Neutral Citation Number: [2021] EWHC 2855 (Ch)

Case No: BL-2019-002365

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

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

Date: 27/10/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) CBPE CAPITAL FUND VIII A LP **(2) CBPE CAPITAL FUND VIII B LP** **(3) CBPE NOMINEES LIMITED**	**Claimants**
- and -	
(1) DR MOHAMED TARANISSI **(2) ARGC TOPCO LIMITED**	**Defendants**

- -
- -

Rosanna Foskett (instructed by **Macfarlanes LLP**) for the **Claimants**
Richard Fisher QC (instructed by **Carter Ruck Solicitors**) for the **Defendants**

Hearing dates: 15-19 June 2021

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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.

....

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on the trial of a claim under CPR Part 8 for a declaration as to the construction of various documents, but in particular the agreement, contained in a letter of 2 December 2013 ("the 2013 Letter"), made on behalf of the claimants with the first defendant. The claim form was issued on 19 December 2019. Although this was originally a Part 8 claim, on 11 February 2020 it was ordered to continue as a Part 7 claim. Particulars of claim were then served, and subsequently amended. This led to a defence and counterclaim (also amended), which denies the claimant's construction of the 2013 letter, but in the alternative pleads that the letter does not give effect to the parties' agreement or otherwise of the parties were mistaken, and therefore the letter should be rectified. In the further alternative the defendants say that the claimants are bound by an estoppel by convention. There is not only an amended reply and defence to counterclaim, but also a rejoinder.

BACKGROUND

2. The dispute arises out of an investment made by the claimants, private equity specialists, in a business which was set up and developed by the first defendant. This business was the provision of gynaecological medical services, in the field of assisted reproduction. In simplified, lay terms, the business is that of a fertility clinic. Broadly, the structure of the various entities concerned is as follows. The business itself was carried on by a company called Assisted Reproduction and Gynaecology Centre Ltd ("ARGC"). The entire share capital of this company was purchased and held by another company, the second defendant. The shareholders of the second defendant were (i) the first defendant (as to 540,000 'A' shares), and (ii) the third claimant (as to 360,000 'B' shares), thus totalling 900,000 shares.

3. In addition, in May 2012 the second defendant issued 'A' Loan Notes to the first defendant with a nominal value of £27,180,000, and 'B' Loan Notes to the third claimant with a nominal value of £18,120,000, totalling £45,300,000. The loan notes were made pursuant to instruments made on 16 May 2012, together with a subscription and shareholders' agreement ("SSA") of the same date. It will be seen that both the shares and the loan notes are divided up between the first defendant and the third claimant in the ratio 60:40.

4. The third claimant holds the loan notes on trust for the first and second claimants. It is owned by CBPE Capital LLP, which indirectly owns CBPE Capital VIII GP Ltd (a Scottish limited company), which is the general partner of CBPE Capital VIII GP LP (a Scottish limited partnership), which in turn is the general partner of each of the first and second claimants, which are English limited partnerships. In all these names, the initials "CBPE" are derived from "Close Brothers Private Equity", whose business was the subject of a management buyout and is now independent of Close Brothers. In this judgment I will use "CBPE" to denote the claimants and the CBPE entities generally.

5. From May 2012 until October 2016, the board of directors of the second defendant comprised the first defendant and Anne Hoffmann and Anand Jain of CBPE. In October 2016 Ms Hoffmann left the board (and CBPE). In September 2018 Mr Jain

also resigned from the board (but is still part of CBPE). From September 2018 to March 2020 the first defendant was the sole director of the second defendant. In March 2020 CBPE nominated two further directors, relying on provisions in the second defendant's articles and the SSA, though these appointments have been disputed by the first defendant. The latter dispute is not before me, and I do not need to resolve it.

6. As indicated above, the original deal was done in May 2012. It was intended that the parties would ultimately sell on the investment or list the company. However, during 2013 there was dissatisfaction on both sides with various aspects of the parties' relationship. Discussions took place, which led ultimately to the December 2013 letter agreement already referred to. They also led to a further agreement between Ms Hoffmann and the first defendant in February 2014 which I shall have to refer to in more detail, though the present dispute is not about that agreement. The present dispute is simply about the effect on the pre-existing contractual position of the 2013 Letter.

THE MAIN DOCUMENTS IN THE CASE

(1) The loan notes instrument

7. There are three main documents in the case. The instrument constituting the issue of £18,120,000 unsecured fixed rate B loan notes of ARGC Topco Ltd is a deed poll dated 16 May 2012. It recites a resolution of that company's board of directors passed on the same date, creating the loan notes. Clause 1 contains various definitions and provisions for interpretation. Those that are most relevant to the present proceedings are the following:

> "Conditions the Conditions of the Notes in the form set out in Schedule 1
>
> this Deed this Deed Poll and the Schedules, including any deed or deed poll supplemental to this Deed
>
> Execution Date the date of this Deed
>
> Interest Payment Date as defined in Condition 2.3
>
> Interest Period as defined in Condition 2.4
>
> Interest Rate 10 per cent (10%) per annum
>
> Loan Notes the £18,120,000 unsecured fixed rate loan notes originally constituted by This Deed, or as the case may be, the principal amounts represented by them and of the time being issued and outstanding, and a reference to a "Loan Note" is a reference to any one of such Loan Notes
>
> Noteholder a person whose name is entered in the Register as the holder of a Note but for the purposes of paragraphs 5 and 6 of Schedule 2, a reference to a Noteholder includes a person who holds A Notes

Notes the Loan Notes and/or the PIK Notes (as the context may require) originally constituted by this Deed, or as the case may be, the principal amounts represented by them and for the time being issued and outstanding, and a reference to a "Note" is a reference to any one of such Notes; and for the purposes of paragraphs 5 and 6 of Schedule 2, a reference to Notes shall be construed as including A Notes

PIK Notes any notes originally constituted by this Deed in respect of a liability to pay interest due on the Notes as may be issued from time to time in accordance with the Conditions, or as the case may be, the principal amounts represented by them and of the time being issued and outstanding, and a reference to a "PIK Note" is a reference to any one of such PIK Notes

Redemption Date the eighth anniversary of the Execution Date

Subscription Agreement the subscription and shareholders' agreement relating to the Company between the Investor and Mr Taranissi (each as defined in the Subscription Agreement)"

8. Further relevant clauses of the deed are as follows:

"2. Constitution of the Notes

2.1. The aggregate maximum Nominal Amount of the Loan Notes constituted by this Deed is £18,120,000.

2.2. PIK Notes may only be issued to satisfy the payment of interest payable in respect of the Loan Notes, in accordance with the Conditions. Subject to the foregoing, there is no limit on the Nominal Amount of the PIK Notes.

2.3. PIK Notes shall have a maturity date and shall be subject to identical terms and conditions and shall rank pari passu with the Loan Notes as set out in this Deed.

2.4. The Notes may be issued in amounts or integral multiples of £1.

2.5. The Notes are held subject to the Conditions and the provisions contained in the Schedules which are binding on the Company, the Noteholders and any person claiming through or under them respectively. The Conditions and the provisions contained in the Schedules shall have the same effect as if they were set out in this Deed.

3. Interest

Until such time as the Notes are redeemed or repaid, the Company will pay interest on the principal amount of the Notes in accordance with, and subject to, the terms of this Deed and the Conditions.

4. Ranking

4.1. The rights of the Noteholders in respect of the Notes and this Deed rank pari passu and rateably inter se, and, subject to clause 4.2 below, the Notes shall rank at least pari passu with all other unsecured indebtedness of the Company.

4.2. The Notes are subject to contractual subordination arrangements pursuant to which the Notes rank ahead of the A Notes in right and priority in respect of all principal amounts outstanding under the Notes and A Notes pursuant to an subject to clause 17 of the Subscription Agreement.

5. Redemption

As and when a Note (including any PIK Note issued pursuant to Condition 2.4) is due to be redeemed in accordance with this Deed and the Conditions, the Company shall pay to the relevant Noteholder the principal amount of the Note at par together with any accrued but unpaid interest (after deduction of tax which the Company is required to deduct by Law) up to but excluding the date of redemption in accordance with the provisions of Condition 7.

[…]

7. Certificates

7.1. A person on becoming a Noteholder is entitled, without charge, to one certificate for the total principal amount of Notes registered in his name.

7.2. When a Noteholder transfers or has redeemed part of the principal amount of Notes registered in his name he is entitled without charge to one certificate for the balance of the principal amount retained by him.

7.3. Where the Company pays the interest due under this Deed by issuing PIK Notes to a Noteholder, the Company shall, on the date on which the Company issues such PIK Notes, execute a certificate for such PIK Notes and deliver it to the relevant Noteholder as soon as reasonably practicable after the issue of the PIK Notes.

[…]

10. Modification of the Deed

10.1 The Company may (by deed expressed to be supplemental to this Deed) from time to time modify, abrogate or vary the provisions of this Deed on terms previously sanctioned by a Written Resolution.

10.2. The Company shall endorse on this Deed a memorandum of execution of any deed supplemental to this deed."

9. The conditions forming part of the deed poll include the following:

"2. Interest

2.1. Interest on the Notes shall accrue from the date of issue of the Notes (save that interest shall accrue on PIK Notes from the Interest Payment Date to which

the interest accrued is satisfied by the issue of the PIK Notes in question) at a rate equal to the Interest Rate per annum and shall compound annually on each anniversary of the date of issue of the Notes.

2.2. Interest is calculated on the basis of a 365 day year and actual days elapsed.

2.3. Subject to Condition 2.5, accrued interest shall be payable on each anniversary of the date of issue of the Notes (each an "Interest Payment Date"). Any accrued interest not already paid to the Noteholder shall be paid when the Notes are redeemed in accordance with the terms of this Deed. For the avoidance of doubt, the unpaid interest shall not at any stage be capitalised to become part of the principal amount outstanding.

2.4. Subject to the terms of Conditions 2.5 and 2.6, the Company may, with the prior written consent of the Noteholder in question at any time after each Interest Payment Date or at some other dates sanctioned by a Written Resolution as a means of making payment of any interest accrued under Condition 2.1 in respect of the period (an "Interest Period") up to the Interest Payment Date, issue PIK Notes to Noteholders in satisfaction of such interest, on the basis of £1.00 of PIK Notes for each £1.00 of interest due, rounded down to the nearest whole £1.00. Each issue of PIK Notes shall constitute full payment of the interest accrued to the extent of the par value of the PIK Notes issued.

2.5. Without prejudice to Condition 2.4, the Company shall not be bound to pay any accrued interest in cash at any time before the third Interest Payment Date but on the third Interest Payment Date and thereafter on each subsequent Interest Payment Date the Company may, with the prior written consent of the Noteholder in question and with the prior written consent of CBPE Capital, pay any interest accrued under Condition 2.1 but unpaid (after deduction of tax which the Company is required to deduct by Law) in cash instead of the issuance of PIK Notes in accordance with Condition 2.4.

[…]

2.10. If at any time the Board determines that there are sufficient cash balances available to the Company after reserving cash for all foreseeable needs of the Group, the Company may, with the prior consent of CBPE Capital and the Executive A Noteholder, apply an amount of such cash to pay any arrears of accrued interest under the Notes at any time (an "Excess Cash Payment Event")."

(2) The Subscription and Shareholders Agreement

10. The Subscription and Shareholders Agreement ("SSA") is dated 16 May 2012, and is made between CBPE Capital Fund VIII A LP and CBPE Capital Fund VIII B LP (together "CBPE"), Mohamed Taranissi ("Mr Taranissi"), Michael Leach ("Mr Leach"), and ARGC Topco Ltd (the "Company"). So far as material, it provides as follows:

"10. General Business Undertakings

[…]

10.6. Upon the approval by the Board of the audited accounts for each financial year, any net cash balances held in the Group in excess of the Dividend Buffer shall, be repaid to the holders of A Loan Notes and B Loan Notes and/or, to the extent permitted by law, distributed by the Company by way of a dividend to the holders of the A Shares and B Shares, such repayments or distributions being in each case pro rata to such holders' respective holdings of the Loan Notes and A Shares and B Shares as the case may be.

17. Ranking of Loan Notes

17.1. If upon an Exit the Company has insufficient funds available to repay the principal sums outstanding under the Loan Notes, the parties agree that all principal sums payable or owing under the Loan Notes (whether or not matured and whether or not liquidated and including any accrued interest which has been compounded with the principal amount of the Loan Notes or otherwise itself bears interest) shall rank in right and priority or payment in the following order:

(a) all principal sums owing or due under the B Loan Notes; and then

(b) all principal sums owing or due under the A Loan Notes.

17.2. Until all principal sums owed under the B Loan Notes have been irrevocably paid, without the consent of CBPE:

(a) the Company will not make any payment of or in respect of any principal amount owing under, or purchase, redeem or acquire, any of the A Loan Notes in cash or in kind;

(b) Mr Taranissi will not demand or receive payment of or in respect of any principal amounts under the A Loan Notes in cash or kind or apply any money or assets in or towards discharge of principal amounts owed under the A Loan Notes;

(c) neither Mr Taranissi nor the Company will discharge any principal amount owed under the A Loan Notes by set-off, any right of combination of accounts or otherwise; and

(d) the Company will not create or permit to subsist any security interest over any of its assets for any amounts owed under the A Loan Notes.

17.3. The parties agree that, notwithstanding the provisions of clause 17.1 and 17.2, any interest paid in respect of the Loan Notes other than at the same time as a redemption or repayment of the principal amount of the Loan Notes shall be paid to the holders of the A Loan Notes and B Loan Notes pari passu, and as such the Company shall pay interest to the holders of the B Loan Notes and A Loan Notes in proportion to the principal amount of Loan Notes (including any accrued interest which has been compounded with the principal amount of the Loan Notes or otherwise itself bears interest) held by the holders of Loan Notes.

[…]

26. Amendments

Subject to clauses 13.2 and 20.3, no amendment, change or addition to this Agreement shall be effective or binding on any party unless reduced to writing and executed by all the parties, except that amendments to this Agreement may be made in writing by CBPE Capital and Mr Taranissi without the involvement or agreement of the other parties to this Agreement if the effect or application of such amendment does not and could not increase the liability or potential liability or affect the rights of any other party under this Agreement whose consent is not obtained.

[…]"

(3) The letter of 2 December 2013

11. The letter of 2 December 2013 is stated to be

"From CBPE Capital LLP, acting in its capacity as manager of CBPE Capital Fund VIII A LP and CBPE Capital Fund VIII B LP (together, 'CBPE')",

and addressed

"To Mohamed Taranissi ('MT')

ARGC Topco Limited (the 'Company')".

12. It reads as follows:

"Dear Mohamed

ARGC Topco Limited - Distribution of Excess Cash and Exit proceeds

1. We refer to a subscription and shareholders agreement dated 16 May 2012 between CBPE, MT and the Company (the "SSA") and the articles of association of the Company (the "Articles").

2. We agree that upon approval by the Board of each of (a) the audited accounts for each financial year; and (b) the management accounts for the first half of each financial year, all free cash balances held in the Group and available to the Company in excess of the Dividend Buffer ("Excess Cash") shall be distributed and applied as follows:

(i) first, in paying interest that shall have accrued on the Loan Notes down to such accounts date, in the proportions of 70 per cent to the holders of the A Loan Notes and 30 per cent to the holders of the B Loan Notes; and

(ii) secondly, to the extent that the interest entitlement on the A Loan Notes and/or B Loan Notes at that time shall be fully satisfied by the payment under (a) above, the Company shall (subject to profits being available for distribution) distribute the balance of any Excess Cash to the holders of the A Shares and B Shares by way of dividend, in the proportions of 70 per cent to the A shareholders and 30 per cent to the B shareholders.

3. We also agree that on an Exit or a partial Exit or a reduction or return of capital, the cash balance and net proceeds of the Exit or net assets of the Company (the "Net Equity Proceeds") shall (after paying all amounts of principal and interest in respect of the Loan Notes) be distributed to the Shareholders in the following proportions (as between the A Shareholders and B Shareholders and subject to the rights of any other Shareholders):

(a) 70 per cent shall be paid to the A Shareholders; and

(b) 30 per cent shall be paid to the B Shareholders.

4. The parties agree that the SSA shall be construed subject to the terms of this letter and MT and CBPE agree to procure that the Articles shall, if either CBPE or MT require, be amended in order to give effect to the terms of this letter.

5. The consideration for the making of this letter is the undertaking by the parties of their mutual obligations in this letter. Terms used in this letter which are defined in the SSA or Articles shall have the same meanings in this letter."

13. The letter was signed by Anne Hoffmann "for and on behalf of CBPE Capital LLP, acting in its capacity as manager of CBPE Capital Fund VIII A LP and CBPE Capital Fund VIII B LP". Underneath her signature are the words "agreed and signed by". Underneath those words, Mr Taranissi has also signed the letter. The words "agreed and signed by" are then repeated lower down, and there is a similar space for a signature on behalf of ARGC Topco Ltd, but it appears that that company never in fact signed the letter. It is agreed that nothing turns on that.

FACT FINDING AND WITNESSES

How judges find facts

14. The parties in this case are legally represented, and their lawyers will know what I am about to say, but, for the sake of the lay clients, I will set out a number of points about how English civil judges make decisions about the facts in a dispute. I base the following remarks on similar statements I have made in other cases that I have tried. First of all, this is the claimants' claim, and the claimants accordingly bear the burden of proof, on the usual civil standard of balance of probabilities. However, the first defendant has made a counterclaim, and, in relation to that, he accordingly bears the burden of proof, to the same standard.

15. Secondly, in addition to the written and oral evidence of the witnesses who gave evidence before me, I am also able to take into account, as admissible evidence, the documents which are found in the bundle prepared for the trial: see CPR PD 32, paragraph 27.2. But I bear in mind that, for the most part, I have not seen the makers of these documents give evidence before me, so that I could not observe their demeanour, and they could not be cross-examined. Nor were they on oath when they made them. It is a matter for me what weight to give to these documents.

16. Thirdly, in commercial cases where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as

being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. This is just such a case, especially given the absence of any evidence (written or oral) from one of the main protagonists, that is Ms Hoffmann, and also from another witness, Mr Miranda. Oral evidence and cross-examination are however still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of witnesses.

17. Fourthly, where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so may in some circumstances entitle (though not compel) the Court to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing. I do not need to deal with this now, but will return to it later, to deal with Ms Hoffmann and Mr Miranda.

18. Fifthly, the court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation. So the lay parties should not expect from this written judgment a detailed discussion of all the minutiae.

Witnesses

19. I heard oral evidence from the following witnesses. For the claimants there were Anand Jain and Sean Dinnen, both partners in CBPE. The first defendant gave evidence on his own behalf, and he also called Irvin Fishman, his accountant. I consider that all of them were trying to assist the court, and not mislead it. But all were to some extent affected by the needs of the particular case they were called to support.

20. Mr Jain was good at details, numbers and economics, but, as he was at the margins of the deal in the early days, less good at knowing precisely what was happening from time to time at the deal-face. Mr Dinnen, although more senior to Mr Jain, and with a detailed knowledge of what he understood the deal to be, was also at a disadvantage, as he had not negotiated directly with the first defendant either. The real problem for both of them was that their own evidence was of what happened *at one remove* from the deal.

21. Mr Taranissi himself, whose first language was not English but who spoke it perfectly (and at some speed), was a precise and knowledgeable witness. Given that Ms Hoffmann was not called, he was the only witness with first-hand knowledge of the negotiation of the deal. His evidence was not shaken to any material extent in cross-examination. Mr Fishman was straightforward, transparent and very professional. But his evidence was again more peripheral.

FACTS FOUND

22. On the basis of the material before me, I find the following facts. The first defendant is a consultant obstetrician and gynaecologist, who founded the Assisted Reproduction and Gynaecology Centre in 1995. This has become one of the foremost fertility clinics in the world, and is run through a company called ARGC Ltd. The claimants invested in the business in May 2012. For this purpose, a partner in CBPE, Anne Hoffmann, negotiated on behalf of the claimants and signed all the documentation on their behalf. All the legal documents were prepared by CBPE's solicitors, King and Wood Mallesons SJ Berwin ("KWM").

23. Anne Hoffmann was a partner at CBPE Capital LLP. Her role was set out in a letter dated 8 May 2012 written by her on behalf of CBPE Capital LLP to the first defendant, confirming

> "that for so long as I am a partner at CBPE Capital LLP and CBPE is an investor in ARGC, I will be the lead person responsible for the investment and will be the main point of liaison on all operational and strategic matters and the Investor Director".

This letter was requested by the first defendant, and approved by the claimants (and not just Ms Hoffmann herself).

24. Mr Dinnen gave evidence, which I accept, that the request was unusual for CBPE, but that the letter was approved by the claimants and given on the basis that the claimants were being straightforward, and that the first defendant could rely on it. It appears that the first defendant reposed particular confidence in Ms Hoffmann because she herself had formerly been a patient of the clinic. In cross-examination Mr Dinnen accepted that it would be reasonable for the first defendant, if told by Ms Hoffmann that something had been approved by the claimants, to assume that it had been so approved.

25. The original structure of the investment was complicated by the participation of a gentleman called Michael Leach, but he left in January 2013, and in this judgment it is convenient to refer to the structure as it became at that date. The shares in ARGC Ltd had been acquired by a new company, ARGC Topco Ltd. After January 2013 the shares were held as to 60% by the first defendant and as to 40% by the claimants. The first defendant's shares were "A" shares and the claimants' shares were "B" shares. Ms Hoffmann and Mr Jain were appointed directors of ARGC Topco Ltd, as was the first defendant.

26. ARGC Topco Ltd issued debt in the form of loan notes, split into "A" loan notes and "B" loan notes, again held as to 60% by the first defendant and as to 40% by the claimants. Under the terms of the SSA, clause 17, the "A" loan notes are subordinated to the "B" loan notes for the purposes of repayments of capital. The idea was that the loan notes would be fully repaid only on the future sale of the business to a third party, or in any event in 2020. This has not yet happened, however, and the loan notes remain outstanding.

27. By mid-2013, it was apparent to the parties that the relationship was not working as they had wished. The first defendant considered that the claimants were not doing as much as they had agreed to promote the business, and moreover now considered that the commercial terms on which he had done the deal favoured the claimants rather

than him. He was therefore looking to renegotiate these terms. For their part, the claimants were concerned that, although the business was proving to be extremely profitable, they were not receiving any return on their investment so far. This was because of the terms of the deal, which did not require the Company to pay any interest on the loan notes before May 2015 (condition 2.5). They considered that they were unduly at risk.

28. As a result of this mutual dissatisfaction, discussions took place between Ms Hoffmann and the first defendant, as to how the relationship between the parties might be improved. I accept from the evidence that it would be unusual for a private equity investment to be re-negotiated so soon after the original deal had been done, but also that in the present case there was sufficient commercial need on both sides to do so. There are a number of documents in the bundle which reflect these discussions.

29. First there is the minute of a meeting of the partners of CBPE Capital LLP on 7 October 2013, attended by Ms Hoffmann and Mr Dinnen, amongst others, but not Mr Jain (who was not then a partner). The relevant part reads:

> "MT is finding it difficult to hand over control. Early discussions on restructuring our investment which would involve the repayment of our loanstock and maybe a reduction in our equity holding."

30. There is then an email from Ms Hoffmann to the first defendant dated 22 October 2013, in which Ms Hoffmann says she has

> "taken into consideration your questions regarding both equity rebalance and how we handle the cash between now and our ultimate exit"

and then,

> "Ultimately I am saying we should draw a line at the value on the business today and then rebalance the equity percentage on anything we would achieve as a valuation beyond this point on exit."

31. An attachment to this email sets out an example of a so-called "ratchet mechanism". This reads:

> "The following represents the principles upon which we could effectively rebalance the proportionate share of the value in ARGC going forward.
>
> • We will set a ratchet mechanism for exit based on the value of the business today
>
> • Proceeds received for the business up to today's value will be split along current shareholding
>
> • Proceeds above today's value would be split 72/25 in Mohamed Taranissi's favour up to the total value of the business
>
> • The surplus cash in the business will be used to paydown half the CBPE loanstock over the next 12 months (or earlier as agreed)

• All other surplus cash will then be split at completion (or before) in the split 75/25 in Mohamed Taranissi's favour

• As an example - if we assume the current business is worth £72m and the business is ultimately sold for £100m in 2016 then Mohamed Taranissi would receive approximately £7lm (including surplus cash) from the current deal and would take £21m of the £28m additional proceeds (being the difference between £100m and £72m) making a total return of £92m. Were the business to be sold for more than £100m Mohamed would continue to take 75% of all proceeds beyond the 'hurdle value' of £72m."

32. However, the first defendant said in evidence, and I accept, that he was not comfortable with the idea of paying down CBPE loan notes (the fourth bullet point). So this is followed by an email from Ms Hoffmann to the first defendant dated 24 October 2013. So far as material, this says:

> "As I explained on the call – this is something that I would need to take to my partners for agreement. The basis of the economic relationship between us going forward would be as follows:
>
> > 1. Cash in the business would be split between us in the ratio 30/70 in your favour. I am aware that the cash balance is, in itself, not something you place importance on. It is however an important element of our investment and we would want to remove the excess cash balances from the business on an annual (or six monthly) basis. We can agree between us how much we believe is necessary to remain in the business in any given year. I would obviously expect that if we swept our element of the cash out of the business then you should also ensure your cash was removed to a personal account in the same way (to avoid any confusion later).
> >
> > 2. When the business is sold, we would receive our loanstock back plus accrued interest at that time, you would receive your loanstock plus accrued interest and the balance of funds remaining would then be split between us in the ratio 30/70 in your favour.
> >
> > 3. As you know, I am unable to simply gift equity but can look into how this might be transferred in a tax efficient manner.
> >
> > 4. The revised arrangement would be completed on the basis sufficient resource is introduced into the business to help deliver the plan over the next three to four years. I know this is something you have agreed to in principle and would want to agree a sensible timeline within which we can complete that. We should agree that in the first instance we would look to recruit an operations person and a finance person. Additional resource can be determined between us in future as we see fit.
> >
> > 5. I would like to visit the Kuwait (and future overseas facilities) at some point in the future. To be clear – this is not a condition of any restructuring between us. This is simply my desire to see the set up and context of the overseas facilities.

> As we have discussed before -you know it would be my preference to take out some of our loanstock now (using the excess cash on the balance sheet). You have previously said you did not want to do that. Can I ask you to think about that again in the light of reaching the above agreement between us?"

This was still only a proposal, and not yet an agreement. This email was forwarded to Mr Jain a week later, on 31 October 2013.

33. On 5 November 2013 Ms Hoffmann sent an email to four members of the Investment Committee of CBPE Capital LLP (but also copied to Mr Jain). This simply attached a two-page paper "giving the background and context to the current discussions". This set out at some of the history and the concerns on both sides as to what was wrong with the present relationship. The concluding bullet point in this paper reads as follows:

> "I believe there is still the potential to make considerable value in this investment and am trying to balance a win win situation that allows us to feel we have gained something from the current situation without feeling our hand has been forced. Recutting the equity, taking some cash off the table and introducing a couple of directors would, in my opinion, considerably de-risk our position whilst allowing us to retain enough equity to benefit from future value creation."

34. At the CBPE partners' monthly operational meeting on 11 November 2013, the investment in ARGC was discussed, and the following was minuted:

> "Investment structuring – formal paper to be issued. Equity split to be changed at exit, CBPE share to reduce from 36% to 30%. Cash to be received every six months and will be a mixture of loan note interest and dividends."

35. In his oral evidence, the first defendant accepted that there was no change as at 24 October 2013 to either the loan stock or the accrued interest on the loan notes. Nevertheless, he also said that by the time he spoke to Mr Fishman on about 4 November 2013 the agreement for a new 70:30 interest split had been reached between Ms Hoffmann and himself, which was later encapsulated in the letter of 2 December 2013. Unfortunately, there are no documents reflecting contact between the first defendant and Ms Hoffmann in that interval. But, on or about 12 November 2013, Ms Hoffmann instructed KWM to prepare a side letter setting out the agreement between herself and Mr Taranissi. She chased them for this on 13 November 2013.

36. On 14 November 2013 Mr Miranda of KWM sent an email to Ms Hoffmann referring to discussions two days earlier, and attaching a draft letter agreement:

> "We have endeavoured to keep this very short and commercial, as requested. In particular, because of the difficulty in having MT agree to a more formal legal document (even though it would benefit him), you have required that we do not amend the SSA or articles which would be the better method to adopt from a legal and possibly tax point of view.
>
> The letter sets out the following changes to the cash sweep and exit waterfall as discussed on our call:

a) the cash sweep will occur every six months after the final of six month accounts are approved and be distributed to MT and CBPE on a 70:30 basis as payment of accrued interest on the loan notes (and if accrued interest is used up, then by way of dividend on the shares);

b) on an Exit (or reduction/return of capital), the equity proceeds distributed to MT and CBPE shall be split on a 70:30 basis".

In an email in reply to Mr Miranda, Ms Hoffmann said:

"The letter does exactly as I want it (thank you)."

37. Ms Hoffmann sent the draft letter to Mr Taranissi on 15 November 2013 by email, in which she commented that it was "reflecting the agreement between us moving forward". She also prepared a memorandum for the Investment Committee (dated 18 November 2013). This set out the background to the negotiations between herself and Mr Taranissi, and then said:

"A number of further conversations ensued to understand what was both possible and acceptable (from both sides). This included an internal discussion at CBPE with IRS, NMAC & SD. This culminated in the following position:

- A cash sweep mechanism is introduced to the business on a six monthly basis (beginning at the end of November).

- The sweep will remove all cash deemed surplus to the business and will be used (first) in the paydown of accumulated interest and (second) as a dividend.

- All CBPE loanstock will remain in place and in priority (as currently documented).

- In recognition of the above arrangement – the equity proceeds on exit to CBPE will revise down from 36% to 30% (once all loanstock and accumulated interest is repaid in full).

- The underlying agreement (albeit not explicitly made a condition) is that a proper management structure be established within the business.

There is still the potential to make considerable value in this investment and the proposed alteration ensures we benefit from the future cashflows (which could result in us receiving the equivalent of all our money back over the next 3-4 years) and see the return of the bulk of our capital at exit (due to the priority of our loanstock) – i.e. doubling our money – before having to adjust our equity proceeds.

The above position was discussed at the Ops board and with NMAC, IRS and SD before being formally tabled with MT. We are not therefore intending to meet as a group to formally approve this change but should you have any comments or questions, please feel free to speak to NMAC or myself."

It is however to be noted that the memorandum does *not* refer to the draft side letter agreement that had been emailed to Mr Taranissi, let alone attach a copy of it.

38. There are no minutes or other documentary records of the meeting, but in his witness statement Mr Dinnen said:

> "53. The approved position was therefore that CBPE would relinquish some of its equity in favour of Mr Taranissi in return for a regular cash sweep to remove excess cash from the business in the form of interest and dividend payments, but there would not be any change to the Loan Notes, and that on an exit the Loan Note principal and accrued interest would be paid off before any payment of equity proceeds.
>
> 54. The precise mechanics of the cash sweep were not a specific detail discussed by the Investment Committee when Ms Hoffmann proposed the restructuring of the ARGC investment. As explained at paragraphs 13 to 18 above the mechanics of the regular cash sweep were secondary considerations as against CBPE's fundamental requirements. The important detail for the Investment Committee was the introduction of some form of cash sweep which provided the *quid pro quo* for CBPE reducing its equity in ARGC.
>
> […]
>
> 69. CBPE would not have agreed to change the underlying entitlements under the Loan Notes in an informal manner. There is no example of such an arrangement in any of CBPE's portfolio companies. The correct process for amending the Loan Notes, and each Loan Note holder's interest entitlement, is set out in the Loan Note instruments. No amendment to the Loan Notes in accordance with the relevant terms has occurred. The Loan Note instruments continue to set out the Loan Note holder's entitlements under the Loan Notes as originally agreed, including in relation to the accrual of interest."

39. In cross-examination, at the meeting (according to Mr Dinnen) Ms Hoffmann was authorised to negotiate a cash sweep with the first defendant and "very specifically authorised with no discretion 30% equity … no shift of value entitlement" (Transcript, day 2, page 104, lines 8-11). I assume that this means "*not less than* 30% equity for CBPE".

40. On the same day, Mr Taranissi telephoned Mr Miranda of KWM. The main subject of the conversation was money sitting in KWM's client account, but they also discussed the interest split on the loan notes set out in the draft letter. Mr Miranda sent an email the same day to Ms Hoffmann, referring to that discussion and saying that, in respect of the split of interest to be paid on the loan notes, Mr Taranissi

> "seemed to be saying that interest should be paid on the loan notes on a 70:30 split between himself and CBPE at any time, even on Exit."

41. There was no immediate response from Ms Hoffmann to Mr Taranissi in respect of this. But on 25 November 2013 she sent him an email saying:

> "I am attaching worked example of how a deal would work on a complete and partial exit. It should be self-explanatory but I am happy to pop over and discuss tomorrow if that makes sense. I have assumed there would be no outstanding interest on our respective loan notes at exit as the cash we sweep (between us) between now and then should more than clear the interest each year."

42. Certain small modifications were thereafter made to paragraph 3 of the draft letter. In an email from Ms Hoffmann to the first defendant, copied to KWM, she said she had "tweaked" the letter in relation to exit and partial exit. Then she added:

> "I think this now reflects our joint understanding of the agreement between us".

No changes were made to paragraph 2, and it was signed by both Ms Hoffmann and Mr Taranissi, and dated 2 December 2013.

43. This account of events is unfortunately not as clear as it might be. Ms Hoffmann commissioned a draft letter from KWM and sent it to the first defendant on 15 November 2013, as "reflecting the agreement between us moving forward". This can only mean that the agreement had already been reached between the first defendant and herself, at least in principle. I find that the agreement to split the interest 70:30 was made between the first defendant and Ms Hoffmann at some point between 24 October 2013 and (about) 4 November 2013, when the first defendant discussed the matter with Mr Fishman.

44. Paragraph 2 (the critical paragraph) of the draft prepared by Mr Miranda on about 13 November 2013 remained unchanged at signature on 2 December 2013. Ms Hoffmann did not show the letter to CBPE, or disclose its existence, or indeed that she had instructed lawyers, but instead on 18 November prepared a memorandum for, and discussed with, CBPE what its negotiating position with the first defendant *would* be. She was then authorised by the investment committee to negotiate outstanding matters, *within* certain limits. But (as I find) the deal was already done way before 15 November 2013. As the first defendant said, why would you instruct lawyers to draft up your proposal, when it may yet be rejected? You ask them to draw up your *agreement*.

45. On 22 January 2014, Ms Hoffmann sent an email to Mr Taranissi concerning dividend policy, saying:

> "Good to see you again yesterday. As we discussed last week – the opportunity exists to address your concerns over contribution and 'fairness' by agreeing a dividend policy. The dividend would be £1.5m and would be taken in priority to the cash sweep mechanism we discussed before. For example – if there were £10m of surplus cash in the business then the dividend of £1.5m would be taken by you leaving £8.5m to be split in the ratio 70/30 between you and CBPE respectively. The dividend would be a fixed amount each year of £1.5m and would be taken each year provided the business continued to grow and generate cash (clearly we would both want to review cash distribution of any sort in the highly unlikely event that the business did not grow or performance went backwards)."

46. On 10 February 2014, Ms Hoffmann sent to Mr Taranissi a proposed additional dividend letter. Whilst there exist several versions of this letter, the signed version relied upon by Mr Taranissi, and later accepted by CBPE to be binding upon them, reads:

> "Further to our conversation regarding next steps, I would suggest agreeing an additional cash payment to you every year of no less than £1.5m via a dividend from the business.
>
> This amount would initially be calculated pro-rata to reflect the position for the year to 31 August 2012, and subsequently would be paid annually (1st September to 31st August every year thereafter) in advance to any calculation and distribution of the remaining cash proceeds between us as agreed in my letter dated 2 December 2013."

The letter is signed by Ms Hoffmann, and under her name appears the word "Partner". However, the existence of this letter was not disclosed to CBPE until August 2016.

47. Nor was the existence of the December 2013 letter immediately disclosed by Ms Hoffmann to her partners. The minutes of the CBPE Investment Committee for their meeting on 31 March 2014 (at which Ms Hoffmann Mr Jain and Mr Dinnen were present) included the following:

> "Agree with MT that a cash distribution would be made six-monthly, £2m would be left in the business. As long as we receive cash every six months, we agree to reduce our equity stake to 30% on exit. Will be documented and agreed prior to completion."

The last sentence clearly demonstrates that neither Mr Jain nor Mr Dinnen was aware that the letter had already been written, printed out and signed. But of course Ms Hoffmann knew.

48. However, the existence of both documents *had* been made known to the auditors of ARGC Topco Ltd. So they wished to see them for the purposes of finalising the 2013 accounts. Mr Peerless of the auditors, Montpelier, emailed Mr Jain to this effect on 28 May 2014, copying in Mr Taranissi, Ms Hoffmann and Mr Fishman. On 29 May 2014, Mr Jain emailed Ms Hoffmann with comments on Mr Peerless's email. One of them (in capitals in the original) was:

> "AS DISCUSSED THESE CONVERSATIONS STARTED AFTER THE 31 AUGUST 2013 AND WILL NOT AFFECT THE NUMBERS FOR FY13."

49. A further comment made by Mr Jain was that:

> "We cannot vary the rights to interest as those loan notes attract 10% to the legal holder of the loan notes. The only thing we can do re loan notes is sell a proportion back to him so that he owns 70% of them. (We have paid him £ for £ on the loan notes so he has not lost anything by buying them back)."

(Of course, Mr Jain did not then know about the terms of the deal already agreed between Ms Hoffmann and the first defendant, and signed in December 2013, which –

if effective on the first defendant's view – had altered the split of accrued interest between the parties.)

50. Ms Hoffmann's response to this was:

> "We shouldn't send this to Montpelier without me discussing with MT first. My aim is to agreed [sic] this in writing as part of the LFC: Newlife: whole deal thing. Don't send this now as it will only inflame things and it's not what they need. They are after legal confirmation."

Mr Jain agreed with this approach, and, although he replied to Peerless on 30 May 2014 he did not make the comments that he had suggested to Ms Hoffmann, and gave no confirmation about the documentation.

51. On 17 June 2014, Mr Jain sent an email to Ms Hoffmann to tell her that Mr Fishman had called concerning the delay in finalising the accounts. His email went on:

> "I explained that re point one, as we said in the meeting, these discussions were after the year end and so not relevant for the FY13 accounts. Apparently Mohamed has told Irvin 'he agreed with Anne that the changes were retrospective to Day 1'!"

52. On 10 July 2014 Ms Hoffmann sent an email to Mr Taranissi attaching loan note interest calculations which had been prepared by Claire Bentley of CBPE for Ms Hoffmann. However these calculations indicated a 60:40 interest split, no doubt because Ms Bentley was not aware of the December 2013 letter. Within a few minutes of receiving these calculations, Mr Taranissi replied by email (in capitals):

> "THIS IS NOT WHAT HAS BEEN AGREED (AND DOCUMENTED) IN OUR EARLIER DISCUSSIONS."

Within an even shorter period of receiving this response, Ms Hoffmann replied:

> "We aren't in disagreement on this!"

53. On 28 August 2014, Ms Hoffmann sent a text message to Mr Taranissi as follows:

> "Sorry Mohamed I am on a train. The route Montpelier are taking is not the one we agreed. They are taking £4.5m of our loan stock out of the balance sheet – this was never ever agreed (and can't be done). The agreement was our loan stock now represents 30% and you then get interest + additional to compensate. Plus the additional drawings you and I discussed."

54. An email from Mr Peerless, dated 28 August 2014, attached a schedule showing that interest which had accrued and become due on the loan notes was calculated retrospectively from 12 May 2012 onwards in the proportions 70:30 in favour of Mr Taranissi. Although they were not copied into the email, no objection was made by either of the two CBPE nominated directors of ARGC Topco, Ms Hoffmann and Mr Jain, either then or when the payments were made. Similarly for 2015. In addition, the ARGC Topco accounts filed at Companies House for the years 2013, 2015 and 2016 showed accrued loan note interest as having been paid on the 70:30 basis in favour of Mr Taranissi. (The 2014 Accounts do not show the split between the Lon Note

holders.) No note in any of these accounts recorded any overpayment to Mr Taranissi in excess of his entitlement.

55. But there were nonetheless expressions of a different point of view. By an email dated 8 September 2015, Mr Jain raised with Ms Hoffmann the point that

> "it is clear that every time we receive LN interest, we receive 30% and MT receives 70% despite us having 40% of the LNs and him having 60%. I thought you had had the discussion with him that the reallocation only applied to equity on disposal of the business, but if not then we also need to cover that with him".

In addition, on 9 September 2015, Claire Bentley of CBPE sent an interest calculation to Mr Peerless of Montpelier, based on a 60:40 split. Mr Taranissi was not copied in. But there is no evidence that Ms Bentley knew of the letter of 2 December 2013, and I find that she did not know.

56. Then on 10 September 2015 Mr Jain emailed Ms Hoffmann:

> "I reflected on the ARGC situation and the points of difference break down into 3 key areas:
>
> 1. Cash at completion (£3,247k)
>
> 2. Loan note interest and what is the mechanism for changing to 30%/70%
>
> 3. Special payments of £1.5m and £0.2m to Mohamed and Elly every year.
>
> The first point is a point of fact and we have a completion statement that fully supports our position. Montpelier are on our side and can see our argument. Equally if Mohamed speaks to his lawyer he should get a consistent story. Therefore, I think we should respond with the email I sent you last night to try and take this issue off the table.
>
> The other 2 points are more difficult to fix and all depend exactly what has been signed and the discussions that were had at the time. Interesting that we have still not been sent this letter that he claims has been signed. I suspect it will be a horse-trade that may end up in a bust up. However, I cannot see him destroying his business to 'teach us a lesson' and we have prior ranking on liquidation so our capital should be protected (failing any foul-play within the business)."

A further email from Mr Jain that day, this time to Mr Peerless, but copied to Mr Taranissi, Mr Fishman and Ms Hoffmann, discussed the first of these issues, but not the second or third.

57. In October 2015, Ms Hoffmann sent Mr Taranissi another summary document, showing how proceeds of a proposed sale would be distributed. The equity split was 70:30, but the interest calculations did not reflect what Mr Taranissi considered had been agreed in December 2013. He telephoned Ms Hoffmann, and emailed her on 19 October 2015, saying:

> "Just for the record, and as I said over the phone, those calculations don't reflect what has been already agreed between us."

Ms Hoffrmann's email reply to him was:

> "The treatment of the interest is clearly dealt with in the letter we sent at the time Mohamed."

A minute later, Ms Hoffmann forwarded the email from Mr Taranissi to Mr Jain, adding "FYI". But she did not forward her reply.

58. Also on 19 October 2015, Mr Taranissi sent a signed copy of the December 2013 letter to Mr Peerless. By email dated 30 November 2015, the accounts for 2014 were approved by Ms Hoffmann in her capacity as a director of ARGC Topco Ltd.

59. When the draft financial statements for ARGC Topco Ltd for 2015 were circulated in late May 2016, they showed interest split 60:40 in favour of Mr Taranissi. Mr Jain's file note of the meeting of directors with the auditors on 25 May does not refer to any discussion about interest on the loan notes. The issue that *was* discussed (and not resolved) was that of the special dividend to Mr Taranissi. This was followed up by Ms Hoffmann in an email to Mr Taranissi dated 27 May, but that too focussed on the dividend question. Revised draft financial statements were circulated by the auditors on 31 May 2016. These contained the same statement about the interest split as the earlier version. But the version of these accounts that was *filed* showed the split as 70:30 (see [54]). There is a dispute as to whether Mr Jain saw the accounts *before* they were filed, but it is clear that he took no action to correct any perceived error in them once they were.

60. A file note dated 15 June 2016 records an internal conversation at CBPE with Ms Hoffmann in which she was asked about the equity reduction:

> "3. I asked AH if she could confirm that there was absolute (sic) no documentation in existence relating to the 'understanding' with MT about the reduction in CBPE's equity holding in ARGC.
>
> 4. Previously, AH had stated that nothing was in writing and it was important that there was nothing in writing.
>
> 5. AH said that she would check. She noted that the 'understanding' included 6 monthly cash sweeps and the up to date payment of our monitoring fees. She therefore wondered if perhaps there was something in writing but she would need to double check. She then stated that 'if there was something in writing there would have been nothing signed' as that was important to the overall CBPE negotiating position."

61. In advance of a meeting fixed for 22 June 2016, Ms Hoffmann sent an email on 21 June to Mr Dinnen and Mr MacNay, copying in Mr Gissel and Mr Jain, in which she said:

> "Separately I will step through the dividend table. The dividends in lieu of salary were agreed at the time of the original deal. The special dividends (totally (sic) £1.5m each year) are not. In addition – the £2.29m claimed as special divi in 2014 re additional deal cash is NOT agreed As laid out in the file note – the 2014 total divi (£5.2m) was effectively set aside in light of the pending exit to TA and

instead, we agreed our exit proceeds as a single figure that would give us a 2.2x MM.

Although a signed version is not in existence, we did verbally agree to reset the equity split in 2013 at 70/30 for all future exit proceeds and for payment of loanstock interest (albeit the balancing amount would then be rolled forward for final payment on exit) i.e. there was no adjustment to the loanstock principal or interest.

Anand won't be able to join us tomorrow but has seen all the attached docs and has confirmed this is also his understanding."

62. Given the existence of the signed letter of 2 December 2013, the statement in the first line of the second paragraph that there was no "signed version … in existence" is plainly false. Nevertheless, (part of) the minutes of the Investment Committee meeting of 22 June show that Ms Hoffmann made a similarly false statement at that meeting, as italicised by me below:

"AH was asked to confirm that no further verbal or written documents/evidence of any relevant discussions or agreements existed. *AH confirmed that this was the case*.

Conclusions

 There has been a verbal agreement to adjust the equity-sharing ratio to 70/30 (MT/CBPE). The agreement reached was conditional on a 6 monthly rolling sweep to the shareholders of excess cash in the business being implemented and outstanding CBPE monitoring fees being paid up to date as well as (sic).

 It was noted that six monthly cash sweeps had not occurred and the monitoring fees remained outstanding.

 It was noted that the loan note capital and interest sharing ratios remained 60/40 (MT/CBPE)

 It was noted that any dividend relating to profit distribution to MT for the year-end 2014 was entirely conditional on the completion of an exit to TA. Under the arrangement agreed with MT in relation to TA, CBPE would receive a fixed return and MT would be free to distribute any surplus cash via a dividend.

 It was noted that the TA arrangements had clearly been expressed as a one off arrangement and those terms did not apply in the future on any subsequent exit.

…

Way forward

 It was agreed that in future no communication with MT would be handled by a single person alone. AH to attend meetings/calls with PG or another partner.

 A meeting should be convened with MT:

 CBPE will agreed to the making of a distribution of surplus cash.

 An agreed quantum of loan note interest to be paid in the ratio 60/40 (MT/CBPE)

 A dividend comprising catch up salary due to MT to be authorised.

 A dividend comprising any balance of surplus cash to be distributed in the ratio 70/30 (MT/CBPE)

 All monitoring fees and the Directorbank liability settled by CBPE on ARGC's behalf must be paid in full.

 MT/the auditors must confirm what payments, if any, by way of loan or distributions to shareholders have been made. It was noted that no explanation had been forthcoming in relation to the £3.6m movement in cash in January 2016 despite explanations having been sought by AH. In the event distributions have been made the distributions to be agreed now will need to be adjusted for payments already made.

 Any discussions about exit and process surrounding exit will only be entertained by CBPE once the issue of distributions has been agreed and settled.

The Committee confirmed its unanimous agreement to the above."

63. Later the same day, Mr Gissel asked Claire Bentley about the outstanding loan note interest position, and she told him that the outstanding interest for CBPE was far higher than that for Mr Taranissi. He asked her why that should be so, and her email reply was:

> "Because he has been paying himself 70% (what he thinks the equity split is) of the interest rather than 60% (what the split of the loan notes are)."

64. Mr Gissel sent a draft of the minutes of the meeting of 22 June 2016 to Ms Hoffmann on 24 June 2016, asking her to supply the details of when the agreement with Mr Taranissi was come to. In response she sent an email dated 27 June 2016 to Mr Gissel, attaching an unsigned copy of the final version of the letter of 2 December 2013. But there is nothing in the bundle to indicate any reaction on the part of any of her partners, perhaps because the copy was not signed.

65. On 18 July 2016 CBPE wrote to Mr Peerless asking for confirmation that the assets which it held in ARGC Topco Ltd as at 30 June 2016 were its registered shares and 40% of the loan notes. The letter did not claim any other asset, such as accrued but unpaid interest. On 10 August 2016, Ms Hoffmann signed a letter on behalf of CBPE seeking to resolve the issue relating to the special dividend. But it included the following statement:

> "Separately, I am aware that you may be planning for an element of loanstock interest to be paid in the near future to optimise the tax position of ARGC. We are of course supportive of that and will consent to the payment of interest to loannote holders in the 70/30 proportions."

It also attached calculations of amounts due to CBPE. But these did not suggest any overpayment of interest to Mr Taranissi or underpayment to CBPE.

66. Mr Taranissi replied on the same day, attaching copies of both the December 2013 letter and the February 2014 letter. This caused a considerable reaction within CBPE. Mr Gissel spoke to Ms Hoffmann on 10 August 2016. His file note of the conversation recorded questions and answers as follows:

> "a. Had she prepared or signed the letter of 10/2/14. AH said 'no'
>
> b. Had she signed the 2/12/13 letter where we had previously only seen an unsigned copy. AH said she had but that she had been clear previously that 'we' had signed the letter."

There is no reason not to accept this as an accurate record. On that basis, the answer given by Ms Hoffmann to the first question is simply untrue. Moreover, Ms Hoffmann's answer to the latter question is inconsistent with her statement in her email of 21 June 2016 to Mr Dinnen and Mr MacNay saying "a signed version is not in existence … "

67. On 11 August 2016, Ms Hoffmann sent an email to her partners at CBPE, attaching copies of both the December 2013 and February 2014 letters. In that email she expressly denied writing or signing the letter of February 2014. She did not say anything about the letter of December 2013. On 12 August 2016 Mr MacNay on behalf of CBPE wrote to Mr Taranissi to say that it was the first time that the Management Board had seen the letter of February 2014, that it had not been authorised by the Investment Committee and had not been written on behalf of CBPE. No similar statements were made in relation to the December 2013 letter. An investigation into the February 2014 letter was instituted. On 25 August 2016, Macfarlanes, on behalf of CBPE, wrote to Mr Taranissi accepting that the letter of February 2014 constituted a binding agreement, and although it was not authorised by the Investment Committee that committee would now retrospectively approve it.

68. On 26 August 2016 Mr MacNay on behalf of CBPE wrote to Mr Taranissi to similar effect, but adding the following comment concerning loan note interest:

> "Finally, I understand that net loan stock interest of £1,087,200 was paid yesterday in accord with the 2 December 2013 agreement. It would be helpful if, at our meeting, we could be provided with an analysis of dividends and loan stock interest that has been paid to date in anticipation of approving the 2015 statutory accounts".

There was nothing in this email suggesting that there was any dispute concerning loan note interest or that there was any outstanding interest due to CBPE.

69. On 31 August 2016 there was a meeting between Mr Taranissi, Mr MacNay and Mr Jolyon Latimer. There is a file note dated 1 September 2016, under Mr MacNay's name, of the meeting in the bundle. Amongst the various matters discussed, Mr MacNay updated Mr Taranissi on the internal investigation being carried out by CBPE. He confirmed that CBPE would honour the letter of February 2014 although this arrangement had not been disclosed by Ms Hoffmann to her partners. One matter

that does not appear to have been raised was the letter of December 2013, or the question of loan note interest.

70. The bundle also contains a longer note, dated 26 September 2016, said to be of a meeting with Mr Taranissi, at which Mr MacNay and Mr Jain were said to be present (but not Mr Latimer). This longer note refers at the outset to a "previous meeting a few weeks ago" and therefore appears to be a note of a different, later meeting. It certainly contains material which does not appear in the earlier note. Curiously, however, it also contains every paragraph in the earlier note, in identical terms. This was not explained to me. Nevertheless, the longer note too does not deal with the letter of December 2013, or the question of loan note interest.

71. On 14 September 2016 the ARGC Topco accounts for 2015 were filed, having been approved by Mr Jain in his capacity as a director. A revised note 26 stated the amounts paid as interest to Mr Taranissi and CBPE, which were in the proportions 70:30, with no provision made in the accounts for unpaid interest due to CBPE.

72. There is a note in the bundle dated 20 September 2016 which is headed "ARGC Investigation Summary". The names of Mr MacNay and Mr Gissel appear at the foot of this note. It concentrates on the letter of February 2014. It notes the discovery of various different versions of that letter on the CBPE computer system, including the editing by Ms Hoffmann of one version to become another in June 2016. At one point it says

> "We are deeply concerned that AH may in fact have signed Version A"

and later it says

> "We are concerned that AH's general conduct of the management of the ARGC investment has been consistent with the possibility that she did indeed sign Version A."

73. Part of the material supporting the last statement deals with the December 2013 agreement, as follows:

> "c. In a meeting with PG on 15 June 2016 AH was specifically asked if there was any documentation in existence relating to the 70/30 restructuring. AH said she would check but 'if there was something in writing there would have been nothing signed as that was important to the overall CBPE negotiating position'. AH also stated that the 'understanding' included 'the up-to-date payment of our monitoring fees.' …
>
> d. A week after this discussion, AH stated, at the IC subcommittee meeting on 22 June 2016, that 'there has been a verbal agreement to just the equity sharing ratio to 70/30 (MMT/CBPE). The agreement reached was conditional on a six monthly rolling sweep to the shareholders of excess cash in the business being implemented and outstanding CBPE monitoring fees being paid up-to-date as well' …
>
> e. A written agreement was later provided by AH although she could not provide a signed copy … A signed version was subsequently provided by MT …

Although we note that prior to that it had in fact also been returned to AH by MT in July 2014 …

i. The agreement was in fact in writing and signed by AH.

ii. The agreement was not conditional on monitoring fees being paid up-to-date.

iii. … The restructuring was formally minuted on 31 March 2014 at the IC which approved the LFC bolt on …

iv. There is no mention of any special dividend arrangements in any of these papers."

74. The CBPE investigation concluded not long after, and Ms Hoffmann left CBPE in October 2016. The claimant's skeleton argument says that she left as a result of conduct in connection with the "special dividend" of £1.5 million per annum agreed with the first defendant in February 2014. There was no evidence before me of the terms upon which she left, but so far as I can see nothing turns on that. I record here that I was not invited either to infer that Ms Hoffmann's conduct in relation to that "special dividend" had been in any way dishonest, or even wrongful, much less that it should impact on my finding the facts in relation to the letter agreement of December 2013. For the avoidance of any doubt, I make clear that I have not relied on or even taken into account that conduct in considering the likelihood or otherwise of her having agreed with the first defendant on the split of interest. My findings on the split of interest are independent of that consideration.

75. As I have already noted, Ms Hoffmann was not called as a witness at the trial by either side, and neither side explained why it had not done so. I know that in his recent decision in *The Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272 (Comm), Foxton J referred (at [45]) to

> "The tendency to elevate any missing witness from the role of second gravedigger to the missing prince [as] scarcely conducive to cost-effective litigation, and it is necessary to remember that there are many reasons why a particular witness might not be called other than a desire to keep unhelpful evidence from the court."

I do bear in mind that there are many reasons why Ms Hoffmann might not have been called. Nevertheless, and unfortunately, Ms Hoffmann was not the second gravedigger in this story, but (at least) a co-prince. I must do the best I can without the benefit of her evidence, although I shall have to consider the effect of her absence in due course.

76. As I have noted, the focus on the part of CBPE from the time that it knew of both the letter of December 2013 and the letter of February 2014 up to this point was on the latter, the letter of February 2014. But in May 2017 the focus shifted to the earlier letter. Claire Bentley sent an email dated 28 April 2017 to Mr Peerless setting out CBPE's calculation of the loan note interest, on a 60:40 split. A file note of a meeting dated 9 May 2017 referred to Mr Taranissi's saying that he was *entitled* to the interest 70:30, and not just being paid at that rate. Mr Peerless sent the December 2013 letter

to Mr Jain, who forwarded it to Mr Dinnen and Mr Gissel on 11 May 2017. On 12 May 2017, draft accounts were circulated together with a report to the board of ARGC Topco. This report however stated that the loan note interest was calculated on the basis of a 60:40 split and that CBPE was entitled to a significant amount of unpaid interest. Notwithstanding this, the audited accounts for 2016 were prepared on the same basis as before, that is that the interest *entitlement* was split 70:30.

77. On 10 July 2017, CBPE wrote to seek confirmation of the assets it held in ARGC Topco as at 30 June 2017. It claimed to be the owner of shares in the company and 40% of the loan notes. However, no claim was made to accrued but unpaid interest due to CBPE. On 3 October 2017 loan note interest for 2016 was paid by the company. CBPE received 30% of the total interest payable. Claire Bentley sent an email to Mr Jain Mr Dinnen and Mr Gissel the same day, pointing this out. There was no evidence before me of any reaction to this on their part. But mere payment of 30% to CBPE without more is not inconsistent with CBPE's position that Mr Taranissi was being paid 70% though his *entitlement* was only 60%.

78. The discrepancy was not raised again until April 2018, when Claire Bentley sent an interest calculation to Mr Peerless, taking the view that interest was *paid* 70:30 although the *entitlement* was 60:40. Internal emails within CBPE in May 2018 between Mr Gissel and Mr Jain show that the partners were well aware that there were two inconsistent views of the effect of the agreement of December 2013. Indeed, Mr Jain remarked in one:

> "I do not like the way Anne's letter was worded re 70:30 etc and this will be used against us".

79. On 23 May 2018 Mr Peerless sent an email to Mr Jain, the draft of which had been seen by Mr Taranissi, raising the question of the interest entitlement split fairly and squarely:

> " … In relation to the interest on the loan notes and the accruals thereof, Mohamed contends that accrual of the loan interest should be made in the same proportion as the payments of the interest, i.e. that the interest accrued 70% to him and 30% to CBPE despite the capital being held 60:40. Therefore the payments and accruals will match and there will be no disproportionate compounding of the interest to CBPE. … Please would you confirm that this is now CBPE's understanding as Mohamed told us that this had all agreed with and previously and confirmed again before she left."

80. Mr Jain's email reply was sent later the same day. The draft had been seen by Mr Dinnen and Mr Gissel. In part it said this:

> "Regarding the interest on the loan notes, I attach the letter that Anne and Mohamed signed. As you can clearly see the letter talks about accelerating the interest payments to Mohamed (and therefore giving him a significant cashflow advantage vs CBPE) but not changing the underlying economics of the loan notes. If the agreement was to permanently change the entitlement to loan note interest then the letter would have had to expressly state this by rebasing CBPE's loan note coupon to 7.5% and Mohamed's loan note to 11.7%. Given how

specific the letter is, I struggle to see how anybody could interpret that the intention was to do the latter?"

81. Because the first defendant's 70% of interest was greater than CBPE considered to be his loan note interest entitlement at that time, they say that he has been partially repaid capital, in breach of the subordination provisions of the loan notes. CBPE complained formally of this on 14 June 2018.

82. I make the following findings of fact on the question of Ms Hoffmann's authority to bind the claimants:

1. Ms Hoffmann was a partner in the CBPE partnership.

2. As evidenced by the letter of 8 May 2012 addressed to the first defendant, at his request, the partnership had appointed her to be the lead person responsible for the investment, the main point of contact, and the Investor Director.

3. The partnership intended that the first defendant should be able to rely on the letter.

4. In particular, the first defendant could properly rely on a statement by Ms Hoffmann to him that an agreement had been approved by the partnership.

5. After a proposal for amendment had been rejected by the first defendant, Ms Hoffmann put forward a revised proposal to the first defendant in an email of 24 October 2013, but said that that she would have to take it to her partners.

6. Thereafter, Ms Hoffmann and the first defendant reached agreement on a further proposal, which was incorporated in a solicitors' draft letter by 14 November 2013, and, by discussing the matter further with him and signing the draft letter (as "tweaked") on 2 December 2013, she confirmed to him that the further proposal had been approved.

7. Subject to the foregoing, the first defendant had no notice of any express limitation on Ms Hoffmann's authority.

83. Quite apart from questions as to Ms Hoffmann's apparent or ostensible authority, I should say this as to her *express* authority. On the evidence, it is clear that the claimants on 18 November 2013 authorised a variation of the original contractual arrangements (i) to implement a cash sweep to remove excess cash from the business to pay (a) accumulated interest to loan note holders and (b) a dividend to shareholders, whilst (ii) all CBPE loanstock remained in place in its current capital priority, but (iii) also reducing the claimants' equity down to 30% (but no less) at exit. It was however left to Ms Hoffmann to implement this, *without further recourse to her partners*. That means, in my judgment, that Ms Hoffmann had express authority, albeit within stated limits, to implement the revised arrangement as she thought best. That would include authority to vary the proportions in which interest was to be paid in the meantime.

84. From this point on the dispute has crystallised, and each side's correspondence represents its entrenched position. So, for example, on 3 July 2018, CBPE sought an audit confirmation that the assets of CBPE in relation to ARGC Topco included an

unpaid interest balance. At a meeting on 17 July 2018 between Mr Taranissi and Mr Jain, both sides repeated their positions. A letter from Mr Jain to Mr Taranissi dated 24 July 2018 and a reply from Mr Taranissi dated 27 July 2018 simply confirmed those positions. In September 2018 Mr Jain resigned from the board of ARGC Topco. As mentioned earlier, these proceedings were commenced on 19 December 2019. The loan notes were due for redemption on 16 May 2020, but so far have not been redeemed. CBPE claims that at the redemption date it was owed about £7.4 million, but by now over £10 million. The first defendant's case is that he was owed £3.171 million, as at the redemption date.

85. Earlier I referred to the absence of Ms Hoffmann as a witness in this case. I may add to that the fact that Mr Miranda has not been called either. The question is whether these absences have any significance for the parties' cases. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA, Brooke LJ (with whom Roch and Aldous LJJ agreed), in what is now a well-known passage, said:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

86. This statement has been quoted with approval and followed in many later cases. But, as Sir Ernest Ryder SPT (with whom Sales LJ agreed) made clear in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882:

> "30. … *Wisniewski* is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion *ie* 'the court is *entitled* to draw adverse inferences'." [Emphasis added]

87. More recently, in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), Cockerill J, dealing with the same point, said:

> "154. In my judgment the point can be dealt with relatively briefly thus:
>
> > i) This evidential 'rule' is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.

> ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the 'missing' witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.
>
> iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:
>
> > a) the overriding objective; and
> >
> > b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial.
>
> […]"

88. Even more recently, indeed after the arguments in the present case were completed, judgment was given in the Supreme Court in a case called *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3893. In his judgment, Lord Leggatt (with whom all the other members of the court agreed) said:

> "41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

89. In the present case, no explanation has been given for not calling either Ms Hoffmann or Mr Miranda. Each of them could give relevant evidence, in the case of Ms Hoffmann, indeed, critical evidence, given that she alone negotiated with the first defendant, whilst being clothed with authority to bind CBPE. Part of this case is about what the parties agreed (but of course that is a question of construction), or what they thought they had agreed (the rectification claim). The first defendant has given evidence as to what he thought was agreed between himself and Ms Hoffmann, but CBPE has not called the one other person who can give direct evidence as to what, if

anything, was agreed or thought to be agreed between them. In my judgment this unexplained failure goes to strengthen the evidence of Mr Taranissi on the point.

90. The failure to call Mr Miranda is perhaps less eloquent. His evidence is less central, and the documents in the case cover the main points of what would be his evidence. Nevertheless, the first defendant's evidence of the telephone conversation with Mr Miranda was criticised by the claimants as "very unclear". Yet the claimants could have called Mr Miranda to shed light on this. They did not choose to do so. Nor did they explain why they were not calling him. It seems to me that in these circumstances the failure to call Mr Miranda does go to weaken the evidence put forward by the claimants on this point.

91. I should also formally record my findings as to (1) the subjective intentions of the (i) first defendant, (ii) Ms Hoffmann, and (iii) partners of CBPE (other than Ms Hoffmann), (2) the knowledge of (i), (ii) and (iii) of the intentions of the others, (3) their reliance on their own understanding of the position. The first defendant thought that on 2 December 2013 he had agreed with Ms Hoffmann on behalf of CBPE both an equity shift and an interest split shift from 60:40 in his favour to 70:30 in his favour. He did not realise until very late on that the members of CBPE (apart from Ms Hoffmann) thought differently, because every time there was something from CBPE that alerted him, and he complained to Ms Hoffmann, Ms Hoffmann reassured him that they were in agreement. Since CBPE had agreed that Ms Hoffmann should be the person at CBPE who dealt with him, he had no reason to question this.

92. It is more difficult for me to find the subjective intentions of Ms Hoffmann, because she did not give evidence before me. But I must do the best I can on the material I have. On this basis, I find that she was trying to find a form of words that would satisfy both the first defendant and her partners in CBPE. That is, a form that would appear to the first defendant to give him what he wanted (a greater share of the whole deal for the future) whist appearing to her partners to do something different (give CBPE access to cash flow now, at the original interest split, with greater equity to the first defendant, though only on exit). I am entirely satisfied that she realised that the first defendant thought they had agreed that he would have both equity and an interest split of 70:30 in his favour immediately for the future, but she did not disillusion him. She hoped that there would be so much money coming in that everyone would be happy in the meantime, and then ultimately the business would be sold at a huge profit, so that everyone would be satisfied. If there was then an argument between the parties as to the entitlement to interest in the run-up to the exit, that could be attributed to poor drafting by the lawyers, and resolved either by negotiation or litigation. But it would not be her fault.

93. I find that the partners of CBPE other than Ms Hoffmann were kept almost entirely in the dark by her as to what she had done, until it all came out in the summer and autumn of 2016. Their intention had been to secure an amendment to the deal giving them a stream of cash before the original contractual date in 2015, in return for which they could give up some equity on final exit, but not before. They were not aware until too late that the first defendant was not happy with that, and wanted greater equity straight away, and moreover that Ms Hoffmann had given him to understand that he could have that. And when they became aware of exactly what she had agreed, they were fearful that the wording was not sufficiently clear to achieve those intentions.

94. I further find that the first defendant relied on his own view as to what the agreement meant in a number of ways. First of all, he continued working with CBPE in the joint venture, and trying to resolve the difficulties he had with what he saw as a lack of commitment on the part of CBPE. Second, he caused ARGC Topco to pay him what he understood to be income, on which he paid income tax, rather than a repayment of capital, which would have put him in breach of the agreement with CBPE. Third, he caused ARGC Topco to prepare its accounts for 2014-16 on the basis of his understanding of the agreement.

LAW

95. There are four main legal issues. The *first* is the question of construction of the letter of December 2013. The *second* is the question of rectification of that letter. The *third* is the question of estoppel by convention. The *fourth* is the question of an agent's authority to bind her principal. Here I deal with the relevant law, as to which there is, happily, not much dispute between the parties.

Construction

96. As to the construction of a written contract, such as the letter of 2 December 2013, there are three main aspects to consider. One is what to do with the words themselves. The second is what to do with the surrounding circumstances and other events, both before and after. The third is what effect to give to provisions requiring specified formalities to be observed for a variation, such as "no oral modification" clauses.

The words themselves

97. As to the first of these, there have been a number of decisions in recent years at the highest level, including *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173, as well as decisions of the Court of Appeal such as *Fishbourne Developments Ltd v Stephens* [2020] EWCA Civ 170. In the last of these, Asplin LJ (with whom Macur LJ and Marcus Smith J agreed) said:

> "33. The legal principles which apply to the interpretation of written contracts are very well known. The court's task when construing the 2002 Option is to ascertain the objective meaning of the words used by the parties in the context of the 2002 Option as a whole, taking into account the relevant factual background which would have been available to the parties, but excluding subjective evidence of the parties' intentions. The court must focus on the meaning of the relevant words in their documentary, factual and commercial context. If there is an ambiguity, or in other words, there are rival meanings, the court can give weight to the implications of the rival constructions by reaching a view as to which is more consistent with business common sense … "

So, as Lord Hodge said in *Capita Insurance* (at [11]),

> "this is not a literalist exercise focused solely on a parsing of the wording of the particular clause …"

The surrounding circumstances

98. As to the second matter, this is a contract wholly in writing, and *post*-contractual conduct and events cannot be taken into account at all: *Carmichael v National Power* [1999] 1 WLR 2042, 2048-49, per Lord Hoffmann, citing *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] A.C. 583, HL. Pre-contract *negotiations* are also irrelevant: *Arnold v Britton* [2015] AC 1619, [15], per Lord Neuberger. On the other hand, as Asplin LJ says in *Fishbourne Developments*, the relevant factual *background* available to the parties *is* to be taken into account. So the question is what the words used objectively mean in the context of the whole agreement and taking into account the relevant factual background available to the parties (except subjective intention).

Terms requiring formalities

99. As to the third point, it is clear, following the decision of the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119, that the law recognises the efficacy of contractual provisions requiring specified formalities to be observed for variation, at least subject to the possible application of the doctrine of estoppel. (It was not necessary in that case to discuss that doctrine, as the courts below were clear that on the fact there could have been no such estoppel.)

Rectification

Common mistake

100. I turn to consider the law of rectification. The defendants' counterclaim here is based on both common mistake and unilateral mistake. In its recent decision in *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2020] Ch 365, the Court of Appeal dealt with common mistake. Leggatt LJ (with whom Flaux and Rose LJJ agreed) said:

> "46. At a general level, the principle of rectification based on a common mistake is clear. It is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed accurately to record. This requires convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed."

101. But there are two subcases. Leggatt LJ said (at [176]):

> "We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, 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 communication between them, the parties understood each other to share that intention."

102. Unlike with the position for construction arguments, however, the court may look at post-contractual materials. In *HMRC v Secret Hotels2 Ltd* [2014] 2 All ER 685, Lord Neuberger (with whom the other judges agreed), said:

> "33. In English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement – see *FL Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. The subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons. First, they may be invoked to support the contention that the written agreement was a sham – *ie* that it was not in fact intended to govern the parties' relationship at all. Secondly, they may be invoked in support of a claim for rectification of the written agreement. Thirdly, they may be relied on to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct). Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship."

Unilateral mistake

103. As to rectification for unilateral mistake, in his even more recent decision in *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* [2021] EWHC 1119 (Comm), Jacobs J recorded that the parties agreed that the relevant law was set out in the judgments of the Court of Appeal in *Thomas Bates & Sons Ltd v Wyndhams (Lingerie) Ltd* [1981[1 WLR 505. The judge summarised the principles as follows (at [445]):

> "(1) One party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain;
>
> (2) The other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of A;
>
> (3) B has omitted to draw the mistake to the notice of A;
>
> (4) The mistake was calculated to benefit B."

104. Moreover, as with rectification based on common mistake (at [446]),

> "convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself."

105. The judge accepted (at [448]) that 'actual knowledge' of the mistake included the case of a person who "wilfully shuts his eyes to the obvious, or wilfully and recklessly fails to make such enquiries as an honest and reasonable man would make". He also considered the authorities bearing on the question of dishonesty, and said this:

> "458. I therefore conclude that unless actual knowledge of the mistake can be shown, dishonesty is on current authority a necessary requirement for a case of rectification for unilateral mistake. Whilst this dichotomy may appear anomalous, in practice (as Blackburne J indicated in paragraph [79] of his judgment

in *Wimpey* [*George Wimpey v VI Construction Ltd* [2005] EWCA Civ 77]), a case where one party knows that the other is labouring under a mistake as to the contract terms, but does nothing to alert him, will usually be a case of dishonesty anyway."

106. It will be seen that there is a kind of estoppel at work in such cases. A is mistaken. B *knows* of A's mistake, and in equity comes under a duty to draw it to A's attention, but does not. B's failure to speak is treated as a representation (*ie* that there is no mistake) on which A relies to his detriment by executing the document concerned. B is estopped from asserting that the document correctly records the agreement: *cf Spiro v Lintern* [1973] 1 WLR 1002, 1010-11, CA, dealing with authority to enter into a contract.

Whose intention?

107. In *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch), Mann J was concerned with the question of whose intention was relevant in relation to a corporate party to a transaction. He considered a number of authorities, including the decision of the Court of Appeal in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] 2 All ER 748, and said this (at [198]):

> "(a) One is looking for the person who in reality is the decision maker in the transaction in order to find intentions in relation to rectification.
>
> (b) In the case of the company that person will usually be the person with authority to bind the company.
>
> (c) Someone who is not a person with power to bind can nonetheless be treated as the decision maker if that is the reality on the facts.
>
> (d) The intention of a 'mere negotiator' may be relevant if it is shared with the actual decision maker; but, as it seems to me, that is because the intention has become that of the actual decision maker.
>
> (e) Where a person who would normally be expected to be the decision maker (such as the board of a company) leaves it to a negotiator to negotiate a deal and produce a contract by instructing solicitors, on the understanding that the decision maker would do a deal on those terms, then the negotiator's intention is the relevant one, either because that person is the decision maker, or, if that description is not apt, because the technical decision maker has simply adopted the intentions of the negotiator (*Hawksford* at paragraph 43; and see *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC) at para 130)."

Estoppel by convention

The general principle

108. Next on the law, there is the question of estoppel by convention. In *The Indian Endurance* [1998] AC 878, 913, Lord Steyn (with whom the rest of their lordships agreed) said:

> "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."

Qualifications

109. The claimants also relied on the statement of the law by Hamblen LJ (as he then was, with whom McCombe LJ and Sir Bernard Rix agreed) in *Tinkler v HMRC* [2019] 4 WLR 138, [54]. This was a case of estoppel by convention arising in a *non-contractual* context. Very recently, however, the Supreme Court has allowed an appeal from the decision of the Court of Appeal (see [2021] UKSC 39, [2021] 3 WLR 697). Nonetheless, so far as I can see, the decision turns on the application by the Supreme Court of the law to the facts, and the relevant principles of law are still as stated by Hamblen LJ, being based on those formulated by Briggs J (as he then was) in *HMRC v Benchdollar Ltd* [2010] 1 All ER 174, subject to an amendment made to the first principle by the Court of Appeal in *Blindley Heath Investments Ltd & Anor v Bass* [2017] Ch 389, [91].

110. They are as follows:

> "(1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption.
>
> (2) 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 on it.
>
> (3) 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.
>
> (4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> (5) 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."

111. In the Supreme Court, whilst accepting these principles as correct, Lord Burrows also added this:

> "51. It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as 'C') must know that the person against whom the estoppel is raised (who I shall refer to as 'D') shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.
>
> 52. It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from Spencer Bower, *The Law Relating to Estoppel by Representation*, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:
>
> > 'In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view).'
>
> For a similar statement, using the same wording of C's reliance on "the subscription" of D to the common assumption, see the present edition of that work, Spencer Bower: *Reliance-Based Estoppel*, 5th ed (2017), para 8.26. But this is not to suggest that C must be relying *solely* on D's affirmation of, or subscription to, the common assumption as opposed to C relying on its own mistaken assumption. It is sufficient that, as D intended or expected, D's affirmation of, or subscription to, the common assumption strengthened, or influenced, C in thereafter relying on the common assumption.
>
> 53. As I have already said, both counsel submitted that the *Benchdollar* principles, subject to the *Blindley Heath* amendment to the first principle, applied in this case. I agree. This judgment therefore affirms that those principles, as amended by *Blindley Heath*, are a correct statement of the law on estoppel by convention in the context of non-contractual dealings. What I have also sought to do is to explain the ideas underpinning the first three principles which may provide assistance in the understanding and application of those principles."

112. As I pointed out above, this case concerned estoppel by convention arising in a *non-contractual* context. Where it arises in a contractual context, the rules are similar, but it has been held that

> "it is not necessary in cases involving contractual dealings to establish detrimental reliance in order to prove unconscionability. Material influence such that it would be unconscionable to allow the other party to resile from the convention will be enough": see *First National Trustco (UK) Ltd v Page* [2019] EWHC 1187 (Ch), per Joanna Smith QC (as she then was), at [113](iv).

113. One final point about estoppel by convention is that, once the true position is known, the estoppel will no longer operate prospectively, beyond a short grace period. In *London Borough of Hillingdon v ARC Ltd* [2000] EWCA Civ 191, the effect of the truth becoming known to the proponent of the estoppel was said by the Court of Appeal to be that:

> "64. … From that date it could no longer even be suggested that the parties were proceeding on some shared assumption, and ARC were no longer entitled to rely on there being a common assumption. If a common assumption existed up to this moment in time, ARC were entitled to a reasonable time to react to the disappearance of their assumption. In the circumstances of this claim that period might be measured in weeks rather than days, but not in months."

Authority to bind LLP

114. I did not understand the relevant principles of the law of agency to be controversial at the trial. A convenient starting point is set out in article 22(1), (2) of *Bowstead and Reynolds on Agency*, 22nd edition:

> "(1)The authority of an agent may be—
>
> (a) actual (express or implied) where it results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the principal to the agent; or
>
> (b) apparent, where it results from such a manifestation made by the principal to third parties.
>
> (2) The burden of establishing a conferral of authority rests on the party asserting its existence."

115. For present purposes, this can be fleshed out by reference to two paragraphs in the comparatively recent decision of the Court of Appeal in *Ukraine v Law Debenture Trust plc* [2019] QB 1121:

> "78. The law on this subject is authoritatively stated in two decisions of this court, *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 786 (*Freeman & Lockyer*) and *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549.
>
> 79. The relevant principles may be summarised as follows:
>
> (1) There are two types of authority, actual and ostensible. Actual authority involves a true relationship of agency, whereas ostensible agency describes the situation where one person (the principal) is by their own acts, words or conduct estopped from denying the authority of another person (the agent) to bind the principal to the transaction to which the agent has purported to commit the principal.
>
> (2) Actual authority may be express or implied.

(3) Express actual authority connotes the express conferring of authority by the principal on the agent to enter into a particular transaction or class of transactions.

(4) Implied actual authority connotes circumstances, falling short of express words, in which the principal authorises the agent to enter into transactions of the type in question on the facts of the case.

(5) A common example of implied actual authority occurs when the principal appoints the agent to a position, such as chief executive of a company, which is generally understood to confer authority to enter into transactions of the type in question.

(6) Implied actual authority may also occur where, without being appointed to such a position, the agent enters into transactions as if he had been so appointed and the principal communicates its approval of the agent acting in this way: see *Freeman & Lockyer* at p.501 per Diplock LJ. This type of implied authority derives from a course of conduct by the agent, which with full knowledge is approved by the principal. It was by this type of authority that the defendant company was bound in *Hely-Hutchinson v Brayhead Ltd* and, in the view of Diplock LJ, could have been bound in *Freeman & Lockyer*.

(7) Ostensible authority may arise from any circumstances in which the principal holds the agent out as having authority to enter into the transaction in question on behalf of the principal.

(8) Circumstances giving rise to implied actual authority will generally also give rise to ostensible authority. 'Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different': *Freeman & Lockyer* at p.502 per Diplock LJ. So, for example, a chief executive of a company will have both implied actual authority and ostensible authority to enter into transactions generally understood to be within the authority of a chief executive. However, if in a particular case the chief executive's authority is limited in a way of which the third party has no notice, for example by a requirement imposed by the board for prior board approval, the chief executive will not have implied actual authority but will have ostensible authority."

116. It was not suggested before me that the legal position of a partner of a limited liability partnership was materially different from that of a partner of an ordinary (unlimited liability) partnership, or from that of a director of an ordinary limited company. I will therefore proceed on the basis that the ordinary principles of the law of agency apply.

THE PARTIES' CASES

117. It will be helpful at this point to summarise the parties' cases, before turning to the application of the law to the facts. The claimants' case is that

1. The December 2013 agreement did not change the interest entitlement on the loan notes, but merely gave the first defendant a cash flow advantage, that is, a loan or advance payment; and therefore

2. The claimants are owed further outstanding unpaid interest on the loan notes, amounting to £7.4 million as at the redemption date, but now over £10 million;

3. Whilst the claimants accept that the letter agreement of December 2013 "is a legally binding and effective agreement as between the claimants and the first defendant", they also say that Ms Hoffmann had neither actual or apparent authority to enter into the December 2013 agreement *if it means what the first defendant says it means*.

118. The first defendant's case is that

1. The December 2013 agreement did change the interest entitlement on loan notes; and therefore

2. The interest was correctly paid, and no outstanding interest is owed to the claimants; but,

3. If point 1 is wrong, the agreement should be rectified so as to effect a change in interest entitlement, because that was what was intended, alternatively Ms Hoffmann knew that that was what the first defendant thought was agreed but did not alert him to his error;

4. If points 1 and 3 are wrong, the claimants are estopped from denying that the effect of the agreement was to change the interest entitlement;

5. Ms Hoffmann had both actual and apparent authority to bind the claimants.

APPLICATION OF LAW TO FACTS

Ms Hoffmann's authority to bind the claimants

119. With that summary of the law in mind, I turn to consider the application of the law to the facts of this case. It is convenient if I start with the fourth question, that of Ms Hoffmann's authority to bind the claimants. As I have already noted, it is a feature of this case that, in their pleading, the claimants accept that the December 2013 letter "is a legally binding and effective agreement as between the claimants and the first defendant". Yet, as I have also noted, they argue that the authority of Ms Hoffmann did not extend to making an agreement in the terms *in which the first defendant understood it to be made*. I therefore need to consider that question on principle.

120. Ms Hoffmann was a partner in the claimants, and the claimants had appointed her by a letter in writing to be the main point of contact with the first defendant in relation to this investment, intending her to rely upon the letter. They had further authorised her expressly to conclude a variation of the original deal with the first defendant, so long as it implemented a sweep of excess cash to pay interest and a dividend, but preserving capital priority for the claimants' loan notes and not lowering the claimant's equity below 30%. The variation that she carried out on 2 December 2013 was within the limits of her express authority, and in my judgment therefore binds the claimants. For the purposes of the agreement of December 2013, she was therefore the decision-maker on behalf of the claimants.

121. However, even if it was not within her express actual authority, it was certainly within her *implied* actual authority as a partner in the claimants. The first defendant was not aware of any limitation on the powers of a partner in the claimants. The only reference to anything which could be construed as such a limitation was an earlier statement by Ms Hoffmann that a further revised proposal would have to be taken to her partners. I doubt very much whether this could amount to a limitation on authority at all. It is a commonplace for a partner to negotiate with a third party and to tell the third party that he or she wishes to consult other partners before committing the partnership. That does not affect the basic position. As a former partner in a firm of solicitors, I know this very well for myself.

122. However, since thereafter the revised proposal was brought back to the first defendant and ultimately signed off, the first defendant was entitled to assume that in the interim it had been approved. In any event, therefore, even if (contrary to my view) that statement had amounted to some kind of notice to the first defendant of a limitation on Ms Hoffmann's authority, it would have been removed by her further actions. Accordingly, I conclude that Ms Hoffmann had both express and implied actual authority to bind the claimants in the agreement of December 2013.

123. Strictly speaking, it is not necessary for me to go on and consider Ms Hoffmann's *apparent* authority to bind the claimants. Yet I have no doubt that the claimants held Ms Hoffmann out as a person who had their authority to bind them. This arises not only from her published position as a partner, but also from the letter of 8 May 2012 to the first defendant from the claimants, which was indeed signed by Ms Hoffmann, but was in fact approved by other partners. The claimants made no attempt in that letter to inform the first defendant of any limitations on the power of Ms Hoffmann to bind the claimants. On the contrary, they intended, as I have found, that he should rely on it. And, as I have also said, the first defendant *did* rely on the representations of the claimants, and they are therefore bound by the apparent authority with which they clothed Ms Hoffmann.

Construction

124. I now turn to the true construction of the 2013 Letter. I note first of all that paragraph 1 refers expressly to the SSA of 16 May 2012 and to the articles of the Company, but not to the Loan Notes. On the other hand, as shown by Mr Miranda's email of 14 November 2013, it was the claimants who wished to effect the revised deal by way of simple side letter, rather than by amending the original documents. The form of the side letter complies with clause 26 of the SSA, on the formality of amendments to that document. Clause 4 of the letter required the parties to procure amendment to the articles of Topco to give effect to it if either side required. But as I understand the position, neither side did.

125. But there was no need to amend the terms of the Loan Notes, as they continued to accrue interest at the same rate. What was amended was the split of the accrued interest between the parties. Clause 2, which is the critical provision, is an agreement that certain cash balances available to the Company should be distributed differently from what otherwise would have been the case under the original deal. It falls into two parts, the first having priority over the second. The first part is to pay interest "that shall have accrued on the Loan Notes" in the new proportions 70:30 in favour of the first defendant, instead of the original 60:40. The second part applies only "to the

extent that the interest entitlement on the A Loan Notes and/or B Loan Notes at that time shall be fully satisfied" under the first part. It provides that the balance of excess cash should be distributed *as dividends* (so far as there are distributable profits) to the shareholders in the proportions 70:30 as between A and B shareholders.

126. I bear in mind the context of this agreement. In part this was that CBPE wanted to obtain cash from the profits of the business sooner than originally provided (in 2015), whereas the first defendant was dissatisfied with the equity shares originally agreed, but had no pressing need for cash. There is therefore no obvious reason why the first defendant should have agreed to unlock the cash pile for the benefit of CBPE without at the same time doing something about the allocation of equity, especially when he did not need the cash himself. That does not necessarily mean that the 'something' had to be an immediate change to equity. It *could* have been a future change (*eg* on a future sale). But the first defendant wanted a change straight away, and there was no commercial need for the first defendant to enjoy a mere cash flow advantage, whilst creating the right for the claimants to compound unpaid interest at 10% per annum.

127. Clause 2(i) entitles the holder of the A Loan Notes (the first defendant) to 70% of "the interest that shall have accrued on the Loan Notes". The natural meaning of these words is 70% of "all the interest accrued on *both* the A *and* the B Loan Notes". The question is whether this is (i) merely a payment of the 60% interest to which the first defendant was originally entitled plus a payment on account of future interest entitlement of a further 10%, or (ii) in substance altering the entitlements for the future, so that the first defendant is entitled to 70% from now on, and the claimants are entitled only to 30%. The wording used draws no distinction between interest entitlement and right to payment as distinct from of entitlement. In my judgment, the language of the clause more naturally fits the first defendant's interpretation than the claimants'. If the claimants' view were right, you would need to say that "interest that shall have accrued" is to have accrued at the *original* rate (60:40) as between the parties, instead of what the first defendant says (and I agree) is the accrual of interest on the loan notes *as a whole*.

128. Clause 2(ii) then makes clear that *that* subclause can only operate where (a) the interest entitlement has been satisfied *and* (b) there is still excess cash, *ie* that there will be no interest accrued but remaining unpaid. The claimants' position is that clause 2(i) is paying the first defendant *more* than his (60%) entitlement, thus giving him a cash flow advantage, and is paying the claimants *less* than their (40%) entitlement, thus leaving 10% of that entitlement outstanding and unpaid. If the claimants are right, clause 2(ii) could operate only if 30% of the excess cash were sufficient to allow payment in full of the claimants' 40% interest entitlement, and then the balance would be split 70:30 in dividends.

129. To my mind this creates a very complicated situation, which can best be illustrated by a simple example, which was indeed used during the cross-examination of Mr Dinnen. Suppose that the interest accrued on all the loan notes in a particular year amounts to £100, and that there is excess cash (as defined) in the business of £200. Under the original deal, the first defendant would be entitled to £60 and the claimants would be entitled to £40 (but only as from 2015). Under the 2013 Letter Agreement, the payment out of £100 will satisfy the whole of the interest entitlements on the loan notes. However, according to the plain words of clause 2(i), £*70* (rather than £60) will be paid to the first defendant, thus overpaying his entitlement by £10, and £*30*

(instead of £40) will be paid to the claimants, leaving them underpaid by £10. Interest of £10 will therefore still be outstanding. But nothing can be paid out under clause 2(ii) until *all* the interest is paid, and *none* is outstanding. So, out of the remaining excess £100, another £10 must first be paid to the claimants, thus satisfying their entitlement to interest in full. That will leave £90 to be divided between the parties in accordance with clause 2(ii). Of the £90, 70%, that is £63, will be paid to the first defendant in dividends, bringing his total receipts up to £133. The remaining 30%, that is £27 will be paid to the claimants in dividends, bringing their total receipts up to £67.

130. In other words, on these figures, where there is an excess of £200, it will be ultimately divided between the parties in the proportions 2:1 in favour of the first defendant. That is neither the 70:30 nor the 60:40 ratio contended for either side. It is simply the result of the arithmetic on the basis of the particular excess available. And the proportions will be different again if there is more or less excess cash available. Moreover, the agreement is entirely silent as to how the 10% overpayment to the first defendant is to be regularised in future.

131. Mr Dinnen in cross-examination did not agree with this. First of all, he was asked about a scenario in which £100 of interest accrued, but there was *no* excess cash beyond that in the business. He said (transcript, day 2, page 93 line 17 – page 94 line 14):

> "What would happen is that the £100 would be paid out in the ratio 70/30. However, Mr Taranissi would not have accrued £70 of value. Therefore, he cannot be paid £70 of value, and this is clear in the December 13 letter which is what I was going to refer to… So he would be paid 60 because he's capped at 60. Only 60 has accrued. CBPE would be paid 30 and, as the letter makes clear, therefore there can be no distributions to anybody else unless the interest accrual on the B note is satisfied, and the B note is always going to lag in that scenario because it's getting paid at a lower ratio than it's accruing. So you then would have what we call a golden zone, you would call it a dead zone, but a hundred P in the pound, the £10 would go, so it would end up being 60/40. He could determine that only £90 be paid out and that £10 be unpaid out, so it doesn't have to give CBPE that £10, but that's the mechanism as I perceive it."

132. So, according to Mr Dinnen, although clause 2(i) refers to payment of interest in the ratio 70:30, Mr Dinnen says that the first defendant cannot be paid £70 because he has not accrued £70 of interest *entitlement*: he is "capped at 60". Next, the witness was asked about the example of interest accruing of £100 but excess cash in the business of £200. He said (transcript, day 2, page 97 lines 4 – 14):

> "So he would get 60 because he's capped at 60. He would get 30 – sorry, we would get 30. We would then get the extra 10 because there's nowhere else for that ten to go without going to capital, but then the next hundred would be split 70/30, 70 to him, 30 – this next 100 is a dividend (inaudible) distributable reserves. He would get 70 and we would get the 30 because a dividend is in proportion to equity and we've given up the equity in that way."

133. The case for CBPE was presented on the basis that, in addition to securing an alteration in the equity on an exit, the first defendant would also enjoy a cash flow

advantage in being paid sums on account of interest which had not yet accrued (that is, in being paid a sum equal to 70% of all interest accrued, although in fact only 60% would have accrued to the first defendant). But Mr Dinnen's evidence says that is wrong. Because the first defendant only has an interest entitlement of *60%*, he is "capped" at that, and cannot be paid anything above it on account of interest. On the other hand, the 10% by which the claimants are underpaid their interest entitlement needs to be rectified before any dividends can be paid under clause 2(ii). This seems to me to be a commercial nonsense, and to do considerable violence to the plain words of the clause.

134. It is also inconsistent with the statement which Ms Hoffmann made in an email to the first defendant on 25 November 2013, enclosing a worked example. She said:

> "I have assumed there would be no outstanding interest on our respective loan notes at exit as the cash we sweep (between us) between now and then *should more than clear the interest each year*" (emphasis supplied).

Of course, Ms Hoffmann was assuming (perhaps optimistically) that excess cash would always exceed accrued interest. But so it does in the £200 example given above. And yet Mr Dinnen said that the first defendant was capped at 60%, even though clause 2(i) refers to the payment to the first defendant of a sum equal to *70%* of the accrued interest.

135. On the other hand, if the construction placed on clause 2 by the first defendant is right, payment and entitlement under clause 2(i) are always the same, that is in the proportions 70:30, and so there is never a problem with clause 2(ii), and any further excess cash is also paid in the proportions 70:30. This construction gives a sensible meaning to all the words in the clause, unlike the construction put forward by Mr Dinnen. No commercial reason was suggested to me why, if dividends on equity are to be paid on a 70:30 basis, entitlement to interest on loan notes should be different. In my judgment this confirms the interpretation which I have placed upon this clause, using the natural meaning of the words.

Rectification

136. In case I am wrong in my construction of clause 2 of the December 2013 letter agreement, I will go on to consider briefly the question of rectification of that letter. I have found that, in December 2013, the first defendant thought he had agreed with Ms Hoffmann on behalf of CBPE both an equity shift and an interest split shift from 60:40 in his favour to 70:30 in his favour, which he thought were properly recorded in the letter agreement. I have also found that Ms Hoffmann sought and signed up to a form of words which she considered would appear to bridge the gap between what the first defendant wanted and what she thought her partners were seeking. As she said at the time to the claimants' lawyer Mr Miranda, "The letter does exactly as I want it (thank you)." However, she was also well aware that the first defendant thought they had agreed that he would have both an equity and an interest split of 70:30 in his favour immediately for the future, but she did not disillusion him.

137. In their skeleton, the claimant argued that the claimant's Investment Committee was the relevant decision-maker for the purposes of considering the elements of any claim in rectification. The first defendant argued that the relevant decision-maker for this

purpose was Ms Hoffmann. I have already held that Ms Hoffmann had the authority to bind the claimants and was acting within the express (or alternatively implied) actual authority given to her in agreeing the terms of the revised arrangement with the first defendant. She was also acting within her apparent authority. Accordingly, I agree with the first defendant that Ms Hoffmann was more than a mere negotiator, and was the relevant decision-maker.

138. In my judgment, on these facts, this is not a case where I can hold that the *common intention* of the parties has been mis-recorded in the written instrument. Judged subjectively, there was no such common intention, and it is therefore not a case of common mistake. Nevertheless, it is a case that falls squarely within the second category of rectification, namely unilateral mistake (on the part of the first defendant) coupled with what the old textbooks used to call "sharp practice" (on the part of the other). This is really just a case of *actual* knowledge by one party of the other party's mistake and failing to draw it to that other party's attention. If I had not decided that the first defendant's construction of the letter agreement was the correct one, I would have ordered rectification of the letter agreement so as to conform to that construction.

139. I should say that it was argued on behalf of the claimants that there had been significant delay in seeking rectification. This was based on the fact that the first defendant disputed the claimants' position in relation to the split of interest as long ago as July 2014, and yet did nothing about it, except to assert it. The fact however is that the first defendant did dispute the claimants' position when it was put forward, by complaining to Ms Hoffmann, who was held out by the claimants as his point of contact with them. Given that the first defendant as a director of Topco was able to direct the payment of interest to himself in accordance with what he understood to be the agreement between the parties, it is unclear to me what else the first defendant should have done. There was no point in embarking on legal proceedings when he was suffering no harm.

140. I do not consider that the first defendant is to be criticised, much less shut out from the equitable remedy of rectification, merely because he did not launch legal proceedings to seek rectification of a document which he considered expressed correctly what he understood to have been agreed between himself and the claimants (the more so since I have held that his construction was the right one anyway).

Estoppel by convention

141. In case I am wrong on both of those matters, I go on very briefly to consider the question of estoppel by convention. This is not on its face a case where there was a common assumption by the parties. It is clear that the first defendant on the one hand and Ms Hoffmann on the other hand were not in fact assuming the same thing at all. Ms Hoffmann was trying to ride two horses, on the one hand not disillusioning the first defendant, and on the other not expressly agreeing something she knew her partners would not like.

142. But I am satisfied that the first defendant put forward his understanding of the contractual position to Ms Hoffmann on a number of occasions, and on each occasion Ms Hoffmann reassured the first defendant that she shared his view. In fact this was not true, but in my judgment the claimants cannot be better off by their agent making

an untrue statement than they would have been had her statement that she took the same view been true. Analytically, by allowing the first defendant to proceed as he did on the basis that Ms Hoffmann acquiesced in his view, the claimants are now estopped from denying the truth of what Ms Hoffmann told him, that is, that she agreed with him. That is a sufficient basis for an estoppel by convention to operate, if the other conditions are satisfied, as I hold that they are. Accordingly, if there were no rectification for any reason, there would be an estoppel by convention in this case.

CONCLUSION

143. This is a classic case where the parties to the litigation are only here in court because of the actions of a non-party, a person who was standing between them, in this case Ms Hoffmann. Each side thinks it is right, based on what it understands to have happened. But they cannot both be right. The court has to decide which of the two sides is in the right, and which shall suffer, because of the actions of the third party. That is what I have done. In my judgment, for the reasons which I have given, the claimants' claim fails, and the first defendant's counterclaim succeeds on the basis I have stated. I cannot leave this case without paying tribute to the quality of the written and oral submissions of counsel on both sides. It was a pleasure to adjudicate on such a well-argued dispute. I would be grateful to receive a minute of order to give effect to this judgment.