How sharp is your practice?

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The term "sharp practice" is not a legal term of art, but none of us would like to be accused of it. The single-minded pursuit of the interests of a client sometimes takes a lawyer into difficult territory, which is a subject of a superbly written judgment in *Visa Inc. v. Luxottica Retail UK Ltd.* [2026] EWHC 615 (Comm).

The issues of interest to professional liability practitioners - in a case the whole of which is interesting both factually and legally - were:

(1) whether a party which entered into an agreement settling litigation, and/or, more importantly, its solicitors, had been guilty of conduct which should be stigmatised as "sharp practice" (this required both identifying the conduct factually and judging its moral quality); and

(2) if so, what, if any, remedy should be granted.

The conclusion, after evidence was given by, among others, the solicitors (the person principally concerned being a managing associate, on the cusp of partnership, at Linklaters), was that there had not been "sharp practice"; the discussion of the law reminds lawyers settling cases that a dangerous area is a clause releasing any liability for claims other than the live ones between the parties which are consciously being settled: sweeping up has its hazards. No one wants to be the subject of a case which may be the subject of either Chapter 4 (impeachment of a compromise) or the later part of Chapter 21 (liabilities of lawyers acting for parties to settlement negotiation) of *Foskett on Compromise* - now in its 10th edition and a text on adjectival law so important that over the years Forewords have been written by at least four sometime Chief Justices.

Facts

The Visa organisation worldwide has been attacked by many end-users of its services who

have alleged that it has infringed competition law. It has resisted claims (made at least in England, Europe and the USA) with determination, but has entered into some compromise agreements. In this jurisdiction it has used the services of Linklaters for such claims. Entirely understandably, (a) Visa/Linklaters have a strategy, and (b) an aim in settling any given claim is, as far as can be done, to put an end to claims against Visa from the particular claimant or any related source.

Luxottica Retail UK Ltd. ("Luxottica"), a company in a very large corporate group ("the Group") which has many other subsidiaries in many countries worldwide, is a party with which Visa settled. It was represented in the settled claim by Fieldfisher, who, though interested in developing a practice in relation to such claims, had not by that stage developed a general strategy for them.

GrandVision NV is another corporation which, with parties related to it, brought similar claims against Visa.

There is an unusual chronology:

21/07/2017	Luxottica issued a Claim Form in England.
04/06/2018	GrandVision and 46 related companies issued a Claim Form in England.
31/07/2019	Announcement that the Group had agreed in principle to acquire a controlling interest in, and potentially the whole of, GrandVision.
26/10/2020	Luxottica and Visa agreed on a settlement figure of £200,000, subject to contract.
2020-2021	The terms of a settlement agreement were negotiated between solicitors.
20/01/2021	Luxottica and Visa entered into a written settlement agreement.
01/07/2021	Grand Vision was acquired by the Group.
00/00/2021	Visa asserted that the Luxottica/Visa settlement had placed Luxottica under obligations as to GrandVision's claims, producing a practical effect equivalent to having brought those claims to an end.
00/00/2023	Visa brought the proceedings to establish that its position was correct.

Questions and decision

The questions which arose were:

> the correct construction of the Luxottica/Visa settlement;

> the two sharp practice questions above.

The Judge "concluded that the settlement agreement does oblige Luxottica to ensure that the GrandVision claims are withdrawn, and to indemnify Visa for them. It is not unconscionable to enforce those obligations."

It is certainly a striking effect of the Luxottica/Visa settlement that it should have had that effect in relation to the claims of a company which was not, at the time of the settlement, part of the Group to which Luxottica belonged. It is, however, not the purpose of this note to comment on the part of the judgment which determined the construction question. The purpose is to highlight the "sharp practice" point.

It is worth nothing that while the Judge, inevitably, dealt with interpretation on the basis that any witness' subjective belief about the scope of the settlement agreement was irrelevant to interpretation, he considered that subjective belief might be relevant to the issue whether there had been "sharp practice": paragraph 89.

In paragraphs 173 to 188 the Judge considered the law, principally by reference to *BCCI v Ali* [2000] 3 All E.R. 51 [2000] I.C.R. 1410 and its appeal [2001] UKHL 8 [2002] 1 A.C. 251. *Foskett* had remarked [paragraph 4-38] that it remained the case that no definitive position can be stated. The Judge did not attempt to state a definitive position, but he has provided an illuminating survey of an area with limited authority. His survey shows that there is a risk that at some stage a clause releasing some claims will not be enforced, because of "sharp practice".

The majority in the Court of Appeal in *BCCI v. Ali* had held that there is "an equitable principle by which equity would relieve against the "unconscionable" enforcement of releases" [of claims].

The House of Lords regarded the issue of the existence of such a principle as an *obiter* matter.

Lord Bingham, with whom Lord Browne-Wilkinson agreed, preferred to express no opinion on that matter. [Paragraphs 20 and 21]. So did Lord Clyde. [Paragraph 80].

Lord Nicholls [paragraph 32] considered that: "In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy."

Lord Hoffmann [paragraph 71] considered that "the principle that a party to a general release cannot take advantage of a suggestio falsi or suppressio veri, in other words, of what would ordinarily be regarded as sharp practice, is sufficient to deal with any unfairness which may be caused by such releases."

The one thing which to this writer does seem clear is that many of the judges in that case thought that there could be circumstances in which a party was acting so odiously in obtaining a release of something, which the beneficiary of the release was aware was a potentially serious, or seriously arguable, claim, and of which the beneficiary knew the releasor to be unaware, that the court should not give effect to the release. This was the view of four of the five erstwhile Chancery Division judges who sat on the *Ali* appeals. What the boundaries of such a principle would be is more uncertain indeed than its existence.

The Judge then set out his findings of fact, identifying the facts which Luxottica has asked him to make on the allegation of "sharp practice". While he made several of the findings for which Luxottica contended, the most important thing was that he rejected the allegation that Visa's settlement practice and strategy were to pay "only a fair settlement sum for a particular claim" but including some very wide wording in the standard form of the Settlement Agreement in the speculative hope that it might extend to all the claims of Luxottica's corporate group of a similar kind. (A point here being that Visa was not seeking to pay a "fair" sum; what it was seeking to do was to pay a sum which it regarded as commercially acceptable from its own point of view.) A significant feature of the discussion

around this point was that Luxottica was professionally represented; another was that it was clear that the written agreement as proffered was seeking to resolve similar claims by group companies [paragraph 191]. Another important allegation rejected was that the managing associate solicitor at Linklaters knew that Luxottica probably did not intend the settlement agreement to cover [similar claims of] Associated Companies that had no connection with Luxottica's UK business. When the Judge summarised the position he said that the managing associate "was aware of a risk that Luxottica would be settling (or indemnifying Visa) against [a certain claim or claims] in ignorance of the fact that that is what it was going to do, or without having considered its implications." Referring to certain possibilities, he said that she "did not do anything to find out which of these things was correct, but that was not because she preferred not to know, but because she did not see it as a critical issue for Visa, and felt justified in leaving it to Luxottica and its advisers." [Paragraph 214]

The following section of the judgment has a heading which is, in the circumstances, unfortunate: "Was this sharp practice justifying relief?" The reader might think that the Judge had found the practice to be sharp, but not so. It is worth quoting paragraph 218 in full:

> "In any event, even viewing the facts in a way that is favourable to Luxottica, I do not think there was sharp practice here. The settlement agreement was framed, expressly, to catch both known and unknown claims. It was unmistakeably not limited to settling just the claims of Luxottica in the High Court action. Visa had made no bones about that. Luxottica was professionally advised, and its advisers had proposed drafting amendments to a key definition which showed that they had considered—as one would expect—the draft terms. Luxottica was not in any sense vulnerable. It was not looking, and had no business to look, to Linklaters or Visa to advise it. Negotiations were at arm's length. The risk that Luxottica might be wrong about the consequences for its business was one that Visa was, in objective good conscience, allowed to leave it for Luxottica to assess. Ms Williams was not baiting a trap, or exploiting a known error. She was simply opening a door into which Luxottica chose to step."

Comment

This is a very instructive case for those involved, as virtually every civil litigator is, in settling cases: we have a duty to our clients, subject to our professional duties of behaviour,

to pursue the client's interest single-mindedly. We also have a duty not to engage in sharp practice. (The SRA Code of Conduct says that a solicitor must "not abuse your position by taking unfair advantage of clients or others. In the Bar Code of Conduct, Core Duty 4 requires acting with integrity, and Core Duty 6 prohibits behaving in a way which is likely to diminish the trust and confidence which the public places in oneself or in the profession.) The problems can be difficult, and one should heed the Judge's reference to the releasing party having been represented by (eminent) solicitors. *Dean v. Allin & Watts* [2001] EWCA Civ 758 [2001] Lloyd's Rep. P.N. 605 reminds one of the problem where lawyers for one party are dealing with an opponent or counter-party who is not represented. (In the particular circumstances of that conveyancing case, the solicitors were held to have owed a duty to an unrepresented counter-party of their clients.)

Quite where the supposed principle ends is obscure. What if both parties are experienced business people and neither is represented by a regulated lawyer? What if the releasor is represented by a regulated lawyer and the beneficiary of the release by a sly unregulated person?

No doubt most or all litigators aspire to be sharp-witted. We should all aspire to avoid being accused, let alone convicted, of sharp practice. The consequences of arguably sharp practice in seeking a wide release of potential claims may be regulatory, and may also lead to unwanted satellite litigation.

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