

[Jo Braithwaite](#)

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# The origins and implications of contractual estoppel

Jo Braithwaite\*

## I. Introduction

Compared to other forms of estoppel, the requirements for contractual estoppel are light. If parties have concluded a binding contract containing an acknowledgement of a certain state of affairs, subject to statute and public policy, contractual estoppel will prevent the maker of the statement from "asserting in litigation"<sup>1</sup> that the opposite was true. In the pivotal case of *Peekay Intermark v Australia and New Zealand Banking Group*,<sup>2</sup> an investor signed terms which included a description of his investment and an acknowledgement that he had read and understood the documentation. The Court of Appeal held that, because of contractual estoppel, the investor was precluded from arguing that he had been induced into the agreement by a misrepresentation as to the nature of his investment.

Since *Peekay* and the subsequent consolidation of the doctrine in *Springwell Navigation Corp v JP Morgan Chase Bank*<sup>3</sup> there has been no stopping contractual estoppel. In particular, it has become a regular feature in disputes arising from the latest financial crisis, typically as one of several reasons why sophisticated counterparties fail in multifaceted claims against their banks. These financial markets cases have catalysed the development of the doctrine, as well as the debate around it. On the one hand, the courts have now clearly confirmed that, as a matter of freedom of contract, parties are able to agree that they are contracting on the basis of a certain (for example, "representation-free")<sup>4</sup> state of affairs, and as a matter of contractual certainty, the courts will not disrupt this approach. A short overview of the doctrine as it now stands is set out in Part II of the paper. On the other hand, these recent sightings of contractual estoppel have started to generate concerns. These concerns may be thought of as falling into two groups, and they are the subject of the remainder of the paper.

The first set of concerns is about labelling this doctrine as an estoppel. One leading textbook describes it as "anomalous" and "not an estoppel",<sup>5</sup> while a recent High Court decision refers to the term as "a convenient label" and to the doctrine as an estoppel "(so-called)".<sup>6</sup> Contractual estoppel may, it seems, be nothing of the sort. These concerns reflect the fact that, unlike other forms of estoppel, including the evidential estoppel considered in *EA Grimstead & Son Ltd v McGarrigan*,<sup>7</sup> there is no requirement of detrimental reliance before contractual estoppel binds a representor to his statement of

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\* Associate Professor, Department of Law, London School of Economics and Political Science.

<sup>1</sup> *Peekay Intermark v Australia and New Zealand Banking Group* [2006] EWCA Civ 386; [2006] 1 C.L.C. 582, at [70], per Chadwick L.J.

<sup>2</sup> [2006] 1 C.L.C. 582, appealed from *Peekay Intermark v Australia and New Zealand Banking Group* [2005] EWHC 830 (Comm); [2005] 2 C.L.C. 111.

<sup>3</sup> [2010] EWCA Civ 1221; [2010] 2 C.L.C. 705.

<sup>4</sup> *Mears Ltd v Shoreline Housing Partnership Ltd* [2013] EWCA Civ 639; [2013] C.P. Rep. 39, at [17].

<sup>5</sup> S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at pp. 90-91 and 315.

<sup>6</sup> *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm); [2015] Bus. L.R. D5, at [309] and [322].

<sup>7</sup> [1999] All E.R. (D) 1163; [1998-99] Info. T.L.R. 384; Official Transcript.

fact. Some commentators use this as basis attacking the substance of the doctrine. Thus, for Professor McMeel, the argument that contractual estoppel is an "illegitimate species of estoppel" is one of several reasons why the doctrine is a "myth", which should be "exploded" by the Supreme Court at the first opportunity.<sup>8</sup> However, even if this is not a new form of estoppel, it does not follow that this doctrine lacks valid means to reach the same ends. For this reason, it is submitted that the question of whether this doctrine has been mislabelled should be addressed after considering the origins and content of the doctrine. Accordingly, Part III below begins by considering the pivotal cases. It explains that the doctrine is a hybrid of authority and principle, and that, over time, it has become a well-established and distinct rule based on freedom of contract. Part III concludes that, apart from intensifying the challenge for those attempting to set up some sort of unified law of estoppel, in practice, little now turns on the label "estoppel".

The second set of concerns about contractual estoppel relates to its implications. As discussed in the first section of Part IV, the English courts have consistently held that the widely-used risk allocation provisions found in Mandate Letters<sup>9</sup> and Information Memorandums<sup>10</sup> in the syndicated loans context, and in derivatives contracts<sup>11</sup> and in the client documentation used by investment banks may give rise to an estoppel so that defendants avoid responsibility for actual events. While there is some room for debate about the implications of contractual estoppel for financial agreements of this type, and about the applicability of the Unfair Contract Terms Act 1977 ("UCTA"), an arguably more pressing concern is about contagion from the financial markets case law into what Christopher Clarke J. called "everyday contracts made with consumers or between businesses great and small".<sup>12</sup> Accordingly, the second section of Part IV considers cases applying *Springwell*. It shows that contractual estoppel is now being argued in more diverse contexts. In a recent case, for example, an employer argued that an employee's contractual acknowledgement that a restrictive covenant was fair should stop him from arguing the reverse. Drawing on these cases, Part IV of the paper explains the potential of contractual estoppel to disrupt the status quo regarding promises of good faith and reasonable endeavours, and the capacity of a statutory body, but it also finds evidence of both "internal" and "external" limits being carefully applied by the courts. It concludes that these limits will be tested and developed further as draftsmen catch on to contractual estoppel.

## II. Overview

Contractual estoppel arises when parties have concluded a binding contract containing an acknowledgement of a state of affairs. The maker of the statement is thereby estopped from "asserting in litigation"<sup>13</sup> that the opposite was true, whether or not it actually was.

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<sup>8</sup> G. McMeel, "Documentary Fundamentalism in the Senior Courts: The myth of contractual estoppel" [2011] L.M.C.L.Q. 185, at p. 206 and 207.

<sup>9</sup> *Barclays Bank v Svizera Holdings BV* [2014] EWHC 1020 (Comm); [2015] 1 All E.R. (Comm) 788.

<sup>10</sup> *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123.

<sup>11</sup> See, e.g., *Standard Chartered Bank v Ceylon Petroleum Corporation* [2012] EWCA Civ 1049; [2012] All E.R. (D) 317 (Jul), considering, inter alia, section 9(a) of the International Swaps and Derivatives Association ("ISDA") Master Agreement, at [774].

<sup>12</sup> *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, at [305].

<sup>13</sup> *Peekay Intermark v Australia and New Zealand Banking Group* [2006] 1 C.L.C. 582, at [70].

One set of commentators concludes that "[f]ollowing the logic of the cases where contractual estoppel has been considered, it appears that any representation of fact made in a contract may be given effect by the operation of the new doctrine."<sup>14</sup> In practice, however, the principal focus of the case law to date has been statements of past and present fact along the lines that no advice or representations have been given by one party to another. There were several examples in the extensive "Relevant Provisions" litigated in *Springwell*, including the statement that no advice had been provided by the bank to the investor.<sup>15</sup> Furthermore, in a recent High Court decision, the judge could "see of no reason of authority, principle or policy" that the doctrine should be confined to statements about a present or past state of affairs.<sup>16</sup> Such provisions are now common in commercial documentation. The main implication of this type of statement giving rise to an estoppel is that the maker becomes precluded from asserting certain claims, including, commonly, for misrepresentation. This strictly upholds the terms of the bargain, but it is also one of the reasons that contractual estoppel has been harshly criticised by some commentators.<sup>17</sup>

Like other estoppels including estoppel by representation,<sup>18</sup> contractual estoppel operates subject to statute and public policy. So, for example, the decision in *Lowe v Lombank*<sup>19</sup> that a consumer was not bound by a contractual statement that she had not made the purpose of her purchase of a car known was subsequently explained in *Springwell* as a result of the protections afforded by the Hire Purchase Act 1938. To the extent that statements limit or exclude, rather than prevent, claims for misrepresentation, section 3 of the Misrepresentation Act 1967 will apply, so that statements have to meet the requirement of reasonableness in UCTA. In practice, when both parties are commercial entities, such terms seem inevitably to be found reasonable.<sup>20</sup> For clear reasons of public policy, contractual estoppel will not arise in the context of fraud or, as has been held at first instance, in the case of a restrictive covenant in an employment contract.<sup>21</sup>

The authorities are clear that contractual estoppel is, at the very least, a "separate doctrine" to estoppel by representation and estoppel by convention.<sup>22</sup> Because of the presence of a contract between the parties, it has been held that there is no need to show "some other mechanism" like unconscionability or detrimental reliance in order to make contractual estoppel enforceable.<sup>23</sup> As a result, however, contractual estoppel will wholly depend on the validity of the contract. For example, it will not be available if the contract is ultra vires as regards one of the parties, and therefore void. For the same reason,

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<sup>14</sup> S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at p. 140.

<sup>15</sup> *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm); [2008] All E.R. (D) 167 (Jun), at [497]-[535].

<sup>16</sup> *Credit Suisse International v Stichting Vestia Groep* [2015] Bus. L.R. D5, at [307].

<sup>17</sup> See, e.g., G. McMeel, "Documentary Fundamentalism in the Senior Courts: The myth of contractual estoppel" [2011] L.M.C.L.Q. 185.

<sup>18</sup> As discussed in S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at p. 183.

<sup>19</sup> [1960] 1 W.L.R. 196; [1960] 1 All E.R. 611.

<sup>20</sup> Applying s 3(2) of UCTA, Chadwick L.J. stated that "experienced businessmen representing substantial companies of equal bargaining power" ... "should be taken to be the best judge of the question whether the terms of the agreement are reasonable". *Watford Electronics v Sanderson* [2001] EWCA Civ 317; [2001] 1 All E.R. (Comm) 696, at [55]. See further discussion of UCTA reasonableness in Part IV below.

<sup>21</sup> *Dinsdale Moorland Services Ltd v Evans* [2014] EWHC 2 (Ch); [2014] 2 Costs L.R. 217, discussed further in Part IV below.

<sup>22</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [177].

<sup>23</sup> *Springwell Navigation Corp* [2010] 2 C.L.C. 705, at [177].

contractual estoppel is also vulnerable to misrepresentation as to the effect of the documents.<sup>24</sup> In the context of a recent summary judgement application, it was held to be arguable that a bank could not rely on estoppel arising from a disclaimer signed by reason of a dishonest representation.<sup>25</sup> In such cases, it may be possible to establish estoppel by representation instead. This type of estoppel does not require a contractual relationship, but it does require that additional criteria are met, including that the representee has acted to his detriment in reliance upon the representation.<sup>26</sup>

### III. Origins

Contractual estoppel has never been considered by the Supreme Court (or House of Lords). *Peekay* is the pivotal Court of Appeal case, in the sense that it defined the doctrine as it is now widely applied. *Springwell* subsequently confirmed and consolidated the doctrine. Both the exhaustive first instance decision in *Springwell* and the unanimous Court of Appeal decision upholding it have been widely relied upon in the subsequent authorities. This part of the paper examines the origins and the content of the doctrine and, on that basis, concludes by considering how it should be labelled.

#### 1. *The pivotal case of Peekay*

In *Peekay*, at [56], Moore-Bick L.J. explained contractual estoppel as follows:

"There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concern those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see *Colchester Borough Council v Smith* [1991] Ch 448, affirmed on appeal [1992] Ch 421."

In *Peekay*, an investor with "considerable investment experience"<sup>27</sup> purchased a product described as a "structured US Dollar hedged Russian Treasury bill deposit" from ANZ Bank. Critically, repayment under this product was contractually linked to the performance of a Russian government bond (a "GKO"), but the product gave the investor no proprietary rights in GKO's. This was significant because it meant that, in the event of a sovereign default, investors would have no standing as regards the issuer, and therefore no control over how the investment was liquidated.<sup>28</sup> The Final Terms and Conditions ("FTCs") of the product set out the details of the product accurately. The investor signed and returned the FTCs, along with a Risk Disclosure Statement ("RDS") though he had not read either document. Before signing, he received "inconsistent" information from the bank about the rights attached to the product. In August 1998 the

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<sup>24</sup> *Peekay Intermark v Australia and New Zealand Banking Group* [2006] 1 C.L.C. 582, at [57] and [60]. For example, see *Curtis v Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805; [1951] 1 All E.R. 631.

<sup>25</sup> *Deutsche Bank v Unitech* [2013] EWHC 2793 (Comm); [2014] 2 All E.R. (Comm) 268, at [157].

<sup>26</sup> *Lowe v Lombank* [1960] 1 W.L.R. 196, at 205.

<sup>27</sup> *Peekay Intermark v Australia and New Zealand Banking Group* [2006] 1 C.L.C. 582, at [2].

<sup>28</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [6].

Russian government announced a moratorium on its obligations under GKOs, and the investment became virtually worthless.<sup>29</sup>

The investor claimed damages under section 2(1) of the Misrepresentation Act, on the basis that the product had been sold as one offering proprietary rights in GKOs. The investor was successful at first instance, with the judge finding that the investor was induced to purchase the product by the bank's informal representations. The Court of Appeal, however, unanimously upheld the bank's appeal, placing far greater weight than the judge on the FTCs. It found that the FTCs were clear and definitive as to the nature of the product, and, while prior "informal"<sup>30</sup> information provided to the investor was inconsistent, it was also provided "innocently"<sup>31</sup> and on a "rather rough and ready"<sup>32</sup> basis. As Moore-Bick L.J. put it, "the true position appeared clearly from the terms of the very contract which the claimant says it was induced to enter by the misrepresentation."<sup>33</sup> As a result, the Court of Appeal found that investor was induced to purchase the product by his own assumptions, and not by the bank's previous statements.

Contractual estoppel was raised by the appellants in *Peekay* as an alternative argument. Specifically, the Court of Appeal was required to decide whether, by signing the RDS, the investor was "precluded as a matter of contract from contending that it did not understand the true nature of the investment".<sup>34</sup> The argument focused on two terms of the RDS, which were as follows:

"You should also ensure that you fully understand the nature of the transaction and contractual relationship into which you are entering."

and:

"The issuer assumes that the customer is aware of the risks and practices described herein, and that prior to each transaction the customer has determined that such transaction is suitable for him."

It was also relevant that immediately above the space for signature on the RDS, there was the following statement:

"[Client] confirms it has read and understood the terms of the Emerging Markets Risk Disclosure Statement as set out above."

Moore-Bick L.J. found that by signing the RDS, the investor was bound by the third statement above, confirming he had read and understood the terms. By returning the signed FTC and RDS, he offered to contract with the bank on the terms therein and his offer was accepted by the bank implementing his instructions. As a result, the contract between investor and bank included the first and second terms above. This meant that it was not open to the investor to say he did not understand the nature of the transaction described in the FTCs, or to say that he was induced to contract by an inconsistent earlier statement by the bank. In short, contractual estoppel prevented the investor

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<sup>29</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [50]-[58].

<sup>30</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [52].

<sup>31</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [45].

<sup>32</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [25].

<sup>33</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [43].

<sup>34</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [58].

avoiding the effect of terms of a contract by arguing in court that the opposite was true (i.e., that he had not read or understood the terms). Collins L.J. and Chadwick L.J. concurred, with the latter providing a substantive judgment in which he gave three reasons for his decision, one of which was that:

"[the confirmation in the RDS], as it seems to me, operated as a contractual estoppel to prevent Peekay from asserting in litigation that it had not, in fact read and understood the Risk Disclosure Statement."<sup>35</sup>

## **2. *Springwell***

*Springwell* is the second landmark decision on contractual estoppel, which, over the course of the first instance and Court of Appeal decisions, confirmed and developed the doctrine established by *Peekay*.

As in *Peekay*, this investor's claims arose out of the August 1998 default by the Russian state on its GKO's. In *Springwell*, the investor's claims were heard in two parts, addressing pre-default and post-default claims. The investor's pre-default claims against the bank were very broad-ranging, including claims for "excessive profits", as well as for "breach of contract, negligence, breach of fiduciary duty, negligent mis-statement and/or under section 2 of the Misrepresentation Act in respect of the loss of the value of the investment portfolio acquired through its dealings with Chase".<sup>36</sup> Contractual estoppel was one of many issues considered during the trial of the pre-default claims but it was of significance, however, because of the potentially sweeping effects of the "Relevant Provisions" of the documentation of a "very broad nature"<sup>37</sup> entered into by the parties.<sup>38</sup> Against this background, *Springwell* made three particularly important contributions to the development of the doctrine of contractual estoppel.

### **(a) *Distinction from other forms of estoppel***

*Springwell* clearly confirmed, as had been found in *Peekay*,<sup>39</sup> that contractual estoppel is a separate doctrine to other forms of estoppel, including the "evidential estoppel" discussed by Chadwick L.J. in *EA Grimstead*<sup>40</sup> and in *Watford Electronics v Sanderson CFL*.<sup>41</sup> The outcome in *EA Grimstead* demonstrates very clearly why this distinction matters, and why it is hopeless to argue that contractual estoppel should have other requirements bolted on to make it a "true" estoppel.

In *EA Grimstead*, a share sale agreement contained two acknowledgements of non-reliance on representations and warranties, with the exception of those contained in the

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<sup>35</sup> *Peekay Intermark* [2006] 1 C.L.C. 582, at [70].

<sup>36</sup> *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] All E.R. (D) 167 (Jun), at [4]-[9].

<sup>37</sup> *Springwell Navigation Corp* [2008] All E.R. (D) 167 (Jun), at [476].

<sup>38</sup> *Springwell Navigation Corp* [2008] All E.R. (D) 167 (Jun), at fn 104 details the extensive documentation relied on by the bank.

<sup>39</sup> *Peekay Intermark v Australia and New Zealand Banking Group* [2006] 1 C.L.C. 582, at [57], considers separately contractual estoppel and estoppel by representation. *Peekay* was relied upon as authority for this point in *Trident Turboprop (Dublin) v First Flight Couriers* [2008] EWHC 1686 (Comm); [2009] 1 All E.R. (Comm) 16, at [35] where Aikens J. states that "I am quite satisfied, having looked at the cases, that the two forms of 'estoppel' are different." In fn 9 to this decision, Aikens J. indicates that since argument, he has read the judgment of Gloster J. in *Springwell* and agrees with her analysis of this point.

<sup>40</sup> *EA Grimstead & Son Ltd v McGarrigan* [1998-99] Info. T.L.R. 384.

<sup>41</sup> [2001] 1 All E.R. (Comm) 696, at [40].

agreement. The Court of Appeal found that no false oral representations had been made by the vendors. However, had such representation had been made, it was held that the clauses may be "capable of operating as an evidential estoppel".<sup>42</sup> Applying *Lowe v Lombank*<sup>43</sup> (discussed further below), the Court went on to consider whether the vendor had proved the three requirements of evidential estoppel, being (i) that the non-reliance statements given by the purchaser were clear and unequivocal, (ii) that the purchaser had intended that the vendor should act upon those statements, and (iii) that the vendor believed that the statements were true and had acted on them. Chadwick L.J. (writing for the unanimous Court) concluded that while points (i) and (ii) were met, (iii) would be problematic for the vendor because, having made representations (a pre-condition of the estoppel point being relevant), "it is difficult to avoid the conclusion that [the vendor] did so in order to persuade [the purchaser] to agree to the purchase".<sup>44</sup> In that case, the vendor would be precluded from arguing that he believed the purchaser's statement of non-reliance was true, and he could not rely on any estoppel arising from those statements.

*Springwell*, on the other hand, clearly confirmed that contractual estoppel does not require detrimental reliance,<sup>45</sup> but arises on the basis of the contract alone. Contractual estoppel therefore avoids the "insuperable difficulties" caused by the evidential estoppel requirements in the context of non-reliance cases.<sup>46</sup> Of course, estoppel by representation may arise as well as, or instead of, contractual estoppel, should the requirements be met.<sup>47</sup> This may be useful if, for example, the underlying contract itself is void.

The Court of Appeal also confirmed in *Springwell* that contractual estoppel is distinct from "estoppel by convention", which would require that the party wishing to rely on a statement shows that it would be unconscionable for the other party to go back on the assumed state of affairs.<sup>48</sup> It had been submitted by the investor in *Springwell* that any estoppel in that case should be governed by "considerations of justice and equity". These arguments were dealt with decisively by the Court of Appeal, which held that contractual estoppel is "a separate doctrine"; it is based on the contract between the parties, so no other "mechanism" such as unconscionability is required; and these other requirements are "irrelevant" to contractual estoppel.<sup>49</sup>

### ***(b) Is Peekay sound?***

It was also submitted in *Springwell* that *Peekay* itself was not good law. More specifically, it was argued that the parts of *Peekay* addressing contractual estoppel were obiter, or alternatively per incuriam. After a detailed review of the authorities, these various attacks on *Peekay* were robustly dismissed both at first instance and by the Court of Appeal.

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<sup>42</sup> *EA Grimstead & Son Ltd v McGarrigan* [1998-99] Info. T.L.R. 384, at 411.

<sup>43</sup> [1960] 1 W.L.R. 196.

<sup>44</sup> *EA Grimstead & Son Ltd* [1998-99] Info. T.L.R. 384, at 412.

<sup>45</sup> *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] All E.R. (D) 167 (Jun), at [558]-[563].

<sup>46</sup> *Watford Electronics v Sanderson* [2001] 1 All E.R. (Comm) 696, at [40].

<sup>47</sup> *Peekay Intermark v Australia and New Zealand Banking Group* [2006] 1 C.L.C. 582, at [57].

<sup>48</sup> Estoppel by convention was deployed by the Court of Appeal in the RASCALS case as a justification for the transfer of property in an automated intra-group repo transaction. *Re Lehman Brothers International (Europe)* [2011] EWCA Civ 1544; [2012] 2 B.C.L.C. 151, at [106]-[124], as discussed in M. Bridge and J. Braithwaite, "Private law and financial crises" (October 2013) 13(2) J.C.L.S. 361.

<sup>49</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [177]-[178].



The obiter argument was dismissed promptly in *Springwell*, as it was by Christopher Clarke J. after his detailed review of the authorities in *Raiffeisen*.<sup>50</sup> In both instances it was held that this was one of the grounds on which the investor's claim was dismissed by the Court of Appeal in *Peekay*. It is curious, therefore, to see the two key paragraphs of Moore-Bick L.J.'s judgment in *Peekay* (one of which is reproduced at the start of this part of the paper) still described as "obiter" in the 2012 edition of an estoppel textbook.<sup>51</sup>

The per incuriam arguments merit more consideration, because they were based on the fact that the Court of Appeal in *Peekay* did not cite or refer to the 1960 Court of Appeal decision in *Lowe v Lombank*.<sup>52</sup> In *Springwell*, Aikens L.J. noted that *Lowe* was the sole authority or "legal principle" cited by counsel for the investor in support of the proposition that parties cannot agree in a contract "that X is the case even if both know that it is not so".<sup>53</sup> This raises the questions of exactly what *Lowe* decided, whether the decision should be narrowly read, and the implications of its absence from the decision in *Peekay*.

In *Lowe* a consumer bought a car on hire purchase terms. The consumer signed, but did not read, the hire purchase agreement. She was assured by the salesman that the car was "in perfect or almost perfect condition". Later, the consumer signed a delivery receipt which stated:

"[...] I/We acknowledge and agree that I/We have read the hire-purchase agreement made between us and fully understand the terms and conditions thereof before signing."

In fact, the car was not roadworthy. The consumer sought damages for breach of the implied condition of fitness for purpose under section 8(2) of the Hire-Purchase Act 1938. By way of a defence, the hire purchase company argued that they were acting "purely as bankers" and had given no express or implied warranty about the vehicle. Further, they argued that the consumer was estopped from relying on any such implied condition.

Clause 8 of the hire purchase agreement purported to exclude certain conditions and warranties implied under the Hire-Purchase Acts 1938 and 1954, but the judge and Court of Appeal agreed that it did not exclude conditions implied by section 8(2).<sup>54</sup> The Court of Appeal also agreed with the judge that in this case the consumer had "plainly made it known to the defendants by implication" what she needed the car for, namely "the purpose of driving about". As a result, there was an implied condition to that effect in the hire purchase agreement.

At first instance, however, the judge went on to find that the consumer was estopped by the statements in the delivery receipt from relying on the defects to make a claim for a breach of an implied condition. Diplock J., giving the judgment of the Court of Appeal,

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<sup>50</sup> *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, at [241].

<sup>51</sup> S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at p. 139.

<sup>52</sup> [1960] 1 W.L.R. 196.

<sup>53</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [144].

<sup>54</sup> *Lowe v Lombank* [1960] 1 W.L.R. 196, at 203.

started by considering the "curiously drafted"<sup>55</sup> clause 9(ii) of the hire purchase terms, which stated that:

"The hirer further acknowledges and agrees that he has not made known to the owners expressly or by implication the particular purpose for which the goods are required, and that the goods are reasonably fit for the purpose for which they are in fact required."

He found that the acknowledgement or "representation" by the consumer could only operate as estoppel by representation, "preventing the plaintiff from asserting the contrary". The judge went on to note that the defendants had not taken this point, which the court presumed was because there was no evidence that the defendants believed in the truth of the representation. Secondly, the judge considered the effect of the wording that the hirer also *agreed* that she had not made the purpose known. The defendants argued that this was an "express promise" by the consumer, which negated any "implied promise" about fitness for purpose. In a much-cited passage, Diplock J. dismissed the possibility that such an "agreement" could:

"convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future."<sup>56</sup>

Diplock J. found that this statement (and that in the delivery receipt, which did not form part of the contract) might give rise to an estoppel by representation but, on the facts, this argument was not available to the defendants. In sum, the defendants in *Lowe* failed to meet the evidentiary burden necessary to show an estoppel by representation and could not sustain an argument based on contractual estoppel. The hirer knew the purpose intended for the car, and this was not affected by clause 9(ii) or the delivery receipt.

*Lowe* has been considered in detail three times over the course of the development of the law of contractual estoppel, though, as noted, not in *Peekay*. This analysis is found at first instance and appellate level in *Springwell* and, in between those two decisions, in *Raiffeisen*. Though for somewhat different reasons, on none of these occasions was *Lowe* found to be binding authority for the proposition that an agreement as to past facts can never amount to contractual estoppel. The Court of Appeal in *Springwell* found that *Lowe* was to be read narrowly. Specifically, it disagreed with Christopher Clarke J.'s statement in *Raiffeisen* that *Lowe* did not hinge on section 8(3) of the Hire Purchase Act. Aikens L.J. stated "I think that is precisely what it did".<sup>57</sup> Clause 9(ii) purported to exclude an implied condition and therefore, under the statutory scheme, it would have had to be brought to the attention of the consumer. As the defendants failed to do this, the term of the hire purchase agreement was ineffective. In light of this, the remarks of Diplock J. as to estoppel were "not, in my view, necessary for either part of the decision of the case".<sup>58</sup> In this respect, the Court of Appeal agreed with the discussion of *Lowe* at first instance in *Springwell*, though on that occasion, the judge went on to suggest that in *Lowe*, the "so-

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<sup>55</sup> *Lowe* [1960] 1 W.L.R. 196, at 204.

<sup>56</sup> *Lowe* [1960] 1 W.L.R. 196, at 204.

<sup>57</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [151].

<sup>58</sup> *Springwell Navigation Corp* [2010] 2 C.L.C. 705, at [152].

called "agreement"" could be seen "as no more than a sham".<sup>59</sup> For these reasons, *Lowe* found not to be binding authority which needed to be addressed in *Peekay*.<sup>60</sup>

In the alternative, if *Lowe* did decide that estoppel could not arise in these circumstances, Christopher Clarke J. held that it would be wrong, or itself per incuriam, because it failed to address the Court of Appeal decisions in *Burrough's Adding Machine Ltd v Aspinall* and *Colchester Borough Council v Smith*.<sup>61</sup> This was confirmed in *Springwell*, where Aikens L.J. described these authorities as "a series of cases which support the proposition that parties can agree that a state of affairs will be the basis of their contractual dealings with one another."<sup>62</sup> The former case held that a salesman was bound by a statement of accounts prepared by a company, though he knew them to be incorrect. This was because of a term in the contract between him and the company, whereby the statement was deemed to be correct unless the salesman objected within 30 days of receipt. The latter case, which cited the former, concerned a tenant farmer's settlement with his council, whereby he agreed that he had not obtained any interest in a section of land by adverse possession. At first instance, Ferris J cited a reference in the leading textbook to estoppel "by express contract"<sup>63</sup> and held the farmer was estopped from going back on this statement. The Court of Appeal confirmed this outcome, on the basis that the agreement was a bona fide compromise of the dispute.

These authorities have been criticised for not providing a comprehensive basis for the doctrine of contractual estoppel, not least because of the particular factual contexts in which both decisions were reached.<sup>64</sup> But the point is not that they justify contractual estoppel as we know it, but that the authorities, in conjunction with the analysis of *Lowe*, and the application of principle (discussed next), provide the foundations for the subsequent development of this area of law in *Peekay*. *Peekay* was, in turn, confirmed as binding authority in both *Raiffeisen* and in *Springwell*, and even at the time of the Court of Appeal decision it had "now been followed in a large number of first instance cases [...]".<sup>65</sup> Accordingly, in *Springwell*, it was held that "[t]he correct analysis must be the same as that in *Peekay*."<sup>66</sup>

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<sup>59</sup> *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm); [2008] All E.R. (D) 167 (Jun), at [550].

<sup>60</sup> The decisions in *Springwell* and *Raiffeisen* also state that the composition of the Court of Appeal in *Peekay* was relevant in evaluating whether that decision was per incuriam. For example, Christopher Clarke J. notes that Moore-Bick L.J. "referred to *Grimstead v McGarrigan* (which proceeded on *Lowe v Lombank* lines) and Chadwick L.J. gave the leading judgment in *Grimstead* and *Watford Electronics v Sanderson CFL Ltd* [2001] 1 All E.R. (Comm) 696, [2002] F.S.R. 299. The court must necessarily have had the *Lowe v Lombank* type of estoppel in mind ..." *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, at [242].

<sup>61</sup> See *Raiffeisen Zentralbank Osterreich* [2011] 1 Lloyd's Rep. 123, at [255] discussing *Burrough's Adding Machine Ltd v Aspinall* (1925) 41 T.L.R. 276, CA and *Colchester Borough Council v Smith* [1992] Ch 421, CA; [1992] 2 All E.R. 561.

<sup>62</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [156].

<sup>63</sup> *Colchester Borough Council v Smith* [1991] Ch 448; at 493, citing G. Spencer Bower and A. Turner, *Estoppel by Representation*, 3<sup>rd</sup> edn. (London: Butterworths Law, 1977).

<sup>64</sup> G. McMeel, "Documentary Fundamentalism in the Senior Courts: The myth of contractual estoppel" [2011] L.M.C.L.Q. 185, at 199.

<sup>65</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [169] and *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, at [255] with Christopher Clarke J. concluding that "I believe that I should follow the later decision of the Court of Appeal in *Peekay*, which has itself been followed in several subsequent first instance decisions ... "

<sup>66</sup> *Springwell Navigation Corp* [2010] 2 C.L.C. 705, at [170].

To conclude, the remarks of Diplock J. in the consumer case of *Lowe* are the only authority which is cited in either the case law or in the literature as directly challenging the development of the doctrine of contractual estoppel. On three occasions *Lowe* has been closely scrutinised by the courts, including by the Court of Appeal in *Springwell*. Each of these decisions has held unequivocally that *Lowe* is not authority for such a challenge to contractual estoppel, and that *Peekay* is good law, despite not citing or referencing *Lowe*. At the same time, the pivotal parts of *Peekay* have uniformly been found to be "consistent with principle and authority"<sup>67</sup> and have been widely followed, without any further challenge on the basis of *Lowe*.<sup>68</sup> For these reasons, it is submitted that the statements of Moore-Bick L.J. in *Peekay* are binding authority as to the operation of contractual estoppel, were correctly followed in *Springwell* and the subsequent cases, and should be upheld, if they are considered by the Supreme Court.

### **(c) Principle**

In *Springwell*, Aikens L.J. first considered contractual estoppel "from principle",<sup>69</sup> before evaluating the authorities. Later in the same judgment, (as discussed above) *Peekay* was confirmed as good law on the basis that it was "consistent with principle and authority".<sup>70</sup> Both statements confirm what is evident across the pivotal judgments, which is that contractual estoppel arises as much from principle as it does from the authorities.

The underlying principle being referred to here is freedom of contract. As the Privy Council put in recently (in a case concerning estoppel by deed) "[p]arties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them."<sup>71</sup> In our particular context, subject to "some principle of law or statute to the contrary"<sup>72</sup> freedom of contract has been held to require, first, that commercial parties are free to devise their own "contractual matrix"<sup>73</sup> in order to allocate risk as they see fit, and secondly, that the resulting bargain will be certain, in the sense that a contract should be immune from a party's attempts to deny it later. In other words, contractual estoppel protects the parties' autonomy to define "the true nature of their agreement"<sup>74</sup> by defending acknowledgements given in binding contracts.

By rooting the discussions of contractual estoppel in freedom of contract, the courts have located the doctrine within one of the most pervasive and powerful traditions in English commercial law. This has several implications. In the first instance, it facilitates judicial reasoning by allowing analogies to be drawn with other areas of commercial life. So, for example, terms in marine insurance contracts were cited by Aikens L.J. to support the finding that there is no reason in principle why parties should not be free to "agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case [...]".<sup>75</sup>

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<sup>67</sup> *Springwell Navigation Corp* [2010] 2 C.L.C. 705, at [169].

<sup>68</sup> *Lowe v Lombank* [1960] 1 W.L.R. 196 appears to have been cited in only one reported case since *Springwell*, namely *ACG Acquisition XX LLC v Olympic Airlines SA (In Liquidation)* [2012] EWHC 1070 (Comm); [2012] 2 C.L.C. 48, where it was distinguished.

<sup>69</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [143].

<sup>70</sup> *Springwell Navigation Corp* [2010] 2 C.L.C. 705, at [169].

<sup>71</sup> *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] A.C. 436, at [46].

<sup>72</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [143].

<sup>73</sup> *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] All E.R. (D) 167 (Jun), at [482].

<sup>74</sup> *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, at [317].

<sup>75</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [143].

Drawing another analogy, a recent Privy Council case about estoppel by deed may also be seen as informative as regards the development of contractual estoppel. In *Prime Sight Ltd v Lavarello*<sup>76</sup> the Privy Council considered an appeal from the Court of Appeal in Gibraltar involving a deed of assignment, registered with the Registrar of Land Titles. In the deed, the assignor (the Official Trustee) acknowledged payment of a sum from the assignee (a company). Both parties knew that this recital of fact was untrue; no sum had been paid. The question was whether the statement in the deed estopped the assignor from asserting that the company still owed the debt. Having reviewed the authorities on estoppel by deed and drawing on the authorities on estoppel by convention, the Privy Council concluded that both doctrines allow parties to assume a state of facts or law for their own purposes, and that this accords with earlier cases, and "more fundamentally, it accords with the principle of party autonomy which underlies the common law of contract".<sup>77</sup> On this basis, the Privy Council held that the Official Receiver was not able to claim that the deed of sale ought to be enforced while seeking "to discard as bogus the part of the document which treats the price as paid... there is no principled basis for having it both ways, by splitting the contractual provision of the deed in that manner".<sup>78</sup> This decision clearly demonstrates that freedom of contract serves as a common denominator for different types of estoppel, and that estoppel is regarded as a means of holding parties to their bargains. It is submitted that contractual estoppel clearly fits into this analysis, and that freedom of contract is likely to be of central importance if contractual estoppel is considered by the Supreme Court.

The prominence given to freedom of contract in the pivotal cases also means that contractual estoppel may be understood as part of a wider trend. We know from the work of Professor Atiyah that freedom of contract is, in historical terms, pervasive but not static.<sup>79</sup> Against this background, the emergence of contractual estoppel may be seen as part of a vigorous assertion of the principle freedom of contract that is evident across recent financial markets cases. Another example of this trend may be found in insolvency law. In 2011 the Supreme Court rejected the claim that the common law anti-deprivation principle rendered void a "flip" clause within complex securitisation documentation, which changed the ranking of two sets of secured creditors on the insolvency of one of them. As Lord Collins stated, giving one of the opinions in a unanimous judgment of the Supreme Court:

"[d]espite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned, not least because the interests of third party creditors will be involved. But, as Lord Neuberger stressed [2010] Ch 347, para 58, it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal."<sup>80</sup>

Accordingly, and in keeping with a separate decision considering the anti-deprivation principle in the context of the International Swaps and Derivatives Association ("ISDA")

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<sup>76</sup> [2014] A.C. 436. The link between this case and contractual estoppel is discussed in A. Trukhtanov, "Receipt clauses: From estoppel by deed to contractual estoppel" (2014) L.Q.R. 3.

<sup>77</sup> *Prime Sight v Lavarello* [2014] A.C. 436, at [46].

<sup>78</sup> *Prime Sight* [2014] A.C. 436, at [52].

<sup>79</sup> P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

<sup>80</sup> *Belmont Park Investment PTY Ltd v BNY Corporate Trustee Services Ltd and LBSF Inc* [2011] UKSC 38; [2012] 1 A.C. 383, at [103].

Master Agreement,<sup>81</sup> the anti-deprivation principle was held not to apply to terms in a financial contract which are included for bona fide commercial reasons.

This extract from Lord Collins' opinion highlights the relationship between the underlying subject-matter of financial markets cases like *Belmont* and reasoning which has vigorously asserted parties' freedom of contract. Notably, Lord Collins cites the complexity of the underlying instruments as providing a "particularly strong case for autonomy". This factor appears significant in the contractual estoppel cases too. As explained, the pivotal contractual estoppel cases involve relatively complex debt instruments, which were documented in detailed and extensive agreements between sophisticated parties. In these circumstances, it is unsurprising that the Court of Appeal in *Springwell* acknowledged the "commercial utility"<sup>82</sup> of the Relevant Provisions. Contractual estoppel has continued to feature prominently in cases involving complex deals, having been found to arise from the relevant provisions of notes with embedded collateralised debt obligations,<sup>83</sup> zero cost collars,<sup>84</sup> and currency derivatives allegedly so complex that "the Bank required specialist proprietary software to understand and analyse them".<sup>85</sup>

Indeed, it is submitted that financial markets cases exemplified by *Springwell*, and by first instance decisions like *Titan Steel Wheels*, present a whole range of related factors that are linked but not limited to the complexity of the underlying deals, which help to explain why freedom of contract has flourished in this setting. These include the sophistication of the parties, their equality of bargaining power and their freedom of choice of counterparties,<sup>86</sup> the fact that such parties are advised by lawyers, and that the documentation is professionally drafted and well-known across the markets.<sup>87</sup> These factors also include the relative absence of regulation in such markets. This is evidenced by the private law basis of the various claims brought in cases like *Springwell*, and by the failure of several different attempts to argue that such parties should be protected by investor regulation because they fall into the definition of "private persons" for the purpose of pursuing an action for damages under section 150 of the Financial Services and Markets Act 2000.<sup>88</sup>

In this context, an emphasis on freedom of contract seems obvious and consistent. Across various areas of law the courts have sought the same end of upholding professionally drafted and complex terms. However, as evidenced by the discussion earlier in this section, the effects of such decisions do not stay confined to specialist sectors, but develop the common law more broadly. Unlike the anti-deprivation principle, contractual estoppel is not qualified by requiring the courts to examine the

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<sup>81</sup> *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch); [2011] 2 B.C.L.C. 120.

<sup>82</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [143]-[144].

<sup>83</sup> *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank* [2011] EWHC 484; [2011] 1 C.L.C. 701.

<sup>84</sup> *Standard Chartered Bank v Ceylon Petroleum Corporation* [2012] All E.R. (D) 317 (Jul).

<sup>85</sup> *Titan Steel Wheels v The Royal Bank of Scotland* [2010] EWHC 211 (Comm); [2010] 2 Lloyd's Rep. 92, at [47]

<sup>86</sup> This is also relevant in certain cases outside the financial markets. See, for e.g., "Avrora is a vehicle for a particularly rich man and that it was under no economic imperative to deal with Christie's if it did not wish to." *Avrora Fine Arts Investment v Christie, Manson & Woods* [2010] EWHC 2198 (Ch); [2012] P.N.L.R. 35, at [151].

<sup>87</sup> See, for e.g., the discussion of the negotiations between clients and lawyers around the "Additional Representations" in the derivatives documentation in *Credit Suisse International v Stichting Vestia Groep* [2015] Bus. L.R. D5, at [292].

<sup>88</sup> *Titan Steel Wheels v The Royal Bank of Scotland* [2010] 2 Lloyd's Rep. 92, at [44]-[76] and *Grant Estates Ltd v RBS* [2012] CSOH 133; 2012 G.W.D. 29-588, at [43]-[62].

commercial good sense of the underlying provision. This means its potential to impact on "everyday" contracts is greater. These broader effects, and the limits to them, are considered further in Part IV below.

### **3. Conclusion**

The most important point made in this part of the paper is that the pivotal cases of *Peekay* and *Springwell* clearly establish the origins and effects of contractual estoppel. These origins encompass the authorities and the principle of freedom of contract. It is also now clear that contractual estoppel is distinct and independent from other forms of estoppel, and does not require detrimental reliance or unconscionability; it arises solely by the "mechanism" of the contract. This has been soundly debated and unanimously held in two Court of Appeal decisions, as well as numerous first instance cases, and the pivotal cases have now been widely and consistently applied. As a result, this doctrine is now as established as it can be short of a decision of the Supreme Court.

In *Amalgamated Investment & Property Co. v Texas Commerce International Bank*<sup>89</sup> Lord Denning said that the "doctrine of estoppel is one of the most useful and flexible in the armoury of the law". The follow-up question arising from the discussion in this part is whether it is flexible enough to encompass contractual estoppel, as it has now been defined. It should be noted first, however, that unlike hotly contested labels like "floating charge", this is not a label which comes with automatic and drastic effects for parties attempting to rely on contractual estoppel. As a result, it is submitted that the main significance of this question lies with those trying to assert some sort of a unified law of estoppel. But even this is an exercise that at least some writers regard as a "failure" anyway, for reasons far broader than the emergence of contractual estoppel, including the "inconsistencies" between proprietary estoppel and other types, and a general movement by the courts "towards a further divided and fractured series of discrete estoppels".<sup>90</sup> Against this background, there is no consensus about how contractual estoppel fits in: Wilken and Ghaly describe contractual estoppel as a "new and independent species of estoppel"<sup>91</sup> and they also suggest that it is an "anomalous doctrine" along with estoppel by deed, the *Panchaud Frères* doctrine, and *res judicata*.<sup>92</sup>

In short, modern estoppel seems fragmented rather than flexible. As a series of independent doctrines, it can surely accommodate contractual estoppel's reliance on the "mechanism" of contract, as no more exceptional than, say, proprietary estoppel's substantive differences from other forms of estoppel<sup>93</sup> or the absence of detrimental reliance from the requirements for estoppel by deed.<sup>94</sup> Furthermore, it has been noted that freedom of contract and party autonomy are regarded by the Privy Council as

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<sup>89</sup> [1982] Q.B. 84; [1981] 3 All E.R. 577, at 122.

<sup>90</sup> S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at pp. 86-89.

<sup>91</sup> S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at p. 90.

<sup>92</sup> S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at pp. 10-11.

<sup>93</sup> S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at p. 87.

<sup>94</sup> It was not considered in the course of confirming that estoppel by deed arose in *Prime Sight Ltd v Lavarello* [2014] A.C. 436. The absence of this requirement is discussed, though not wholly endorsed by Wilken and Ghaly. S. Wilken and K. Ghaly, *The Law of Waiver, Variation and Estoppel*, 3<sup>rd</sup> edn. (Oxford: Oxford University Press, 2012), at pp. 294-296.

underpinning both estoppel by deed and estoppel by convention, and contractual estoppel fits easily into this analysis. However, what really matters, for commercial parties at least, is that, in light of the cases considered in this part of the paper, the problems associated with categorisation do not offer any persuasive means to challenge contractual estoppel itself. Therefore, with some justification, but little real consequence for litigants, the "estoppel" label looks set to stick.

#### IV. Implications

A central point to note when considering the implications of contractual estoppel is that the doctrine does not operate in a vacuum, but as a means of holding parties to their particular statements. For that reason, as Stanley Burnton L.J. put it in *Axa Sun Life plc v Campbell Martin Ltd*, when considering the effects of an entire agreement clause, "it is not necessarily helpful to rely on the judgments on differently worded provisions."<sup>95</sup> It follows that any implications of the doctrine will entirely depend on the words used by the parties. This was vividly demonstrated in *Camerata Property v Credit Suisse Securities (Europe) Ltd*, where the judge found that contractual estoppel did arise, but also that the agreements provided that the statements in question had only been given for the narrow purpose of allowing the bank to make them when it acted on the investor's behalf, and about a state of affairs at a particular point in time.<sup>96</sup> As a result, they did not protect the bank from the claims being brought by the investor.

That said, the majority of reported contractual estoppel cases to date, including the pivotal cases considered above, relate to certain, widely-used provisions. This drafting is designed to protect one (or, in the case of derivatives, both)<sup>97</sup> parties from claims for misrepresentation and, sometimes, breach of collateral warranty. So, for example, the "Relevant Provisions" in *Raiffeisen* included clauses in the Facility Agreement whereby the Existing Lender:

"makes no representation or warranty and assumes no responsibility to [RZB] for: (i) the legality, validity, effectiveness, adequacy or enforceability of the Finance Documents or any other documents ... (iv) the accuracy of any statements (whether written or oral) made in or in connection with any Finance Document or any other documents, and any representations or warranties implied by law are excluded."<sup>98</sup>

Contractual estoppel is controversial in this context, because it can be read as complicating an important, but already piecemeal, set of legal rules, and potentially skewing them in favour of the representee. It has been alleged that contractual estoppel allows draftsmen to create a "virtual reality" so that the substance of "actual negotiations" may be ignored.<sup>99</sup> Given the prevalence of such clauses, their significance in the contractual estoppel case law and the criticism of the effects of contractual

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<sup>95</sup> [2011] EWCA Civ 133; [2011] 2 Lloyd's Rep. 1, at [35].

<sup>96</sup> [2011] EWHC 479 (Comm); [2011] 2 B.C.L.C. 54, at [183]-[184].

<sup>97</sup> For example, in a derivatives contract net payments may flow from A to B or vice versa over the life the contract, depending on the performance of the underlying rate. Accordingly, the contract will not distinguish between the parties, and defensive drafting will apply equally to both.

<sup>98</sup> Clause 22.4(a) of the Facility Agreement, cited at *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, at [229].

<sup>99</sup> G. McMeel, "Documentary Fundamentalism in the Senior Courts: The myth of contractual estoppel" [2011] L.M.C.L.Q. 185, at 188.



estoppel in this context, it is instructive to consider in detail the implications of contractual estoppel in this area of law.

### **1. Types of "basis" clauses?**

In practice, defensive drafting in commercial contracts often weaves together different ways of minimising parties' potential liability. However, to assist discussion of the implications of contractual estoppel, three widely adopted types of provisions are separately considered below.

#### **(a) No responsibility**

These provisions attempt to establish that no duty arises as between the parties, including fiduciary duties or a duty of care. Clear-cut examples of this type of clause may be found across the banking sector. As decided in *Springwell*, banks and their customers may agree that no advisory duty is to arise or has arisen in the past; Lord Hodge, citing *Springwell* in the course of his judgment in *Grant Estates*, stated that such wording "defines the basis of [the parties'] trading or banking relationship and allocates risk in a way which negates any possibility of a general or specific advisory duty coming into existence."<sup>100</sup> The effect of contractual estoppel in this context is that such a clause will bar the customer from alleging he was given advice and relied upon it, regardless of what happened in "actual reality".<sup>101</sup> Contractual estoppel also allows parties to acknowledge no such duty arose prior to the contract, thereby defining the basis on which they entered into their dealings.

*Springwell* has been widely cited on this point, and, overall, there is now a line of cases suggesting that, in the banking context at least, such terms will be held to define the parties' relationship, and consequently, the terms will fall outside UCTA. In *IFE Fund SA v Goldman Sachs International*,<sup>102</sup> the Court of Appeal considered an investment fund which had bought corporate bonds from a bank (GSI), and was alleging that the bank had made implied representations and owed it a duty of care. Waller L.J., with whom the other judges agreed, stated that, on the terms between the parties, "[n]othing could be clearer than that GSI were not assuming any responsibility to the participants".<sup>103</sup> In *Titan Steel Wheels v Royal Bank of Scotland plc*,<sup>104</sup> it was similarly held that such terms addressed the "scope of the service to be provided".<sup>105</sup> In recent cases, the courts have continued to uphold such "basis" terms robustly; in litigation arising out of the LIBOR scandal, the Court held that the standard provisions of a transaction (a termsheet and swap documentation) could preclude a duty of care from arising, even if a dishonest misrepresentation was alleged.<sup>106</sup> At first instance in *Springwell*, Gloster J. said that the danger of the reverse was that "every contract term which contains contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness".<sup>107</sup>

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<sup>100</sup> *Grant Estates Ltd v RBS* 2012 G.W.D. 29-588, at [73], cited in *Barclays Bank v Svizzera Holdings BV* [2015] 1 All E.R. (Comm) 788, at [69].

<sup>101</sup> *Grant Estates Ltd* 2012 G.W.D. 29-588, at [73]-[74].

<sup>102</sup> [2007] EWCA Civ 811; [2007] 2 Lloyd's Rep. 449.

<sup>103</sup> *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Rep. 449, at [28].

<sup>104</sup> [2010] 2 Lloyd's Rep. 92

<sup>105</sup> *Titan Steel Wheels v The Royal Bank of Scotland* [2010] 2 Lloyd's Rep. 92, at [104].

<sup>106</sup> *Deutsche Bank v Unitech* [2014] 2 All E.R. (Comm) 268, at [156].

<sup>107</sup> *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] All E.R. (D) 167 (Jun), at [602].

The classification of such terms will, however, be subject to review in each case, and outside the banking context, there is authority that they may be found to be exclusion clauses. In *Avrora*, the court considered drafting purporting to preclude an auction house's responsibility for the attribution of a painting. In deciding whether a term was an attempt to prevent or to exclude liability for negligence, Newey J. stated that "[t]here is surely scope for argument about what distinguishes the two situations."<sup>108</sup> The judge confirmed that all turns on the specific language and the context, which go to deciding if responsibility was assumed in the first place.<sup>109</sup> It was held in *Avrora* that approach of Aikens L.J. in *Springwell* to the application of section 3 of the Misrepresentation Act to a "no representation" clause<sup>110</sup> was relevant to establishing whether the denial of responsibility for negligence in this case would come within section 2 of UCTA. On this basis, the test applied was whether the clause aims "to rewrite history or parts company with reality". The judge found that "Christie's had taken responsibility for the attribution"<sup>111</sup> of the painting, so the drafting was found to be an attempt to exclude liability. It should be noted, however, that it would have been difficult for the auction house to argue otherwise, because it had expressly given the buyer a Limited Warranty to that effect.<sup>112</sup> This contextual factor, normally absent in the banking setting, and certainly absent in *Springwell*, helps to distinguish these two lines of cases for the time being.

### **(b) No representations and no reliance**

Other now common provisions attempt to establish that no representations have made, either at all, or outside of those included in the contract, and that there has been no reliance on any representations. So, for example, in *Avrora*, the terms of the auction house's Conditions included the following:

"Except as stated in the Limited Warranty in paragraph 6 above, all property is sold 'as is' without any representation or warranty of any kind by Christie's or the seller."<sup>113</sup>

"Non-reliance" clauses are often woven together with these acknowledgements of "no representations". The former are usually drafted on the lines that "any such representations have not been relied on by the other party, even if they both know that such representations have in fact been made or relied on".<sup>114</sup> The origins of these clauses were discussed in *EA Grimstead*, where Chadwick L.J. cited Jacob J in *Thomas Witter*,<sup>115</sup> who identified the "genesis of such clauses" as:

"remarks of Mr Justice Browne-Wilkinson in *Alman and another v Associated Newspapers Group Limited* (unreported, 20 June 1980) that:

If it [the entire agreement clause which he was considering] were designed to exclude liability for misrepresentation it would, I think, have to be couched in different terms, for example, a clause acknowledging

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<sup>108</sup> *Avrora Fine Arts Investment v Christie, Manson & Woods* [2012] P.N.L.R. 35, at [141].

<sup>109</sup> *Avrora Fine Arts Investment* [2012] P.N.L.R. 35, at [127].

<sup>110</sup> This in turn referenced Christopher Clarke J.'s judgment in *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, as discussed in the next section.

<sup>111</sup> *Avrora Fine Arts Investment v Christie, Manson & Woods* [2012] P.N.L.R. 35, at [144].

<sup>112</sup> *Avrora Fine Arts Investment* [2012] P.N.L.R. 35, at [146].

<sup>113</sup> *Avrora Fine Arts Investment* [2012] P.N.L.R. 35, at [122].

<sup>114</sup> *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank* [2011] 1 C.L.C. 701, at [505].

<sup>115</sup> *Thomas Witter v TBP Industries* [1996] 2 All E.R. 573; *Independent*, 8 August 1994.

that the parties had not relied on any misrepresentations in entering into the contract."<sup>116</sup>

*EA Grimstead* held that binding a party to such a statement would be a matter of evidential estoppel, however, as already discussed, *Springwell* confirmed that contractual estoppel may arise to hold parties to these no representation and non-reliance clauses. One commentator regards this as redressing a "mischief" by finally putting "non-reliance clauses on the same footing with entire agreement clauses", as discussed further below.<sup>117</sup> The effect in *Springwell* was decisive: the investor was contractually estopped from arguing that there were any actionable representations made by the bank.<sup>118</sup> Subsequently, this element of the decision has been widely applied, for example in the recent case of *Barclays v Svizzera Holdings*, which considered a non-reliance clause in a Mandate Letter for a syndicated loan. Here, *Peekay*, *Springwell* and *Cassa di Risparmio* were cited as a line of authority that "the party may be contractually estopped from alleging that he relied upon a representation in entering the contract."<sup>119</sup>

In *Barclays v Svizzera Holdings*, the borrower's argument that this drafting should be struck down under sections 3 and 11 of UCTA was described as "hopeless".<sup>120</sup> However, compared to the "no responsibility" line of authority considered above, there seems much more room for debate within the cases about whether this type of drafting falls under UCTA. It was assumed, but not decided, in *EA Grimstead* that UCTA would apply, via section 3 of the Misrepresentation Act, because the drafting was found to be "terms which exclude any remedy available to a party to a contract by reason of a pre-contractual misrepresentation".<sup>121</sup> Going on to consider this reasonableness requirement, it was held to be "wholly fair and reasonable" for the purchaser's remedies to be limited. The judge noted that the courts should not refuse to give effect to "an acknowledgement of non-reliance in a commercial contract between experienced parties of equal bargaining strength – *a fortiori*, where those parties have the benefit of professional advice." This was for two reasons; upholding the parties' intention to avoid the uncertainty of litigation over "oral discussions at pre-contractual meetings"; and because the price would have reflected the risk that the parties had agreed to take.<sup>122</sup>

In later cases, the question of whether language excludes or prevents liability has been determined by construing the substantive effect of the clause in light of the parties' dealings. In *Raiffeisen*, in part of the judgment already touched upon above, the question of whether certain provisions excluded or restricted liability for misrepresentation and therefore fell under section 3 of the Misrepresentation Act was found to turn on "whether the clause attempts to rewrite history or parts company with reality." Christopher Clarke J. distinguished cases where:

"sophisticated commercial parties agree, in terms of which they are both aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making, a suitably drafted clause may properly be regarded as establishing that no

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<sup>116</sup> *EA Grimstead & Son Ltd v McGarrigan* Info. T.L.R. 384, at 411.

<sup>117</sup> A. Trukhtanov, "Exclusion of liability for pre-contractual misrepresentation: A setback" (2011) 127 L.Q.R. 345, 349.

<sup>118</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [171].

<sup>119</sup> *Barclays Bank v Svizzera Holdings BV* [2015] 1 All E.R. (Comm) 788, at [58].

<sup>120</sup> *Barclays Bank* [2015] 1 All E.R. (Comm) 788, at [61].

<sup>121</sup> *EA Grimstead & Son Ltd v McGarrigan* Info. T.L.R. 384, at 413.

<sup>122</sup> *EA Grimstead & Son Ltd* Info. T.L.R. 384, at 413.

representations (or none other than honest belief) are being made or are intended to be relied on [...]"

with the situation where:

"to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone on before, and in substance an attempt to exclude or restrict liability."<sup>123</sup>

In this case, the judge went on to hold that the terms being relied upon by the bank "did not attempt to exclude or restrict any liability" but rather this was the parties agreeing the "ambit" of their deal.<sup>124</sup> As a result, UCTA was not relevant. In *Springwell*, Aikens L.J. reached a different conclusion applying Christopher Clarke J.'s analysis to certain of the Relevant Provisions. This first stage of this process in *Springwell* involved construing the provisions in detail. For example, Aikens L.J. stated "I agree with Gloster J. that the penultimate sentence of paragraph 4 and the last part of the single sentence that makes up paragraph 6 of the DDCS letters are exemption clauses".<sup>125</sup> Where the effect of the drafting was difficult to categorise, notwithstanding the first *Raiffeisen* extract above, the second extract was applied as a test. Thus, part of a clause which provided that "no representation or warranty, express or implied, is or will be made ... in or in relation to such documents or information" was found to be "an attempt retrospectively to alter the character and effect of what has gone before" and thus it fell within section 3 of the Misrepresentation Act, and the UCTA reasonableness regime. The provision was later found to be reasonable, given the sophistication and knowledge of the investor. As a result the bank could rely on this exemption from liability for both negligent misstatement and misrepresentation under section 2 of the Misrepresentation Act.<sup>126</sup>

To sum up, contractual estoppel has transformed a party's ability to use no representation and non-reliance drafting as a defence to claims for misrepresentation, because the previous requirements of evidential estoppel were nearly insuperable in this context. At the same time, however, this has opened up such drafting to detailed interpretation both to determine its exact effects and whether the UCTA requirements of reasonableness apply. This case-by-case scrutiny may be seen as an inevitable part of an estoppel that arises from the words used by the parties. Moreover, where UCTA is held to apply, the implications for commercial parties are not, on the evidence to date, onerous. For a start, parties' other acknowledgments may give rise to an estoppel which effectively puts this matter beyond doubt (e.g., arising from acknowledgments of sophistication), while a host of contextual factors already point in this direction. For example, in *Avrora*, the exclusion provisions were held to be reasonable because of a list of reasons, including that the buyer had other remedies available under the terms of the deal.<sup>127</sup> In *Springwell*, matters relevant to the requirement of reasonableness had already

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<sup>123</sup> *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2011] 1 Lloyd's Rep. 123, at [314]-[315].

<sup>124</sup> *Raiffeisen Zentralbank Osterreich* [2011] 1 Lloyd's Rep. 123, at [316]-[317].

<sup>125</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [181].

<sup>126</sup> *Springwell Navigation Corp* [2010] 2 C.L.C. 705, at [184].

<sup>127</sup> *Avrora Fine Arts Investment* [2012] P.N.L.R. 35, at [152]. See similar lists in *Titan Steel Wheels v The Royal Bank of Scotland* [2010] 2 Lloyd's Rep. 92 at [105], including that it "was open to Titan to choose any bank and indeed it did take its custom elsewhere"; in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm); [2011] All E.R. (D) 113 (Jul), at [569], including that the term in that case was "in a standard form document produced by the industry body, ISDA, in the interests of all market participants

been decided in other parts of the judgment which, for example, established the sophistication of the parties. This meant that Aikens L.J.'s discussion and findings on UCTA reasonableness could be completed in a few short paragraphs.<sup>128</sup> The only example in the contractual estoppel cases suggesting that such drafting would not meet the requirement of reasonableness is found in a decision arising out of the collapse of the Lehman Brothers group, *Camerata v Credit Suisse Securities (Europe) Ltd*. Here, the judge held that UCTA did not apply as the clauses in question were basis clauses. However, he went on to add that if it did, the requirements of reasonableness would not be met as the clauses were so "unclear and open to debate".<sup>129</sup> In all the other decisions examined for this article the courts found that this type of provision safely met the UCTA requirement of reasonableness.

### ***(c) Entire agreement clauses***

Entire agreement clauses often feature in commercial contracts, alongside the clauses considered above. While these two types of provisions have traditionally received different treatment by the courts, a theme in the recent cases is that contractual estoppel has helped to bring about convergence in terms of their judicial treatment.

The status and interpretation of entire agreement clauses is, of course, highly fact-specific, but they have usually been treated by the courts as contractual terms. For example, in *Inntrepreneur Pub Co v East Crown Ltd*, Lightman J said that:

"such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document."<sup>130</sup>

In the 2011 Court of Appeal decision in *Axa Sun Life Services plc v Campbell Martin Ltd*,<sup>131</sup> however, the parties agreed that contractual estoppel was the basis on which an entire agreement clause took effect in accordance with its terms (though the defendants reserved their rights on this point for any appeal).<sup>132</sup> Similarly, in a recent appeal from a first instance decision to refuse an application to strike out a claim,<sup>133</sup> one of the points considered by the Court of Appeal was whether contractual estoppel arose from a very simply drafted entire agreement clause and, if so, whether it had the effect of barring a claim based on prior representations and estoppels.<sup>134</sup> In *Standard Chartered Bank v Ceylon Petroleum Corporation*<sup>135</sup> Hamblen J held that an entire agreement clause incorporating a

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and end-users, and has been used for almost 20 years."; and in *Camerata v Credit Suisse Securities (Europe) Ltd* [2011] 2 B.C.L.C. 54, , at [169].

<sup>128</sup> *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 C.L.C. 705, at [183]-[186].

<sup>129</sup> [2011] 2 B.C.L.C. 54, at [187].

<sup>130</sup> [2000] 2 Lloyd's Rep 611; [2000] 3 E.G.L.R. 31 at [7]. See, also considering an entire agreement clause, *World Online Telecom Limited v I-Way Limited* [2002] EWCA Civ 413; [2002] All E.R. (D) 114 (Mar), at [10], per Sedley L.J.: "In a case like the present, the parties have made their own law by contracting and, in principle, can make or unmake it."

<sup>131</sup> [2011] 2 Lloyd's Rep. 1.

<sup>132</sup> *Axa Sun Life plc* [2011] 2 Lloyd's Rep. 1, at [34].

<sup>133</sup> *Mears Ltd v Shoreline Housing Partnership Ltd* [2013] C.P. Rep. 39.

<sup>134</sup> *Mears Ltd* [2013] C.P. Rep. 39, at [17].

<sup>135</sup> [2011] All E.R. (D) 113 (Jul), at [567]. (This point was not raised on appeal).

non-reliance provision took effect "if necessary" because of contractual estoppel, thereby preventing claims based on any non-fraudulent representations, while a recent first instance decision also described *Springwell* as giving "legal efficacy" to entire agreement clauses.<sup>136</sup> In this respect, there seems to be convergence between the legal justifications for the effects of non-reliance and entire agreement clauses.

That said, the case law on entire agreement clauses has focused much more on the interpretation of particular terms, and related issues like the capacity of parties to vary them by oral agreement.<sup>137</sup> In *Axa Sun Life*<sup>138</sup> the Court of Appeal held that a particular entire agreement clause did not cover misrepresentations, and was limited to excluding liability for breaches of collateral warranties. In the academic literature, this construction of the clause in *Axa Sun Life* has been criticised for being a "setback" from the courts' previous "business-friendly approach".<sup>139</sup> In practice, this may be offset by an accompanying non-reliance clause, but the recent case of *UBS AG v Kommunale Wasserwerke Leipzig*<sup>140</sup> demonstrates how a claim for misrepresentation may still be possible, even where derivatives documents contained versions of both such clauses. Here, following *Axa Sun Life*, the entire agreement clause in the parties' ISDA Master Agreement was found not to cover representations, while the non-reliance provision in the swap confirmation was limited to statements made as investment advice or recommendations.

The Court of Appeal in *Axa Sun Life* held that the UCTA requirement of reasonableness did apply to the entire agreement clause in that case. On the face of it, this could be seen as surprising, as even Stanley Burnton L.J., before applying the test, stated that "[a]n entire agreement clause such as clause 24 is not an exemption clause of the kind with which UCTA was and is principally concerned."<sup>141</sup> Moreover, the clause clearly prevented collateral warranties coming into existence, rather than excluding liability for them, which meant that section 3(2)(a) of UCTA did not apply. However, it was held that section 3(2)(b)(i) of UCTA did apply here, because the objective of the clause might have been, in some circumstances, to allow a party to render performance substantially different to that which was expected of them, though the judge did not go on to explain in detail how this analysis applied on the facts of this case. In a separate debate about the enforceability of, and limits to, "conclusive evidence" clauses in commercial loan contracts, it has been suggested that the "unfortunately drafted" section 3(2)(b)(i) may apply there too.<sup>142</sup> In other words, it seems that this section of UCTA is being called upon to mitigate the effects of different types of commercial arrangements which purport to provide conclusivity, but in practice may prove to be uncomfortably harsh.

Going on to apply the UCTA requirements, Stanley Burnton L.J. found that Axa's entire agreement clause was reasonable, notwithstanding the difference in size between Axa and

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<sup>136</sup> *Matchbet Ltd v Openbet Ltd* [2013] EWHC 3067 (Ch); [2013] All E.R. (D) 150 (Oct), at [132].

<sup>137</sup> E.g., see *Energy Venture Partners v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm); [2013] All E.R. (D) 347 (Jul), at [271]-[274].

<sup>138</sup> *Axa Sun Life plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep. 1

<sup>139</sup> A. Trukhtanov, "Exclusion of liability for pre-contractual misrepresentation: A setback" (2011) 127 L.Q.R. 345, at 349.

<sup>140</sup> [2014] EWHC 3615 (Comm); [2014] All E.R. (D) 47 (Nov), at [773]-[783]. These points were considered in the alternative, as the bank's representations were found to be fraudulent, in which case entire agreement and non-reliance clauses "cannot assist", at [773].

<sup>141</sup> *Axa Sun Life plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep. 1, at [49].

<sup>142</sup> S.A. Booyen, "'Pay now-argue later' Conclusive evidence clauses in commercial loan contracts" [2014] *Journal of Business Law* 31, at 42.

its counterparties, and the fact these were Axa's standard terms. The Court placed weight on the fact that the defendants should have read and understood the terms and that both sides benefitted from the resultant "certainty as to the terms of their contract"<sup>143</sup> and reduced likelihood of litigation. This is consistent with the courts' approach to the reasonableness of other drafting considered in this part of the paper.

#### ***(d) Conclusions***

On this analysis, what difference has contractual estoppel made to these types of defensive drafting in commercial contracts?

First, and most significantly, it has provided a new means by which parties will be bound by no responsibility, non-reliance and no representation provisions. This stops various types of claims from arising, including, most often, for misrepresentation. Previously, this effect would have required evidential or another form of estoppel, which, as *EA Grimstead* demonstrated, was almost impossible to show in this context.

Secondly, contractual estoppel has brought about what seems sensible convergence between the law around clauses designed to prevent liability for misrepresentation and entire agreement clauses. This is because contractual estoppel now equips the former with the legal weight traditionally given to the latter. Convergence is also evident where contractual estoppel is mentioned as a means of holding parties to entire agreement clauses.

Thirdly, it is now clear that, where contractual estoppel is alleged to arise, the courts have to carefully consider how to interpret the underlying clauses, their effects, and the related question of statutory controls. In particular, it is now routine for courts considering such drafting to have to address arguments about whether it is a "basis" or exclusion clause, and whether it is subject to the requirement of reasonableness in UCTA. Seen in overview, some decisions about whether UCTA applies in this context seem hard to reconcile, but this is because they have to be made on a case-by-case basis, and because, as the courts have acknowledged, the statute was not written with clauses such as "entire agreement" terms in mind. While it is still the case that the "legislation is, in practice, of very limited application in the cases of commercial contracts between commercial counterparties"<sup>144</sup> it is submitted that, when there are close calls to make, the courts seem prepared to err on the side of finding a way to apply the UCTA reasonableness requirement. In the end, this had no substantive impact on the outcome of any case considered here: with the exception of the obiter comments about the bank's terms that lacked clarity, all the terms considered in these cases were found to be reasonable.

The real significance of applying the requirement of reasonableness, therefore, lies elsewhere. It is that these cases demonstrate how, notwithstanding the rise of boilerplate terms made binding by contractual estoppel, provisions may still be the subject of review. It is submitted that this possibility is very significant, especially for consumers and non-sophisticated counterparties for whom UCTA remains an important, if imperfect, safeguard in the face of drafting that may otherwise eviscerate ways of enforcing rights.

## ***2. Contractual estoppel in other contexts***

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<sup>143</sup> *Axa Sun Life plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep. 1, at [64].

<sup>144</sup> *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] All E.R. (D) 167 (Jun), at [603].

Recent decisions applying *Springwell* and *Peekay* reveal examples of innovative arguments in various new contexts. The fate of the more extreme of these arguments should serve to reassure those who worry that contractual estoppel will have sweeping effects outside the financial markets. However, there are also signs of the difficult questions which lie ahead.

**(a) Good faith and reasonableness**

Even though there is no over-arching duty of good faith in English law, we have already seen how contractual estoppel can deny a party access to the "piecemeal solutions"<sup>145</sup> that are available instead, such as an action for misrepresentation. However, contractual estoppel may have a more direct effect on this area of law, because it is possible that it might arise from an acknowledgement that a certain state of affairs was reasonable or that certain matters were conducted in good faith.

To date, there are two first instance cases which touch on this issue. In *Dinsdale Moorland Services Ltd v Evans*,<sup>146</sup> the High Court in Leeds was asked to consider the effectiveness of a restrictive covenant in an employment contract between a company and its managing director. Counsel for the company submitted that the following part of the "complicated and long" restrictive covenant clause, gave rise to an estoppel:

"[The Managing Director] agrees that, having regard to all the circumstances, the restrictions contained in this clause are reasonable and necessary for the protection of [the company] and that they do not bear harshly upon him [...]"<sup>147</sup>

Counsel argued that the principles in *Springwell* "apply just as much to a covenant in an employment contract as they do to a pre-contractual misrepresentation".<sup>148</sup> Counsel added that, as per *Springwell*, the parties in this matter were of equal bargaining power. The Court decline to agree, and held that summary judgment could not be awarded on the basis of estoppel. Having explained that "[t]he law relating to such covenants depends on public policy [...]"<sup>149</sup> Behrens J. held that this requirement could not be sidestepped by contractual estoppel, stating "[i]t seems to me to be by no means fanciful to suggest that the parties cannot themselves agree that such a clause is reasonable in the public interest."<sup>150</sup>

*Dinsdale Moorland Services* involved a special type of contractual term, which is expressly regulated by the common law in order to protect employees. Rejection of the employer's argument was therefore consistent with the express limits to contractual estoppel, namely that it arises subject to public policy and contrary legal rules. However, in other cases, especially those involving two commercial parties disputing an "ordinary" type of term, the courts may be willing to accept that contractual estoppel may arise to bind a party to an acknowledgement of good faith. In *Charles Shaker v Vistajet Group Holding SA*,<sup>151</sup> the

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<sup>145</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433; [1988] 1 All E.R. 348, at 439, per Bingham L.J.

<sup>146</sup> [2014] 2 Costs L.R. 217.

<sup>147</sup> *Dinsdale Moorland Services Ltd v Evans* [2014] 2 Costs L.R. 217, at [8], reproducing clause 20.5 of the employment contract.

<sup>148</sup> *Dinsdale Moorland Services Ltd* [2014] 2 Costs L.R. 217, at [39].

<sup>149</sup> *Dinsdale Moorland Services Ltd* [2014] 2 Costs L.R. 217, at [40] citing *Office Angels v Rainer-Thomas* [1991] I.R.L.R. 214; *The Times*, 15 April 1991.

<sup>150</sup> *Dinsdale Moorland Services Ltd v Evans* [2014] 2 Costs L.R. 217, at [41].

<sup>151</sup> [2012] EWHC 1329 (Comm); [2012] 2 All E.R. (Comm) 1010.



Claimant, the prospective buyer of an aircraft, applied for summary judgment on a claim for the return of a deposit paid pursuant to the terms of a Letter of Intent ("LOI"). The Defendant argued that, contrary to the LOI, the Claimant had failed "to proceed in good faith and to use reasonable endeavours" in order to produce and agree certain documents. Summary judgment was awarded to the Claimant on the basis that there was "no doubt" that this obligation in the LOI "does not give rise to an enforceable obligation in law".<sup>152</sup> In the alternative, however, the court considered the parties' amendment to the LOI, in which the parties "acknowledge that, notwithstanding the exercise of good faith and reasonable endeavours by all relevant parties" the documents would not be ready by the original deadline. The judge held that this acknowledgement was "clear and unambiguous" and contractual estoppel could arise from it.<sup>153</sup> Citing *Raiffeisen, Peekay and Springwell*, Teare J. held that an "acknowledgment" of this state of affairs could give rise to a contractual estoppel, and that this outcome was backed-up by the fact "the commercial sense of the amendment is clear".<sup>154</sup> As a result, the judge held that the Defendant was estopped from contending that the Claimant had failed to act in good faith or exercise reasonable endeavours before the date of this amendment.

We may infer that, should the English law ever change to recognise duties such as good faith in pre-contractual negotiations, acknowledgments like those in *Charles Shaker* might severely limit the practical effects of such a change. This conclusion does not necessarily undermine the arguments in favour of such a duty, any more than *Springwell* undermines the arguments for a duty to advise arising in appropriate cases. But those debating *Walford v Miles*<sup>155</sup> should realise that a reversal would, amongst other effects, incentivise draftsmen to make the most of contractual estoppel. This finding highlights the importance of having clear and widely understood limits to contractual estoppel, whether imposed by statute, or by public policy, as already recognised in the context of contractual statements made to an employer.

### **(b) Capacity**

Contractual estoppel cannot alter a statutory body (including a company)'s legal capacity to take certain actions, and nor may it make valid a contract that is ultra vires or otherwise void for reasons of public policy.<sup>156</sup> Yet, it has been held that contractual estoppel may arise from acknowledgements of validity in framework contracts, thereby assisting banks facing an exposure because derivatives transactions agreed to subject to that framework are found to be ultra vires a public sector counterparty. This implication of contractual estoppel may prove to be very significant in practice, not least because so many of the derivatives being energetically disputed by foreign public authorities are governed by English law and subject to the jurisdiction of the English courts.<sup>157</sup>

Contractual estoppel proved helpful to the bank in the early stages of *Merrill Lynch v Commune di Verona*.<sup>158</sup> In this case, the English court granted the bank an order making various declarations, certain of which reflected representations made by the defendant in derivatives documentation, including that the deal was "valid and binding". The court

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<sup>152</sup> *Charles Shaker v Vistajet Group Holding SA* [2012] 2 All E.R. (Comm) 1010, at [7].

<sup>153</sup> *Charles Shaker* [2012] 2 All E.R. (Comm) 1010, at [22].

<sup>154</sup> *Charles Shaker* [2012] 2 All E.R. (Comm) 1010, at [25].

<sup>155</sup> [1992] 2 A.C. 128; [1992] 1 All E.R. 453.

<sup>156</sup> As considered in *Credit Suisse International v Stichting Vestia Groep* [2015] Bus. L.R. D5, at [304].

<sup>157</sup> One of two default choices in the ISDA Master Agreement, the other being N.Y. law and the jurisdiction of the N.Y. courts.

<sup>158</sup> [2012] EWHC 1407, unreported (22 May 2012), at [28]-[29].

held, because of contractual estoppel, the defendant could not deny the truth of these statements, and it was prepared to make the order on that basis.

These acknowledgements of validity were considered much more fully in 2014, in another derivatives dispute between an investment bank and quasi-public authority. The main part of the decision in *Credit Suisse International v Stichting Vestia Groep*<sup>159</sup> found that a Dutch housing authority did not have capacity to enter several disputed derivatives transactions, because they were speculative and not part of a hedging strategy. Crucially, it was held that these transactions were ultra vires and therefore void, but that the overarching Master Agreement remained valid.<sup>160</sup> This meant that contractual estoppel could still arise from acknowledgements in the Master Agreement; as clearly established in the pivotal cases, it could not have arisen had there been no valid contract.

Having reached this decision, Andrew Smith J. went on to consider the legal status of various provisions in the (valid) Master Agreement and the "Additional Representations" in the Schedule to it, including Vestia's statement that it would be in compliance with its articles of association when it entered into transactions. Finding that the latter were intended to be contractual warranties, the judge held that contractual estoppel could arise where the parties have made "an agreement about a state of affairs in the future".<sup>161</sup> Going on to interpret the words of this "compliance provision", the judge found that the parties intended this drafting to mean that future transactions should not be invalid because of capacity. It followed that the compliance provision was clearly intended to cover ultra vires transactions. If it applied only where there was a valid contract, it would "be to attribute an absurd intention to the parties."<sup>162</sup>

As a result, the bank was allowed to enforce the Master Agreement as if the ultra vires contracts were valid, while Vestia could not dispute their liability to the bank under the Master Agreement on the grounds that the contracts were outside their capacity.<sup>163</sup> This meant that the bank could claim the contractually defined Early Termination Amount, or recover damages for that amount.<sup>164</sup> Because of contractual estoppel arising from these provisions, there was no need to rely on restitution for unjust enrichment to recover the sums outstanding, as had been the case in earlier public authority cases involving derivatives.<sup>165</sup>

This aspect of the *Vestia* decision is significant for two reasons. First, where transactions are found to be ultra vires, it affords the derivatives counterparty a contractual damages-based remedy. The sum due under the Master Agreement on Early Termination is defined therein, and to that extent, it is more predictable than a claim in restitution. Nor is such recovery subject to defences like a change of position. It has been suggested that

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<sup>159</sup> [2015] Bus. L.R. D5.

<sup>160</sup> *Credit Suisse International v Stichting Vestia Groep* [2015] Bus. L.R. D5, at [314].

<sup>161</sup> *Credit Suisse International* [2015] Bus. L.R. D5, at [308], though here the judge discusses that this may not be a "true" estoppel.

<sup>162</sup> *Credit Suisse International* [2015] Bus. L.R. D5, at [315].

<sup>163</sup> *Credit Suisse International* [2015] Bus. L.R. D5, at [319]-[320].

<sup>164</sup> *Credit Suisse International* [2015] Bus. L.R. D5, at [345]. Credit Suisse claimed €83 million as the Early Termination Amount.

<sup>165</sup> e.g., *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1994] 1 W.L.R. 938; [1994] 4 All E.R. 890 (this point was not appealed to the House of Lords in [1996] A.C. 669; [1996] 2 All E.R. 961). See also *Haugesund Kommune v Depfa A.C.S. Bank, Wikborg Rein & Co* [2011] EWCA Civ 33; [2011] 3 All E.R. 655, an action by a bank against its law firm, to try to recover the shortfall in its losses after derivatives with a Norwegian municipality were declared ultra vires. The bank's claim in restitution is discussed at [22]-[27].

an action for restitution would "often" recover "much less than contractual measure" in this context.<sup>166</sup> Secondly, this decision promises to have knock-on effects upon the drafting of derivatives deals and more broadly, because it represents what practitioners have referred to as "a way in which banks can try to draft their way out of capacity problems, which have previously been (in effect) a legal risk which could not be mitigated contractually."<sup>167</sup> Specifically, this is because the decision makes it possible for the parties to warrant that they will have the capacity to enter all future transactions under the Master Agreement. In this way, *Credit Suisse International*, like other cases confirming that contractual estoppel arises from particular provisions, is a striking example of the symbiotic relationship between the courts and the contents of commercial contracts.

## V. Conclusion

Despite allegations to the contrary, contractual estoppel is not revolutionary, nor is it about parties being estopped from basing claims on the truth. Contractual estoppel is a means of preventing parties from contracting on one basis and litigating on another. As such, it is about parties being estopped from denying a version of events that they previously agreed to, whether or not that version of events was true.

Tracing the origins of the doctrine shows it to be a hybrid of authority and freedom of contract. This helps us understand that it is no accident that contractual estoppel has come to the fore in the last seven years or so, against a backdrop of spectacular volatility in the financial markets. Looking over these cases shows that exogenous market factors have played a part in shaping contractual estoppel as we now know it. This matters not only as a historical note, but substantively too. Cases about complex financial contracts entered into by sophisticated clients, whom the public sector has chosen to exclude from the safety net of financial regulation, suit a muscular version freedom of contract. Contractual estoppel is not the only area of law to be shaped by these exogenous factors, but, unlike areas including the anti-deprivation principle, it has potentially universal application. However appropriate it is for the financial markets, this makes the limits to the doctrine crucial.

We are starting to see such limits applied and developed in the cases. Over the course of recent cases applying *Springwell* and *Peekay*, the courts have effectively established that there are two types of limits to contractual estoppel. First, there are the "internal" limitations of the parties' own words, which will be closely scrutinised by the courts in order to define the estoppel which arises. In recent decisions, the courts have spelt out to over-ambitious litigants that *Springwell* does not mean that any old drafting will give rise to an estoppel blocking a claimants' claims. We have already seen contractual estoppel limited by scope, time and purpose, all because of the parties' own choice of words.

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<sup>166</sup> Dentons, "Early termination payment calculated under ISDA Master Agreement enforced against quasi-public body lacking capacity" (16 October 2014) Practice note, available at <http://www.dentons.com/en/insights/alerts/2014/october/16/early-termination-payment-calculated-under-isda-master-agreement> (last visited 19 January 2015).

<sup>167</sup> Dentons, "Early termination payment calculated under ISDA Master Agreement enforced against quasi-public body lacking capacity" (16 October 2014) Practice note, available at <http://www.dentons.com/en/insights/alerts/2014/october/16/early-termination-payment-calculated-under-isda-master-agreement>.

After defining the nature of the estoppel, the courts apply the better-known "external" limits, based on public policy and statute. How these work in the classic context of defensive drafting in financial deals is now fairly well understood, though the courts still have to make difficult calls on particular provisions. It is submitted that, to date, they have erred on the side of caution, by finding borderline clauses to be exclusionary, with the implication that they will be subject to statutory controls. This is as it should be, in the case of a doctrine which is potentially so sweeping in its effects.

The implications of contractual estoppel outside of the financial context have yet to take shape. There have been no reported consumer cases involving contractual estoppel, only one employment case and very few cases involving individuals. Yet, history suggests that it is only a matter of time before both draftsmen and litigants from outside the financial markets seek to capitalise on the cases discussed in this article. When they do, they will inevitably test, sharpen and help to develop both types of limits to contractual estoppel. As is already indicated by the cases, protecting parties to "everyday" types of contracts is possible, but it will depend on these internal and external limits, rather than on challenging contractual estoppel itself.