SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 62
CA163/19

Lord Justice Clerk
Lord Malcolm
Lord Turnbull

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

ROBERT GORDON KIDD

Pursuer and Reclaimer

against

(FIRST) LIME ROCK MANAGEMENT LLP; (SECOND) LIME ROCK MANAGEMENT LP; (THIRD) LIME ROCK PARTNERS V, LP; (FOURTH) HAMISH HECTOR LAWRENCE ROSS; (FIFTH) JASON SMITH; (SIXTH) LEDINGHAM CHALMERS LLP; (SEVENTH) MALCOLM LAING; AND (EIGHTH) RODNEY ALPHONSIOUS MAGILL HUTCHISON

Defenders and Respondents

Pursuer and Reclaimer: Lord Keen of Elie QC, Manson; Harper Macleod LLP
Defenders and Respondents: McBrearty QC, McKenzie; Gilson Gray LLP
(first to fifth respondents)
Dean of Faculty QC, Paterson; CMS Cameron McKenna Nabbarro Olswang LLP
(sixth to eighth respondents)

12 November 2021

[1] I am obliged to Lord Malcolm for setting out the history of the case, the relevant background and the issues which were before the court for resolution. I agree that the

reclaiming motion should be allowed, for the reasons he gives. I have only a small number of observations of my own to make.

[2] *Erskine's Institute of the Law of Scotland* III.i. 15 states:

> "Where two or more persons have been culpable, either as principals or some of them only as accessories, each of them may be sued for the whole damage, because both of them concurred in committing the wrong; but as soon as the damage is repaired or made up to the party hurt by any one of them, the obligation is extinguished as to the rest; for an obligation founded solely upon damage cannot possibly continue after the damage ceaseth to exist".

The focus of this passage is on the making up of the entire damage; if that is done in a proceeding against one wrongdoer, no action can lie against others who were equally culpable, but the reason is not that other wrongdoers are thereby discharged of their obligation; it is that there is no remaining damage to make up.

[3] That emphasis seems consistent also with the observations of Lords Nicholls in *Tang Man Sit (Personal Representatives of)* v *Capacious Investments Ltd* [1996] AC 514, 522, para b64, quoted in both *Jameson* and *Heaton,:*

> "…. a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery."

The focus here is again on a claimant fully recouping his loss; if the full loss has been made up by one wrongdoer, or the pursuer has accepted the sum in settlement as having that effect, there is nothing left to recover from another. On the other hand, if he has not done so, there should be no barrier to further action. That is why the focus in the present case, as identified in *Heaton*, must be on whether the settlement reached in the previous action,

construed in context, shows that the pursuer accepted the sum in settlement for the whole of his loss, in respect of the current defenders as well as the former ones.

[4] The legal arguments in this case focused primarily on *Jameson* and *Heaton*. In light of the discussion in *Heaton* I am not sure that more can be taken from *Jameson* than the key points explained in *Heaton* by Lord Bingham (para 80; Lord Mackay (para 41) and Lord Rodger (paras 68 and 69). In fact, despite the efforts in *Heaton* to explain and clarify *Jameson*, it continues to be difficult to reconcile the two cases.

[5] *Jameson* was, perhaps unsurprisingly, interpreted as laying down a rule of law that A, having accepted and received a sum from B in full and final settlement of his claims against B in tort, was thereafter precluded from pursuing against C any claim which formed part of his claim against B. The reasoning in *Heaton (see* Lord Bingham, para 5) rejected any such interpretation. Central to the way *Jameson* was decided would seem to be Lord Hope's suggestion that a case pursued to judgment and one resolved by settlement had exactly the same effect, and that whatever the reasons for it, the compromise fixed the amount of the plaintiff's claim in just the same way as if the case had gone to trial and he had obtained judgment. This is central to the rationale of *Jameson:* essentially compromise is seen as extinguishing the claim against all, unless the settlement shows clearly that the intention was to the contrary. A similar approach, but based on policy considerations, can be seen in the speech of Lord Clyde. He took the view that where the matter was not clearly stated in the agreement, a settlement with one of several parties jointly and severally liable to the same plaintiff should involve a release of the others. But why should this be the case? The original agreement will in most cases have been reached with only one party, or one set of parties, and in relation to specific proceedings. It is, as the pursuer submitted, one thing to say that a compromise sets the remedial obligations of a specific defender; it is another thing

to suggest that compromise with that defender should be taken as setting the remedial obligations of all possible defenders. As Lord Bingham noted (para 9(2)) in *Heaton* an agreement between A and B does not affect A's rights against C unless A agreed to forego or waive those rights; or the agreement was one which created an enforceable right in C. In other words, it must be clear on a proper construction of the deed that either of these situations applies. Even "clear and comprehensive language" as between A and B "has little bearing" on the question whether the agreement represented the full measure of A's loss, in respect of C as well as B (*Heaton,* para 9(3)). The reasoning in *Jameson* cannot reasonably be reconciled with the discussion in *Heaton* as to the factors, apart from the ordinary contingencies of litigation, which might influence a settlement, and which might point away from its being taken as representing a resolution of the claimant's whole loss. In *Jameson* Lord Hope equated settlement with judgment and thus full value; Lord Clyde appeared to proceed on the same basis, and to conclude that any arm's length settlement should be assumed to represent full value. The speeches in *Heaton* eloquently explain why that is not the case.

[6] In the present case the Lord Ordinary's reasoning for determining that the pursuer was barred from proceeding with the present action is to be found in para 41 of his opinion. It is that having settled with one joint wrongdoer for final settlement of the loss claimed against that wrongdoer, he is *per Jameson* precluded from pursuing a claim against other joint wrongdoers for the same loss. The reason for the conclusion that the loss is the same is essentially that the claim in the present action replicates the claim made in the first. There is no analysis of this, nor is there any explanation of why he considers the situation can be differentiated from the facts in *Heaton,* despite the fact that the claim against the defendant in the second part of *Heaton* "were wholly encompassed within the damages claimed"

against the defendant in the first part, including all the items of loss for breach of the second defendant's contract. The Lord Ordinary stated (para 33) that there were no averments that the agreed sum gave a discount for particular matters (for example, the understanding of the insurance position; the defence on causation etc), thus these matters were not relevant. Yet in so far as these matters were averred in the original action they surely form part of the context against which the agreement in that action fell to be construed.

[7] In essence the Lord Ordinary approached matters from the wrong end. He should have approached matters by asking whether the terms of the agreement made it plain that the pursuer had accepted the sum of £19 million as reflecting the whole of the loss attributed by him to the sale of his shares. To phrase it another way (see Lord Mackay, *Heaton*, para 48), could it be inferred from the agreement that the defenders in the settlement had accepted full responsibility for that loss, measured in the sum of £19 million. Had the Lord Ordinary approached matters this way, making the terms of the settlement agreement the primary focus of attention, and considering it both as a whole, and in its appropriate context he would have been unable to answer either of these questions in the affirmative.

[8] In the preamble, the terms of the agreement are stated to be in "full and final settlement **of the primary action"** (emphasis added). This sets the tone for the whole of the document, the language of which is redolent of an agreement between and limited to specific parties and for a particular purpose. From the outset the document does not purport to be a settlement of the pursuer's claim as a whole or against whomever. It is necessary to turn our attention to clause 2 to identify what the actual terms of the "full and final settlement" are. There (clause 2.1) the terms are agreed "in return for the release and agreement not to sue" set out in the clause. This language seems more consistent with the agreement constituting an agreement to accept a sum in exchange for release of, and

agreement not to sue, specified parties, rather than the wider interpretation advanced for the defenders. What the parties intended to be understood by the reference in paragraph 3 of the preamble to full and final settlement of the primary action is expanded upon in clause 2.5, the terms of which are indeed comprehensive, but only as between the parties and related parties. The claims which are discharged are the claims that such parties have or may have "against each other", the "released claims". As far as the *Corray* action is concerned, the agreement is that the pursuer will "not further pursue" that action, and will conclude it without any demand for payment; this again is a language of individual release rather than payment accepted to represent the whole of the pursuer's loss. Were the defenders' construction correct, this part of the agreement would be wholly superfluous. There is much in the reclaimer's submission that the wording of the agreement, taken as a whole, tends to confine and constrain the scope and effect of the settlement.

[9] There is nothing in the agreement to justify the inference that the pursuer was accepting the sum of £19 million as representing the full measure of his claim. The wording is redolent of an intention to release individual defenders rather than create a situation in which any further action against parties not identified in the agreement were to be barred. I agree that the reclaiming motion must succeed, and that the case should be remitted to the commercial roll for further procedure.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

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Lord Justice Clerk
Lord Malcolm
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OPINION OF LORD MALCOLM

in the Reclaiming Motion

by

ROBERT GORDON KIDD

Pursuer and Reclaimer

against

(FIRST) LIME ROCK MANAGEMENT LLP; (SECOND) LIME ROCK MANAGEMENT LP; (THIRD) LIME ROCK PARTNERS V, LP; (FOURTH) HAMISH HECTOR LAWRENCE ROSS; (FIFTH) JASON SMITH; (SIXTH) LEDINGHAM CHALMERS LLP; (SEVENTH) MALCOLM LAING; AND (EIGHTH) RODNEY ALPHONSIOUS MAGILL HUTCHISON

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12 November 2021

[10] The issue in this case can be described as follows – does the settlement of an earlier action against another party prevent the pursuer and reclaimer from pursuing proceedings against the current defenders for the balance of the claim said to be still outstanding? The

commercial judge answered in the affirmative and dismissed the action. This court is asked to reverse that decision.

The background circumstances

[11] The background circumstances are set out in the commercial judge's decision, see [2020] CSOH 94. Reference can also be made to the narration in a decision of Lord Tyre during the first action before it was settled, see *Kidd* v *Paull & Williamsons LLP and another* 2018 SC 193. The context can be summarised as follows. The pursuer was the sole shareholder of ITS Tubular Services (Holdings) Ltd (ITS), a company operating in the oil industry. He decided to sell part of his shareholding. He appointed two new directors to assist in these plans, one of whom, Mr Jeff Corray, was appointed chief executive officer. The pursuer and ITS jointly instructed Paull & Williamsons (P&W) as their solicitors with a view to representing their interests in the negotiation and implementation of any such bargain. (Subsequently this firm merged with another to become Burness Paull LLP (BP).) The individuals in P&W dealing with the matter were Mr Scott Allan and Mr Kenneth Gordon. The Lime Rock Group expressed an interest. Ultimately the pursuer transferred 36% of his shares to Lime Rock receiving a payment of US$10m. In addition ITS was provided with US$45m by way of financial investment. Subsequently the operational performance of the company deteriorated. Administrators were appointed and the company's business and assets were sold.

The first action

[12] The pursuer raised a commercial action against P&W/BP seeking damages of US$210m, being the claimed value of his holding before the company ran into difficulties less the sum paid by Lime Rock. The loss was said to have been caused by the transaction

with Lime Rock. The summons averred breach of contract, fault and negligence, breach of fiduciary duty and fraudulent misrepresentation. The latter two claims were based on the proposition that, unknown to the pursuer, Lime Rock was an existing client of P&W and Mr Gordon acted for them. It was said that he was an "unofficial counsel" for Lime Rock, and that he arranged for another firm of solicitors, Ledingham Chalmers LLP, now the sixth defenders in the current proceedings, to "front" the negotiation for Lime Rock. The pursuer contends that had P&W revealed this state of affairs he would not have entered into the transaction and would thereafter have realised the then full value of his shareholding.

[13] After initial denials and following on the recovery of certain documentation P&W/BP accepted that the actions of Mr Gordon had created a conflict of interest. Thereafter the pursuer moved for summary decree in respect of the cases of breach of fiduciary duty and fraudulent misrepresentation. In the decision mentioned earlier Lord Tyre dismissed the case based on fraud but granted summary decree in respect of the plea of breach of fiduciary duty. He excluded various averments from probation and fixed a proof to address causation/quantum of damages and a plea of contributory negligence. The pursuer had also raised separate proceedings in respect of the same head of damages against Mr Corray.

Settlement of the first action

[14] In due course the action against P&W/BP was settled. The settlement agreement bore to be confidential, but it has been made public without objection by any party. The parties to it were the pursuer, P&W and BP. It bore to be in full and final settlement of the action against P&W/BP. Without admission of liability the pursuer would be paid £19m inclusive of expenses. The agreement was in full and final settlement of, and irrevocably released and forever discharged all actions, claims, rights, etc. which the parties had or may

have against each other arising out of the proceedings or the underlying facts, to be referred to as "the released claims". The pursuer also undertook to abandon the claim against Mr Corray. The terms of the settlement agreement, at least so far as relevant for present purposes, are appended to this opinion.

The present action

[15] The present action is against Lime Rock and Ledingham Chalmers, and certain individuals in the said organisations, who are all said to be jointly and severally responsible for the US$210m loss. The intention is to recover the balance of the claim after accounting for the contribution made by P&W/BP. It is averred that all of the defenders were aware that Mr Gordon was acting wrongfully and that they conspired with him to facilitate the breach of fiduciary duty and fraudulently achieve the completion of the transaction. They deliberately deprived the pursuer of the knowledge that he could not trust his solicitors and led him to believe that he was in receipt of independent "arms- length" advice. But for this he would not have completed the transaction and would not have suffered the loss of the value of his shareholding.

The commercial judge's decision

[16] The defenders contend that the settlement and subsequent payment of the £19m by P&W/BP precludes the present action. The commercial judge upheld this plea. He applied the law as he understood it to be laid down in the House of Lords cases of *Jameson and another* v *Central Electricity Generating Board (No 1)* [2000] 1 AC 455 and *Heaton and others* v *AXA Equity and Law Life Assurance Society plc and another* [2002] 2 AC 329. (Both decisions will be discussed in detail later). The question turned on the proper construction of the settlement agreement. The true value of the claim was not a relevant factor. There was no

need for a proof on that matter. It was noted that the pursuer made no averments as to any factors which persuaded him to settle at less than the full value of the claim. Nothing was identified which should lead to a particular meaning of any of the terms of the settlement agreement.

[17] The commercial judge assessed a number of submissions based on specific parts of the agreement. He regarded them as being neutral or of no real assistance in resolving the preclusion plea, for example the abandonment of the Corray claim. Applying Lord Hope's analysis in *Jameson*, which he considered was accepted in *Heaton*, for the judge the key issue was whether the claim that had been settled was for the whole amount of the loss. Both actions concerned the same loss, namely that said to have been caused by the Lime Rock transaction. The settlement with one alleged joint wrongdoer was to be regarded as in full and final settlement of all claims for that loss. There was nothing in the agreement which indicated that the settlement was not in full of the conclusions of the action. The new action was incompetent and should be dismissed.

Parties' submissions

[18] The court was favoured with detailed and sophisticated submissions. What follows is but a brief summary.

Pursuer

[19] *Heaton* is the leading authority on the nature and operation of the preclusion rule. It operates in tandem with the rule that a pursuer cannot recover more than his actual recoverable loss. Unless it is clear that a settlement agreement fixes the measure of loss at the sum to be paid it does not have the conclusive effect of a court judgment. In this regard the terms of the settlement viewed in its factual context is the primary focus of attention. If a

pursuer has settled against one joint wrongdoer for less than his loss he should be free to pursue others for the balance.

[20] The commercial judge wrongly interpreted the settlement as fixing the measure of the pursuer's loss in the same way as a court judgment. He placed inappropriate weight on the fact that both actions concerned the same head of damage. Properly interpreted the agreement does no more than release P&W/BP from further proceedings at the instance of the pursuer in respect of the Lime Rock transaction. It does not discharge the current defenders who were not parties to it.

Defenders

[21] The defenders adopted the reasoning of the commercial judge. Viewed in its context the agreement demonstrated that the payment of £19m was in full and final settlement of the wrong done to the pursuer and discharged all potential claims against any party in respect of the Lime Rock transaction. The amount of the settlement was irrelevant. Nothing was averred by the pursuer which might indicate a contrary intention. Having received full satisfaction no loss remained to be claimed from other alleged wrongdoers in respect of the transaction and its consequences. The analysis in *Jameson* is directly applicable and conclusively supports the dismissal of the action.

Analysis

[22] When does settlement of a claim by A against B prevent A from pursuing C for an alleged balance due in respect of the same loss? The short answer is that it depends on the terms of the agreement construed in its context and any other relevant background circumstances. However it is important to be clear as to what it is that the agreement must demonstrate if a plea of preclusion is to be upheld. Is it enough that the settlement is in full

and final settlement of the claim made against B for the whole loss, or must the agreement indicate that the amount payable was, or is to be taken as, full compensation for the loss, injury or damage sustained by A? The legal basis for preclusion is that after the agreed sum has been paid there remains no loss to be pursued against another party. This is a pointer to the second alternative.

Jameson v CEGB

[23] Sometimes the question posed is – has the claim been satisfied? This is how Lord Hope of Craighead phrased the task in *Jameson*. This creates a risk of conflating the two issues, namely settlement of a claim or satisfaction of loss. Lord Hope then asked – what is the effect if the amount of the claim is fixed by agreement? This begged the question as to whether that was the effect of the agreement. The tenor of Lord Hope's discussion suggests that he was focussing on the settlement of the claim as opposed to an agreement on its quantification. He recognised that such settlements usually involve a compromise. He reckoned that a compromise *accepted in full satisfaction of the claim* (emphasis added) "fixes" the amount of the claim in the same manner as if there had been a decision on this by a court (and this even though in *Jameson* it was acknowledged that the settlement was at less than full value). One does not open up issues such as the proper quantification of the claim. In his Lordship's view, so long as the action that was being settled was seeking recovery of the whole of the loss sustained by the plaintiff, it followed that any claim against another party for the same loss was extinguished. If it were otherwise then, contrary to the principle of finality, there could be endless litigation.

[24] Lord Hope appeared to accept that if it was made apparent that the settlement was not to have this effect, then there would be no preclusion. Thus, consistently with some of

Lord Clyde's speech, if A settles a claim for £X made against B for £Y, and if he wishes to pursue C for £X minus £Y, this has to made clear in the agreement. Absent such clarity, the settlement itself is taken as if it were an adjudication on, or agreed valuation of, the amount properly recoverable for the loss sustained. Borrowing a phrase to be mentioned later, this approach could operate as a trap for the unwary. And clearly it would apply even if the potential third party claim emerged after the agreement.

Heaton* v *AXA

[25] It is not difficult to understand why the majority decision in *Jameson* was interpreted as laying down a presumptive rule of law which required to be rebutted in the agreement. In *Heaton* their Lordships noted points of distinction as to the circumstances of the two cases. Nonetheless, while it was not expressly over-ruled, in my view the reasoning of the majority in *Jameson* can hardly co-exist with that in *Heaton*, especially having regard to the speech of Lord Bingham. He hypothesised (para 4) a settlement agreement whereby the sum paid is agreed or is taken to represent the full value of A's claim in tort against B, in which event there is no remaining damage to found a claim in tort against C. In the next paragraph he explained what he described as "the obvious difference" between a court judgment and a compromise agreement. One decides the measure of the defendant's liability, the other may or may not represent that liability. There can be many reasons for settling a claim at less than it is worth, some of which are mentioned. In such a case preclusion would be "unjust". The discussion continued by noting that preclusion depends on the settlement sum being accepted "as representing the full measure of A's loss", see sub-paras 8(5) and (6). Earlier (para 6) Lord Bingham rejected any rule that a full and final settlement of A's claim against

B prevents a claim against C for anything which formed part of the claim against B. So, contrary to Lord Hope's analysis, if a preclusion plea is to be upheld, more is required.

[26] In para 9 Lord Bingham emphasised that a release of one wrongdoer does not release another, and that, in itself, an agreement between A and B will usually have no impact on A's rights against C. That A may no longer be able to pursue B has little bearing on whether the settlement represents the full measure of A's loss. The more inadequate the agreed compensation, the more important that the payer takes steps (some of which are described) to protect himself from being drawn into a further action brought by A to obtain "full redress", something which could occur by way of a contribution claim made against B by the subsequent defendant. A is under no duty to reserve the right to sue C since "in the ordinary way" he is fully entitled to do so.

[27] As to the merits of the case in *Heaton*, Lord Bingham's view was that the agreed sum was not to be taken as "representing the full measure of the respondents' loss". There was nothing in the agreement or the relevant surrounding circumstances which suggested that the plaintiffs entered into the agreement in full and final settlement of all their claims against not only the settling party but against the new defendants as well. It followed that the agreement did not extinguish or exhaust the claim.

Allison* v *KPMG Peat Marwick

[28] It may not be too much of an over-simplification to suggest that in *Jameson* the court favoured defendants by laying the burden of making the position clear on plaintiffs, and *vice versa* in *Heaton*. Furthermore, in so far as policy issues are at work, in *Heaton* it is hard to find any echo of Lord Hope's invocation of the desirability of finality in litigation. In his speech Lord Bingham referred to the assistance he had gained from what he chose to

describe as the "clear and illuminating judgments" of the New Zealand Court of Appeal in *Allison* v *KPMG Peat Marwick* [2000] 1 NZLR 560. Given that A*llison* is a ringing endorsement of the Court of Appeal's judgment in *Jameson* and of Lord Lloyd of Berwick's dissent in the House of Lords, this provides an insight into Lord Bingham's thinking.

[29] The leading judgment in *Allison* was delivered by Thomas J. He considers that, in principle, it is unsatisfactory to enlarge the scope of a settlement to embrace third parties not involved in it (para 119). "Arid and technical distinctions" laid aside, the question is whether the settlement is in full satisfaction of the plaintiff's claim, thereby extinguishing it, or simply a release of the immediate defendant. It will be the former if a sum is paid in performance of a contractual agreement as to the *quantum* of damages. In that event, and quite independently of the agreement, thereafter no injury or loss exists on which to sue a co-delinquent (paras 130-134). However a defendant may be released for any number of reasons short of acceptance that his loss has been satisfied. Why should the law presume that others benefit from this? Furthermore, the paying defendant should be the party responsible for making the position clear (paras 118, 141, 142 and 152).

[30] Thomas J had difficulty in seeing the compromise in the case before him as fixing the amount of the appellant's claim in the same way as if it had been pursued to a court judgment (para 159). Reference is made to observations of Steyn LJ (as he then was) in an earlier case as to the absurdity of the English common law rule that release of one joint tortfeasor (using the common law sense of the term) releases all. In a less formalistic age, and recognising that this was a policy issue, "the best solution" was that it should not release the others. As it stood it operated as a "trap for the unwary" (para 156). According to Thomas J, if *Jameson* could not be distinguished, it should not be followed (para 160).

Further analysis

[31] The correct answer depends on asking the correct question. In *Heaton* Lord Rodger of Earlsferry described it as whether the settlement was intended to fix the full measure of the claimant's loss, or in other words as full satisfaction of the wrong done to him so as to preclude any further proceedings, see paras 79 and 81. An English court could perhaps live with both *Jameson* and *Heaton* by reference to certain peculiarities of English common law. However it has to be said that two of the majority in *Jameson* were Scottish judges, and reference was made to some Scottish decisions, in particular *Carrigan* v *Duncan* 1971 SLT (Sh Ct) 33. Nonetheless I consider that the majority in *Jameson* adopted the wrong approach. They did not ask the correct question which, to echo Lord Bingham in *Heaton* at para 10, is: did the settlement agreement, when viewed in its surrounding circumstances, indicate that the pursuer accepted £19m in full and final satisfaction of all his claims for the harm allegedly done by the deal, not only against P&W/BP, but against Lime Rock and the others as well? If this is the correct question, the commercial judge also adopted the wrong approach and asked the wrong question by following *Jameson*, see his opinion at paras 25 and 41.

[32] Towards the end of his speech in *Heaton* Lord Rodger indicated that, having regard to the amount claimed and the relatively large settlement sum, his initial view was that it had been accepted as being full satisfaction, but he did not intend to dissent from the decision. There is now no suggestion that there be a proof on quantum and causation, but it does not follow that the settlement amount must be irrelevant. If Mr Kidd had accepted £100m, perhaps that would be a significant factor, and similarly if he had taken £3m inclusive of expenses. £19m, inclusive of expenses, is a large amount, but considerably

below the sum sought as representing the alleged destruction of the value of his shareholding. I doubt that anything can be taken from it one way or the other when seeking an answer to the key question.

[33] The sum paid was in full and final settlement and discharge of any claims the parties (Mr Kidd and P&W/BP) may have against each other arising out of or connected with the proceedings or the underlying facts relating to the proceedings – "the released claims". Whatever else, the wording shows that the agreement was intended to release P&W/BP (and because of another clause Mr Corray) from any claim made by the pursuer relative to the deal done with Lime Rock. On *Jameson* reasoning, which was adopted by the commercial judge, absent anything pointing to the contrary, that is sufficient for the agreement being taken as extinguishing the loss thereby precluding a claim for an alleged balance against other parties. However, on the *Heaton* approach it tells us nothing as to whether the sum was accepted as being or representing full value. In my view nor does anything else in the settlement agreement.

[34] There is nothing in the agreement, nor in the relevant circumstances, nor in averment which allows one to say with any confidence that, having been paid £19m inclusive of expenses, Mr Kidd has received all that he is entitled to receive in respect of the claim; in other words that there is now no loss or damage which can found a claim against the current defenders.

Some of the Scottish cases

[35] Again at the risk of over-simplification, the defenders invited us to follow the commercial judge's lead and adopt the *Jameson* approach, while the pursuer urged *Heaton* upon the court, drawing attention to its endorsement by the Court of Appeal in *McGill* v

Sports and Entertainment Group and others [2017] 1 WLR 989. There are some older Scottish authorities and decisions which might illuminate the correct path. Many of them cite Erskine *Inst.* III.i.5:

> "Where two or more persons have been culpable, either as principals or some of them only as accessories, each of them may be sued for the whole damage; because both of them concurred in committing the wrong; but as soon as the damage is repaired or made up to the party hurt by any one of them, the obligation is extinguished as to the rest; for an obligation founded solely upon damage cannot possibly continue after the damage ceaseth to exist."

[36] In *Western Bank* v *Bairds* 1862 24D 859, at page 901 Lord Justice Clerk Inglis also focussed on whether any damages claim remains to be enforced against others.

> "We have already, by more than one judgment, fixed that the present action is founded on joint delinquency, inferring a joint and several liability, or in other words, a liability *in solidum* against each defender. … I am of opinion that the pursuers of such an action by discharging several defenders, with or without consideration, do not thereby necessarily discharge the whole claim, nor debar themselves from enforcing that claim against others of the co-delinquents, each of whom is liable *in solidum*. I cannot therefore give any effect to the pleas which the defenders have founded on the deed of agreement and discharge, and the consequent absolvitor of thirteen parties who were co-defenders with them in this action."

Lords Benholme and Neaves initially entertained doubts, and thus said more on the matter, but ultimately agreed with the Lord Justice Clerk.

[37] In *Delaney* v *Stirling* (1893) 20R 506 Lord Kinnear opined that:

> "It is necessary for the defender to show that (the) discharge is a discharge of all claims against her as well as against the defenders in the former action, because it is no defence to her that they have been completely discharged, since each of several common wrongdoers is separately responsible for the wrong, and must show when he founds upon a discharge which he himself has not obtained that the discharge is a discharge of claims against himself."

[38] In *Douglas* v *Hogarth* (1901) 4F 148 one defender paid £15 to settle the claim against him. The other defender entered a plea as follows:

> "In respect that he has accepted from the defender Robert Gillespie a sum in full of his claims of damages in the present action, the pursuer is barred from insisting in this action and this defender is entitled to absolvitor."

[39] At page 151 Lord Moncrieff said:

> "The pursuer proceeded originally against two defenders, but has thought fit not to proceed against one of them. It is immaterial that a sum of money has been paid by that defender. The case is the same as if the pursuer had brought his action against Hogarth alone."

[40] It was made clear that if in due course damages were awarded account would have to be taken of the sum paid by the discharged defender. (A plea that the action should be stopped because Hogarth had been deprived of a right of relief against Gillespie was rejected because the settlement had no such effect.) Reference can also be made to Lord Sorn in *McNair* v *Dunfermline Corp* 1953 SC 183 at 186.

[41] *Fleming* v *Gemmill* 1908 SC 340, citing Bell *Principles* at para 56, confirms that if two or more parties are liable "jointly and severally", as would be the case here, each is liable for either the whole or a share.

[42] In *Steven* v *Broady Norman & Co Ltd* 1928 SC 351 the Second Division addressed a case where a decree in absence obtained against one of a number of joint and several obligants proved to be worthless. It was held that this was not a bar to pursuing the same claim against a co-delinquent.

[43] Citing Stair and the passage in Erskine mentioned earlier, Lord Justice Clerk Alness (at page 358) indicated that these showed that "*satisfaction* at the hands of the wrongdoer first sued is a condition precedent of a second action being held barred." His Lordship referred to the decisions in *Western Banks, Delaney*, and *Douglas* (see above), and observations of a US Supreme Court Justice that it is only when a plaintiff "has accepted satisfaction in full for the injury done to him, from whatever source it come" that a further

claim will be barred (Mr Justice Miller in *Lovejoy* v *Miller*, 1865). It was noted that in *Dillon* v *Napier, Shanks & Bell* 30 SLR 685 (also 1893 1 SLT 55) a discharge for a modified sum did not stop a second action against another wrongdoer. The cases preventing a party being vexed by repeated lawsuits, for example *Stevenson* v *Pontifex Woods* (1887) 15R 125, do not apply when there are different debtors. The pursuer "may sue either or both of them as he pleases."

[44] In *Steven* Lord Anderson noted (page 364) that in support of the plea of bar there had been reference to English common law concepts (also discussed in *Allison* and *Heaton*) which are "alien to our legal system", and which in any event had become hedged with exceptions to avoid hardship. His Lordship identified three general rules which guided his approach. First, every wrong has a remedy. A person wronged is entitled to invoke the aid of the court until he has succeeded in obtaining his due. This rule was vouched in the authorities relied on by the Lord Justice Clerk. Secondly, the court will not aid someone in any endeavour to obtain more than the just remedy to which he is entitled. "Stated otherwise, if satisfaction has been made, the plea is ended." Reference was made to the passage cited in Erskine, and also to *Delaney* (see above) where the pursuer had been "completely indemnified" by a payment made in settlement of an action brought against a joint delinquent thus a second action against another was barred. The third general rule was that vexatious litigation will be discouraged by the court, illustrated by *Stevenson* v *Pontifex Wood* and the requirement that all interested pursuers should claim damages in one action. With reference to the first rule, Lord Anderson noted that the pursuer had no prospect of gaining satisfaction from the decree in absence. The second rule was satisfied in that the decree would be assigned to the defenders.

[45] This review of Scottish authority helps in identifying the correct path when faced with the *Jameson*/*Heaton* fork in the road. The emphasis is on a further claim against a co-delinquent being available unless it can be said that the pursuer has accepted a sum which is, or is to be taken as, full indemnification for the loss. Our law does not set its face against the notion of pursuing a claim after settlement with one co-delinquent, though plainly any sum recovered must be accounted for. It provides no support for a policy decision based on a preference for finality and the protection of settlors from contribution proceedings. It is the new defender who pleads bar, and, as a matter of principle, unless it is apparent that the plea is well-founded the action should not be stopped. As observed in *Heaton*, if ultimately it is shown that the true value is at or less than the sum accepted in the settlement, the likelihood is that there will be consequences for the pursuer in expenses, see Lord Mackay of Clashfern at para 52.

The commercial judge's opinion

[46] Before the commercial judge, though not in this court, the pursuer contended that *Jameson* and *Heaton* stood together, with neither representing the law of Scotland. This, to my mind misguided approach, may have led the judge down the wrong path, and in particular to the application of the approach of the majority in *Jameson*, see para 41. The commercial judge was also asked to reserve his decision until after a proof on the proper value of the claim; an invitation which was correctly rejected.

[47] The commercial judge considered that an absence of averment by the pursuer on certain factors, for example as to why a discount was accepted, was adverse to his interests. This would flow naturally from his view that, on its own terms, the agreement was to be treated as "full and final settlement of all claims for that loss" (para 40), the loss being the

damage done to the shareholding by the transaction. The most obvious rejoinder is that the agreement does not say that. However, even if the most that can be said is that it settled all claims against P&W/BP (and Mr Corray), on *Jameson* reasoning that would be sufficient for preclusion, unless the contrary could be divined from the agreement properly construed. In that context an absence of averment by the pursuer might be worthy of note. But if *Jameson* reasoning is rejected, the value of such a comment falls away. If it is plain from the agreement construed in its context that the loss has been extinguished by the settlement, there can be no claims against alleged co-delinquents. If that cannot be said, the opposite is not furthered by any reference to matters, necessarily speculative, which do not appear in the pursuer's pleadings. To put it another way, the pursuer is entitled to prosecute the claim unless it can be established that he has already been indemnified.

[48] Finally with regard to the commercial judge's analysis, at para 39 he drew comfort from judges in *Heaton* commenting that the settlement and the new claim were for damages described as not coincident, whereas in the present case the respective claims were for exactly the same loss. The substantial damages claim against Equity & Law, the appellants in *Heaton*, had been a part of the overall claim in earlier proceedings against Target. (This was on the basis that Target's unfounded accusations had caused Equity & Law to breach its contract with Inter City.) It was the settlement of the Equity & Law head of loss, itemised as accounting for one half of the £10m settlement figure, which prompted the preclusion plea. Founding on *Jameson* it was argued that this was as if the respondents had succeeded on this part of the claim, had established causation and recovered damages for their loss, and thus any success in the second action would constitute double recovery, see para 78 in the speech of Lord Rodger. His Lordship continued at para 79:

> "But just as the effect of any prior judgment depends on what its scope actually was so also the effect of any prior settlement must equally depend on what its scope actually was. As your Lordships have observed, whether a sum accepted in settlement of a claim is intended to fix the full measure of a claimant's loss so as to preclude any further proceedings depends on the proper construction of the particular compromise agreement in the light of all the facts surrounding it."

[49] The fact that the previous settlement included sums due in respect of additional claims of no relevance to the current proceedings was of no significance for the outcome in *Heaton*. The focus was on the proper interpretation of what had been agreed in respect of the settlement of exactly the same head of loss as was now sought against a party not involved in the settlement. The discussion is directly applicable to the circumstances in the present case.

[50] Lord Rodger also noted that *Jameson* concerned concurrent tortfeasors, whereas *Heaton* involved separate and overlapping breaches of contract (para 61). Perhaps drawing on his background in Scots law, he considered this to be of no importance when it came to whether *Jameson* should or should not be applied (para 83). Such distinctions have never carried any significance in Scots law, according to which if two or more parties contribute to one loss, even by way of wholly separate and distinct wrongful acts, perhaps one in delict, the other in contract, their liability is joint and several. This remains true in respect of breaches of different contracts, see *Grunwald* v *Hughes* 1965 SLT 209. The reality may be that, *Jameson* not having been challenged head-on, in *Heaton* mention was made of certain differences between the respective circumstances, but this should not detract from the reasoning on points of logic and principle which are relevant on both sides of the border.

Decision

[51] For the above reasons I am of opinion that the reclaiming motion should be upheld;

the commercial judge's interlocutor dismissing the action should be recalled; and the whole matter remitted to the commercial roll for further procedure.

Appendix – the relevant parts of the settlement agreement

WHEREAS:-

1. The Pursuer has raised proceedings against the Defenders at the Court of Session, Edinburgh, under Court reference number CA2 I 1/20 15 (hereinafter "the Primary Action").

2. The pursuer has also raised proceedings against Jeffery Corray (hereinafter "Corray") at the Court of Session, Edinburgh, under (i) Court reference number CA9/1 6 (hereinafter "the Corray action") and (ii) P826/15 (hereinafter "the Corray petition").

3. Parties have agreed to terms for the full and final settlement of the Primary Action and wish to record the terms of settlement on a binding basis in this Settlement Agreement.

AGREED TERMS

1 DEFINITIONS AND INTERPRETATION

In this Settlement Agreement, unless the context otherwise requires, the following words and expressions have the following meanings:

"Close Family Members" means the Pursuer's wife, sister, brother in law, children and the spouses or civil partners of his children.

"Related Parties" means in respect of any party to this Settlement Agreement any parents, subsidiaries, affiliated entities, all related corporate and operating entities, successors, transferees, representatives, principals, agents, officers, partners, members, employees or directors of that party.

"The Parties" means the pursuer, the first and second defenders, and the former partnership of Paull & Williamsons and the various partners thereof from time to time.

"The Proceedings" means the Primary Action, the Corray Action and the Corray Petition.

2 SETTLEMENT TERMS AND RELEASE AND AGREEMENT NOT TO SUE OR APPEAL

2.1 Without any admission or acceptance of liability on the part of the Parties or any of their Related Parties, the following settlement terms have been agreed, in particular in return for the release and agreement not to sue set out in this clause.

2.2 Subject to the terms of clause 2.6, the Defenders will pay to the Pursuer the sum of £19 mi11ion, such payment to be made by same day bank transfer to the client account of the Pursuer's solicitors, Levy & McRae Solicitors LLP. Payment will be made by 21st February 2018, failing which interest will run thereon from that date at the rate of 8% a year.

2.3 The Pursuer and Defenders will share equally between them the cost of the instruction of McNeill & Cadzow relative to the preparation of the electronic bundle to be used at the proof in the Primary Action.

2.4 No other sum of money, whether referable to damages, interest, expenses or otherwise, is payable as between the Parties. In particular, to the extent that they have not already been paid, any awards of expenses in favour of any party hereto are hereby waived irrevocably. For the avoidance of doubt no party shall be obliged to repay any sum already paid in respect of an award of expenses.

2.5 This Settlement Agreement is entered into in full and final settlement of, and the Parties hereby irrevocably release and forever discharge, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether in law or equity and whether or not presently known to the Parties which the Parties and/or their Related Parties or any of them ever had, may have or hereafter can, shall or may have against each other, arising out of or connected with the Proceedings and/or the underlying facts relating to the Proceedings (all of which are hereinafter referred to as the "Released Claims").

2.6 The Parties warrant and represent to each other that they have not assigned or transferred of any action, claim, right or demand or other matter relating to the Released Claims, and they hereby acknowledge that the warranty and representation made under this clause 2.6 by the pursuer is a condition precedent to the Defenders obligation to make payment to the Pursuer in terms of clause 2.2. For the avoidance of doubt, the Pursuer shall be at liberty to assign the right to payment arising under clause 2.2 hereof.

3. PURSUER WARRANTIES AND UNDERTAKING

The Pursuer hereby warrants and undertakes that 3.1 he is not presently aware of having any claims or rights of action against the Defenders or the former partnership of Paull & Williamsons and the various partners thereof from time to time;

3.2 without prejudice to his entitlement to negotiate with Corray on the terms relating thereto regarding the question of expenses, he will not further pursue the Corray Action or the Corray Petition and rather will abandon or otherwise bring to a conclusion same by no later than 10th July 2018 without any demand for payment being made of or accepted from Corray, and will if requested to do so exhibit such documents as may reasonably be required to vouch that he has done so.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 62
CA163/19

Lord Justice Clerk
Lord Malcolm
Lord Turnbull

OPINION OF LORD TURNBULL

in the Reclaiming Motion

by

ROBERT GORDON KIDD

Pursuer and Reclaimer

against

(FIRST) LIME ROCK MANAGEMENT LLP; (SECOND) LIME ROCK MANAGEMENT LP; (THIRD) LIME ROCK PARTNERS V, LP; (FOURTH) HAMISH HECTOR LAWRENCE ROSS; (FIFTH) JASON SMITH; (SIXTH) LEDINGHAM CHALMERS LLP; (SEVENTH) MALCOLM LAING; AND (EIGHTH) RODNEY ALPHONSIOUS MAGILL HUTCHISON

Defenders and Respondents

Pursuer and Reclaimer: Lord Keen of Elie QC, Manson; Harper Macleod LLP
Defenders and Respondents: McBrearty QC, McKenzie; Gilson Gray LLP
(first to fifth respondents)
Dean of Faculty QC, Paterson; CMS Cameron McKenna Nabbarro Olswang LLP
(sixth to eighth respondents

12 November 2021

[52] I am also grateful to Lord Malcolm for setting out the history and other relevant aspects of the case. I agree with all that has been said by both Lord Malcolm and the Lord

Justice Clerk. For the reasons which they give, I agree that the reclaiming motion should be allowed. I need only offer a few brief observations of my own.

[53] It seems to me that the principles which can be taken from the decision in *Heaton* include the following:

1. There is no rule of law that a full and final settlement of A's claim against B prevents a claim against C for anything which formed part of the claim against B – (Lord Bingham at para 6);

2. The release of one wrongdoer does not release another – (Lord Bingham at para 9);

3. In itself an agreement made between A and B will not affect A's rights against C – (Lord Bingham at para 9);

4. A is under no duty to reserve the right to sue C as in the ordinary way he is fully entitled to do so without such reservation – (Lord Bingham para 9);

5. The effect of any prior settlement must depend on what its scope actually was – (Lord Rodger at para 79).

The application of these principles to the question of whether the prior settlement relied upon in the case of *Heaton* did prevent a further claim against others for an alleged balance due in respect of the same loss can be seen in certain of their Lordships' speeches:

> "There was nothing in the terms of the compromise agreement or in the relevant surrounding circumstances to suggest that the respondents entered into that agreement in full and final satisfaction of all their claims not only against Target but against Equity & Law as well. It follows that the compromise agreement did not extinguish or exhaust the claims which the respondents were entitled to pursue against Equity & Law." (Lord Bingham at para 10);
>
> "In respect of the claim for destruction of Inter City's business I do not find it possible to extract from the agreement with Target the inference that Target were necessarily accepting the full responsibility for that destruction and it is perfectly possible to read the settlement as a settlement of the claim for Target's part in that destruction not necessarily amounting to the full responsibility for that destruction." (Lord Mackay at para 48);
>
> "… the proper question is whether, when construed against the appropriate matrix of fact, the terms of the settlement show that the parties intended that the agreed sum should be in full satisfaction of the wrong done to the claimant." (Lord Rodger at para 81).

In my opinion the analysis of the older Scottish cases, as undertaken by Lord Malcolm, demonstrates an approach which sits well alongside that of their Lordships in *Heaton*. Accordingly, the question in the present case must be whether the settlement reached in the previous action, construed in context, shows that the pursuer accepted the sum of £19m in full and final settlement for the whole of his loss in respect of the current defenders as well as the former ones.

[54] In my view, it does not. The language of the settlement agreement is redolent of an agreement between specific parties for a particular purpose. The "released claims" are the claims which the parties have or may have "against each other". There is nothing within the terms of the agreement to show, suggest, indicate, or permit the inference to be drawn that the pursuer was accepting the sum of £19m as representing the full measure of his claim.