CC-2020-BHM-000031

Neutral Citation No: [2022] EWHC 94 (Comm)

Case No: CC-2020-BHM-000031

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (QBD)

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 20 January 2022

Before :

HHJ WORSTER

Between :

Last Mile Gas Limited	**Claimant**
- and -	
E.ON Energy Solutions Limited	**Defendant**

Nicola Allsop (instructed by **Shakespeare Martineau LLP**) for the **Claimant**
Emma Jones (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 16 November 2021
Draft Judgment: 7 December 2021

Approved Judgment

HHJ WORSTER :

The Application

1. The Defendant ("Eon") applies to strike out paragraph 10(6) of the Reply on the grounds that it fails to disclose reasonable grounds for bringing a claim, and alternatively seeks summary judgment on that element of the claim. Paragraph 10(6) provides as follows:

> *In the premises, even if (which is denied) the Claimant were wrong in its case on the true construction of cluse 3.2(a), the Defendant is in any event estopped, by way of an estoppel by convention, from denying that it is obliged to pay to the Claimant the charges set out in the Claimant's [Metering Charges Statement] in respect of the Claimant's provision of Supply Meter Installation.*

2. The application was made by notice dated 20 October 2021 and supported by a witness statement from the Defendant's solicitor Ms Taylor of 20 October 2021. The Claimant ("Last Mile") opposes the application and relies upon the witness statement of its solicitor Ms Lediard of 9 November 2021. I heard the application at the CCMC on 16 November 2021.

3. The principles to be applied on an application such as this are well established. CPR Part 3.4(2) provides that:

> *The Court may strike out a statement of case if it appears to the court-*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
>
> *(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings…*

4. Practice Direction 3A provides examples of cases where the Court may conclude that there are no reasonable grounds for bringing a claim. These examples include claims which are incoherent and make no sense, and claims which contain a coherent set of facts but where those facts, even if true, do not disclose any legally recognisable claim.

5. CPR Part 24.2 provides that:

> *The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-*
>
> *(a) it considers that-*
>
> *(i) that claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(ii) that defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial.*

6. Counsel both refer me to *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] where Lewison J (as he then was) sets out a summary of the principles to apply on an application for summary judgment:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman … ;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel … ;

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) … ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd …;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd … .

That summary was approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 [24] and is adopted by the editors of the White Book in the notes to Part 24.

The background

7. Last Mile is an independent gas transporter, providing gas transportation networks and metering. Eon ships gas through gas transportation networks including those networks operated by Last Mile. The parties have been trading with each other since about 2005.

8. Their contractual arrangements include the Independent Gas Transporter Uniform Network Code (" IGT UNC") which came into effect in 2007. Last Mile is a Pipeline Operator and Eon a Registered User for the purposes of the IGT UNC. Clause 3 of Part D provides as follows:

> *3.1 This clause 3 applies where the Pipeline Operator provides or has provided (whether before or after the date of implementation of the Code) the Supply Meter installation or any part of it*
>
> *3.2 Where this Clause 3 applies:*
>
> *(a) subject to paragraphs (d) and (e) and to Clauses 3.4 and 6.1, the Pipeline Operator will be responsible for securing (at its cost but subject as provided in this paragraph (a)) (on behalf of the Registered User) the installation (in accordance with Clause 2.2), maintenance, repair, exchange and replacement of the Supply Meter Installation or relevant part thereof provided by the Pipeline Operator, within a reasonable time after a request to do so and subject to payment of the charges (if any) in respect of the same provided for in the Transportation Statement or in the Metering Charges Statement.*

9. Last Mile's case is that these terms give rise to two sets of contractual obligations. First that Last Mile provide the Supply Meter Installations. For the purposes of this application I take it that Last Mile supplied the relevant meters. Secondly, that there is a corresponding obligation on Eon to pay the charges provided for in Last Mile's Transportation Statement or in its' Metering Charges Statement.

10. Last Mile's Transportation Statement for 2014 provided that meter provision would be via an approved service provider and that Eon would charge out costs plus 10%. Charges were to be on the basis of an annual operational lease designed to recover provision and maintenance costs.

11. Last Mile issued a Metering Charges Statement in 2017. This set out various categories of charges, described at paragraph 9 of the Particulars of Claim as:

> *... annual charges (which vary by meter type), transactional costs ... (including for instance installation, re-siting and testing), and meter removal charges (which reduce with the age of the meter).*

12. Last Mile's case is that the classic (or "dumb") meters it installed have a useful life of 20 years, during which annual charges are payable. If a meter is removed Last Mile lose the annual charges and so levy a meter removal charge to reflect that loss. The charge reduces with the age of the meter because it reflects the loss of annual charges.

13. Since 2013 Eon has been required by the conditions of its gas supplier licence to take all reasonable steps to ensure that "smart" meters are installed in the domestic premises to which it supplies gas. As a consequence it has removed over 3,000 dumb gas meters from "gas transportation systems" operated by Last Mile. The cost of the removal of the dumb meters and their replacement with smart meters has been paid by Eon.

14. Last Mile's claim arises because it says that it is entitled to meter removal charges calculated in accordance with its Metering Charges Statement for the meters Eon has removed and replaced with smart meters. It has been invoicing Eon for these charges since February 2018. Eon have refused to pay any of the meter removal charges and argues that it is not liable to do so. There was some pre action correspondence in which the parties set out their respective cases, and on 10 November 2020 this claim was issued for the sum of £1,230,524. That sum continues to rise as further meter removal charges are invoiced by Last Mile.

The pleaded case

15. Eon's case is that the entitlement to impose charges derives from clause 3.2(a), and not from the Metering Charges Statement. The central issue between the parties relates to the construction of clause 3.2 of the IGT UNC. Eon's case in simple terms is that whilst Last Mile is entitled to impose charges under clause 3.2(a), that is only in respect of the matters expressly referred to in the clause. In other words the installation, maintenance, repair, exchange or replacement of the Supply Meter Installation. The word removal does not appear in clause 3.2 and so there is no entitlement to impose a removal charge; see paragraph 17.2 of the Defence. Further and alternatively Eon say that as a matter of construction, Last Mile are only entitled to impose charges on Eon insofar as Last Mile actually incurred any costs in respect of the Supply Meter Installation it provided; see paragraph 17.3 of the Defence. Here of course, the cost of removal has been borne by Eon. Those points of construction are not for determination on this application, but they set the scene for the argument before me.

16. In its Reply, Last Mile responded to Eon's case on the construction of clause 3(2)(a). Paragraphs 9(1)-(5) and 10(1)-(5) are of particular relevance. At paragraph 9(1) Last Mile sets out its case that its Metering Charges Statement is incorporated into the parties contractual relationship. At paragraph 9(2) it is said that the charges in the Metering Charges Statement are the quid pro quo (or the legal consideration) for Last Mile's obligations to provide the Supply Meter. Paragraph 9(3) sets out the relevant provisions of the Metering Charges Statement, referring in particular section 4 which deals with Meter Removals.

17. At paragraph 9(4) Last Mile gives this further explanation for the meter removal charges.

    (a) Charges in respect of the removal of Supply Meters are the corollary of the rental (ie annual) payments for meters which remain in situ. They are triggered when a Registered User removes the Supply Meter and thereby deprives the Pipeline Operator of the revenue it would otherwise earn over the remaining life of the Supply Meter by way of the annual charges in respect of the same. The meter removal charges represent compensation in respect of the loss of annual charges,

    (b) In other words, both the annual meter charges and the meter removal charges are charges which relate to the provision of the Supply Meters

> *within the meaning of Part D. They are two inextricable components of the Pipeline Operator's charges in respect of the provision of the Supply Meters. Both constitute "the Pipeline Operator's charges (if any) for the provision of Supply Meters" in accordance with the definition of a "Metering Charges Statement" in Part M of IGT UNC.*

18. At paragraph 9(5)(a) Last Mile asserts that annual charges with an additional charge for early replacement is the standard industry practice for the provision of supply meters. Sub paragraph (b) provides as follows:

> *… there is an industry wide practice and/or understanding that, in the absence (as here) of any other commercial agreement between [the parties], in consideration of the provision of the Supply Meter by the Pipeline Operator, the Registered User is obliged to pay the charges prescribed [in the Metering Charges Statement] pursuant to clause 3.2(a) …*

19. At paragraph 9(5)(c) Last Mile refer to the following matters in support of that proposition:

> *(i) Ofgem's letter dated 11 December 2008 to Shippers, Independent Gas Transporters and interested parties in which Ofgem expressly acknowledged that metering is part of "the existing contractual arrangements provided by the Network Code framework agreements"*
>
> *(ii) IGT UNC Modification Proposal iGT022, proposed by the Defendant itself, to remove reference to the "Metering Charges Statement" from the IGT UNC (and introduce instead a separate metering contract to be concluded as between the Pipeline Operator and the Pipeline User). In that proposal, the Defendant expressly recognised that: "Under the current arrangements, metering, although formally financially unbundled from transportation revenue, is still entrenched within the iGT Uniform Network Code". The Defendant's complaint, however, was that it considered it "inappropriate to continue to include metering provision and charging statements within the iGT Uniform Network Code".*

The Modification Proposal is at page 339 of the hearing bundle. Ofgem's response to the Defendant's proposal was to the effect that it needed more development. Eon subsequently withdrew the proposal.

20. Paragraphs 10(1)-(4) of the Reply respond to Eon's construction arguments as set out in the Defence at paragraphs 17.1 to 17.4. Paragraph 10(5) of the Reply is in the following terms:

> *It bears noting that the Defendant's case (now) on the true construction of clause 3.2(a), as set out at paragraph 17, is inconsistent with:*
>
> *(a) The fact that the Defendant has, throughout the course of the parties' relationship, paid the annual meter charges in accordance with the Claimant's MCS without protest (notwithstanding that there is no reference to "rental" or "annual" charges in clause 3.2(a) and notwithstanding that, taking the Defendant's case as pleaded in the Defence to its logical conclusion, those charges would also not be payable pursuant to clause 3.2(a)); and*

> *(b) The Defendant's previous implicit, if not express, recognition that the Claimant is entitled to impose the charges set out in its MCS pursuant to clause 3.2(a); see e.g. the facts and matters set out in sub paragraph 9(5))(c)(ii).*

21. Paragraph 10(5) of the Reply provides the context of the pleading of the estoppel by convention in paragraph 10(6). Paragraph 10(6) begins with the words "in the premises", which I read as referring back to the sub-paragraph which precedes it. Paragraph 10(5)(b) in turn refers back to the matters set out in sub paragraph 9(5)(c)(ii), in other words Eon's Modification Proposal. That appears to have been the intention of the pleading; see paragraph 20 of the witness statement of Ms Lediard (page 317 of the bundle). The phrase "in the premises" would also import the general background, but these appear to be the specific matters relied upon in the Reply in support of Last Mile's estoppel by convention argument.

22. On 20 April 2021 Eon made a request for Further Information pursuant to CPR Part 18. Last Mile responded on 26 May 2021. Requests 8 to 12 relate to paragraph 10(6) of the Reply and the pleading that:

> *... the Defendant is, in any event, estopped, by way of an estoppel by convention, from denying that it is obliged to pay to the Claimant the charges set out I the Claimant's MCS ...*

23. Requests 8-11 seek to identify the necessary elements of the estoppel by convention. I set out the requests and replies in turn.

> *8 Please identify in clear terms the alleged shared assumption of fact or law said to found the alleged estoppel by convention.*
>
> *The common understanding and/or shared assumption was that, in consideration of the provision of the Supply Meter by the Claimant, the Claimant was entitled to levy on the Defendant the charges set out in the Claimant's MCS*
>
> *9. Please identify with full particularity the manner in which the alleged shared assumption is said to have been communicated between the parties, including when and by whom any such communications were made.*
>
> *This is a matter for evidence in due course. Without prejudice to that, the Claimant refers (without limitation) to the facts and matters pleaded in paragraph 10(5) of the Reply.*
>
> *10. Please identify with full particularity how the Claimant is said to have relied upon the alleged shared assumption, including when and by whom there was any such reliance.*
>
> *This is a matter for evidence in due course. Without prejudice to that, the Claimant's reliance resides in its expectation that the Defendant would pay the meter removal charges set out in the Claimant's MCS and/or the fact that the Claimant has not to date exercised any of the rights available to it pursuant to [the IGT UNC] in respect of the Defendant's non payment, when it was entitled to do so.*
>
> *11. Please explain why it is said it would be unjust or inequitable for the Defendant to resile from the alleged shared assumption.*

> *Whilst this is a matter for legal argument in due course, see response 10 above*.

24. Eon was not satisfied with these replies, and by solicitors letter of 9 June 2021 gave Last Mile a further opportunity to deal with the requests in correspondence before it made an application to strike out. In reply Last Mile indicated that the matter was clearly and sufficiently pleaded in the Reply and the Further Information provided.

25. At paragraphs 20 to 35 of her witness statement in opposition to the application, Ms Lediard deals with a number of matters relevant to this application. She summarises Last Mile's position in the following way:

> *25. It is the Claimant's position that the Defendant has routinely paid the annual rental charges for classic meter rentals which arise under the Metering Charges Statement … and prior to that, the transportation statement. That conduct of paying rental payments has established the common assumption that all of the charges referable to or arising out of the Claimant's supply of a meter would be payable.*

She then goes on to repeat the point made in the Reply that meter removal charges are the corollary of the rental (or annual) charges.

26. Secondly, at paragraph 27 she explains the absence of levying meter removal charges prior to 2019. In simple terms, her evidence is that this was because meters were not being replaced very often. Her evidence is that it is only since 2013 when gas suppliers licences were changed to require the replacement of classic meters with smart meters, that there was a real risk of these meters being removed. That lack of charge is not an indication of an absence of a common assumption. Or as Mr Lediard puts it at the end of paragraph 27:

> *Rather than an assumption not existing throughout the entirety of the commercial relationship, it did exist but was historically not exercised because of the low risk of meter removal.*

27. Thirdly, at paragraph 28 there is a further reference to Last Mile's case that clause 3.2(a) was being interpreted and applied throughout the industry in accordance with Last Mile's understanding, and that the Defendant was always aware of that fact. That leads into the evidence of Eon's Modification Proposal of 4 March 2009. The passage relied upon from Eon's proposal is as follows:

> *… the Metering Charges Statement is not subject to the modification process of the network code, nor does it have a formal change process that will allow Shippers to engage with Transporters over the nature of the charges or the terms on which metering is provided. In the current arrangements, although metering should be at the "request" of the Shipper, the Shipper has no ability to influence the level of charges applied or to negotiate the terms on which it is provided. More worryingly is that the SLC process that ensures the licence protection from unreasonable charges that is applied to transportation revenue does not extend to metering charges – which is an unacceptable risk to Shippers and ultimately to customers as these costs feed into the prices customers pay for their energy.*

Last Mile suggest that Eon understood that the Metering Charges Statement allowed the Transporters to set their own "metering charges".

28. Fourthly at paragraph 31 the point is made that Eon have not sought any further clarification of what metering charges could be included in a Metering Charges Statement, but have proceeded since 2009 on the basis that the Metering Charges Statement is incorporated by reference in clause 3(2)(a), and may include charges over which Eon has no control. Ms Lediard returns to the point that Eon have paid the annual charges Last Mile have raised for meters, and that meter removal charges are a "corollary" of the annual charge. The word corollary is used here to mean that the one follows from the other, or that they go "hand in hand", or that they are two sides of the same coin.

29. Finally at paragraph 33, a new matter is raised. Ms Lediard sets out her instructions that based on the common assumption as to the interpretation of the IGT UNC and Eon's continued payment of the annual charges, Last Mile believed that it was entitled to raise meter removal charges should it need to do so.

> *By the point that it was appropriate to levy the charges … [Eon] refused to pay … and by that time [Last Mile] had relied to its detriment on the common assumption and conduct referred to as it had not sought to re-negotiate terms earlier.*

It is said that it would be unjust and unconscionable to allow Eon to go back on the common assumption because that would mean that Last Mile had supplied Eon for many years on terms where it has not been properly compensated for the revenue lost by the removal of meters.

Estoppel by convention

30. The principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings were considered and stated by Briggs J (as he then was) in *HMRC v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [52].

    (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

    (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

    (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

    (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

    (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

31. Briggs J's first principle made no reference to the need for conduct to have "*crossed the line*", but in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch) at [137] he accepted the submission that his first principle

should be amended to include that "*the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred"*. The Court of Appeal reached much the same view in *Blindley Heath Investments v Bass* [2015] EWCA Civ 1023. Hildyard J, giving the judgment of the court at [92] made clear in relation to the first principle that "*something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption."*

32. The law in this area was recently reviewed by the Supreme Court in *HMRC v Tinkler* [2021] UKSC 39. The leading judgment was given by Lord Burrows, who affirmed that the *Benchdollar* principles as amended by *Blindley Heath*, were a correct statement of the law on estoppel by convention in the context of non-contractual dealings [53]. Lord Hodge, Lady Arden and Lady Rose agreed. Lord Briggs gave a short judgment of his own, but agreed with Lord Burrows that the *Benchdollar* principles as amended were an accurate summary of the relevant law [92]. At [51]-[52] Lord Burrows explained the ideas underpinning the first three principles in *Benchdollar* to assist in understanding and applying them:

> *51. ... Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.*
>
> *52. It will be apparent from that explanation of the ideas underpinning the first three Benchdollar principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from Spencer Bower, The Law Relating to Estoppel by Representation, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:*
>
> *"In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view)."*
>
> *For a similar statement, using the same wording of C's reliance on "the subscription" of D to the common assumption, see the present edition of that work, Spencer Bower: Reliance-Based Estoppel, 5th ed (2017), para 8.26. But this is not to suggest that C must be relying solely on D's affirmation of, or subscription to, the common assumption as opposed to C relying on its own mistaken assumption. It is sufficient that, as D intended or expected, D's*

> *affirmation of, or subscription to, the common assumption strengthened, or influenced, C in thereafter relying*

33. The parties in *Tinkler* were not dealing with each other contractually, but Lord Burrows took the opportunity to consider the application of the *Benchdollar* principles to parties dealing contractually at [78]:

> *There is one linked point of general importance to the law on estoppel by convention. As we have seen, the facts of Benchdollar, like this case, involved mutual dealings between the parties but did not concern a contract or transaction between the parties. Yet the principles laid down by Briggs J (as amended) have been treated as also being applicable to contractual dealings; see, for example, Blindley Heath. In Stena Line Briggs J himself drew on The August Leonhardt (a contractual case) in qualifying his first principle. In Mitchell v Watkinson [2013] EWCA Civ 1472 ...para 52, it was suggested that there is no significant difference between the principles for estoppel by convention applicable to non-contractual dealings, set out in Benchdollar, and those applicable to contractual dealings set out in Chitty on Contracts. While it is possible that there may be some differences required by the relevant contractual or non-contractual context (and, although the Benchdollar principles do not refer to the cause of action/defence issue, one must bear in mind what has been said about that issue in para 76 above), it would appear that the Benchdollar principles are being viewed as general principles applicable to estoppel by convention. It is significant in this respect, that the present edition of Spencer Bower: Reliance-Based Estoppel, 5th ed (2017), chapter 8, centres its whole analysis of estoppel by convention on the Benchdollar principles. Although it is unnecessary to decide this in this case - and we heard no submissions on it - there appears to be no good reason to confine them to non-contractual dealings. In my view, the five Benchdollar principles, with the Blindley Heath amendment to the first principle, comprise a correct statement of the law on estoppel by convention for contractual, as well as non-contractual, dealings.*

34. These principles, as affirmed in *Tinkler,* have since been applied in the context of contractual dealings by the High Court. Ms Jones refers me to *Airfinance v Saudi Arabian Airlines* [2021] EWHC 2330 (Comm) and *Almacantar (Marble Arch) SARL v The Railway Pension Exempt Unit Trust* [2021] EWHC 2385 (Comm). *Airfinance* was an application to amend in a contractual case. Mr Philip MacDonald Eggers QC sitting as a Deputy High Court Judge applied the principles in *Tinkler*; see [27]-[30]. I also note his approach to the need for the party raising the estoppel to plead some detrimental reliance; [34]. *Almacantar* was an application for summary judgment and/or strike out in a contractual context. Sir Ross Cranston applied the principles as affirmed in *Tinkler*. The parties were content for him to do so, on the basis that they reflected the established principles; see [71]-[75]. Ms Jones makes much the same submission.

35. Ms Allsop takes a slightly different position. The essence of her submission is that what is required to prevent a party going back on an assumed state of facts, is that it would

be unjust or unconscionable for them to do so, rather than there being a requirement for something that is to be labelled as detrimental reliance. She relies firstly upon the speech of Lord Steyn in *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878 at 913:

> *It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption… It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention*.

36. In addition to Lord Steyn's speech she relies on the decision of Joanna Smith QC (as she then was) in *First National Trustco (UK) Ltd v Page* [2019] EWHC 1187 (Ch) at [113]:

> *(iii) there is a requirement for the party claiming the benefit of the convention to have relied upon it in the sense of being materially influenced by it or having acted upon it;*
>
> *(iv) but it is not necessary in cases involving contractual dealings to establish detrimental reliance in order to prove unconscionability. Material influence such that it would be unconscionable to allow the other party to resile from the convention will be enough*.

37. Further, in her skeleton argument at paragraphs 22 and 23 Ms Allsop refers to the following passages from "Estoppel by Conduct and Election" 2nd ed (2016), edited by the eminent Australian judge Mr Justice Kenneth Handley.

> *8-009 The change of position that supports an estoppel by convention may be entry into the relationship which creates the convention, or as in Texas Bank, entry into the convention which creates the relationship. The estoppel prevents a return to the previous relationship and there is no need to evaluate the detriment that a return to the previous relationship would cause to the party enforcing the estoppel. This is the position with estoppels by deed and with estoppels by convention such as the tenant's estoppel against disputing his landlord's title. Both are enforceable without considering the detriment avoided by the estoppel…*
>
> *15-035 … The estoppel compels adherence to the relationship and the detriment it prevents is a return to the previous relationship. In analogous cases a tenant cannot challenge his landlord's title and a party to a deed cannot contradict its recitals. In those cases the Court enforces the estoppel*

> *without weighing the benefits conferred by the estoppel that would be lost if it could be repudiated*."

38. The authorities and text to which Ms Allsop refers pre date *Tinkler*, and whilst of considerable weight, must be seen in the light of that decision. That is not simply because it is a decision of the Supreme Court. There are three points in particular. Firstly, Lord Burrows referred to the passage from Lord Steyn's speech in the *India Steamship* case in the course of his review of the development of estoppel by convention in English law coming into *Benchdollar*. It was one of the six leading cases he dealt with; see [28][39] and [41]. He plainly took it into account when affirming the *Benchdollar* principles.

39. Secondly, Lord Burrows took the opportunity to deal with the position in contractual cases in his judgment at [78]. It was an issue which he described as being of general importance. In doing so he recognised that it was possible that there may be some differences required by the relevant contractual or non-contractual context. So here the court is to consider how the parties dealt with each other against the background of their contractual regime. But the effect of Lord Burrows' judgment is that there are no significant differences between the principles to be applied in contractual and non contractual cases. He considered that there was no good reason to confine their application to non-contractual cases, and none was suggested to me in the course of argument. Moreover, that approach has since been applied by two Judges in the High Court since the judgments in *Tinkler* were handed down, and I should follow their approach unless I consider that it is wrong.

40. Thirdly, Lord Burrows considered the requirement of unconscionability in estoppel by convention in his judgment at [64].

> *What about unconscionability? This was mentioned as part of the fifth of Briggs J's principles in Benchdollar; and in other leaner formulations - such as that of Lord Steyn in The Indian Endurance - it has been put forward as playing an even more central role. In most cases, in line with Briggs J's statement of principles, unconscionability is unlikely to add anything once the other elements of estoppel by convention have been established and, in particular, where it has been established that the estoppel raiser has detrimentally relied on the common assumption. However, one can certainly envisage exceptional cases where unconscionability may have a useful additional role to play. For example, even if all the other elements of estoppel by convention can be made out, fraudulent conduct by the estoppel raiser would rule out estoppel by convention …*

It seems from this treatment of the subject that it is detrimental reliance which leads to unconscionability for the purposes of establishing the estoppel. Unconscionability may play an additional role in preventing the estoppel arising, because the party relying has acted badly. Different facts bring out different aspects of the principles, and the process

of their application allows the court some flexibility. But it is the *Benchdollar* principles which apply, not some other formulation.

Applying the *Benchdollar* principles

41. The argument focussed on three aspects:

    (i) the common assumption;

    (ii) whether the common assumption crossed the line; and

    (iii) detrimental reliance.

42. Dealing firstly with the submissions made on behalf of Last Mile. The first matter to consider is the common assumption contended for. It does not appear from paragraph 10(6) of the Reply, although it might be spelt out of paragraph 10(5)(b). The Part 18 replies provided in May 2021 state that:

> *The common understanding and/or shared assumption was that, in consideration of the provision of the Supply Meter by the Claimant, the Claimant was entitled to levy … the charges set out in the Claimant's MCS.*

Whilst Ms Allsop defends that formulation, it required her oral submissions to bring out the true nature of Last Mile's case. Her focus was on the fact that the parties had conducted themselves in accordance with a common assumption that the mechanism for charging for metering services was by reference to the Transportation Statement and the Metering Charges Statement, rather than some other mechanism limited to the payment of charges for services expressly referred to in clause 3(2)(a).

43. That common assumption is said to arise out of two matters. Firstly Eon's payment of annual metering charges, despite the fact that clause 3(2)(a) makes no express reference to "annual charges" or the like. The payment of these charges, without protest, is said to be an outward manifestation of the parties' common assumption. In support of the case for meter removal charges, Ms Allsop emphasises the point that meter removal charges are the corollary of the annual charges. Secondly Last Mile relies upon Eon's Modification proposal to Ofgem in 2009, to the effect that the Metering Charges Statement be removed from clause 3(2)(a) on the basis that pipeline operators such as Eon had no control over the charges which Last Mile could levy. Last Mile's case is that this proposal arose from Eon's realisation that it was liable to pay any charges covered by the Metering Charges Statement, and provides further evidence of the common assumption. If Eon had believed that only charges listed in clause 3(2)(a) could be levied in a Metering Charges Statement, it would not have said what it did and sought a modification.

44. To satisfy the first *Benchdollar* principle, there must be words or conduct crossing the line between the parties from which the necessary sharing of this assumption can properly be inferred. Last Mile rely upon the same two matters to demonstrate that the common assumption crossed the line: the payment of the annual charges and the Modification proposal. The payment of an annual charge crosses the line in the sense that it is a payment from one party to the other. The real issue with the payment of the annual charges is what can properly be inferred from that conduct. Whether the Modification proposal is conduct which crosses the line is far less clear. This was a proposal to Ofgem, and only indirectly related to the mutual dealings between the

parties. Ms Allsop submits that it was a publicly available document produced for the purposes of a modification to the arrangements within the industry, and that it would be superficial to suggest that it did not cross the line. In any event she submits that this is an issue of fact for trial, and not suitable for summary determination.

45. Thirdly, detrimental reliance. This is not expressly pleaded, and until recently Last Mile did not suggest that there had been any detrimental reliance. Ms Allsop confirmed that she did not pursue the argument raised in the Further Information at 10, to the effect that Last Mile had not exercised its rights under the IGT UNC in respect of Eon's non payment when it was entitled to do so. The point was misconceived. The estoppel argument arises only if Last Mile is wrong on its case as to the construction of clause 3(2)(a), and in those circumstances, as a matter of contract, it would not be entitled to enforce those rights. However Last Mile did pursue the point raised by Ms Lediard at paragraph 33 of her witness statement, to the effect that Last Mile relied on the common assumption to its detriment in not seeking to renegotiate terms earlier, to include meter removal charges, and proceeded on the common assumption that it could raise such charges by way of a Metering Charges Statement.

46. Turning to Eon's case. Firstly it denies that there was any such common assumption, or that there were words or conduct which crossed the line. Ms Jones submits that it does not follow from the payment of the annual charges for the use of a meter that Eon shared an assumption that it was also liable for the payment of a meter removal charge (or any other charge) if and when Last Mile produced a Metering Charges Statement and included a charge for meter removals within it. Or to put it another way, payment of annual charges over the years in circumstances where there was no Metering Charges Statement, and no meter removal charges, is no evidence of the shared assumption contended for. Further, Eon's case is that an annual charge and a meter removal charge are fundamentally different. The first relates to the use of a meter, whereas the removal charges are to compensate for lost revenue. The two do not go hand in hand. Nor does the Modification proposal provide evidence of a shared assumption, or amount to words or conduct which crosses the line. The proposal refers in general terms to metering charges, and makes no mention at all of meter removal charges.

47. Ms Jones also draws attention to the letter sent by Eon to Last Mile dated 5 February 2010 (bundle page 270-1), which ends with this:

> *... we do not agree that publication of a Metering Charges Statement is a valid contract for commercial metering arrangements and as such we will not accept any charges for premature replacement of meters*

The letter shows that Eon were alive to the possibility that Last Mile would levy meter removal charges. But more importantly it is positive evidence from not long after the Modification proposal, and many years before the publication of a Metering Charges Statement, that Eon was not proceeding on the common assumption that it would be liable for meter removal charges, nor that it recognised a Metering Charges Statement as a valid basis for charging. I note that whilst the letter was expressly referred to at paragraph 58.2 of Ms Taylor's witness statement under the heading "Inconsistent with incontrovertible facts", Last Mile did not seek to challenge the letter in its evidence in response.

48. Ms Jones also questions Last Mile's case as to when this common assumption is said to have arisen. The parties have been in a contractual relationship since 2005. At

paragraph 27 of her witness statement Ms Lediard's evidence was to the effect that this assumption had always existed. But at paragraph 31 she appears to say that it ran from 2009. Ms Jones submits that Last Mile's case in this regard is incoherent.

49. In addition to the requirements of the first *Benchdollar* principle, it is convenient at this point to consider whether the conduct Last Mile relies upon can satisfy the requirements of the second and third *Benchdollar* principles. Is it realistic to argue that Eon's conduct conveys to Last Mile an understanding that Eon expected Last Mile to rely upon this common assumption in the context of their contractual dealings? Lord Burrows' judgment in *Tinkler* at [52] is of assistance here. It is plain from the letter of 5 February 2010 that Eon did not actually intend Last Mile to take from its conduct a common assumption of the kind contended for. The question is whether Last Mile could have reasonably understood that Eon was subscribing to such a common assumption. Eon's case is that Last Mile relied upon its independent view.

50. The evidence of the payment of the annual charges and the Modification Proposal is at best ambiguous. Last Mile see the payment of the annual charges as indicating that Eon will pay charges in accordance with a mechanism which incorporates a Metering Charges Statement. But that does not necessarily follow. Eon may be content to pay annual charges for the use of the meters, but it is unreal to suggest that this demonstrates a shared assumption that Eon will pay some further charge which might be levied in the future, even if it had a logical connection to the annual charge. The fact that this assumption is said to have arisen over a period of years when there was no Metering Charges Statement adds to that unreality. Even taken with the Modification Proposal, there is nothing Last Mile can point to which demonstrates a shared assumption.

51. I reach a similar conclusion on the related question of whether the conduct crossed the line. It is not realistically arguable that this material shows that Eon were expressly sharing this common assumption with Last Mile. Last Mile cannot have reasonably understood that Eon was subscribing to such a common assumption, or expecting Last Mile to rely upon it. The position is put beyond sensible argument by the letter of 5 February 2010 where Eon say expressly that they will not be paying removal charges, and that it does not accept that the Metering Charges Statement is the contractual basis for charging. Whether or not that is right, Last Mile could not have read that letter as being anything other than contrary to the common assumption it asserts, and it is unrealistic to argue that it could have thought that Eon shared the common assumption it contends for after receiving that letter.

52. Finally the fifth *Benchdollar* principle. It is said either that Eon will have benefitted if permitted to resile from the common assumption, or that Last Mile will have lost from not renegotiating earlier, and that consequently it would be unconscionable to allow Eon to resile from the common assumption. None of this is pleaded. Ms Allsop submits that there is at least an arguable case. Ms Jones submits that there is no detrimental reliance, that Last Mile's expectation that Eon will pay the meter removal charges is based upon its own independent view, and that is not capable of constituting reliance. The assertion that there was a lost opportunity to renegotiate is unparticularised.

53. A party relying on an estoppel has a duty to plead it clearly. There are failings in the way Last Mile have pleaded its case, in particular in relation to the common assumption and its detrimental reliance (or that it would be unjust or unconscionable to allow Eon

to resile from the common assumption). Ms Jones submits that one of the purposes of a pleading is that it is a critical audit of the party's case. Last Mile fail that test. That said, if I was satisfied that Last Mile's case for an estoppel by convention had a real prospect of success, I would not strike it out on this application without giving Last Mile one further opportunity to plead the matter properly. The claim is still at a relatively early stage, and Eon can be compensated in costs.

54. This is not a case where it is suggested that the Court can expect further relevant evidence at trial. The parties are well resourced and have had ample opportunity to investigate the matter. The relevant evidence is all before the court. I also agree with Ms Jones's submission that the relevant principles of law were settled by the Supreme Court in *Tinkler*.

55. On that evidence I conclude that Last Mile's case that an estoppel by convention arose in the terms it alleges has no real prospect of success, and that there is no other compelling reason why that issue should be disposed of at trial. Last Mile has no real prospect of establishing the first three *Benchdollar* principles, and its case on the fifth is problematic. I give summary judgment for Eon on this issue.