SETTLING WISELY

CONSIDERATIONS FOR SETTLEMENT IN MULTI-PARTY FRAUD LITIGATION

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In 2023, the long running case of Kea v Watson (also known as Glenn v Watson) finally came to an end. The final assessment of equitable compensation, after many recoveries, gave rise to practical points of significance in fraud and asset tracing, where a claimant often has to pursue multiple defendants so as to maximise the eventual judgment and recovery.

Glenn v Watson (trial judgment at [2018] EWHC 2016 (Ch)) involved claims to recover some £129m plus interest from a trust company which had entered into a joint venture agreement with Kea Investments Ltd, a company owned by Sir Owen Glenn. The joint venture company was called Spartan, and it had received the £129m. Of that £129m, some £12.5 m had been paid out by Spartan to the principal wrongdoer, Mr Eric Watson, so that Kea had a tracing claim to that money. The bulk of the money was recovered mid-trial when the claimants settled with the trust company after it became clear that one of the relevant contracts was a forgery. The trial continued against Mr Watson and one of his assistants, and Kea succeeded in establishing deceit, bribery and breach of fiduciary duty. The court ordered that Kea was entitled to equitable compensation and ordered an interim payment, accounts as to the tracing claims and an enquiry as to the total equitable compensation once the tracing claims had been dealt with.

In 2023, Kea obtained judgment as to the amount of the equitable compensation: Kea v Watson [2023] EWHC 1830 (Ch). In the meantime, Kea had:

(a) successfully recovered traceable money from various sources, including a US LLC which had bought a NY penthouse, Mr Watson's accounts in banks in Monaco and Switzerland, a trust which had bought a house for one of Mr Watson's former partners, and Mr Watson's assistant, who had been the object of a knowing receipt claim;

(b) settled claims against parties in England, Hong Kong and the BVI in relation to assets which were not traceable but which Kea asserted were being held by those parties as nominees for Mr Watson (relying on the interim payment order); and

(c) settled a claim for damages against a firm of solicitors which had acted for Mr Watson/the trust company.

Kea had to make various allocations and appropriations in order to arrive at the final sum for equitable compensation. The claims against third parties which were settled gave rise to a number of issues which have practical importance when considering settling against any particular defendant.

The principles

If the claimant has claims against A and B and settles against A, the question arises as to how much of the settlement sum received from A the claimant must give credit for in the continuing claim against B. This can make a significant difference to the claim against the continuing defendant, B.

The relevant principles are set out in paragraphs 30-41 of the judgment [2023] EWHC 1839 (Ch), and the application of those principles to the settlement with the solicitors is at paragraphs 102-119. In short, the things to be considered are:

- What claims have been settled against A;
- To what extent the settled claims overlap with the claims against B;
- Whether the court can be satisfied that the claim against A was sufficiently meritorious. (What that means could be the subject of another whole article).

The practical lessons

Four matters follow which need to be borne in mind when settling against third parties.

First, it is best if any settlement agreement expressly provides that the claimant does not allocate or appropriate payments by party A to particular claims against party A, and preserves its right to make allocations against particular claims in the future. That maximises the ability of the claimant to allocate the receipts to claims which do not overlap with remaining claims against the remaining defendants (for example by allocating the recovery to costs claimed against Party A only).

Second, try to avoid entering into confidentiality or non-disparagement agreements with party A which will get in the way of showing the court in the final assessment against party B that the claim against party A was sufficiently meritorious. Ensure that there is always a carve out for putting sufficient evidence before the court on future hearings against party B to prove that the case against party A was sufficiently meritorious. In this case, as appears from paragraph 2 of the judgment, the court was willing to protect some of the confidential information of party A: part of the hearing was conducted in private, orders were made protecting the confidentiality of information (eg under CPR 5.4C), and the judge used descriptions rather than numbers and refrained from identifying certain third parties by name. That may provide some comfort to settling parties that they will be protected even if the claimant has to later prove that the case against them was sufficiently meritorious.

Third, part of the settlement sum can be allocated to the costs of the proceedings against party A, but probably only to a sum equivalent to that which would have been recovered against party A if the claim against party A had been successful (including on an indemnity basis if that can be shown to be likely to have been the outcome of a successful claim).

Fourth, where the claim against party A included a claim for the costs which had been incurred in pursuing party B or perhaps other parties (in this case, against Mr Watson and against Spartan and in recovering traceable assets and against others who had acted as nominees), the receipts from party A by way of settlement can be allocated or appropriated to those claims if there was a sufficiently meritorious claim against party A for recovery of those costs (for example in a claim for negligence; see paragraph 108 of the judgment).

Finally, the case is noteworthy because certain assets had been obtained by Kea from the alleged nominees which assets were not readily saleable. The Judge allowed those to be dealt with on the basis that credit for those assets would be given in the future against the judgment sum when those assets generated cash. How to account for illiquid assets can be a problem, so while the judgment deals with this very shortly at paragraphs [122]- [129] it is well worth bearing in mind.

Liz Jones KC led David Drake and Paul Adams on this part of the case, instructed by Toby Graham and Tom McPhail at Farrer & Co.