Neutral Citation Number: [2020] EWHC 397 (Comm)

Case No: CL-2017-000034

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QB)

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 26 February 2020

Before:
LORD JUSTICE PHILLIPS
- -
Between:

ALFRED STREET PROPERTIES LIMITED (formerly known as KILLULTAGH ESTATES LIMITED)	**Claimant**
- and –	
NATIONAL ASSET MANAGEMENT AGENCY	**Defendant**

- -
- -

Adam Tolley QC (instructed by **Collyer Bristow LLP**) for the **Claimant**
David Head QC (instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing dates: 7-10, 13, 14 and 16 May 2019

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Approved Judgment

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Lord Justice Phillips:

1. On 2 April 2012 the defendant ("NAMA") purported to exercise options contained in five extendable interest rate swaps ("the Swaps"), to which NAMA and the claimant ("ASPL") were then party, the options being to extend the Swaps for a further three years ("the Options"). Thereafter, until 1 April 2014, ASPL made quarterly payments to NAMA on the assumption that the Swaps had been duly extended. The total paid was £4,778,289.56.

2. ASPL subsequently asserted that NAMA's attempt to exercise the Options by telephone was not in compliance with the terms of the Swaps and was ineffective, so that the Swaps were not extended. ASPL claimed restitution of the sums it paid to NAMA, together with interest, and pursued that claim to trial.

3. NAMA's primary defence was that it exercised the Options validly and effectively, but in the alternative contended that, if the Swaps were not in fact extended, ASPL was estopped from so asserting given that both parties acted on the common assumption (and ASPL in any event represented) that the Options had been extended. In the further alternative, NAMA denied ASPL's entitlement to restitution of the sums paid, relying, in particular, on the fact that the sums paid to NAMA could otherwise have been applied to ASPL's substantial indebtedness to NAMA until June 2014, when NAMA assigned the benefit of that indebtedness and of the Swaps to a third party.

The facts

4. The parties agreed a chronology of the key events, emphasising that the area of disagreement was as to the significance of events and their effect rather than as to what in fact occurred. The essential facts, as summarised below, were therefore not in dispute, the one issue of fact (the time of the telephone call in which NAMA purported to exercise the Options) being conceded by ASPL in the course of its opening submissions.

(a) The Anglo facilities

5. ASPL, a company incorporated in Northern Ireland, is in the business of commercial property development and investment. The company was established in 1995 by Frank Boyd to be one of the vehicles used in his property business. In 2002, ownership of ASPL was transferred to a Boyd Family Trust, of which Mr Boyd was not a beneficiary, although he remained its sole executive director and its chief executive officer. Michael Lamont joined ASPL in 2008 as Head of Finance, becoming a director in 2016.

6. For the purposes of its business ASPL (and other companies of which Mr Boyd remained a beneficial owner, either solely or together with certain associates) entered numerous banking facilities with commercial lenders, including Anglo Irish Banking Corporation ("Anglo"), a bank incorporated in the Republic of Ireland.

7. By a facility letter dated 4 August 2007 Anglo agreed to extend facilities totalling about £111.5 million to ASPL (in addition to other facilities extended to what was referred to as "the Boyd Connection"), consolidating and replacing earlier facilities.

The facilities were available to ASPL on an interest only basis until 30 September 2011 and were thereafter repayable on demand. ASPL covenanted that a minimum of 50% of the facilities would be hedged to the satisfaction of Anglo at all times.

(b) The Swaps

8. On 4 March 2008 ASPL and Anglo entered the Swaps, each with a notional amount of £10 million, effective from 1 April 2008 and terminating on 2 April 2012. Anglo was the floating rate payer and ASPL was the fixed rate payer (the fixed rate being 4.5% until 1 April 2010 and 4.75% until 2 April 2012). The Swaps were evidenced by five identically-worded confirmations ("the Confirmations") from Anglo to ASPL, sent to its postal address.

9. Each of the Confirmations expressly incorporated the 2000 ISDA Definitions ("the 2000 Definitions") and further provided that, until the parties had negotiated an ISDA Master Agreement (Multicurrency-Cross Border), a negotiation which did not in the event occur:

> "...this Confirmation, together with all other documents referring to the ISDA Form (each a 'Confirmation') confirming transactions (each a 'Transaction') entered into between us (not withstanding anything to the contrary in a Confirmation) shall supplement, form part of, and be subject to an agreement in the form of the ISDA Form as if we had executed an agreement in such form (but without any Schedule except for the election of English Law as the governing law) on the Trade Date of the first such Transaction between us. In the event of any inconsistency between the provision of that agreement and this Confirmation, this Confirmation will prevail for the purpose of this Transaction."

10. Each of the Confirmations further contained the following Swap Extension Terms:

> "On the 02 April 2012 **Anglo Irish Bank Corporation plc** has the right but not the obligation to extend this transaction under the following terms-
>
> **Procedure for Exercise**
>
> | | |
> |---|---|
> | Exercise Period: | 02 April 2012, or if such day is not a London Business Day, the following such Business Day |
> | Expiration Time: | 11:00 am London time |
> | Exercise Business Day: | London" |

11. The Confirmations then set out the terms of the "particular Swap Transaction" which would result from the exercise of the right to extend, each confirming a further swap from 2 April 2012 to 1 April 2015 on the same terms as the original Swap, save that the fixed rate to be paid by ASPL was increased to 5.42%.

(c) Relevant provisions of the 2000 Definitions

12. The effect of section 1.1 of the 2000 Definitions was that the transactions evidenced by the Confirmations fell within the definition of "Swap Transactions" simply because the 2000 Definitions were incorporated.

13. Section 10.1 of the 2000 Definitions provided that "Option Transaction" means (a) a Swap Transaction that is a Swaption, (b) a Swap Transaction to which Optional Early Termination is specified to be applicable and (c) any other transaction identified as an Option Transaction in the related Confirmation.

14. Section 10.2 provided that "Swaption" means a Swap Transaction that is identified in the related Confirmation as a Swaption.

15. Article 12 of the 2000 Definitions made provision for the Exercise of Options. Section 12.1 defined numerous terms, including "Exercise Period" and "Expiration Time", and referred to "Exercise Business Day" (a term defined in Article 11, also relating to Option Transactions).

16. Section 12.2 set out the "Procedure for Exercise" as follows:

> "Except when rights granted pursuant to an Option Transaction are deemed to be exercised pursuant to the provisions of Section 12.7 (Automatic Exercise) or Section 12.8 (Fallback Exercise), Buyer must give notice (which may be given orally, including by telephone, unless the parties specify otherwise in the related Confirmation) during the Exercise Period to Seller or, if designated in the relevant Confirmation, Seller's Agent, of its exercise of such rights in accordance with the contact details, if any, specified in the related Confirmation, and that notice will be deemed to be irrevocable."

(d) Relevant provisions in the relevant ISDA Master Agreement

17. It was common ground that the reference in the Confirmations to the ISDA Master Agreement (Multicurrency-Cross Border) was to the 1992 edition of the ISDA Master Agreement (there being no Multicurrency-Cross Border version of the 2002 edition). Section 12 of that form of agreement ("the ISDA Form") provided for the giving of notice as follows:

> "**12. Notices**
>
> (a) Effectiveness. Any notice or other communication in respect of this Agreement may be given in any manner set forth below (except that a notice or other communication under Section 5 or 6 may not be given by facsimile transmission or

> electronic messaging system) to the address or number or in accordance with the electronic messaging system details provided (see the Schedule) and will be deemed effective as indicated: -
>
> (i) if in writing and delivered in person or by courier, on the date it is delivered;
>
> (ii) if sent by telex, on the date the recipient's answerback is received;
>
> (iii) if sent by facsimile transmission, on the date that transmission is received by a responsible employee or the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);
>
> (iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; or
>
> (iv) if sent by electronic messaging system, on the date that electronic message is received,
>
> unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Local Business Day."

18. Part 4 of the Schedule to the ISDA Form invites the parties to give Addresses for Notices for the purposes of section 12(a), but ASPL and NAMA did not negotiate and execute an ISDA Form, so no contact details were ever provided, at least in that format.

(e) The transfer of Anglo's interests to NAMA

19. NAMA is a statutory corporation created by the National Asset Management Agency Act 2009 of the Republic of Ireland in response to the 2008 global financial crisis. In the first phase of its operation NAMA acquired loans and financial instruments with a face value of about €74 billion from five participating financial institutions, including Anglo.

20. On 13 December 2010, as part of that process, NAMA became the beneficial owner of Anglo's rights under the Swaps (although Anglo remained legal owner) and, on 22 December 2011, NAMA notified ASPL that it had also acquired ASPL's indebtedness to Anglo, by then known as the Irish Bank Resolution Corporation ("IBRC").

(f) The purported exercise of the Options

21. By 30 March 2012 NAMA had decided to extend the Swaps and that day instructed IBRC, as its agent, to notify ASPL on 2 April 2012, before 11am, that the extension right had been exercised. NAMA provided IBRC with contact details for ASPL, specifying ASPL's Head of Finance, Michael Lamont as the contact name, and providing a postal address and telephone, mobile and fax numbers.

22. On 2 April 2012, at about 9.15am, Sean Young of IBRC telephoned Mr Lamont via ASPL's switchboard. The call was recorded and the following is an agreed transcript of the relevant part of the conversation:

> "**MR. YOUNG:** I've just been asked to give you a call this morning just in relation to some swaptions we have maturing for you today, I'm not sure if you are familiar with those or are expecting them.
>
> **MR. LAMONT:** Yeah
>
> **MR. YOUNG:** Emm, effectively NAMA have asked us to give you a call just to confirm that we are indeed exercising the rights under all five of those swaptions. Emm, So I might just brief, very quickly run through the details with you if that's okay? Emm, I'm not sure if you have them to hand? Do you want a second to get your own figures there or will I talk you through what I have?
>
> **MR. LAMONT:** Yeah, okay fire away.
>
> **MR. YOUNG:** We've got five swaptions eh today which are expiring- or that we are exercising. I guess the first one there is 1012751 is our trade number which is eh, with [inaudible] dates-
>
> **MR. LAMONT:** Five of them 10 million
>
> **MR. YOUNG:** Sorry?
>
> **MR. LAMONT:** Five of them 10 million each.
>
> **MR. YOUNG:** Five of them at 10 million each, yeah and the rate will be 5.42% eh out to the 1st April 15. So the first one I have there is 1012751 (interrupted)
>
> **MR. LAMONT:** No, I have the five of them here, yeah I know exactly what you are talking about. Can I ask you, emm why would NAMA exercise options and not take it as debt reduction?
>
> **MR. YOUNG:** You would need to speak to them really to be honest on that Michael to be honest.

> **MR. LAMONT:** You know I'm only thinking- that's what would seem to make sense but.
>
> **MR. YOUNG:** Yes, no, listen as I say, emm I guess these do have a value eh so you know, it is purely to them to decide what way they want to approach it I guess, you know, no listen I see your point of view but unfortunately we are just messengers really. I was just told to exercise the five of them against you guys.
>
> **MR. LAMONT:** It's the very thing I've raised in my or put down in my business plan that is due to go in to them, asking them basically the same question, you know?
>
> **MR. YOUNG:** Yeah, yeah, yeah.
>
> **MR. LAMONT:** Emm, why take it as interest when it would be better as- I would have thought, it is what you call it you know.
>
> **MR. YOUNG:** Yeah, yeah, no I appreciate that, well obviously, you know. I'm sure they are expecting you to include that in your discussions with them but obviously as I say for now anyway that they've said, told us to just go ahead and exercise them. Do you mind if I just double check we have the same deal numbers? have 1012751 [interrupted]
>
> **MR. LAMONT:** I don't have the deal numbers in front of me now.
>
> **MR. YOUNG:** Okay, fair enough. But you are happy that you've got the five individual swaps for 10 million
>
> **MR. LAMONT:** I've got the five-
>
> **MR. YOUNG:** Yeah, and the fifty million total out to the 1st April 15 at 5.42%. We'll follow up with a formal confirmation to you as you'd normally get with any of the deals with ourselves and that will specify everything but obviously as you say you are familiar with them and you were expecting it anyway.
>
> **MR. LAMONT:** I'm afraid so [laughs]."

23. Mr Lamont made a manuscript note of his call with Mr Young, recording that "NAMA has advised exercising @5.42%".

24. At 3.01pm IBRC sent an email to Mr Lamont attaching five separate notices, each headed "Swaption Exercising" and giving notice that on 2 April 2012 "this Transaction was exercised", each notice further attaching a copy of the relevant Swap.

(g) Subsequent communications and dealings between ASPL and NAMA in relation to the Swaps

25. As Mr Lamont mentioned in the telephone call with Mr Young on 2 April 2012, he was then in the process of preparing a Business Plan for submission to NAMA, setting out proposals for managing and reducing the substantial indebtedness of part of the Boyd Connection (including ASPL) to NAMA.

26. In the final version dated 5 April 2012, the Business Plan recognised that the total indebtedness of the relevant companies to NAMA was £196m, including the £110m owed by ASPL. The Business Plan proposed the orderly disposal of properties over several years, estimating that this would reduce the total debt owed to NAMA to around £115m in 2021.

27. Paragraph 6.5 stated:

> "IBRC/NAMA has exercised its right to extend the transaction until 1st April 2015 at the fixed rate of 5.42%...Consequently, swap payment obligations of circa £6.5m, based on the current LIBOR rate, will fall due, restricting the ability for Debt Reduction."

28. On 11 and 15 June 2012 IBRC's NAMA unit emailed Mr Lamont asking for confirmation of ASPL's authorisation for "the Swap payment" of £547,791.35 to be collected from ASPL's accounts by one-off direct debit. On 15 June 2012 Mr Lamont provided his confirmation. A similar pattern of requests for authorisation and express confirmation from ASPL occurred thereafter on a quarterly basis. The requests for and the authorisations of payment were, self-evidently, on the mutually assumed basis that the Swaps had been extended.

29. On 21 May 2013 a meeting took place between Mr Boyd and members of NAMA's Asset Recovery team at which Mr Boyd expressed his displeasure that NAMA had exercised the Options. Mr Boyd confirmed in his witness statement that he mentioned that payments being made by ASPL at the high fixed rate under the terms of the Swaps could adversely affect asset sales and asked why the payments could not be applied as debt reduction.

30. On 18 December 2013 NAMA wrote formally to ASPL and other members of the Boyd Connection, stating that it was not satisfied that the Business Plan met NAMA's statutory objectives in terms of debt reduction or property management and realisation, and reserved the right to take enforcement action. Nevertheless, NAMA was prepared to continue to provide support, initially for 6 months, subject to certain requirements, including that NAMA would have to approve all transactions and that all net rental income would be remitted to NAMA and fully secured. Internally, NAMA's strategy for dealing with the Boyd Connection recognised that, even with a long-term consensual approach, ultimate recoveries from the Boyd Connection (including ASPL) would fall far below the face value of ASPL's indebtedness.

(h) NAMA's transfer of the Swaps

31. On 20 June 2014 NAMA sold a portfolio of loans acquired from several lenders, including the indebtedness of ASPL, to Promontoria Eagle Limited. The indebtedness was transferred at a significant discount. NAMA's rights and obligations under the Swaps were transferred as part of the transaction.

(i) ASPL's claim

32. It was not until 23 June 2016, two years after NAMA had sold ASPL's indebtedness and the Swaps (and over a year after the extended term of the Swaps had expired), that ASPL's solicitors wrote to NAMA asserting that the purported extension of the Swaps on 2 April 2012 had been invalid and claiming repayment of the £4,778,289.56 paid by ASPL thereafter, together with interest.

33. That letter proceeded on the basis that the purported exercise of the Options had been by way of the emails sent by IBRC at 3.01pm in the afternoon of 2 April 2012, asserting (correctly) that such emails were ineffective to exercise the Options both (a) because email was not a permitted method of giving notice and, in any event, (b) because they were sent after the 11am expiry of the Exercise Period. The letter did not mention the earlier telephone call between Mr Young and Mr Lamont, as pointed out by NAMA's solicitors in their response, further asserting that the Options were exercised in that call.

34. On 12 August 2016 ASPL's solicitors replied, asserting that exercise by telephone was not valid or effective and that, in any event, ASPL's recollection was that the call "took place later in the day [than 11am]".

35. ASPL commenced these proceedings on 18 January 2017.

Whether the Swaps were validly extended

36. At the trial, the main focus of the dispute as to whether NAMA had validly exercised the Options was on whether, as a matter of contractual interpretation, NAMA was entitled to use the routes specified in the 2000 Definitions, those routes including exercise by telephone.

37. However, ASPL also argued (a) that NAMA could not prove that the telephone call took place before 11am on 2 April; and (b) that Mr Young did not, in any event, purport to exercise the Options during the course of the telephone call. Neither of these arguments had any force whatsoever (the first being abandoned by ASPL on the first morning of the trial), but are indicative of ASPL's willingness to take any and every point, however lacking in substantive and legal merit, in an attempt to recover from NAMA. I propose to deal with those points after first considering whether, in principle, exercise of the Options by telephone (as expressly provided for in the 2000 Definitions) was permissible.

(i) Whether exercise by telephone was permissible

(a) ASPL's contentions

38. Mr Tolley QC, counsel for ASPL, accepted that the Options used terms which, on their face, were taken from Articles 10 and 11 of the 2000 Definitions, dealing with Option Transactions and the Exercise Of Options (namely, "Exercise Period", "Expiration Time" and "Exercise Business Day"). Mr Tolley further accepted that those terms were deployed in the Options under the heading "Procedure for Exercise", being the precise wording of the heading of section 12.2 of the 2000 Definitions, which provides that notice of exercise of rights granted pursuant to an Option Transaction may be given orally, including by telephone.

39. On the face of matters, therefore, it seemed that the Confirmations provided that the procedure for exercising the Options was that set out in section 12.2 of the 2000 Definitions, permitting exercise by telephone.

40. Mr Tolley nevertheless argued that the Procedure for Exercise set out in section 12.2 of the 2000 Definitions was simply not engaged because that procedure relates only to Option Transactions (including Swaptions) as defined in Article 10. Although the Options were undoubtedly option transactions (providing NAMA with "the right but not the obligation" to extend the Swaps), Mr Tolley submitted that such transactions would only fall within Article 12 if they were expressly identified as an Option Transaction (or a Swaption), that is to say, by the use of those exact terms, with the first letters capitalised. Mr Tolley went so far as to submit that, even if the parties had used the term "option" or "swaption" without capitalising the first letter, Articles 11 and 12 (including section 12.2) would not have been engaged.

41. In support of that strict and highly technical approach to the engagement of Articles 11 and 12 of the 2000 Definitions, Mr Tolley referred to *Lomas v JFB Firth Rixson Inc* [2011] 2 BCLC 120, in which Briggs J (in a passage which was not criticised on appeal) stated at [53]:

> "The ISDA master agreement is one of the most widely used forms of agreement in the world. It is probably the most important standard market agreement used in the financial world. English law is one of the two systems of law most commonly chosen for the interpretation of the master agreement, the other being New York law. It is axiomatic that it should as far as possible be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand."

42. Mr Tolley further emphasised that it must be assumed that the 2000 Definitions will have been drafted after considerable thought and with the benefit of the knowledge of the relevant market: see *Re Lehman Brothers International (Europe) v Lehman Brothers Finance SA* [2013] BCLC 451 at [87]. The objectives of clarity, certainty and predictability, he submitted, required that only a transaction expressly identified in a confirmation as an Option Transaction or Swaption would be governed by the provisions of Articles 11 and 12 of the 2000 Definitions.

43. Mr Tolley further pointed out that the Confirmations:

    i) did not use the terms "Seller" and "Buyer" as defined in Article 11 of the 2000 Definitions to describe the parties to the Options;

    ii) did not specify whether settlement was to be "Cash" or "Physical";

    iii) although referring to an Exercise Period and an Expiration Time, did not provide for an Expiration Date and an Earliest Exercise Time as required for a European style Option Transaction (one in which the option must be exercised on a particular Expiration Date); and

    iv) did not adopt the format of any of the sample confirmations exhibited to the 2000 Definitions.

44. It followed, Mr Tolley contended, that the applicable procedure for exercising the Options was to give notice in accordance with the provisions in section 12(a) of the ISDA Form, which provides a menu of effective forms of notification, but not including notification by telephone. He referred to *Greenclose v National Westminster Bank plc* [2014] 2 Lloyds Rep 169, in which Andrews J held, at §121, as follows:

> "Section 12(a) is mandatory and notice has to be given by the means it prescribes, by reference to and in accordance with the information provided in Part 4 of the Schedule… If the Schedule does not provide certain information necessary for service by a prescribed method, then the contract must be construed as limiting prescribed methods to those expressly permitted by the Schedule unless and until the missing information is notified under Section 12(b) or the contract is formally amended."

45. Mr Tolley further contended, in the alternative, that even if section 12.2 of the 2000 Definitions was engaged, NAMA was not entitled to exercise the Options by telephone because the Confirmations did not include a contact telephone number for ASPL, the only "contact details" provided being ASPL's postal address.

(b) The proper approach to interpretation of the Confirmations

46. Whilst a strict approach, favouring clarity, certainty and predictability, is required in interpreting the terms of standard market agreements such as the ISDA master agreement or Definitions, the authorities recognise that those documents are in each case subject to the specific provisions in any agreed Schedule and that the terms of the specific confirmation must prevail in the event of any uncertainty.

47. Therefore, although the starting point is to interpret the relevant provisions of the 2000 Definitions and the ISDA Form on the basis that they are standard market agreements, the question of whether and to what extent parties have agreed to incorporate and/or vary such provisions falls to be interpreted according to well recognised principles set out in the Supreme Court decisions in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC

36, [2015] AC 1619 and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173.

48. Lord Hodge, in the last of those decisions, emphasised that the *Rainy Sky* and *Arnold* cases adopted the same "unitary" approach to contractual interpretation, summarising that approach as follows:

> "*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.*
>
> *11…. Interpretation is… a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…*
>
> *12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated… To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements…*"

(c) Interpretation of Article 10 of the 2000 Definitions

49. Article 10 of the 2000 Definitions could have provided that parties must use the precise name or label "Option Transaction" or "Swaption" in the confirmation in order to engage the ensuing provisions, but did not do so. Instead, the Article employed the broader concept of a transaction being "identified" as such.

50. Whilst the most straightforward and perhaps usual way to identify a transaction as an Option Transaction or Swaption would be to so name or label the transaction in

question, I see no reason why identification should be strictly limited to naming or labelling, even in the context of the need for certainty and clarity. An object or a person can be identified by description as well as (and sometimes more accurately than) by name. In a different context, the Supreme Court in *Financial Conduct Authority v Macris* [2017] UKSC 19 held that a notice could identify a person for the purpose of s.393 of the Financial Services and Markets Act 2000 by use of a synonym for him, such as his office or job title (where it was apparent that it was him from the notice itself or from publicly available information).

51. For example, a confirmation could expressly state that a transaction "falls within section 10.1(c)/10.2 of the 2000 Definitions", clearly identifying the transaction as an Option Transaction or a Swaption as defined in those provisions. It would be absurd to suggest that such wording did not sufficiently identify the transaction for the purposes of Article 10 because it did not use the term Option Transaction or Swaption, but that is the effect of Mr Tolley's argument. Again, if the confirmation stated expressly that the transaction conferred a right which was to be governed by and exercised in accordance with the provisions of Articles 11 and 12 of the 2000 Definitions, it would, in my judgment, clearly identify the transaction as one of those referred to in those Articles without expressly labelling it as such.

52. I conclude, therefore, that a transaction falls within Article 10 and the ensuing provisions of the 2000 Definitions if the confirmation labels it as an Option Transaction or Swaption, or otherwise defines or describes it or its operation in terms which make it clear that it falls within the provisions dealing with those transactions.

(d) Interpretation of the Confirmations

53. The first question is whether the Confirmations in this case identified the Options as Option Transactions. If they did so, that would appear to be determinative of the question of whether the Procedure for Exercise in 12.2 of the 2000 Definitions was applicable (and I did not understand Mr Tolley to suggest otherwise). However, if the Options were not identified as Option Transactions, the further question arises as to whether the Confirmations, properly interpreted, nevertheless incorporated and engaged the provisions of 12.2 of the 2000 Definitions.

i) Identification

54. In my judgment it is plain beyond sensible argument that the Confirmation did identify the Options as Option Transactions. Having expressly adopted the 2000 Definitions in the Confirmations, the parties then provided for options to extend the Swaps based entirely on capitalised terms which are expressly defined in the 2000 Definitions. Apart from the broad point that the parties adopted defined terms to be found within Articles dealing with Option Transactions and their exercise, two of the terms are defined by reference to and in relation to an Option Transaction. Thus "Exercise Period" is defined in terms of the type of Option Transaction in question and "Expiration Time" means "in respect of an Option Transaction, the time specified as such in the related Confirmation".

55. Mr Tolley argued that the terms "Exercise Period", "Expiration Time" and "Exercise Business Day" could not be interpreted or understood as per the 2000 Definitions because, as neither the term Option Transaction nor Swaption were used in the

Confirmations, the 2000 Definitions were simply inapplicable in relation to those terms. But that argument pre-judges the very question at issue, namely, whether the Options are identified as Option Transactions, and (in my judgment) wrongly excludes the possibility that the use of those terms in itself provides the required identification by reference to their definitions.

56. In support of his argument, Mr Tolley argued that the terms "Exercise Period", "Expiration Time" and "Exercise Business Day" could be understood and applied independently of their deployment in Article 12 of the 2000 Definitions, but that appears nonsensical. Those terms, each capitalised, are plainly defined terms which can (in this context) be found and only found in the 2000 Definitions and only in relation to Option Transactions. They are also used in conjunction with the heading Procedure for Exercise, obviously taken from section 12.2.

57. It follows that the Options were created and given effect according to terms that related solely to Option Transactions. The only sensible explanation for their use is that the Options are Option Transactions within Article 10. In my judgment, by so providing, the Confirmations clearly and obviously identified the Options as Option Transactions within Article 10 of the 2000 Definitions. Instead of expressly stating that the Options were Option Transactions, the Confirmations structured the Options by using terms which identified them as such. The effect, in my judgment, was the same.

58. Further, the Options were entirely workable on the basis that they were Option Transactions governed by Articles 11 and 12 of the 2000 Definitions (and ASPL did not contend otherwise). It is true that the Confirmations omitted certain of the details usually expected (simply stating, for example, that the Exercise Period was 2 April 2012) and did not use the terms Seller and Buyer, but those are minor details. The larger picture, which was clear beyond doubt, was that the Confirmations provided for the Options to be governed by the procedures in Articles 11 and 12 of the 2000 Definitions, thereby clearly identifying them as Option Transactions for that purpose.

59. I therefore conclude that, contrary to ASPL's primary contention, the Confirmations do identify the Options as Option Transactions and thereby do engage the Procedure for Exercise in section 12.2 of the 2000 Definitions.

ii) Incorporation/engagement

60. If I am wrong in the above conclusion, the question still arises as to whether, on a proper interpretation of the Confirmations, the Procedure for Exercise in section 12.2 of the 2000 Definitions was incorporated or adopted (notwithstanding, on this hypothesis, that the Options were not identified as Option Transactions or Swaptions), or whether notice of exercise could only be given by one of the routes set out in section 12(a) of the ISDA Form.

61. In my judgment, a textual analysis of the Confirmations strongly supports the former interpretation, first and foremost because (as discussed above) the Options and their terms are structured solely by reference to terms defined in Articles 11 and 12 of the 2000 Definitions. Even if the Options are not strictly "identified" as Option Transactions, it is nonetheless clear that the procedure for exercising them is incorporated into the transactions set out in the Confirmations. None of the detailed

points made by Mr Tolley as to the absence of certain defined terms undermines that conclusion.

62. Further, section 12(a) of the ISDA Form provides for notice to be given to the address or number provided in the Schedule (or via the electronic messaging details provided in the Schedule), but ASPL and NAMA did not agree a Schedule. It follows that, on a strict reading of section 12(a) of the ISDA Form, there was no route for NAMA to give notice under that provision. As there must have been a contractually valid method of exercising the Options (a proposition Mr Tolley endorsed), the obvious conclusion is that the applicable procedure was that set out in section 12.2 of the 2000 Definitions, which does not require that contact details be set out in the Schedule, providing that notice must be during the Exercise Period "in accordance with the contact details, if any, specified in the related Confirmation". Whether or not any contact details were set out in the Confirmations (an issue addressed below), the section 12.2 Procedure for Exercise provided a straightforward route for exercise, whereas section 12(a) of the ISDA Form did not. If no contact details were set out, only the section 12.2 Procedure for Exercise was workable.

63. The broader business context of the Confirmations also supports the conclusion that the parties were adopting the section 12.2 Procedure for Exercise. It is obvious (and was common ground) that the decision as to whether to exercise an option in relation to an interest rate swap may be highly sensitive to market movements and may be made (or changed) at the very last minute: in this case it was to be made by 11am on the specified day. In that context, the ability to exercise the Options orally and by telephone, as permitted by the section 12.2 Procedure for Exercise, makes far more business sense than the more cumbersome routes permitted by section 12(a) of the ISDA Form, particularly as ASPL argued that the only permissible route was by post (which might not arrive by 11am) or by courier.

64. I should add that NAMA also contended that "market practice" supported an interpretation which permitted exercise by telephone. Both parties called expert evidence in the field of interest rate swaps, including a somewhat arid debate as to whether the Options were properly to be regarded (as a matter of market practice only) as swaptions or "merely" extendable interest rate swaps. It was common ground that swaptions were generally exercised by telephone (the "market practice" in that regard being reflected in the 2000 Definitions), but Mark Rule, the expert for ASPL, did not accept that an option element in an extendable swap was a swaption, properly so called. At the end of the day both Mr Rule and Gerald Priedl (NAMA's expert) accepted that the applicable process for exercise was dependent on the terms of the contract between the parties and that there was no "market practice" that would or could override what had been agreed. I accept Mr Tolley's submission that the expert evidence does not assist in the process of contractual interpretation in this case.

65. Nevertheless, for the reasons set out above, I conclude that, even if the Options were not identified as Option Transactions, the Confirmations in any event incorporated or adopted the Procedure for Exercise set out in section 12.2 of the 2000 Definitions, including exercise by telephone.

(e) The absence of a telephone number

66. Mr Tolley contended that, even if the section 12.2 Procedure for Exercise was applicable, exercise by telephone was not permitted. Referring to the requirement to give notice "in accordance with contact details, if any, specified in the relevant Confirmation", he submitted that (i) the Confirmations did specify contact details for ASPL, being addressed to ASPL at its postal address in Belfast and therefore (ii) only exercise via that route was permissible.

67. The first question, in my judgment, is whether the section 12.2 Procedure for Exercise is dependent on the specification of contact details (as is clearly the case in respect of section 12(a) of the ISDA Form, as interpreted in *Greenclose*). In closing argument, Mr Tolley accepted that, if no contact details at all were provided, notice could nevertheless be given under 12.2, including by telephone. He was clearly right to make that concession given the express use of the words "if any". It follows that, in the absence of any contact details, the party exercising the option rights may do so in a telephone call with an authorised representative of the counterparty, without any telephone number being specified in the Confirmation. It would obviously be for the exercising party to ensure (and if necessary prove) that it had telephoned and thereby notified such a person. In the context of this type of transaction, where the exercising party will (as in this case) ensure contact details are available in advance and routinely record calls, there appears to be no significant problem with that course. Despite taking any and every point, ASPL has not suggested that giving notice to Mr Lamont was ineffective exercise as against ASPL. Further, there was no difficulty in reaching Mr Lamont through ASPL's main switchboard.

68. The second question is whether provision of one contact detail, a postal address, entails that other routes of exercise are unavailable. In my judgment it does not. Section 12.2 expressly permits oral exercise (including by telephone) unless otherwise provided in the Confirmation. It would be surprising if that express permission was countermanded, not by express exclusion, but implicitly by provision of a postal address. The answer is, in my judgment, that the words "if any" are to be read as relating to each form of notice.

69. If I am wrong in relation to the second question, a further question is whether any contact details were specified in the Confirmations in this case. In my judgment there is a clear distinction between an address to which a confirmation is sent (inserted unilaterally by the sender and not forming part of the body of the confirmation) and specified contact details agreed to be available for future formal contractual communications. In this case ASPL's address was plainly in the former category and did not constitute a specified contact detail.

70. It follows that I find that NAMA was entitled to give notice by telephone pursuant to section 12.2 of the 2000 Definitions.

(ii) The time of the 2 April 2012 telephone call

71. As referred to above, in their letter of 12 August 2016 ASPL's solicitors stated that "ASPL's recollection" was that the telephone call took place after 11am, the Expiration Time of the options.

72. However, on 2 March 2017 NAMA disclosed, with its Defence, a transcript of the call (produced, by a professional transcription firm, from IBRC's audio recording). The transcript noted that the call took place between 9.15am and 9.19am ("091543-091923").

73. Further, on 14 August 2018 NAMA gave disclosure, which included an internal IBRC email timed at 10.32am on 2 April 2012 in which Mr Young confirmed that he had spoken to Mr Lamont about the exercise of the options. Unless the authenticity or accuracy of that email was to be challenged by ASPL, it was more than sufficient evidence to prove that (perhaps not surprisingly) Mr Young had made the call before the Expiration Time.

74. No such challenge was, in the event, ever forthcoming. Indeed, in his witness statement dated 9 November 2018, Mr Lamont simply stated that "I cannot remember the exact time of this call".

75. Nevertheless, on the same date ASPL served a Notice to Prove the transcript of the call (but not Mr Young's email). Thereafter ASPL's solicitors made a stream of demands for (i) disclosure of the audio files and the underlying metadata (ii) cross-examination of persons who dealt with such matters (iii) further details of the metadata and of the report from the third party provider who extracted it. Although NAMA's solicitors provided text files and metadata screenshots (confirming that the call took place at about 9.15am) and a report from the third party provider who re-extracted the metadata to deal with certain queries, ASPL maintained that NAMA had not proved that the telephone call took place before 11am on 2 April 2012. That stance was ultimately based on an argument that a Hearsay Notice, served by NAMA in respect of documents produced by IBRC and the third party provider, was served out of time.

76. That remained ASPL's position in its skeleton argument for trial and right up to ASPL's oral opening. At that point, Mr Tolley stated that the point was not being pursued.

77. Whilst a party is of course entitled to require that a fact be proved at trial, it must be a fact which remains open to challenge on that party's case and consistent with its procedural stance: for example, when proof of a relevant fact, which has been the subject-matter of a non-admission, is dependent on oral evidence which can properly be challenged or a document which has been subject of a notice to prove. However, requiring a party to "prove" a fact which is established by a document the party cannot challenge or contradict at trial cannot be justified and risks being abusive. In the present case all the evidence (and commercial common sense) pointed to the telephone call having taken place before 11am on 2 April 2012 and Mr Young's email of 10.32am on that date put it beyond doubt. ASPL's subsequent intransigence on the issue and the taking of technical evidential objections in the face of reality, caused NAMA to incur significant costs on what was a non-issue. ASPL's approach was, in my judgment, completely unacceptable in Commercial Court proceedings (or indeed in any proceedings), failing to cooperate in the process of identifying and presenting the real issues for determination at trial and thereby failing to help the court to further the overriding objective.

(iii) Whether the Options were exercised in the course of the telephone call

78. The issue was whether (on the assumption that exercise by telephone was permissible), Mr Young exercised the Options in the course of his call with Mr Lamont.

79. It was common ground that the test was an objective one, as explained in the speech of Lord Steyn in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749, a case in which the issue was whether a tenant had given notice exercising a breach clause in a lease. At p.767G Lord Steyn stated:

> "The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relative objective contextual scene."

80. The question in the present case, therefore, was whether a reasonable person in the position of Mr Lamont, with knowledge of the relevant circumstances, would have understood that, during the course of the telephone call on 2 April 2012, Mr Young, on behalf of NAMA, was exercising the options to extend the Swaps. That falls to be decided by looking at both the actual words used (a textual analysis of the agreed transcript) and the factual context of the call: see *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376 per Simon LJ at §30.

81. Mr Tolley contended that, on a proper reading of the transcript of the call, Mr Young was informing Mr Lamont, as a matter of courtesy, that NAMA would be exercising the Options at a later point, not that he was exercising them in the course of that very call. Mr Tolley argued that that understanding is borne out by the fact that NAMA, later the same day, did indeed send emails confirming exercise of the Options.

82. In my judgment, neither the words used by Mr Young nor the context of the call provides any support for that conclusion, but clearly demonstrate that Mr Young was exercising the Options. As for the words used:

    i) Mr Young did not merely state that NAMA would be exercising the Options, as might be expected in a courtesy call, but repeatedly sought to "run through the details" of each of the Options with Mr Lamont, seeking to identify each one by number and to "run through the numbers". In the event he did not do so because Mr Lamont stated that he knew "exactly what you are talking about" and that he "had the five of them here". Nevertheless, Mr Young's approach was exactly what would be expected of a party effecting an oral trade (or in this case exercising an option in a trade), ensuring that his counterparty knew the precise subject matter of the conversation and understood the precise terms of what was being undertaken, and that such matters were captured on the audio recording of the call;

    ii) further, Mr Young repeatedly referred to the fact that NAMA was exercising the Options in the present tense (and not the future tense), stating "we are indeed exercising the rights …", and "we are exercising …";

iii) Mr Young then stated that IBRC would "follow up with a formal confirmation", clearly indicating that the operative exercise had been made and that (as would be expected) subsequent documentation would be by way of confirmation, not exercise.

83. As for the factual and commercial context of the call, the Options had to be exercised during a short period on 2 April 2012, one of the methods mentioned in the 2000 Definitions for exercise of a swaption (which the parties to the call plainly understood these transactions to be) being by telephone. A reasonable person in Mr Lamont's position, well knowing the terms of the Swaps, would expect and understand that a telephone call about the Swaps during that window was likely to be NAMA exercising the Options. Mr Lamont's assertion in his witness statement that he did not understand Mr Young to be exercising the Options is not relevant to the objective analysis, even if true.

84. I do not accept Mr Tolley's contention that the terms of the email confirmations sent at 3.01pm on 2 April 2012 are relevant to the issue: the Options either were or were not exercised in the course of the earlier telephone call, viewed objectively as at the time it was made. But in any event, the emails are entirely consistent with the Options having been exercised in the course of the call, being the "formal confirmations" to which Mr Young referred. The covering email stated that it was attaching confirmation of swaptions "that were exercised today" and each confirmation stated that it was giving notice that "on the 2nd April 2012 this Transaction was exercised".

(v) Conclusion

85. For the above reasons I find that the Swaps were extended validly and effectively on 2 April 2012.

Estoppel

86. If, contrary to my conclusion above, the Swaps were not validly extended, the question arises as to whether ASPL was entitled to raise that technical objection (itself based on a highly technical argument) years later, after both parties had fully performed the obligations which would have arisen under the extended Swaps on the common assumption that they had indeed been extended.

87. The contention, when raised, was remarkably opportunistic and unattractive for the following reasons:

i) ASPL had had the benefit of the protection the extended Swaps provided against significant future interest rate rises and would happily have accepted net payments due from NAMA under the extended Swaps had those eventuated (and would not have raised any issue as their validity). The belated assertion of invalidity was a classic case of a party claiming to have the benefit of a one-way bet, seeking the return of its stake when the bet was lost;

ii) ASPL had also had the benefit of the extended Swaps being treated as substantially fulfilling its contractual obligation to hedge 50% of its borrowing from NAMA;

iii) by the time the issue was raised, NAMA had sold ASPL's very substantial debt, so was no longer in a position to apply the sums received under the extended Swaps against that debt (either by agreement with ASPL or by making demand and applying a set-off). ASPL, correspondingly, was effectively seeking a windfall repayment which it could not have obtained whilst NAMA held its debt.

88. There was some debate as to what would have occurred if ASPL had asserted on 2 April 2012 (or at any time before the sale of the Swaps in June 2014) that the extension of the Swaps was invalid and ineffective. Mr Tolley contended that it would have made no difference to the position because (i) ASPL would have continued making payments, doing so without prejudice to its assertion of invalidity, (ii) NAMA would have been content with that position; and (iii) litigation might have commenced sooner, but would not have been resolved by June 2014, so both ASPL and NAMA would have been in exactly the same position they were at trial.

89. However, the evidence did not support that analysis:

i) in his witness statement Mr Boyd stated that, if he had known about the invalidity issue straight away, he would have directed ASPL to cease making payments to NAMA under the Swaps. If the point had come to light later, Mr Boyd recognised that the monies already paid could well have been applied to ASPL's debt. Either way, he would have used the issue as a negotiating factor or "leverage" in the ongoing negotiations he was having with NAMA;

ii) when cross-examined, Mr Boyd accepted that the money would in the end have been paid to NAMA and retained by them one way or another: this was consistent with both the Business Plan and Mr Boyd's statements at the meeting on 21 May 2013: monies payable under the extended Swaps would otherwise have been paid by way of debt reduction;

iii) Sarah Ó Cinnéide, a member of NAMA's Asset Recovery team from October 2012 and the principal case manager for the Boyd Connection from about December 2013, gave evidence as to the relationship between NAMA and ASPL. She stated that, having paid for the benefit of the Swaps when acquired from Anglo, NAMA would not have accepted non-payment of sums due from ASPL under the renewed Swaps and would have brought the matter to a head. She accepted Mr Tolley's suggestion that it might have resulted in earlier litigation, but it is plain that she considered that it was considerably more likely that the dispute would have been resolved by commercial negotiation.

90. In my judgment there would have been no question whatsoever of litigation between ASPL and NAMA prior to the sale of the debt in June 2014. ASPL owed £110m to NAMA, which could be demanded at any time, and ASPL (and the Boyd Connection as a whole) was entirely dependent on NAMA's support for the continuation of its business. The most ASPL could have hoped for was that NAMA would agree to take the Swaps payments as debt reduction instead. The suggestion that ASPL would have sued NAMA in those circumstances was absurd.

91. Further, the benefit to ASPL of reducing its total debt was primarily the effect it would have on NAMA's approach to ASPL's business, the support it would provide

and the terms it would impose: the reduction of debt would, in itself, have been of only marginal benefit to ASPL. If money was to be paid in debt reduction in place of Swaps shown on NAMA's books (and included in NAMA's hedging strategy) it was unlikely that NAMA would have treated it as a favourable development, and ASPL would have well known and understood that.

92. In my judgment, had ASPL asserted the invalidity of the extension of the Swaps at any time before the sale of its debt in June 2014, and thereupon (per Mr Boyd's evidence) ceased making payments under the extended Swaps or threatened to do so:

i) NAMA would have firmly rejected the assertion and insisted that ASPL waive or withdraw that contention and/or agree that the Swaps were valid and/or enter fresh Swaps on identical terms, if necessary threatening to make demand or impose other terms in default;

ii) ASPL would have had little or no leverage to maintain its assertion. The most it could have hoped for was some small concession, for example, in relation to the ongoing need to obtain NAMA's consent for the use of sale proceeds and rental income from charged properties for its ongoing business;

iii) if the issue had been raised in the run up to the sale of the debt, I readily infer that NAMA would have sought to resolve the matter promptly, not least because the Swaps were included in the sale and a failure to do so would have left NAMA exposed to the claim and the resulting losses with which it is now confronted;

iv) the end result would have been that the validity of the extension of the Swaps would have been confirmed or agreed in a manner which would have bound ASPL. But if I am wrong in so finding, the monies paid under the extended Swaps would in any event have been paid to NAMA by way of debt reduction and such reduction would have made little difference to the amount NAMA received on the sale of that debt in June 2014.

93. Against that background, NAMA contends that ASPL is estopped from asserting that the extension of the Swaps was invalid, relying on the doctrines of estoppel by convention and/or waiver by estoppel (sometimes also referred to as estoppel by conduct).

(a) Estoppel by convention

94. Lord Steyn summarised the law relating to estoppel by convention in *Republic of India v India Steamship Co. (No.2)* [1998] AC 878 HL 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.

> 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."

95. The modern exposition of the doctrine has its origins in the decision of the Court of Appeal in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84. In that case the bank agreed to make a loan to the claimant's subsidiary, secured by a guarantee executed by the claimant in respect of its subsidiary's liability to the bank. However, the bank in fact made the loan to its own subsidiary, which then on-lent the money to the claimant's subsidiary. The result was that, on its face, the guarantee did not cover the loan. The Court of Appeal held that, since the parties had acted on the agreed assumption that the plaintiff was liable for the loan, the plaintiff was estopped by convention from denying that it was bound to discharge the indebtedness to the bank.

96. A more detailed set of principles was set out by Briggs J in *HMRC v Benchdollar Ltd.* [2010] 1 All ER 174 at [52] as follows:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, to be derived from *Keen v Holland*, and the cases which comment upon it, are as follows. (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."

97. In *Blindley Heath Investments Ltd v Bass* [2017] Ch 289 seven shareholders in a company agreed to sell their shares to a purchaser, such sale being in breach of pre-emption rights in a shareholders agreement, but they and the other shareholders (also directors of the company) had forgotten about those rights and had proceeded on the mistaken basis that there were no valid rights of pre-emption. When the directors refused to register the transfer of shares to the purchaser, the purchaser applied for rectification of the register of members. The Court of Appeal upheld a finding that the directors were estopped by convention from relying on the pre-emption rights, providing the following exposition of the relevant principles:

> "73. Estoppel by convention is not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact: its basis is consensual. Its effect is to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case of promissory estoppel and proprietary estoppel); and see *Snell's Equity* 33rd ed (2015), para 12-012. If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights *inter se* for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so.
>
> ……
>
> 79. It may be that most cases of estoppel by convention arise from a mistake made by the parties or a mistake made by one party and acquiesced in by the other. But the authorities do not suggest that the principle is confined to cases of mistake. Moreover, a mistaken recollection is not, to our minds, legally different from a state of forgetfulness. The essence of the principle is that the parties have conducted themselves on a conventional basis which is, wittingly or unwittingly, different from the true basis. Whether the true state of things has been misappreciated, misremembered or forgotten should make no difference to whether the parties have in the event mutually adopted a common assumption.
>
> ……..
>
> 88. …the different results in the conjoined cases referred to above exemplify the necessity, if an estoppel by convention is to be established, of demonstrating conduct "crossing the line" and unambiguously giving rise to a clear assumption of fact or law on the faith of which both parties unequivocally proceed.
>
> 89. We consider that the real difficulty confronting a party seeking to establish an estoppel on the basis of an assumption contrary to, and in circumstances where the parties have forgotten, the true state of things is not a legal one but an evidential one: it is the problem of showing that something other than forgetfulness played a part in the adoption of the assumption, and that the person sought to be estopped assumed some responsibility for it.

98. As for the requirement that something must have "crossed the line" sufficient to manifest an assent to the assumption, the Court of Appeal stated:

> "93. The question whether the parties manifested assent to the assumption by something said or some conduct which clearly crossed the line is largely a question of fact. The judge was convinced that such assent was indeed manifested and we see no reason to depart from that conclusion. Indeed, what in the judgment is described as the "heated discussion" at the board meeting of 20 July 2010 about the transfer of shares to MSK 050 which gave effective control of the company to the Dixon interest to the prejudice of the Bass interest, in the course of which Mr Bass sought to raise a number of arguments against approval of the transfer but never raised any question of pre-emption rights, is not explicable except on the basis that all present made manifest their assumption, or at least (in the case of Mr Dixon) were prepared to proceed on the footing, that there was no impediment on which Mr Bass could rely to object to that transfer. "

99. In relation to the question of "assumption of responsibility for the common assumption", the Court of Appeal stated:

> "94. …..we consider that in the particular circumstances all parties shared responsibility. In a case of share transfer of a small private company there is every reason for the parties to be thinking of terms of company control and an assumption that there is no way of stopping any change in that control was an assumption that operated on the parties' minds throughout, and was relied on in connection with their subsequent mutual dealings".

100. On the face of matters, this appears to be a clear case where the doctrine of estoppel by convention applies with full force. After 2 April 2012 ASPL and NAMA continued to deal with each other on the common assumption that the Swaps had been extended validly and effectively, an assumption which thoroughly "crossed the line", not least when NAMA asked for authority to debit ASPL's account with the net payment due and ASPL provided the same. NAMA relied upon the common assumption in numerous ways, both in the steps it took (such as formulating its strategy for dealing with ASPL's debt and its own internal hedging strategy and ultimately selling the Swaps to a third party) and in the steps it did not take (such as addressing the invalidity or otherwise taking the payments in reduction of debt). In my judgment it was plainly unconscionable for ASPL to assert the invalidity of the extension of the Swaps after June 2014.

101. However, Mr Tolley raised several objections to the application of the principle.

102. The first objection was that it was not sufficient to identify the common assumption as broadly as that "the Swaps had been (validly) extended". Mr Tolley argued that it was necessary to show that the parties had a much more specific common understanding, namely, that exercise of the Options by telephone was permissible, an understanding that ASPL could not be shown to have shared. I reject that argument. What must be shown is that the parties shared a mistaken assumption as to the state of affairs which governs or affects their relationship (such as the existence of a contractual or other

obligation), not as to the mechanics which gave rise to that state of affairs. Thus the assumption in the *Texas Bank* case was the broad assumption as to the plaintiff's liability for a loan, not as to the detailed drafting of the guarantee or its effect. Equally, the assumption in *Blindley Heath* was the broad assumption that there were no rights of pre-emption, not as to the effect of the various dealings which resulted in those rights being forgotten.

103. The second objection was that ASPL had not assumed responsibility for the mistaken assumption, as the drafting of the Confirmations and the exercise of the Options was not in its control and it was not under any duty to investigate or speak about the validity of the notice of exercise. However, it might equally have been said in *Texas Bank* that the mis-match between the guarantee and the structure of the loan was the fault of the bank, not the customer. In both that case and the present case, the customer was able to review the documents and form a view as to their liability, and in that context have unequivocally accepted and communicated to the bank/agency that they are under the liability in question. ASPL was acutely aware of the impending exercise of the Options and was keen that they not be exercised. It was just as much open to ASPL to consider the validity of that exercise in April 2012 as it was when ASPL undertook that exercise in or about 2016.

104. The third objection was that ASPL did not manifest any intention to encourage NAMA to rely on the assumption. However, the Business Plan referenced the extension of the Swaps as a reason why ASPL would make reduced debt payments, thereby effectively inviting NAMA to accept lesser reductions on the basis that the extended Swaps were in force.

105. The fourth objection was that NAMA formed its own view of the validity of the extended Swaps and was not influenced by any communications from ASPL in that regard. But NAMA required ASPL's authority to debit its account with the net payments due under the Swaps and on each occasion Mr Lamont's consent confirmed that the extended Swaps were in effect and being operated by both parties. Had Mr Lamont refused his consent, NAMA's operative assumption would immediately have been undermined.

106. The fifth objection was that NAMA did not suffer any detriment by reason of the assumption, Mr Tolley contending that ASPL was not responsible for NAMA's decision to sell the ASPL debt. However, for the reasons set out above, I am satisfied that the assumption that the Swaps had been validly extended caused NAMA not to require ASPL to waive any defect in the exercise of the Options or otherwise to pay the same sums in debt reduction before NAMA lost the ability to require such payments. The very fact that NAMA is now subject to a claim for repayment, which would undoubtedly have been avoided if the point had been raised contemporaneously, demonstrates the detriment NAMA has suffered.

107. Finally, Mr Tolley asserted that there is nothing unconscionable in ASPL seeking to resile from the conventional understanding. For the reasons set out in detail above, I do not agree. ASPL is raising a highly technical argument to recover monies paid under a fully-executed contract when no monies would have been recovered had the point been taken at the time.

108. In my judgment, if the exercise of the Options was ineffective, that was a technicality which neither party considered as they continued their contractual relationship, completely unaware of the point. It is precisely the type of situation the doctrine of estoppel by convention is intended to address.

(b) Waiver by estoppel/estoppel by conduct

109. In the alternative, NAMA contended that, by failing to take any point in relation to the validity of the extension of the Swaps, ASPL waived any objection to that extension. NAMA did not rely upon the doctrine of waiver by election, but the "more flexible" doctrine of waiver by estoppel. The distinction is explained in *Chitty on Contracts* 33rd ed §24-008 as follows:

> "Both waiver by election and waiver by estoppel share some common elements. The principal similarity is that both would appear to require that the party seeking to rely on it (i.e. the party in default) must show a clear and unequivocal representation, by words or conduct, by the other party that he will not exercise his strict legal rights to treat the contract as repudiated. But there are also important differences between the two types of waiver. In the case of waiver by election the party who has to make the choice must either know or have obvious means of knowledge of the facts giving rise to the right, and possibly of the existence of the right. But in the case of waiver by estoppel neither knowledge of the circumstances nor of the right is required on the part of the person estopped; the other party is entitled to rely on the apparent election conveyed by the representation. Waiver by election is final and so has permanent effect, whereas the effect of an estoppel may be suspensory only. This difference may not be so marked in the context of waiver of breach because here the waiver may have permanent effect because, in some circumstances, it would be inequitable to allow the innocent party to retract his waiver. For example, in the case where a buyer assures a seller that the goods are in conformity with the contractual specifications, and the seller, in reliance upon these assurances, does not make a fresh conforming tender when he could have done, the buyer will be held to have waived any breach relating to the conformity of the goods and so the waiver will have permanent effect. Finally, waiver by estoppel requires that the party to whom the representation is made rely on that representation so as to make it inequitable for the representor to go back upon his representation. There is, however, no such requirement in the case of waiver by election; once the election has been made it is final whether or not the party has acted in reliance upon the election having been made. Waiver by estoppel is thus the "more flexible" of the two doctrines."

110. Mr Head QC, counsel for NAMA, relied on *Panchaud Frères v. Etablissements General Grain Co*. [1970] Lloyd's Rep. 53, as authority for the proposition that a party that did not take a technical objection to contractual performance would later be estopped from raising the point. In that case buyers of maize under the CIF contract did not take a point on late shipment of goods (evident from the documents tendered) until their later rejection of the goods on the ground of quality failed. Lord Denning

M.R. held that the buyers were estopped by their conduct from setting up late shipment as a ground for rejection, in that they had led the sellers to believe that they were not relying on that ground and it would be unjust or unfair to allow them to do so when they had had full opportunity of finding out from the contract documents what the real date of shipment was, but did not trouble to do so. Winn L.J. agreed that, having accepted the documents, the buyers could not properly thereafter turn round and say that the goods tendered were not contract goods.

111. However, it is not clear what reliance the seller placed on the buyer's acceptance of the documents and it is now recognised that the *Panchaud Frères* case does not create any separate doctrine and that the requirements of estoppel by conduct, including reliance and unconscionability, must be established in every future case: see *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514 and *Chitty* §24-006.

112. Considering those requirements in the present case, ASPL repeatedly made statements to NAMA based on the fact that the Swaps had been extended, including complaining about that extension. NAMA relied upon those statements by not taking steps to protect its position (as against an allegation of invalidity) prior to the sale of ASPL's indebtedness in June 2014. It matters not that ASPL was unaware of the fact that the exercise of the Options was technically invalid. ASPL is therefore estopped from asserting that invalidity, it being inequitable to allow it to retract its waiver after the June 2014 sale.

113. Mr Tolley stated that ASPL's objections to a finding of waiver by estoppel mirrored those set out above in relation to estoppel by convention. For the reasons set out above, I do not see any difficulty in NAMA establishing the requisite representation, intention that it be relied upon, actual reliance and detriment and unconscionability.

Good consideration/change of position

114. NAMA contended that it had a further defence to ASPL's claim for restitution of the sums paid under the extended Swaps on the ground that far greater sums were in any event due to NAMA and NAMA could have applied the monies received against that debt.

115. Mr Head relied upon *Kleinwort Benson Ltd. v. Lincoln City Council* [1999] 2 A.C. 349, in which Lord Hope of Craighead identified the third requirement of a claim for restitution of money paid under a mistake as being: "Did the payee have a right to receive the sum which was paid to him?", stating at p. 408:

> "The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground."

116. That requirement reflects part of the analysis of Robert Goff J in *Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd.* [1980] Q.B. 677, in which he summarised the elements of and defences to a claim for restitution of monies paid

under a mistake (limited, until the *Kleinwort Benson* case, to a mistake of fact) as follows, at p. 695:

> "(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so."

117. However, whilst the evidence clearly established that the monies paid under the extended Swaps would in any event have been paid by ASPL to NAMA by way of debt reduction, it is not accurate to say that NAMA had a right to such payments, nor a right to apply monies wrongly received against ASPL's indebtedness. ASPL's debt was contingent on the making of a demand by NAMA. It follows that NAMA could require that payments be made by way of debt reduction as a condition of not making demand (that is, continuing its "support" of ASPL), but did not have a right to receive payments or apply them to an account without first making demand or obtaining ASPL's authority.

118. In my judgment, therefore, if the Swaps were not validly extended, NAMA did not have a right to be paid equivalent sums and so does not have a "good consideration" defence.

119. On the other hand, at all times prior to the June 2014 sale NAMA had the right to make demand for ASPL's debt and set-off the monies it had received in respect of the (invalidly) extended Swaps against that debt. That right and ability was irrevocably lost when NAMA sold ASPL's debt on 20 June 2014. The question arises as to whether that action amounted to a defence of "change of position" as recognised by Lord Goff in *Lipkin Gorman (A Firm) v Karpnale Ltd*. [1991] 2AC 548 namely, that a defendant can escape liability in unjust enrichment where his:

> "… position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively restitution in full."

120. The present case is not a classic case where a recipient has spent the money paid to him by mistake in a manner which rendered it inequitable for it to be repaid (there being no evidence as to how NAMA in fact applied the monies paid under the extended Swaps). However, it is recognised that lost opportunities (including the opportunity to restructure matters so that the payment was valid) may amount to sufficient change of position. *Goff & Jones: The Law of Unjust Enrichment* 9th ed. summarises two cases which support that proposition as follows:

> "27-28 *Kinlan v Crimmin* [2007] 2 B.C.L.C. 67 also suggests that lost opportunities can constitute detriment. The defendant was a shareholder and director of a company to which he sold his shares under an agreement that was void for non-compliance with the Companies Act 1985 ss.164 and 159(3). The company's claim to recover its payment was defeated by the change of position defence, for these reasons:
>
> > "Had [the defendant] realised that the agreement was invalid and the payments made under it were made by mistake, [he] would obviously have wished to consider how his continuing interest in the company should be protected, either by his resuming his rights to protect himself as a quasi-partner in the business or by seeking the reformulation of the agreement so as to ensure that it and the payments to him were valid. These opportunities which were denied him cannot be restored to him."
>
> 27-29 Similarly, in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 C.L.R. 560, the claimant was fraudulently induced to make payments to the defendants, who believed that the money was being paid to discharge debts owed to the defendants by companies controlled by the fraudster. As a result, the defendants continued to deal with the companies and refrained from taking action to enforce the debts. The High Court of Australia held that they were entitled to the defence of change of position."

121. In the present case, NAMA sold ASPL's indebtedness in June 2014 believing, in good faith, that it was not liable to repay ASPL any part of the monies it had received under the extended Swaps and, in so doing, lost the opportunity to protect its rights to those monies (in the manner discussed in detail above). In my judgment, the loss of that opportunity rendered it inequitable to require NAMA to repay ASPL any part of those monies.

122. I therefore conclude that, had the extension of the Swaps been invalid, NAMA would have had a valid change of position defence to the entirety of ASPL's claim.

Conclusion

123. This was a highly opportunistic and meritless claim, based on a technical point as to the validity of contracts taken months after the contracts had been fully executed by both parties and after one party had sold the relevant business. To make it worse, the technical point was itself based on an overly-pedantic and unreasonable interpretation of commercial confirmations of the relevant contracts. The claim should not have been brought, was pursued unreasonably, and stands dismissed.