

DRAFTING AND NEGOTIATING EFFECTIVE SETTLEMENT ORDERS

Drafting Techniques

There is no particular magic about drafting a compromise or settlement. Recent decisions have tended to confirm that compromise or settlement agreements will be construed in the same way as any other commercial document, that there are no special rules governing the construction or interpretation of such agreements and that terms will be implied, where necessary, to give them effect: see *Watts v. Aldington*, The Times, 16 December 1993 (exchange of letters), *Johnson v. Davies* [1999] Ch 117 (voluntary arrangement under the *Insolvency Act 1986*) and *BCCI v. Ali* [2001] 2 WLR 731 (construction of a general release). The *Henderson v. Henderson* principle applies to actions which have been settled just as much as actions fought to a conclusion and, in certain circumstances, it may be an abuse of process for a party to seek to litigate a claim which was properly the subject matter of the compromise even if not within the letter of the agreement: see *Johnson v. Gore Wood & Co* [2001] 2 WLR 72. In the past, lawyers tended to incorporate lengthy and broad formulae in settlement agreements. In keeping with the modern approach, there should be no further need for draftsmen to resort to formulaic language and provisions should only be inserted where they serve a specific purpose.

Form

In principle, settlements and compromises are like any other contracts. Their form and content depend on the scope and complexity of the terms agreed:

- In the context of a dispute compromised on simple terms or to be given effect immediately, the consent order or judgment may embody all of the necessary terms. Alternatively, it may only be necessary for the parties to do no more than exchange letters setting out any additional terms.
- In more complex disputes, however, it will be necessary for the parties to prepare a complex agreement. It is common practice, as described in our first paper, for the parties to submit to an order staying the proceedings on the agreed terms set out in the schedule. The schedule will then embody the terms of the agreement, which the parties have reached. If the parties take the opportunity of settlement to negotiate a complex commercial arrangement, the schedule will look very like a commercial contract.
- In even more complex multi-party disputes, where one or more of the parties to the agreement are not parties to the litigation or the dispute straddles a number of jurisdictions, parties often make use of an “umbrella” agreement. An umbrella agreement provides for the execution and carrying out of a number of legal procedures, often in a number of different jurisdictions, including the compromise of the proceedings with which the English court is seised. The terms will often provide that the parties agree to apply to the court in England for an order in an agreed form. The construction and enforcement of the agreement will be governed by the law of one “umbrella” jurisdiction although a number of the documents or arrangements for which it provides will be governed by the law of the different jurisdictions in which they are to be executed or to take place.

The Tomlin Order

For the purpose of this paper, the paradigm is taken to be the stay on agreed terms in “Tomlin” form and the model clauses set out below are designed for insertion in the schedule to an order staying the proceedings. Where proceedings are settled by this means, there are number of brief formal points to observe: first, the Order and the Schedule serve the double function of both an order and a contract. Although the parties may apply in the proceedings to Court to enforce the terms of the order (and the CPR now permits a claim for damages to be made by this procedure where the Claimant has accepted a Part 36 Offer: see r36.15(6)), the parties may also wish to sue on the contract for damages: see *Hollingsworth v. Humphrey*, the Independent, 21 December 1987 (CA). It is normal to insert in the schedule an agreement clause enabling the parties to enforce the agreement by separate action if they wish to do so: see Model Clause 1. Secondly, the Order must contain the relevant orders, which the parties want the Court to make. Most obviously, the Order will contain the stay of proceedings and the permission to apply. But it will also need to contain all the relevant orders for costs, which the parties wish the Court to make. If any existing costs orders are to be enforced or discharged, the Order must say so.

FINALITY

It is axiomatic that the purpose of a well-drafted and well-considered compromise is to achieve finality for the parties. The best kind of compromise enables the parties to resolve their differences in a way which they would not otherwise have achieved by litigating the dispute to a conclusion. But although this may be the ultimate goal, the parties may not wish to achieve it at any price and especially at the expense of other legitimate claims, which they may wish to pursue either against other or against third parties. When approach the question of settlement, there are two critical questions the negotiator must address: first, which claims can properly be compromised? Secondly, which other parties (if any) will be affected by the terms of the compromise and what effect will the compromise have?

Which Claims?

The principal problem for the parties in negotiating the terms of a settlement is what disclosure to make in negotiation. The settlement agreement will be construed pragmatically by the court in the light of the background information common to both parties. If the Claimant is considering further proceedings either against the Defendant or a third party, the problem will be that he or she may be taken to have promised not to bring those proceedings unless disclosure is made and the agreement expressly provides for the new proceedings to be brought. Equally, if the Defendant is aware that the Claimant has other potential claims but does not reveal this fact, the Court will be slow to accept that the parties intended there to be a release of claims of which the Claimant was unaware, however wide the language of the agreement. Some disclosure is therefore to be recommended. On the basis of their negotiations, the parties then have a number of alternatives:

- *Simple Release*: In a simple case, where proceedings have been issued and the Claimant and the Defendant agree to settle the instant claim, no particular problems are presented and a relatively simple form of release may be used: see Model Clause 2.

- *Intermediate Release:* Of greater complexity is the case where the parties wish to achieve a “clean break” by settling all potential claims which arise out of their relationship. The claim may involve a simple breach of contract but as the price of settling that claim, the Defendant may wish to obtain a release from any other potential claims which might be made under that contract. Model Clause 2 also sets out a more complex form of “intermediate” release designed to achieve that object. The pitfalls of giving an “intermediate” release of this kind are obvious. A Claimant is being asked to release claims which he may be unable to value and the implications of which he may be unable to assess.
- *Release of Pro Forma Claims:* Where there is some doubt about potential claims, one solution to be recommended, and that adopted by some of the parties in *Heaton v. Axa Equity & Law* [2001] Ch 143, is for the Claimant to serve a “pro forma” Statement of Case, even in abbreviated form setting out the basis for the further claim or claims and the Settlement Agreement to refer specifically to that statement of case. Again, Model Clause 2 incorporates such a release.
- *General Release:* Finally, the parties may wish to settle all claims of any kind which they may have against each other. In *BCCI v. Ali* (supra), the House of Lords held that a “general” release of “all or any claims, rights or applications of whatsoever nature” given by employees of the Bank during a reorganisation which made them redundant shortly before it went into liquidation in 1991 was insufficient to release the Bank from “stigma” claims for breach of their contracts of employment. The claims arose out of the fact that the senior management were corrupt and the stigma of association made it more difficult for them to find new jobs. In an earlier decision in 1998 the House of Lords ruled that damages were recoverable in principle. In *Ali* they ruled that the stigma claims were not within the contemplation of the parties when the releases were given. The negotiators and employees were equally unaware of the internal corruption and given the novelty of the claims neither they nor their advisers could possibly have intended the releases to cover those claims. Model Clause 2 also sets out a “general” release designed to meet the *Ali* problem. There is no guarantee that it will be effective.

Which Parties?

Another principal problem for the parties negotiating a settlement is that the Claimant may have alternative remedies against third parties. If the Claimant pursues those remedies against the third party, the third party may seek a contribution from the Defendant and the end result may be that the parties will have to litigate the very dispute, which they thought they had settled. The problem from the Claimant’s point of view is that if he or she reveals to the Defendant that proceedings against a third party are in contemplation, the Defendant may want a further discount to reflect the possibility of contribution proceedings being brought. On the other hand, if the compromise fails to reserve the Claimant’s rights to pursue the third party, the Claimant’s rights against the third party may be extinguished. In determining whether a claim against a third party survives a compromise between the Claimant and the Defendant, the Courts have formulated two questions: first, did the Claimant settle the action on the basis that the terms of settlement were in “full satisfaction” of his claim (“the Full Satisfaction Question”)? Secondly, do the terms of the settlement expressly or impliedly prohibit the Claimant for pursuing the third party (“the Final Settlement Question”)? The lesson to be learnt from these decisions is that the terms of the settlement should, if possible, deal expressly with these potential claims:

- *Other Wrongdoers:* An essential part of any cause of action in tort is proof of damage. The Claimant may suffer the same damage at the hands of two wrongdoers who commit separate torts (e.g. a passenger in a car who suffers personal injury because of the negligent driving of both drivers involved in the accident). In *Jameson v. CEGB* [2000] 1 A.C. 455 the House of Lords held that where the victim of a tort settled with one wrongdoer on terms that the payment was “in full satisfaction” of his claim (even though the amount he agreed to accept reflected a discount), this had the effect of extinguishing any claim against a second wrongdoer for the same damage. In order to pursue his claim against the second wrongdoer, the Claimant should have accepted the Defendant’s offer on terms that it was in full and final settlement of his claim against the Defendant but reserved the right to claim any additional loss he had suffered against the third party: see Model Clause 3.
- *Other Contract Breakers:* The parties face a similar problem in relation to overlapping claims in contract. The Claimant may have separate claims in contract against a number of parties which give rise to the same or substantially the same recovery. In *Heaton v. AXA Equity & Law* (above) the Claimants sold life products as agents for two life companies, Target and E&L. Target wrongfully terminated their agency agreement for serious misconduct. Shortly afterwards, E&L did the same with the consequence that the Claimants could not get accreditation under the LAUTRO rules and ceased trading. The Claimants brought proceedings against Target for lost commissions and consequential losses. They also claimed that the termination of their contract with E&L was the direct consequence of Target’s actions and claimed their losses arising out of the termination of that contract as well. This action was compromised and the Claimants then commenced proceedings against E&L. E&L applied to strike out the claim on the basis that the action was an abuse of process on the authority of *Jameson*. The application failed in the Court of Appeal for three reasons: first, because, on its true construction, the settlement agreement did not prevent the Claimant from proceeding against the second insurance company (“the Final Settlement Question”); secondly, because the Claimant was able to point to some additional losses (“the Full Satisfaction Question”); and, thirdly, because even if nominal damages were recoverable only, the Claimants had real interest in establishing that the termination of the agency agreement was wrongful (and clearing their names). Again, if the Claimant wishes to pursue any additional losses from a third party or to argue that the amount received from the Defendant did not fully satisfy his claim, he needs to reserve these rights expressly: see Model Clause 3.
- *Other Debtors:* A specific problem also arises where the Claimant agrees to release the Defendant from a debt or liability which is jointly owed by a number of parties. The old law provided that where the obligation was joint rather than joint and several, the release of one obligor had the inevitable effect of releasing the others although a several liability would survive: see *Deanplan Ltd v. Mahmoud* [1993] Ch 151. In *Watts v. Aldington* and *Johnson v. Davies* (above) this mechanical approach was rejected. The question now is whether, on the true construction of the settlement agreement, the parties intended the release of the Defendant to be absolute or whether it was intended to be a release with a reservation of rights against the co-debtor. In both cases the Court was prepared to imply a reservation of rights against a co-debtor or co-obligor. Rather than rely on the implication of a term by the Court, the prudent course for the draftsman

would be to reserve the right to claim the balance of the debt from the co-debtor: see Model Clause 3.

- *Contribution Proceedings:* Finally, the parties' advisers need to consider the potential effect of contribution proceedings. If the Claimant is free to pursue a third party in new proceedings, the third party may seek a contribution from the Defendant, who may be hoping to achieve a final resolution of all disputes. Likewise the third party may seek to defend those proceedings on the basis that the terms of the settlement prohibit the Claimant from pursuing the new claim. In *Cape & Dalglish v. Fitzgerald* [2001] Lloyd's Rep PN 110, the Claimants, a group of companies, dismissed the Defendant, a director, for gross misconduct. The parties settled the claim on the basis that the Defendant surrendered his shares in the group to the Claimants. The Claimants then brought proceedings against their auditors for negligence. At trial the judge ordered the auditors to pay compensation of £400k, after taking into account the value of the Defendant's shares. In their turn, the auditors brought contribution proceedings against the Defendant. The Defendant applied to strike out the claim on the basis that the Claimants' claim was prohibited by the settlement agreement and that he had settled the claims against him in full. The Court of Appeal held that the contribution proceedings should continue. If the Defendant had wanted to prohibit the Claimants from taking proceedings against their auditors and to prevent himself from being the subject of contribution proceedings, the settlement agreement should have made express provision for this: see Model Clause 3.

CONFIDENTIALITY

Parties commonly agree that the terms of the compromise or settlement should be kept confidential and the Court will enforce an obligation of confidentiality by injunction. But an absolute obligation is not enforceable in any event. The duty of confidentiality is normally no answer to an order for disclosure in other proceedings, or a witness summons or a question in cross-examination and the Court would normally imply an exception that the parties are free to disclose the terms of the compromise to the extent necessary for the protection or enforcement of the parties' rights: see e.g., *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 WLR 314 (permanent injunction granted to restrain the implied obligation of confidentiality in relation to arbitral proceedings). The typical clause will therefore impose an obligation of confidentiality subject to the consent of the other parties with certain exceptions. The negotiator, therefore, needs to consider a number of points in relation to the terms of any confidentiality clause, a number of which are addressed in Model Clause 4:

- Should the parties agree a form of words for public statements?
- Should the parties be permitted to correct any inaccurate public statements either made by the other parties or in any event?
- Should the parties be permitted to reveal the terms of the settlement in other proceedings and, if so, what kind of proceedings?
- Should the parties be permitted to reveal the terms of the settlement to any tax or public authority and, if so, on what terms?

- Should the parties be permitted to reveal the terms of the settlement under compulsion of law?
- Should the consent of the parties be subject to an obligation not to withhold consent unreasonably?

INSURER AND INSURED: WHO DECIDES ON SETTLEMENT?

The Legal Framework

A contract of insurance is a contract of indemnity and, in theory at least, until the insured is fully indemnified by his insurer for the full amount of his loss, he retains full control over any legal proceedings and may sue for any insured and uninsured losses. In theory, again, the insured retains control over the proceedings even if payment has been made by the insurer in respect of the insured losses: see *Commercial Union Assurance Co Ltd v. Lister* (1874) Ch App 484. Accordingly, the insured will have full control of the proceedings (and, therefore, when and whether to settle them) unless the contract otherwise provides. Likewise, the principal obligation of an insurer is to indemnify the insured against the stated risk and the insurer has no right – and owes no duty – to take, defend or settle proceedings on the insured’s behalf unless the contract otherwise provides.

Liability Insurance

In practice, however, most liability insurance will confer on the insurer the right to nominate solicitors and counsel and to conduct proceedings on the insured’s behalf, although it is less common for the contract to impose a duty to defend the proceedings on the insured’s behalf. If the insurer elects not to pursue or defend the claim or unsuccessfully resists liability under the policy, the insured is then entitled to pursue or defend the proceedings. Most liability policies impose some qualified duty to obtain the consent of the other party:

- The contract may impose a duty on the insured to not to settle the claim without the insurer’s consent (the so-called “duty of co-operation”): see, e.g., *Terry v. Trafalgar Ins Co Ltd* [1970] 1 Lloyd’s Rep 524 (motor insurance), cited in the *Law of Insurance Contracts* (Clarke ed., 1999) at 27.A4, where the relevant clause provided that “no liability shall be admitted or legal expenses incurred nor any offer or promise or payment made to Third Parties without the Company’s consent”.
- The contract may impose a duty on the insurer to settle the claim unless the parties receive legal advice to the contrary (the so-called “QC Clause”): see Clarke above, which gives the following example: “[The Company will be obliged to pay] any such claim or claims which may arise without requiring the assured to dispute the claim unless a Queen’s Counsel (to be mutually agreed upon by the underwriters and the assured) advises that the same could be successfully contested and the assured consents to such claim being contested, but such consent not to be unreasonably withheld”.

The insurer must exercise his right to veto settlement in good faith: see *Distillers-Bio-Chemicals (Australia) Pty Ltd v. Ajax Ins Co Ltd* (1973) CLR 1, 26-7, where Stephen J said this:

“Its [the insurance company’s] power of restraining settlement by the insured must be exercised *in good faith* having regard to the interests of the insured as well as its own interests and in the exercise of its power to withhold consent the insurer must not have regard to considerations extraneous to the policy of indemnity.”

If the insurer declines to compromise the claim in breach of good faith within the terms of the cover and the insured is later exposed to a personal liability, the insured may be entitled to recover the additional amount from the insurer as damages for breach of contract, even if it is in excess of the original cover. The insurer may also be exposed to an order for costs personally: see *Chapman v. Christopher* [1988] 1 WLR 12.

Conflicts of Interest

Although the insurer will have the right to nominate solicitors and to control the conduct and tactics of the litigation, this usually causes no problem because the interests of the insurer and the insured usually coincide in pursuing, defending or settling the claim. But settlement negotiations can lead to a conflict between the interest of the insured and the interest of the insurer:

- Where the Defendant makes an offer to the Claimant, which is close to the limit of his indemnity, the Claimant’s insurer will be keen to settle and avoid the risk of losing a guaranteed recovery. The Claimant may wish to fight on in order to recover more, especially if there is a substantial excess or the claim involves a number of uninsured losses.
- Where the Claimant is prepared to accept an offer close to the limit of the Defendant’s cover, the Defendant will be keen to settle to avoid any personal liability for the excess. The Defendant’s insurer may want to take the risk of going to trial instead. The insurer’s total liability will always be capped at the amount of the cover and if the defence succeeds, it may avoid liability altogether.
- If the offer involves the withdrawal of claims, which are not covered (e.g. claims of fraud or breach of fiduciary duty), the insurer may wish to continue with the litigation, especially if recovery on the lesser claims is in doubt. The Defendant may wish to settle to avoid any exposure on the personal claims.
- Where the insurer reserves the right to repudiate liability, as the action progresses the insurer may become keener to settle and contest the insured’s rights under the policy, rather than to contest the main action.

In *Cormack v. Washbourne* [2000] Lloyd’s Rep PN 459, the Court of Appeal gave the following guidance to insurers in the context of settlements:

“In most cases of professional indemnity and product liability cover – certainly up to the limit of cover provided – its [the insurer’s] interests should coincide with those of the insured and it may not be necessary to involve him closely in the decision-making. In some cases, within or

in excess of the cover limit, there may be some tension or potential for conflict between the two interests, matters for which it is for the responsible insurer to balance in its conduct of the litigation. If and when a significant conflict arises, say when there is a realisation that if the matter proceeds the cover limit may be exceeded, the insurer should have regard both to its own interest and to the separate interest and exposure of the insured. This may, depending on the circumstances, require the insurer to pay greater attention to the insured's expressed concerns or to involve him more in the making of decisions...These may include, for example, whether and when to seek settlement and for how much rather than to continue the proceedings. The manner and extent of such greater involvement of the insured are clearly matters of judgment and balance depending on the facts of each case."

The Solicitor's Duty

If an actual conflict arises between the duties of the solicitor to the insurer and the insured, the solicitor cannot continue to act for both parties. If matters come to his or her attention which make it advisable to settle the claim but suggest that the insurer may have grounds for repudiating liability, the solicitor should advise each client of the conflict and withdraw from the proceedings. In *TSB v. Irving & Burns* [1999] Lloyd's Rep IR 528, proceedings were commenced against the Defendants, a firm of valuers. The firm's insurers nominated solicitors to act on their behalf. The policy contained an exclusion for work done by a particular consultant and it came to the solicitors' notice that he had been involved in the relevant valuation. Counsel was instructed to advise the Defendant in conference in relation to the claim. He was also instructed to consider whether the insurer had any grounds for repudiating cover. Following the conference with counsel, the insurer repudiated cover. The Defendants brought third party proceedings against them and in their Defence, the insurers relied on the admissions made by one of the partners in the firm at the conference with counsel. The Court of Appeal struck out the defence on the basis that those conversations were privileged. Morritt LJ said this at 537:

"The skilled cross-examination of Mr. Burns about matters adverse to his interests with a view to founding a repudiation of cover in a situation where Mr. Burns was entitled and did repose trust and confidence in his solicitors and counsel and had received no prior warning of any sort as to the peril in which was placed, was manifestly unfair; and in my judgment, it was also a breach of the duties owed to the Defendants by [the solicitors] and counsel."

The Court of Appeal held that all communications made by the insured to the solicitors after the time at which the actual conflict of interest arose until the insured had been given a reasonable opportunity to decide whether to instruct new solicitors were confidential and could not be reported to the insurer.

OWNERSHIP AND USE OF DOCUMENTS PRODUCED ON DISCLOSURE

CPR 31.22

CPR 31.22 now imposes an express obligation on the parties not to use any document disclosed in the course of proceedings except where:

- The document has been read to or by the Court, or referred to, at a hearing which has been held in public;

- The Court gives permission; or
- The party who disclosed the document and the person to whom the document belongs agree.

The rule does not, however, apply to documents produced by a party in other circumstances, e.g. on an application for a freezing order (although the Court may require an express undertaking from the applicant before making such an order). Nor is it implicit in the rule that the parties must hand back copies of any documents obtained during the proceedings. If a party wishes to ensure that the obligation extends this far, it must be imposed expressly: see Model Clause 5.

Collateral Use of Documents

Documents produced on disclosure may only be used for the purpose of the current proceedings (subject to very narrow exceptions). In certain circumstances the Court may permit the collateral use of documents obtained on disclosure, e.g. for the purposes of commencing new proceedings. Unless the original parties and the owner of the documents consent, however, the burden on the applicant to satisfy the Court that permission should be granted is a heavy one: see *Matthews & Malek Disclosure* (2nd ed., 2000) at 13.35-13.44. Accordingly, if one party wishes to make use of documents obtained on disclosure or otherwise during the course of the proceedings, he or she should require the consent of the other parties as a term of the compromise: see Model Clause 5. If new proceedings are brought without the consent of the other parties or the permission of the Court, the original parties may enforce the obligation of confidentiality by injunction. Alternatively, the new defendant may have the action struck out as an abuse of process.

The Solicitor's Duty

The obligations imposed by CPR 31.22 are owed as much to the Court as they are to other parties and they are owed not only by the lay client but also by the solicitor, whose duty it is to advise the client of their scope. If the client commits a breach of those obligations in ignorance of those obligations, his or her solicitor may be ordered to pay the costs of any contempt application or enforcement proceedings: see *Watkins v. A. J. Wright (Electrical) Ltd* [1996] 3 All E.R. 31 (disclosure of invoices to Inland Revenue by the client in ignorance of the obligation not to deploy documents for a collateral purpose).

MODEL CLAUSES

There now follow a number of model clauses designed to illustrate the points in the course of this paper. These model clauses should not be used by delegates for the purpose of drafting any compromise or settlement agreement without a thorough and detailed consideration of their suitability to the individual case. The author assumes no responsibility either to the delegates or any of their clients for the use of these clauses in any individual case.

MODEL CLAUSES 1: AGREEMENT CLAUSES

Agreement Enforceable as a Contract

The terms of this Schedule shall be enforceable as a contract by the Parties as well as pursuant to the permission to apply contained in the Order.

Entire Agreement

The terms of the Order and this Schedule set out the entire agreement between the Parties and supersede all negotiations, preliminary agreements and understandings written, oral or otherwise.

The Parties each acknowledge and represent that they have not relied upon or been induced to enter into the terms of the Order and this Schedule by any written, oral or other representation or undertaking not expressly recorded in them and, accordingly, no part of the Order or this Schedule shall be set aside on the basis of any such representation or undertaking and none of the Parties shall be liable to any of the others of them on the basis of any such representation or undertaking.

MODEL CLAUSES 2: RELEASE CLAUSES

“Simple” Release

In full and final settlement and full satisfaction of the claims made by the Parties in these proceedings the Claimant HEREBY RELEASES all claims made by him in these proceedings (including any claim for interest and costs) and the Defendant HEREBY RELEASES the counterclaim made by him in these proceedings (including any claim for interest and costs)

“Intermediate” Release

In full and final settlement and full satisfaction of all claims mentioned in this Clause the Claimant HEREBY RELEASES the Defendant from all existing or potential claims (including any liability for interest or costs) of any nature which it has or may now have arising out of or in connection with or relating to the subject matter of these proceedings, the Defendant’s employment by the Claimant or his office as a director of the Claimant or as a shareholder of the Claimant or under the Shareholders’ Agreement.

Release of “Pro Forma” Claims

In full and final settlement and full satisfaction of all claims mentioned in this Clause the Claimant HEREBY RELEASES the Defendant from all existing or potential claims (including any liability for interest or costs) of any nature which he has or may now have arising out of or in connection with or relating to the subject matter of these proceedings or any of the claims or matters identified in the Particulars of Claim sent by the Claimant’s solicitors to the Defendant’s solicitors under cover of a letter dated 23 January 2002 and the Claimant HEREBY AGREES with the Defendant not to commence or prosecute any proceedings against the Defendant arising out of or in connection with such matters.

“General” Release

In full and final settlement and full satisfaction of all claims mentioned in this Clause the Parties HEREBY RELEASE one another (including for the avoidance of doubt past and present directors and other officers of corporate bodies) from all claims whether known or unknown, ascertained or unascertained, quantified or unquantified, actual, prospective or contingent, and whether they have presently arisen or may in the future arise, including any claim for fraud, dishonesty, deliberate breach of fiduciary duty or other wrongdoing or unlawfulness and whether or not any of the Parties has concealed (deliberately or otherwise) from any of the other Parties or not revealed any facts or matters which might give rise to a claim so that it shall be possible for any of the Parties to rely on this release against any of the other Parties, however dishonest or fraudulent or unconscionable or inequitable or wrongful or unlawful the released Party or his or its acts or omissions has or have been and whether or not the those acts or omissions relate to the basis of the right or claim in question or the concealment or failure to reveal that claim.

MODEL CLAUSES 3: CLAIMS AGAINST THIRD PARTIES CLAUSES

Reservation of Rights

In full and final settlement of the claims brought by the Claimant against the Defendant the Claimant HEREBY RELEASES the Defendant from all existing or potential claims (including any liability for interest or costs) of any nature which the Claimant has or may now have against the Defendant arising out of or in connection with or relating to the subject matter of these proceedings PROVIDED ALWAYS that the Claimant reserves the right to pursue all and any claims against the parties identified in Appendix 1 to this Schedule including any claims or allegations made against those parties in these proceedings which now exist or would but for the terms of this Order and this Schedule have existed so that the terms of this Order and this Schedule shall not restrict or affect in any way the rights of the Claimant to pursue those claims against any of those parties.

Surrender of Rights

1. Without limiting or being limited by the release in Clause 2 below, in full and final settlement and full satisfaction of the claims mentioned in this Clause brought by the Claimant against the Defendant the Claimant HEREBY RELEASES the Defendant from all existing or potential claims (including any liability for interest or costs) of any nature which he has or may now have arising out of or in connection with or relating to the subject matter of these proceedings.

2. In consideration of the benefits accruing to the Claimant under the terms of this Order and this Schedule the Claimant HEREBY RELEASES any existing or potential claims (including any liability for interest or costs) of any nature which it has or may now have arising out of or in connection with or relating to the subject matter of these proceedings against the parties identified in Appendix 1 to this Schedule including any claims or allegations made against those parties in these proceedings

3. The Claimant HEREBY COVENANTS with the Defendant not to do or omit to do anything (and in particular not bring or continue any legal proceedings against any of the parties identified in Appendix 1 or any other person mentioned in these proceedings either in any statement of case, witness statement or expert's report or any document or documents referred to therein) which would or might result in legal proceedings being brought against the Defendant in relation to the subject matter of these proceedings.

4. For the avoidance of doubt, any person who is not a party to these proceedings or the agreement embodied in this Schedule may enforce any of its terms which purports to confer a benefit on him, her or it in accordance with the Contracts (Rights of Third Parties) Act 1999 and no such term may be varied in such a way as to extinguish or alter his, her or its entitlement under that right without his, her or its consent.

MODEL CLAUSE 4: CONFIDENTIALITY CLAUSES

1. None of the Parties will in any circumstances make or authorise the making of, or cause or contribute to the making of, any public statement on the proceedings other than in the terms of the press release set out in Appendix 2 to this Schedule except (1) with the consent of all of the other Parties (2) to correct any inaccurate public statement on the proceedings or (3) in any of the circumstances specified in Clause 2 below.

2. Nothing in Clause 1 above shall preclude the making of any statement by any of the Parties:

- to a Court or arbitral tribunal or to any tax or other public authority to which that party is subject to the extent reasonably necessary to protect that Party's interests;
- for the purpose of making or proving title to any property of any kind; and
- under compulsion of law.

MODEL CLAUSES 5: USE OF DOCUMENTS CLAUSES

No Collateral Use

1. Each of the Parties HEREBY UNDERTAKES that he will not without the consent of the other Party or the permission of the Court use any of the following for the purpose of civil or criminal proceedings in this or any other jurisdiction:

- original or copy statements of case, witness statements or experts' report served by the other Party;
- copies of original or copy documents produced by the other Party either voluntarily or pursuant to rules of court or to any order made in the course of the proceedings;
- copies of any original or copy document mentioned or referred to either in any statement of case, witness statement or expert's report served by the other Party; or

- any information obtained by him from any of the above-mentioned documents or generally as a result of these proceedings.

2. The Claimant HEREBY UNDERTAKES that he will at the request and cost of the Defendant return all copies of the individual documents identified in Appendix 3 to this Schedule, which were produced to, or obtained by, him in the course of these proceedings.

3. The Defendant HEREBY UNDERTAKES that he will at the request and cost of the Claimant return all copies of the individual documents identified in Appendix 4 to this Schedule, which were produced to, or obtained by, him in the course of these proceedings.

Collateral Use Permitted

PROVIDED ALWAYS that nothing in Clause 1 shall preclude the Parties from using copies of any such documents or any such information for the purpose specified in Clause 4 below.

4. Each of the Parties HEREBY CONSENTS to the other Party using any copies of the documents identified in Clause 2 above and any information obtained by them from any of those documents or as a result of these proceedings for the purpose of taking or defending civil proceedings against all or any of the parties identified in Appendix 4 to this Schedule and the Parties also HEREBY WARRANT to each other that there are no documents identified in Clause 2 (apart from those specifically identified in Appendix 5 to this Schedule) which belong to or are confidential to any other person.