

Please release me

Court of Appeal clarifies how the scope of a settlement agreement will be construed

England and Wales

The Court of Appeal has given guidance on the construction of a settlement agreement that is expressed to release claims unknown to either party at the date of settlement, confirming that claims in conspiracy (and fraud and dishonesty) were released even though the settlement agreement did not expressly mention such claims.

By David Bridge and Liz Williams

Background

Maranello Rosso Limited v Lohomij BV and others [2022] EWCA Civ 1667 concerned the sale by an auction house of a large collection of rare Ferraris, some of which were extremely valuable. The seller had purchased the collection using finance provided by Lohomij and then immediately consigned the cars to the auction house for onward sale, believing that they would attract a higher price when sold individually and would thus achieve a considerable profit.

In the event, not all of the cars were successfully sold, and the seller was dissatisfied with the price achieved for those that did sell. The seller's solicitors, Spring Law, wrote to the auction house advancing

claims in negligence and breach of duty. Without specifying any further causes of action, the letter also referred to allegations of duress, bad faith, illegality, and conflict of interest in that there was a pre-existing connection between Lohomij and the auction house.

The parties entered into negotiations and concluded a settlement agreement that, so far as relevant, released:

“all claims... whether present, actual, prospective or contingent, whether or not known to the Parties... and whether arising in contract, tort, under statute or otherwise... which relate to, arise from, or otherwise connected with... the sale of the Collection... including all claims alleged in Spring Law’s letter.”

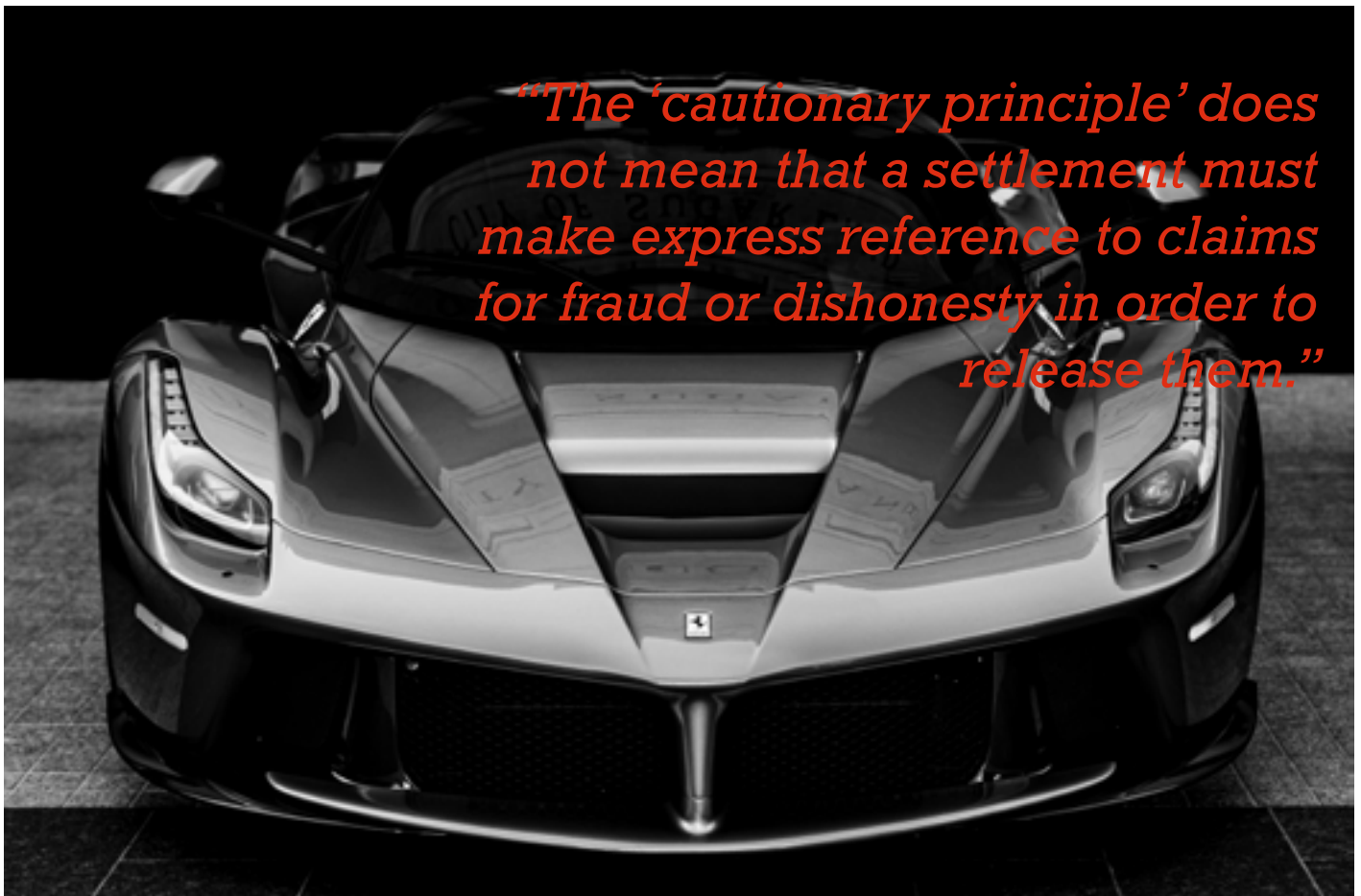
In return for the release, Lohomij advanced further funds, extended the date for repayment of the existing balance, and waived its facility fee of £13.6m.

Basis of the proceedings

Subsequently, two of the beneficial owners of the seller attended a meeting with a non-executive director of the auction house, at which he allegedly made remarks that led them to believe there had been a conspiracy between Lohomij and the auction house to sell the cars at an undervalue. The alleged motive for this course of action was partly to allow the cars to be acquired by associates of the parties, and in part to boost the auction house’s reputation in the US by auctioning some of the cars there rather than in the UK, where they were likely to achieve a higher price. The seller commenced proceedings for conspiracy to injure its interests by unlawful means.

Issues for the court

At first instance, HHJ Keyser QC (sitting as a deputy judge) held that the conspiracy claim fell within the scope of the settlement agreement and had therefore been released. The seller appealed.



The Court of Appeal was required to decide:

1. Whether the scope of the settlement agreement extended to claims for unlawful means conspiracy;
2. If so, whether it was nevertheless unenforceable on the basis that the defendants had engaged in "sharp practice".

There were also certain issues regarding the deputy judge's handling of the hearing that are beyond the scope of this note, but which in any event were dismissed by the court, and some further issues as to whether the allegations of unlawful means were properly arguable on the facts that, in the event, did not arise for decision as a result of the court's other findings.

Scope of the settlement agreement

Phillips LJ, giving the unanimous judgment of the court, held that the settlement agreement did extend to claims for unlawful means conspiracy. In reaching this conclusion, he drew the following principles from earlier case law:

- Settlement agreements are to be construed according to the same principles as any other contract.
- The aim is to ascertain the objective intention of the parties by considering the language used against the background of the surrounding circumstances or "factual matrix".
- In commercial cases, part of the surrounding context is generally that the parties assume honest dealing on the part of their counterparty and do not readily release unknown claims in respect of fraud. Some caution is therefore required before concluding that such a claim has been released (known as the "cautionary principle"). However, the parties are free to enter into such a release if they so choose.
- The "cautionary principle" does not mean that a settlement must make express reference to claims for fraud or dishonesty in order to release them. A release may take place without express words if the language and surrounding context make it sufficiently clear

that this was the intention. The scope of the release must be construed by reference to the specific claim that is being brought, not by reference to predetermined categories of claim such as fraud, dishonesty, conspiracy etc.

- A key question is whether the claim being brought is one that would have been in the contemplation of the parties when the settlement was made.

Applying these principles, Phillips LJ noted that the letter before claim made "*clear and express allegations*" amounting to breach of fiduciary duty, illegality, threats and duress, and referred several times to the connection between Lohomij and the auction house. The allegations of conspiracy involved the same allegations, simply reformulated under a different cause of action. In his view, it could not have been intended that the seller should be able to bring such a "*recast*" claim after benefiting from the waiver of the very substantial facility fee and the extension of the loan facility as a result of entering into the settlement. This led to the "*inevitable conclusion*" that the claim for unlawful means conspiracy was released.

"Sharp practice"

Phillips LJ noted that some previous authorities referred to the possibility that a release might not be given effect if a party sought the release in the knowledge that there was a claim of which the other party was unaware.

The deputy judge held at first instance that this "sharp practice" principle did not apply in the present case. Rather, it was unconscionable for the seller to settle a claim in circumstances where, on its own case, it had objective grounds to suspect deliberate wrongdoing, and then to make the same allegations under a "*very slightly different guise*" when the only new information it claimed to have related to the motivation behind actions that it already knew about. Phillips LJ agreed with this reasoning, characterising the unconscionability of the seller's actions as "*obvious*".

The appeal was dismissed, with the result that (subject to any further appeal) the seller cannot pursue its claim against the defendants.

Comment

The importance of paying careful attention to the wording of the release in a settlement agreement, particularly with regard to unknown claims, is well known. However, this judgment provides a useful overview of the principles that a court will apply in construing such a release. In particular, it shows that allegations of fraud and dishonesty are not to be treated as a special category, but may be

released by general words if the context points to that conclusion.

In that regard, the case draws additional attention to the importance of pre-action correspondence, and especially the letter before claim, in establishing what allegations the parties had in contemplation at the time of settlement. Such correspondence should be carefully drafted and avoid making exaggerated allegations, especially if the evidence to support these is lacking. A more measured approach will have a better chance of preserving any genuinely unknown claims that may subsequently emerge, particularly those involving any form of improper dealing.

About the authors



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David Bridge is a partner and solicitor advocate in the Commercial Disputes Team at CMS London. He has over 10 years of experience handling large and complex claims, involving litigation, arbitration and all forms of ADR.

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