an international laughing stock of fraud and corruption*".

(ii) It is now clear that Mr Riley had been carrying out research into allegations of misconduct by GRG in November and December 2013. In particular, Mr Riley sent an email on 20 December 2013 which showed that he had done research into the identities and roles of various people connected with GRG and had reviewed articles on the website *ianfraser.org*. Various articles on that website, which had been published by December 2013, included allegations of "*systemic institutionalised fraud*" inside GRG and referred to an alleged strategy by the Bank to shift billions of pounds of commercial property assets from its books.

19. In the course of the hearing, there was reference to articles in the Nottingham Post which contained quotations from Mr Riley which were said by the Bank to be relevant to his knowledge at the time. Efforts to obtain them had come to nought, but following the hearing, two articles were provided to the Court by the Claimants with the consent of the Bank. They referred to how the Bank had put RHL into administration and had offered too little money to buy the River Crescent Development. Mr Riley referred to exorbitant fees and charges being imposed by the Bank. He was concerned that the Bank was about to benefit from putting its customers into an insolvency procedure and buying properties for themselves at an under-value through its associated company West Register.

20. The evidence of Mr Riley is that although he was aware of the Tomlinson Report at the time, he was not in close contact with Dr Tomlinson. His attempts to meet with Dr Tomlinson had not been successful. Nevertheless, Mr Riley admits in his second witness statement that he made reference to contents of the Tomlinson Report being autobiographical and to Dr Tomlinson being a spokesman for those affected by the Bank's conduct. He does not deny knowledge of articles of Ian Fraser which refer to "*systemic institutionalised fraud*" of the Bank obtaining low valuations from in-house and panel valuers and disposing of these assets to West Register.

21. However, Mr Riley says that these matters were separate from the fraud now alleged about the GRG's intention to support and return the Claimants' businesses' relationships back to mainstream banking. The Tomlinson Report did not provide evidence about the Bank having decided that commercial property should be treated as non-core business as referred to above. The Fraser articles make no reference to the Bank's non-core division or its non-core strategy, although the Bank referred to an article making such a reference.

22. Both Claimants in their respective evidence say that they knew nothing about the Bank differentiating between core and non-core business at the time of the Tomlinson Report or thereafter at the time of the Settlement Deed. Their first knowledge in that regard was at the time that they first saw a report under section 166 of the Financial Services and Markets Act prepared by Promontory Financial Group (UK) Ltd (the "Promontory Report"), a summary of which was published by the FCA in November 2016, and which was published in full in February 2018

(d) Other developments in late 2013/early 2014

23. Shortly before the publication of the Tomlinson Report (on 1 November 2013), HM Treasury published a review into the 'case' for the establishment of a formal 'bad bank' within RBS ("the Treasury Report"). This report contained some reference to the Bank's 'Non-Core' division and the progress which that division had made in running down and/or managing down assets and (in that regard) serving as an informal (internal) 'bad bank' (see e.g. paras 5.21 and 10.23). It referred at para.4.30 to running down its non-core division from £201 billion to £45 billion from the end of 2009 to mid-2013. There was a reduction of commercial real estate assets from £63 billion in 2008 to £18.3 billion in the first half of 2013: see page 13 and para. 4.30. Para 5.56 described "*RBS Non-Core*" as "*…the Non-Core division, set up in 2009 as a £258 billion run down unit, [it] still holds around £45 billion of assets across a number of different RBS business lines, including commercial real estate, project finance, aviation loans, leveraged finance…"* Para 10.12 (and Chart 10.A), which provided a breakdown of the assets included in what was called "*RBS's new internal bad bank*" by asset class, which breakdown showed that 47% was comprised of commercial real estate loans.

24. The Claimants say that they did not see the Treasury Report despite the investigations which they undertook and despite the fact that Nabarro's were acting for them at the time of its publication and until 2014. Further and in any event, the Claimants say that the references in the Treasury Report were less clear and stark than the subsequent Promontory Report.

III The alleged fraud and the Claimant's case about the discovery of the fraud

25. In short, the Claimants say that the Bank made various representations (the "Alleged Representations") which were false and dishonest as follows:

(i) First, taking the alleged representations pleaded in paragraphs 94(1) and 94(2) of the Particulars of Claim together, that GRG's role was and/or the Bank was willing and/or intended to support the Riley Group with a view towards returning it to the Mainstream Bank (the "Support/Return Representations"). The Claimants say that these representations were false and dishonest because in fact the Bank wished and/or intended to 'exit' the relationship by 2013 and to profit from the Riley Group in the meantime.

(ii) Second, that the Bank did not intend the River Crescent Development to be sold to West Register (the "West Register Representation"). The Claimants say that this representation was false and dishonest because a sale of the development to West Register was the Bank's intention throughout and indeed this was the true reason for the GRG Transfer.

(iii) Third, that the Bank had credit approval for and/or intended to release the sum of £100,000 to one of RHL's creditors, Clegg Construction ("Clegg") if RHL signed a standstill agreement with Clegg (the "£100,000 Representation"). The

Claimants say that this representation was false and dishonest because the Bank had no such approval and/or intention.

26. The Claimants say that the falsity and dishonesty of the Alleged Representations only became apparent to them following the entry into the public domain from 10 October 2016 onwards of various documents relating to the activities of GRG. In particular, they rely on:

(i) Emails, manuals and other internal (i.e. GRG) documents which, they say, show that GRG was (or was regarded or treated as) a "*profit centre*" for the Bank whose aim or purpose was to extract value from (rather than to rehabilitate and/or support) customers and that West Register was one vehicle through which the Bank sought to do so by acquiring 'distressed' assets at an undervalue; and (as the culmination of the series of documents relied on).

(ii) The Promontory Report referred to above, a summary of which was published by the FCA in November 2016, and which was published in full in February 2018.

27. The Claimants place particular reliance on the Promontory Report and say that it revealed for the first time the significance of the Bank's 'Non-Core' division (the "Non-Core Division") in terms of setting or determining GRG's strategy towards a customer: see paragraphs 83 and 84 of the Particulars of Claim. In particular, the Claimants say that the Promontory Report included explanations that, in summary:

(i) following the global financial crisis, the Bank had established the Non-Core Division for those of its assets which were no longer considered 'core' to the Bank's business and/or lending model, which assets included, in significant part, commercial real estate assets.

(ii) the key purpose, or one of the key purposes, of the Non-Core Division was to 'run-down' or 'manage down' these assets over a five-year period;

(iii) as such, the Bank's (including GRG's) internal 'strategy' as regards assets and/or customers within the Non-Core Division was to seek an 'exit' within 5 years, that is by the end of 2013.

28. The Claimants contend that these documents (and in particular the Promontory Report) revealed to them for the first time that the Alleged Representations had been false and had been made dishonestly by the Bank; and thus revealed to them a claim in fraud against the Bank of which they say they had not been aware at the time they signed the Settlement Deed.

29. Albeit that the Promontory Report did contain the matters set out in the above paragraphs, the Bank draws attention to the fact that the Promontory Report did not

substantiate many of the allegations in the Tomlinson Report. In particular, it stated that:

> *(i) "RBS did not set out to artificially engineer a position to cause or facilitate the transfer of a customer to GRG; …*
>
> *(ii) There was not a widespread practice of identifying customers for transfer for inappropriate reasons, such as their potential value to GRG rather than their level of distress; …*
>
> *(iii) There was no evidence that an intention for West Register to purchase assets had been formed prior to the transfer of the customer to GRG".*

30. The Bank also draws attention to the following points (among others), namely

(i) the "*widespread inappropriate treatment*" referred to in the Promontory Report was of a much lower order than that alleged by Dr Tomlinson.

(ii) There was no evidence that assets were systematically undervalued or valuations manipulated to achieve a transfer to GRG.

(iii) There was no evidence that when West Register acquired assets it paid clearly below market price or that West Register made "huge profits" as alleged by the Tomlinson Report.

(iv) Debello's letter of 6 September 2018, despite being sent after, and expressly referring to, the Promontory Report, did <u>not</u> articulate any case based on, or even make any reference to, the Bank's 'Non-Core' division. On the contrary, it largely repeated the content of Nabarro's February 2013 Letter. However, it stated:

(iii) *"4.2 Our clients' position, broadly, is that RBS was culpable of systematic and institutional behaviour in artificially distressing their business and pushing them towards liquidation. Evidence is now available, post the Settlement Agreement, to substantiate these claims, and on this basis our clients' intention is now to i) make an application to the court to set aside the Settlement Agreement and ii) instigate legal proceedings against RBS.*

(iv) *4.3 We note that the facts of our clients' case reflect the findings in both the Lawrence Tomlinson Report and the s:166 Report."*

(v) The Debello letter of 6 September 2018 complained that the Bank's true agenda, from in or about 2009, was to extract maximum value from customers over that period and then dispose of the assets by no later than 2013 – including, if it was financially advantageous to the Bank, by a transfer to West Register. Thus, the Claimants contend that the Alleged Representations were made fraudulently.

(vi) Debello conceded at para 15 of its letter dated 3 May 2022 on behalf of the Claimants that "*the Promontory Report does not support alleged systematic fraud*" and claimed that the "*key point arising from it*" was that it provided strong support for the idea that RHL had been identified and classified as 'Non-Core'.

31. The Bank denies the claim on every level. It denies the allegations of mistreatment. In any event, it denies that the Alleged Representations (or any of them) were made or were relied on by the Claimants. Falsity and dishonesty are denied, as are causation and loss. Even assuming all of the foregoing, the Bank says that the claims have been compromised by the Settlement Deed and/or are time-barred.

32. It is denied (as appears to be alleged) that, the principal purpose of and/or the Bank's principal lending strategy with respect to assets within the Bank's 'Non-Core' division ("the Non-Core Division") was to run down those assets over a period of 5 years and to seek to exit the business within that time. Without prejudice to its denials, the Bank also denies the assertion that it was only the Promontory Report which identified that a material proportion of such assets included commercial real estate assets. To the contrary, as pleaded in paragraph 85 of the Defence:

(i) The establishment and purpose of the Non-Core Division was publicly announced (and was the subject of press coverage) in 2008 and 2009 and was (for example) commented upon in the Bank's annual report for 2009.

(ii) The 2013 Treasury Report included extensive discussion in relation to these matters, including in relation to the progress which had been made by the Non-Core Division in achieving its principal purpose.

(iii) In this regard, as to the existence (on the Claimants' own case) of relevant publicly available materials prior to the publication of the Promontory Report, the Bank notes the contents of paragraphs 65 to 72 of the Claimants' Pre-Action Letter dated 23 November 2021.

(iv) Further, as to the existence in the public domain by 2013/2014 of (on the Claimants' case) highly relevant material specifically linking the establishment and/or purpose of the Non-Core Division with the (alleged) activities of GRG, the Bank relies on paragraphs 88(1), 88(4)(d) and 90 of the Particulars of Claim.

33. As set out in paragraphs 33 to 78 of the Particulars of Claim, in these proceedings the Claimants make various allegations about the way the Riley Group was allegedly mistreated in GRG. In summary, the Claimants make allegations about the following matters:

(i) GRG's refusal and/or unwillingness to release NDA from the Cross-Guarantee, which it is said resulted in NDA being "*effectively lost to the Rileys and/or RHL*": see paragraphs 33 to 45 of the Particulars of Claim. A particular

complaint is made about the Bank's failure to proceed with a proposal put forward by Jones Day in December 2010, which it is said would have enabled the Cross-Guarantee to be released.

(ii) GRG's insistence on a re-valuation of RHL's assets (including the River Crescent Development) being carried out by King Sturge, who it is said were conflicted and/or prejudiced against the Claimants, and GRG's use of and/or reliance upon that re-valuation to declare that RHL was in breach of covenant and/or otherwise apply pressure to RHL: see paragraphs 46 to 50 of the Particulars of Claim.

(iii) GRG putting forward onerous and/or unreasonable heads of terms for a potential restructuring of the Riley Group's facilities at short notice: see paragraphs 53 to 57 of the Particulars of Claim. Particular complaints are made about the Bank's proposal that under the potential restructure it would, via a subsidiary company called West Register, receive 20% of the share equity in NDA under an 'Equity Participation Agreement' ("the EPA"), which it is said would not have been acceptable to the universities with whom NDA dealt.

(iv) GRG's unreasonable rejection of a restructuring proposal from the Riley Group's auditors, RSM Tenon ("Tenon") and its proposal instead that RHL's properties (except Rufford Hall which is the Claimants' home) be sold to West Register: see paragraphs 61 and 64 to 71 of the Particulars of Claim. It is alleged in this regard that GRG had in fact always intended for the River Crescent Development to be acquired by West Register at a reduced price with a view to the Bank profiting in due course and that this was the true reason for the GRG Transfer.

(v) GRG's decision to cause RHL to enter administration by making a demand for immediate repayment in March 2012, even though it is said that: (a) RHL had sufficient income from lettings at the River Crescent Development to cover its interest costs; and (b) the value of the River Crescent Development exceeded the amount owed by RHL to the Bank: see paragraphs 68 to 69 and 74 to 77 of the Particulars of Claim.

IV Submissions of the parties about knowledge of core and non-core business

34. The Bank says that there was reference to the core and non-core business in publicly available documents. In particular, it refers to the following, namely:

(i) the establishment and purpose of the Non-Core Division was publicly announced (and was the subject of press coverage) in 2008 and 2009 and was commented upon in the Bank's annual report for 2009.

(ii) the fact that Dr Tomlinson gave evidence to the body which published the 2013 Treasury Report. This included discussion in relation to these matters, including in relation to the progress which had been made by the Non-Core Division in achieving its principal purpose.

(iii) other press articles relating to allegedly fraudulent practices including sales of properties at an undervalue and being acquired by West Register.

35. The Claimants maintain that they knew nothing of the core and non-core business of the Bank until after the Promontory Report in 2018. Nor did they know about the Bank's annual report for 2009 or the matters relating to the 2013 Treasury Report at the time. In any event, such references were far less specific than those in the Promontory Report. They say that it was this that triggered his realisation that the Bank had made the fraudulent misrepresentations which underlie the current action.

V The Settlement Deed

36. Everyone agrees that the Settlement Deed is to be construed against its factual matrix. The Bank says that the Settlement Deed was entered into on 12 November 2014 against the background of:

(i) the allegations in the Nabarro Correspondence;

(ii) the allegations in the Tomlinson Report, the Claimants' contact with Dr Tomlinson and research on the internet; and

(iii) the public statements made by and about the Bank including about its 'Core' and 'Non-Core' divisions.

37. Clause 7 of the Settlement Deed ("Clause 7") stated as follows:

> *(iv) "7.1 The terms of this Deed and payment of the Settlement Sum are in full and final settlement of, and each Borrower hereby releases and forever discharges, any and/or all actions, claims, rights, demands, disputes and set-offs or other matters, whether in this jurisdiction or any other, whether or not presently known to the Parties or the law, and whether in law or equity, that it may have or hereafter can, shall or may have against the Bank or any Connected Party of the Bank arising from, out of or in connection with (i) the Facility Agreements, the Personal Guarantee or the Legal Charge; (ii) NDA; or (iii) Riley Holdings and all properties owned or formerly owned by Riley Holdings (collectively the "Released Claims").*
>
> *(v) 7.2 The Borrowers agree that they will not bring or commence any proceedings whatsoever in any jurisdiction against the Bank or any Connected Party or of the Bank arising out of or in any way connected with the Released Claims save for the purposes of enforcing their rights under this Deed."*

(a) The allegations in the Nabarro correspondence

38. In its summary of these letters in their skeleton argument, the Bank characterised the key aspects of the Nabarro letters as follows:

(i) the allegations made included: (i) misstatements and/or malpractice on the part of the Bank; (ii) reckless conduct on the part of the Bank; and (iii) references to conduct which was said to be dishonest and/or deliberately pursued with profit in mind. Reference is made in particular to the involvement in LIBOR manipulation and the *"thinly disguised ploy"* to take on its books *"an incredibly profitable asset at a cut price*". Further, a direct contrast was drawn between the way GRG had been described and the way it had (allegedly) behaved.

(ii) a significant number of the allegations made in the Nabarro Correspondence related to RHL, and express reference was made to the value of RHL as having been "*decimated*" or "*destroyed*" and the potential future quantification of a claim relating thereto.

(iii) more than one reference was made to publicly available material and/or publicly known issues relating to aspects of the Bank's conduct, including swap mis-selling, LIBOR manipulation and the role of West Register.

39. The Claimants say that:

(i) the current action involves allegations of specific misrepresentations which did not feature in the Nabarro correspondence;

(ii) the current action involves specific accusations of dishonesty in the nature of making representations known to be false made intentionally or recklessly. There are no allegations of deceit in the Nabarro correspondence;

(iii) there is reference to some common subject matter in a table of the material in the Nabarro correspondence and the factual matters set out in the Particulars of Claim in the instant action. However, this material does not contain any allegations of fraudulent misrepresentations or other dishonest conduct.

40. The Claimants submit that the allegations in the Nabarro correspondence do not comprise allegations of dishonest conduct and/or deliberate misconduct. They say that it falls short of alleging fraud, dishonesty or intentional wrongdoing.

41. More specifically, they say or there are available to them the following arguments:

(i) the allegations of misstatements and malpractice were not specifically of dishonest conduct, but take their character from the words used e.g. *"irrational, precipitous decisions, misstatements, malpractice and poor customer service".* These were not specifically words about fraud, but rather acting in an unacceptable manner vis-à-vis their customer. Those particular words

themselves were in very general terms: they were not the allegations in the current proceedings without the allegation of fraud or dishonesty.

(ii) the reference to reckless conduct on the part of the Bank was not to the tort of deceit or intentional torts. They take their character from the words used, namely "*irresponsible, negligent and reckless conduct*".

(iii) the reference to the value of RHL having been decimated or destroyed is a reference not to intentional or dishonest conduct but to the extent of the losses.

(iv) the references to conduct which was said to be dishonest and/or deliberately pursued with profit in mind were not to allegations of dishonesty, because none were made. In particular:

(a) whilst there was a concern that there was a "thinly designed ploy" to earn a profit for West Register at the expense of RHL and the Claimants, this was a concern rather than an allegation, and the particular concern was not about a specific allegation because West Register did not purchase the assets of RHL;

(b) the reference to LIBOR was said to appear *"to lay the groundwork"* for a potential claim by RHL in relation to alleged LIBOR manipulation. This was not the same as making such a claim (and no claim ensued or was notified): it was not alleging that the relevant representatives of the Bank were involved in swap mis-selling.

(b) The allegations in the Tomlinson Report

42. The Bank submits that the allegations contained in the Tomlinson Report amount to systemic conduct calculated to put viable businesses into an insolvency process and to pick up assets for the Bank at a discounted price. The allegations are not specifically with reference to the business of the Claimants and their companies, but it can connect with the complaints made by the Claimants. The Bank submits that, on this basis, there were allegations about deliberate misconduct on the part of the Defendant, even if it was not the same misconduct as the fraudulent misrepresentations now relied upon. There was also information in the media in which Mr Riley alleged fraudulent practices of the Bank and associating himself and his businesses with the Tomlinson Report.

43. The Claimants submit that whilst the allegations contained in the Tomlinson Report were serious about the way in which the Bank was conducting itself, the Report did not contain information relating to the fraudulent misrepresentations now being pursued. In particular, it did not refer to the allegation about a distinction between core business and non-core business of the kind which subsequently appeared in the Promontory Report.

(c) The public statements made by and about the Bank including about its 'Core' and 'Non-Core' division

44. The Bank draws attention to the public statements made by the Bank about its core and non-core division. As noted, it refers to its accounts and the 2013 Treasury Report. The Bank also submits that there was an openness about this information which is inconsistent with the Claimants' case about false representations and cover up now alleged. The Claimants say that they did not see this information, and that in any event, it was not clear in the same way as emerged in the Promontory Report. Although the Claimants say that they did not see these documents at the time, there is material on which the Bank would be able to cross-examine the Claimants on these assertions.

VI The law

45. The general principles of construction of written contracts were summarised by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at *[12]* :

> *(vi) "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."*

(a) The appropriate approach to contractual releases

46. In *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, the House of Lords considered the correct approach to the construction of contractual releases. For present purposes, the most important passages in the speech of Lord Bingham of Cornhill (with which Lord Browne-Wilkinson agreed) are as follows:

> *(vii)"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 896,912-913 apply in a case such as this.*

> *(viii) 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.*
>
> *(ix) 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.…"*

At paragraph 17, Lord Bingham described this not as a rule of law but as *"a cautionary principle"*.

47. Lord Nicholls emphasised that the scope of the release would frequently be construed as being circumscribed by the subject-matter of the compromise:

> ***(x) "26. [T]here is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?***
>
> *(xi) 27. That said, the typical problem, as I have described it, which arises regarding general releases poses a particular difficulty of its own. Courts are accustomed to deciding how an agreement should be interpreted and applied when unforeseen circumstances arise, for which the agreement has made no provision. That is not the problem which typically arises regarding a general release. The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary,* ***part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality.*** *When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope*

> *of the release.* ***The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made.*** *For instance, a mutual general release on a settlement of final partnership accounts might well preclude an erstwhile partner from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed accounts.*
>
> *(xii)28. This approach, however, should not be pressed too far. It does not mean that, once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever its subject matter may be.* ***However widely drawn the language, the circumstances in which release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed … Echoing judicial language used in the past, that would be regarded as outside the "contemplation" of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not "under consideration".***
>
> *(xiii) 29. This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates*[emphasis added]*."*

48. Lord Clyde at para. 78 stated that the solution was to be found by considering the language used by the parties against the background of the surrounding circumstances. At para. 79, he said:

> *"... Generally people will say what they mean. Generally if they intend their agreement to cover the unknown or the unforeseeable, they will make it clear that their intention is to extend the agreement to cover such cases. If an agreement seeks to curtail the possible liabilities of one party, he, if not both of them, will generally be concerned to secure that the writing clearly covers that curtailment."*

(b) May a general release extend to fraud claims?

49. In *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), Moore-Bick LJ considered whether the release extended to unknown fraud claims. Moore-Bick LJ, whose discussion of the point was strictly obiter, referred to *BCCI v Ali* and continued:

> *209. ...I find it more difficult to say that they intended to release Western Star from liability for claims arising out of its own fraud, however. I am satisfied that neither party had the possibility of fraud in mind. As Rix LJ said in HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 at page 512, fraud is a thing apart because parties contract with one another in the expectation of honest dealing. Moreover, the manner in which fraud is treated in Article 12 of the Share Purchase Agreement reinforces the conclusion that the parties in this case regarded it as giving rise to fundamentally different considerations. If, therefore, Mr. Ellis's knowledge is to be imputed to Western Star so as to render any of the representations not only false but fraudulent, I do not think that the settlement agreement was intended to deprive MN of its right to pursue a claim in respect of them."*

50. In *Satyam Computer Services Limited v Upaid Systems Limited* [2008] EWCA Civ 487, Lawrence Collins LJ, with whom Waller and Rimer LJJ agreed, went on to consider obiter whether the release in that case would have applied to unknown claims that arose after the date of the settlement agreement and to unknown claims involving allegations of fraud. He recorded the appellant's submission that it must have been intended to compromise unknown claims and fraud-based claims because the settlement agreement was a termination of the whole relationship, and he continued:

> *"84. I do not accept this submission. I would agree that the exclusion clause cases should not be automatically imported into the area of releases, but that is not what either Moore-Bick LJ did in MAN Neufahrzeuge AG v Ernst & Young [sic], or what Flaux J did in the present case. Lord Bingham said (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.*

> *85. 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…"*

51. In the many cases cited to the Court, it is worth noting the facts of the case of *Maranello Rosso Limited v Lohomij BV* [2022] EWCA Civ 1667 *("Maranello")* because its facts have a resonance in respect of the instant case. Indeed, para. 1 of the judgment of Phillips LJ reads as follows:

> *"This appeal raises the familiar issue of whether an agreement for the settlement of "all and any claims" between the parties (whether or not known to them at the time), had the effect of compromising claims in fraud and dishonesty (and, in the present case, conspiracy), notwithstanding that claims of that nature were not expressly mentioned in the agreement."*

In referring to the case, it is important not to lose sight of the need to interpret each contract of release separately having regard to the particular words of the contract and the different factual matrix in each case.

52. In *Maranello*, there was a claim for about £70 million for alleged conspiracy to defraud. The claim was brought in relation to the auction of a valuable collection of vintage Ferraris. The defendants comprised the auction house and some of its former directors.

53. A letter before action notified claims *"for negligence and breach of contractual and common law duties"* in respect of the defendants' conduct of auction(s) and the collection. Whilst the letter did not allege fraud or conspiracy, it made accusations of *'coercion', 'withholding of information', 'unlawful practices'* and being motivated solely by their own self-interests. The parties entered into a settlement agreement by which Maranello released the defendants from all "Claims", which were broadly defined in that agreement, including unknown claims. The definition did not refer expressly to claims in fraud or conspiracy.

54. Proceedings were brought in which Maranello alleged dishonesty, fraud and conspiracy against the defendants. There were allegations of wrongs both before and after the settlement agreement.

55. In *Maranello*, in the judgment of the Court of Appeal at para. 44, Phillips LJ said the following:

> *"I agree with the Judge's understanding, expressed at [94] and [97], that neither Moore-Bick LJ nor Lawrence Collins LJ was suggesting any departure from the application of the ordinary principles of contractual construction in the case of fraud claims. Rather, consistently with those principles, they recognised that part of the commercial context to be taken into account was that parties would generally proceed on the basis of honest dealing and would not readily release unknown claims in respect of the fraud of their counterparty. Both decisions reflect that the specific release under consideration did not demonstrate an intention to settle claims in fraud. As the claims in Satyam were based on the fact that assignments had been forged, the release would have only been effective in respect of such claims if express words had been used: that should not be read as support (even obiter) for the proposition that express words are always or even generally required to release a claim in fraud."* (emphasis added)

56. Phillips LJ referred to *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204, in which the Court of Appeal considered whether a contractual release applied to claims based on an unlawful means conspiracy which were sought to be added by amendment. It was important to apply contractual principles of construction including that it is a unitary process moving between language and context balancing the indications given by both of them. Asplin LJ (with whom Hamblen LJ and Nugee J agreed) stated:

> *"44. It was agreed that the 2014 Releases must be construed in accordance with the principles in Arnold v Britton [2015] AC 1619. Those principles were endorsed by the Supreme Court in Wood v Capita Insurance Services Ltd [2017] AC 1173. As Lord Hodge explained at [10] of his judgment, the court must ascertain the objective meaning of the language which the parties have used and in doing so 'must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.' He also reiterated the principle that the interpretation of contracts is a unitary exercise, stated that the process is an iterative one and added at [12]:*
>
> *'To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.'*
>
> …

> *49. It seems to me that the definition of 'Claims' in clause 2(a) viewed in the context of the Revised Redress Offer as a whole and clause 2(a) in particular, and in the light of its relevant factual context, is extremely wide and is sufficient to include the claim of unlawful means conspiracy. 'Claims' are defined to include 'all complaints, claims and causes of action in any way connected to the sale of the IRHPs' (emphasis added). The language used is broad and unambiguous and it seems to me to be inescapable that it is sufficiently wide to include the claim as pleaded in the proposed amended pleading which contains numerous references to the sale of the IRHPs and their effects upon the Appellants."*

57. It is worth setting out in full paras. 58-59 of the judgment in *Maranello* which provides assistance in respect of the correct approach to construction. Phillips LJ said the following:

> *"58. In my judgment there is no merit in the suggestion that the Judge's approach to construction of the Settlement Agreement was overly-literalist or otherwise wrong, for the following reasons:*
>
> *i) The Judge undertook a detailed and careful consideration of both the wording of the relevant clauses and the factual matrix, reaching the conclusion that both pointed to the release covering all claims relating to the subject matter in existence as at its date, including those now alleged by MRL. In so doing, he carried out the unitary exercise identified and explained in Wood v Capita Insurance Service Ltd [2017] AC 1181; [2017] UKSC 24 by Lord Hodge at [12], it being unimportant whether the Judge started "with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract".*
>
> *ii) In the course of the above exercise, the Judge (as he was both entitled and obliged to) had regard to the nature of the drafting, placing particular weight on the text due to the fact that it was formal and high quality. His detailed consideration of the precise words used by the parties reflected the approach adopted by Asplin LJ in Elite, as did his conclusion.*
>
> *iii) The Judge had full regard to the "cautionary principle", reflected in his recognition in [117] that, in the absence of express words one will not readily conclude that a reasonable person would understand a release to refer to fraud or dishonesty claims. His reference in that paragraph to the words of the release being "unequivocal and unambiguous" and evincing a plain intention to omit nothing and leave no loopholes was not the sole justification for his decision, but was the second of three reasons for rejecting the submission that the absence of express words was determinative against the release of claims in fraud. The first reason was that the absence of express*

words was not determinative given that he had already reached the conclusion, on ordinary principles of construction, that fraud was included in the release (see [116]), and that there was no rule of law that it should be determinative. The third was that the release was framed in terms of subject matter, further explaining why express words were not necessary to incorporate claims in fraud. Again, that third reason was expressed to be an element in the Judge's overall assessment, not a determinative factor. (emphasis added)

59. I am also in full agreement with the Judge's conclusion as to the proper construction of the Settlement Agreement, essentially for the reasons he gave, but perhaps looking at matters in a different order as follows:

i) I would start by considering the nature of the dispute which was being settled. The Spring Law letter, although framing claims in terms of breach of contract and negligence, made clear and express allegations amounting to breach of fiduciary duty by Bonhams in its role as agent for MRL. The letter asserted repeated and deliberate steps taken by Bonhams to profit considerably at MRL's expense, including accusations of illegality and duress, to which can be added evidence that Mr Brooks had threatened to "destroy" Mr Sullivan. The connection between Bonhams and Lohomij was referenced numerous times, the clear implication being that that link had been or could be used to prejudice MRL's position. Combined with the assumption in the without prejudice letter that Bonhams could procure agreement by Lohomij and the subsequent joinder of Lohomij as a party to the Settlement Agreement (recognising that no separate allegations had been made against it), it was clearly envisaged that Lohomij might be said to be liable for MRL's alleged wrongdoings.

ii) In that factual and commercial context, the widely worded release of all claims, no matter the cause of action, arising out of the above matters would naturally and obviously include claims that Bonhams' actions amounted to deliberate and dishonest breaches of fiduciary duty in combination with others, including in particular Lohomij. I consider that to be the case with full regard to any cautionary principle that applies. To apply the test referred to in Satyam, if the parties, on entering the Settlement Agreement, had been asked whether MRL could thereafter bring claims for the matters referred to in the Spring Law letter, but reformulated as being part of an unlawful means conspiracy, the answer would surely have been that they could not. It would have been uncommercial and surely not intended that MRL would benefit from the waiver of a fee of €13.6m and the extension of its loan facility from Lohomij, but remain free to pursue the very same accusations merely by recasting them as having been unlawful acts carried out in combination.

> *iii) It is true that the Settlement Agreement contained a standard "entire agreement" clause which excluded claims in fraudulent misrepresentation from its scope. Such a clause addresses a very different question than the scope of the release. But in any event, as Arnold LJ pointed out in the course of argument, the inclusion of that clause demonstrates that the parties were perfectly able to exclude fraud from the scope of the provisions if they intended to do so.*
>
> *iv) It follows, in my judgment, that the proper unitary exercise of construing the Settlement Agreement leads to the inevitable conclusion that claims in fraud, dishonesty and conspiracy were released."*

(c) General principles

58. Applying the above and by way of summary and without seeking to detract from the expositions of the law as set out by the higher courts, it is necessary to have regard in particular to the following:

(i) the interpretation of a release is a matter of construction according to usual principles, there being no special rules of interpretation in respect of deeds of release;

(ii) the task is to ascertain the intention of the parties from 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 as known to the parties;

(iii) as Lord Hodge explained in *Wood v Capita* [2017] AC 1173 at para.10 the Court must ascertain the objective meaning of the language which the parties have used and in doing so "*must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning*."

(iv) the Court must read the language in dispute and the relevant parts of the contract that provide its context. Then it does not matter which the Court considers first, the factual background and the implications of the rival constructions, or a close examination of the relevant language of the contract: see *Wood v Capita* at para. 12. It is an iterative process going from language to context or the other way around and to and fro, balancing the indications given by each.

(v) the true question is whether on its proper construction the release applies to claims of the type made in the proceedings. It is not a helpful approach to consider whether the release applies in the abstract to unknown claims and then separately whether it applies to fraud-based claims: see *Satyam* at para. 85 as quoted above.

(vi) the cautionary principle identified by Lord Bingham in *BCCI v Ali*, is that in the absence of express words one will not readily conclude that a reasonable person would understand a release to refer to fraud or dishonesty claims. This is not a rule of law. The absence of express words is not determinative: see *Maranello* at first instance at para. 117 and in the Court of Appeal at paras. 44 and 58(iii) (as quoted respectively at paras. 55 and 57 above), and particularly the statement that *Satyam* is not authority, even obiter, for "*the proposition that express words are always or even generally required to release a claim in fraud"*.

(b) The law relating to summary judgment/strike out

59. The relevant rules in the CPR are as follows:

(i) Power to strike out a statement of case

(xiv) "3.4

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

(ii) Grounds for summary judgment

"24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*
>
> *(Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)"*

60. In *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J said the following about summary judgment applications, but the same applies also to strike out applications:

> *"The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or*

> *alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;*
>
> *vii)On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

VII The Settlement Deed and whether or not the instant claim was barred by it

61. Clause 7 of the Settlement Deed (*Clause 7*) provided as follows (emphasis added):

> *"7.1 The terms of this Deed and payment of the Settlement Sum are in full and final settlement of, and each Borrower hereby releases and forever discharges,* ***any and/or all*** *actions, claims, rights, demands, disputes and set-offs or other matters, whether in this jurisdiction or any other,* ***whether or not presently known to the Parties or the law****, and whether in law or equity, that it may have* ***or hereafter can, shall or may have*** *against the Bank or any Connected Party of the Bank arising from, out of or in connection with (i) the Facility Agreements, the Personal Guarantee or the Legal Charge; (ii) NDA; or (iii) Riley Holdings and all properties owned or formerly owned by Riley Holdings (collectively the "****Released Claims****").*
>
> *7.2 The Borrowers agree that they will not bring or commence* ***any proceedings whatsoever*** *in any jurisdiction against the Bank or any Connected Party of the Bank arising out of* ***or in any way connected with*** *the Released Claims save for the purposes of enforcing their rights under this Deed."*

62. The terms of the settlement are in extremely wide-ranging terms in a professionally drafted document. They were in clear and precise terms. Reference is made in particular to the following, namely that the release refers to:

    (a) "*any and/or all actions, claims, rights, demands, disputes and set-offs*"

    (b) "*whether or not presently known to the Parties or the law*" (in other words, it refers expressly to unknown claims);

    (c) "*it may have or hereafter can, shall or may have against the Bank or any Connected Party*" (in other words, it refers to present and future claims)

    (d) it has a connection with subject matter through the words *"arising from, out of or in connection with (i) the Facility Agreements, the Personal Guarantee or the Legal Charge; (ii) NDA; or (iii) Riley Holdings and all properties owned or formerly owned by Riley Holdings."*

    Clause 7.2 widens the effect of the Released Claims by an obligation not to bring *"any proceedings whatsoever"* in any jurisdiction *"arising out of or in any way connected"* with the Released Claims.

63. The Settlement Deed provided for a standard "entire agreement" clause which excluded claims in fraudulent misrepresentation. Clause 13(2):

> *"The Parties expressly agree that they will not have any right of action in relation to any statement or representations made by or on behalf of any other Party in the course of any negotiations which preceded the execution of this deed, unless such statements or representations were made fraudulently".*

64. As noted by Phillips LJ in *Maranello*, such a clause addressed a very different question from the scope of the release: see para. 59(iii). It was noted that Arnold LJ said that this showed that if the parties had intended to remove fraud claims from the release, they could have done if they intended to do so. It may be that the exclusion of fraud in this context was to meet arguments under the Unfair Contract Terms Act 1977 to the effect that without it, the clause would or might be of no effect: see *Thomas Witter Ltd -v- TBP Industries Limited* [1996] 2 All ER 573.

(a) The Bank's submissions

65. There is a point where context and the terms of the agreement overlap. The total debt under the facility agreements and the personal guarantee was a sum of £2,716,180.17 at the time of the Settlement Deed: see Clause 1.4.23. The parties agreed to payment either of:

(a) an early settlement sum within a year of the Settlement Deed comprising a sum of £1,100,000: see Clauses 2.2.1(a), 1.4.7 and 1.4.8; or

(b) a deferred settlement sum in accordance with deferred settlement terms comprising a sum of £1,250,000 plus interest at a rate of 2 per cent over Base Rate, compounding quarterly with deferred settlement terms agreed for monthly payments, minimum annual payments and a final payment: see Clauses 2.2.1(b), 1.4.5, 1.4.6, 1.4.10, 1.4.11, 1.4.13 and 1.4.14.

This shows that there was a very substantial reduction in the indebtedness conditional on payment either on the basis of the early settlement terms or the deferred settlement sum. The Settlement Deed provided for events of default and acceleration at Clause 5.

66. The Bank submits that the wide wording of the release and the reduction of the indebtedness show that the draftsman and therefore the parties were seeking to draw a line under events up to the date of the Settlement Deed.

(b) The Claimants' submissions

67. The Claimants submit the following, namely:

(i) however widely drawn the contract was as regards the terms of the release, there was no express provision to the effect that the release extends to claims in respect of fraud. (Since the close of oral argument, the Claimants have provided a redacted agreement in an unrelated matter which expressly discharged fraud claims);

(ii) the Court should apply the cautionary principle and infer that the parties would not generally have intended to include fraud being practised by one party on the other which was unknown to the other party as being covered by the settlement;

(iii) in the event that there had been a request from the Bank to the Claimants as to whether the release could extend to fraudulent misrepresentation, the answer would have been in the negative;

(iv) the agreement was predicated upon breach of contract and negligence and the like, but it was not intended to wash away fraud;

(v) the correspondence of the Claimants' solicitors, despite being the obvious product of considerable thought and the matters being set out in detail did not allege expressly the tort of deceit. The submissions of the Claimants at para. 35 as regards the lack of knowledge of the Bank's characterisation of core and non-core business and at paras.39-41 above as regards the Nabarro correspondence are repeated;

(vi) the Tomlinson Report did not make reference to the fraud by reference to the core and non-core business differentiation. The submissions of the Claimants summarised at para.43 above as regards the Tomlinson Report are repeated;

(vii) the Court at this summary judgment stage should operate on the basis that the Claimants did not know about the core and non-core business differentiation until the Promontory Report in 2018.

68. It therefore follows according to the Claimants, applying the legal principles set out above, that the Court ought to construe the Settlement Deed as not barring the instant claim of fraud.

(c) Discussion

69. It is accepted by the parties that it may be appropriate in principle to decide the question of construction on a summary judgment application. This is the premise of the Bank's application for summary judgment. At para. 17 of the Claimants' skeleton argument, it is stated that *"It is recognised that this gives rise to a point of construction which (but for the issue of "sharp practice", considered further below), the court may consider amenable for summary judgment."* This judgment shall return to the issue of sharp practice. It would only be if there were potentially critical issues to construction about the context of the agreement that there might be a barrier to deciding construction at this stage. As the skeleton argument of the Claimants recognises and, as I find, there is no such barrier. At this summary stage, I shall adopt the point made by the Claimants in sub-paragraph (vii) of the preceding paragraph above. That is to say that the strike out/summary judgment application in respect of the claim will be decided on the basis that the Claimants did not know and could not have known with reasonable diligence about the claim in fraud by reference to the core business and non-core business allegation at the time of the Settlement Deed. It follows that the Settlement Deed must be construed for the purpose of the application on that basis.

70. In my judgment, deliberate wrongdoing was the backdrop to the Settlement Deed. This is apparent from the following sources, namely:

(i) the references in the Nabarro Correspondence to LIBOR manipulation. I do not accept that this is simply laying the ground for a possible future claim. It is stronger than that, at least in the letter of 21 November 2013. That is by its nature an allegation of deliberate misconduct.

(ii) the references in the Nabarro Correspondence to *"a thinly disguised ploy by RBS/Natwest to take on to its books, an incredibly profitable asset at a cut price*" for the benefit of West Register and contrary to the interests of RHL and the Claimants. This is to be seen in the context of other allegations such as misstatements and malpractice. Although the term "concern" was used, it is not an answer, if it was the case, that this was a concern rather than an allegation. In my judgment, whichever of the two it was, it shows that the context of the Settlement Deed was either a claim to this effect or an intimation of a possible claim. Whichever it was, its effect is that deliberate wrongdoing was a part of the backdrop to the Settlement Deed.

(iii) the references in the Tomlinson Report to systematic and institutional transfer of a business from being viable to a journey towards insolvency where the Bank

manipulates valuation, distresses the business to take the assets for West Register at a discounted price.

(iv) the adoption of this report by the Claimants who referred to the same being autobiographical and made more general references to fraud and corruption in the UK banking industry.

71. This all arose out of the way in which the accounts of RHL and the Claimants were being treated by the Bank. Even assuming for this purpose that the particular allegation about non-core assets was not known to the Claimants, the factual context of the Settlement Deed was not limited to allegations of breach of contract and/or negligence. The background extended to deliberate wrongdoing. This may not have been the same as the specific allegation of deceit with the falsity being that the Bank had also decided that the business of RHL and the Claimants would not be backed because they were non-core business. However, the alleged false representations arose out of closely related deliberate misconduct and was captured by the very wide wording of the Settlement Deed. In particular, the following is to be noted, namely:

(i) The allegation of forcing a profitable company into insolvency and a thinly disguised ploy with a view to acquiring them for the benefit of an associated company West Register is to the effect that there was deliberate misconduct to look after the Bank's interests at the expense of RHL or the Claimants. This is very close to the particular deceit of promising to look after the interests of RHL and the Claimants whilst having decided to treat the assets as non-core assets and to exit the relationship.

(ii) It is in this context that expressions like "*irrational, precipitous decisions, misstatements, malpractice and poor customer service"* do not connote simply breach of contract or negligence but are broad enough also to connote deliberate misconduct.

(iii) There was a lot of concentration on whether the Tomlinson Report had provided a basis for pleading fraud. As regards the question of construction, whether it did provide a basis is not to the point. The point is that there were allegations of deliberate misconduct of a closely related kind to the allegations later to appear in the Particulars of Claim, namely artificially distressing an otherwise viable business and causing them to become insolvent in a systematic and institutional way. The alleged purpose was to distress businesses to put them into GRG and then take their assets for West Register at a discounted price.

(iv) If there was any doubt as to what this meant or as to the knowledge of the Claimants of the Tomlinson Report, the Claimants identified themselves with it by referring to the Report as being autobiographical and the adoption of the Report as exposing "fraud and corruption".

(v) All of this is captured by the wide wording in Clauses 7.1 (the Released Claims) and 7.2 (the covenant not to sue). It arose from or out of the banking relationship referred to in the subject matter of the release mentioned in Clause 7.1 of the Settlement Deed. Alternatively, it was in connection with the banking

relationship there referred to. It came within the scope of the covenant not to sue in Clause 7.2 in that it arose out of was "in any way connected with" the Released Claims (as defined in Clause 7.1).

72. Whilst each case is different on its own particular facts, there are parallels to the *Maranello* case. In that case, the claims had been framed in breach of contract and negligence but there were allegations of repeated and deliberate steps by the auctioneer to profit at Maranello's expense, and evidence of accusations of illegality, duress, and intention to destroy the client. In the instant case, the allegations were not limited to the Nabarro letters. There was also the Tomlinson Report. There was wrongdoing in the Nabarro correspondence, and sufficient, in my judgment, even without the Tomlinson Report, to indicate that deliberate wrongdoing was alleged. The effect of the Tomlinson Report, as adopted by the Claimants, by itself or together with the Nabarro letters was that deliberate wrongdoing was alleged. In the *Maranello* case, the focus was on the Spring Law letter. In the instant case, the focus is not solely on the Nabarro letters but also on the Tomlinson Report and the public communications of the Claimants.

73. As in the case of *Maranello*, for the reasons set out above, the accusations sufficed to render the background one of deliberate wrongdoing, not restricted to breach of contract or negligence, but closely related to the allegations which would be made in this action. As in *Maranello*, there had been no allegation of deceit made prior to the subsequent action, but the nature of the allegations made were such that the settlement agreement was capable of being construed as broad enough to extinguish all of the alleged wrongdoings arising out of the transaction.

74. In that context, the widely worded release of all claims would, as in *Maranello,* naturally and obviously include claims arising out of or closely related to the deliberate wrongdoing referred to in the Nabarro letters and/or in the Tomlinson Report. There has been referred to above the width of the clauses of settlement and release in *Elite Property Holdings Ltd v Barclays Bank plc* at para. 49. In these cases, the wide-ranging clauses of settlement and release did not contain an express provision releasing claims of conspiracy or fraud or deliberate wrongdoing, but were held as a matter of construction to include claims for conspiracy (in *Elite*) or conspiracy and fraud (in *Maranello*) as construed against their background. It is now formulated in the way in which this has been done through the tort of deceit in respect of the non-core business allegation, but it is against the background of the allegations and concerns about deliberate wrongdoing which is the backdrop to the Settlement Deed. It would have been uncommercial and not intended for the Claimants to benefit to the extent of over a million pounds being written off and to have a long deferment of the time for payment, but for the Claimants to remain free to pursue allegations of deliberate wrongdoing.

75. The allegations in this action arise out of the same relationship and out of the same or similar facts and matters as alleged in the Nabarro letters and/or the Tomlinson Report In considering the meaning and effect of the Settlement Deed, the additional ingredient of the "non-core businesses" does not render this claim of of a different character from anything which was contemplated at the time of the Settlement Deed. Against the factual background referred to above and in the next few paragraphs, and applying the wide words of the settlement, the intention of the parties was to bar the claim now made. In reaching this conclusion, the Court has engaged in a unitary or iterative process

moving between language and context balancing the indications given by both of them, as referred to by Lord Hodge at [12] in *Wood v Capita* which was quoted in the passage cited at para. 56 above in *Elite Property Holdings Ltd v Barclays Bank plc*.

76. All of this is in the context of a settlement which was clearly intended to draw a line under the dispute of the parties. In that vein, it was to discount very substantially the amounts to be paid by reducing the indebtedness conditional upon payment and to defer very substantially the time for payment with a non-penal rate of interest. The background in the instant case included not only solicitors' letters as in *Maranello*, but also a much-publicised report (the Tomlinson Report) and the comments to the press by Mr Riley identifying the Claimants' experience with the Report. Against this background of allegations about deliberate wrongdoing, the notion that a subsequent discovery of the non-core businesses differentiation (making the assumption for this purpose only that it was not known, nor could it be expected to have been known before) could take the instant claim outside the settlement is wrong. Whether the matter is considered textually or contextually or in an iterative way, going from one to the other and back, the conclusion is that the instant claim was extinguished by the Settlement Deed.

77. There were very serious allegations made not depending on the non-core business allegation including:

(i) GRG's refusal to allow the cross guarantee to be released from NDA;

(ii) the insistence on the re-valuation of RHL's assets and using conflicted valuers;

(iii) putting forward onerous and/or unreasonable heads of terms for a potential restructuring of the Riley Group's facilities at short notice;

(iv) the proposal that RHL's properties be sold to West Register, an associated company of the Bank at a reduced price;

(v) GRG's decision to cause RHL to enter administration by demanding payment in March 2012 despite RHL having money to pay interest costs and the value of the development exceeding the amount owed by RHL to the Bank.

78. Given that it was also the case that the Bank had made promises that they would back the business of the Claimants and their companies, the totality of this conduct must have fuelled a belief that the Bank had no intention of backing the business of the Claimants. If it is the case that there was no knowledge of the business being non-core business, there was a belief on the part of the Claimants that the Bank's conduct was fraudulent.

79. Mr Riley, with whom Mrs Riley has identified herself throughout, believed that the Riley businesses and Mr and Mrs Riley as guarantors and shareholders were the victims of fraud. This is apparent from the following, namely:

(i) The Tomlinson Report referred to banks including RBS artificially distressing viable businesses enabling West Register to take the assets at a discounted price. Mr Riley regarded these allegations as autobiographical, in other words reflecting their experience of dealing with the Bank;

(ii) Mr Riley wrote to his MP the day after publication referring to the Tomlinson Report and to the UK banking industry as "*an international laughing stock of fraud and corruption*".

(iii) Mr Riley had been carrying out thorough research into allegations of misconduct by GRG including a website *ianfraser.org* which referred to "*systemic institutionalised fraud*" inside GRG.

(iv) The Nabarro letters had expressed a concern that the conduct of the Bank was a "*a thinly disguised ploy by RBS/Natwest to take on to its books, an incredibly profitable asset at a cut price*". This concern in the context of everything else was to the effect that the Bank was involved in deliberate activity to make the Claimants and their companies fail so that they could obtain profitable assets at a large discount.

(v) The allegations made in the Nabarro letters included: (i) misstatements and/or malpractice on the part of the Bank; (ii) reckless conduct on the part of the Bank; and (iii) references to conduct which was said to be deliberately pursued with profit in mind.

80. At the time of the Settlement Deed, there was a published belief on the part of the Claimants that they had been the victims of deliberate malpractice by the Bank to obtain their properties for itself and in so doing not to back their business. Whether or not claims of fraud could properly be advanced by Nabarro or pleaded prior to the Settlement Deed is a different question, which might touch or concern professional duties of Counsel, but does not affect the belief of the Claimants that they and their businesses had been victims of deliberate wrongdoing including fraud on the part of the Bank. This is having regard to the totality of the Nabarro correspondence, the Tomlinson Report, and the research undertaken by the Claimants including the articles on the website *ianfraser.org* alleging "*systemic institutionalised fraud*" inside GRG. It is reflected in the statements including those publicly issued on the part of the Mr Riley at the time.

81. Against this background, the Settlement Deed was intended to deal with claims in fraud whether known or not known. The factual matrix of the Settlement Deed was that there was believed to be deliberate wrongdoing committed by the Bank on the Claimants and their companies. The fraud related specifically to the deliberate destruction of the business of the Claimants' businesses. There was a motive so that the Bank could acquire properties at a very substantial discount. This was in the face of the representations that the Bank intended to back the businesses were shown to be false by the subsequent conduct. I consider that this analysis is not affected by the absence of express inclusion within the Settlement Deed that the settlement included claims based in fraud and dishonesty. This analysis is consistent with the cases referred to above.

82. There is no requirement that a clause intended to bar fraud claims must expressly refer to fraud claims (as did the redacted agreement in another matter supplied on behalf of the Claimants to the Court.) In *Maranello*, the contract did not expressly refer to the barring of fraud or dishonesty claims, but the meaning and effect was that it did against the factual matrix of the case. This did not prevent the Court from construing that it nonetheless had that effect. The reasoning at paras. 58 -59 of *Maranello* in the Court of Appeal, quoted fully at para. 57 above, are of direct application. As noted above, the fact that the word 'fraud' was not used expressly in Clause 7 is not determinative: see *Maranello* at first instance at para. 117 and in the Court of Appeal at para. 44 (as quoted above). Express words are not *"always or even generally required"* to release a claim in fraud. The factors to opposite effect are first that the parties chose to define the scope of the release and the covenant not to sue in Clause 7 by reference to subject matter and not specific causes of action (*Maranello* at 1st instance at para. 112 and in the Court of Appeal at para.58(iii)). Second, there is the wider factual matrix as described above.

83. What then did the reference to non-core businesses add to the picture of the Claimants, even assuming in their favour that their first knowledge of this occurred at the time of the Promontory Report? It is said that it gave rise to an ability to plead a case based on the representations of continued support being fraudulent when made for the first time, years after the time of the Settlement Deed. Even assuming that to be the case for this purpose, the Claimants believed that they had been the victim of fraud and deliberate wrongdoing at the time of the Settlement Deed. It is important not to confuse an inability to plead a specific claim in fraud by reference to the discovery of the non-core businesses differentiation with a belief on the part of the Claimants that they had been subjected to fraud on the part of the Bank.

84. If there was, years later, a discovery relating to the non-core business, it provided a particular way of pleading a claim in fraud. The ability to plead the fraud in that specific way was no more than an aspect of what was believed to be a deliberate attempt to destroy the business of the Claimants. It does not support the argument that the release of a claim could not have been intended until the alleged discovery. On all the information before the Court, I conclude that the instant claim in fraud was barred by the Settlement Deed. The Settlement Deed was intended to deal with claims in fraud whether known or not known. The argument to the contrary has no real prospect of success nor is there any other compelling reason for the argument to proceed.

VIII Is the settlement of the action arguably ineffective due to sharp practice?

85. In order to meet the above conclusion in *Maranello*, it was advanced that there was a real prospect that the equitable sharp practice doctrine prevented the Bank from relying on its own wrongdoing. The argument was that the premise of the new action was that the Bank had committed a fraud on the Claimants of which they had no knowledge.

86. It would then be sharp practice for the Bank, having knowledge of the fraud, to sit by whilst the Claimants entered into an agreement discharging the liability of the Bank. This might be in circumstances where in the event that the Claimants had had the

knowledge that they would have had a greater claim than the discount which they were receiving by entering into the settlement.

87. The nature of the sharp practice doctrine was referred to in *BCCI v Ali*, referred to above. Both Lord Nicholls and Lord Hoffmann referred to the possibility that, even if a release covered a claim on its true construction, it might not be given effect if a party had sought, by way of sharp practice, to exclude liability for a claim he knew about but which was unknown to the other party. At para. 32 Lord Nicholls stated the following:

> *"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."*

88. Although Lord Hoffmann dissented on the facts rather than the law, in his judgment at paras.70-71, he said the following on sharp practice:

> *"70. …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."*

89. In *Maranello*, a sharp practice argument of a similar kind was run. *Maranello* contended that, even if its claims in existence were, as a matter of construction, covered by the release in a settlement agreement, that release should not be given effect. This was because the respondents must be taken to have been aware (for the purposes of the applications before the Judge) that they had conspired together to injure *Maranello* by unlawful means and that *Maranello* was unaware of that conspiracy. In those circumstances, it was argued, for the respondents to have sought a release of all claims (including claims in fraud and conspiracy) amounted to sharp practice which was an affront to the conscience of the court and should not be given effect.

90. The Judge, HH Judge Keyser QC, accepted that there was, at least arguably, a "sharp practice" principle, and held that it was not necessarily confined to general rather than specific releases but held that it was not arguable that it applied in the present case. It is worth setting out in full the reasoning of the Judge.

> *"119. …If there is any unconscionability, it seems to me rather to lie with MRL's attempt to make substantially the same complaints under a very slightly different guise—and, moreover, when by the Settlement Agreement it freely gave up the opportunity of learning more about the background to the self-interested conduct of which it complained. Its complaints regarding the acquisition of the Collection, the financing of that acquisition, the Commercial Agreement and the sale of the Collection were all settled for substantial value in a contract reached by commercial parties with equal bargaining positions and legal representation. And that settlement expressly included a release of unknown claims in circumstances where MRL had (on its own case) objective grounds of knowledge of deliberate wrongdoing by the Bonhams Defendants and a combination involving Lohomij. Yet now it seeks to sue for precisely the same matters because of what it says is new information concerning the defendants' motivations for doing the very things previously complained of. I regard this as a simple attempt to avoid the effect of a commercial contract freely entered into, and I unhesitatingly reject the suggestion that equity should relieve MRL of the consequences of its contract."*

91. The circularity of the sharp practice argument in most cases was referred to by Phillips LJ in *Maranello* in the Court of Appeal at paras. 65-67 as follows:

> *"65. MRL argues on this appeal that the Judge's reasoning failed to recognise the (necessarily assumed) fact that the respondents knew that they had unlawfully conspired against MRL and that MRL was unaware of that conspiracy. MRL contends that several of the factors referenced by the Judge, such as MRL "freely" giving up the opportunity to learn more about the background, the substantial value obtained by MRL and the equality of bargaining power, are all undermined by the assumed fact that the respondents were taking advantage of the ignorance of their victim. MRL's submission is that the full background should properly be examined at a trial and that the application of the sharp practice principle (itself a developing area of law and equity) could then be considered in the light of the full facts.*
>
> *66. In my judgment MRL's contention fails to address the core of the Judge's reasoning, namely, that it was not arguable that it was unconscionable for the respondents to rely on the release as having settled claims in fraud and conspiracy. This is not a case where the respondents knew that MRL had claims of which it was totally unaware and took advantage of that ignorance by obtaining a release which settled those claims surreptitiously. As the Judge explained in some detail, MRL was fully aware, and had alleged, that Bonhams had damaged MRL by acting (deliberately) in breach of its duties as agent, leveraging its connection with Lohomij to do*

> *so. MRL had chosen not to investigate the full background to that wrongdoing and the extent to which the respondents had acted together, but chose to settle those claims for very valuable consideration. Far from it being unconscionable for the respondents to rely on the release, it was obviously unconscionable for MRL to seek to avoid the release by re-asserting the very same factual contentions, but arguing that they were unlawful acts pursuant to a conspiracy. I see no basis for overturning the Judge's decision in that regard.*
>
> *67. I would add that, where a release is construed as covering unknown claims in fraud, dishonesty and conspiracy relating to a defined subject matter (as in this case), such construction entails a finding that the parties mutually intended to settle such claims. That would seem to leave little scope for a finding that one of the parties was guilty of sharp practice in relation to the existence of such a claim."*

92. Applying this to the instant case, I have found above that the construction point is such that the claims made in the instant case are barred by the wide terms of the Settlement Deed. The Claimants believed that they were aware of, and had alleged, deliberate misconduct on the part of the Bank. In particular, they alleged that the Bank had engineered a situation of driving a profitable company into insolvency and creating the possibility of an associated company of the Bank being able to acquire its assets at a very advantageous price. This was a case where the Claimants had chosen not to investigate further the full background of the claims but chose to settle all claims as therein defined for very valuable consideration. The unconscionability in those circumstances would be of the Claimants in seeking to avoid the release to rely on wrongdoing and fraud in the same transactions and relationships which had been the subject of their complaints in the many months leading up to the Settlement Deed. On the facts of this case, for the same reason set out by Phillips LJ in *Maranello* at para. 67, having settled unknown claims which extended to fraud, there was no scope to find that the Bank was guilty of sharp practice in relation to the existence of such a claim. It follows that the sharp practice argument has no real prospect of success nor is there any other compelling reason for the argument to proceed.

IX The submission that the Settlement Deed was procured by fraud

93. The Claimants contend that the failure to disclose the deceit which is the basis of the instant action was a fraud not only in itself but that it induced the Settlement Deed. There was an exclusion from the entire agreement/non reliance clause of fraudulent misrepresentations. They also rely on the case of *HIH Casualty v Chase Manhattan Bank* [2003] UKHL 6; [2003] 1 All ER (Comm) 349 at paras. 15-17 about the inability to exclude liability for one's own fraud, and that any liability of the fraud of an agent can only be in clear and unmistakable terms on the face of the contract.

94. The argument is that among other documents the Settlement Deed was entered into in reliance on and as a direct consequence of the fraud. If the true position had been known by the time of the Settlement Deed, the Claimants say that there would have been no Settlement Deed on those terms or at all: see Particulars of Claim at paras. 11 and 101. The submission is therefore made that the Claimants are entitled to rescind the Settlement Deed.

95. The Claimants say that they had suspicions of fraud, but that they did not have solid evidence on which to plead fraud. The Claimants rely on the decision of the Supreme Court in *Zurich Insurance Co plc v Hayward* [2016] UKSC 48; [2017] AC 142. In that case, a personal injuries claim of just under £420,000 was settled for a sum of just under £135,000. The Tomlin Order stated that the sum was accepted "in settlement of his cause of action" and that upon payment, the defendant "*be discharged from any further liability to the claimant in relation to the claim herein."* A part of the defence had been one of exaggeration of injuries, and video evidence had been relied on. Two years after settlement, neighbours of the claimant provided evidence to the defendant that the claim had been dishonest because there had been full recovery a year prior to the settlement. Accordingly, a claim for deceit was brought and rescission was sought of the Tomlin Order. Lord Clarke at para. 48 said that "*As I see it, it is difficult to envisage any circumstances in which mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established*." The primary focus of the judgments was in respect of the correct test for inducement and whether suspicion of exaggeration precluded unravelling the settlement of the disputed claim when fraud was subsequently established.

96. In my judgment, *Zurich* is to be distinguished on the facts of the instant case. In *Zurich*, money was paid in settlement of a claim as then constituted. The terms of the Tomlin Order in Zurich did not purport to settle all claims known or unknown or that a party "*may*" have (i.e. including the deceit claim) but simply the claim as then constituted. The Tomlin Order had nowhere near the width of the settlement agreements considered in *Maranello,* and indeed the present case. In the instant case, the settlement involved a wide-ranging release of claims including settling all claims known or unknown or that a party "*may*" have. The question is whether as a matter of construction, the words were sufficiently wide in their ambit against the factual matrix of the Nabarro letters and the Tomlinson Report and the other matters referred to above that the parties intended to settle unknown claims in fraud. For the reasons set out above, the answer is in the affirmative.

97. A similar argument was raised in the case of *Bank of Scotland v Hoskins* [2021] EWHC 3038 (Ch) before HH Judge Paul Matthews sitting as a Deputy Judge of the High Court. He had found that the clause had the effect of releasing all claims including fraud, albeit that fraud was not mentioned expressly in the clause. In rejecting a submission that the settlement agreement could nonetheless be rescinded for fraud, HH Judge Matthews said the following at para. 60:

> *"Another problem is that the matters complained of, and actually pleaded in paragraph 60, if proved to have taken place, must have taken place in 2007-2008, some five or six years before the settlement agreement was entered into. Yet the settlement agreement was entered into in order to compromise the claims*

> *arising out of the events of 2007 and 2008. As I have already held, on the true construction of the release of 2013, all claims arising out of or relating to those events were given up, even if they were not then known to the defendant. In my judgment, it is not possible to rely on claims which are being given up by a particular settlement agreement as a basis for rescinding that settlement agreement. It would be like pulling yourself up with your own bootstraps."*

98. On the premise that the parties were settling all claims including unknown fraud claims, it does not make sense that the Bank was at the same time representing to the other that there was no fraud claim or no fraud claim of which it had knowledge. It is a contradiction in terms. Once unknown fraud claims were settled, then absent more, the failure to disclose an unknown fraud claim cannot be a misrepresentation whether by omission or otherwise. In certain circumstances, the failure to identify the fraud claim may be tantamount to sharp practice, but not in a case such as the instant case where the settlement extinguished even unknown claims in fraud. The essence of what HH Judge Matthews was saying is captured by the penultimate sentence stating that "*it is not possible to rely on claims which are being given up by a particular settlement agreement as a basis for rescinding that settlement agreement."*

99. There has not been a representation or misrepresentation because of the scope of the release and discharge, and this is not a case about excluding liability for misrepresentation. As noted by Phillips LJ in *Maranello* at para. 59(iii) (quoted at para. 57 above of this judgment), an exclusion clause about fraud *"addresses a very different question than the scope of the release."* In their skeleton argument (at footnote 8), the Claimants have sought to distinguish *Bank of Scotland v Hoskins* on the basis that the Judge in that case found also that the fraud was not properly pleaded. Para. 60 of the judgment was on its face a different point, namely the scope of the release. The Claimants also say that the decision was inconsistent with *Satyam*. That is not the case because, as already noted, in *Maranello* (at para. 44 quoted at para. 55 above), *Satyam* is not authority for the proposition that express words are always or generally required to release a claim of fraud.

100. In my judgment, this argument of the Claimants suffers because of the same circularity as applies to the complaint of sharp practice. In circumstances where the parties have as a matter of construction agreed to settle all claims, including unknown claims in deceit, it is circular to seek to revive them by saying that the Bank had represented that there were no such claims. In these circumstances, there was no representation that no deceit had been carried out nor was there any reliance on the part of the Claimants on the alleged deceit. It follows that the submission that the Settlement Deed was procured by fraud has no real prospect of success nor is there any other compelling reason for the defence to proceed. Accordingly, the argument must fail.

101. The following paragraphs (101-103) have been added since the matter was handed down to the parties. The Court asked for a particular point of clarification in respect of the Counterclaim. This elicited a response from the Claimants to the effect that in the course of their submissions, the Court asked whether in addition to the matter as pleaded, there was an allegation that there had been a representation inducing the

Settlement Deed giving rise to the extent that there was an agreement to pay the sums agreed to be paid under the Settlement Deed. It was said that in the event that this was pleaded (it is now accepted that it has not been pleaded within the body of the pleadings, but it is said that it is captured by the prayer for relief), then the Claimants would seek to rely upon this an alternative argument and, if necessary, agree to re-plead the matter.

102. It follows from the reasoning above that this point goes nowhere. The reasoning is that the effect of the Settlement Deed was to settle and discharge known and unknown claims and to discharge and release liability about claims related to the subject matter to which reference has been made. This includes the claims relied upon in connection with the misrepresentations as pleaded and the argument as mentioned in oral argument to the extent mentioned above. Leaving aside procedural matters about whether the prayer for relief is sufficient to plead the alleged alternative claim and assuming that it had been fully pleaded in the body of the statement of case, it must fail for the same reasons as the failure of the pleaded representations referred to from para.93 of this judgment. As with the pleaded claim, the settlement, release and discharge of this putative alternative claim must fail for the same reason, namely that there was no representation so that no deceit had been carried out nor was there any reliance on the part of the Claimants on the alleged deceit. If it ever existed, it was extinguished by the settlement, release and discharge. The alleged alternative representation, canvassed in oral argument, must therefore fail, and has no real prospect of success, nor does it provide some other compelling reason for a trial in this action.

103. The procedural point is not a free-standing point. If an application had been made for permission to amend, it would have been refused because the new case would not have raised a case with a real prospect of success. It is not necessary to rule on whether the lateness of the amendment would have stood as a barrier, but had it been a good point, it is difficult to see how this point could not have been dealt with procedurally. Although this alternative claim was raised at the hearing by the Court, it did not add significantly to the claim because it is based on the same foundation as the original case, which itself has no real prospect of success for the reasons set out above.

X Alternative argument that rescission barred by affirmation

104. The Bank submits that the Claimants are precluded from rescinding the Settlement Deed. It says that the Claimants have affirmed it by making payments under it until 8 January 2019. This was after they had (on their own case) read the Promontory Report and, on their own case, become aware of the alleged fraud. It is common ground that the Claimants continued making payments under the Settlement Deed until 8 January 2019. The Debello letter – which invited the Bank to set aside the Settlement Deed by reference to *Zurich* - was sent on 6 September 2018. These payments, made with a knowledge of the right to rescind, are said by the Bank to amount to affirmation and are a bar to rescission.

105. The arguments that there was no bar to rescission can be summarised as follows:

(i) It is to be assumed for this purpose that until sight of the Promontory Report, the Claimants did not know or arguably did not know about the alleged deceit by

reference to core and non-core business. The Promontory Report did not come to the attention of the Claimants until June 2018: its date was 2016 and it is possible that it was not published until 2018. After the Report came to the attention of the Claimants, they took legal advice from Debello. It was in this context that the letter of 6 September 2018 is to be seen. It was asking the Bank to agree to the setting aside of the Settlement Deed by reference to the Zurich case.

(ii) Against that background, it is at least arguable that it was not clear and unequivocal that any payments made thereafter were a statement that the Claimants should not exercise a right to rescind. In the first instance, there was an attempt to make the setting aside by agreement rather than using the self-help remedy of rescission with the risks which that entailed. Thereafter, some time for advice and for thinking through the consequences was required before electing to rescind.

(iii) With the consequences attaching to missed payments under the Settlement Deed, it is arguable that an opportunity to agree the position about setting aside the Settlement Deed should be allowed to elapse with payments being made so as to protect the position in the interim. There is an argument that paying during this period should not amount to a clear and unequivocal affirmation.

106. These arguments are not a point of construction. They are to be seen in the context of the case as a whole. The law is set out in Chitty on Contracts 34th Ed. at paras. 9-140 – 9-141 to the following effect, namely that each case is decided on its own facts. In general, a party entitled to rescind or avoid a contract will not be held to have affirmed it unless he knows the facts, and also is aware that he has a right to rescind or avoid: see ***Peyman v Lanjani*** [1985] Ch 457, where there was a full review of the authorities. It suffices to cite from headnote:

> *"where a party to a contract was faced with the choice whether to affirm or rescind the contract, in order to render his election irrevocable he had to have knowledge not only of the facts which gave rise to the election but also of the right of election itself; that a person could not be treated as having elected to affirm a contract unless he had unequivocally demonstrated to the other party that he intended to proceed with it; that the issue of election was a question of fact to be decided on the evidence"*

107. In this case, as regards affirmation, there are questions which cannot be answered conclusively without a trial including the state of knowledge of the Claimants (a) prior to receiving the Promontory Report in June 2018, (b) after receiving the Promontory Report, (c) of the right of election whether to rescind or not. A trial would be required also in order to determine the wider context, including whether in the context of the correspondence between the parties the Claimants had unequivocally demonstrated to the Bank their intention to proceed with the Settlement Deed by the payments up to

January 2019. It follows that the argument of the Bank of entitlement to summary judgment/strike out by reference to the affirmation argument must fail at this stage, and it is therefore not an alternative basis for summary judgment/strike out.

XI The RHL argument

108. It is now necessary to consider what is referred to as the RHL argument. RHL was not a party to the Settlement Deed. It is therefore submitted on behalf of the Claimants that any claim by RHL was not released or discharged by the settlement. The reason why RHL was not a party to the Settlement Deed was because it had gone into administration. It was not therefore under the control of the Claimants. RHL subsequently on 3 June 2015 was struck off the register of companies and dissolved. It may have gone into liquidation before it was finally struck off. Its assets thereafter vested in the Duchy of Lancaster as bona vacantia. By a deed of assignment dated 6 October 2022 ("the Assignment Deed"), between the solicitor for the affairs of the Duchy of Lancaster and Mr Riley, there was assigned the benefit to a claim in misrepresentation and deceit against the Royal Bank of Scotland and the Bank in respect of statements made to RHL about a development loan facility including statements following the referral of the case to the Bank's GRG in 2009.

109. It is argued that the claim brought on behalf of RHL by Mr Riley pursuant to the Assignment Deed falls outside and/or is not covered by clause 7 of the Settlement Deed, since RHL was not a party thereto: see para 10 of Debello's letter dated 3 May 2022.

110. In my judgment, the answer to this point is that the claim is not brought by RHL. The claim is brought by Mr Riley. It is a claim which was acquired by Mr Riley as a result of the assignment. Nevertheless, the claims that are barred by reason of the Settlement Deed include future claims, which are any claims which the Claimants *"may have or hereafter can, shall or may have against the Bank".* As a result of the assignment, the Claimants acquired this claim which comes with the definition of Released Claims contained in Clause 7 of the Settlement Deed. It therefore follows that the argument that this is a claim of RHL and falls outside the Released Claims is fallacious. It has no real prospect of success nor is there any other compelling reason for the matter to be tried, and so the strike out and summary judgment application must succeed also as regards the claims brought pursuant to the Assignment Deed. It is suggested that there could have been a clause inserted to say that such a claim was included. A redacted agreement in an unrelated matter has been provided which contained such a clause. This was after the conclusion of the oral agreements but with the consent of the Court. Such a clause could have been provided, but there is no reason, in my judgment, why the failure to include such an express provision was significant, let alone that it might have had the effect that Mr Riley would be able to prosecute a claim arising out of a subsequently acquired assignment. The plain words are to contrary effect.

XII Limitation

111. In view of the conclusion that the claim is barred by the Settlement Deed, it is not strictly necessary to say anything about the limitation defence which arises for consideration only if in fact the claim had not been barred by the Settlement Deed. Nevertheless, having had the benefit of full arguments, I shall make findings as if limitation did arise for consideration.

112. The claim relates to misrepresentations said to have been made between 2009 and 2012 for which the usual 6-year limitation period applies. The claim is therefore prima facie barred subject to section 32 of the Limitation Act 1980. Section 32 reads as follows:

> "(1) …where in the case of any action for which a period of limitation is prescribed by this Act, either -
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the [claimant's] right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the [claimant] has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

The Claimants rely both on section 32(1)(a) and 32(1)(b).

113. The key relevant principles on Section 32 can be summarised as follows:

(i) As Section 32 constitutes an exception to the ordinary regime, the burden of proof is on the claimant - Millett LJ in *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 418.

(ii) 'Fraud' is a wide concept, but it applies to the tort of deceit: see *Kitchen v RAF Association* [1958] 2 All ER 241 at p.249C per Lord Evershed MR.

(iii) Whilst there is an assumption within Section 32 that the claimant desires to discover whether a fraud has been committed (or whether a matter has been concealed from him), the claimant is not simply assumed to be 'on notice' that this is the case. Rather, there must be something (a 'trigger') which can be said to have put the claimant 'on notice' of the need to investigate whether there has been fraud and/or concealment: see *DSG Retail Ltd v Mastercard* [2020] EWCA Civ 671; [2021] 1 All ER (Comm) 63.

(iv) Thus, in recent authorities the approach has often been to approach issues arising under Section 32 in two stages: (i) when (if at all) was there a 'trigger' which put the claimant on notice; and (ii) when would a reasonably diligent investigation by the claimant have revealed enough to start the limitation period running. *However*, it has been noted that, whilst this is a helpful analytical structure, it is not the statutory test, and the requirement of reasonable diligence applies at *both stages* and/or *throughout* – see Males LJ in *OT Computers v Infineon Technologies AG* [2021] EWCA Civ 501 at [47]:

> *"…although the question what reasonable diligence requires may have to be asked at two different stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."*

(v) The words "*could with reasonable diligence*" in Section 32 connote an objective standard. Accordingly, the subjective knowledge of the claimant is irrelevant. However, it was decided in *OT Computers* (this being the key *ratio* of that appeal) that the objective standard is informed by the position of the *actual* claimant – i.e. the question is whether the *actual* claimant (and not a hypothetical claimant) could objectively have discovered the fraud or concealment, save that certain (potential) characteristics of the particular claimant such as slothfulness, naivety or incuriousness are ignored: see *OT* at paras. 38 and 48.

(vi) So far as the 'statement of claim' test is concerned, in terms of what the claimant must be in a position to plead:

> (a) What is required is an ability on the part of the claimant to plead a complete cause of action; that is to say, a viable claim. In a fraud case, that means that the claimant must be able (in the sense of having the necessary actual or constructive knowledge) to plead the precise case that is ultimately alleged at least as regards the critical allegations which comprise the tort of deceit, namely that a representation has been made, that it was false and that the representor knew it was false: see *Barnstaple Boat Co, v Jones* [2007] EWCA Civ 727 at [34].

(b) This does not require the claimant to have been able to plead all of the evidence which it later decides to plead; it must merely know (or have been objectively capable of discovering) each of the facts without which the cause of action is incomplete: see *LIA v Credit Suisse* [2021] EWHC 2684 (Comm) at para. 33, in which HHJ Pelling QC referred to the following statement by Bryan J in *LIA v JP Morgan Markets* [2019] EWHC 1452 (comm) at para. 34:

> *"at the point at which the claimant can plead the complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court."*

(c) The authorities suggest that regard must be had to the professional obligations on counsel when it comes to pleading allegations of fraud. In particular, the claimant (and counsel in particular) must have material before them which makes it professionally proper for a plea of fraud to be advanced (see *Sephton* at para.44), described in the Bar Code of Conduct at rC9.2.c as "*reasonably credible material which establishes an arguable case of fraud*". However, in this regard, it is important to note the comments of Lord Bingham (with whom the majority agreed) in *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120 on a previous version of the Bar Code of Conduct rule referred to above at para. 22:

> *"…I would however agree with Wilson J that at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. I could not think, for example, that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or public inquiry, even though counsel had no access to the documents referred to and the findings were inadmissible hearsay."*

The mental element of "concealment" requires proof of active and intentional concealment or a deliberate decision to withhold information but does not require proof of 'dishonesty' as such. A conscious decision to withhold information which the defendant has a duty to impart may be sufficient: see per Mance LJ in ***Williams v Fanshaw Porter & Hazelhurst*** [2004] EWCA Civ 157 at paras. 34 – 39.

(a) The Claimants' submissions

114. The issue is whether the Claimants in their personal capacity and/or Mr Riley, as assignee of RHL, knew or could with reasonable diligence have known of the claim more than six years prior to the date when the claim was issued. The claim was issued on 7 October 2022. The following points are emphasised:

(i) The precise claim was only discovered following consideration of the Promontory Report which was not seen by the Claimants until June 2018. It is based on the discovery that there was an intention of the Bank alone not to back non-core businesses, the businesses of the Claimants being of that kind. Non-core businesses were not mentioned in the Nabarro letters or in the Tomlinson Report. Although it was mentioned in 2009 accounts and in the 2013 Treasury Report, they were not seen by the Claimants until after sight of the Promontory Report.

(ii) It was therefore only after June 2018 that the Claimants were able to plead a case by reference to misrepresentations about backing the businesses of the Claimants, being made falsely and known to be false because at the time the representations were made, the Bank intended to wind down non-core businesses including those of the Claimants. Even then, advice had to be obtained from lawyers, Debello, which only unravelled after consideration of the materials in 2021, such as to enable a letter of claim to make the precise allegations now pursued.

(iii) The intention of the Bank about non-core businesses could not reasonably have been discovered at an earlier stage. That is said to be evidenced by the fact that Nabarro did not identify the claim for the fraudulent representations now being pursued. Nor did the administrators in control of RHL from 2012 to 2015 identify the allegations of fraud.

(iv) Bearing in mind the strictures on pleading fraud without reasonably credible material, a claim alleging that the representations about backing the business of the Claimants being fraudulent was not available to the Claimants until discovery of the plans of the Bank to wind down non-core businesses. An inferential case that it could have been pleaded based on the conduct of the Bank vis-à-vis the Claimants' businesses alleged in the Nabarro letters and the Tomlinson Report or the *ianfraser.org* blogs would have infringed the requirements of having reasonably credible material on which to plead fraud. In any event, since none of that included the information about the intention of the Bank vis-à-vis non-core businesses, an essential plank of the case was missing.

(v) The first information emanating from the Bank about the designation of non-core businesses only came in the Defence to this action and in internal "Advice" documents such as one in 2010.

(vi) In the submission of the Claimants (skeleton argument para. 53), *"it is important as a matter of public policy that the court does not enforce a high standard for pleadings of fraud and yet at the same time apply a low threshold*

under s.32, otherwise, necessarily, encouragement will be given to pleading claims of fraud at a time earlier than they properly could and should be made."

115. It is also alleged by the Claimants that the position of RHL is different from their own. This connects with the claims which were assigned by RHL to the First Claimant. The Claimants submit that the test under section 32 has to be considered by reference to what the RHL administrators could reasonably have discovered by 3 June 2015 when RHL was dissolved. The argument is that the position is different from the position of the Claimants in respect of their non-assigned claims.

116. Having regard to the above, the submission was made that no summary judgment should be given in respect of the allegation that the claims were time-barred, but instead there should be a full investigation at trial. The matters, turning upon what was known to the Claimants and could have been discovered with reasonable diligence required proper investigation at a trial.

(b) The Bank's submissions

117. The Bank's analysis can be summarised as follows:

(i) Given the background of the Nabarro correspondence and the Tomlinson Report in 2013 and 2014, the Rileys were on notice of a need to investigate. The key question is whether they had the actual knowledge, or they could with reasonable diligence have acquired the required knowledge to plead the claim before 7 October 2016.

(ii) The vast majority of the facts and matters required to plead the claim were known or capable of being known to the Claimants by 2014 at the latest. Much of the Particulars of Claim is in very similar terms to the Nabarro Correspondence, the Tomlinson Report and the articles in the *ianfraser.org* website. By way of example, the 1 February 2013 letter of Nabarro made complaints in sections 3, 4, 5, 9, 10 and 11 which very closely align with the allegations in paras 33-50, 53-57 and 61-77 of the Particulars of Claim. The May 2013 Nabarro letter closely aligns with the matters raised in paras. 52-54 of the Particulars of Claim.

(iii) The core and non-core business point was not essential to the claims. The points which established the falsity of the representations were the course of conduct of the Bank in wishing to distress RHL and/or with a view to making profit and exiting the relationship. Dishonesty of the representations could have been pleaded long before. In this light, the non-core business point improved the claims, but was simply additional evidence rather than an essential element of the claim.

118. The non-core business point could with reasonable diligence have been discovered by before the dissolution in June 2015 and in any event before October 2016, that is more than 6 years prior to the issue of proceedings. It was not a secret since these matters

were published in 2008/2009, in particular in the 2009 accounts and also formed part of a 2013 HM Treasury Report which published a review into the 'case' for the establishment of a formal 'bad bank' within RBS. This Report contained significant discussion relating to the Bank's 'Non-Core' division and the progress which that division (the establishment and purpose of which had been *publicly* announced at the time e.g. in the Bank's Annual Report for 2009) had made in running-down and/or managing down assets and (in that regard) serving as an informal (internal) 'bad bank': see especially page 13, para. 4.30, 5.56, 5.84 and 10.

119. In any event, with reasonable diligence, it was submitted that the Claimants could have inferred a case that the Bank had pursued an exit strategy in respect of their business based on the Tomlinson Report, the evidence of Dr Tomlinson before the Treasury Select Committee in which he linked the practices of GRG with the Bank's "Non-Core division". There was also reference to the *ianfraser.org* website to "Non-Core" which had been reviewed by the Claimants.

120. There were other representations relied upon by the Claimants which do not appear to depend on the Promontory Report, namely a representation whether it was the intention of the Bank for West Register to acquire RHL. That had been suggested as a ploy in May 2013 Nabarro letter and the role of West Register was prominent in the Tomlinson Report. There was a representation (the third of the three Alleged Representations set out above) about an intention to remit some money to Clegg which was said to have been false because the Bank sought to create leverage and/or distress so as to enable profits to be generated by the Bank. The Bank says that this was apparent from the Nabarro correspondence and from the Tomlinson Report and was not improved from the Promontory Report which resiled from some of the allegations about "widespread inappropriate treatment."

121. The Bank submits that the position is not different as regards the assigned claims because the availability of the claim could have been known about the administrators of RHL before it was dissolved. In any event, the Bank contends that it is artificial to distinguish between the knowledge of RHL and that of the Claimants.

(c) Discussion

122. Having considered the evidence as a whole, the real question is whether the Claimants have raised sufficient evidence and/or argument to amount to a real prospect of success in respect of the defence to the time bar allegation. The arguments in favour of the Bank appear to be quite strong. There is much to be said in favour of the argument that the inferential case was made out by 2014, alternatively by June 2015 when RHL was dissolved (as regards the RHL assigned claims), alternatively by 7 October 2016 (six years prior to the commencement of proceedings) that the Bank was making representations regarding supporting the business of the Claimants when it had no intention of doing so. If and insofar as the case depended on knowledge of the non-core business categorisation, there is reason to believe by 2014, alternatively by June 2015 the time of RHL's dissolution (as regards the RHL assigned claims), alternatively by 7 October 2016, the Claimants and/or RHL (up to its dissolution) could with reasonable diligence have discovered that categorisation.

123. Nevertheless, for the purpose of a summary judgment/strike out application, the Claimants have a real prospect of success of being able to resist the limitation arguments. The following arguments of the Claimants require a trial in order to be evaluated fully, namely:

(i) without the non-core business categorisation, they could not plead the specific case which they now have pleaded, and the very similar inferential case might not have been available to the level required for Counsel to plead such a case, bearing in mind the strictures applying in respect of a claim in fraud;

(ii) they did not have knowledge of the non-core business categorisation until the dissolution (as regards RHL) or 7 October 2016 or thereafter, and nor could they with reasonable diligence have made that discovery. They could not reasonably have been expected to find the 2009 Accounts or the 2013 HM Treasury Report, or, if they did, to have drawn the same inferences about the non-core business categorisation prior to 7 October 2016.

124. It is not that the Court concludes that this was the case, but rather applying the law regarding summary judgment and/or strike out as set out by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* above that this is a case which does require further investigation at a trial. Without restricting the ambit of the reasons for this, they include the following:

(i) Fraud claims are frequently based on inferences. The published pronouncements of Mr Riley prior to the time of the Settlement Deed indicate that he believed that he and his wife and their businesses had been the victims of the Bank's fraud. If it is the case that the Claimants did not know at that stage about the non-core business point, it appears that Mr Riley got there through the broad picture of the Nabarro correspondence, the Tomlinson Report and their other enquiries.

(ii) Despite this, there is a substantial argument that as a matter of inference, fraud could not have been pleaded without knowledge of the non-core categorisation. If it was an available inference, it is worth noting that Nabarro in their wide-ranging allegations did not expressly allege the deceit now relied upon or the inferential case said to be available with reasonable diligence (albeit that their letters were before the publication of the Tomlinson Report). The point made for the Claimants is about the danger of having "*a high standard for pleadings of fraud and yet at the same time apply a low threshold under s.32".* This is a point which should not be determined finally without a fuller investigation.

(iii) There are questions which have been raised as to how far Counsel could plead a case in deceit on the basis of the Tomlinson Report (combined with the matters set out in the Nabarro correspondence) and with such other inquiries as were made. This gave rise to a belief on the part of the Claimants that they had been the victims of fraud. Nevertheless, there is a serious question which is not fanciful as to whether there was a sufficiently credible basis for a pleading of inferential fraud if the Claimants did not know of the non-core business point.

(iv) It may be that there was a sufficiently credible basis, but in order to reach a conclusion in respect of questions of actual and constructive knowledge and involving inferences to be drawn by references to inquiries which ought to have been carried out, there are dangers in reaching a summary conclusion without a fuller investigation.

(v) There are questions as to whether further inquiries could with reasonable diligence have been made which would have given rise to finding out about the non-core business point whether by reference to the 2009 accounts or the Treasury Report or otherwise. Although it appears that this could have been discovered, a deeper understanding of all the relevant circumstances is required in order to reach a conclusion with the exercise of reasonable diligence, the Claimants would have discovered the non-core business differentiation.

125. In the light of all of these matters, I should have ordered a trial if the only question were the Limitation Issue. In the event, that is not necessary because of the conclusion on the Settlement/Release Issue. There is no contradiction in the result because the issues address different questions. In respect of construction, it was accepted by all parties that it lent itself to summary disposal (subject to the sharp practice point, which has been considered above). Even if this had not been accepted, the particular question of construction in this case is appropriately resolved summarily. I shall assume for this purpose that at the time of the Settlement Deed, the Claimants were unable to plead the fraud claim as now formulated. The Settlement/Release Issue stands to be resolved against the Claimants bearing in mind my conclusions about the wording of the Settlement Deed and the factual context as set out above. There is an abundance of uncontroversial evidence, on which to conduct the iterative exercise of construction required in this case moving between the clear and wide words used and the factual context including all the background matters referred to above.

126. The matters which arise for consideration on the Limitation Issue are not the same as those which arise on the Settlement/Release Issue. The Limitation Issue is about the precise knowledge, actual and constructive, of the Claimants taking into account the professional duties attaching to pleading the precise fraud claim now made. The Settlement/Release Issue involves an assessment of the scope of the settlement under the Settlement Deed, both by reference to the terms of the settlement and the factual context against which it was made. For the reasons set out above, I am satisfied that the Settlement/Release Issue lends itself to summary judgment/strike out.

XIII Counterclaim

127. As regards the Counterclaim, the only defences to the allegations put forward in the Defence to Counterclaim are that:

(i) the Settlement Deed should be rescinded consequent upon the claim of the Claimants for misrepresentation: the claim to misrepresentation of the Settlement Deed fails for the reasons set out above.

(ii) there is an equitable set off of damages against the Counterclaim: the consequence of the result on the summary judgment/strike out application is that this defence falls away. It is accepted by the Claimants (see para. 57 of their skeleton argument) that in the event that there is summary judgment/strike out because the claims of fraudulent misrepresentation are released and discharged, the claim for set off must fall away. As the Claimants put it to this extent only *"The Application in this regard in part stands or falls with the court's adjudication in relation to the Settlement Deed and Limitation Issues."* In the event that the Claimants had succeeded in respect of the Settlement Deed but not on the limitation issues, the arguments about set off still arose. In the event, using the language of the Claimants at para. 57 of their skeleton argument, the claims in fraudulent misrepresentation are *"caught by the Settlement Deed"*, and accordingly the set off issue *"falls with the court's adjudication".*

(iii) This is then reflected at para.7(1) of the note of the Bank's Supplementary Note on Equitable Set Off of 10 May 2023 as follows:

> *"If the Bank wins on the settlement issue (whether or not it also wins on the limitation issue) it appears to be common ground that the Rileys cannot pursue their set off as a defence to the Counterclaim."*

128. When the draft judgment was sent out, the parties were asked to confirm at the same time as the provision of the suggested typographical changes that the above statement (para. 7(1) of the Supplementary Note) is indeed a correct statement of common ground. It was in this context that the alternative loss claim canvassed in the oral argument was advanced, but this does not add anything substantively to the case, and has been rejected for the reasons set out at paras. 101-103 above. On this basis, it is accepted that if the Court is against the Claimants in respect of the alternative loss claim, then there is no additional point on the set off to the Counterclaim. This being the case, there is to be summary judgment on the Counterclaim. When the Judgment was sent out in draft, the parties were invited to consider the appropriate order including the sums for which judgment should be given in respect the Counterclaim. The parties are not ready to agree an order, and a consequentials hearing is to be fixed to determine all orders to made consequential on the judgment. Instead a draft order providing for consequentials has been submitted by the parties to the Court, but according to an email on behalf of the Claimants of 25 September 2023, *"this is subject to minor points to be completed when we know when the judge is likely to perfect the judgment and hand down."* The parties are now asked to review the draft order so that it can be finalised.

129. In the event that the Court had found the opposite, namely against the Bank on the Settlement/Release Issue, but in favour of the Bank on limitation, it would have been necessary to consider whether despite the limitation finding, there would be a defence of equitable set off against the Counterclaim. This does not arise. I shall not deal with this issue unless the parties require it and there is good reason to do so.

XIV Conclusion

130. It follows from the above that the claim is dismissed by reason of being struck out and/or reverse summary judgment. Further, subject to the matters set out above, there would be summary judgment to the Bank on the Counterclaim on terms to be set out in an appropriate order.

131. It remains to thank all Counsel and the parties' legal advisers more widely for the expertise and experience which they have brought to bear to the case, and for the attractive and skilful way in which they presented their respective arguments both in writing and orally.