Neutral Citation Number: [2025] EWHC 3175 (Ch)

Claim No: BL-2024-001842

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVANCY AND COMPANIES LIST (ChD) and BUSINESS LIST (ChD

7 Rolls Buildings,
Fetter Lane, London,
EC4A 1NL

Date: 3rd December 2025

Before:

THE HONOURABLE MR JUSTICE THOMPSELL

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(1) MARITIME TRANSPORT LIMITED
(2) MARITIME GROUP LIMITED

Claimants

and

DAVID BOOMER

Defendant

Mr Edmund Cullen KC instructed by Birketts LLP for the **Claimants**
Mr David Reade KC and Ms Mia Chaudhuri-Julyan instructed by Stewarts Law LLP for the **Defendant**

Hearing dates: 3rd & 4th November 2025

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JUDGMENT

Mr Justice Thompsell

1. INTRODUCTION AND BACKGROUND

1. This case concerns the fall-out from a tax scheme that went wrong and the interpretation, and possible rectification, of a Settlement Agreement relating to the termination of the employment of the Defendant.

2. The First Claimant, Maritime Transport Limited ("**MTL**"), is a company providing integrated road and rail freight logistics. It was previously known as Maritime Haulage Limited. The Second Claimant, Maritime Group Limited ("**MGL**"), operates as a group holding company. I will refer to MTL and MGL collectively as "**Maritime**".

3. The Defendant, Mr David Boomer is a former employee of Maritime. He had been employed by MTL from 31 January 1994 originally as a Depot Manager. He rose to the senior (board-level) position of the Chief Executive of Distribution from around 2018 until 31 May 2021 when MTL terminated his employment.

4. In or about 2009, Maritime adopted a Growth Securities Ownership Plan ("**GSOP**") tax scheme originally marketed by Grant Thornton whereby employees entered into Contracts for Differences ("**CFDs**"). The scheme was based on the idea that the CFDs were to be treated as "employee-related securities" within the meaning and for the purposes of the Income Tax (Earnings and Pensions) Act 2003. This was intended to have the effect that payments made to employees under the GSOP scheme would not be subject to income tax ("**IT**") and national insurance contributions ("**NIC**") but would instead be subject to capital gains tax ("**CGT**").

5. On the assumption that the scheme was effective, for the tax years 2009/10 to 2015/16, MTL and the employees dealt with payments under the scheme on the basis that no IT or NIC was accounted for under the PAYE scheme and instead the employees involved declared and paid CGT on the amounts of payments they received under the CFDs.

6. The effectiveness of the scheme was challenged by HM Revenue & Customs ("**HMRC**"). HMRC wrote requiring more information about the CFDs on 7 October 2011. By 4 November 2013, HMRC was warning that there was a risk that MTL would be required to pay IT and NIC in respect of payments made under the CFDs (together with interest for late payment and possible penalties). By 12 November 2013, HMRC started issuing determinations assessing tax on the basis that the scheme was not effective and IT and NIC was due.

7. Whilst Maritime did not accept this view, it paid tax on account on a precautionary basis for the tax years 2016/17 to 2018/19, in the amounts claimed by HMRC, and advised the employees affected to keep open their own Self-Assessment Returns and to delay paying the CGT.

8. In order to challenge HMRC's assessment of the effectiveness of the GSOP scheme, two other companies that had made use of the scheme, with the backing and involvement of a number of other companies that had used the scheme, including Maritime, pursued a test case within the First Tier Tribunal. The Tribunal published its

decision on 20 January 2022 -see *Jones Bros Ruthin (Civil Engineering) Co Ltd & Britannia Hotels Ltd v HMRC* [2022] UKFTT 00026 (TC) (the "**Decision**"). The Decision vindicated HMRC's view that the GSOP scheme was ineffective and IT/NIC rather than CGT was due on payments made under the CFDs.

9. Following the Decision, the Claimants and the employees affected have accepted that the scheme was ineffective.

10. In relation to the employees affected other than Mr Boomer, the employees involved have acknowledged that they had agreed under the documentation relevant to CFDs that they would indemnify Maritime for the IT and NIC paid by the First Claimant under PAYE and they accepted an offer by MTL that MTL would not claim under that indemnity provided that they assigned to MTL their rights to receive a refund (with interest) of the CGT that they had paid to HMRC on the assumption that the scheme was effective.

11. Mr Boomer, however, did not agree to this on the basis that he was in a different position. By the time it had become apparent that the GSOP scheme was not effective, his employment had been terminated. He had entered into a Settlement Agreement dated 21 May 2021 (the "**Settlement Agreement**") which dealt, amongst other things, with what would happen if the scheme proved ineffective. Clause 4.5 of the Settlement Agreement ("**clause 4.5**") provided as follows:

> "The Company [i.e. MTL] and Maritime [i.e. MGL] each agree, on a joint and several basis, to indemnify the Employee [i.e. Mr Boomer] and hold him harmless in respect of any liability (and any related interest, penalties, costs and expenses) that the Employee may incur in respect of income tax and/or National Insurance contributions arising from the HMRC challenge to the GSOP/Contracts for Difference."

12. On the basis that he had already been fully indemnified for any IT or NIC liabilities arising from the GSOP scheme, Mr Boomer saw no reason why he should assign his rights to a repayment of the CGT he had already paid in relation to payments made to him under the scheme.

13. The Claimants have brought this claim to require Mr Boomer to pay an amount equal to the repayment of CGT that he had already paid. The claim is made on the following alternative bases:

    i) that on its true construction, clause 4.5 indemnified Mr Boomer only to the extent of any additional liability for IT and NIC that is in excess of the CGT which he had already paid in the event of the FTT making the determination which it did make. As Maritime was compelled by law to pay the full amount of IT and NIC (and interest and penalties) without any set-off of the amounts already paid in respect of CGT, Mr Boomer would be unjustly enriched if he retained the repayments in respect of CGT; and in the alternative,

    ii) that the Settlement Agreement mistakenly failed to give effect to the parties' common intention (as reflected in the terms of the Claimants' proposal by a letter dated 5 May 2021 which were agreed by the Defendant) that, in the event

of the FTT making the determination which it did, the Claimant's would bear only the additional further IT and NIC (over and above the CGT which had already been paid) for which the Defendant would become liable.

14. The trial of this matter was held in accordance with directions given following a Case Management Conference. There emerged from that Case Management Conference an agreed list of the principal issues for determination as follows:

i) **Question 1**: whether, on a true interpretation of the Settlement Agreement, the Claimants were only to indemnify the Defendant in respect of liability for any additional IT and NIC (in excess of the CGT which he had already paid)?

ii) **Question 2**: whether, as a matter of law, the Claimants are entitled to restitution of the amount of the CGT refund received by the Defendant?

iii) **Question 3**: whether, at the time of the Settlement Agreement, the parties had a common intention that the Claimants would only bear the additional further IT and NIC (over and above the CGT which the Defendant had already paid), which the Settlement Agreement mistakenly failed accurately to record and whether, as a result, the Settlement Agreement should be rectified to give effect to that common intention? and

iv) **Question 4**: what was the total amount of the CGT refund received by the Defendant?

15. At the trial of these issues, the Claimants were ably represented by Mr Edmund Cullen KC of counsel. Mr Boomer was no less ably represented by Mr David Reade KC and Ms Mia Chaudhuri-Julyan of Counsel. I am obliged to counsel for their clear exposition and helpful skeleton arguments.

2. EVIDENCE

16. At the trial of this matter, the court had the benefit of a court bundle containing relevant documentation and heard witness evidence from three of the individuals involved:

i) Mr John Williams, the majority shareholder and Chief Executive Officer of MTL;

ii) Mr Alan McNicol, the Group Finance Director from 4 October 2001 until his retirement on 30 June 2023; and

iii) Mr Boomer, himself.

17. There was nothing in the evidence given by Mr Williams or by Mr McNicol or in their demeanour that caused me to doubt that they were doing anything other than giving their honest testimony according to the best of their recollection.

18. Mr Cullen has invited me to doubt some of the testimony of Mr Boomer and has described some of it as lies. I would not go as far as that, but certainly some of the evidence that Mr Boomer gave was difficult to reconcile with the plain meaning of the documentary evidence put to him. In addition, he claimed to remember some points in giving his oral evidence that he had not sought to include in his witness statement, but

clearly were relevant to questions about his understanding and intention, which I have no doubt he understood to be key issues for the case. This also creates doubt about the credibility of some of his testimony. Mr Boomer clearly had a good understanding of the legal arguments that his counsel were making and I think it is likely to have influenced some of his answers causing him to have or claim to have a clearer memory on some points than is likely to be reflective of his unaided memory.

19. In this context, and having regard to the oft-quoted warnings given in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15-22] ("***Gestmin***"); and *Martin v Kogan* [2019] EWCA Civ 1645 [2020] F.S.R. 3 at [88-89] about the unreliability of memory where it is not corroborated - and the particular unreliability in the context of civil litigation and where witnesses have a stake in a particular version of events (see *Guestmin* at [19]), I am especially cautious about relying on the witness evidence generally where it is uncorroborated, and in particular inn relation to aspects of Mr Boomer's evidence where he has suddenly remembered relevant matters that he chose not to deal with in his more considered written witness evidence.

3. LEGAL PRINCIPLES IN RELATION TO CONTRACTUAL INTERPRETATION

20. Counsel on both sides referred me to a number of cases where the courts have described the proper approach to contractual interpretation. Counsel were largely agreed on the principles to be followed.

21. Mr Cullen referred me to what he describes as "the centrally relevant authorities", being "the well-known trio of Supreme Court decisions *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900 ("***Rainy Sky***"); *Arnold v Britton* [2015] UKSC 36 [2015] AC 1619 ("***Arnold v Britton****")*; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [2017], AC 1173 ("***Wood v Capita****")*."

22. He followed the editors of *Chitty on Contracts* (35th ed) at 16-053 in adopting the following summary of the principles emerging from the case-law from Popplewell J (as he then was) in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep. 654 at [8]:

23. Mr Boomer's counsel also referred to the same cases as well as to a few others. They referred in particular to the following passages from Lord Clarke's judgment in *Rainy Sky*:

    i) at [14], to the effect that the ultimate aim of interpretation of a provision in a contract, is:

    > "to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant",
    >
    > and that
    >
    > "the relevant reasonable person is one who has all the background knowledge which would reasonably have been

> available to the parties in the situation in which they were at the time of the contract"

ii) at [21], to the effect that the court must have regard to all the relevant surrounding circumstances and that if there are two possible constructions, it is entitled to prefer the one which is consistent with business common sense; and

iii) at [23], where Lord Clarke said that:

> "Where the parties have used unambiguous language, the court must apply it".

24. Mr Boomer's counsel also referred to *Arnold v Britton* and to *Wood v Capita.*

25. From *Arnold v Britton* they referred in particular to Lord Neuberger's judgment at [15] requiring a focus on:

> "the meaning of the relevant words […] in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

26. In addition, they took from his paragraphs [16] to [23] the following six factors that Lord Neuburger considered it important to emphasise (his seventh factor was not relevant in the case before me):

i) Commercial common sense and the surrounding circumstances should not be used to undermine the importance of the language actually used in the contract and

> "The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."

ii) The clearer the natural meaning of a provision, the more difficult it is to justify departing from it. The worse the drafting, the more ready a court can be to depart from its natural meaning.

> "However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning."

iii) Commercial common sense should not be invoked retrospectively only once it has become clear that the bargain "has worked out badly, or even disastrously, for one of the parties".

> "Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."

iv) The court should be slow to reject the natural meaning of a term merely because it appears to have been an imprudent term for one of the parties to have agreed:

> "The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed."

v) The court can only take into account surrounding facts or circumstances which were known or reasonably available to both parties. It cannot take into account a fact or circumstance known only to one of the parties.

vi) When an unanticipated event occurs, and it is clear what the parties would have intended had they contemplated or intended that event to occur, the court will give effect to that intention.

27. From Lord Hodge's judgment in *Wood v Capita* the Defendant's counsel took in particular the following (underlining elements that they thought to be particularly important)*:*

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning." [10]
>
> "This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated […]" [12]
>
> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. […]"
>
> (Emphasis added)

28. They referred also to the *Lukoil* case as well as some others.

29. In addition, they also sought to draw my attention to the parole evidence rule (which they described as being that where a contract is made wholly in writing, extrinsic evidence is not admissible to add to, vary or contradict the written terms). They also referred to *Prenn v Simmonds* [1971] 3 All ER 237 for the proposition that prior negotiations may not be looked at in aid of construction of a written document.

30. With these principles in mind, I turn to the Claimants' argument relating to the interpretation of clause 4.5 of the Settlement Agreement.

4. THE CLAIMANTS' ARGUMENT ON CONTRACTUAL INTERPRETATION

31. The Claimants' argument is principally based on the factual background which the Claimants say were known to both parties. They say that that background included the facts that:

    i) The need for clause 4.5 arose out of the GSOP and the pending FTT proceedings.

    ii) The GSOP was a scheme for tax mitigation. So far as the Claimants and the Defendant (and the other participants) were concerned, what mattered about that scheme (and all that mattered) was the difference between the tax paid/payable if the scheme "worked" and the tax paid/payable if the scheme did not "work". Whether that tax was called CGT or IT was neither here nor there. What was important was the amount of tax which was "saved" if the scheme "worked" and conversely the amount of additional tax which would be due if the scheme did not "work".

32. The Claimants argue that these points are not only self-evident; but that they are supported by documentary evidence that shows what the parties were interested in was (I think they imply, exclusively):

    i) for the tax years 2009/10 to 2015/16, the difference between the CGT paid and the IT/NIC that might be payable if HMRC succeeded and

    ii) for the tax years 2016/17 to 2018/19, the difference between the amount paid in respect of IT/NIC and the amount which would be payable in CGT if HMRC lost in the FTT.

33. There are a number of difficulties in accepting this analysis.

34. First the analysis is difficult, and indeed in my view impossible, to square with the plain words of clause 4.5. As we have seen, this was drafted in the following terms:

> "The Company and Maritime each agree, on a joint and several basis, to indemnify the Employee and hold him harmless in respect of any liability (and any related interest, penalties, costs and expenses) that the Employee may incur in respect of income tax and/or National Insurance contributions arising from the HMRC challenge to the GSOP /Contracts for Difference."

35. The indemnity is against **any** liabilities that Mr Boomer may incur in respect of income tax or NIC. There is nothing in the wording to suggest that this is only where and to the

extent that these amounts are in excess of the CGT that Mr Boomer had already paid. Given the clear words of the provision it is difficult to see any ambiguity that needs to be clarified by reference to the surrounding facts.

36. The exercise that the Claimants propose that the court should take, of going to the surrounding facts and the knowledge of the parties in order to come up with a meaning that is different to the plain language of the agreement, runs contrary to the warnings of Lord Neuberger in *Arnold v Britton* not to use the surrounding circumstances to undermine the importance of the language actually used. Indeed, the Claimants' case in relation to interpretation also runs contrary to many of the other principles I have summarised at [26] above. The Settlement Agreement was not unclear or ambiguous. It had been professionally drafted by solicitors, each side being represented. Whilst it is true that the Settlement Agreement went from first draft to signed version only within a matter of a few days, I do not think that means that the agreement did not receive proper attention. As the clause is clear, it is difficult to justify departing from it. I can see that from the point of view of the Claimants this might have been an imprudent or overly generous term for the Claimants to agree, but I am warned by Lord Neuberger to be slow in rejecting the natural meaning of clause 4.5 on that basis.

37. Secondly, the difficulty in reaching a conclusion that the parties did not intend clause 4.5 to have its plain meaning, but rather meant to continue an earlier understanding that MTL would cover only additional liability for tax (over and above the CGT already paid by Mr Boomer), is compounded by the fact that the Settlement Agreement included an "Entire Agreement" clause which included a provision that each party acknowledged and agreed that:

> "This agreement constitutes the entire agreement between the parties and any Group Company and supersedes and extinguishes all agreements, promises, assurances, warranties, representations and understandings between them whether written or oral, relating to its subject matter".

38. Thus, even if I accepted the Claimants' proposition that it "flies in the face of common sense" that the parties meant to cover Mr Boomer for any more than his net exposure to the scheme not achieving its objectives (i.e. net of any refund of CGT), I would not find that lack of commercial sense by itself sufficient to overturn the clear language of the Settlement Agreement.

39. Thirdly, I am not convinced that the lack of commercial sense is as pronounced as the Claimants suggest that it is. The context of the Settlement Agreement is different to the context that applied in relation to the relationship between the Claimant companies and their other employees.

40. In particular, clause 4.5 was only one part of a Settlement Agreement arising from the dismissal of Mr Boomer after 27 years' service to Maritime (but in circumstances where Maritime had concerns about his performance and/or attitude). It is clear from the circumstances of the Settlement Agreement that Mr Williams and therefore Maritime was looking for a consensual exit. Mr Williams wanted Mr Boomer to accept a restriction on working in the freight industry for two years. He wanted also to avoid protracted negotiations, the possibility of litigation, and anything that would upset a plan that was then in place for the sale of Maritime. He was clear in his evidence that

he considered that the terms being offered to Mr Boomer were generous and were intended to be generous. It is common ground that Mr Boomer was being offered a payment, in the event of success against HMRC, that was in excess of the value to MTL of that success insofar as it related to Mr Boomer's tax position.

41. In all the circumstances it is not outlandish to suggest that the parties might have wanted similarly to over-compensate Mr Boomer in the event of a failure to overturn HMRC's demands for taxation, or at least that Mr Boomer may have concluded that that was what was on offer. There is no evidence that this was the intention of Mr Williams or of MTL, but that is not the point. The point is that the argument that the clear wording of clause 4.5 must be reinterpreted because it makes no commercial sense is not self-evidently correct.

42. Fourthly, the argument that everyone (including Mr Boomer) was only concerned to deal with the net position as between IT/NIC payments and CGT repayments is denied by Mr Boomer and the evidence for this proposition is weak. I deal with this point in more detail when I come to the question of rectification, where the subjective understanding of the parties has more relevance, but for the moment it is sufficient for me to note that my conclusion in relation to the evidence that this was Mr Boomer's sole concern was to protect his net position is weak.

43. In view of the points made above, I reject the Claimants' argument that clause 4.5 needs to be interpreted not in accordance with its plain words, providing an indemnity for any IT or NIC, but rather in accordance with an unstated limitation that it would cover only such taxes to the extent that they were in an amount that was in excess of CGT already paid by Mr Boomer.

44. The Claimants can only succeed, therefore, if I accepted their alternative argument based on rectification.

45. I will consider the legal principles relating to rectification before considering the argument that the Claimants have put forward in relation to this.

5. LEGAL PRINCIPLES IN RELATION TO RECTIFICATION

46. Again, the parties are substantially agreed as to the principles that the court needs to follow in considering whether to order rectification. The Claimants' counsel put this in the following terms (based on *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361 [2020] Ch 365 ("***FSHC***") at [176]).

47. Rectification is available where a written agreement mistakenly fails to give effect to the common intention of the parties. It is necessary to show that:

    i) when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record; and.

    ii) there was an outward expression of accord meaning that, as a result of communication between them, the parties understood each other to share that intention.

48. In contrast to the approach to interpretation:

i) The inquiry is largely directed at the parties' subjective intentions. In *FSHC*, the Court of Appeal took the opportunity to disagree with the previous *obiter* opinion of Lord Hoffmann in *Chartbrook v Persimmon* [2009] AC 1101 to the effect that "common intention" rectification required that the parties' intentions should be ascertained objectively. In *FSHC*, the Court of Appeal expressed the view that, save in cases where there was a prior enforceable contract, the common intention must be one that is held by the parties subjectively. This was apparently endorsed by the Supreme Court in *National Union of Rail, Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive T/A Nexus* [2024] UKSC 37 [2025] A.C. 1222 at [31].

ii) Evidence of prior negotiations is admissible: *Chitty on Contracts* (35th edition) ("*Chitty*") para 5-061 (although I would add the caveat also made in that paragraph that it must be borne in mind that statements made in the course of negotiations are often no more than statements of a negotiating stance at that point in time). Indeed, it will generally lie at the heart of the case since it will provide the evidence of the outward expression of accord.

iii) Evidence of post-contractual conduct may also be relevant as evidence of subjective intent, albeit that its weight may be limited, particularly where the pre-contractual evidence is clear (see *Chartbrook* at [65]).

49. The Offer Letter is admissible on the question of rectification, notwithstanding that it is marked "*without prejudice*": see *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44 [2011] 1 A.C. 662 at [33].

50. The "entire agreement" clause in the Settlement Agreement is not a bar to a claim for rectification: (see Snell's Equity (35th edition) paragraph 16-024; and *DS-Rendite-Fonds v Titan Maritime S.A* [2013] EWHC 3492 (Comm) at [48]).

51. I do not think that the Defendant's counsel disagreed with any of the above analysis, but they referred me to some further learning. I will not mention all of the cases to which they referred but some of the more relevant include:

i) The summary of the remedy of rectification provided by Chitty at [5-058]:

> "It has long been an established rule of equity that where a contract has by reason of a mistake common to the contracting parties been drawn up so as to militate against the terms intended by both as revealed in their previous oral or written agreement, the court will rectify the document so as to carry out such intentions. So if the subsequent agreement was intended to reflect the terms of the earlier agreement but fails to do so, a party will be entitled to rectification unless it was shown that the parties intended to vary the terms of the earlier agreement. Rectification will not be ordered, in contrast, if the terms of the subsequent written agreement were intended to supersede the terms of the earlier agreement, if a written agreement fails to mention a matter because the parties simply overlooked it,

> having no intention on the point at all, or if they decided deliberately to omit the issue. In such cases the written agreement must be construed as it stands. It is an essential element of the doctrine that there has been a mistake."

ii) *Gibbon v Mitchell* [1990] 1 W.L.R. 1304 at page 1309 for the proposition that rectification is not possible if the parties were simply mistaken about the consequences of their agreement. I would add that it is important to note that in that case Millet J (as he then was) made a careful distinction (on page 1309 at E) between (i) a mistake as to the *effect of the transaction itself* (where rectification might apply) and (ii) a mistake as to the *consequences or advantages to be gained by entering into the transaction* (where rectification would not be available).

iii) *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch); [2010] S.T.C. 2544 at [17] for the proposition that the rule that rectification will not be given on the basis of the mistake as to the consequences of the transaction includes the tax consequences. It is perhaps worth quoting from what HHJ Hodge QC (now KC) said at that paragraph:

> "A mere misapprehension as to the tax consequences of executing a particular document will not justify an order for its rectification. The specific intention of the parties as to how the fiscal objective was to be achieved must be shown if the court is to order rectification."

iv) *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560; [2002] 4 WLUK 164 at [33], as approved (obiter) by Lord Hoffmann in *Chartbook,* for the proposition that the conditions for rectification on the ground of common mistake are four-fold :

> "The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

v) *FHSC* at [87] for the proposition that an outward expression of accord is an absolute requirement:

> "Provided that it is understood that on a claim for rectification the court is concerned with what the parties actually communicated to each other, and not with identifying their presumed intention by means of an officious bystander test"

vi) *Tucker v Bennett* (1887) 38 Ch. D. 1 for the proposition that the burden of proof is on the party seeking rectification. This was perhaps not the best example as this case was dealing with the special circumstances (and Victorian mores)

surrounding the negotiation of a marriage settlement, but the point is anyway obvious;

vii) *Joscelyne v Nissen* [1970] 2 Q.B. 86 for the proposition that there must be "convincing proof" that the document was not in accordance with the parties' true intentions at the time of its execution; and

viii) *Fowler v Fowler* 45 E.R. 97, (1859) 4 De Gex & Jones 45 ER 97 for the proposition that there must also be convincing proof that the proposed rectified version of the agreement is in accordance with the parties' true intentions.

52. With these principles in mind, I turn to the Claimants' argument relating to rectification.

6. THE CLAIMANTS' ARGUMENT ON RECTIFICATION

53. The Claimants acknowledge that for rectification to apply there must be not only a common intent but an outward expression of that common intent. They find that expression of common intent in the Offer Letter.

54. The circumstances of this letter were that a few days earlier, Mr Williams told Mr Boomer that he no longer had a future with MTL and was to be dismissed, but would receive a generous settlement offer.

55. After a false start, in which a draft of the Offer Letter was sent, Mr Williams sent the Offer Letter (dated 5 May 2021, but sent on 6 May 2021) to Mr Boomer. The Offer Letter had been drafted in accordance with instructions from Mr Williams but Mr McNicol had taken on the job of finalising the draft in conjunction with MTL's solicitors.

56. The contents of the Offer Letter included an explanation of Mr Williams' reasons for terminating Mr Boomer's contract and an explanation of the principal terms of what was being offered. These included:

i) a severance payment of £1.5 million (later clarified to be a gross amount subject to IT and CGT);

ii) payment of £1 million if there should be a successful completion of the disposal of the shares in MGL "as part of the current project", to be paid within 28 days of completion of the disposal;

iii) an expectation that the settlement agreement would include post-termination restrictions on Mr Boomer in respect of working for competitors; and

iv) confirmation that it was expected that Mr Boomer's wife's employment would also terminate, with no extra termination payment (although it was acknowledged that part of the £1.5 million payment to Mr Boomer could be reallocated to his wife).

57. Importantly for the current dispute, the Offer Letter also set out what was on offer in relation to the tax position concerning the taxation of the payments under the CFDs. At this point, the test case in the First Tier Tribunal had been heard, but the decision of the Tribunal was still outstanding. The Offer Letter provided in the alternative as follows:

> "a payment of £1million [to Mr Boomer, and clarified later to be subject to tax and NIC] if there is a favourable conclusion for Maritime to the current Contract for Difference case that has recently been heard by the First Tier Tax Tribunal. Whilst we should know the outcome of that hearing in a matter of months, there is the prospect that the unsuccessful party appeals that judgement. The monies would only be paid to you once all appeals have been exhausted, or HMRC has confirmed that it will make no further appeal. As you are aware, if HMRC's challenge is ultimately successful then there will be a further income tax and NIC charge on you. I am prepared to agree that in this event Maritime will bear any further additional payment to HMRC."

58. I will call the last two sentences of this paragraph the "**Offer Letter Indemnity Provision**".

59. After some attempts to clarify and renegotiate the deal on offer, Mr Boomer by email on 11 May 2021 confirmed that he would accept this offer and asked to see a copy of the proposed settlement agreement reflecting it.

60. The Claimants argue that the Offer Letter, coupled with this response, provides an outward expression of that common intent of how the tax issues relating to the CFD would be dealt with and that it was the mutual intention of the parties that the Settlement Agreement should reflect the terms of the Offer Letter. I agree.

61. The first draft of the Settlement Agreement was produced by the Claimants' solicitors. Whilst it dealt with the £1 million payment to Mr Boomer if the test case was favourable to MTL, it failed (I think through oversight) to include anything reflecting the Offer Letter Indemnity Provision.

62. This point was noticed by Mr Boomer's solicitor and he inserted into a travelling draft of the Offer Letter the provisions that we now see in clause 4.5 with a marginal note saying "this is to reflect the final section of the first para of page 3 of the 5 May 2021 letter". He was referring here to the Offer Letter Indemnity Provision.

63. I think there can be little doubt therefore that it was understood by all parties that clause 4.5 was meant to reflect the Offer Letter Indemnity Provision.

64. The Claimants central argument on rectification is that clause 4.5 did not reflect the Offer Letter Indemnity Provision, and should be rectified to do so.

65. The Claimants point out that, unlike the provision in clause 4.5, the Offer Letter Indemnity Provision did not offer an indemnity for all IT and NIC relating to the CFDs but instead offered "any further additional payment to HMRC". They argue that, in the context of the knowledge and expectations of the parties, the word "additional" was clear in denoting that this meant only payments that were additional to payments already made to HMRC, including the payments that have been made in respect of CGT. In other words, the indemnity should be considered to cover (only) the net position (the IT and NIC payable less the CGT already paid). For brevity I will refer to this interpretation as the "**net of CGT interpretation**". Mr Boomer had not agreed (as

would the other affected employees) to assign to MTL his right to reclaim CGT. In the absence of this, the argument goes, any element of the payments that had been made by MTL to HMRC in relation to Mr Boomer's liability for IT and NIC that was in excess of Mr Boomer's net position (i.e. an amount equal to the CGT reclaim to which Mr Boomer was entitled) was not covered by the Offer Letter Indemnity Provision and therefore fell to be reclaimed from Mr Boomer.

66. This argument depends entirely on the words "any further additional payment to HMRC" within the Offer Letter Indemnity Provision having the net of CGT interpretation for which the Claimants contend.

67. The Defendant argues that this is not the meaning of those words. He argues that "further additional payment" must be read in the light of the previous sentence which refers to "a further income tax and NIC charge on you" and therefore as an additional payment in respect of IT and NIC: he argues that it was perfectly natural that the words "additional further" would be used in this context because IT and NIC had already been paid to HMRC in respect of the later years. For brevity I will refer to this interpretation as the "**net of IT/NIC already paid interpretation**".

68. As a matter of construction of the words on the page, and not looking at any broader circumstances, including any other evidence of the common understanding of the parties or the question of commercial sense, it seems to me that the constructions put on this by the Claimants and by the Defendant are equally viable. The words "further additional payment" beg the question "further to what?" and there is no lack of logic in the interpretation offered by either side. If anything, I would say that the Defendant has the better argument in the words "further additional payment" should be related back to the words "further income tax and NIC charge" in the previous sentence. Certainly, just looking at the words, the Claimants have not discharged their burden of proof to show that the Offer Letter Indemnity Provision has the limited meaning they are contending for and could only be understood that way.

69. The Claimants' case on rectification depends, therefore and showing that there are broader circumstances that point sufficiently clearly to the proposal that both the Claimants and the Defendant understood these words in the way that the Claimants now contend.

70. The Claimants have a number of arguments to establish this point.

A. The argument based on commercial sense

71. I have already touched on one of these arguments: that there was a lack of commercial sense or as Mr Cullen put it, it "flies in the face of common sense" that the parties meant to cover Mr Boomer for any more than his net exposure to the scheme not achieving its objectives (i.e. his exposure net of any refund of capital gains tax).

72. At [39] to [41] above I give my reasons for dismissing the "common sense" argument in relation to the interpretation of clause 4.5. These reasons are compelling as reasons for not overturning the clear and unambiguous wording of clause 4.5.

73. The position is slightly different when we come to consider rectification rather than interpretation, since in this case we are dealing with ambiguous wording within the

Offer Letter Indemnity Provision and because with rectification it is necessary to consider the subjective understanding of the parties. Nevertheless the arguments that I consider at [39] to [41] above are relevant also in relation to the question of understanding what the parties meant in relation to the ambiguous meaning of the wording of the Offer Letter Indemnity Provision. They lead me to consider that the "commonsense" argument does not by itself provide a sufficiently clear indication to allow the court to choose the net of CGT interpretation over the net of further IT/NIC interpretation.

74. In order to establish what the parties would have understood the Offer Letter Indemnity Provision to mean, it is necessary for me to consider the wider evidence of the parties' understanding, and in particular to consider the central assertion by the Claimants that all that anyone was concerned about was the net position, and therefore the implication that, to the extent that the Offer Letter Indemnity Provision may be ambiguous, it must have been understood in accordance with the net of CGT interpretation.

75. I will consider first the understanding that Mr Williams and Mr McNicol may be considered to have had

B. The understanding of Mr Williams and Mr McNicol

76. I accept that Mr Williams and Mr McNicol, whenever they turned their mind to the possibility of tax under the CFD,s thought about this in relation to the net position, as is shown by internal communications between them. I was referred to an example of this in the form of an internal email from Mr McNicol to Mr Williams dated 18 April 2019. This clearly discussed an offset between the further PAYE and NIC that might be owed and focused on the calculation of a net exposure, and the net position as regards repayment of IT/NIC that would have been paid on account should be case before the Tribunal be favourable to Maritime.

77. This was certainly an understandable approach against a background where MTL had the benefit of a full indemnity under the terms under which the CFDs for any IT or NICs that MTL might become obliged to pay. Under these arrangements it would always be open to MTL either reclaim to the full IT and NICs from the employees and let them reclaim the CGT, or to do what MTL did in fact go on to do with all other employees (and sought to do with Mr Boomer), which was to agree to pay the IT and NIC assessments in full, but only on condition that the employees assigned their rights to repayment of any CGT paid.

78. Mr Williams' evidence is that from a very early stage, he intended to look after employees by ensuring that they would never need to bear more than the CGT preferable to their payments, notwithstanding the full indemnity they gave under the CFDs. He says that this was a point that was discussed at informal meetings of the directors and that his "decision to hold my directors harmless would have arisen at those meetings". As I discuss further below, Mr Boomer denies recalling any regular discussion of this promise of Mr Williams, but he does have a recollection of a dinner given by Mr Williams in 2018 following the failure of an earlier attempt to sell Maritime where Mr Williams gave an informal assurance to "sort it" referring to the tax position.

79. Considering the net tax liability (or net repayment) was a convenient way of understanding the quantum of the amounts involved, but I think it is going too far to say that Mr Williams and Mr McNicol had a reasonable expectation that what HMRC would require was a net payment – i.e. that HMRC would set off CGT paid by employees against the PAYE demand made on MTC (the "**net payment approach**"), rather than reclaiming underpaid IT and NIC from MTL and separately refunding CGT to the employees (the "**separate payments approach**"). In fact, by the time that the Offer Letter was being drafted, they had each received strong indications that HMRC would implement the separate payments approach. These included:

    i) the Notices of Determination sent to MTL by HMRC which determined outstanding IT/NIC without any offset for CGT paid;

    ii) a form of letter sent by HMRC to affected employees - the court was given a copy of the version sent to Mr Boomer on 12 October 2025 but it was acknowledged that letters in a similar form would have been sent to Mr McNicol and Mr Williams in their own capacity as participants in the GSOP scheme. These letters made it clear that HMRC intended to recover IT and NIC from MGL;

    iii) an email dated 18 February 2020 from Mr McNicol to participants in the GSOP scheme and copied to Mr Williams. The email sent on advice that had been received from Grant Thornton which explained what would happen if there would be a successful challenge of the GSOP scheme, outlining that the employer would be required to pay the IT/NIC under PAYE; the employer would look for an indemnity for these amounts from the employees and the employees should have an ability to claim back any CGT already paid – but only if they kept their Self-Assessment tax return open for the relevant year or made a claim for overpayment relief and the CGT paid. In his covering email sending this onto employees, Mr McNicol describes the steps that the employees needed to take as a "check to carry out each year to ensure that you can offset any CGT paid against PAYE due in the event that we lose at Tribunal". However, I do not think the use of the word "offset" could be taken as an indication that the net payment approach would be taken (either with the employees or with Maritime) given that it attached advice from Grant Thornton that clearly described the separate payments approach.

80. What emerges from the above correspondence is that the Claimants and Mr McNicol and Mr Williams had been informed by both Grant Thornton and HMRC that if further IT/NIC was payable, HMRC would be expected to take the separate payments approach and not the net payment approach.

81. Mr Williams was frank in stating in his evidence that he left the details of the tax matters to Mr McNicol, in whom he had complete confidence. Against this background, and against what appears to be the common position of the parties that the wider board of the Maritime companies received reports about the tax position, rather than discussing in great detail, I consider it is fair to conclude that in relation to these tax affairs it is Mr McNicol's knowledge and understanding that should be imputed to Maritime.

82. Mr McNicol provides an account of his understanding in his witness statement as follows:

> "In the first instance, and certainly up until HMRC started to communicate with MTL/MGL in respect of the Decision [i.e. the decision of the First Tier Tribunal), I was under the impression that HMRC would pursue the Employee for the balance of the PAYE and NI (i.e. the PAYE and Employee NI less the sums of CGT paid by the Employee)."

83. In his oral evidence Mr McNicol stood by this description of his understanding at the time and said that he had obtained this impression from meetings with Grant Thornton and RPC, the solicitors dealing with the test case.

84. The documentary evidence that I have referred to above is at odds with the understanding that Mr McNicol says that he had. I think it more likely that he had not applied his mind in detail to how the tax position would be unwound in the event of the challenge against HMRC failing.

85. It is clear both from the witness evidence of Mr McNicol and Mr Williams, and from some of the correspondence that right up to receiving the decision in relation to the test case that Maritime was fairly confident (on the basis of what they were being told by Grant Thornton and by the eminent tax counsel that had been engaged) that HMRC would lose the test case at the FTT, and therefore it is not surprising that Mr McNicol did not give too much attention to the mechanics that would be applicable in the event of HMRC being successful.

86. Once the decision of the Tribunal was known, HMRC did indeed generally adopt the separate payments approach, and contrary to what Mr McNicol says that he expected, claimed the additional IT and NIC (and interest) from Maritime rather than from the employees. There was a small exception, however. In cases where the employees had (notwithstanding the advice from Grant Thornton) failed either to keep their Self-Assessment tax years open or to make a claim for overpayment of CGT, HMRC by way of a concession made in an email dated 14 July 2022 did set off the amount of CGT that had been paid, and could no longer be refunded against the IT/NIC due in relation to the relevant employee. This included CGT paid by Mr Boomer for one of the years in question.

87. Mr McNicol on behalf of MTL accepted this decision but in an email dated 17 August 2022 did try to persuade HMRC to allow an offset for the purpose of calculating the interest payable on the late payment of IT/NIC on the basis of the amount net of CGT payments already made (rather than paying interest on the full amount at a higher rate and having the interest and the repayment of the CGT being allowed only at a lower rate). This request was refused.

88. Insofar as the later actions of the Claimants (after the Offer Letter was sent and the Settlement Agreement was entered into) may be relevant to an assessment of the Claimants' state of mind at the time the Offer Letter was entered into, the evidence is not particularly supportive of their case.

89. HMRC had suggested to Mr McNicol that MTL might ask the employees to provide a mandate for any CGT payments to be paid to MTL rather than to the employees direct, and provided a form of mandate that could be used for this purpose. Following this suggestion, Mr McNicol (on behalf of MTL) sent a letter to each of the participants in

the GSOP scheme informing them that HMRC had prevailed at the Tribunal and accordingly that IT and NIC was now due, but offering that MTL would pay this and not insist on the indemnity it had under the CFD documentation provided the employee signed the form of mandate that HMRC have provided allowing MTL to collect any repayments of CGT (plus interest) to which the employee is entitled.

90. One of these letters (dated 20 September 2022) went to Mr Boomer. Mr McNicol's evidence is that Mr Boomer's letter was in exactly the same form as that sent to other employees. The letter, accordingly, made no reference to Mr Boomer's rights under the Settlement Agreement. Mr McNicol claims that he had considered the matter and thought that this letter was still appropriate, notwithstanding the terms of the Settlement Agreement, although Mr McNicol had no strong recollection of reviewing the Settlement Agreement at the time that he sent out this letter.

91. It is difficult to understand how Mr McNicol could have come to that conclusion since the offer that was being made in the 20 September 2022 letter to settle all IT and NIC contributions had no benefit for Mr Boomer – he already had such an undertaking. I think it more likely that Mr McNicol did not address his mind as to the terms of the Settlement Agreement, but was just putting forward what he thought was a pragmatic solution that he (and Mr Williams) considered to be fair.

92. Mr Boomer did not respond to this letter. Mr McNicol followed it up with a further letter (which he says was drafted with the help of MTL's solicitors) dated 11 October 2022. This letter did refer to the Settlement Agreement but set out a suggestion that the Settlement Agreement Indemnity Provision did not apply as it applied only to income tax and national insurance liabilities incurred (directly) by Mr Boomer and did affect the indemnity that Mr Boomer had given to MTL under the documentation relating to the CFDs. This is not an argument that is now being pursued by the Claimants.

93. What is interesting about this letter is what it did not say. It did not say that clause 4.5 provided an indemnity only for the net liability after taking into account CGT refunds, as you would expect it to say if MTL considered that this had clearly been understood to be what clause 4.5 was meant to say. If MTL had a clear understanding on this point, and considered that Mr Boomer had had such an understanding also only some four months earlier, surely that is the argument they would have pursued at this point.

94. This open letter was accompanied by another letter of the same date marked "without prejudice save as to costs". This second letter referred to and repeated the offer made in the letter dated 20 September 2022, and put a time limit on acceptance of that offer. Again this letter did not say that clause 4.5 provided an indemnity only for the net liability after taking into account CGT refunds, as you would expect it to say if MTL considered that this had clearly been understood to be what clause 4.5 was meant to say.

95. Mr Boomer instructed solicitors who wrote on his behalf on 17 October 2025 which denied the interpretation of the Settlement Agreement put forward in Mr McNicol's open letter of 11 October 2022.

96. MTL instructed its solicitors to respond and on 7 December 2022 they wrote a letter before action setting out MTL's claim against Mr Boomer. On this occasion the

solicitors put forward a version of the argument now being pursued. They set out the terms of clause 4.5 and stated:

> "As indicated by its wording, this indemnity only covers the position in respect of any future additional income tax or national insurance contributions liability – the further liability that the parties "may incur". It does not affect the pre-existing allocation of tax liability, namely that Mr Boomer had paid tax on the GSOP Payments in the form of the CGT Payments."

97. On the basis of that argument, coupled with the information that MTL was being obliged to pay the full amount of the IT/NIC assessment and Mr Boomer would be getting the benefit of a repayment of the CGT with interest, which they described as a "windfall", they argued that Mr Boomer was obliged to hand over the payments made to him in relation to CGT and that the original indemnities that he gave in the CFD documentation still applied to that extent.

98. Mr Boomer's solicitors wrote back challenging this interpretation, stating in particular that there had been no explanation why on MTL's case "the natural and ordinary meaning of the wording in the 2021 Indemnity excludes the pre-existing allocation of tax liability" and challenging the introduction of the concept of "future additional liabilities".

99. In response MTL's solicitors wrote a letter on 12 January 2023 which both placed emphasis on the words "may incur" within clause 4.5 and also explained that clause 4.5 was meant to implement the Offer Letter Indemnity Provision (which was quoted in full).

100. MTL later changed solicitors and the new solicitors repeated these arguments in the letter of 19 May 2023 to Mr Boomer's solicitors and, by that point, had developed the arguments into more or less those set out in what became the Claimants' Particulars of Claim.

101. Looking at the documentary evidence as a whole, as well as their witness evidence, I reach the following conclusions about the state of mind of Mr McNicol and Mr Williams (who between them, I consider, may be regarded as representing the state of mind of the Claimant companies):

i) Mr Williams had intended to look after employees by ensuring whatever the outcome before the First Tier Tribunal, they would not need to bear more tax in respect of the payments they received under the CFDs than the amount of CGT;

ii) Mr Williams largely depended on Mr McNicol to understand and deal with all tax implications and with the finalisation of the Settlement Agreement, with the benefit of advice from Maritime's solicitors;

iii) whilst Mr Williams and Mr McNicol generally thought about the possibility of tax under the CFDs in relation to the net position, this was in relation to quantifying the overall benefit if the test case against HMRC was successful or the overall liability if it was not, and cannot be taken as demonstrating that they

thought that HMRC would only pursue employees or Maritime for the net position;

iv) certainly Mr McNicol, and probably Mr Williams, had been made aware that it was at least likely that HMRC would follow the separate payments approach (and would claim against Maritime rather than the employees) in the first instance, and not the net payment approach;

v) against the background mentioned in the previous paragraph it is not readily explicable why Maritime was not clearer both in the Offer Letter and in the Settlement Agreement that the intention was only to cover the net liability so as to leave Mr Boomer in the position as if CGT rather than IT/NIC applied to the payments under the CFDs.

vi) the failure of Mr McNicol and of MTL's solicitors in the early discussions with Mr Boomer, when he was being asked to assign his right to reclaim CGT, to mention an understanding that clause 4.5 indemnified only the position net of CGT, pours doubt on the proposition that Maritime (as represented by Mr McNicol) had understood this to be the effect of the indemnity.

C. The understanding of Mr Boomer

102. There are only two pieces of documentary evidence that the court has been made aware of as to Mr Boomer's understanding of the Offer Letter Indemnity Provision.

103. The first is in the form of email correspondence between Mr Boomer and another employee, Mr Smart on 10 May 2021. The Claimants argue that this provides evidence that Mr Boomer was only concerned about the net position and understood the Offer Letter Indemnity Provision as providing only for the net position. I find it difficult to draw this conclusion from that email exchange.

104. The email exchange follows an oral discussion between Mr Boomer and Mr Smart. Mr Boomer had sent a copy of the Offer Letter (or of the draft offer letter) to Mr Smart. It is clear that Mr Boomer's concern related to the position where HMRC lost so that there was money to come back from HMRC. In those circumstances the Offer Letter promised payment to Mr Boomer of £1 million and his concern was that this figure seemed disproportionate to the amount that Maritime would be repaid by HMRC in respect of PAYE referable to him. He did some rough calculations of what tax had been paid under PAYE (four years where IT and NIC had been paid by Maritime on account) and of the lesser amount of tax that would be payable if CGT applied and came to the conclusion that:

> "We were actually taxed at the PAYE level, 45% so we were basically paid £550k net, the £450k tax payment was paid on account by the company. If we now win this, surely HMRC would just refund the company the difference between the 2 different tax rates. To us, we have paid the £450k tax but if we win, we would then receive this back and then simply pay the capital gains tax rate of 20 / 28%, this would be between £170k - £250k. I therefore haven't got a bloody clue where the £1m

> comes from but if you recall, John has always said that its worth a lot of money to us if we win".

105. He went on to ask Mr Smart to check the position with MTL's finance director, Richard Long.

106. Mr Boomer's oral evidence about this exchange was not particularly helpful. He confirmed that what he was concerned about here was the calculation of the £1 million offered by Mr Williams in the event of success against HMRC. He was adamant that the reference to "£170k – £250k" was a reference to the likely level of CGT that would need to be paid, but this could not be the case mathematically on the figures that he had given. In my view it is clear that these figures referred to the difference between his rough calculation of the IT/NIC paid and that of the CGT that would become payable.

107. Mr Smart replied to Mr Boomer later that day saying that he had checked the principle with the Finance Director, who had agreed but

> "did say that it may be that the whole transaction may have to be reversed (i.e. all the tax is paid back and then we pay the 20/28% CGT) but that means we would also have to pay back the [amount] that the company paid net to us over the period, the net result would be the same. However, your letter doesn't state that!"

108. The Claimants invite me to see this correspondence as clear evidence that Mr Boomer thought only about the net position in relation to the tax provisions in the Offer Letter, and had only the net position in mind when he signed the Settlement Agreement.

109. I do not accept this argument.

110. First, this email exchange was intended only to clarify whether the £1 million that he was being offered in the event of success against HMRC was a good offer. It is clear that he would need to consider the net position in order to calculate this, and this says nothing about whether he also considered the net position (and only the net provision) in relation to the Offer Letter Indemnity Provision.

111. Secondly, having received the response from Mr Smart, he was aware of a possibility that HMRC would not provide a net payment but would reverse the transactions. Insofar as this correspondence might be relevant to the converse position where it was HMRC that succeeded at the First Tier Tribunal, then this evidence would leave him to believe that there was at least a possibility that HMRC would deal with the matter following the separate payments approach rather than the net payment approach.

112. The second piece of documentary evidence is that Mr Boomer would have received the email from Mr McNicol that I refer to at [79(iii)]. The Claimants say that this is an example of communications referring to an "offset". That word certainly is used in Mr McNicol's covering email. However, it is at least equally important, and I would consider more important, that this email passed on detailed advice from Grant Thornton which indicated that HMRC was likely to follow the separate payments approach.

113. Turning to the witness evidence, as I have mentioned, it is part of Maritime's case that there had been a long-standing understanding amongst employees that Mr Willams had promised that if the case against HMRC was unsuccessful despite the indemnities that have been given by employees in the CFD documentation, Maritime would bear the difference between the tax and NIC due and CGT already paid. There is no documentary evidence for this promise.

114. Mr Boomer did not recollect this being a long-standing understanding or it being discussed at board meetings but he did recall that there had been a promise in relation to the tax position to "sort it" at a dinner in 2018, as I have described above.

115. Mr Boomer also could not recall discussions that Mr McNicol said that he had with Mr Boomer (at a point in time that Mr McNicol cannot recall) about how HMRC would treat the CGT payments, although he acknowledged that Mr McNicol provided updates about how the case with HMRC was developing.

116. Although Mr Boomer accepts that he was told about the promise, there is no evidence that he had that promise in mind when considering what was meant in the Offer Letter. He denies that to be the case.

117. Mr Boomer's evidence was that he was trying to get the best deal out of Maritime that he could. That part of his evidence rings true.

118. In cross-examination, Mr Boomer gave evidence to the effect that it was his expectation, having undertaken research on the HMRC website and having reviewed correspondence he had received earlier from HMRC, that the separate payments approach would apply and he would be fully indemnified for IT and NIC and in addition would or at least might get a CGT refund.

119. Mr Boomer had not recalled this point when drafting his witness statement and I am not prone to place any reliance on this oral evidence. However, that is not to say that I accept the converse: that Mr Boomer understood that he was being covered only for any new liability net of CGT already paid.

120. There are three possibilities about what was Mr Boomer's state of mind as to what clause 4.5 meant when he signed the Settlement Agreement:

    i) that contended for by the Claimants: that he understood that the Offer Letter Indemnity Provision covered him only for the liability net of CGT already paid and that is what he expected clause 4.5 to cover;

    ii) that he understood that it was the intention of the Claimants that the Offer Letter Indemnity Provision covered him only for the liability net of CGT already paid, but realised that the wording in clause 4.5 gave him a full indemnity without set-off of any CGT he could claim back and that he saw no reason to disabuse the Claimants of the effect of clause 4.5 - this effectively is what Mr Boomer was saying in his oral evidence; or

    iii) he was happy with the indemnity that his lawyers had drafted as clause 4.5 and did not turn his mind at all as to what would happen if he could reclaim CGT.

121. Of these three possibilities, I think the third the most likely. I think it most likely that he was happy to receive an indemnity but had not focused at all on what would happen about the CGT repayments, believing as did others at Maritime, that it was more likely that there would be success against HMRC so this would not arise.

122. In my view the second possibility is the next most likely. Had Mr Boomer actually thought in any detail about the point that HMRC were likely to follow the separate payments approach, and had he considered the wording of clause 4.5 with that in mind, given the advice he had received from Grant Thornton and the more recent advice he had received via Mr Smart, he would have concluded that clause 4.5 did not require him to account for repayments by HMRC of the CGT he had paid. He may or may not have realised that this was not what Maritime was trying to achieve with the Settlement Agreement but, if he had realised this, he might have been very happy to get one over Maritime in circumstances where he had been dismissed after 27 years' service and had been presented with a non-negotiable offer which required him not to work in any competing business for two years.

123. The first possibility, which is the one that the Claimants need to show in order to establish their case on rectification, seems to me to be the least likely.

D. Conclusion in respect of rectification

124. The Claimants have based their case for rectification on a common mistake rather on unilateral mistake, and as they have not been able to show a common intention that was mistakenly not carried through into the drafting of clause 4.5, their pleaded case on rectification must fail.

125. As I have already mentioned, to obtain rectification the Claimants need to demonstrate that the parties had a common intention in respect of a particular matter – in this case to produce an indemnity that covered Mr Boomer for IT and NIC only to the extent that this was an additional to the CGT that he had already paid - and that there has been an outward expression of accord recording that common intention.

126. The Claimants acknowledge that the Offer Letter and its acceptance by Mr Boomer is the only outward expression of the accord that they contend for. Unfortunately for their case, the relevant provision in the Offer Letter, the Offer Letter Indemnity Provision is by no means clear on this point. Its wording is ambiguous.

127. I have considered the background to see whether there is sufficient evidence of the putative common understanding between the parties such that the ambiguity should be resolved in favour of the Claimants. My conclusion, for the reasons I have discussed, is that there is not.

128. Whilst I accept that Mr Williams, to the extent that he thought about the point, may have intended that Mr Boomer was to be indemnified only for the excess of IT/NIC above the CGT already paid and that he and Mr McNicol may have intended to convey that in the wording of the Offer Letter Indemnity Provision, there is no real evidence that Mr Boomer would have understood it this way and some indications that he would not.

129. Accordingly, I cannot find that the Claimants have provided convincing proof that the proposed rectified version of the agreement is in accordance with the parties' true intentions so as to discharge the Claimants' burden of proof and to meet the tests outlined in *Joscelyne v Nissen* and *Fowler v Fowler* that I have referred to above. To quote from *Fowler v Fowler*:

> "The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description… It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought."

130. In my view the Claimants have not even discharged the bare burden of proof to show their interpretation of the Offer Letter was understood by all parties. Certainly they have not provided evidence that could be said to establish in the "clearest and most satisfactory manner" that all parties considered that clause 4.5 should have been drafted in the manner for which they now contend. Accordingly, the rectification claim must also fail.

7. CONCLUSION

131. I have considered carefully both arguments put forward by the Claimants: their argument as to construction and their argument as to rectification, based on a mutual mistake. On close examination neither of those arguments are supportable so as to allow me to give judgment in favour of the Claimants.

132. I return then, to the agreed list of the principal issues for determination, and accordingly answer these as follows:

i) **Question 1**: On a true interpretation of the Settlement Agreement, the Claimants were to indemnify the Defendant in respect of liability for any additional income tax and NIC and not only for the excess above the CGT which he had already paid.

ii) **Question 2**: As both their interpretation argument and their rectification argument have failed, there is no basis, as a matter of law, for the Claimants to be entitled to restitution of the amount of the CGT refund received by the Defendant.

iii) **Question 3**: The Claimants have failed to show that, at the time of the Settlement Agreement, the parties had a common intention that the Claimants would indemnify only the additional further IT and NIC (over and above the CGT which the Defendant had already paid), and therefore have failed to establish that the Settlement Agreement mistakenly failed to record accurately such an intention. As a result, the Settlement Agreement should not be rectified to give effect to that common intention; and

iv) **Question 4**: The total amount of the CGT refund received by the Defendant is not relevant to the claim as a result of my answers to Questions 1-3, although it may have some residual importance in relation to proportionality when the question of costs comes to be considered. Mr Boomer has given evidence that this amount is £357,349.52 and I have seen no evidence to refute this figure and so I will find accordingly.