THE CONSTRUCTION OF COMPROMISE AGREEMENTS

The leading case is *Bank of Credit and Commerce International SAI v Ali* [2001] UKHL 8; [2002] 1 AC 251. It was also an extreme case where the majority of the House of Lords (4-1) refused to give effect to an extremely well-drafted general release signed by an employee upon redundancy from the bank in 1990. As is well known the bank was wound up in 1991.

The clause (ACAS Form COT-3) provided:

> "The applicant agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the applicant has or may have or has made or could make in or to the industrial tribunal, except applicant's rights under [the bank's] pension scheme."

It was held that a claim against the employer for "stigma damages" (only invented post-release by the House of Lords in *Mahmud v BCCI* [1998] AC 20) was not comprised in its wide language.

The House of Lords also heavily hinted that personal injuries claims would not be barred even though read literally the release would cover such claims. See Lord Bingham (para [18]); Lord Clyde (para [85]).

The House of Lords unanimously applied Lord Hoffmann's well-known guidelines on contract construction in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-3:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in every day life...

> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax ...
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> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

The judges were emphatic that the same rules of construction applied at common law and in equity. See Lord Bingham (para [17]); Lord Nicholls (para [25]); Lord Clyde (para [79]). Further, there were no special rules for construing compromises. See Lord Bingham (para [8]); Lord Nicholls (para [26]).

Nevertheless in *Ali* it is clear that the majority paid great heed to a line a of cases going back to the eighteenth century in which judges showed a consistent disposition to refuse to construe general releases literally or strictly. In the words of Lord Bingham (at [10]):

> "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 Nicholls stated:

> "The question is whether the context in which the general release was given is apt to cut down the apparently all-embracing scope of the words of the release." (at [23]).

His Lordship answered the question in the affirmative. Indeed Lord Nicholls would have construed the release as limited to

> "claims arising out of the *ending* of the employment relationship." (at [35]).

The example of an unrelated dispute between the same parties is discussed in para [28] prompting Lord Nicholls to observe:

> "Echoing judicial language used in the past, that [an unrelated dispute between the same parties] 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.'"

The "long and salutary line of authority" quoted by both Lords Bingham and Nicholls is extensive. It includes the powerful statement in *Ramsden v Hylton* (1751) 2 Ves Sen 503, 507 by Lord Hardwicke LC:

> "the law, in order to prevent surprise, will construe it to relate to the particular matter recited…which was under the contemplation of the parties, and intended to be released…."

Similarly in *Directors of the London and South Western Railway Co v Blackmore* (1870) LR 4 HL 610, 623-4 Lord Westbury opined:

> "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."

In *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112, 129-130 Dixon CJ, leading the High Court of Australia, declared:

> "a releasee must not use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor."

Lastly consider the observations of Lord Denning MR in *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98, where the plaintiff lost his arm in an industrial accident in Dubai and accepted a paltry sum due under a local statute in that currency, signing a form that it was in "full satisfaction and discharge of all claims":

> "…in this case there is no evidence of a true accord at all. No one explained to [the plaintiff] that he might have a claim at common law. No one gave a thought to it. So there cannot be an agreement to release it. There being no true accord, he is not barred from pursuing his claim at common law."

CONTRACT OF COMPROMISE - THE EFFECT OF MISTAKE OF LAW

An important modern discussion is *Brennan v Bolt Burdon (a firm)* (29 July 2004) [2004] EWCA Civ 1017, [2004] 3 WLR 1321(CA: Sedley and Maurice Kay LJJ and Bodey J); revsg [2003] EWHC 2493 (QB), [2004] 1 WLR 1240 (Morland J).

A claimant in a personal injury and professional negligence action had her claim struck out for not serving the claim form in accordance with the Civil Procedure Rules as then interpreted in a first instance authority and in dicta in the Court of Appeal in *Godwin v Swindon Borough Council* [2002] 1 WLR 997. As a result the claimant in February 2002 compromised her claim against the defendant. Subsequently in *Anderton v Clwyd County Council (No 2)* [2002] 1 WLR 3174 the

Court of Appeal reversed the first instance case. The claimant in these proceedings sought to appeal out of time and the defendant sought to rely upon the contract of compromise. Morland J held the compromise was void on the ground of common mistake of law: [2003] EWHC 2493 (QB), [2004] 1 WLR 1240. The defendant's appeal allowed: the contract of compromise was valid and not tainted by mistake of law.

The Court of Appeal reasoned as follows:

(1) The defence of common mistake of law was available in contract and relief for mistake of law was not confined to restitutionary claims: applying *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, and doubting *S v S (Ancillary Relief: Consent Order)* [2003] Fam 1. Maurice Kay LJ indicated:

> "Although the *Kleinwort Benson* case concerned a restitutionary claim rather than a contractual one, it cannot be doubted that its effect now permeates the law of contract" (at para [10]).

(2) As with any other contract compromises may be vitiated by a common mistake of law. Nevertheless compromise of litigation on a give-and-take basis involved considerations of the policy and finality.

(3) Applying the test for common mistake in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2003] QB 67 the compromise remained at all times possible to perform. Furthermore, the claimant's advisers were at fault in not enquiring whether an appeal was pending the *Anderton* case. Accordingly that test was not satisfied.

The Court of Appeal held that *Kleinwort Benson* must also apply to contractual compromises, including the retrospective sting in the tail. Their Lordships found this hard to reconcile with the approach of the House of Lords to the construction of compromises in *BCCI v Ali* [2002] 1 AC 251 (whereby compromises are construed as normally not covering new causes of action created by subsequent judicial decision). Their Lordships were largely able to draw the sting by stressing the important policy considerations underlying compromise, as recognised in dicta in *Kleinwort Benson* [1999] 2 AC 349 at 382 (Lord Goff) and 412 (Lord Hope).

Maurice Kay LJ and Bodey J would have favoured as a matter of public policy a substantive exception to the mistake of law rule that:

> "a compromise in the course of litigation, entered into on professional advice, should never be vitiated by a subsequent judicial decision in a case to which the instant litigants are not parties, unless the compromise contains a suitable express provision" (at paras [23] and [52]).

In contrast, Sedley LJ's near-dissent attempts to reformulate the *Great Peace* test in a way suitable for mistakes of law as opposed to mistakes of fact: if the parties had appreciated then what the law is now known to be would there still be an intelligible basis for their agreement (para [60]). However Sedley LJ accepted that such a test "would permit the unravelling of a good many litigation compromises" (para [61]).

His lordship preferred to consider public policy as part of the factual matrix in which compromises should be construed.

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