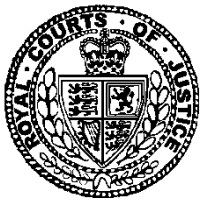

Neutral Citation Number: [2020] EWCA Civ 353

Case No: A3/2019/1930

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS
BUSINESS LIST (CHANCERY DIVISION)
Julia Dias QC sitting as a Deputy High Court Judge
[2019] EWCHC 1951 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2020

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE HENDERSON
and
LORD JUSTICE ARNOLD

- -

Between:

KEVIN TAYLOR	**Appellant**
- and -	
RHINO OVERSEAS INC.	**Respondent**

- -
- -

James Ramsden QC and **Daniel Benedyk** (instructed by **Keystone Law**) for the **Appellant**
Lance Ashworth QC and **Dan McCourt Fritz** (instructed by **Archerfield Partners LLP**) for the **Respondent**

Hearing dates: 19-20 February 2020

- -

Approved Judgment

Lord Justice Arnold:

Introduction

1. Kevin Taylor is a successful businessman with a passion for boats. On 24 July 2015 Mr Taylor agreed to lend the sum of US$1,591,040 for a period of six months pursuant to written Heads of Terms ("the Heads of Terms") which named the borrower as Van Dutch Marine Holdings Ltd ("VDMH"). The Heads of Terms envisaged that the parties would enter into a detailed loan agreement. Although a loan agreement between Mr Taylor on the one hand and (i) Van Dutch Marine Limited ("VDML"), (ii) VDMH, (iii) Hendrik Erenstein and (iv) Ruud Koekkoek (collectively "the Original Defendants") on the other hand was substantially drafted and executed by the Original Defendants on about 30 November 2015 (this draft being referred to as "the Loan Agreement"), it was neither completed nor executed by Mr Taylor. The loan matured on 26 January 2016, but was not repaid. On 17 May 2016 Mr Taylor commenced proceedings against the Original Defendants. On 2 August 2016 Mr Taylor obtained a default judgment against the Original Defendants for the amount of the loan, contractual interest to date and further damages to be assessed. The default judgment remains wholly unsatisfied.

2. On 21 September 2017 an order was made giving Mr Taylor permission to join Mohammed Khodabakhsh, New Beginnings Technologies LLC ("NBT") and Rhino Overseas Inc ("Rhino") (collectively "the Additional Defendants") as defendants to the proceedings and to amend his Particulars of Claim to advance claims against the Additional Defendants for breach of contract, misrepresentation, conspiracy, unjust enrichment and constructive trust. These claims were tried by Julia Dias QC sitting as a Deputy High Court Judge ("the Judge") in April and June 2019. On 22 July 2019 the Judge handed down an impressive judgment ([2019] EWHC 1951 (Ch)) running to 323 paragraphs dismissing all of Mr Taylor's claims.

3. A considerable part of the Judge's judgment was devoted to examining the true basis for the so-called "rule in *Kendall v Hamilton*" (1879) 4 App Cas 504 (so-called because it derives from a passage in the speech of Earl Cairns LC at 514-515 which was neither agreed with by the other members of the majority of the House of Lords nor even the subject of argument at the Bar). The rule is stated in *Bowstead & Reynolds on Agency* (21st edition), Article 82(1) as follows:

> "Where an agent enters into a contract on which he is personally liable, and judgment is obtained against him, the judgment, though unsatisfied is, so long as it subsists, a bar to any proceedings against the principal, undisclosed or (perhaps) disclosed, on the contract."

4. Mr Taylor sought permission to appeal against the Additional Defendants on three broad grounds. On 4 October 2019 Rose LJ granted Mr Taylor limited permission to appeal against Rhino alone on two grounds, namely (i) the Judge erred in holding that VDML was not, at the time of the loan, acting as agent for Rhino as undisclosed principal pursuant to an agreement dated 15 October 2007 ("the Agency Agreement") and (ii) the Judge erred in holding that, if Rhino was an undisclosed principal, Mr Taylor's claims against it were barred by the rule in *Kendall v Hamilton* as a result of the default judgment against the Original Defendants. Although on its face Rose LJ's

order appears clear both as to the extent of the permission granted and as to the reasons for her decision, there was a dispute before us as to whether Mr Taylor had permission for some of the contentions advanced by his counsel. I will address those points in context.

5. Mr Taylor has recently commenced proceedings to set aside the Judge's judgment as having been procured by fraud. For the purposes of this appeal, however, it must be assumed that the judgment is not tainted by fraud.

Factual background

6. The Judge set out the facts in considerable detail at [6]-[20] and [58]-[193]. It is important to note, for reasons that will appear, that the Judge was not asked to make, and therefore did not make, any findings of fact concerning any period of time earlier than 2013. Many of the facts found by the Judge are not germane to the issues on the appeal. I can therefore briefly summarise the relevant facts as follows.

7. VDML is a company incorporated in England and Wales. For reasons that will appear, it must have been in existence since at least October 2007.

8. VDMH is a Maltese company incorporated at the end of April 2015, when it became the sole owner of VDML. Mr Erenstein and Mr Koekkoek are Dutch nationals who each own 50% of the shares in VDMH. It appears that, prior to that, they each owned 50% of the shares in VDML.

9. Rhino is a Panamanian company. It appears from the Judge's findings that it was incorporated on 5 October 2007. Prior to 5 May 2015, it had bearer shares. When the Van Dutch group was restructured in late April to early May 2015, Rhino became a wholly-owned subsidiary of VDMH.

10. On 15 October 2007 VDML and Rhino entered into the Agency Agreement, which is central to the first ground of appeal. On 1 April 2013 VDML and Rhino entered into a nominee agreement ("the Nominee Agreement"), which is relied upon by Rhino by way of a Respondent's Notice.

11. Certainly by 2013, and it appears since at least 2009, VDML carried on business designing, manufacturing and selling luxury leisure yachts. Rhino owned all the relevant intellectual property rights, moulds and tools, however.

12. On 18 November 2013 VDML entered into an agreement with Marquis Yachts LLC ("Marquis"), a US company, which provided for Marquis to build yachts which VDML would purchase. It expressly recorded that the IP rights, moulds and tools were owned by Rhino. The Judge found that the whole basis of the business had been changed in 2013, with production in the Netherlands ceasing and all manufacturing operations being moved to the USA. The 2013 agreement was subsequently replaced by an agreement dated 4 May 2015 which recorded that VDML owned and had exclusive rights to the moulds and tools, and did not mention Rhino. A French manufacturer was added in 2015.

13. Mr Khodabakhsh is a US citizen of Iranian extraction. He is a physicist and engineer by training. He is the owner of NBT. By an agreement dated 30 May 2015 VDMH

undertook to transfer all of the shares in Rhino to Mr Khodabakhsh as nominee for NBT as part of a joint venture between the Van Dutch group and Mr Khodabakhsh/NBT to develop a green motor for marine use. The Judge found that Rhino was beneficially owned by Mr Khodabakhsh/NBT from that date, although the shares in Rhino were not formally registered in the name of NBT until 25 January 2017.

14. It is not necessary for present purposes to recite all the Judge's findings concerning the circumstances in which the Heads of Terms were entered into. One aspect which is germane is that part of the background was that Marquis was pressing for payment of unpaid invoices. Immediately after the Heads of Terms were signed by Mr Erenstein, Mr Taylor arranged for the funds to be advanced by way of direct remittance to Marquis.

15. At the time of the Heads of Terms Mr Taylor knew that Rhino owned the IP rights, mould and tools, but was unaware of the possibility that VDML might be acting as agent for Rhino. Mr Taylor only became aware of this possibility when it was asserted by Messrs Erenstein and Koekkoek in affidavits served in these proceedings on 23 November 2016. That was also when Messrs Erenstein and Koekkoek asserted for the first time that Rhino was (beneficially) owned by Mr Khodabakhsh/NBT. On 21 April 2017 NBT confirmed to Mr Taylor's solicitors that at all material times VDML had acted as agent for Rhino. It was not until some time after that that the transfer of the shares in Rhino came to light.

16. On 20 October 2017, by which time he was aware of the involvement of Mr Khodabakhsh and NBT with Rhino, Mr Taylor made an *ex parte* application to the President of the Court of First Instance of Monaco for an order for the precautionary seizure of shares held by Messrs Erenstein and Koekkoek in a Monegasque company called Eko Invest SCI. The application stated that Mr Taylor planned (according to the translation which was before the Judge):

> "to initiate proceedings against [Messrs Erenstein and Koekkoek] to obtain enforcement exequatur in Monaco of the default judgment granted by the High Court of Justice in London on 2 August 2016, but wants first to exercise a precautionary measure with regard to the valuable assets belonging to [Messrs Erenstein and Koekkoek] that might be transferred easily to third parties."

17. The order was made on 24 October 2017 and served on 21 March 2018 when Messrs Erenstein and Koekkoek were summoned to appear in court on 5 April 2018.

18. No application has ever been made by Mr Taylor to set aside the default judgment he obtained against the Original Defendants.

The Agency Agreement

19. As the Judge noted, the Agency Agreement is expressly governed by Panamanian law, but neither side adduced any evidence of Panamanian law and both sides proceeded on the basis that it did not differ in any material respect from English law.

20. The Agreement defines VDML as "the Agent" and Rhino as "the Principal". The recitals state:

> "(A) The Principal carries on or intends to carry on the Business of trading in the buying of pleasure yachts from the Netherlands and selling worldwide ('the Business').
>
> (B) The Principal wishes to appoint the Agent to carry out duties ('the Duties') in connection with the Business as its agent on behalf of the Principal but in the name of the Agent.
>
> …"

21. By clause 1 VDML is appointed as Rhino's agent to carry out the Duties. By virtue of clause 2, the Agreement is to continue indefinitely unless terminated by no less than 30 days' notice in writing.

22. Clause 3 provides:

> "DUTIES OF AGENT
>
> As agent of the Principal, the Agent shall perform the Duties and carry out such transactions, dealings, acts and things as may be necessary or expedient for carrying out the duties to the best account, and without prejudice to the generality of the foregoing, the Agent shall in particular:-
>
> (a) Use its best endeavours and work diligently at all times to carry out the Duties to the best of its abilities; and
>
> (b) Not without the prior written consent of the Principal engage or be concerned or interested either directly or indirectly in any activity likely to compete or interfere with the Business or the carrying out of the Duties; and
>
> (c) Engage and employ such staff and personnel as may in its opinion be appropriate for the proper carrying out of the Duties;
>
> (d) Place orders with, enter into commitments, obligations and liabilities of any description with and to third parties for or in the course of the carrying out of the Duties, purchase, sell and turn to account all assets materials and goods used therein… purchase, sell, construct, install or dispose of all plant and equipment and effects used in connection with the carrying out of the Duties or ancillary or incidental thereto and procure services for the purposes of carrying out the Duties.
>
> (e) Open and maintain in its own name such banking account or accounts as the Principal shall agree and credit thereto all moneys received by it in connection

> with carrying out the Duties or which may be paid to it by the Principal for the purposes of carrying out the Duties and debit thereto all expenses incurred in connection with carrying out the Duties and any sums which the Principal may from time to time require to be paid to it out of such account or accounts by the Agent;
>
> (f) Hold any assets of the Business or collect any commissions or other payment due to the Principal in the name of the Agent as agent and nominee for the principal.
>
> …"

23. Clause 5 provides expressly that the agency is to be undisclosed, while clause 11 provides that the parties are not partners or joint venturers and that VDML has no authority to act on behalf of Rhino save as authorised under the Agreement.

The Nominee Agreement

24. The Nominee Agreement expressly provides that it is governed by English law. It also provides that it "amends all previous agreements". Rhino is defined as "the Principal" and VDML as "the Nominee".

25. Clause 1 provides:

> "The Principal by this Agreement instructs the Nominee to retain one time exclusive right to exercise in the name of the Nominee but in trust and on behalf of the Principal and at the latter's risk the following assets (hereafter referred to as the 'Assets'):
>
> The Beneficial ownership of the Assets held by the Nominee or registered under its name in its capacity as nominee of the Principal shall at all times belong to the Principal."

26. Other relevant provisions are:

i) Clause 4(a), which provides that Rhino agrees that VDML "acts in the capacity of nominee of the Principal";

ii) Clause 4(b), which provides that VDML will, when entering into any agreement on behalf of Rhino, "inform the parties that all assets are the property of the Principal and not of the Nominee";

iii) Clause 5(a), which provides that the proceeds received by VDML from any transaction in relation to which Rhino had beneficial ownership should be credited to Rhino;

iv) Clause 5(b), which provides that, if VDML does not receive funds due, then it will on request assign the claim or claims to Rhino;

v) Clause 6, which provides for a fee to be paid to VDML;

vi) Clause 7, which requires VDML and its agents to "use its best endeavours to act in accordance with the best interests of the Principal" and not to "place the Assets of the Principal into any situation where they may incur any liability whatsoever to the Principal";

vii) Clause 9, which provides that VDML and its agents will indemnify Rhino against "any and all losses, costs, expenses and liabilities whatsoever wheresoever and howsoever arising directly or indirectly out of or in consequence of any act or omission of the Nominee in carrying out or failing to carry out any of the terms of this Agreement";

viii) Clause 10(b), which provided that Rhino accepted no liability for any transactions entered into by VDML.

The Heads of Terms

27. The Heads of Terms provide:

> "From: KEVIN TAYLOR
> [address]
>
> Van Dutch Marine Holding Ltd
> Represented by
> Hendrik R Erenstein
>
> This letter sets out the principal terms and conditions on and subject to which Kevin Taylor is willing to enter into an Loan with Van Dutch subject to the agreement and signing by the parties of a detailed legally binding agreement (**Formal Agreement**).
>
> A loan will be provided by Kevin Taylor to the Company on the following terms:
>
> Amount: USD 1,591,040
>
> Interest rate – 4% per month for 6 months with a minimum charge of 4 months and rising to 5% per month of total outstanding if principal and interest not repaid in full after 6 months.
>
> Options to be granted
>
> Kevin Taylor is granted the option to purchase any 2 Van Dutch at cost price
>
> VD 40 – Euros 275,000 (plus transport)
>
> VD 55 – Euros 610,000 (plus transport)

VD 75 – Euros 1,400,000 (plus transport)

In the event that Mr Taylor does not take up one or both of his option boats he will receive 75% share in the profits of the sale of a VD 55 for each option boat not taken.

Kevin Taylor to be given an option to purchase 33.33% of the entire business at a 10% discount to market price within 2 years.

Collateral

30% of the equity in the Company to be pledged to Kevin Taylor until loans and interest are fully repaid. Hendrik R Erenstein to pledge all his available shares until his other shareholders are in a position to pledge the full 30%.

Charge to be given by the Company over the 3 stock boats owned by the Company

Whilst the loan and interest remain unpaid:

There is to be full transparency on all financial dealings

Bi weekly meeting will be held in our Monaco office

Kevin Taylor will be required to authorise all payments to be made by any group companies

Any receipts of funds from any source into any group company can be directed by Kevin Taylor to be used to repay the outstanding loans and interest.

Governing law and jurisdiction

This paragraph is legally binding.

1.1 This letter, and the negotiations between the parties in accordance with the proposed Deal and all disputes or claims arising out of or in connection with them or their subject matter or formation (including non-contractual disputes or claims) will be governed by English law.

1.2 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this letter or its subject matter or formation (including non-contractual disputes or claims).

1.3 This letter is for the benefit of the parties to it and is not intended to benefit, or be enforceable by, anyone else."

28. There is no dispute that the Heads of Terms were intended to be legally binding notwithstanding that they provided for the Formal Agreement to be agreed.

The Loan Agreement

29. It is not necessary for present purposes to set out the terms of the Loan Agreement in any detail. The points that matter are that (i) it names VDML as a party, (ii) VDML is defined as "the Borrower", (iii) it provides in clause 7.1 for the Borrower to create a charge over three boats and (iv) it was executed on behalf of VDML.

The Judge's judgment

30. In summary, and so far as relevant to the grounds of appeal, the Judge held as follows:

    i) The Agency Agreement was not superseded by the Nominee Agreement. The two agreements were to be read together, the effect being that the Nominee Agreement regulated the rights and obligations of the parties regarding the specific use of Rhino's IP rights, moulds and tools, while the Agency Agreement (amended by conduct so as to concern the Business as it was carried on from 2013) continued to apply to the distribution and sale of boats by VDML after 2013. This conclusion is challenged by Rhino's Respondent's Notice.

    ii) Clause 3 of the Agency Agreement authorised VDML to take out a loan on behalf of Rhino in the ordinary course of the Business, but it did not authorise VDML to enter into the loan agreement in the Heads of Terms because (i) it was a short-term bridging loan on onerous terms (interest equivalent to 48% per annum rising to 60% if not repaid in full within six months) and (ii) it purported to provide security which Rhino was not in a position to offer, namely a pledge of shares belonging to VDMH and Mr Erenstein, an option to purchase further boats and an option to purchase a stake in the entire Van Dutch business. Accordingly, VDML did not enter into the Heads of Terms as agent for Rhino, which meant that Mr Taylor had no claim against Rhino for either breach of contract or misrepresentation. This conclusion is challenged by Mr Taylor's first ground of appeal.

    iii) In any event, VDMH was the sole counterparty to the Heads of Terms. VDML was not a party to the Heads of Terms. Even if VDML had been a party to the Heads of Terms, an intention to contract on behalf of Rhino was negatived both by clause 1.3 of the Heads of Terms and by the fact that Rhino had by then been sold to Mr Khodabakhsh/NBT. Mr Taylor also seeks to challenge these conclusions as part of his first ground of appeal, although there is a dispute as to whether this is open to him.

    iv) No binding contract was ever concluded on the terms of the Loan Agreement. This conclusion is not challenged by Mr Taylor.

    v) The basis for the rule in *Kendall v Hamilton* was merger (as Rhino contended) and not election (as Mr Taylor contended). Accordingly, the subsistence of the default judgment barred Mr Taylor's contractual claim against Rhino. This conclusion is challenged by Mr Taylor's second ground of appeal.

vi) Even if the basis for the rule in *Kendall v Hamilton* was election, Mr Taylor had elected to hold the Original Defendants liable to the exclusion of the Additional Defendants by making and serving the application for asset seizure in Monaco. By that date Mr Taylor knew all of the relevant facts giving rise to his right to elect. The application required Mr Taylor to prove the existence of a valid debt and he had relied upon the default judgment for that purpose. He had thereby elected to hold the Original Defendants liable rather than to pursue a remedy against the Additional Defendants. That election barred Mr Taylor's contractual claim against Rhino, although not his claim in misrepresentation. Mr Taylor also seeks to challenge this conclusion as part of his second ground of appeal, but again there is a dispute as to whether this is open to him.

First ground of appeal

Construction of the Agency Agreement

31. Mr Taylor contends that, upon the true construction of the Agency Agreement, it authorised VDML to enter into a loan agreement of the kind contained in the Heads of Terms on behalf of Rhino. Since there are no findings as to any relevant factual matrix, this is a pure question of interpretation of the words of the Agreement. Although at one stage in his submissions counsel for Mr Taylor attempted to rely upon the Judge's findings as to what happened subsequently, and in particular the agreements between VDML and Marquis, as he accepted, these cannot affect the construction of the Agency Agreement.

32. A preliminary point is that, as the Judge noted, the Agency Agreement does not clearly define the term "Duties". The Judge held that, having regard to recitals (A) and (B), VDML's Duties were to carry on the Business on behalf of Rhino, that is to say, to buy pleasure yachts from the Netherlands and sell them worldwide. Counsel for Mr Taylor did not take issue with this conclusion, and in any event it seems to me clearly to be correct.

33. Counsel for Mr Taylor focussed his argument upon the breadth of the words in clause 3(d) "enter into commitments, obligations and liabilities of any description with and to third parties for or in the course of the carrying out of the Duties". He submitted that this language meant exactly what it said. Accordingly, he argued, it extended to a short-term bridging loan at a high rate of interest. Furthermore, it was irrelevant that the Heads of Terms included security that VDML was not in a position to promise either on its own behalf or on behalf of Rhino, since that merely meant that Mr Taylor had a claim for misrepresentation.

34. Counsel for Rhino submitted that the Judge was right to conclude that clause 3(d) only conferred authority on VDML to borrow in the ordinary course of business for the purpose of buying and selling yachts and that such authority enabled VDML to enter into loans on reasonable commercial terms, but not to assume onerous obligations, still less to make promises that it knew that neither it nor Rhino could possibly perform (not least because they required performance by a parent company that did not even exist at the time of the Agency Agreement). That would not be to act "to the best account", i.e. in the best interests of Rhino, as required by the general words in clause 3.

35. This is a short point, which is incapable of much elaboration. In my judgment the Judge's construction of the Agency Agreement was correct. The words "of any description" merely mean that VDML has authority to enter into commitments of any type for the purpose of carrying on the Business. They cannot sensibly have been intended to give VDML carte blanche to enter into any loan agreement whatever, no matter how onerous its terms and regardless of whether VDML or Rhino were able to perform its terms. The Judge drew the line at borrowing "in the ordinary course of" the Business. I accept that those words are not to be found in clause 3(b), but in my view the Judge was right to hold that they were implicit.

36. My only reservation is that the Judge drew support for this conclusion from the limited scope of an agent's implied authority to do what is incidental to the ordinary conduct of the principal's business (see *Bowstead & Reynolds*, Article 29). Since this is a case of express authority, I am not sure that that is directly relevant, although I can see that the underlying considerations are similar.

37. It follows that it is not necessary for me to express any view on the submission made by counsel for Rhino that the Agency Agreement only authorised loans for the purpose of buying and selling yachts, and not for manufacturing them; or on the answering submissions made by counsel for Mr Taylor that (i) although there was no such finding by the Judge, the relationship between VDML and Marquis at the time of the Heads of Terms must have been that of buyer and seller of yachts (as opposed to manufacturer and contractor) alternatively (ii) a loan for the purpose of constructing a yacht was incidental to the business of selling that yacht.

Respondent's Notice

38. Given the conclusion I have reached concerning the interpretation of the Agency Agreement, it is not strictly necessary to consider the Nominee Agreement. Nevertheless, I shall do so briefly.

39. Again, there is a preliminary point, which is that the Nominee Agreement does not define or identify the term "Assets". The Judge held that it meant the IP rights, moulds and tools owned by Rhino. Neither party challenges that conclusion.

40. Counsel for Rhino submitted that it was clear from the Nominee Agreement that it was not an agency agreement, indeed its provisions were inconsistent with VDML being an agent for Rhino, particularly as undisclosed principal. The Judge accepted the first part of this proposition, and for my part I accept the whole of it. As the Judge rightly held, however, it does not necessarily follow that the Nominee Agreement superseded the Agency Agreement. As she pointed out, that is not what it says. Nor is it a necessary implication because the two agreements are not entirely co-extensive. The Judge construed the Nominee Agreement as being directed specifically at the assets owned by Rhino, and as such it displaced the Agency Agreement to that extent but no further. That left the Agency Agreement applying generally to the distribution and sale of boats by VDML. In my opinion the Judge's analysis is correct, and none of the submissions made by counsel for Rhino persuade me to the contrary.

The Judge's contractual analysis

41. Although the conclusion reached in paragraph 35 above is sufficient to dispose of this appeal, I shall also consider the correctness of the Judge's contractual analysis if (contrary to that conclusion) VDML had authority to enter into the loan agreement contained in the Heads of Terms on behalf of Rhino.

42. The first question is whether it is open to Mr Taylor to challenge the Judge's analysis. Rhino contends that it is not, because the ground of appeal for which Mr Taylor sought, and was given, permission was that "the learned Judge misconstrued the scope and nature of the principal-agent relationship". I agree that this does not appear to challenge the correctness of the Judge's contractual analysis, particularly given that the Judge dealt with that quite separately from her analysis of the extent of VDML's agency; but paragraphs 59-65 of Mr Taylor's skeleton argument on the application for permission to appeal made it clear that Mr Taylor was also challenging the contractual analysis. Accordingly, I consider that Rose LJ must be taken to have granted permission to appeal on the latter aspect as well.

43. Turning to the substance of the matter, the Judge set out her analysis at [277] as follows:

> "i) VDMH was the sole counterparty to the Heads of Terms. Not only did Mr Taylor expressly state in evidence that he regarded himself as lending to the 'topco', but the Heads of Terms themselves provided in clause 1.3, which was expressly stated to be legally binding, that they were for the benefit of the parties alone and were not intended to be enforceable by or against anyone else.
>
> ii) Accordingly, VDML was not a party to the Heads of Terms and since only VDML is alleged to have had any agency relationship with Rhino, there is no conceivable basis on which it can be said that Rhino was party.
>
> iii) Even if VDML had been a party to the Heads of Terms, both parties agreed that an intention to contract on behalf of Rhino was an essential pre-requisite of the undisclosed principal doctrine. However, any such intention was clearly negatived by clause 1.3 which would have been sufficient to exclude the intervention of Rhino, whether to sue or to be sued: see *Bowstead (op.cit.)* Art. 76(4) and paragraph 8-081.[9]
>
> iv) It must in any event be doubtful whether VDML intended to contract on behalf of Rhino in July 2015 when Rhino had by then been sold to Mr Khodabakhsh as part of the joint venture. There was certainly no evidence to that effect."

Footnote 9 cited *Kaefer Aislamientos SA de CV v AMS Drilling Mexico Sade CV* [2019] EWCA Civ 10, [2019] 1 WLR 3398.

44. Mr Taylor contends, in outline, that the Judge ought to have concluded (a) that VDML was also a party to the Heads of Terms and (b) that neither of the reasons relied upon by the Judge supports the conclusion that there was no intention on the part of VDML to contract on behalf of Rhino.

45. Having regard to the arguments on the appeal, it seems to me that the starting point is to consider the contractual status of the Heads of Terms. Although counsel for Mr Taylor submitted that the contract was partly written and partly oral, as counsel for Rhino pointed out, no such case was pleaded by Mr Taylor. On the contrary, Mr Taylor's pleaded case is that the contract was a written one contained in the Heads of Terms. It does not appear that this was in issue at trial, and that is how the Judge approached the matter.

46. That being so, the next question is whether the identification of the parties to the contract is purely a question of interpretation of the words used in the written document or whether it is a question of fact on which extrinsic evidence is admissible. Somewhat surprisingly, counsel for Rhino submitted that it was a question of fact, and this was also implicit in the submissions of counsel for Mr Taylor.

47. Having reviewed a number of authorities, Jackson LJ summarised the relevant principles in *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470, [2013] BLR 447 at [57] as follows:

> "i) Where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue.
>
> ii) In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.
>
> iii) If the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification.
>
> …"

48. In *Barbudev v Eurocom Cable Management Bulgaria Eood* [2011] EWHC 1560 (Comm), [2011] 2 ALL ER (Comm) 951 (which is not one of the authorities discussed by Jackson LJ) Blair J stated at [114]:

> "… having held that the agreement was contained in the Side Letter (and was not partly oral), I also accept their submission that since ECMB was specifically identified as the party in the document, oral or extrinsic evidence is not admissible to show that others were the parties (*Shogun Finance Ltd v Hudson* [2004] 1 AC 919 at [49], Lord Hobhouse, and at [178] Lord

> Phillips). If FNCH (or Warburg Pincus International) is to be treated as a party to the Side Letter, that can only be, in my view, on the basis of a shared mutual assumption sufficient to give rise to an estoppel by convention (as the requirements for which see *Republic of India v India Steamship Co* [1998] AC 878, 913–4, Lord Steyn)."

49. It can be seen that there is some tension between these authorities. They are not in direct conflict, because Jackson LJ is addressing the question of whether, given that the contracting party is described in the document as A, it is possible to conclude that the true contracting party was B; whereas Blair J is addressing the question of whether, given that the contracting party is described as A, it is possible to conclude that B was also a contracting party in addition to A (with the counterparty C). It may be questioned, however, why a different answer should be given to these two questions. In the present case the issue is of the second kind. Nevertheless, given that (i) counsel for Rhino did not argue that extrinsic evidence was inadmissible, (ii) no doubt for that reason, neither authority was cited in argument and (iii) *Hamid* is a decision of this Court, I will assume for present purposes that Jackson LJ's more relaxed approach is correct and applicable.

50. Counsel for Rhino relied on the Judge's finding that Mr Taylor intended to contract with the "topco", i.e. VDMH, but with respect to the Judge that evidence was plainly inadmissible on this issue.

51. Counsel for Mr Taylor advanced two main arguments in support of the proposition that VDML was a contracting party in addition to VDMH. First, he relied upon the intrinsic evidence, namely the terms of the agreement, read against the background matrix of fact. He pointed out that the Heads of Terms granted Mr Taylor an option to purchase two boats and a charge over three stock boats "owned by the Company". He submitted that, since VDMH was merely a holding company and VDML was the trading company, the boats must have been owned by VDML, and this showed that "the Company" must be VDML. This does not necessarily follow, however. As Underhill LJ pointed out during the course of argument, a parent company may agree to procure that its wholly-owned subsidiary grants an option to purchase and/or a charge over property owned by the latter.

52. Secondly, counsel for Mr Taylor relied upon two items of extrinsic evidence. The first item was that the loan monies were paid to Marquis and that this was for the benefit of VDML given that the Marquis invoices were addressed to VDML. As counsel for Rhino submitted, however, this does not demonstrate that VDML was a contracting party. Again, there was nothing to prevent VDMH from directing that the monies be paid for the benefit of its subsidiary.

53. The second item consisted of post-contractual conduct. Counsel for Rhino disputed that post-contractual conduct was admissible on this issue. Counsel for Mr Taylor cited *Great North Eastern Railway Ltd v Avon Insurance plc* [2001] EWCA Civ 780, [2001] 2 All ER (Comm) 526 at [29] (Longmore LJ) as showing that post-contractual conduct was admissible for this purpose, but as counsel for Rhino pointed out the issue in that case was whether a term had been incorporated into a contract. Nevertheless, I shall assume for the reasons given above that counsel for Mr Taylor was correct as to the admissibility of such evidence.

54. Counsel for Rhino also objected that this point was not advanced by Mr Taylor before the Judge. Given that the evidence is purely documentary, and that the question is an objective one for the court, I do not consider that this is a fatal objection to the point being taken now.

55. The post-contractual conduct relied upon consists of the Loan Agreement, which the Judge found had been drafted (to the extent that it was) by Mr Taylor's lawyers. As noted above, this names VDML as a party, has provisions concerning VDML and was executed by VDML. The short answer to this point, however, is that the Loan Agreement was never concluded. At best, therefore, it represents an offer by the Van Dutch parties which was not accepted by Mr Taylor. The fact that it evidently shows that, at that point in time, Mr Taylor was minded to contract with VDML (and Messrs Erenstein and Koekkoek) as well as VDMH does not show that, at the date of the Heads of Terms, the parties intended that VDML was to be a party to that agreement even though it was not named as such.

56. I did not understand counsel for Mr Taylor to dispute that, if VDML was not a party to the Heads of Terms, then it necessarily followed that VDML could not have contracted as agent for Rhino. I can see some force in the submissions made by counsel for Mr Taylor that, if on the other hand VDML was a party to the Heads of Terms, neither of the reasons relied upon by the Judge for concluding that there was no intention that VDML should contract as agent for Rhino justified that finding, but it is not necessary for me to come to any conclusion on that aspect of the matter.

Second ground of appeal

57. Given the conclusions that I have reached on Mr Taylor's first ground of appeal, the second ground of appeal does not arise for decision. It is therefore not necessary for me to express any view on the interesting question of the true basis for the rule in *Kendall v Hamilton*. Nor is it desirable that I should do so given that anything I said would be obiter. This is all the more so for two reasons.

58. First, it became clear during the course of argument that the question is tied up with the nature of the liability of an agent and an undisclosed principal to the counterparty who contracted with the agent: is it alternative (as counsel for Rhino argued) or is it joint and several (as counsel for Mr Taylor argued)? This is an aspect of the matter on which I would have preferred to have heard more detailed submissions than time permitted.

59. Secondly, the doctrinal basis for the rule would only matter if Mr Taylor were able successfully to challenge the Judge's conclusion that he elected to rely on the default judgment by his actions in Monaco. A similar issue arose to that considered above as to whether it was open to Mr Taylor to challenge that conclusion. Mr Taylor's ground of appeal was that the Judge "wrongly misapplied, and erroneously misidentified the rationale and justification for the principle in *Kendall v Hamilton*". Again, however, I consider that paragraphs 44-51 of Mr Taylor's skeleton argument made it clear that he was challenging the judge's conclusion on election, and Rose LJ must be taken to have given him permission to do so.

60. There is a further aspect to the issue this time, however. As counsel for Rhino pointed out, election is a question of fact: *Evans v Bartlam* [1937] AC 473 at 485 (Lord

Wright). Mr Taylor's grounds of appeal did not mention any challenge to a finding of fact by the Judge. Nor did his skeleton argument in support of the application for permission to appeal make it very clear that he was challenging a finding of fact by the Judge, although this is apparent with the benefit of hindsight. It is therefore not at all certain that Rose LJ appreciated that that was the case.

61. Practice Direction 52C paragraph 5 provides:

> "(1) The grounds of appeal must identify as concisely as possible the respects in which the judgment of the court below is –
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity,
>
> as required by rule 52.21(3).
>
> (2) The reasons why the decision under appeal is wrong or unjust must not be included in the grounds of appeal and must be confined to the skeleton argument."

62. It is common experience in this Court that grounds of appeal are not concise, as required by paragraph 5(1), but prolix. In the present case, Mr Taylor's grounds of appeal were commendably succinct. Nevertheless, they should have made it clear that Mr Taylor was challenging a finding of fact by the Judge. It would have sufficed to say "the Judge was wrong to find as a fact that Mr Taylor elected to maintain the liability of the Original Defendants to the exclusion of the Additional Defendants because that finding was not open to the judge on the evidence", leaving the supporting submissions to be developed in the skeleton argument.

63. In future, parties filing appellants' notices should clearly identify any challenges to the lower court's findings of fact in their grounds of appeal and squarely address those challenges in their skeleton arguments, so as to ensure that (i) the judge considering the application for permission to appeal appreciates that such a challenge is being mounted and can decide whether or not to grant permission for it and (ii) if permission is granted, the members of the Court hearing the appeal can prepare accordingly.

64. Given that it was a finding of fact, Mr Taylor faced obvious difficulties in challenging the Judge's conclusion that he had elected to rely on the default judgment. No doubt recognising that he faced an upward struggle, on 18 February 2020 (the day before the hearing of the appeal) Mr Taylor applied, purportedly pursuant to CPR rules 52.20(1) and 3.1(2)(m) but properly rule 52.21(2)(b), to adduce further evidence consisting of a witness statement of Olivier Marquet, a Monegasque lawyer who has been acting for Mr Taylor in the Monaco proceedings. Rhino opposed the application on the grounds that (i) it was egregiously late, (ii) the evidence did not satisfy either of the first two criteria in *Ladd v Marshall*, (iii) a substantial part of the evidence was expert evidence which Mr Taylor had neither sought nor obtained the permission of the court to adduce and which did not satisfy the requirements of Part 35 (e.g. because it did not

contain the appropriate expert declarations), and (iv) admission of the evidence would necessitate a remission of the issue to the lower court.

65. These factors explain why I do not consider that it would be desirable to prolong this judgment by considering the second ground of appeal. It is sufficient to say that the application to adduce further evidence must in any event be dismissed having regard to the failure of Mr Taylor's first ground of appeal.

Conclusion

66. For the reasons given above, I would dismiss the appeal.

Henderson LJ:

67. I agree.

Underhill LJ:

68. I agree that this appeal should be dismissed for the reasons given by Arnold LJ. I wish to echo what he says at paras. 61-63. It is rather surprising for this Court to be complaining that grounds of appeal are too succinct: usually, as Arnold LJ says, the problem is that they are far too discursive. But grounds do need to identify (though they should not develop) the specific errors which the Judge is said to have made, and that includes any errors of fact on which the appellant seeks to rely. The careful analysis which this may require should be as useful to the pleader as it will be to the Court.