

# Client Update

## English Court of Appeal Considers Settlement in Multiparty Disputes

### LONDON

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On 26 October 2016, the Court of Appeal delivered its judgment in *Kazakhstan Kagazy Plc & 6 others v (1) Baglan Abdullayevich Zhunus (2) Maksat Askaruly Arip (3) Shynar Dikhanbayeva* [2016] EWCA Civ 1036. The decision highlights the potential risks a co-defendant may face when deciding to settle without including all parties to the dispute in the settlement.

### THE ISSUE

The claimants, a group of companies, brought claims in fraud and breach of fiduciary duties against the three defendants, all of whom were former directors of the second claimant. After all three defendants served defences denying the allegations, the first defendant entered into a settlement with the claimants. The claimants stayed their claim against the first defendant and continued only against the second and third defendants. The second and third defendants subsequently applied (a) for permission to bring a contribution claim against the first defendant pursuant to CPR r.20.6(2)(b) and section 1 Civil Liability (Contribution) Act 1978 and (b) a worldwide freezing order in the amount of £72 million against the first defendant.

The second and third defendants' primary case was to deny the fraud allegations. Their contribution claim arose only in the alternative, if they were found to have been fraudulent. In such circumstances, the second and third defendants argued that, on the facts, the first defendant would also be liable in fraud and they would be entitled to make a contribution claim against him.

### THE DECISION AT FIRST INSTANCE

At first instance, Leggatt J refused permission for the second and third defendants to serve the contribution notice, as drafted, because they did not make their own allegation of fraud against the first defendant.

The judge commented that the second and third defendants needed to advance their own case against the first defendant. They could not rely on the claimants' case because the claimants were no longer pursuing a case against the first defendant as a result of the settlement. The judge held that *"it cannot be right to require [the first defendant] to take part in a trial in order to respond to a case which no one is actually making against him"*. The judge went on to observe that he did not *"think it right to permit [the second and third defendants] to commence a claim for contribution against [the first defendant] when neither they nor the claimants are currently making a factual case against [the first defendant] which, if proved, would potentially entitle [the second and third defendants] to recover contribution from him"*.

It was also an important factor for the judge that, while the second and third defendants were protesting their innocence, they could not assert that the first defendant was himself fraudulent.

On that basis, the judge went on to compare the second and third defendants' application to the commencement of proceedings without any intention of pursuing them, which would amount to an abuse of process: *"[f]or [the second and third defendants] to commence proceedings under CPR Pt 20 in these circumstances would, as I see it, be an improper use of the court's process in the same way as it is an abuse of process for a claimant to commence or continue proceedings which the claimant has no present intention of pursuing"*.

The judge held that because the second and third defendants did not advance their own case against the first defendant, and—in any event—their substantive case contradicted their claim for contribution against the first defendant, their application to bring a contribution claim had to fail. In the absence of a contribution claim, he further held that there was no cause of action against the first defendant allowing the grant of a freezing order.

### THE COURT OF APPEAL'S DECISION

The Court of Appeal (Longmore and Richards LJJ) unanimously allowed the appeal.

The Court of Appeal agreed with Leggatt J that, in principle, in order to bring a claim in contribution, the second and third defendants had to advance their own factual case against the first defendant.

However, the Court recognised that the second and third defendants' contribution claim against the first defendant arose in the alternative, if the

second and third defendants were found to have been fraudulent contrary to their primary case. The Court held that the fact that the first defendant had reached a settlement with the claimants should not prevent the second and third defendants from formulating an alternative case that if they were held liable for fraudulent conduct, the first defendant had been fraudulent too.

Longmore LJ observed that *“it is common for a defendant to assert that he is not liable to a claimant but alternatively that, if he is liable, a co-defendant or part 20 defendant is liable as well. The mere fact that that co-defendant settles with the claimant should not make any difference”*. The Court also disagreed with Leggatt J’s comment on abuse of process. Longmore LJ explained that an alternative case is, by its nature, not pursued *“currently”* but *“conditionally”*. This conditionality does not equate to a lack of intention to pursue the alternative case and, therefore, is not an abuse of process.

The Court of Appeal granted the appeal and gave permission for the second and third defendants to advance a contribution claim against the first defendant pursuant to CPR r.20.6(2)(b) and section 1 Civil Liability (Contribution) Act 1978. The Court of Appeal held that there could be no valid cause of action until the second and third defendants were in fact held liable to pay compensation to the claimants. However, the Court acknowledged that pending the outcome of the main dispute, there could not be *“any blanket denial of any recovery”* from the first defendant. In these circumstances, the Court held that *“it is appropriate to maintain the position by either imposing a freezing injunction or extending [the first defendant’s] current undertakings for the benefit of [the second and third defendants]”*.

### THE FUTURE OF SETTLEMENTS IN MULTIPARTY DISPUTES

The Court of Appeal’s decision highlights a risk that co-defendants must consider if seeking to settle multiparty proceedings. Although a defendant may settle with the claimant(s), this will not protect him from contribution claims from his co-defendants if they are not parties to the settlement. It remains to be determined what effect, if any, the settlement will have on the overall damages recoverable by the claimant, and on the amount that the second and third defendants are able to recover from the first settling defendant in their claims in contribution.

The decision demonstrates the importance of ensuring that, where possible, all parties to the dispute are also parties to any settlement agreement. If it is not possible to include all parties in the settlement agreement, a defendant contemplating settlement should seek to factor into the terms of the settlement

the risk of potentially extensive liabilities for contribution claims by any non-settling parties.

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Please do not hesitate to contact us with any questions.