CA on appeal from QBD Commercial Court (Christopher Clarke J) before Waller LJ, Vice-President of the Court of Appeal, Civil Division, Sedley LJ, Carnwath LJ. 3rd April 2007

JUDGMENT : Lord Justice Waller:

1. By a judgment handed down on 27th January 2006 Christopher Clarke J dealt with an application for summary judgment brought by the claimants. This is an appeal from that judgment. The claimants are the son (Israel) and grandson (Samuel) of the late Rabbi Joseph Halpern and his wife Frieda, also deceased. Their claim was to enforce a compromise alleged to have been reached between Israel and Samuel who at all material times acted for his father Israel with the defendants (four other sons and a daughter of Joseph and Frieda). The compromise was of an arbitration before a Beth Din composed of three Rabbis which in the main was taking place in Zurich. The arbitration had been intended to settle issues, which had arisen after the deaths of Joseph and Frieda, between Israel (the first claimant) and his siblings relating to what he perceived to be his due inheritance. The first three defendants (Mordecai, David and Jacob) were the executors of both estates, but the dispute was not simply about the distribution of the estates (valued for Probate, as we were shown but the judge was not, in the case of Joseph at £309,945 and in the case of Frieda at £210,000), but as to whether there were not other assets which should be brought by the defendants into account in considering what should be Israel's fair share.

2. The compromise was made by Mordecai on behalf of himself, his two executor brothers, a further brother Aaron and his sister Esther as party A, and Israel and his son Samuel who had represented Samuel during the arbitration as party B. It was written in Hebrew by Mordecai and a translation, which for the purposes of the appeal both sides were prepared to accept as accurate, is appended hereto. Although all those described as party A were named as defendants to the proceedings only the three executor brothers were served.

3. When I point out that the executor brothers rely as a ground for frustrating the compromise on the fact that at a different Beth Din sitting in New York the sister, Esther, was awarded as against the executor brothers the whole of the estate and when I say that we were told Esther has now been paid or had transferred to her assets to the value of some £4 million (something again the judge may not have been told) it is clear that the main area of dispute relates to assets outside the estate valued for probate. That is further confirmed by the fact that under the compromise, if it be valid, Israel was to receive £2.4 million. We were concerned as to how the figures at which the estates had been valued for probate could be squared with these figures, and in particular the £4M said to be the value of the estate transferred to Esther.

4. Of course perfectly legitimate activities can place assets outside an Estate but in this case our concerns were not mollified by the fact that it was a term of the compromise relied on by the executor brothers as a condition, precedent to any liability on them, that all documents produced during the arbitration before the Beth Din in Zurich, whether in the hands of the claimants or the Rabbis before whom the disputes were being arbitrated, should be destroyed or handed over to the defendants. Furthermore Samuel had actually made the accusation that the reason for such a term was to hide a fraud on Her Majesty's Revenue and Customs ("HMRC"). In the result we requested affidavits to be sworn by the executors and allowed Israel and Samuel the opportunity to respond thereto. These were received after the conclusion of the hearing. My concerns are not (I confess) allayed, particularly as the affirmation of Mr Rubin, for Israel and Samuel, seems to maintain the attack. The question arises as to what steps we should take.

5. Christopher Clarke J, lacking perhaps some of the details which fuelled our concerns, dealt with the application for summary judgment, deciding many of the issues against the executor brothers but leaving at least one key issue to be tried. The key issue he left to be tried related to duress. In relation to that issue a preliminary issue of law was directed to be tried as to whether rescission was available as a remedy for duress if substantial restitution could not be given. Those advising the claimants were arguing that since all the documents had now been destroyed it was not possible to put the parties back into the position they were before the compromise was entered into. The question of law was tried by Nigel Teare QC, as he then was, sitting as a Deputy High Court Judge. He decided that issue against the executor brothers and that decision is also the subject of an appeal before us. It had been thought, at least by those acting for the claimants, and possibly Christopher Clarke J, that resolution of that issue of law against the executor brothers would lead to summary judgment being entered against them and obviate the need for a trial. But the basis on which the issue succeeded involved accepting that if duress was established and if substantial restitution could not be given, a claim in damages for intimidation would be available or, (which comes to very much the same thing) conceivably, counter restitution would be ordered as a money judgment.

6. In the result an interesting but arid point of law has been decided and is before us on appeal which, whichever way it was or is decided, is not going to help to curtail the litigation. There remains and always will remain to be tried the question whether the defendants, and in particular Mordecai, only entered into the compromise as a result of duress.

7. The trial is due to take place next October with, as we were told, an estimate of 8 days. That, even without regard to matters the subject of this appeal, will not be the only issue to be tried. As I understand it although a point decided by Christopher Clarke J and a matter before us on appeal relates to the true construction of clause 4 of the compromise, (the clause requiring the destruction of documents), even if the judge were upheld, an issue still arises as to whether the claimants can establish that the condition precedent provided by that clause has been complied with.

8. As I have already indicated I am not myself satisfied with the explanation at present given as to how the probate value of the estates can be squared with the other figures representing assets of the late Joseph and Frieda. Indeed, I am concerned as to whether, in relation to a term requiring destruction of documents, the court is not being asked to deal with a compromise agreement, one purpose of which is to keep the true picture away from HMRC. That is a point, if it were to be established, which the court would be bound to take for itself in considering the possibility of the compromises.

9. We are obviously not in a position to resolve that issue. Furthermore, in order to be clear whether it is a point which the court should take for itself, the court would be assisted by a consideration of the matter by HMRC itself. I would accordingly direct that this judgment and the affidavits served after the hearing be served on HMRC for them to consider the matter and to give consideration as to the steps they might take to assist the court.

10. That still leaves for resolution the appeals before us. The appeal from Nigel Teare QC, as between the parties, raises a point which may well prove academic but it is right that the court should deal briefly with the same. Carnwath LJ in his judgment has done so and that is a judgment with which I entirely agree.

11. The appeal from Christopher Clarke J seeks to resolve whether other issues should be added to those already being tried in October. One is inclined to feel that this case was one in which courts in the past might have taken the view simply that it should go to trial. Indeed possibly now one knows that substantial issues will be being tried out in October, the court should be less inclined to rule on different points in the absence of findings of fact. But in an attempt to limit the issues Christopher Clarke J in a detailed judgment dealt with the many points that arise and it is right to say that the exercise has dealt with one point which, if left in issue, might have taken up time at a trial and on which there has rightly been no appeal from his judgment and another point which on any view should be resolved on a preliminary basis, i.e. the question as to the applicable law of the compromise. It is this latter point on which most time and effort was concentrated before us.

12. As an issue this arose in a not altogether satisfactory way and it is helpful to explain all issues by placing the issue of applicable law in the context of the other issues that arise. The claimants issued proceedings seeking to enforce the compromise serving only the executor brothers. The executor brothers put in a lengthy defence and counterclaim. The defence in paragraph 8 said this:- *"Whatever the status of the inheritance disputes identified within paragraph 4 of the Particulars of Claim they fall to be considered exclusively within the sole jurisdiction of the Probate Registry of the High Court of Justice. Without prejudice to the several matters hereinafter pleaded these Defendants contend that this Claim is not sustainable and is contrary to public policy and in effect seeks to oust the jurisdiction of the High Court to determine the rights of the beneficiaries to the Estate of the Deceased and Frieda Halpern."*

13. The defence then asserted that the reference to arbitration was procured by a forged document and that thus the submission to arbitration was void. (See paragraph 16). Christopher Clarke J held that allegation had no prospect of success at a trial and it is that aspect from which there is no appeal from his decision.

14. By the defence Mordecai admitted signing the *Heskem Peshara*, the compromise agreement, but the defence then took the following points:-

(i) (A point which no longer needs to concern us) the defence denied that the compromise had been turned into a final award.

(ii) The executor defendants denied that neither Mordecai nor any of them had any authority to act for Aaron or Esther.

(iii) The defence pleaded that it was too uncertain to be enforceable.

(iv) It pleaded that Mordecai (who signed for all) had entered into it under duress. The nature of the duress pleaded was an insistence by Rabbi Schmerler (one of the Rabbis presiding over the Zurich Beth Din) in the presence of Samuel, that each of the defendants would, if the arbitration continued, be forced to swear a Chiyuv Shavah (a ritual oath) or each pay a penalty of £250,000. The oath is asserted by the defendants to be one known to the Rabbi as one which would not be sworn by an observant Jew.

(v) It pleaded the compromise was entered into under a mistake in that Mordecai thought the Rabbi had the power to demand the oath, whereas Mordecai had discovered since that the circumstances under which the Rabbi was suggesting he was acting, i.e. on the basis of rumour and suspicion, did not under Jewish Law empower the Rabbi to extract the oath.

(vi) It pleaded that the compromise was illegal and, contrary to public policy, not on the grounds previously suggested in this judgment but on the grounds that the compromise was "not intended to create rights in personam but rather was intended to divide up the interests of the Estate of the deceased", and was contrary to public policy because it interfered with the rights of the 4th and 5th defendants, it interfered with the rights of Eldermount Limited a "non-party" and of which other members of the family not parties to the litigation were shareholders, and because the dispute resolution was unfair, arbitrary, and irregular so as to offend natural justice.

(vii) The defence then contained the heading "Application of Jewish law". It referred to the submissions to arbitration and pleaded that Jewish law (Halakha) was intended to be the lex causa as well as the lex curia and would regulate procedure. It then pleaded in paragraph 30 as follows:-

"Accordingly in addition to the matters identified herein which offend ordinary principles of fairness and natural justice it is further alleged that the Compromise Agreement is ineffectual by reference to Halakha. These Defendants intend to seek permission from the Court to rely upon expert evidence and to serve further particulars of the breaches of Halakha that are relevant to the issues in this claim."

(viii) There then followed a plea which before Christopher Clarke J gave rise to an issue as to "frustration"; the allegation in the defence was that the daughter Esther, on hearing of the compromise, took proceedings before a Beth Din in New York and obtained an award of the whole Estate. Although not pleaded, a statement was put in before the judge from Esther asserting that Esther also obtained injunctions against the executors which were said to prevent them complying with the compromise, and this formed part of the written submissions before the judge (see para 33 page 544). Under Jewish law daughters do not inherit but a parent may execute a form of promise, enforceable against the parent one hour prior to death in a sum in excess of the value of the estate (in this case the promise by Joseph was £10 million and the promise by Frieda was of a further £10 million). The promise is intended to enable the daughter to claim her share or, in default, may enable her to claim the whole estate. Esther in this case demanded her share from the executors, but claimed that since her share had not been granted to her the whole estate should be hers. The claimants allege that these claims by Esther were made pursuant to a collusive arrangement with the executor brothers, but as the judge stated "There is no evidence …to support that suspicion."(see para 13)

(ix) The next plea related to clause 4 of the compromise which required the handing over or the destruction of the documents as a condition precedent. The pleading asserted no document had been handed over and put the claimants to proof that the condition precedent had been performed. Before the judge it seems Mr David Berkley QC developed an argument that on the true construction of Clause 4 the documents (if they were to be destroyed as opposed to handed over) had to have been destroyed before entry into the compromise, and that once the compromise had been entered into the obligation was to hand over the same - destruction was not an option. (See paragraph 108 of the judgment).

(x) The final plea was that by virtue of accepting the repudiation of the compromise, the claimant had discharged all parties and thus it was asserted "each would be free . . . to seek determination of the inheritance disputes by litigation and, in particular, recourse to the High Court."

15. On behalf of the claimants there was then lodged a Reply and Defence to Counterclaim of some 40 pages. The first 15 dealt with the allegation of forgery (the point disposed of by the judge and from which there is no appeal) but contained a paragraph to be repeated in other contexts to the effect that now that parts of the compromise agreement had been performed including the payment of certain sums by the defendants to Israel and by virtue of the destruction of documents restitution *in integrum* was not now possible, disentitling the defendants to rescission and/or affirming the compromise.

16. Only in his written submissions for the hearing before Christopher Clarke J did Mr Berkley expressly contend that the applicable law of the compromise agreement was Jewish law. Even then it was not identified precisely what the effect of applying Jewish law was as compared to the application of either English law or possibly Swiss law. But it seems during argument Mr Berkley suggested that if Jewish law applied there might be differences of consequence. For example a point was developed by reference to the statement of Rabbi Gartner, exhibited to Mordecai's statement, particularly a footnote to that statement to the effect that under Jewish law if duress or mistake were established that would render the compromise void *ab initio* and not, as under English law, voidable.

17. This led, so we were informed, to the judge referring to ***Shamil Bank of Bahrain EC v Beximco Pharmaceuticals*** [2004] 1 W.L.R. 1784, a decision of the Court of Appeal which the judge suggested at the very least cast doubt on the question whether Jewish law as opposed to the law of a country could ever be adopted, expressly or otherwise, as the law applicable to contract. This led to further extensive written submissions following the hearing on the question whether Jewish law could, by agreement, ever be the applicable law of a contract under English conflict of laws principles. Mr Berkley submitted that the compromise contained terms which either expressly or by implication agreed Jewish law as the applicable law. His argument before the judge (as before us) was primarily that *Shamil* was distinguishable and thus English conflict of laws would recognise that since there was a body of law recognised as *Halakha,* i.e. Jewish law, that law could be the applicable law of the contract in a true sense. Alternatively he argued that as a matter of construction *Halakha* would, if chosen as the applicable law whether expressly or by implication, be incorporated into the contract as terms thereof similarly to the way in which the Hague Rules can be incorporated. In the further alternative it was argued that Israel, by submitting the dispute to a forum (the Beth Din) applying Jewish law, was thereby representing that he would be seeking no more than Jewish law would allow him to recover and should be estopped from recovering anything that was irrecoverable as a matter of Jewish law. The judge ruled against the defendants on all these points.

18. The judge then tackled each of the points raised by the defendants. So far as points which arise on the appeal he held:-

(i) that duress gave rise to an arguable point: the question whether restitution *in integrum* was necessary also gave rise to an arguable point and the question whether there had been affirmation was also arguable;

(ii) he did not regard Mr Berkley's construction of clause 4 of the compromise requiring documents undestroyed as at the date of the compromise to be handed over undestroyed as realistic. In the judgment that led him to say the defendants had no realistic prospect of establishing non-compliance with the condition precedent, but it

seems when judgment was handed down the judge accepted the question whether there had been compliance with clause 4, as construed by him, must still be a matter for trial.

(iii) He then dealt with mistake. By this stage in addition to a mistake as to the Rabbi's power to demand a *shavuah*, (mistake (a)), a further alleged mistake was being relied on in argument by Mr Berkley for the executor brothers, i.e. a mistake in thinking that the Estate was not in Jewish law indebted to Esther in a sum which would exhaust it (mistake (b)).The judge dealt with the alleged mistake in these terms :-

"110. Mistake (a) is not said in the defence to have been common. Mistake (b) is not pleaded. In any event I find it impossible to accept that it was a fundamental assumption of the claimants in entering into the compromise agreement that either of the facts said to have been mistakenly believed were correct. The claimants' interest was to secure payment of an acceptable sum of money and to put an end to the inheritance dispute. It was not fundamental to their reaching an agreement whether or not Rabbi Schmerler was entitled to require an oath and whether Esther's clam was good or not.

"111. Further, as to mistake (b), the three brothers knew that Esther had made a claim which, if valid, would, if Esther's evidence (which they do not confirm) as to the value of the estate is right, probably absorb all or most of the estate. Mordechai's statement complains that Rabbi Schmerler ignored Esther's request but is silent as to what assumption he made as to its validity. In any event the compromise agreement was expressed to be entered into by Mordechai on behalf of his brothers (other than Israel) and Esther. In those circumstances, even if the claimants were aware of Esther's claim, a subject on which the pleadings and the evidence are silent, far from there being a common mistaken assumption that Esther had no valid claim, the agreement itself purported to bind Esther and her siblings to transfer assets to Samuel and thus to forego any inconsistent claim that she might have. If there was any mistake on the claimants part it was their mistaken belief (if mistaken it was) that Mordechai had the authority that he claimed. But that is not something that Mordechai can rely on, nor David and Jacob if the compromise agreement was signed by Mordechai with their authority. Further it is impossible to suppose that it was, so far as the claimants were concerned, fundamental to the agreement that Esther had, as a matter of Jewish law, no valid claim. What they sought was a settlement of the inheritance claim which would render moot, so far as Israel was concerned, any further question as to which siblings were entitled to what.

Unilateral mistake

112. So far as unilateral mistake is concerned, the mistake pleaded – mistake (a) - is a mistake on the part of Mordechai as to Rabbi Schmerler's power to require an oath. It is not pleaded that the claimants knew or contributed to that mistake. But Mr Berkley submitted that Moredchai's mistaken belief was induced by Samuel's representations to Rabbi Schmerler. That may amount to duress; but it is not a ground for avoiding the contract on the ground of mistake. It is not suggested that there was any mistake as to the *terms* of the compromise agreement and a unilateral mistake "*will only operate where the mistake or misunderstanding is about the terms of the contract*": Chitty 5 -005; 5-065.

113. As to mistake (b), it is not suggested that Samuel knew that Mordechai mistakenly believed that Esther had no claim that would exhaust the estate and mean that the claimants could not be paid. This is not surprising since Mordechai was purporting to bind his sister to a compromise agreement which would ensure that they would be. In any event any such mistake would not be as to the terms of the agreement."

(iv) He then dealt with frustration in these terms:-

"120. It was further submitted (but not pleaded) that, if the agreement was not void or voidable for mistake, it was frustrated in that, by virtue of the supervening decision of the Belski Beth Din that Esther was entitled to £ 20,000,000, as a result of which the performance of the compromise agreement became something radically different from that which the parties had contemplated. As Mr Tager pointed out there is some difficulty in treating that decision as a supervening event given that it was delivered in January 2004 and performance of the obligation to transfer the assets was to be done as soon as possible after the compromise agreement with an estimate of six months. But in any event the argument must founder on the fact that the compromise agreement purported to bind Esther, and, thus, to address the question of her entitlement to be paid from the estate in preference to the claimants. The agreement thus catered for the contingency (that Esther might have had a claim which would preclude that of Israel) which is now said to constitute the frustrating event."

(v) As regards the plea of uncertainty he dealt with the points raised by the defendants and concluded that any argument as to uncertainty to render the whole contract unenforceable would fail.

(vi) Finally he dealt with personal liability. He rejected the argument that the three brothers as executors were simply intended to be liable to account for that part of the estate which remained after satisfaction of Esther's claim. He pointed out how the claim in the arbitration had covered assets transferred to the three brothers during Joseph's and Frieda's lifetimes. It was, as the judge put it, not surprising that the obligations were expressed in language which apparently imposed personal obligations on the defendants. What the judge did not however deal with was the point as to whether the obligation was joint and several as between the defendants.

Applicable law of the compromise

19. There were, Mr Berkley suggested, four questions (1) could the parties as a matter of English conflict of laws principles choose Jewish law as the applicable law of the compromise? (2) Did the parties choose Jewish law expressly as the applicable law of the compromise? (3) If they did not choose Jewish law expressly did they choose Jewish law by necessary implication? (4) If the parties did choose Jewish law, and the answer to (1) is that English conflict of laws will not allow for the choice of Jewish law as the applicable law, is there any other way in which effect could be given to the parties' choice? Posing the questions in this way does not in my view put matters in the right order and risks raising points in an academic way, when what the court should be concentrating on is what the parties agreed in this case, first in relation to the applicable law of the contract and second as to the applicability of Jewish law and the extent to which effect, depending on what they agreed, can be given to that agreement. I intend therefore to approach the matter by considering the true nature of the compromise agreement and its applicable law applying English conflict of laws principles. In the course of so doing the answer to the questions posed by Mr Berkley can be addressed in their context.

What have the parties agreed expressly or by implication as to the applicable law to govern their contract?

20. This question must be answered by reference to English conflict of laws principles. The Contracts (Applicable Law) Act 1990, as its preamble states, makes provision as to "the law applicable to contractual obligations in the case of conflict of laws". It provides by Section 2 "subject to subsections (2) and (3) below, the Conventions shall have the force of law in the United Kingdom." In the Act the Conventions mean the Rome Convention, the Luxembourg Convention and the Brussels Protocol, all of which are set out in schedules to the Act. Section 3 provides guidance as to interpretation allowing reference in relation to the Rome Convention to the reports on that convention by Professors Giuliano and Lagarde.

21. By Article 1 of the Rome Convention, the rules of the Convention apply *"to contractual obligations in any situation involving a choice between the laws of different countries"*. I make two comments on this fundamental provision. First I do not accept Mr Berkley's submission that the Rome Convention does not apply because the dispute as to which law applies relates to a law other than one of a country. That argument would be hopeless in my view, even if the choice was simply between Jewish law and English law, for the reasons I shall express below but in fact the contest in this case is between English law, Swiss Law and Jewish law – in other words the situation does involve a choice between the laws of different countries. But the fundamental reason why the argument is hopeless is because the starting point for the Rome Convention was a point accepted by all countries party to that Convention, that laws could not exist in a vacuum; by 'laws' were meant laws enforceable in the courts of countries whether parties to the Convention or other states. Paragraph 32-081 of the 14th Edition of Dicey, Morris and Collins puts the matter succinctly and in my view correctly:-

> "**General principles of law, Stabilisation clauses.** Article 1(1) of the Rome Convention makes it clear that the reference to the parties' choice of "the law" to govern a contract is a reference to the law of a country. It does not sanction the choice or application of a non-national system of law, such as the *lex mercatoria* or general principles of law. It is true that in international arbitrations, where a government is a party to a contract, the parties may choose as the governing law the *"general principles of law"*, or even public international law. Prior to the 1990 Act it had been said in England that *"contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words . . ."* [See Lord Diplock in ***Amin Rasheed Shipping Corp v Kuwait Insurance Co*** [1984] AC 50 at 65] It is suggested that a choice of *lex mercatoria* or general principles of law is not an express choice of law under the Rome Convention. So also in ***Shamil Bank of Bahrain EC v Beximico Pharmaceuticals Ltd*** the Court of Appeal held that a choice of the principles of Sharia law was not a choice of law of a country for the purposes of the Rome Convention."

22. Further support for the view that the Convention had in mind the laws of a country, and that it was not intended that persons should be able to contract out of the Convention, is gained from other provisions of the Convention e.g. Article 3(3) the inability to derogate from mandatory rules of a particular country and Article 7 applying mandatory rules of another country "when applying under this convention the law of a country".

23. By Article 1(2) there are certain exceptions and the rules do not apply for example to contractual obligations relating to "wills and succession", a point relied on by Mr Berkley. Little help is available as to the precise scope of this exception in Dicey, Morris and Collins [see paragraph 32-033]. However it would seem to me that a compromise of an arbitration dealing with a dispute as to whether assets outside an estate should be brought into account in order that one party should gain his fair share could not be termed a contract relating to "wills and succession".

24. I ought at this stage to deal with the decision of Rix J in ***Al Midani v Al Midani*** [1999] 1 Lloyd's Reports 923 in which he expressed the view at page 930 that in the circumstances of that case *"it seems to me very likely that the applicable law of the agreement is either Shari'a law or such law modified by Saudi law . . . . . For these purposes I regard Islamic or Shari'a law as a branch of foreign law"*. Mr Berkley submitted this authority supported his argument that a law such as Jewish law could be recognised by the court as the applicable law. I do not accept Mr Berkley's submission. First Rix J was not applying the 1990 Act and the Rome Convention. Although no mention is made of why that was so, it is probable that, since what was in issue was the true construction of an agreement to arbitrate, it was appreciated that such agreements are excepted from the Rome Convention [see Article 1(2)(d) and Dicey, Morris and Collins paragraph 16-015]. Second even applying common law principles, as opposed to

the 1990 Act, Rix J was, as it seems to me, aware that the conventional view supported by the language used in the speeches in *Amin Rasheed* was that by applicable law was meant "the substantive law of the country which the parties have chosen" [see page 62], and that is why he used the language "a branch of foreign law". It is unclear what evidence there was as to view the Saudi courts took as to the enforceability of "strict Shari'a law". Third the choice being made was not so much between Shari'a law and such law as modified by Saudi law, but as between other laws and those two versions of Shari'a law, it not making a material difference whether strict Shari'a law or that law modified by Saudi law was applied to the interpretation of the agreement. Fourth, and finally, the use being made of Shari'a law, strict or modified by Saudi law, was to interpret the obligations under the agreement to arbitrate, which (as I shall seek to explain below) is a legitimate use of a body of law or rules which do not have the force of law of a country or state.

25. Thus the rules of the Convention apply to the compromise agreement. That being so a choice has to be made as to which is the applicable law, and the choice can only be between the laws of different countries. Article 3(1) provides:- *"A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."*

26. Three points should be noted – (1) the choice may be express; (2) if it is to be implied the implication must be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case; and (3) the choice can relate to the whole contract or part of a contract. The relevance of this last point may have some bearing on a point to be discussed hereafter, as to whether Jewish law has any relevance.

27. The compromise makes no express choice of the law of any country or indeed any express choice of law at all. Furthermore it cannot in my view be said that any implication of a choice of law of <u>any country</u> can be demonstrated with any certainty. It follows that one must move to Article 4, applicable in the absence of choice. The material parts of Article 4 provide as follows:-

> *"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.*
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> *2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is not closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situation or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. . . .*
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> *5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country"*

28. The choice lies between Swiss and English law and since no one has suggested that Swiss law is any different from English law, a decision as to which law is the applicable law is actually unnecessary. But if the issue did arise Article 4(2) would seem to indicate that since Mordecai and the executor brothers resided in England that English law should be the applicable law. Again one notes that different laws may apply to different parts of the contract.

29. It follows that as a matter of English conflict of laws principles there can be no question of Jewish law being agreed either expressly or by implication as the applicable law of the contract. The applicable law is English law.

Has Jewish law any relevance?

30. It seems to me that the answer is that it may have. By Article 10 of the Convention the applicable law, English law, will govern "(a) interpretation, (b) performance, (c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages, insofar as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions;(e) . . . [has no application by virtue of section 2(2) of the 1990 Act] . . ."

31. As a matter of English law it is possible to incorporate some provisions of foreign law as a term or terms of the contract. It was this aspect which was addressed in some detail in ***Shamil.*** Potter LJ in ***Shamil*** reasoned as follows:-

> *"49. Mr Hacker thus opts for a construction that the wording is apt, and intended, to incorporate into English law for the purposes of its application to the contract, the "principles of … Sharia". In this respect, and no doubt to avoid the difficulty that the principles of Sharia, generally stated, are of broad nature and application (indeed they are unexplored for the purposes of this litigation), Mr Hacker argues that the clause should be read as incorporating simply those specific rules of Sharia which relate to interest and to the nature of Morabaha and Ijarah contracts, thus qualifying the choice of English law as the governing law only to that extent.*
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> *50. In that respect, he seeks to rely upon the passage in Dicey & Morris (supra) at paragraph 32-086, which expounds the distinction between reference to a foreign law as a choice of law to govern the contract (or part of a contract) on the one hand and incorporation of some provisions of a foreign law as a term or terms of the*

contract in question. While observing that it is sometimes difficult to draw the distinction in practice, it is there stated that:

> *" … it is open to the parties to an English contract to agree e.g. that the liability of an agent to his principal shall be determined in accordance with the relevant articles of the French Civil Code. In such a case the foreign law becomes a source of law upon which the governing law may draw. The effect is not to make French law the governing law of the contract but rather to incorporate the French articles as contractual terms into an English contract. This is a convenient 'shorthand' alternative to setting out the French articles verbatim. The court will then have to construe the English contract, 'reading into it as if they were written into it the words' of the French statute.*
>
> *32-087 It often happens that statutes governing the liability of a sea carrier, such as the former Harter Act in the United States, or statutes implementing the Hague Rules … are thus 'incorporated' in a contract governed by a law other than that of which the statute forms part. The statute then operates not as a statute but as a set of contractual terms agreed upon between the parties. The parties may make an express choice of one law (e.g. English law) and then incorporate the terms of a foreign statute. In such a case the incorporation of the foreign statute would only have effect as a matter of contract."*

51. It does not seem to me that the passage cited or the authorities referred to in the notes thereto, assist the defendants. The doctrine of incorporation can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific 'black letter' provisions of a foreign law or an international code or set of rules apt to be incorporated as terms of the relevant contract such as a particular article or articles of the French Civil Code or the Hague Rules. By that method, English law is applied as the governing law to a contract into which the foreign rules have been incorporated. In such a case, in construing and applying those rules, where there is ambiguity or doubt as to their ambit or effect, it may be appropriate for the court to have regard to evidence from experts in foreign law as to the way in which the provisions identified have been interpreted and applied in their 'home' jurisdiction. However, that is still only as an end to interpretation by the English court in the course of applying English law and rules of construction to the contract with which it is concerned. . . . "

32. It was the above reasoning of Potter LJ which led the judge in the instant case to say at paragraph 74: *"It seems to me, in the light of* ***Shamil,*** *that if Jewish law is not available as the applicable law under the Rome Convention, there is no realistic prospect of successfully contending that the parties impliedly incorporated halachah (or such of it as relates to contracts) as a term or terms of the compromise agreement. No terms have been identified, let alone pleaded, as the corpus of terms apt to be implied. Further the effect of the supposed implication would be to substitute halachah law for Swiss or English law. This would be inconsistent with either of those laws being the applicable law. Those laws would only be a shell in which to incorporate a different non national law."*

33. ***Shamil*** was a case in which, as the paragraphs prior to the passages I have quoted show, the court was striving to find the true intention of the parties, and what it was not prepared to accept was a construction of a clause "*subject to the principles of the glorious Shari'a, this agreement shall be governed by and construed in accordance with the laws of England"* in a way which by introducing some selected terms from Shari'a law would or might defeat the commercial purposes of the contract. It may be that for actual incorporation it is necessary to identify *"black letter"* provisions, but that seems to me to be another way of saying that there must be certainty about what is being incorporated. If one is dealing with foreign law that would require evidence as to that law and evidence as to how clear it is. "*The principles of the glorious Shari'a law"* would seem to be a very uncertain phrase when, as I understand it, there can be different schools of thought as to what Shari'a law lays down (as indeed ***Al Midani*** indicates). I cannot for my part see why, in a context such as exists in this case, compromising disputes between Orthodox Jews under Jewish law, where it seems to be common ground there is a distinct body of law, Jewish law may not be relied on as part of the contractual framework.

34. Points which are said to arise outside questions of interpretation e.g. duress, mistake, frustration and the consequences thereof will be a matter of English law as the applicable law of the contract. But as an aid to interpretation (and in my view not simply because some ambiguity can be identified), the context of the compromise, including the fact that it was settling disputes, the subject of an arbitration, which was applying Jewish law, could make Jewish law material. I say 'could' only because apart from two matters – the interpretation of Clause 4 and the question whether the executor brothers were taking on personal responsibility - no question of interpretation has been identified as arising and even in those areas there has not been any evidence or pleading suggesting that Jewish law would dictate any different interpretation than English law.

35. This solution under which matters of interpretation can be assisted by rules or a law different from the applicable law of the contract, but matters affecting the contract as a whole must be dealt with by the applicable law is, as it seems to me, consistent with the Convention. It must be the solution applied in situations in which different laws can be applied to different parts of the contract, as envisaged by the Convention. If the applicable law of the contract is A but law B is expressed to cover some aspect of the contract, there has to be only one law which can cover matters such as mistake, repudiation of the whole contract etc and that must be the applicable law of the contract as a whole. The different law can only apply to that part of the contract, so as to affect the interpretation of that part of the contract.

36. I should perhaps also make clear that I do not agree with the judge when he suggests that if the parties did expressly agree Jewish law as the applicable law of the contract that might have the effect of rendering the

contract unenforceable [see paragraph 50 (ii)]. In my view the effect would be that such a provision should be ignored for the purposes of identifying the applicable law, but that once the applicable law had been identified it would be for that law to decide the extent to which such a provision incorporated Jewish law as part of the contract.

37. I should mention two further points so that there is no misunderstanding. Section 46 of the Arbitration Act 1996 expressly recognises that arbitral tribunals can and indeed should decide disputes in accordance with the law chosen by the parties "or if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal". Thus an English court would stay proceedings brought in breach of the arbitration clause even though some set of principles not law or a law other than the law of a particular country had been chosen as the applicable law to govern their disputes. It would furthermore enforce an award made by arbitrators applying any "considerations" agreed between the parties.

38. Thus, if parties wish some form of rules or law not of a country to apply to their contract, then it is open to them to so agree, provided that there is an arbitration clause. The court will give effect to the parties' agreement in that way.

39. The second point to which I should refer is the fact that there is a proposal for a Rome 1 Regulation to amend Article 3(2) of the Rome Convention to allow parties to choose as the applicable law "the rules of the substantive law of contract recognised internationally or in the Community" [see footnote 98 page 1568 in *Dicey, Morris and Collins*]. Mr Berkley sought to support his argument by reference to this proposal. In my view he gains nothing from it because the court must deal with the Rome Convention as it is. That is the law to be applied. Only if the amendment were adopted and became part of English law, and there is a doubt as to whether it ever will, would it have any impact. Even if it did become part of English law, it is difficult to think that it could go further than assist interpretation, since remedies, if they were to be effective, would have to flow from a system of law in the sense of a law of a country.

40. I now turn to other matters resolved by the judge.

Clause 4 of the Compromise Agreement

41. The argument of Mr Berkley as I understand it is that clause 4 required documents to have been destroyed (if destruction was to be the method of complying with the condition precedent) prior to the date of the compromise. If documents still existed as at the date of compromise he submits the obligation of party A was to hand the same over to party B. I confess to being quite unable to see how the wording of clause 4 could be so construed. The condition simply requires that confirmation has been given to the Dayonim, and that the Dayonim has confirmed to Party B that "papers, documents tapes etc" have either been "returned to party B or were destroyed [from this world]….".

42. That said, it seems to me the court should not at this stage rule in anyway as to the possible effectiveness of this clause or as to what compliance with the same might or might not have on the obligations of the parties pending consideration of such arguments as may arise as to the legality or otherwise of the compromise as a whole.

Mistake

43. The mistakes on which Mr Berkley submits the executor brothers should be entitled to rely are twofold. As to the first (mistake (a)) he puts the matter this way:- *"The Defendants contend that Mordecai entered into the Compromise Agreement in the belief that Rabbi Schmerler was empowered to administer a Shavuah obligation. That state of mind was arguably induced by the Second Claimant's representations to Rabbi Schmerler and led to a genuine but mistaken belief on Mordecai's part that because of the doctrine of Raglayim LeDavar, Rabbi Schmerler was in a position to demand that each of the five siblings perform a Shavuah ceremony or be charged a forfeit in default."*

44. As to the second (mistake (b))he puts the point this way:- *"There was raised a further defence of mistake which followed from the evidence provided by Esther. The effect of the Shtar Chazi Zachor and the decision of the Rabbi Belsky Beth Din were to the effect that the Estate was indebted to Esther and was in fact insolvent at the date of the Compromise Agreement. The effect of the Shtar Chazi Zachor was not known (at least by the Defendants) and meant that in reality there was nothing of value to form the subject matter of the Compromise Agreement. The situation is analogous to the perishing of the asset before the date of contract."*

45. As to mistake (a) what is being alleged is not a common mistake but a unilateral mistake and although it is not at this stage pleaded it is submitted (and as I understand it would by amendment be pleaded if leave were granted) that Samuel acting for his father induced the mistaken belief by his representations to Rabbi Schmerler. What the judge held was that such might amount to duress, but would not provide a ground for avoiding the contract on the ground of mistake since to obtain relief the mistake would have to be as to the terms of the contract.

46. The judge's view of the law may well be right, but it seems to me that until the full facts are ascertained as to precisely the role of Samuel in bringing about (if he did) some assertion by the Rabbi (if there ever was such an assertion), it would not be right to rule out arguments that, on the facts which will already be being explored in seeking to establish duress, some other legal label should entitle the defendants to relief.

47. As to mistake (b), the allegation here is of a common mistake and what it comes to is a mistake as to the existence or value of the estate. It is as yet unpleaded but I shall assume permission would be sought to plead as indicated in the submissions. In my view it is not arguable that the executor brothers could rely on a mistake as to the

existence or value of the estate. The executor brothers knew when entering the compromise that Esther was making a claim that might have an effect on the value of the estate. With that knowledge Mordecai then made the compromise, acting for the executor brothers and Esther. That compromise was meant to be completed within 6 months. I cannot see how any activity of Esther in obtaining an award could allow Mordecai and his executor brothers to obtain relief from having entered into the compromise; that is particularly so since (1) the compromise involved handing over assets which were in their hands and outside the estate; and (2) contemplated completion of the compromise prior to Esther obtaining any award in New York.

48. I would, in agreement with the judge, not allow mistake (b) to be pleaded.

Frustration

49. The assertion that the award in favour of Esther somehow frustrates the compromise suffers from all the same difficulties which I have spelt out when dealing with mistake (b) above. It seems to me that an allegation that an event brought about by a party on behalf of whom an agreement had been made frustrates an agreement is unarguable in itself, but when one adds that the event relied on took place some months after the agreement was meant to have been performed, the impossibility of the argument is compounded.

Uncertainty

50. The question is whether the executor brothers should be entitled to argue that the whole compromise is unenforceable on the ground of uncertainty. In agreement with the judge, in my view this is not a tenable argument. As to the identity of assets to be transferred (which seems to be the point raised in paragraph 33(1),(2) and (3) of Mr Berkley's skeleton), as the judge points out, by clause 6 the compromise allows party B to choose; and there is a machinery for valuation, and as to what is to happen if there is a transfer of less than the compromise figure [clauses 6 and 7]. As regards the capacity of Samuel, as the judge says it would appear that Samuel will act as trustee, but on any view such a doubt would not render the whole contract unenforceable. Similarly it seems to me that the judge's view as to the point taken on the role of Mr Lang is correct.

Personal Liability

51. The major part of the dispute before the Beth Din related not to the estate as such but as to what assets in the hands of the defendants should be brought into account. The compromise envisaged that assets would be transferred to a certain value from party B defined as Mordecai, David, Aaron, Jacob and Esther. It is party B as defined that have the rights to choose and it is on party B as defined that all the obligations are placed. If party B, as is alleged, have failed to carry out the compromise and have repudiated the same, then it seems to me clear that party B will be liable in damages and it further seems to me that that liability must be joint and several.

52. A question may arise as to how liability is to be shared between those identified as party B. That could be resolved at the trial if all parties were present. That is of no concern to the claimants. Having regard to the fact that the question of illegality is to be considered, it seems to me those parties not at present served should be served so as to give them an opportunity of arguing the point. Their presence for that purpose (if they appear) may allow for the liability between themselves if it arises to be resolved.

Conclusion

53. To the limited extent indicated in paragraph 42 on clause 4 and paragraph 46 relating to mistake (a), I would allow the appeal.

Lord Justice Sedley: I agree with both judgments.

Lord Justice Carnwath:

54. On the main appeal from the judgment of Christopher Clarke J, I agree with the judgment of Waller LJ., and with the order he proposes.

55. The second appeal arises from the separate trial by Nigel Teare QC ("the deputy judge") of a preliminary issue of law. As has been seen, one of the pleaded defences to the claim was that the compromise agreement was procured by duress. The claimants argued that, even if duress is established, rescission was no longer possible, because the parties could no longer be restored to their positions before the agreement. This was because, according to the claimants, they had destroyed all the documents related to the compromise, as required by clause 4 of the agreement. In other words *restitutio in integrum* or "counter-restitution" could not be achieved.

56. Christopher Clarke J seems to have proceeded on the basis that the documents had indeed been destroyed, and that the only remaining issue was one of law: whether that fact was sufficient to rule out rescission for duress. He put the issue thus: *"The act of destruction of the documents is one which has benefited the defendants and prejudiced the claimants. It can neither be undone nor reversed. Nor can any pecuniary relief put the claimants in as good a position as they would have been in if the agreement could have been rescinded and matters restored to the position in which they were before the agreement was made… Accordingly restitutio in integrum would not appear to be possible. It is not however clear that an inability to make restitutio in integrum is a bar to avoidance of a contract on the ground of duress. Avoidance of a contract for duress (as opposed to rescission for undue influence) is a common law remedy. In essence the illegitimate pressure imposed on the victim renders his apparent consent revocable: Anson's Law of Contract, 274. If, after the illegitimate pressure has ceased to operate, the victim treats the contract as valid, he can no longer revoke it. Equity, as a condition of granting rescission where there has been undue influence would require restitutio, at least in substance. It does not however necessarily follow that, if the victim of duress has not affirmed the contract, he loses his right of revocation if he cannot restore the other party to substantially the same position. At any rate I decline on an application for summary judgment to rule that that is so."*

57. Accordingly, he directed that there be a trial of the following legal issue: *"whether a party can avoid a contract procured by duress in circumstances where he cannot offer the other party substantial restitutio in integrum."*

That question was answered by the deputy judge in the negative, and his order contains a determination to that effect.

58. As Waller LJ has explained, matters have moved on since the preliminary issue was ordered, and the answer may well prove academic. On the one hand, it now appears that there is a triable issue as to what documents were in fact destroyed. On 26th January 2007, as part of the directions for trial, Andrew Smith J required the claimants to give particulars of the documents which they allege were destroyed. In the light of that, and other matters, the claimants accept that, even if counter-restitution is required, there is a triable issue whether that requirement can be satisfied on the facts of the case. Furthermore, Mr Tager before us accepted that, even if rescission were no longer possible, the defendants would not necessarily be without a remedy. It might be open to them, on the same facts, to counterclaim for damages for intimidation, and to set those damages off against the claim. The scope of the tort of intimidation in such circumstances is not wholly clear (see e.g. Burrows, *The Law of Restitution* 2nd Ed p 212-3). However, the availability and practical worth of such a remedy, if properly pleaded, can again only be tested at trial.

59. In the light of those developments, the determination of the abstract legal issue before us is of uncertain value in resolving the dispute between the parties. It would be tempting simply to say that it is inappropriate to deal with it, before the relevant facts have been found. However, there was no appeal against the direction for a preliminary issue in that form, and the appeal comes before us as one solely on the substance of the decision. Furthermore, the deputy judge's decision (which is reported at [2006] 3 WLR 946) now stands as the most recent judicial treatment of an issue of some general importance. If it is wrong, we should not leave it uncorrected.

60. Before the deputy judge, the argument turned specifically on the requirements of rescission for duress at common law. This was contrasted, on the one hand, with common law rescission for fraud, for which counter-restitution was a well-established requirement (see e.g. ***Western Bank of Scotland v Addie*** (1867) LR 1 Sc&Div 145); and, on the other, with equitable rescission for undue influence, for which again a form of counter-restitution was required, albeit subject to a more flexible criterion of "practical justice". The classic statement of the latter approach is in ***Erlanger v New Sombrero Phosphate Company*** (1878) 3 App.Cas.1218, 1278, per Lord Blackburn: *"… a Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."* (emphasis added)

In more modern times, the same approach was adopted and applied by this court in ***O'Sullivan v Management Agency and Music Limited*** [1985] 1 QB 428 (see p 458 per Dunn LJ).

61. Before the deputy judge, Mr. David Berkley QC for the defendants had submitted that duress at common law was to be distinguished, in that there was no necessary requirement for the party seeking rescission to offer counter restitution. He relied on the lack of any reported cases in which such a requirement had been imposed, and on the following passage by Professor Burrows (op cit p. 218): *"Most importantly, it appears that the bar that restitutio in integrum is impossible generally does not apply to rescission for duress. The explanation for that is that it would generally contradict the basis for the claimant's restitution to recognise a counter-claim by the defendant: if it was illegitimate for the defendant to demand a sum of money for a particular consideration, for example, carrying out work, it would be inconsistent then to award the defendant counter-restitution for that work."*

62. The judge rejected this argument. He could see no sensible reason for distinguishing between fraud and duress in this respect. He cited Lord Cross in ***Barton v Armstrong*** [1976] AC 104: *"… there is an obvious analogy between setting aside a disposition for duress or undue influence and setting it aside for fraud. In each case -and to quote the words of Holmes J. in **Fairbanks v Snow** (1887) 13 NE 596, 598 – 'the party has been subjected to an improper motive for action.'"*

He also referred to a passage in Duress, Undue Influence and Unconscionable Dealing by Professor Enonchong (2006) at para.28-012: *"The issue of restitutio in integrum has not presented itself in cases of rescission for common law duress. This is probably because in most cases of duress the complainant has simply paid money or agreed to pay money without receiving any benefit that he needs to return upon rescission. Since in such cases the question is only about the repayment of the money by the defendant, there is no issue in restitutio in integrum. The lack of discussion on this issue in case of rescission for duress should not be taken to mean that restitutio in integrum is not a requirement for rescission on the grounds of duress. If A is induced by B's duress to enter into a contract to buy B's car, it is unlikely that the court will allow rescission of the contract so that A can recover the price paid to B without insisting that A should return B's car. It would not be inconsistent with the basis of A's restitution for the court to insist on counter-restitution by A. In any event, restitutio in integrum is clearly a requirement in the case of rescission for other common law vitiating factors such as fraudulent misrepresentation."*

63. In the arguments before this court the differences between the two sides seem to have narrowed since the appeal was launched. In his original skeleton argument (August 2006), Mr Berkley had sought to justify a special rule for common law duress: *"Whereas fraudulent misrepresentation or indeed any misrepresentation is reliant upon a wrong that is extrinsic to the contract itself, as it merely induces a contract, duress by contrast is directly and intimately bound up with the contract formation, that is to say, the improper conduct operates at the point of entry into the*

contract itself. Effectively the victim's autonomy is threatened. Since mutuality is at the heart of contract an avoided contract cannot be enforced in either direction and no benefits including counter restitution can be sought. Effectively, once the contract is avoided for duress and the victim as an act of self-help takes back that which he parted with and/or is relieved from unperformed obligations, the loss lies where it falls in a manner analogous to illegality."

64. However, in his supplementary skeleton (February 2007, with Mr Selwyn Sharpe) he seems to have moved towards an argument based, not on the distinction between law and equity, but on their assimilation:

"…, the modern statement of the law is that, impossibility of restitutio in integrum is no longer a bar to relief when a claimant seeks to avoid/rescind a contract on the grounds of duress or under influence. Instead the Court's approach is to do practical justice between the parties by making orders for counter restitution, even if they cannot restore them to the precise position they were in prior to the contract being rescinded…

The correct approach is that counter-restitution is never in fact impossible: it should always be possible for the party seeking to rescind to pay a Defendant a sum of money to reflect counter-restitution of the value of benefits received by him. There can be no rational reason in a system of fused administration of law and equity why the liberal approach taken in equity cannot also be taken at common law…"

Just as in ***Erlanger v New Sombrero Phosphate Co*** the value of depreciation of a phosphate mine could be measured in order to make counter-restitution in equity, so, it is argued, the court can in the present case put an appropriate monetary value on the loss of the documents, even if this is represented by a reduction in the claimant's prospects of success in the arbitration (cf ***Kitchen v Royal Air Force Association*** [1958] 1 WLR 563).

65. To support this approach, he relies on another passage from Professor Burrows' book (p 246), where, having criticised some aspects of the decision in *O'Sullivan*, he adds: *"Despite this criticism, the decision in O'Sullivan is highly significant for one can strongly argue that, by its willingness to award complex mutual restitution, the Court of Appeal has effectively emptied the traditional 'restitutio in integrum must be possible' bar of any content. What is required is that the rescinding claimant makes counter-restitution, whether specifically or by a monetary equivalent: counter-restitution may be difficult to assess but it is never impossible."* (emphasis added)

66. As an example of this flexible approach, applied to facts similar to the present, Mr Berkley refers to ***Hulton v Hulton*** [1917] 1 KB 813, which concerned a wife's claim to rescind a separation deed for fraudulent misrepresentation. As part of the terms of the deed the litigation documents had been destroyed. This was held not to be a bar to rescission, because (in the words of Scrutton LJ, p 825): *"… it was the defendant who was anxious that those letters should be destroyed. I cannot in those circumstances treat the letters as so important to him that there can be no rescission because they cannot be brought back into existence."*

67. This shift of position by Mr Berkley removed much of the force from the learned disquisition presented in the skeleton of Mr Tager and Miss Levy, on behalf of the claimants. Their lengthy discussion of the history of the remedy of rescission in common law and equity deserves a place in an academic journal, but unfortunately it has lost much of its continuing relevance in the present case. As they acknowledge, at the end of this discussion, the battle ground has changed. *"The Appellants are now advancing a new argument that the court is invariably obliged by applying the 'practical justice' formula and that the Court will always conclude that the requirement will be satisfied."*

68. Thus, it seems, the defendants have abandoned the stance that common law duress was to be distinguished from undue influence at equity. Instead they have embraced the *Erlanger* "practical justice" criterion as applicable to both. But they have taken it a stage further, by arguing that by this test counter-restitution is never impossible. Counsel for the claimants do not dispute the "practical justice" approach, but submit that the extension is wrong in principle, and contrary to authority.

Discussion

69. 130 years after the "fusion" of law and equity by the Judicature Act 1873, an argument based on a material difference in the two systems would have faced an uphill task. Section 49 of the Supreme Court Act 1981 (or "Senior Court Act 1981", as it will be: see Constitutional Reform Act 2005 Sched 11) reproduces the effect of section 25(11) of the 1873 Act; it states: *"… wherever there is any conflict or variance between the rules of equity and the common law with reference to the same matter, the rules of equity shall prevail."*

70. In terms of their subject matter, duress and undue influence have much in common. In ***Royal Bank of Scotland v Etridge (No 2)*** [2002] 2 AC 773, 795, Lord Nicholls said: *"Equity identified two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed."*

Professor Enonchong (op cit p 82-3) expands on the same point: *"…. there was a protection gap between the two doctrines, with equity affording wider protection through undue influence than the common law through duress. In the past this protection gap was very wide, but the great expansion in the scope of duress in recent times has resulted in considerable overlap between the two doctrines, since both deal with overt acts of improper pressure such as unlawful threats."*

71. It would be particularly surprising to find Professor Burrows called into the lists as a champion for the contrary argument. His chapter on Duress quoted above (*op cit* p 211) starts with a plea that: *"In the modern law the historical divide between common law and equity should not be allowed to drive a wedge through uniting principle."*

He expanded on this theme in his professorial inaugural lecture (published as "We Do This at Common Law But That in Equity", 22 *Oxford Journal of Legal Studies* Spring 2002, p 1), in which he nailed his banner firmly to the fusionist mast. He commented specifically on the distinction still drawn in the academic literature between duress and undue influence (p 6): *"…nothing here turns on the distinction between common law and equity. One simply has different types of threats or pressure. Duress at common law traditionally comprised merely threats to the person but has since been expanded to include duress of goods and economic duress. Actual undue influence, in so far as concerned with threats or pressure as opposed to influencing another, covers other types of threat or pressure with many of the cases concerning threats to prosecute, sue or publish information about the claimant. The law can be perfectly well described by saying that all these various types of pressure or threat inducing a contract render the contract voidable. There is nothing to be gained by here referring to actual undue influence as opposed to duress or, more generally, there is nothing to be gained by here referring to common law and equity."*

72. Against this background, the passage previously cited (para 61 above), dealing with the issue of counter-restitution in respect of rescission for duress, cannot sensibly be read as intended to support a special *common law* rule. The passage is part of a section directed to a different purpose, that is, to argue against a distinction between contractual and non-contractual payments. I note that his assertion that the requirement for counter-restitution "generally does not apply" is not supported by specific authority.

73. On the other hand, the example used by him – an illegitimate demand for payment for work carried out - does point to the difficulty of too rigid a rule. To expand the example, one may imagine someone persuaded by improper means to pay an excessive amount for work done on his house, for example re-tiling of his roof. It is hard to see why it should matter whether the improper means was a threat or a fraudulent misrepresentation. In either case, one would expect the law to find a means to enable him to recover his money, without requiring him to undo the work to the roof. It may be open to debate whether he should be required to give any credit for the value of the work done, assuming it was a value to him. But there could be no justification for any such counter-restitutionary requirement, if the evidence was that the re-tiling had not in fact been needed.

74. It is unnecessary to explore such questions in the context of this case, where the facts are very different. The example shows, perhaps, that for the purposes of "*practical justice*", the primary objective may not always need to be to restore *both* parties to their pre ious positions. As Professor Treitel has said (in the context of rescission for misrepresentation): *"… the essential point is that the representee should not be unjustly enriched at the representor's expense; that the representor should not be prejudiced is a secondary consideration, which is only taken into account when some benefit has been received by the representee"* (Treitel, *Law of Contract* 11th Ed, 2003 p 380, a passage quoted by Burrows at p 178).

75. Returning to the question posed by the preliminary issue in this case, a definitive response is not possible or appropriate, until the facts have been found. I would be inclined to agree with the deputy judge that rescission for duress should be no different in principle from rescission for other "vitiating factors". However, the practical effect of counter-restitution, in the terms explained by Lord Blackburn in *Erlanger*, will depend on the circumstances of the particular case. In the present case, if (contrary to Clarke J's expectations) the defendants are able to establish that their consent to the compromise agreement was procured by improper pressure (whether that is characterised as duress or undue influence), it would be surprising if the law could not provide a suitable remedy. The form of the remedy, whether equitable or tortious, is a matter which cannot sensibly be decided until the facts are known, not only as to the nature and effect of the improper pressure, but also as to the identity and significance of the documents destroyed.

76. Mr Tager submits, with some justification, that the defendants' present stance is not reflected in their grounds of appeal. However, the court should not be constrained by the pleadings to answer a question of law which it regards as incapable of useful answer in the terms posed. Accordingly, the right course is to allow the appeal to the extent of setting aside the judge's answer to the preliminary issue, but otherwise to make no order.

David Berkley QC and Richard Selwyn Sharpe (instructed by Simon Bergin, Solicitors) for the Appellant
Romie Tager QC and Juliette Levy (instructed by Shammah Nicholls, Solicitors) for the Respondent