Neutral Citation Number: [2020] EWHC 337 (Ch)

Case No's: BL-2018-002369 AND BL-2019-001483

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

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 24/02/2020

Before:

CHIEF MASTER MARSH

- -

Between in claim BL-2018-002369:

MUSST HOLDINGS LIMITED	**Claimant**
- and -	
(1) ASTRA ASSET MANAGEMENT UK LIMITED	
(2) ASTRA ASSET MANAGEMENT LLP	**Defendants**

Between in claim BL-2019-001483

(1) ASTRA ASSET MANAGEMENT UK LIMITED	
(2) ASTRA CAPITAL INTERNATIONAL LIMITED	**Claimants**
-and-	
(1) MUSST INVESTMENTS LLP	
(3) MR SALEEM ANWAR SIDDIQI	**Defendants**

Peter Knox QC (instructed by **Collyer Bristow LLP**) for **Musst**
Jeffery Onions QC (instructed by **Payne Hicks Beach**) for the **Astra parties**

Hearing dates: 23 and 24 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. In this judgment I will adopt the same abbreviations as in the judgment handed down on 15 January 2020. That judgment also sets out a short background to the two claims which I do not need to repeat here.

2. Musst has applied to amend its particulars of claim and its reply in the Contract claim. The application has no bearing on the Defamation claim. The draft amended statements of case have been through a number of iterations since they were first provided to Astra. However, nothing turns on the changes that have been made and I will consider the merits of the application based on the final versions that were before the court at the hearing on 23 and 24 January 2020.

3. Astra has consented to a number of amendments. It is only necessary to refer to those to which objection is taken.

The law

4. There is no dispute between the parties about the principles that apply in the case of an application for permission to amend that is not 'late' or 'very late', as is the case here. It was agreed between Mr Knox QC who appeared for Musst and Mr Onions QC who appeared for Astra, that they are helpfully summarised in the judgment of Asplin LJ in *Elite Property Holdings Ltd and another v Barclays Bank plc* [2019] EWCA Civ 204 at [40] – [42]:

> "40. …it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost.
>
> 41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1.
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon. …".

5. Mr Onions QC placed particular reliance on the passage in paragraph [42] of the judgment that I have highlighted.

6. It is helpful to add four observations that apply to the application made in this case:

    (1) The issues that arise on the application to amend do not concern disputed issues of fact.

    (2) The differences between the parties on the application in part relate to issues of construction of a written agreement, the Introduction Agreement. The application for permission to amend is not an occasion for the court to reach a concluded view about the issues of construction. Rather, the court must decide whether Musst's construction has a real prospect of success: that it is not fanciful. This sets the threshold for the grant of permission to amend about such issues at a relatively low level. Musst's case must be more than merely arguable. However, where the drafting of an agreement is less than crystal clear, the difference between a point that is merely arguable and a point that has a real prospect of success is likely to be narrow.

    (3) Furthermore, the court dealing with a contested application to amend that relates to issues of construction must have firmly in mind that unlike the trial judge, it does not have the full context in which the document is to be construed.

    (4) As to the passage in Asplin LJ's judgment that has been emphasised, it is not the role of the court when considering an application for permission to amend to determine whether the case could have been pleaded in a different way or, indeed, pleaded in a better way. The court is solely concerned with whether there is an adequate degree of coherence and that the cause of action is adequately particularised.

Introduction Agreement

7. The terms of the Introduction Agreement are central to the application. It is dated 18 April 2013 and had an effective date of 21 November 2012. It was made between Musst (described in the Agreement as "the Introducer"), Octave Investment Management Limited (described in the Agreement as "the Manager") and Octave Investment Management LLP (described as the Investment Manager and collectively with Octave Limited as "Octave"). At a high level, the Introduction Agreement governed the fees, described in the agreement as a "revenue share", Musst was to receive for the introduction of investors to "Funds" managed by Octave (or one of the Octave entities).

8. There are numerous issues between the parties concerning Musst's claim that are irrelevant to the application for permission to amend. For the purposes of the application, contrary to Astra's case, it can be presumed that:

    (1) The Introduction Agreement was novated to Astra LLP and then to Astra Ltd.

    (2) Musst introduced (adopting the same shorthand as the parties have used) 2B and Crown as investors in Funds that fell within the scope of the Introduction Agreement.

(3) Payments made by Astra to Musst in respect of those introductions were not made, as alleged by Astra, pursuant to an oral arrangement that is described as the 21 November Arrangement.

9. The material clauses of the Introduction Agreement are:

(1) Clause 3.1: "The Introducer shall be entitled to share in all management and performance fees … earned and received by Octave … in respect of each Prospective Investor who makes (directly or indirectly) an investment in a Fund managed or advised by Octave (an **Investor**) for the Current Strategy on or before the Cut-off Date, each such investment being an **Eligible Investment**."

(2) Clause 3.2 provides that Musst's revenue share was to be 20% "in respect of any Eligible Investment".

(3) Clause 3.3 obliged Octave to notify Musst of "any discount, rebates or alternative fee structure in respect of any Eligible Investment."

(4) Clause 3.7 provides: "The parties hereby agree that a) any new investment made by an investor in a fund under the management of Octave or the Investment Manager following a strategy other than the Current Strategy (a "New Fund") and deriving from the redemption of investments originally made in a Fund following the Current Strategy will not be treated as Eligible Investments under this agreement and this includes a restructuring of ASSCF to turn into a liquid open ended fund following; and b) should amounts deriving from an Eligible Investment be reinvested in a New Fund by an investor, performance fees are currently expected to become crystallised no later than the date ….

(5) Clause 11.1 requires Octave to keep records of its activities in relation to the agreement "… including but not limited to recording any Eligible Investments (and the ongoing value of the same) and the payments due to the Introducer."

(6) Clause 12 makes provision for termination of the agreement. It continues in force for an initial period of 6 months after which it continues until terminated on not less than 30 days' notice.

(7) Clause 13 deals with the consequences of termination. Clause 13.1 specifies that, other than as set out in clause 13, neither party has any further obligation to the other under the agreement after its termination. Clause 13.2 then provides that: "The Introducer shall continue to be entitled to the revenue share in respect of all Eligible Investments (as defined in Clause 3) for so long as such Eligible Investments in the Current Strategy are maintained by the Investor provided that, notwithstanding the foregoing, should this Agreement be terminated following a repeated … material breach of the Introducer's obligations hereunder … the right of the Introducer to receive revenue share will terminate as of the Termination Date."

10. There are two defined terms used within these clauses that are important:

(1) "Current Strategy" is to invest [1] primarily in synthetic asset backed securities and [2] on a buy and hold basis with limited or on direct leverage, and [3] such that the investments are intended to operate as if they were closed-ended investment pools with capital committed on a locked up basis for several years to be returned to the investors in such funds following realisation of the investments therein." [numbering added for clarity]

(2) "Funds" – "The Astra Special Situations Credit Fund Limited ("ASSCFL"), and other funds and managed accounts designed to substantially replicate the investment securities and risk profile of ASSCF [sic], and following substantially the same strategy as set out under the Current Strategy below, howsoever structured … on or before the Termination Date of this agreement, to which Octave or Manager acts as Investment Manager. It is understood for the purposes of interpretation of the definition of a Fund that the strategy remains substantially similar to the Current Strategy."

11. Astra's case in summary is that:

(1) Musst's right to a share of the fees was dependent upon the investments made by 2B and Crown being "Eligible Investments".

(2) To be an Eligible Investment, the investment had to be made into a managed account designed to follow the Current Strategy.

(3) An Eligible Investment is not the assets that are held within the managed account. An investment in a managed account is the total contributed by the investor to the managed account not any individual security that might be bought on the investor's behalf and held within the managed account.

(4) For there to be an entitlement to a share of the fees, the managed account into which the investment was made had to continue to follow the Current Strategy. It would not otherwise remain an Eligible Investment.

(5) The 2B and Crown investments were Eligible Investments at the outset but by 31 December 2014, or 31 December 2015 at the latest, ceased to be Eligible Investments because the managed accounts into which the investments had been made ceased to follow the Current Strategy.

12. Some observations about the relevant provisions of the Introduction Agreement can be made:

(1) The focus of clause 3.1 appears to be primarily on the trigger requirements that give Musst an entitlement to share management fees. It is not obvious, however, from the drafting that such an entitlement would cease upon any particular event. The point is not directly addressed in clause 3.1.

(2) The language used in clause 3.1 does not suggest any limitation on the entitlement to share management fees, particularly as the Current Strategy envisages that the capital will be provided on a "locked-up basis for several years". As Mr Knox QC points out, Musst had no control over the strategy after the introduction of an investor and it would be open to Astra, on its

construction, to deprive Musst of introduction fees by a change of investment strategy.

(3) The Current Strategy envisages that the investment (meaning the initial cash provided) will be invested "primarily in asset backed securities". The cash investment is translated into assets that are held in the managed account. The capital is to be returned to investors on realisation of the investments in the managed account.

(4) "Each such investment being an Eligible Investment", as it is used in clause 3.1, read literally, refers back to a "Prospective Investor who makes an investment in a Fund" and therefore refers back to the provision of cash as the initial step. However, since it is inevitable that the money invested will become assets held in the Fund, an Eligible Investment may have been intended to mean the product of the investment not just the provision of money. This is because the money invested is provided for the Current Strategy, namely the holding of classes of assets.

(5) It is notable that clause 11.1 requires Astra to keep records of the value of Eligible Investments, not the amount invested. This suggests there is an obligation to keep a record of the investments that are held in the managed account, and their value, not the amount of the initial cash investment.

(6) Clause 13.2 deals with the continuing right to receive a share of fees. Musst is to be so entitled "for as long as such Eligible Investments in the Current Strategy are maintained". Clause 13.2 expressly refers to the definition of Eligible Investment in clause 3. However, an investment, as defined in clause 3.1, can only be an Eligible Investment if it is for the Current Strategy. The reference to an investment in the Current Strategy could point to a continuing requirement and support Astra's case; or it could point back to clause 3.1, with the place of emphasis in clause 13.2 being on the investor maintaining the investment.

(7) For the purposes of this application, and without expressing a concluded view, it must be more than merely arguable that the term Eligible Investment is used in more than one sense in the Introduction Agreement. It may mean for the purposes of a qualifying introduction of cash, triggering a future right to share fees, merely the initial money investment; and it is later used in the sense of the managed account and the investments (or assets) held within it.

13. Astra paid a share of fees earned from 2B and Crown over a period of years, although Astra denies that the fees were paid pursuant to an obligation under the Introduction Agreement. Astra says they were paid ex gratia under the 21 November Arrangement. For the purposes of the application, Musst's case is assumed to be correct and any entitlement arises under the Introduction Agreement.

14. Astra's objections to the principal amendments, that provide Musst's response to Astra's 'ceased to follow the Current Strategy' defence, are in summary:

(1) Musst has failed to provide its case on the proper construction of the Introduction Agreement with any degree of clarity and it has no real prospect of success.

(2) Musst mis-states Astra's case when purporting to respond to it.

(3) The amendments lack coherence.

(4) Musst's case on the parties' common intention and assumption, that provides a basis for rectification or estoppel by convention is put in ways that are inconsistent.

(5) The claim in rectification is not adequately pleaded and the claim has no real prospect of success.

(6) The necessary elements of a claim seeking an estoppel by convention have not been pleaded or alternatively the claim has no real prospect of success when the evidential basis for this claim that is relied upon is considered.

Amended reply

15. In paragraph 17 of the reply, before the proposed amendments, Musst refers to clause 3.1 of the Introduction Agreement and the definitions of Eligible Investment and Current Strategy. In paragraph 19(1), Musst denies that the managed accounts had ceased to follow the Current Strategy giving rise to a disputed issue of fact which will be decided at the trial. Musst goes on to say at paragraph 19(2):

> "In any event, even if the funds ["Managed Accounts" in the amended reply] in question had ceased to follow the Current Strategy, it is denied that on a proper construction the investment in the fund ceased to be an "Eligible Investment", or that the Claimant's entitlement thereupon and without more came to an end. The Claimant reserves the right to plead further to this allegation upon disclosure and upon receipt of further information."

16. Musst has answered Astra's request for information arising from the reply. There are a series of answers that clarify Musst's case about the proper construction of the Introduction Agreement. Musst makes it clear that it does not accept Astra's construction of the Introduction Agreement and that it contends both that the Current Strategy continued after December 2014 (and December 2015) and that, regardless of whether there was a change of strategy, Musst was still entitled to a share of the fees.

17. Musst's case on the proper construction of the Introduction Agreement is clarified in answer 14. It is confirmed that an investment for the Current Strategy would remain an Eligible Investment even if the Fund ceased to follow the Current Strategy and that Musst is entitled to a full share of management and performance fees earned in respect of that investment. Answers 14(1) and 14(2) explain Musst's position by reference to the provisions of the Introduction Agreement. The answers also forecast Musst's case that it seeks to make in the amended particulars of claim to the effect that both parties acted in accordance with a common assumption concerning Musst's rights to receive management and performance fees and that either the Introduction

Agreement should be rectified to accord with the common assumptions or that Astra is estopped from denying them.

18. Musst seeks to amend paragraph 17(1) of the reply. What the amendment is seeking to do is to clarify Musst's case by adding the sentence that commences with "for the avoidance of doubt". Put shortly, provided the initial investment qualified as an Eligible Investment when it was made, it would remain an Eligible Investment regardless of any change of investment strategy. The words in parentheses "alternatively an asset acquired by such" appear to be designed to meet Astra's case that an Eligible Investment can only refer to the initial investment of money for the Current Strategy.

19. Musst also seeks to amend paragraph 111 of the reply. In its unamended form, it merely admits paragraph 115(6)(c) of the defence in which Astra takes issue with the way in which Musst describes the investment made by 2B. In the defence Astra refers more closely to the qualifying requirements of an Eligible Investment and the proposed amendment, in effect, acknowledges that greater clarity about the way in which Musst's case is put is required.

20. To my mind, there is nothing in Astra's objection to this amendment based on the need to obtain permission to withdraw an admission. The admission concerns the description of the contractual language. It is not an unequivocal admission of fact of the type with which CPR Part 14 is concerned. Musst is not seeking to withdraw an admission but, rather, it is seeking to clarify its case in relation to a poorly drafted agreement.

21. Astra's objections to the proposed amendments to the reply are rather more muted than those that relate to the particulars of claim. There can be no objection to the amendments to the reply based on a lack of coherence or a failure to meet Astra's case. Paragraph 17(1) explains Musst's case that once a qualifying introduction had been made, and the investment could be regarded as an Eligible Investment, a change of strategy pursued by the managed account would not alter Musst's entitlement to share the fees generated by the investment. It cannot be said that this approach to the construction of the Introduction Agreement has no real prospect of success. It would be wrong to refuse permission in respect of it.

22. It appears to me that the amendments to the reply and defence to counterclaim are sufficiently clear and cogent and make a case that has a real prospect of success.

Amended particulars of claim

23. Astra's principal objections are to paragraphs 113A to 113L of the amended particulars of claim. There are three main elements to the amendments. First, at paragraphs 113A to 113G, Musst seeks to introduce the claims for rectification and estoppel by convention that were referred to in the answer to the request for information. Secondly, there is a further claim at paragraphs 113H and 113I relating to Musst's claimed entitlement to performance fees in the event that Eligible Investments are sold but fees relating to those investments are not received by Astra UK or Astra LLP. Thirdly, at paragraphs 113J to 113L, Musst seeks a declaration concerning Astra UK's liability to Astra LLP under a Deed of Transfer between them dated 29 April 2016. Each of these amendments needs to be dealt with in turn.

Paragraphs 113A to 113G

24. Astra's case in opposition to the amendment was explained in a letter from Astra's solicitors, Payne Hicks Beach, dated 5 December 2019. As it seems to me, the letter raises as many issues as it answers. It is more than merely arguable that an Eligible Investment comprises the subject matter of the managed account, rather than the initial cash investment. Payne Hicks Beach say it is common ground that Musst's right to a share of the fees earned by Octave in respect of any Eligible Investment continued "until it was sold or converted into a non-Eligible Investment" (quoting from an earlier version of the amended particulars of claim). It seems to me that the notion of an Eligible Investment in the Current strategy being "maintained", as it is put in clause 13.2, is hard to square with the initial investment being maintained. There is a respectable argument, with a real prospect of success, to the effect that "investment" in clause 3.1 means cash, whereas "Eligible Investment" looks at the next stage once the cash has been converted into qualifying investments.

25. Astra's initial objections fall into two categories:

(1) It is said that paragraph 113A does not accurately reflect Astra's case as to the effect of the Introduction Agreement. Mr Onions QC draws attention to the last part of the first sentence: "even if their managed accounts continued to hold Eligible Investments". He submits that Astra's case is clear that it is the total amount that is contributed to the managed accounts that comprises Eligible Investments and, in any event, Musst's case does not carry with it the requisite degree of conviction. I do not consider there is a basis upon which Astra can object to this aspect of the amendment. On one view, the managed accounts continued to hold Eligible Investments even though the assets no longer met the Current Strategy because they had been Eligible Investments at the outset. Even if it could be said that Astra's case could be summarised in a different way, I do not consider there is a proper basis for refusing permission on the basis of a lack of coherence.

(2) Astra objects to the last sentence in paragraph 113A where Musst states it "pleads below to both on the basis of its own construction and on the alternative basis that [Astra's] construction is correct". Astra says that Musst has not made its construction of the contract sufficiently clear. I do not agree. Musst's case about the proper meaning of the contract emerges with sufficient clarity from the amended particulars of claim and the answers to the requests for information. The fact that Astra will seek to persuade the trial judge that Musst's construction, in light of all the admissible evidence about its context, is wrong is not to the point.

26. There is more substance in the objection to the way in which Musst's case about the existence of a common continuing intention and assumption is pleaded. It is said that by virtue of a common mistake (paragraph 113B) the Introduction Agreement did not reflect their common continuing intention and assumption. This is described in paragraph 113C; that Musst's:

> "… right to management and performance fees would continue in relation to each Eligible Investment until and to the extent that it (or the asset acquired by it) was sold or converted into a non-Eligible Investment (or an asset acquired by

such) (at which point its right to performance fees would accrue as set out in the Contract as it stands)."

27. Paragraph 113D sets out the evidence of the common continuing intention and assumption that is relied on:

> "Further, this common intention and assumption is evidenced by the conduct of Octave in continuing to pay management fees to the Claimant up to February 2015, and by Mr Mathur's and Mr Holdom's conduct in procuring Astra LLP and then Astra UK Limited to continue to do so up to May 2016. The reason they did this, it should be inferred, was because they realised that the Claimant's right to fees continued to subsist even if the accounts had ceased to follow the Current Strategy. (For the avoidance of doubt, the Claimant does not accept that the 2B and Crown managed accounts had ceased to follow the Current Strategy by either date.) It is further evidenced by the conversations in April 2015 and June and July 2016 referred to in paragraph 5 of Appendix 1, because the premise of all those conversations was that the Claimant was entitled to management fees and performance fees even though (according to the Defendants' Defence) the managed accounts had ceased by then [to] follow the Current Strategy. It is also evidenced by Mr Holdom's emails to Mr Mathur of 14 June 2016 and 28 June 2016 disclosed by the Defendants and attached hereto, which proceed upon the same premise."

Rectification

28. Paragraph 113E then sets out the nature of the contractual rectification that is required:

> "Accordingly, [Musst] was entitled as against Octave, if necessary, to rectification of the Contract (and of clause 3.1) so as to provide that it was entitled to management and performance fees in relation to each Eligible Investment (or each asset acquired by such) once it had been acquired for a managed account (including those in Crown an 2B's managed accounts) for so long as such investment remained or remains unsold, even if, after acquisition, the managed account ceased to follow or to be for the Current Strategy (whether by reason of a change in strategy, other investments being held in it or otherwise)."

29. Both parties were content to rely on the recent statement (or on one view a re-statement) of the law in the judgment of the Court of Appeal delivered by Leggatt LJ in *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361. At [176] Leggatt LJ sets out his conclusions on the law relating to an application for rectification on the basis of a common mistake:

> "…before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord"

> meaning that, as a result of communications between them, the parties understood each other to share that intention."

30. Earlier in the judgment, Leggatt LJ discusses at [72] to [74] "the need for an "outward expression of accord" and at [75] to [77] the question of uncommunicated intentions. It is not in doubt, in particular from the remarks at [77], that the Court of Appeal considered an outward expression of accord to be an essential prerequisite to the grant of rectification:

> "… it is fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other and not on uncommunicated intentions which happen, without the parties knowing it, to coincide."

31. Rectification based upon a mistake requires there to be a common continuing intention at the time the contract is entered into. Equally, the outward expression of accord must exist by the same date. However, Musst is unable to point to any outward expression of accord leading up to the execution of the Introduction Agreement. The evidence of common intention that is set out at paragraph 113D does not provide evidence of an outward expression of accord because part of the evidence is said to arise by way of inference, and therefore lacks outward expression, and in part because the events post-date the contract. This is fatal to the proposed amendment so far as it seeks rectification.

32. Although it was not a point taken by Astra, Musst has also failed to state with any degree of precision how it is said that the Introduction Agreement should be rectified. This is not a simple case of rectification such as one involving the correction of a typographical error, or the insertion of a missing word or phrase. The Introduction Agreement, on Musst's case, is a poorly drafted agreement. The common continuing intention that is relied on affects as a minimum the definition of Funds and clauses 3.1, 3.2 and 13.2. If changes are needed to those provisions, it is highly likely that consequential alterations will also be required.

33. As it is put in Snell's Equity 24th ed:

> 16-001 "What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing."
>
> 16-016(c) "**Failure to Represent Agreement**. There must be clear and unambiguous evidence that the instrument does not accurately represent the true agreement of the parties at the time when it was executed, or at least that it is doubtful whether it does. It is not sufficient to show that the parties did not intend what was recorded; they have to show what they did intend, with some degree of precision."

34. It seems to me it is axiomatic that if the party claiming rectification is unable to articulate with precision the form the agreement should take when rectified, the claim is bound to fail. This is because the party seeking rectification will have been unable to show what the mistake was and what was the alleged common continuing intention. It does not suffice for the claimant to express the mistake and the common continuing intention at a high level of generality. In the absence of the agreement being produced

in a rectified form, the court could not, and would not, make an order as it could not specify the terms of the rectified agreement in an order. This may be a matter of practice, rather than a rule of law, but it illustrates why rectification requires more than a finding that there was a mistake and a common continuing intention that the parties' interests under the contract were to be different to those that the contractual words produce. Both sides of the equation are needed: that is both what the mistake was and what the contract would have looked like had the mistake not been made.

Estoppel by convention

35. Musst's case on estoppel by convention is set out in paragraph 19(3) of the amended reply and paragraph 113G of the amended particulars of claim. The initial objection taken by Astra is that the way in which Musst's case is put in paragraph 19(3) is not consistent with the amended particulars of claim. Astra says that permission to amend should be refused on the basis of a lack of coherence; or put another way, Astra is entitled to know the case it has to meet.

36. Paragraph 19(3) of the amended reply and defence to counterclaim is put in the following way:

> "Further, for the reasons set out in paragraph 113G of the Amended Particulars of Claim, the Claimant and Octave, Astra LLP and then Astra UK Limited (in each case through Mr Mathur and Mr Holdom) are estopped from denying that once an investment was an "Eligible Investment" (alternatively an asset acquired by such) then it would remain such for the purposes of the Claimant's right to commission under the Octave Contract as long as the investment was maintained by the investor."

37. The common assumption is set out in paragraph 113C of the amended particulars of claim that is set out in paragraph 26 above. It does not appear to me that they are inconsistent. Paragraph 19(3) of the reply and defence to counterclaim is more closely rooted in the language of the Introduction Agreement than paragraph 113C. The former refers to the Eligible Investment (or the asset that is acquired) being maintained by the investor and the latter to its sale or conversion.

38. Paragraph 113 G sets out the case on reliance and unconscionability:

> "… in reliance upon this common intention and assumption [that pleaded at paragraph 113C] shared by each of Octave, Astra LLP and Astra UK Limited, the Claimant (a) arranged its affairs and did not seek earlier clarification of the contract before it was executed, and (b) consented without complaint to Astra LLP and then Astra UK Limited taking on the management of the 2B and Crown accounts, and making payments in place of Octave. Accordingly, it would be unconscionable for either Astra LLP or Astra UK Limited to deny that this common intention and assumption was the effect of the Contract, and accordingly they are each estopped by a conventional estoppel from going back on the same."

39. The essential requirements of an estoppel arising from a convention are summarised in Chitty on Contracts 32nd ed. at 4-108:

> "Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law", the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption if it would be unjust or unconscionable … to allow them (or one of them) to go back on it."

40. There is a further requirement of this type of estoppel that is summarised at paragraph 4-110 in Chitty:

> " **"Communication" passing "across the line"**. To give rise to an estoppel by convention, the mistaken assumption of the party claiming the benefit of the estoppel must, however, have been shared or acquiesced in by the party alleged to be estopped; and both parties must have conducted themselves on the basis of such a shared assumption: the estoppel "requires communications to pass across the line between the parties. It is not enough that each of the two parties acts on an assumption not communicated to the other". Such communication may be effected by the conduct of one party, known to the other. But no estoppel by convention arose where each party spontaneously made a different mistake and there was no subsequent conduct by the party alleged to be estopped from which any acquiescence could be inferred. An estoppel by convention likewise cannot arise where neither party was aware of the fact on which the alleged common assumption is said to have been based, or where the conduct alleged to have given rise to the estoppel can with equal or greater plausibility be explained on grounds other than that the party alleged to be estopped shared an assumption made by the other party or as amounting to a communication by the former to the latter party."

41. In summary, Musst will have to establish that there was a common assumption that was communicated and that both parties acted upon it. It is not the case, unlike with rectification, that the assumption must have arisen before the Introduction Agreement was entered or that any relevant communication passed before that date. In the case of rectification, it is the way the bargain has been reduced to writing that is incorrect. The focus of an estoppel by convention, however, is upon how the parties acted after the contract was concluded; it is a question of whether they implemented the agreement in accordance with its terms. It is not that the words in the contract fail to reflect their intentions but, rather, that their post contract behaviour leads to an outcome that is inconsistent with their written bargain.

42. The common assumption, and the evidence of it, that are relied upon by Musst are the same as that relied upon for the rectification claim, namely the case pleaded in paragraphs 113C and 113D. The evidence is said to comprise three elements (1) the continuation of payment up to May 2016; (2) the conversations between the parties in April 2015 and June and July 2016 and (3) the emails of 14 and 28 June 2016. It is unnecessary to review each of elements in turn because the court at the trial will examine in detail how the parties acted, what was in their minds and how they communicated with each other. Musst is not required to plead its entire evidential case.

43. Mr Onions QC placed particular reliance upon what he submitted was an absence of communication crossing the line. It seems to me that the conversations between the parties that are relied on are capable of fulfilling this requirement. Musst has provided summaries of the conversations in an appendix to the particulars of claim. There will

need to be witness evidence about them and that evidence will no doubt be tested. In my judgment, although the claim based upon an estoppel by convention may not be strong, it is certainly pleaded with sufficient clarity to make out a case that has a real prospect of success.

Declaration concerning performance fees

44. I can deal with paragraphs 113H and 113I briefly. Musst seeks to obtain declaratory relief concerning its entitlement to performance fees if Eligible Investments (or the assets acquired) have been sold without the performance fee being paid or remain to be sold. The difficulty for Musst is that it does not have sufficient information to know what exactly Astra may have done in relation to the managed accounts it has held for 2B and Crown. It seems to me that Musst is entitled to pursue this element of the case in order to protect such entitlement to performance fees as it may have. The claim to relief is pleaded in a manner that is sufficiently clear and it puts forward a case that has a real prospect of success. It is not a relevant objection to say that the issue is hypothetical or because it is not alleged that Astra is likely to behave unlawfully. Wrestling may not provide an entirely apposite simile to apply to this litigation, however, the court could hardly fail to notice that Astra is conducting its defence on a 'no holds barred' basis, albeit entirely lawfully. It is clear that if Astra is not obliged by a judgment, or a declaration, to pay, it will not do so.

Declaration about Astra UK's liability to indemnify Astra LLP

45. At paragraphs 113J and 113K Musst seeks a declaration concerning Astra UK's liability to Astra LLP under the Deed of Transfer dated 29 April 2016. Astra LLP has ceased to trade and has no assets. If Musst succeeds against Astra LLP it wishes to know that Astra UK is liable to indemnify Astra LLP under the terms of the Deed.

46. Astra's starting point is that Musst pleaded in the particulars of claim that Astra LLP received no consideration for the transfer and received no indemnity and this is admitted in the defence. By a minor amendment, which is not disputed, Musst now pleads that there was no indemnity "according to the defence". It is said that Musst seeks to resile from its case. Musst is now saying, by virtue of the agreed amendment it is Astra's case that no indemnity was given and Musst's case is responsive. However, even if that analysis is wrong, Musst is not prevented from making an alternative case to cover a position that is uncertain.

47. Astra also says that it would be wrong to permit Musst to seek this relief because:

    (1) The relief sought deals with an issue that is hypothetical. Musst has not alleged that Astra will behave unlawfully and will decline to provide an indemnity. However, it seems clear enough that Astra in saying there is no obligation to indemnify and is saying inferentially that it will not indemnify.

    (2) If Musst were to obtain a judgment against Astra LLP, and it is not met, it will be open to Astra LLP to consider whether to pursue a claim against Astra UK for an indemnity.

48. Musst's position is that:

(1) The relevant parties are before the court; and the court at the trial will have all the evidence of relevant context it needs to resolve the issue of construction.

(2) The point is short one and will not overburden the trial.

(3) Given that Astra LLP is without assets, there is a reasonable likelihood of the question about the indemnity needing to be resolved.

(4) If the issue is not resolved in this claim, it could significantly delay enforcement of a judgment. In practice, the point would probably have to be pursued in Astra LLP's insolvency. That would take some time to resolve and would delay enforcement.

49. It is not in doubt that the court has power to deal with the relief that is sought. The issue for the trial judge is whether the court should exercise its discretion to do so: see the cases cited at note 40.20.2 in Civil Procedure 2019. It would be wrong in my judgment to refuse permission to amend. It would amount to the court deciding, without all the relevant context before it, that there is no real prospect of the trial judge being persuaded to grant this discretionary relief. In my judgment, whether that will be a proper exercise of the court's discretion is not for the court to determine on an application for permission to amend. It must be decided in light of all the circumstances at the trial of the claim.

Conclusion

50. I will make an order granting permission to amend the particulars of claim and the reply and defence to counterclaim in accordance with the final drafts other than the new claim for rectification for which permission is refused.