Neutral Citation Number: [2011] EWCA Civ 353

Case No: A3/2010/0308

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE WALKER
2008 folio No: 548

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2011

Before :

LORD JUSTICE RIX
LORD JUSTICE CARNWATH
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

ING BANK NV	**Appellant**
- and -	
ROS ROCA SA	**Respondent**

- -
- -

Stephen Phillips QC & Paul Stanley QC (instructed by **Messrs Allen & Overy LLP**) for the **Appellant**
Charles Graham QC & Simon Colton (instructed by **Messrs Izod Evans**) for the **Respondent**

Hearing dates : Monday 29th & Tuesday 30th November, 2010

- -

Approved Judgment

LORD JUSTICE CARNWATH :

Introduction

1. This appeal concerns the construction of a clause governing the calculation of an "additional fee" for financial services provided by ING Bank NV ("ING") to Ros Roca SA ("Ros Roca"). In monetary terms ING claims €6,700,000; on Ros Roca's interpretation, upheld by the judge, the correct amount is €943,922.44. The cross-appeal is based on the contention that, even if ING succeeds on the construction issue, it is precluded by estoppel from relying on that construction.

2. Ros Roca is a Spanish company specialising in waste and environmental services. ING is a Dutch bank, which in 2006 acted as financial adviser to Ros Roca in connection with negotiations for the purchase of another company, Dennis Eagle Group Ltd ("DEG"). ING also provided financial assistance by underwriting a bridging facility of up to €63,500,000. It was a term of that arrangement that the funds provided would be repaid through a capital increase to be subscribed by a third party investor (or "partner"). Under a separate agreement, Ros Roca engaged ING as its exclusive financial adviser in connection with the search for such an investor.

3. The terms of that agreement were set out in a letter dated 31 October 2006. For reasons explained by the judge this agreement has been referred to as "the Hawk Retainer". In due course a suitable investor was identified, Deyà Capital SCR, S.A. ("Deyà"). Under an investment agreement dated 7 December 2007 Deyà made an equity investment of €63,500,000, which enabled Ros Roca to repay the Bridging Facility. The appeal turns on the construction of the formula for calculating ING's fees, described by the judge as the "Entry Ratio".

The Hawk Retainer

4. ING undertook to act for Ros Roca –

> "in connection with the search of a partner to subscribe a capital increase in Ros Roca…("the Transaction") on the terms set out in this letter ("the Engagement")"

5. By section 1 ("Engagement and scope of work") Ros Roca retained ING as "its exclusive financial adviser". The services to be provided as appropriate included:

> "a) using information provided by the Company for the purposes of the Engagement, provide the Company with a valuation of the Ros Roca's assets that form part of the transaction;
>
> b) advising on the best long term financial structure for Ros Roca;
>
> c) preparation, with the assistance of the management of the Company, of the information which will be made available to the potential buyers, including the elaboration of a descriptive sale memorandum, with detailed information of the businesses and its economic financial situation;

> d) in consultation with the Company, developing, updating and reviewing a list of potential purchasers (the "List") and contacting those in the List which have been approved by the Company;
>
> e) advising the Company on the conduct of the Transaction, including advising on obtaining confidential undertakings from potential purchasers in respect of confidential information, dealing with enquiries from potential purchasers, accompanying potential purchasers as required on due diligence meetings with the Company and management and site visits, and distributing further information;
>
> f) advising and assisting in the negotiations the Company may hold with potential purchasers or any other party in the Transaction and its advisers and/or investors and, if appropriate, the advice on tactics which the Company may wish to adopt in relation to such negotiations;
>
> g) assisting the Company on the final terms of the Transaction;
>
> h) collaboration and co-ordination of the Company's other advisers, which will prepare the economic, financial, administrative, technical, tax and legal information (Vendor Due Diligence and Data room) to be delivered to the potential interested parties; and
>
> i) co-ordination of, and assistance with the preparation of any documentation required to execute the Transaction."

6. ING was to assist in co-ordination of the work of other advisers, but not so as to make it responsible for "any due diligence" on behalf of the company. Further:

> "It is solely the Company's responsibility to ensure that the information and advice relating to any due diligence and the implementation of any transaction contemplated in connection with the Engagement is received and considered by the Company as adequate for its purposes under the Engagement."

7. Section 2 ("Fees and expenses") provided for payment of fees to be paid "upon the successful completion of the Transaction". Section 2(a) provided for a fixed fee of 1% of "the higher of the equity bridge facility or the equity investment in Ros Roca". Section 2(b), which is at the heart of the appeal, provided for an additional fee as follows; payable on top of the fixed fee. It was in these terms:

> "b) an *additional Fee* based on the Enterprise Value/EBITDA 2006 ("EV/EBITDA 06") entry multiple implicit in the Transaction.

For an implicit EV/EBITDA 06 multiple in the following range	An additional fee per 0.1*x* multiple of
Below 8.9 *x*	EUR 0
Larger than 8.9 *x* and below/equal to 9.2 *x*	EUR 25,000
Larger than 9.2 *x* and below/equal to 9.5 *x*	EUR 50,000
Larger than 9.5 *x* and below/equal to 10.0 *x*	EUR 75,000
Larger than 10.0 *x* and below/equal to 10.5 *x*	EUR 100,000
In excess of 10.5 *x*	EUR 200,000

In this letter of agreement, the term "Enterprise Value" means the pre-money valuation of the partner's economic offer for its equity investment, plus any debt outstanding in Ros Roca before completion.

Illustrative example: in case of total equity raising from a financial partner of EUR 60m at an entry EV/EBITDA 06 multiple of 9.5*x*, proceeds for ING would amount to a total of EUR 825,000 (fixed fee of EUR 600,000 plus additional fee of EUR 75,000 + EUR 150,000).”

The construction issue

8. The first issue turns on the proper construction of the formula:

> "the Enterprise Value/EBITDA 2006 ("EV/EBITDA 06") entry multiple implicit in the Transaction."

9. There is no dispute about the numerator, that is the Enterprise Value as defined (or "EV"). It is common ground that "the pre-money value" referred to the valuation of the whole of Ros Roca prior to the investment, to which was to be added any debt outstanding, and that on that basis the amount of the Enterprise Value "implicit" in the Transaction was €441 million.

10. As to the denominator, it is also common ground that "EBITDA" refers to earnings before interest, tax, depreciation and amortisation; and that this is a measure widely used in financial markets to value companies. As the judge observed:

> "… the higher the EV/EBITDA multiple, the higher the capital value which the purchaser is prepared to ascribe to the Company in comparison with what is known about its underlying profits."

11. The dispute arises because of the specific reference to the date ("EBITDA 2006") in relation to a transaction which did not take place until the end of 2007. It is common ground that calculation of the denominator by reference to the 2006 EBITDA would result in a denominator of €33.1 million, and an Entry Ratio of 13.3. If instead the 2007 EBITDA is taken (as current at the time of the transaction in December 2007), the corresponding figure for the denominator becomes €42.6 million, and the Entry Ratio 10.35.

12. As already noted, the difference is very substantial. By an invoice dated 6 May 2008 ING claimed fees of €7,350,749.05, made up of a fixed fee of €635,000, expenses of €15,749.05, and an "additional fee" of €6,700,000, based on an entry ratio of 13.3. Ros Roca has paid €1,594,671 made up of the same fixed fee and expenses, but an additional fee of €943,922.44, based on an entry ratio of 10.35. The difference between the parties accordingly is over €5.7m.

Additional background facts

13. The judge made certain additional findings as to "surrounding circumstances… known to both parties" at the time of the agreement:

> "(1) The Hawk Retainer was part of the arrangements that were required in order to enable Ros Roca's purchase of DEG to take place in late 2006, and it and ING's underwriting of the bridging finance were mutually conditional.
>
> (2) At the time of the Hawk Retainer neither party could say what form the offer(s) to invest would take.
>
> (3) If Project Hawk achieved its aim, the successful bid to invest might explicitly identify an Enterprise Value in the sense used in the Hawk Retainer. If it did not then, because bidders would have to say how many shares they wanted for a fixed

amount of money, it would always be possible to extrapolate that value.

(4) At the time of the Hawk Retainer it was not contemplated that ING would have any control over which offer was eventually accepted, which was always a matter for Ros Roca (and in reality for Ros Roca's shareholders). Indeed, there was to be no obligation on the part of Ros Roca to accept the 'highest' offer. In this regard there was an element of risk to ING.

(5) At the time of the Hawk Retainer neither the EBITDA for 2006 nor the EBITDA for 2007 could be known as a definite number. But the parties had forecasts of the EBITDA for both 2006 and 2007. The forecast for EBITDA 2006 for the combined enterprise of Ros Roca and Dennis Eagle was about €28 million. The forecast for EBITDA 2007 was just over €30 million – a figure which made no allowance for 'synergies' resulting from merger, such synergies not being expected to increase gross margin until 2010 onwards. Of these forecasts, the forecast for 2006 could be expected to be more accurate than that for 2007, since it could be based on 9–10 months of actual performance whereas the projection for 2007 was a pure estimate.

(6) At the time of the Hawk Retainer Ros Roca was acquiring Dennis Eagle at an 8.6 multiple, and both parties knew that two current purchases in the sector were taking place at entry multiples relative to EBITDA of 9.0 and 9.4. A minority share would attract, other things being equal, a lower valuation than that for purchase of the entire share capital of a company. As against that, however, the prospect of synergies increasing gross margin from 2010 onwards would tend to increase the valuation of Ros Roca following the imminent acquisition of DEG.

(7) It was market practice that when valuing a company, or comparing valuations, the 'current' figures for Enterprise Value and EBITDA would generally be used – and in the case of EBITDA the 'current' figure might well be a forecast." (para 23)

14. He added in relation to points (6) and (7):

"While I do not have the benefit of expert evidence, the matters set out at paragraph 23(6) and 23(7) above demonstrate the use of EV/EBITDA comparables in the market. They reflect the acceptance by ING's witnesses that valuations for actual transactions would use the figures for enterprise value and EBITDA current at the time of the transaction – which in the case of EBITDA might be a forecast."

15. There was an issue as to when, viewed at the time of the Hawk Retainer, the parties expected the Transaction to be completed. ING contended that it was not reasonably in contemplation that it would be completed in 2006 or by early 2007. This was relevant to whether, at the time of the Retainer, the parties foresaw completion during the period when valuations would naturally be based on the 2006 EBITDA. The judge held that at that time there was "at least a realistic possibility" that the Transaction would be concluded by May 2007 (para 26).

The judge's view

16. It is unnecessary to repeat the judge's detailed and painstaking analysis of the various alternatives. The principal difference between the parties before him can be seen in his summary of their respective interpretations of the words "implicit in the Transaction" (para 38(4)):

> "(a) *ING's view*
>
> One must determine a value for the concept in question by identifying the value for the concept stated or implied in the Transaction. ING acknowledges that on this basis the denominator it contends for ("EBITDA 2006") is not implicit in the Transaction and accordingly it says that the words "implicit in the Transaction" apply only to the numerator:
>
> (b) *Ros Roca's view*
>
> One must determine a value for the concept in question by using figures current at the time when the Transaction was completed – which might or might not have been stated or implied in the Transaction. Ros Roca accepted that their interpretation involved ignoring the reference to 2006."

17. The judge, applying the principles set out by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, asked himself whether –

> "it is clear that something has gone wrong with the language, and if so is it clear what a reasonable person would have understood the parties to have meant?".

18. He rejected ING's construction as "commercial nonsense". He said:

> "42… I do not consider that ING's construction of the words used to express the Entry Ratio is merely idiosyncratic. In my view it is so unreasonable in its result that the parties cannot have intended it – or if they had intended it they would have taken steps to make that intention abundantly clear.
>
> 43. The key point here is not only that valuations generally use current values for both numerator and denominator when computing an entry multiple, but also that this is done for good reason. Only by using the EBITDA which is "current" for the actual or proposed purchase in question can one measure the

> extent to which the purchase price constitutes a high or low assessment of the company's intrinsic worth by reference to its earnings. The obvious purpose of an additional fee is to give ING a success fee over and above its fixed fee to reflect the extent to which the eventual purchaser has made a high rather than a low assessment of Ros Roca's intrinsic worth. On the assumption that EBITDA 2006 would be the current EBITDA at the time of the Transaction this was exactly what the words used to express the Entry Ratio achieved."

19. At the time the Hawk Retainer was drafted, there was a realistic possibility that EBITDA 2006 would be the current EBITDA at the time of the Transaction. In those circumstances he did not find it surprising that the parties referred to "EBITDA 2006", and that –

> "neither party spotted that this overlooked the possibility that 2006 might no longer be apposite at the time of the Transaction."

He did not rest his decision on "the undoubted fact" that ING's construction would lead to a high overall fee:

> "The crucial points here are that on this premise one will not be comparing like with like, and there is no obvious relationship between a denominator of EBITDA 2006 and a numerator achieved by calculating the Enterprise Value for a Transaction at a time when EBITDA 2006 is no longer current." (para 44-5)

20. Finally, he considered whether Ros Roca's interpretation was "commercially problematic", in that the concept of "current EBITDA" was relatively "ill-defined". He said:

> "It is common ground that when valuing or comparing values it is general practice to identify such an EBITDA, which may be a forecast rather than an actual figure. If this can be done as a matter of general practice then there is no reason to conclude that it will involve insuperable commercial problems in the context of the Hawk Retainer." (para 48)

21. He concluded:

> "I consider it clear that a reasonable person would have understood the parties, when using the words they did in expressing the Entry Ratio, to have included references to 2006 by oversight, and to have intended that the denominator should be EBITDA without linking this to a specified year." (para 49)

Discussion

22. Like the judge I would start from Lord Hoffmann's guidance in *Chartbrook*. That requires that it should be clear (a) that something has gone wrong with the language and (b) what a reasonable person would have understood the parties to have meant.

23. I will take the two requirements in turn. On any view the wording of the formula creates problems. Ros Roca's interpretation involves ignoring the reference to the year 2006 altogether. ING's interpretation involves treating the words "implicit in the transaction" as applying only to the numerator, rather than, as the word order suggests, to the "entry multiple" as a whole. In these circumstances, I sympathise with the judge's view that the reasonable observer would be looking for an alternative interpretation, and that his choice would be guided by the purpose of the exercise. As he put it:

> "Only by using the EBITDA which is 'current' for the actual or proposed purchase in question can one measure the extent to which the purchase price constitutes a high or low assessment of the company's intrinsic worth by reference to its earnings...." (para 43 – see above)

His explanation for the reference to "EBITDA 2006" was that the parties had expected the transaction to be concluded reasonably promptly, and had overlooked the possibility that it might be overtaken by events.

24. I am not convinced that this is sufficient to bring Lord Hoffmann's two-stage test into play. On this view nothing has gone wrong with the *language* as such. The reference to EBITDA 2006 was intentional. The mistake was not in the language, but in failing to anticipate its consequences.

25. In any event, I think the interpretation also falls down at stage 2. The question is not whether the judge's approach produces a fairer result, but whether it represents the clear alternative interpretation. The underlying assumption of this part of the judgment seems to be that, at whatever time the transaction might eventually take place, it would be possible objectively to identify "the current EBITDA", which could thus be said to be "implicit" in the transaction. This view does not appear to be supported by the evidence.

26. The judge had himself commented on the likely perceptions of the parties at the time of the Hawk Retainer::

> "At the time of the Hawk Retainer neither the EBITDA for 2006 nor the EBITDA for 2007 could be known as a definite number. But the parties had forecasts of the EBITDA for both 2006 and 2007. The forecast for EBITDA 2006 for the combined enterprise of Ros Roca and Dennis Eagle was about €28 million…." (para 23(5))

This passage to my mind is consistent with ING's submission that there is not necessarily a "current EBITDA" objectively ascertainable at any time. It is a matter of judgment depending on the circumstances, and involving a choice between actual and forecast figures. As Mr Phillips QC put it in his skeleton:

> "The choice of EBITDA will always involve elements of judgment. Suppose, for instance, a valuation made mid-year; no exactly equivalent EBITDA figure (e.g. an EBITDA figure for the 12 months immediately preceding the valuation date) will be available. Comparison is necessarily to either a historical figure (e.g. the last audited figure) or to a forecast figure, which incorporates elements of speculation about what will happen after the valuation date."

27. The judge acknowledged the potential uncertainty, but he did not see this as an "insuperable objection" to his construction. He relied on the fact that when valuing or comparing values it was "general practice" to identify a "current" EBITDA, which might be a forecast rather than an actual figure. This seems to me to pose the wrong question. What has to be ascertained, on Ros Roca's construction, is the "EBITDA implicit in the transaction". No doubt, if the parties had chosen a formula depending in terms on identifying the "current EBITDA" at the time of the transaction, it would have been possible for the court on suitable evidence to arrive at an appropriate figure. However, it does not follow that such a figure would be "implicit" in the transaction, nor that the reasonable observer would have so understood that term.

28. The phrase "implicit in the transaction" suggests a more direct relationship with the terms of the Transaction than a purely temporal one. In relation to the numerator, those words can reasonably be read as importing the specific definition of "Enterprise Value". On that basis, as the judge found (para 23(3) above) the Enterprise Value would either be expressed in the Transaction or could be readily extrapolated. On the other hand there was no expectation that the Transaction would necessarily be linked to any form of EBITDA valuation. It is equally plausible that the very uncertainty of the concept would have led the parties to wish to define EBITDA by reference to a particular year. If so, it is understandable that they should have adopted the year 2006, given their reasonable expectation that the transaction would be concluded within a timescale for which the 2006 EBITDA would remain relevant. The fact that no-one may have contemplated the actual transaction being delayed beyond that time is not in itself a reason for rewriting the agreed formula.

29. It is true that ING's interpretation sits uneasily with the word order, which appears to relate the expression "implicit in the transaction" to the whole formula. However, disregarding that awkwardness of word order does significantly less violence to the language of the clause than ignoring altogether the specific reference to 2006.

30. For these reasons, with some reluctance, I conclude that ING's construction is correct. I would therefore allow the appeal on this issue.

Estoppel by convention – the cross-appeal

The factual case in outline

31. Ros Roca's alternative estoppel case arises out of the events in the last quarter of 2007 leading to the successful conclusion of the Transaction.

32. By October 2007 it was clear that Deyà was likely to subscribe €63.5 million, by way of a capital injection in exchange for a shareholding in what would become Ros

Roca's parent company. Ros Roca needed ING's advice as to what shareholding should be allocated to Deyà in exchange for its proposed capital injection. The shareholding was to reflect the ratio between the capital injection and a sum equivalent to the value of the company after the capital injection, less its estimated net financial debt. Part of that debt was made up of outstanding transaction costs, including fees of professional advisers such as ING.

33. Although the actual debt would be calculated by auditors following completion, an estimate of the Net Financial Debt figure was needed to adjust the agreed value of Ros Roca on the date of Deyà's investment, so as to calculate the percentage shareholding. If the audited net debt was found in due course to be larger than the estimate, then an adjustment would be made, either by increasing Deyà's shareholding or by payment of a cash sum. There was no provision for downward adjustment. Between September and November 2007 Ros Roca and ING exchanged estimates of net financial debt, including estimates of transaction costs of between €3 and 4 million. They settled on an estimate of €4 million which was used in finalising the details of the Transaction completed in 7 December 2007 (in what became Annex 6.8.1).

34. That estimate, it is argued, implied a mutual understanding that the fees would be based on EBITDA 2007, and was wholly inconsistent with the much higher figure which would have resulted from use of EBITDA 2006. Furthermore, ING's internal documents show that they had done their own calculations using EBITDA 2006, but had persisted in the use of the lower figure, and acquiesced in Ros Roca doing the same.

The judge's view

35. As will be seen, the arguments on this point have developed considerably since the hearing before the judge. In any event, having found for Ros Roca on the construction issue, the judge did not need to deal with their alternative case at any length. He considered that "none of the various ways" in which the estoppel claim was formulated established a shared assumption of the kind needed (para 64).

36. As the case was finally put to him, there were two alleged assumptions (identified as "closing assumptions 1 and 2"):

> "1. Ros Roca's total transaction costs for Project Hawk, for ING and for its other advisers, would be in the region of €4 million; and
>
> 2. This €4 million transaction costs figure was calculated on the basis of an Additional Fee calculated using an "EV/EBITDA... entry multiple implicit in the Transaction" of 10.35x" (para 53).

Assumption 1, in his view, did not go far enough; it did not imply that ING could not claim a fee over the estimate (para 57). Assumption 2 was unsupported by the evidence:

> "Ros Roca is wholly unable to point to any part of the history which involved an express assertion by either party that the

> Entry Ratio in the Hawk Retainer was 10.35 or was to be computed by reference to anything other than EBITDA 2006….
>
> At best from Ros Roca's point of view all that can be said is that a figure of €4 million as transaction costs could have been derived by using 10.35 as the Entry Ratio applicable under the Hawk Retainer. Consistently with all these matters, however, ING – and for that matter Ros Roca - could have identified €4 million as transaction costs on the basis that it appeared to be a reasonable "ball park" figure without going to the trouble of working out what the Entry Ratio would be." (para 60-2)

37. In this court, having held in favour of ING on the construction issue, I must examine the factual and legal basis of the alternative case in more detail.

The evidence reviewed

38. The officers principally involved in the discussions during the relevant period were Mr Gomà, Chief Financial Officer of the Ros Roca group, and Mr Muro-Lara, Managing Director of ING's Spanish subsidiary. Also involved for ING on financial matters was Mr Fernandez.

39. The first estimate of transaction costs was given in a presentation by Ros Roca's management in September 2007, when neither the identity of the investor, nor the likely enterprise value was known. A figure of €4 million was proposed by Mr Gomà. In October 2007, after the receipt of various offers including that of Deyà, Mr Fernandez of ING prepared an analysis for Ros Roca. In respect of Deyà's offer (equivalent at that stage to EV €436 million) Mr Fernandez inserted a figure for Transaction Costs of €3 million.

40. By the beginning of November 2007 Deyà had raised its offer to the equivalent of EV €441 million. By this time the audited EBITDA 2006 of €33.1 million and forecast EBITDA 2007 of €42.1 million were known. On 6 November 2007, Mr Fernandez sent an e-mail to Mr Muro-Lara. In an attachment Mr Fernandez showed the calculation of both the EV/EBITDA 2006 ratio (13.3x) and the EV/EBITDA 2007 ratio (10.3x). His calculation based on the EBITDA 2006 showed a total fee of €7,335,000. In the email he commented:

> "Looking at the mandate, I couldn't resist calculating the fees (attached) and I don't know if Excel has gone wrong (and isn't calculating properly) or this is going to cost RR 0.6% of the RR capital."

41. This calculation did not result in any change to the estimates of transaction costs in the exchanges with Mr Gomà. Two days later, on 8 November 2007, Mr Fernandez sent by email to Mr Gomà a document setting out "the Net Financial Debt details", which repeated the previous figure for Transaction Costs of €3 million. On 12 November 2007 Mr Fernandez sent another email to Mr Gomà attaching a revised calculation, showing Transaction Costs of €4m.

42. At the hearing this change was explained in Mr Fernandez' witness statement:

> "At some point in November, .. I recall asking Mr Muro-Lara whether €3,000,000 or the €4,000,000 stated in the September 2007 management presentation should be used for transaction costs. Mr Muro-Lara suggested that €4,000,000 would be more appropriate in order to maintain consistency with the management presentation of September 2007."

His evidence was that these estimates were not made by any "scientific calculation", nor in particular by reference to the entry multiple formula. Of the calculation of ING's fees in his email to Mr Muro-Lara, he said that he had done the exercise "out of curiosity", and that it "did not cross (his) mind" that there was an inconsistency with the figure being used for transaction costs.

43. Mr Gomà spoke in his witness statement of how Ros Roca would have reacted if they had been alerted to ING's calculation of a fee of over €7.3 million:

> ":… there would have been a clear opposition on the side of Ros Roca…. We would have done our best, including to seek the assistance of the lending banks, to settle the issue in reasonable terms. €7.3 million represents almost 13 per cent of the total capital raised… We would certainly also have explored the possibility of changing the terms upon which Deya was investing (to increase the agreed Enterprise Value) so as to offset the additional and unexpected cost of the transaction."

44. He also gave oral evidence as to his understanding of the basis of the €4m estimate. He referred to a spreadsheet which gave a "running estimate" of professional fees, as at December 2007, including an "estimated" figure for ING's fees of €1.536 million. However, it seems that little weight can be attached to this spreadsheet, which first came to light during the hearing. It remained unclear what if any earlier versions there had been at the time the estimates were being discussed, and in any event Mr Gomà did not claim that it had been seen by, or discussed with, Mr Fernandez.

45. Mr Muro-Lara referred in his witness statement to the discrepancy between Mr Fernandez' calculation and the estimates of Transaction Costs as discussed with Ros Roca:

> ".. when Mr Fernandez calculated ING's potential contractual fee under the Retainer Letter, on 6 November 2007, it was not for the purpose of checking the Transaction Costs figure. I did not, at any time, discuss with Mr Fernandez whether the Transaction Costs figure should be amended to reflect the calculation of 6 November. I was generally aware that the potential contractual fee under the Retainer Letter was higher than the Transaction Costs figure but did not consider the difference to be material for the purposes of what Annex 6.8.1 required... In any event, it was not in any of the parties' interests to change the Transaction Costs figure given the

> limited significance attached to the figure (as opposed to the fact the item was included at all) and given the potential disruption that changing it may have caused to the transaction."

In cross-examination, when asked what he meant by "potential disruption", he referred to the "situations" mentioned by Mr Gomà in the passage quoted above.

Comments on the evidence

46. There are obvious dangers in interpreting "raw" evidence at the appellate level, in the absence of considered findings by the judge. However, as I understand ING's position, they do not materially dispute the matters outlined above as matters of fact. Rather, they seek to put them in context of the dealings between the parties as a whole.

47. In the first place, they emphasise that, from Ros Roca's perspective and that of its shareholders, an under-estimate of the net debt, unlike an over-estimate, could be remedied. If the net debt was underestimated, the adjustment provisions would ensure that Deyà would ultimately acquire the same percentage of the capital that it would have acquired if the estimate had been accurate (or there would be a compensating financial payment). There was no equivalent provision for adjustment in the event of an over-estimate. Accordingly, even if Mr Fernandez had appreciated that the estimate of transaction costs was too low, he would have seen it as an error on the right side as far as Ros Roca was concerned, which would not cause them any ultimate prejudice. Secondly, the amount involved was minimal, in relation to the overall figures. By the time of the investment agreement, the total estimated net debt was €216.7 million, of which €4 million (about 1.8%) represented the estimate of transaction costs.

48. Mr Phillips helpfully summarised ING's position in his skeleton:

> "ING's position at the trial – from which it does not resile on this appeal – was that the most that could be said of these communications was that (as set out in its closing outline submissions, emphasis added) 'In the period from late September 2007 up to and including December 2007, the parties shared an assumption (sufficiently evidenced by mutual communications between them) that a reasonable figure *for total transaction costs for the purposes of preparing the estimated net debt required by an Annex to the agreement with Deyà was in the region of €4 million*…'
>
> The italicized words are important. The estimate was only an estimate: it was not intended to be precisely accurate, as Mr Gomà accepted. And it was an estimate *for a particular purpose*, namely inclusion in the estimated net debt calculation, with respect to which it constituted (a) only a very small part of a much larger whole and (b) in relation to which underestimation was, from Ros Roca's perspective, clearly preferable to overestimation."

Ros Roca's evolving case

49. Ros Roca's case has developed, or mutated, over the course of the proceedings. Unfortunately, since this proceeded as a Part 8 claim, there were no formal pleadings. (I agree with Burnton LJ's comments on this aspect.) The agreed list of issues (prepared for a Case Management Conference in February 2009) included the following:

> "(a) Was there a shared common assumption of the parties as to the effect of the phrase 'the Enterprise Value/EBITDA 2006 ("EV/EBITDA 06") entry multiple implicit in the Transaction', as manifested by conduct crossing the line between the parties?
>
> (b) Did the Claimant clearly and unequivocally represent to the Defendant at any material time that its Additional Fee would be calculated by reference to the relevant EBITDA current at the time of the Transaction?"

(I take the expression "crossing the line" as a reference to the words of Kerr LJ in *K.Lokumal v Lotte Shipping ("The August Leonhardt")* [1985] 2 Lloyd's Rep 28, 35: something done "across the line between the parties".)

50. In his closing submissions before the judge (judgment para 53), Counsel for Ros Roca identified two shared assumptions:

> "(i) Ros Roca's total transaction costs for Project Hawk, for ING and for its other advisers, would be in the region of €4 million; and
>
> (ii) this €4 million transaction costs figure was calculated on the basis of an Additional Fee calculated using an 'EV/EBITDA... entry multiple implicit in the Transaction' of 10.35x."

It having been pointed out to him that the former was an "assumption as to the future", rather than one of fact or law, he proposed an alternative based on promissory estoppel. The judge was reluctant to allow such a late reformulation of the case, but in any event could not find "any basis for identifying any express or implicit promise…" (para 51-6).

51. In this court, by the end of the argument, Ros Roca had reformulated its case on estoppel by convention in the form of proposed amended grounds of appeal The key element is the alleged "assumption" and its implications:

> "…. the parties had shared the mistaken assumption that €4,000,000 was a reasonable estimate of the Transaction Costs.
>
> It was implicit in that assumption that the Additional Fee in the ING element of transaction costs would not be charged on the basis of an EV/EBITDA 2006 multiple, but rather on the basis of the current EV/EBITDA multiple, being EV/EBITDA 2007."

They maintained their alternative case based on promissory estoppel, relying on ING's alleged "promise" not to charge a fee "which would take the total Transaction Costs over about €4 million".

52. ING objects to Ros Roca being permitted to reformulate its case in this way. It argues that the estoppels now raised are of a different character to those originally advanced, but are equally unfounded. They complain that they have been required to shoot at a moving target.

53. I have some sympathy with their complaint, but I would allow the amendment. In my view, the proper foundation of this aspect of the case is estoppel by convention. Like the judge, I find it difficult to see how the case can properly be based on promissory estoppel, in the absence of anything which could be categorised in ordinary language as a promise. However, even if the alleged understanding is recast in such terms, as suggested in the judgment of Rix LJ, I do not think it materially alters the substance of the case.

54. As to estoppel by convention, the underlying contention has not changed fundamentally. Essentially, it depends on establishing a shared assumption, express or implied, that notwithstanding the words of the formula, the fees would be not be calculated by reference to EBITDA 2006, but rather on an alternative basis consistent with the estimates of total cost. The relevant facts are not materially in dispute. The differences are as to what can legitimately be inferred from them. The variations in the formulations from time to time can be seen as arising from a possibly misguided attempt to over-refine what is, or should be, a relatively simple concept. The complications arise not from the concept, but from the need to relate it to a complex and unusual factual context. For that purpose I see the reformulated grounds of appeal as a useful aid to analysis, rather than as indicative of a substantial change in the nature of the case.

Estoppel by convention – the law

55. We have the (relatively unusual) advantage of a succinct statement of the modern law, adopted without dissent or qualification by the full House of Lords. This is found in the speech of Lord Steyn in *Republic of India v India Steamship Co* [1998] AC 878, 913-4 ("*The 'Indian Endurance'*").

56. A brief summary of the long and unusual background of that case is sufficient to set the speech in context. It started with a fire on a ship carrying munitions to Cochin in India, for delivery to the Indian Government. The Government sought and obtained judgment in the Cochin court for damages in respect of a limited part of the cargo, having previously issued but not served a writ in the Admiralty Court in England for total loss. The defendants sought to strike out the English claim under section 34 of the Civil Jurisdiction and Judgments Act 1982 (as one "in respect of which a judgment has been given in his favour in proceedings between the same parties…"). In the House of Lords ([1993] AC 10) the Government argued successfully that the case should not be struck out, but should be remitted to the Admiralty Court to investigate whether the procedural bar had been defeated by waiver or estoppel. On the remitted hearing, Clarke J held that the Cochin proceedings had been conducted on the common assumption that the larger claim would proceed in England, and that accordingly the defendants were estopped from relying on the bar ([1994] 2 LlR 331).

That decision was reversed in the Court of Appeal and the House of Lords, but principally on the facts rather than the law.

57. Lord Steyn stated the applicable principles as follows:

> "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: *The August Leonhardt* [1985] 2 Lloyd's Rep. 28; *The Vistafjord* [1988] 2 Lloyd's Rep. 343; Treitel, Law of Contracts, 9th ed., at 112-113. 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."

Later in the same passage he referred to "estoppel by acquiescence"

> "That brings me to estoppel by acquiescence. The parties were agreed that the test for the existence of this kind of estoppel is to be found in the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co. Ltd. v. Twitchings* [1977] A.C. 890. Lord Wilberforce said that the question is ". . . whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title to the property, to take steps to make that claim known . . . ." at 903. Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence."

Lord Steyn rejected the suggestion that the two concepts should be treated as aspects of "one overarching principle", in order not to blur "the necessarily separate requirements and distinct terrain of application" of the two kinds of estoppel (p 914C).

58. The Government's appeal failed on the facts in respect of both forms of estoppel. As to the former, the exchanges between the parties showed no more than that there had been mention of expected English proceedings, but fell "markedly short" of establishing a common assumption that no plea arising from the fact of the judgment would be taken in the English proceedings (p 915A-E). As to the latter, it was "overwhelmingly probable" that until after the Cochin judgment had been handed down, no one gave any thought to its implications for the English proceedings; and there were no "special circumstances" which required the defendants to put the Government on guard as to the risks of taking judgment in Cochin (p 915H).

59. With regard to the suggested division between the two forms of estoppels, I note the following comment in *Spencer Bower: Estoppel by Representation* (4th Ed 2004) para VII.2.3:

> "It is submitted, notwithstanding the refusal of Lord Steyn in *The 'Indian Endurance'*, to formulate an overarching principle, that the only distinction between an estoppel by convention and other forms of estoppel now lies in the manner in which the party to be estopped assumes responsibility for the proposition from which he is to be estopped from departing, namely by mutual assent rather than unilateral assertion"

Other have expressed doubts about the desirability of sub-division of this "most flexible" of doctrines (see e.g. per Judge LJ in *Baird Textile Holdings v Marks & Spencer plc* [2001] CLC 999, citing Robert Goff J in the *Amalgamated Investment* case).

60. In any event, Lord Steyn's formulation implicitly recognised a degree of overlap, since he treated "acquiescence" as one possible foundation for estoppel by convention. In deciding for the latter purpose whether an assumption is "made by one and acquiesced in by the other" it would be illogical to disregard Lord Wilberforce's guidance on that aspect. As will be seen, I regard it as of considerable assistance in relation to the facts of the present case.

Additional authorities

61. Without disrespect to the otherwise excellent arguments before us, I do not propose to comment in detail on the many authorities which have been cited to us or included in the bundles. They include the judgments from more than 20 cases on this topic, ranging over a period of more than 100 years. Some are classic authorities, such as the *Great Boulder* case [1937] 59 CLR 64, *Woodhouse* AC *v Nigerian Produce* in the Court of Appeal [1971] 2 QB 23 and House of Lords [1972] AC 741, and the *Amalgamated Investment* case [1982] QB 84.

62. These earlier cases of course represent important milestones in the development of the law. But we are here engaged, not in legal history, but in the application of developed, modern principles to a particular set of facts. We have also been referred to a number of more recent applications of the established principles at High Court or Court of Appeal level, but mostly these are of little more than illustrative value. It is not surprising that one finds differences of emphasis in the various judgments, reflecting the different factual situations under consideration.

63. Mr Phillips provided an apparently straightforward summary of "the relevant principles", with citations from some of these cases. It included the following propositions:

> "(i) An assumption of 'fact' must be an assumption of present fact, and not as to the future: *Argy Trading & Development Co Ltd v Lapid Development Ltd* [1977] 1 WLR 444, 457A–B (Croom Johnson LJ).

> (ii) The shared common assumption must be sufficiently certain: see *Troop v Gibson* [1986] 1 EGLR 1, at 6D–F.
>
> (iii) The parties should have had the objective intention to make, affect or confirm a legal relationship: *Baird Textiles Holdings v Marks & Spencer plc* [2001] CLC 999, at [92] (Mance LJ).
>
> (iv) The estoppel must arise in the context of a particular transaction, and is effective only for the purposes of that transaction: *Troop v Gibson* [1986] 1 EGLR 1, 5M–6A.
>
> (v) It must be unconscionable for the party estopped to be permitted to depart from the shared common assumption. See, e.g., *Credit Suisse v Allerdale BC* [1995] 1 Lloyd's Rep 315, 367 (aff'd on other grounds [1997] QB 362). That means that the party asserting that there is an estoppel must show that it has relied on the shared assumption to its detriment."

64. On examination, none in my view can stand without qualification:

i) *Present fact.* This proposition accurately records what was said in the 1977 case. But that was relatively early in the development of the law, before even the general restatement of the principles in the *Amalgamated Investment* case (1982). It is inconsistent with the basis on which the *Indian Endurance* case proceeded at all levels. Although Lord Steyn spoke of an assumption of "fact", the alleged assumption related to what was expected to happen in the English proceedings in the future. The parties' common understanding on that issue, if established, would have been sufficient to found the estoppel. That shows that the understanding may relate to the factual or legal basis on which a current transaction is proceeding, even if that understanding includes reference to events in the future.

ii) *Sufficiently certain.* The proposition refers to a comment in the concurring judgment of Ralph Gibson LJ in *Troop v Gibson*, on a point which he acknowledged was unnecessary for the decision. With respect, I find more persuasive the way in which the point was expressed in the leading judgment of Sir John Arnold P. After referring to the extensive argument on the need for a "representation" to be clear and unequivocal to found an estoppel, he said that the same question did not arise in relation to estoppel by convention:

> "Since this is of a consensual character and the terms of the convention, just as those of a contract once the language is established by the evidence, must be interpreted by the court and the only true meaning is that decided upon by the court." (p 3K-L)

iii) *Intention to affect legal relationship.* This again comes from a concurring judgment, rather than one agreed by the other members of the court, and on a point which was not essential to the decision. Although Mance LJ treated the

proposition as relevant to "both "promissory and conventional estoppel", the direct reference is to a case on the former (*Combe v Combe* [1951] 2 KB 215).

iv) *Particular transaction.* This proposition is based on a passage in the concurring judgment of Purchas LJ in *Troop v Gibson*, not adopted in the other judgments. That refers in turn to a statement by Eveleigh LJ in the *Amalgamated Investments* case ([1982] QB 84, 126):

> "The estoppel does not go beyond the transaction in which it arose. The representation or assumed state of facts are not to be held irrefutable beyond the purpose for which the representation or assumption were made."

In so far as there is a tension between the first sentence, which might be said to limit consideration to the ambit of a particular transaction, and the second which looks more widely at its "purpose", I would prefer the latter; but I doubt if Purchas LJ intended such a precise definition.

v) *Need for detriment.* This proposition is not particularly controversial, but it is not clear what is gained by referring to a 1995 first instance decision. It would have been more useful to refer to a recent statement in the Court of Appeal of the correct approach to "detriment", requiring–

> "… a broad enquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances" (per Robert Walker LJ in *Gillett v Holt* [2001] Ch 210, 232D; discussed in *Spencer Bower* op cit para V.5.16-7)

65. Generally, I see these observations as no more than glosses on the underlying principles, as stated authoritatively by the House of Lords.

Discussion

66. Under Lord Steyn's formulation the issue can be reduced to two questions:

i) Was there a relevant assumption of fact or law, either shared by the two parties, or made by Ros Roca and acquiesced in by ING?

ii) If so, would it be unjust (or "unconscionable") to allow ING to go back on the assumption?

By "relevant", I mean one which can be linked directly to the use of EBITDA 2007, rather than 2006, in the calculation of fees.

67. Under (i), as already noted, Mr Phillips accepts that that there was a shared assumption, to the effect that:

> "a reasonable figure for total transaction costs for the purposes of preparing the estimated net debt required by an Annex to the agreement with Deyà was in the region of €4 million"

He says that it is not relevant in the sense I have defined, because it was only an estimate, not intended to be precise; and because it was an estimate for a particular purpose, namely inclusion in the estimated net debt calculation, not for calculating ING's fees.

68. I am not persuaded by the latter point. It is true that the immediate purpose of the estimate was as part of the calculation of the net debt, in the context of the dealings with Deyà. However, it seems to me unrealistic to separate the two purposes. ING and Ros Roca were engaged in a joint project directed to the conclusion of the investment transaction with Deyà. Although estimation of ING's fees had a specific relevance to that part of the project, it could only be done by reference to the terms of the Hawk Retainer, under which the fees would in due course be paid. As between ING and Ros Roca there was a single overall project, of which both the Deyà shareholding and the ING fees were part, and there was only one set of ING fees.

69. The first point is true as far as it goes. The estimate was not intended to be, and could not be, a final figure. But there is no reason to think that it was to be other than a genuine estimate on the information then available, albeit one that might need to be revised. I see nothing to support the judge's suggestion the parties might have intended no more than a "ball park" figure. Furthermore, even if the assumption related overtly to the total transaction costs, the court is entitled to enquire what that necessarily implied in relation to the assumed ING fees, on the information known to the parties. Adopting Sir John Arnold's words, it is for the court to "interpret" the assumption, so as to arrive at its correct meaning for the purposes of the alleged estoppel.

70. The Fernandez email is important in this context. It shows, first, that by early November, all the elements needed to make an accurate estimate of ING's fees were available, and, secondly, that the assumed amount of transaction costs was irredeemably inconsistent with a calculation of fees based on EBITDA 2006. At the very least the estimate implied a shared assumption that, notwithstanding the reference to EBITDA 2006 in the agreement, that was not the basis on which the fees were to be calculated.

71. Would it be unjust or unconscionable to allow ING to go back on that assumption? In my view, it would. I do not see this as depending on the precise terms of the agreement, nor (as was discussed in argument) on whether they gave rise to, or negated, a "duty to speak" on the part of ING. It is enough that ING and Ros Roca were engaged in a joint project, in which each was entitled to assume that the other would act consistently, and would not knowingly conceal information of significance to the project or their relationship in it. Applying the words of Lord Wilberforce, a reasonable man, in Ros Roca's position, would have expected its financial adviser, acting "honestly and responsibly", and with Mr Fernandez's knowledge of the figures, to have taken steps to make its position known. By contrast with the facts of the *Indian Endurance* case, these were "special circumstances" which required ING to do more than simply acquiesce in Ros Roca's continued use of a calculation which they believed, or had reason to believe, was wrong.

72. It does not matter, in my view, that Mr Fernandez may not have been alive to the full significance of the point. He clearly was surprised by the result of his calculation, to the extent that he wondered if there was an error in the spreadsheet. However, he and

his superior decided to ignore it to avoid "potential disruption", and they allowed the discussions to continue on the basis of a figure for transaction costs which they knew, or should have known, to be wholly inconsistent with application of EBITDA 2006. As to detriment, there was no material challenge to Mr Gomà's evidence as to how he would have reacted if he had been told. The very fact that Mr Muro-Lara was keen to avoid disruption impliedly confirms that Ros Roca would have had a negotiating position, which they might have been able to exploit. If detriment is needed, loss of that opportunity is sufficient.

73. That conclusion may not take Ros Roca all the way. It leaves open the question whether the assumption went beyond the negative to the positive. Did it merely negate use of EBITDA 2006, or did it positively imply use of EBITDA 2007? This question can be treated as relevant at either of two stages. It may be relevant to fixing the content of the shared assumption; alternatively, it may simply come in at the later stage of determining the remedy. On either basis, in my view, the answer is dictated by the realities of the position, as known to the parties. Once the other elements relevant to calculation of the formula had become known, the only variable was the choice of EBITDA. From what we have heard, there were only two realistic alternatives at the relevant time. In the factual context known to both parties, negation of the use of EBITDA 2006 implied use of EBITDA 2007. In other words, if it is unjust to permit ING to go back on the shared assumption that EBITDA 2006 was not to be used, so that an estoppel by convention or acquiescence is established, then the appropriate remedy is to direct the use of EBITDA 2007. The flexibility of the equitable doctrine is sufficient to achieve that result without legalistic analysis.

Conclusion

74. For these reason I would allow the cross-appeal, with the result that the effect of the judge's order is preserved, but by a different route.

LORD JUSTICE STANLEY BURNTON :

75. I agree with both of my Lords' judgments on the construction issue, and have nothing to add.

76. In relation to the estoppel issues, I have been less certain as to whether the requirements of a binding estoppel were established by Ros Roca, but I have been convinced by my Lords' cogent judgments. I incline to the view that this is not a case of promissory estoppel, but of estoppel by convention, but I think it unnecessary for me to decide this question, which is largely one of terminology.

77. This case proceeded under CPR Part 8. In general Part 8 proceedings are wholly unsuitable for the trial of an issue of estoppel. Once such a claim is disputed, save in exceptional cases, the proceedings will cease to comply with CPR Part 8.1(2)(a), since they will cease to be proceedings in which the parties do not seek the court's decision only on questions which are "unlikely to involve a substantial dispute of fact". A disputed claim of estoppel should be carefully pleaded. I strongly endorse the contents of the note at paragraph 8.0.2 of the White Book:

> "In essence, the Pt 8 procedure, is in general terms designed for the determination of relevant claims without elaborate

> pleadings. If the procedure is misused, the defendant can object and equally the court of its own motion, and as part of its function to manage claims, will order the claim to proceed under the general procedure and allocate a track and give appropriate directions."

78. In the present case, the parties should have agreed or applied for directions for the exchange of pleadings on the estoppel issue. Pleadings would have clarified precisely how Ros Roca put its case and what facts were in dispute. In the event, this Court has been able to determine the issue of estoppel on the basis of the judge's findings of fact. However, his determination of the factual issues would have been easier, and the risk of injustice less, if the parties had pleaded their respective cases.

LORD JUSTICE RIX :

79. I agree and add a judgment of my own as we are differing from the judge on both points, although dismissing the appeal. I am most grateful to Lord Justice Carnwath for setting out the material in this case.

The construction issue

80. It is impossible in my judgment to ignore and rewrite, or delete, the reference to EBITDA 2006, or to turn it into a reference to a current and different EBITDA. The parties had a choice as to how to express the reference to EBITDA as part of their formula, and they deliberately chose to refer to EBITDA 2006. They did so at a time when that figure was itself a forecast figure, since the financial year 2006 was not yet at an end, and when there existed further forecasts, such as for 2007. It is impossible to regard the inclusion of EBITDA 2006 as done "by oversight" (the judge's para 49). As it happened, the transaction was not closed until December 2007, over a year after the October 2006 contract between Ros Roca and ING, by which time EBITDA 2006 had become historic and Ros Roca was prospering to an extent greater than had been anticipated in the previous year. The error was in not anticipating these facts or providing for them in the formula. That might have been done in a number of ways, including by the imposition of a cap. Or the error could be expressed in another way, as the failure to re-address the formula in the light of the new events as the fulfilment of the transaction approached (as to which more below). Ros Roca was not obliged to close the deal, and it could have raised the question of the appropriate formula for renegotiation. However, these are errors of negotiation or commercial intuition, not errors of language in the expression of an agreement.

81. The fact that these commercial errors occurred does not mean that the original contract on ING's construction of it was a "commercial nonsense", or that it is to be concluded that "something must have gone wrong with the language". Since the contract would have operated perfectly well if it had gone ahead on a timetable as originally contemplated, it is hard to see why a straightforward application of its language should be castigated as nonsense. On any view, moreover, an entry multiple was "implicit" in the transaction whichever EBITDA was used. And on any view it might be difficult to say, as of any particular time, which was the "current" EBITDA by reference to which an entry ratio might be calculated. Hence the contract's adoption of a fixed reference point.

82. I therefore agree that neither of Lord Hoffmann's conditions for the application of the doctrine in *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] 1 AC 1101 are here to be found fulfilled. It will be recalled that Lord Hoffmann adopted those conditions (see at 1114) from the judgment of Brightman LJ in *East v. Pantiles (Plant Hire) Ltd* (1981) 263 EG 61, as qualified by Carnwath LJ in *KPMG LLP v. Network Rail Infrastructure Ltd* [2007] Bus LR 1336. In the former case Brightman LJ said –

> "first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake."

In the latter case, Carnwath LJ pointed out that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context.

83. In this case, however, neither condition was met. Time and circumstance may always test the flaws in a contract. Whereas the error in *Chartbrook* always existed. In such a case as this, I would respectfully refer to the observations of Lord Justice Patten in *Kookmin Bank v. Rainy Sky SA* [2010] EWCA Civ 582 at paras 41/42.

84. I therefore agree that ING's appeal, on the issue of construction, should be allowed.

Estoppel

85. I am more than content to adopt Lord Justice Carnwath's solution in terms of estoppel by convention. However, I also consider that the same solution can be found in the doctrine of promissory estoppel, and is supported by a duty to speak. This should not perhaps come as a surprise since what we are concerned with is an estoppel which alters the effect of a contract by preventing a party from making an assertion or claim contrary to a position adopted mutually between its parties. Although a shared assumption may be lacking from many situations, a representation which is relied upon to the detriment of the representee includes many of the critical aspects of the doctrine of estoppel by convention. Moreover, in a situation in which it is plain that, *internally*, ING did *not* share the assumption concerning transaction costs which *externally and objectively*, it affected and purported to share, there is, to my mind, good sense in considering the matter through the eyes of an estoppel by representation.

86. In my judgment the representation with which we are concerned in this case is the representation, implicit in what I can for convenience call the shared assumption, that ING's fee would not be charged on the basis of EBITDA 2006. Or to put the matter another way, it was implicit in the express representation that a genuine and reasonable estimate of the transaction costs was €4 million, that ING would not be charging its fee based on EBITDA 2006. That is in effect what Carnwath LJ has concluded in [69]-[70] above. That implied representation can be put forward as a representation of fact ("We are not intending to charge you a fee based on EBITDA 2006" or "We are working on a calculation of our fee which does not take EBITDA 2006 as its basis"), or as a promissory representation ("We will not charge you a fee based on EBITDA 2006"). In the circumstances of this case, there is not much to choose between these formulations of the representation: but I would on balance

prefer to think of it in terms of promissory representation and promissory estoppel, because I think that better expresses the essence of the context. The question becomes: what fee is ING *entitled* to charge? In formulating its estimate first at €3 million and then, by agreement and acquiescence with Ros Roca, at €4 million, ING is representing and agreeing that that figure will encompass the fee which ING is entitled to charge on the transaction. Part and parcel of the enquiry, "What is a reasonable estimate of our transaction costs?", is the question: "What will you, ING, be charging us as your fee?". The express answer is, "A fee which is encompassed within €4 million". It matters not that that could also be expressed as "€4 million or thereabouts". On any view such an answer was fundamentally inconsistent with charging a fee based on the contractual formula involving EBITDA 2006.

87. In this connection, I consider that it is relevant, although not necessarily vital, that ING had a duty to speak. Its duty can be expressed in two ways, depending on whether one concentrates on ING's contractual obligations, or on its obligations as an honest business partner in the light of circumstances as they arose.

88. As for the former, ING's contractual obligations, they certainly included collaboration and co-ordination with Ros Roca's other advisers who would prepare the financial information to be delivered to potential investors, and the co-ordination of and assistance with the preparation of any documentation required to execute the transaction (see in particular section 1(h) and (i) of the contract, set out at [5] above). It was in this setting that ING was involved, contractually involved, in agreeing with Ros Roca a figure for the estimated transaction costs. It follows that ING had an obligation under the contract to join with Ros Roca in developing a genuine and reasonable estimate of transaction costs.

89. In this connection, Mr Phillips on behalf of ING submitted that ING is free of any obligation by reason of the exemption clause contained in clause 3 of the contract's Appendix, containing "Terms and Conditions", and in particular in reliance on the sentence:

> "The Company [Ros Roca] agrees with ING Corporate Finance that ING Corporate Finance will not be responsible for the verification of any such information and shall accept no responsibility for its accuracy and completeness."

However, in my judgment that is an exemption clause against liability. It does not prevent otherwise due legal effect being given to an estoppel based either on a shared understanding of the methodology of the contract or on ING's representations as to the fees to be charged under it. Ros Roca is not seeking to hold ING liable for any verification or any inaccuracy, but to operate the contract according to their shared assumptions and/or ING's representations as to its own fees.

90. As for ING's obligations as a business partner in the light of circumstances as they arose, what happened has been set out in Carnwath LJ's judgment above. ING made its own internal calculations as to its fee, and concluded that €7.335 million would be payable under the contract, calculated by applying EBITDA 2006 to Deyà's investment offer, thus producing an entry multiple of 13.3. An alternative calculation applying the current forecast for EBITDA 2007 and producing an entry multiple of 10.3 was also set out. The rest was the mechanical operation of the contract's formula,

which produced the money figures payable on either basis. Thereupon ING considered at the highest level, that of Mr Muro-Lara, who was ING's managing director, whether ING should revisit the discrepancy between the estimate of transaction costs which had passed between the parties and the calculation of ING's contractual fee. It was decided that the figure should not be revisited, given, as Mr Mura-Lara put it in his witness statement, the "potential disruption" that might be caused. When he was asked about this in his cross-examination, he accepted that he had in mind the possibility of a dispute with or an attempt at renegotiation on the part of Ros Roca, i.e. the "situations" mentioned by Ros Roca's Mr Gomà in his witness statement (see [43] above).

91. In my judgment, however, there was in these circumstances a duty on ING to raise with Ros Roca the question of ING's fee and the related question of the estimate of transaction costs. Such costs were directly related both to the number of shares to be issued to Deyà by reason of its investment, i.e. were directly related to the operation of the transaction on which ING was advising (even if an under-estimate of transaction costs was less dangerous than an over-estimate), but were also relevant to the business sense of the transaction as a whole. Would it make sense for Ros Roca to enter into a transaction when ING's fee alone would amount to some 13 per cent of the investment capital to be raised? No doubt Ros Roca was primarily and ultimately responsible for looking out for its own interests, but ING was also responsible under its contract with Ros Roca to advise its client on the transaction, its conduct and negotiation, in general (see section 1 *passim*). Mr Phillips accepted in argument that in such circumstances ING's position, subject only to the niceties of the law of estoppel, was unconscionable (Day 2 of the appeal, 180).

92. What then does the law say about such a situation? Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. *Caveat emptor* reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune. If, however, the contractor speaks, then he may have to live up to what he says; so also where what is unsaid is sufficiently closely connected with what he has said to render what has been left unsaid misleading. In general, however, there is no duty of disclosure. As *Chitty on Contracts*, 30th ed, 2008, Vol I, at para 6-014 puts it:

> "For the same reason it is not possible to set up an estoppel on the basis of an omission to disclose unless a duty to disclose can be established in the particular circumstances of the case. Tacit acquiescence in another's self-deception does not itself amount to misrepresentation, provided that it has not previously been caused by a positive misrepresentation."

93. Nevertheless, particular circumstances can make a difference, and it is possible to formulate a general principle as to why that should be so. Thus in *Moorgate Mercantile Co Ltd v. Twitchings* [1977] AC 890 at 903 Lord Wilberforce, in a dissenting speech but which in this respect has borne fruit, spoke of the possibility

that, in a particular situation which affected two parties, a reasonable man would expect the other party, "acting honestly and responsibly" either to make something known or face the consequences of not doing so. In *Republic of India v. India Steamship Co (No 2) (The "Indian Endurance")* [1998] AC 878 at 914 Lord Steyn approved Lord Wilberforce's observation as "helpful as indicating the general principle underlying estoppel by acquiescence". As Bingham J had put it some years earlier in *Tradax Export SA v. Dorada Compania Naviera SA (The"Lutetian")* [1982] 2 Lloyd's Rep 140 at 157, after citing *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed at 49:

> "More recently, Lord Wilberforce in *Moorgate*…provided persuasive authority for the proposition that the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. (Lord Wilberforce dissented on the outcome, and expressed the principle in proprietary terms appropriate to that case, but neither of these things in my judgment diminishes the significance of what he said.)"

94. Bingham J there applied the principle to a dispute about withdrawal under a time charter, in other words it affected parties to an existing contract. The charterers had tendered payment of hire in an amount which they believed to be correct, as the owners knew. The penalty of failure to pay punctual hire was that owners had the power to withdraw the vessel. By keeping silent about their own calculations of hire, the owners thwarted the charterers' attempt to live up to their contract. The owners were held to be estopped from exercising their right to withdraw (see issue (7) at 156). Bingham J concluded:

> "The relationship of owner and charterer is not one of the utmost good faith. One must be careful not to impute unrealistically onerous obligations to those who may choose to conduct their relations in a tough and uncompromising way. There is nonetheless a duty not to conduct oneself in such a way as to mislead. I have no doubt that the owners knew that the charterers believed they had paid the right amount. It was their duty, acting honestly and responsibly, to disclose their own view to the charterers. They did not do so and indeed thwarted the charterers' attempts to discover their views. Their omission to disclose their own calculation led the charterers to think, until a very late stage, that no objection was taken to their calculation. It would in my view be unjust in the circumstances if the owners could rely on the incorrectness of a deduction which they had every opportunity to point out at an earlier stage and which their failure to point out caused the charterers to overlook. I answer this question in favour of the charterers."

95. In my judgment, the facts of our case are relevantly analogous, but ours is an a fortiori case. The relationship between an advising bank and its client is closer, and more professional, than that between an owner and a charterer of a vessel. Although such an owner and his charterer co-operate on what is hoped to be the success of their maritime adventure, that is commerce in the raw. In our case, the bank is advising its client on its potential transaction, and is earning its fee for doing so and for a successful outcome. Moreover, the contract required the parties to co-ordinate their

estimates of the transaction costs, and that is what ING outwardly purported to do, while internally intending to charge a fee which was totally inconsistent with its outward show of agreement with its client. It was not honest and responsible for ING, but unconscionable as Mr Phillips had in effect to accept, to fail to disclose to Ros Roca, in the run-up to the closing of its transaction, that Ros Roca and ING differed on the calculation of ING's fee. Just as the owner in *The Lutetian* was estopped from denying the accuracy of the charterer's calculation of hire for the purpose of its monthly payment and thus for the purpose of preventing the owner's right to withdraw, because it had represented by its silence that the charterer's calculation was correct, so in my judgment ING is estopped from saying that its calculation based on EBITDA 2006 is the correct calculation. In both cases, one party has represented by his silence (in truth on the facts of this case by more than silence) that the other party's understanding of the situation is correct. ING sought its own advantage in keeping quiet, when it knew that speaking out would lead to a dispute and to a renegotiation. Ultimately, the dispute could not be avoided, and has occurred, but ING considered that its position would be strengthened if the dispute only took place after the event.

96. One question that arises is, of course, whether, assuming that Ros Roca has relied on ING's representation, it would be acceptable to allow ING to withdraw from the position which its silence and seeming acquiescence has created.

97. Indeed Mr Phillips has raised a number of issues to the effect that ING's representation or acquiescence should not be legally effective as an estoppel. He submits that there was no intent to affect legal relations; that there was no sufficient certainty in any representation or no relevant representation; that there was no reliance and no detriment; and that it would not be unconscionable for ING to be permitted to withdraw from its representation or acquiescence. He also relies on a pleading point.

98. In my judgment, all these points fail.

99. As for the intent to affect legal relations, Mr Phillips relied on *Baird Textiles v. Marks & Spencer Ltd* [2002] 1 All ER (Comm) 737 at [92] in order to submit that the parties here lacked "the objective intention to make, affect or confirm a legal relationship" (per Mance LJ). However, the point is misconceived. The parties were in a legal, contractual, relationship (which in *Baird* was not the case). Their relations with one another took effect within that relationship.

100. As for the representation in question, I have dealt with this above. It seems to me that the agreement on €4 million necessarily meant that ING's fee would not be charged at a rate which involved the use of EBITDA 2006. On any view, that was sufficiently certain, for otherwise ING's fee alone would have exceeded €7 million. I agree with Carnwath LJ that, when the terms of a representation can be found, its meaning and effect is for the court, even though it is possible to argue about that, as in the case of so many a contractual provision. The requirement of sufficient certainty, or, as is often said of representations in general, that they should be clear and unequivocal, is that the corpus of the representation should partake of that requirement. Here the parties were agreed, or appeared to each other to be, that the estimate of €4 million covered all the transactional costs. It does not matter whether that agreement was intended to be precise or approximate, conservative or otherwise: it could not accommodate what ING intended to charge, what ING was entitled to charge under

the contract as I would construe it. It was necessarily inconsistent with ING's construction (and, as it turns out, albeit not in the opinion of the judge, what is in my judgment the true construction). That was sufficient for present purposes. Mr Phillips was constrained to accept in the course of argument that the agreed figure was inconsistent with ING invoicing and recovering its €7.3 million figure (Day 3.35).

101. It is another question whether it was also necessarily inherent in the parties' agreed figure that the fee would be charged on the basis of an entry ratio derived from EBITDA 2007, i.e. the current EBITDA. I would conclude that it was, for it was in practice the only other alternative. The internal evidence of ING's email reflects that conclusion, but of course does not drive it. There was also similar internal evidence from Ros Roca's side, reflecting the make-up of the estimated transaction costs which included ING's fee based on an entry ratio of 10.3 (the EBITDA 2007 derived multiple): that was found on a spreadsheet which Mr Gomà had kept. The spreadsheet was only disclosed at a very late stage, during and as a result of cross-examination at the trial itself. In the circumstances, the spreadsheet became a controversial document (although Mr Gomà's evidence about it was not challenged as untruthful). However, it is unnecessary to found upon such internal documents or subjective evidence. The fact remains that the 10.3 entry ratio derived from EBITDA 2007 was the only real alternative. Mr Phillips' submissions that the €4 million figure could have reflected some compromise figure, based on a renegotiation, seems to me to be merely fanciful. It is an entirely different question what figure the parties might have ended with, if they had once entered into a negotiation based on different views as to the effect of the contract which they had made. Contractually, however, the fee agreement could only have led to a figure based on one or other of EBITDA 2006 or EBITDA 2007. The exclusion of the one necessitated the adoption of the other.

102. In any event, it seems to me to be sufficient for the purposes of Ros Roca's cross-appeal that there is an estoppel negativing the imposition of an EBITDA 2006 based fee.

103. As for reliance and detriment, Mr Phillips submitted that at best Ros Roca made its own mistake, unassisted by any contribution from ING's side. He also disputed the evidence given at trial that Ros Roca even believed that ING's fee would not be chargeable on the basis of EBITDA 2006 but would be chargeable on the current, 2007 EBITDA. Therefore there was no reliance, and could be no detriment. However, the internal evidence that Ros Roca was working on the basis of a fee under the contract with ING utilising an entry multiple of 10.3 (i.e. one based on EBITDA 2007) was entirely consistent with all the material in the case, and with the essential indisputable fact that the parties agreed on the figure of €4 million as an estimate for all the transaction costs involved. It was also consistent with ING's internal evidence that ING's fee could sensibly have been based on only the 2006 or 2007 EBITDA figure. It was also consistent with the evidence, reflected in the formulation of section 2(b) of the contract itself, that an entry multiple in the region of 9/10 or thereabouts would be a success. I have no doubt that, whatever the strength or weakness of the evidence about Mr Gomà's spreadsheet, Ros Roca did believe in a fee based on EBITDA 2007. Moreover, as *The Lutetian* itself demonstrates, the question that has to be asked is what would have happened if ING had acted as it should have done, and raised with Ros Roca the question of its fee. It is inevitable in such circumstances that there was reliance on ING's agreement on the €4 million figure and otherwise on

ING's failure to speak. That is demonstrated by ING's unwillingness to broach with Ros Roca the subject matter of its much larger fee, because of the danger of "potential disruption" to the transaction. There would, in my judgment, undoubtedly have been a demand to renegotiate the contract; and I equally have no doubt that to a greater or lesser extent such a renegotiation would have born fruit. In my judgment, Ros Roca relied on the implied representation and suffered detriment as a result.

104. In such circumstances, I also consider that it would have been unconscionable for ING to be entitled to resile from the position that it had adopted. That position was not acceptable in a business context, as *The Lutetian* demonstrates, as Mr Muro-Lara's evidence as to "potential disruption" confirms, and as Mr Phillips' acceptance in argument as to the unconscionability of ING's position also underpins.

105. The question then arises what fee ING is entitled to charge. The estoppel does not amount to a variation of the contract. However, it does mean that ING is not entitled to charge a fee inconsistent with the estoppel. It therefore cannot charge the fee which, on the construction issue's determination, would have been available to it. Just as, in *The Lutetian*, the owners could not withdraw the vessel under their contractual right to withdraw. Although a right to withdraw a vessel for non-payment or, as there, under-payment of hire, is not the same as a positive right to charge a fee, nevertheless the consequence is as or more serious. Vessels are withdrawn from solvent charterers to take advantage in a rise in market rates, and the value to a shipowner of a charter-free vessel when rates have risen is potentially enormous.

106. In the present case, the failure of the contractual fee formula leaves ING's remedy in the hands of the court. In the context of proprietary estoppel it is familiar territory for the court to fashion its own remedy to meet the equity of the situation. This is less familiar in a commercial context. However, the principle must be the same. In such circumstances, I would reject the submission that ING's remedy is to receive the difference between the other transaction costs, now fully known, and the agreed figure (which was always only a reasonable estimate) of €4 million. That submission, on the part of Ros Roca, has led to considerable debate as to the figure to be adopted, and that debate has also led, but unjustifiably, to infect the issue as to the sufficient certainty of the implied representation. In my judgment, in agreement with Carnwath LJ, the necessary implication embraced the only other feasible alternative for a fee, that of one premised on EBITDA 2007 and the entry multiple of 10.3. Therefore, there could be no injustice in confining ING to a remedy on that basis, that is to say to a total fee amounting to €1,578,922, made up of the fixed fee of €635,000 and an additional fee of €943,922 (plus expenses). Ros Roca has already paid that amount.

107. Indeed, I would consider that, in any event, the appropriate remedy would be to confine ING to a fee based on the 2007 EBITDA. For the reasons explained by the judge, even though they have not persuaded me on the construction issue, there would be no unfairness in such a result in circumstances where ING had lost the right to enforce an additional remedy based on EBITDA 2006. It is the natural alternative, even if a renegotiation might have come to some other figure as a matter of compromise.

108. As for a pleading point, in my judgment there is none available. The matter was not assisted by ING's commencement of proceedings under Part 8: but the point has always been sufficiently present to the parties.

Conclusion

109. In sum, ING has won on construction, and has lost on estoppel. Both appeal and cross-appeal should in my judgment be allowed. The result is that overall, but by a different route, Ros Roca has retained its success at trial.

110. Although this result differs from his analysis, the judge reached the right result, albeit, in my respectful opinion, for the wrong reasons. In such circumstances, it is in my judgment relevant to make the following observations. Construction cannot be pushed beyond its proper limits in pursuit of remedying what is perceived to be a flaw in the working of a contract. It is now clear, in a less literal era, that where a contract makes commercial nonsense on its own terms, it should be interpreted in a way which avoids the absurdity. *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 (HL), which contains Lord Diplock's famous dictum at 201E, illustrates that well, for it concerned an arbitration award where three arbitrators concluded that "any other breach of this charter party" in a time charter's withdrawal clause did not, in context, include any breach of any kind but only any breach of a repudiatory kind (*ibid* at 200E/G). In such a case, there is a choice to be made, on the contractual language, between an absurd interpretation and a commercial interpretation. Such cases are not uncommon. More rarely, something has indeed gone wrong with the language, and it is possible and indeed necessary to remedy the error, applying Brightman LJ's and Lord Hoffmann's two conditions. In such cases, however, the contractual language carries its own error within its own terms, as understood in context (as, for instance, where there has been a misdescription, specifying the wrong date, but the context of the document made the intended date obvious to anyone concerned: see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co* [1997] AC 749, the case of a contractual notice). More often, however, the contract will work perfectly sensibly in the context in which it was made, but it contains a flaw in that it does not provide for all eventualities. In such cases, the courts may not be able to find a solution within the four walls of the contract itself. Moreover, there is a danger, frequently warned against in such cases, of the courts seeking to remake contracts for the parties on the basis of what the courts consider would have been reasonable, or more sensible, for the contract to have said. Judges should not see in *Chartbrook* an open sesame for reconstructing the parties' contract, but an opportunity to remedy by construction a clear error of language which could not have been intended.

111. On the other hand, the doctrine of estoppel is a flexible doctrine which can take account of what Bingham J regarded as the honest and responsible interaction of business parties to a contract. Where there is room for disagreement as to the meaning or effect of a contract but the parties have clearly chosen (or purported to choose) their own understanding of it and have dealt with one another on the basis of that understanding, whether that mutuality is found in a common assumption, or in acquiescence, or in one party's reliance on another's representation, the doctrine of estoppel allows the court in a proper case to give effect to the parties' objectively ascertainable and mutual dealings with one another. This is especially appropriate in a case such as this, where there is room for renegotiation in new circumstances and one party is not obliged to proceed if it chooses not to. Of course, such dealings cannot make a contract out of nothing, where one does not exist, nor can it make a new contract by variation unless the conditions for that are available. However, it can prevent one party from taking advantage of a contractual remedy where an estoppel,

reflecting the parties' dealings with one another, would make it unconscionable for that remedy to be exercised.

112. The law should in this way reflect the exigencies and structure of commercial life. The contract is the foundation upon which commercial men operate, and it should remain, for its true construction, unchanged in changing circumstances. However, the parties' dealings with one another in the light of new circumstances may affect their contractual rights so as to make it unconscionable to seek and unjust to permit enforcement of them. I would emphasise Bingham J's wise words about the danger of imputing unrealistically onerous obligations where commerce is conducted in tough and uncompromising ways. Nevertheless, commerce is premised on honest and responsible dealings, even if parties also fall below the expected standards.