



Claiming benefits...

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Both Prince Andrew and Deloitte have been in the news in recent months for unrelated reasons. What may be less well known is that each has sought, in legal proceedings, to benefit from the terms of a settlement agreement to which they were not a party.

Prince Andrew's attempt to avail himself of the release of liability for "any other person" against whom claims might be brought pursuant to Virginia Giuffre's 2009 settlement with Epstein was thrown out last month by a US court. Deloitte were more successful. Having tried and failed to avail itself of a general release from liability contained in a company voluntary arrangement back in 2020, Deloitte took another bite at the cherry and persuaded HH Judge Davis-White QC in September last year that it could take the benefit of a settlement agreement entered into between Rhino Enterprises Property Limited and Barclays Bank compromising an IRHP mis-selling claim which Rhino Enterprises had brought against the bank in 2015. This was on the basis that, as administrators and therefore agents and officeholders of Rhino Enterprises, the relevant insolvency practitioners were "Affiliates" of Rhino Enterprises and therefore caught by the wording of the release.

Deloitte were not aware of the terms of the IRHP Settlement Agreement until Barclays kindly provided it to them some five years later, in November 2020. It is clear from the judgment that Rhino Enterprises considered it to be grossly unfair that the boilerplate wording of the Settlement Agreement might afford Deloitte a get out of jail free card, not least because it was Rhino's evidence that the parties to the settlement were quite clear that it did not encompass any subsequent claim against Deloitte, which potential claim Rhino flagged in discussions with Barclays on a number of occasions.

It is understood that Rhino has appealed the decision, however, the merits of such appeal must be questionable in circumstances where the Settlement Agreement did not contain any carve-out or reservation of Rhinos' rights to pursue Deloitte in due course. Had it done so, the position would have been put beyond all doubt and no doubt Deloitte's claim for summary judgment would have failed.

Interestingly, Deloitte did not rely on what is often termed the joint tortfeasor principle as a basis for its claim for strike-out/summary judgment. This was presumably because the principle requires a factual investigation into the nature of the damage inflicted by multiple wrongdoers to assess whether it is the same damage perpetrated by each. The principle has been judicially labelled a "trap for the unwary" and provides that where a party reaches a settlement against one or more of several joint tortfeasors which fully compensates him for any loss, no cause of action survives against any other joint tortfeasor for the same loss. Following the relevant line of authorities, litigators advising on a settlement in which there are multiple potential defendants to tortious wrongdoing, particularly where some concerted practice or combination is alleged on the part of those defendants, are liable to be found negligent if they fail to preserve future claims or warn their client about the rule. Rhino Enterprises appears to be a paradigm case given it was alleged that Deloitte was "nothing more than a crucial part in Barclays' process for stifling [IRHP] claims" and were "simply carrying out Barclays' bidding".

Even if Rhino Enterprises' appeal is successful it will undoubtedly have incurred significant irrecoverable costs litigating a point which could have been avoided with a single "for the avoidance of doubt" provision. This may explain why the firm which acted on the settlement agreement is not the firm acting in the proceedings. Either way, one suspects that the former solicitors' insurers will be following the case with baited breath...

The judgment can be found here: <https://www.bailii.org/ew/cases/EWHC/Ch/2021/2533.html>



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