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Case No:HT-12-209

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2015

Before:

MR JUSTICE AKENHEAD

Between:

MEARS LIMITED

- and -

SHORELINE HOUSING PARTNERSHIP LIMITED

Anthony Speaight QC (instructed by Ashfords LLP) for the **Claimant**

Marc Rowlands QC (instructed by DWF LLP) for the **Defendant**

Hearing dates: 9-11 and 17 March 2015

JUDGMENT

Mr Justice Akenhead:

1. This is a case that need never have been fought all the way through to trial. Nominally the dispute between the parties, Mears Ltd (“Mears”), the contractor, and Shoreline Housing Partnership Ltd (“Shoreline”), the employer, relates to some £300,000 said to have been overpaid under the terms of a substantial repair and maintenance term contract (“the Contract”) which was signed some six months after work started and by agreement retrospectively applied. Over 12,000 small jobs were done and paid for on a basis that the contract did not recognise as such. The dispute relates mainly to whether by way of estoppels this basis of payment was effectively agreed or otherwise enforceable notwithstanding. The proceedings have been rightly described by Shoreline’s Counsel as having “a long and turbulent history”. Shoreline applied to strike out Mears’ claim, unsuccessfully both at first instance and in the Court of Appeal. The first trial was adjourned and efforts were made with Ramsey J as mediator to settle not only this dispute but another substantial payment claim (running to a seven figure sum); that was unsuccessful also. The pleadings have been heavily amended. The submitted costs budgets (totalling well over what was in issue in these proceedings) were rejected by the Court; the parties for no obvious good reason have not submitted revised budgets. The parties have each instructed experienced specialist QCs. The costs on both sides must total at least twice what is in issue. Belatedly and openly, after I expressed surprise that the case was fighting, Mears offered to settle for 50% of what was claimed and Shoreline offered a “drop hands walk away” deal. Neither was

accepted. Of course, the Court cannot and does not know what has been happening behind the scenes and that may emerge after this judgment is handed down.

The Background

2. Shoreline is and was a registered social landlord with some 8,000 houses or flats under its management in the Lincolnshire and Humberside area, including Cleethorpes, Grimsby and Immingham. Mears is a well known national contractor. Prior to the current contract, Mears and Shoreline were in contract on two other projects; on one, a gas servicing and repair contract, the parties worked well together. For general maintenance, Shoreline used its own in-house subsidiary, Shoreline Property Services Ltd ("SPS"), which had proved unsatisfactory at least so far as efficiency and cost was concerned. It decided to market test and set up a public procurement exercise, subject to the Public Contract Regulations 2006. An appropriate Contract Notice was published in the Official European Journal in August 2008. On 5 January 2009, Mears (and others who had also been shortlisted) were invited by Shoreline to tender, with detailed documentation provided upon which to tender. The proposed contract was described as the "Responsive Repairs, Voids and Planned Maintenance Contract". What was envisaged was that if an outside contractor secured the job, there would transfers of the SPS staff to it under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE").

3. It was made clear that the contract terms would be the New Engineering (NEC3) Term Service Contract conditions incorporating "Option C" ("Target Contract with price list"). The "Service Manager" was named in the provided documents as Brian Clark. I will return to the relevant provisions later in this judgment. Suffice it to say, these conditions called for interim payments to be made to the Contractor on the basis of actual costs plus profit and overheads but provided for a reckoning to take place every 6 months such that there would be an adjustment, if the costs (plus) were more than the tendered prices down to the level of the prices, but if the costs (plus) were less than the prices, there would be a sharing of the difference. This was explained reasonably succinctly by Mr Mark Tomkinson, Shoreline's interim Head of Property Investment, in an e-mail dated 11 February 2009:

"I thought I would clarify the pricing requirement for the NEC3 Term Service Contract.

When pricing the schedule of rates, the rates must be fully inclusive of everything. This forms the 'value' of the work and no additions to the schedule rates are allowable for valuation or interim/final accounting processes. No fee % is added to 'value'.

In the open book reconciliation, the actual cost of labour, plant, materials, support staff and/or other thing[s] directly employed on the contract as defined...will be payable, together with a fee % for directly employed resources and fee % for subcontracted works. This is the 'cost'.

Upon reconciliation, the 'cost' is deducted from the 'value' to form the gain share which is distributed in accordance with the tender documents."

This approach was different to that adopted on the gas servicing and repair contract where the value was invoiced and the "gain share" arose only if the cost was less than the value. There was a Price List for the new project to be priced by tenderers, comprising some hundreds of items of work to price, which was not necessarily exhaustive of all the types of work which the Contractor might be called upon to do. Pricing was not the only criterion upon which the tender would be judged.

4. Mears submitted its tender on 13 February 2009, offering to "provide the Service in accordance with Contract Data part 1 and Contract Data part 2 for a sum to be determined in accordance with the conditions of contract" and said that "this Tender together with your written acceptance shall constitute a binding contract between us". On 18 March 2009, Mr Tomkinson informed Mears by letter that Mears had "been successful in being selected as our preferred partner for the delivery of this contract." Mears' total tendered price at £24.263m was almost £2.5m less than the nearest tenderer and internally in a Report to Shoreline's Board on 17 March 2009 a 22% saving was identified which, if realised, it was thought would generate about £1m's worth of savings per year. Mr Tomkinson went on in his letter to Mears:

"...it is our intention to award the contract to yourselves having achieved a score of 99.33, judged strictly in accordance with the scoring criteria circulated with the tender documentation. This is viewed as the Most Economically Advantageous Tender...

In accordance with the Public Contracts Regulations 2006 section 32 the '10 Day Mandatory Standstill Period' will commence on Thursday 19th March 2009...

I would like to convey the appreciation of our team for all the time, effort and resources you have committed to the process and look forward to building a strong repairs and maintenance partnership."

5. There is a fair amount of reference in the tender and what was later to be the Contract documentation about partnership and co-operation. Indeed, even before the tender was submitted, at a presentation attended by Mears on 1 February 2009 Shoreline's specialist advisers, in particular a Dr Stuart Kings, highlighted the fact that the proposed NEC3 contract fitted "well with [Shoreline's] partnering values and structured project management approach".

6. Although work was not to commence in the result until July 2009 and the contract would not be signed until December 2009, there were extensive interchanges and exchanges between the parties with the main participants being Messrs Tomkinson and Clark for Shoreline and Messrs Critchley and Lester, respectively then Mears' Partnership Manager and Director in charge of the project. It was agreed between the four of them that when work started, invoicing by Mears would be on the basis of the agreed prices in the Price List (often referred to by them as the "SOR" or Schedule of Rates), notwithstanding the clear understanding which both parties had that the contract to be signed required invoicing to be by reference to defined cost plus fee. Apart from this being supported in evidence by Mr Lester and Mr Critchley (which I accept), it is corroborated by Mr Clark's handwritten notes of the meeting on 15 April 2009 (which notes "Invoice on SORs") and by Mr Tomkinson's circulated notes of a Commercial Task team meeting held on 7 May 2009 (which in answer to a recorded question: "Should Mears invoice SOR Value or Cost" the Action specified was: "Agreed to invoice on Value (SOR)". This latter document also recorded that an "average cost schedule was to be established" and that each party's computer systems were to be "populated with average SOR rates"; one advantage was said to be that such average rates would "eliminate the majority of variations". The note also recorded that the average cost schedule was to be agreed with PI (Shoreline's Property Investment department), of which Mr Tomkinson was in charge and Mr Clark was a member.

7. There was a clear belief and understanding as between these four people and indeed others in both organisations from March 2009 onwards that the Price List was incomplete in that there were a significant number of typical jobs which would need to be done which were not listed and therefore not priced. Mr Tomkinson told Mr Lester and Mr Critchley that the reason for this was that SPS had refused to release job data so that Shoreline considered that the Price List upon which Mears had

been invited to tender was "somewhat academic" as Mr Tomkinson recorded in his e-mail of 10 July 2009. Mr Lester gave some examples at Paragraph 11 of his Second Statement.

8. There was extensive consultation between the parties from March through to July 2009 about in practice what was going to happen and to set established procedures and working arrangements. For instance there was a "Launch Workshop on 14 and 17 April 2009 at which collaborative working and partnering were highlighted. The parties organised what were called "process mapping" days in the third week of May 2009; these were instigated as part of the mobilisation process with a view to streamlining processes which would be necessary when the Contract was up and running. They were attended by Mr Tomkinson and Mr Clark and representatives of Mears, as well as numerous others. At these days problems were identified which were:

(a) In relation to ordering of work, much of the need for work required would be raised by tenants who would telephone Shoreline's call centre where the staff would need to identify what work was likely to be required. Before contacting Mears, the staff would need to identify the category of work called for from the Price List and those staff identified a problem which was the difficulty in identifying, and correlating the Price List item with, the work being called for by the tenant. The staff explained that they found it difficult to identify in advance the nature of the job to which the order to be placed with Mears was. They asked for a solution that would make their job more straightforward.

(b) This difficulty would then be compounded if the wrong Price List item was identified and the work actually required not only was different but also was not covered by the Price List at all so that a variation would have to be raised. This had been a real problem when SPS was involved.

(c) A problem identified was that if a job ordered was not within the description of any item in the Price List, it would have to be dealt with on an individual basis on daywork rates which was unattractive to Shoreline because it would lead to cost uncertainty.

(d) The perceived incompleteness of the Price List was anticipated to give rise to a greater number of subsequent inspections of completed work than might be the case otherwise.

Essentially, Shoreline staff made it clear that they wished to have solutions to make their job more straightforward.

9. It was in this context that what came to be known as the "Composite Codes" came to be discussed, this being in substance what the current case is about. By about 11 May 2009, Messrs. Tomkinson, Clark, Lester and Critchley were using offices in the same building (Shoreline House). By this stage there was a broad agreement that the computer systems operated by the parties ("Anite" by Shoreline and "MCM" by Mears) would be correlated and work in tandem with access available by both parties to the other's system. There was great concern about the need for agreement on the way in which these systems would be operated. At an Implementation Principals Meeting on 6 May 2009 attended by Messrs Tomkinson, Lester and Critchley amongst others, Mr Neul of Shoreline was recorded as saying:

"It is essential to have a common agreement on how a Job will be entered into the system, how it will be completed and how it will be paid for. It is important to agree the fundamental details and priorities of the Repairs IT system."

10. Mr Tomkinson sent to Mr Critchley on 6 May 2009 a "RACI" (Responsible, Accountable, Consulted and Informed) document identifying deadlines and who was responsible for what with MCM and Anite to be populated with the Schedule of Rates and cost codes to be allocated to activities and with Mr

Clark and Mr Tomkinson to be involved in key activities. On 12 May 2009 Mr Bolton of Mears sent to Mr Neul of Shoreline a Master Task list which identified that "SOR Codes" were a Client Driven Task and in the Update: the following was stated:

"All codes to go against all contracts but maybe looking at Whole Job costs now so codes will be redundant as they stand**MCM - All codes all contracts. Anite – Client decision".

This followed the suggestion at a recent workshop meeting at which a possible strategic objective was the production of a lump sum price per property as opposed to a rate per individual job. This shows willingness on the part of Shoreline to abandon the tendered basis of pricing.

11. At another "Process Mapping" day on 19 May 2009 which had been set up by Mr Lester and Mr Tomkinson but was also attended by Mr Macdonald (Shoreline's Operations Director) and Mr Clark amongst others, agreement was reached that the parties should start to use an initial composite code that in effect told Mears to go and complete a minor, right first time repair (as Mr Critchley put it in his Second Statement). Mr Neul (Shoreline's Head of IT and Customer Services) described this day as "most useful and without it I think the project was in serious danger of becoming a disaster".

12. At a meeting in the morning of 20 May 2009 attended by Mr Neul and others for Shoreline together with Mr Lester and Mr Critchley, a broad understanding was reached that "a list of composite codes for [this project was] to be agreed and sent to MCM" and that these "Composites [composite codes] [were] to be created by [Mr Critchley and Mr Lester]"; this was recorded in a Task List which was circulated internally by Mr Neul. It was made clear that Shoreline's "Commercial team [was] to OK" this approach.

13. There were three meetings on 21 May 2009. At the second meeting attended by Mr Critchley and Mr Macdonald, there was discussion about the Composite Codes. Mr Macdonald at 2 pm that day e-mailed Mr Tomkinson and Mr Critchley an agreed action plan to be implemented which included the following:

"Lucas Critchley & Gary Lester to pull together composite codes to be added into Anite and put in front of Commercial task team. Include code for no access."

This reflected what was agreed at this meeting.

14. A third meeting on that day was attended by Mr Critchley, Mr Lester, Mr Clark and Mr Tomkinson in the latter's office and its purpose was specifically to discuss the Composite Codes which had been discussed and identified earlier that day. There is no doubt that the idea of the Composite Codes was discussed in detail and it was agreed that Mr Critchley would draft a document to show how the Composite Codes would operate. That night Mr Critchley drafted what has been called the CRED (Composite Rates Explanation Document) and he later produced a list of composite rates which included what were called Initial Order Rates referenced ORDR 00001 and 00002. ORDR0001 was defined as:

"Emergency call out works other than out of hours service. Receive call from Employer, attend on site (any trade) and carry out works to make safe and effect a permanent or temporary repair as appropriate. The rate will include for one hours labour (this will be from the time the Contractor is notified of the call out until the time that Contractor leaves the site) together with all consumables required. Materials & Equipment will [be] paid extra over the rate at defined Cost plus the Fee"

The rate was specified at £35.85.

15. The list of composite rates was sent by e-mail to Mr Neul on the morning of 22 May 2009 and the CRED was sent also by e-mail to Mr Tomkinson and Mr Clark several hours later. The e-mail to Mr Neul stated:

"Please see attached list of composite rate as discussed at Wednesday's meeting. This additional list totals 37 new codes. A few more than we originally anticipated but hopefully still not too much work for you / the PI Team.

The schedule has been agreed in principle with Brian and Mark [Messrs Clark and Tomkinson] and we should receive final sign off on Tuesday..."

The e-mail enclosing the CRED:

"Following on from our conversations this week please see attached Composite Rates proposal"

I will return later in this judgment to whether any agreement or convention was reached in relation to the CRED and the Composite Codes.

16. A Core Group Meeting on 27 May 2009 for which the agenda included "Composite Codes" was attended by Messrs. Tomkinson, Clark and Critchley. The unchallenged minutes recorded:

"Composite Codes agreed. LC [Mr Critchley] to send to Brian [Clark] and Steve Neul..."

There can be little or no doubt that the CRED was discussed and agreed at this meeting. Mr Clark's handwritten note says: "Composite rates - agreed methodology" followed by a tick sign. On the same day, after the meeting, Mr Critchley sent to Mr Neul and Mr Clark, amongst others, (copied to Mr Tomkinson and Mr Lester) a slightly updated list of the composite codes.

17. In the minutes of another Core Group Meeting attended by Mr Critchley, Mr Tomkinson and Mr Clark amongst others on 2 June 2009, there was confirmation under the headings "Performance" and "IT" that composite rates were "agreed". Within a few days, those and other rates had been loaded by Shoreline's IT team into its Anite computer system.

18. Mears prepared a process flow chart which was sent to Shoreline on 9 June 2009, being copied to Mr Clark, Mr Tomkinson, Mr Macdonald and Mr Bacon (the Director of Finance of Shoreline since March 2009). This chart which is populated with symbols but also text is relatively simple to understand and it charts what happens from the time that a tenant contacts Shoreline asking for a repair. From that time the following key actions are identified:

(a) The call taker "raises job onto Anite & enters 4 key pieces of information: 1. Trade 2. Priority 3. Description of Work 4. Appointment time"

(b) This is then transferred into Anite: "Anite automatically populates the system with a cost for the job based on the trade and priority from the 2 key composite codes: 1. Initial Ordering Rate 2. Average Additional Work Rate".

(c) This information is then (automatically) transmitted to Mears' MCM system where the "relevant administrator organised by trade picks the job up and ensures that the right craft worker attends with the right materials"; the MCM system then "pushes the job through the relevant craft worker's handheld" computer and that worker receives the job in question and actions the repair. The worker then informs the MCM administrator through his handheld computer of the actual work carried out.

(d) The MCM administrator then "varies 'Average Additional Work Rate' to reflect work actually carried out or just removes if minor repair with no materials". Thereafter "10% Joint Inspections carried out split between [Shoreline] and Mears". The administrator, having ensured that inspections have been completed where required and that all costs are on the system, checks the costings and initiates invoicing which leads to an invoice being sent from the MCM system to the Anite system and the invoice being paid.

It is worth noting that this process flow chart does not indicate the Initial Ordering Rate being removed before invoicing. Mr Bacon certainly considered this process flow chart because he commented to Mr Macdonald about it in some detail later on 9 June 2009. By reason of his interest, I am satisfied that he knew exactly what was to happen, which was what did actually happen.

19. From about 20 July 2009, Mears started to carry out reactive repair and maintenance works and between then and 25 January 2010 some 13,600 orders were placed by Shoreline based on the Composite Codes (primarily the ORDR00001 code), albeit that a small minority of orders were based on other codes. These orders were entered into the Anite system by Shoreline staff on the basis of those codes and because the Anite system was linked to Mears' MCM system, they were then processed by Mears and the very large bulk of the work called for by those orders was actually done. Mears invoiced Shoreline by reference to the composite codes and was paid by Shoreline on that basis. By early July 2009, Mears had provided to Shoreline a list of 4 "Initial Ordering Rates" and 48 "Average Additional Work Rates", ORDR00001 being the first on the list; these Additional Work Rates were to be added into the computer systems.

20. By the end of August 2009, Mears had submitted to Shoreline by hard copy a substantial number of invoices, albeit that I infer that they had also gone electronically as well in accordance with the process flow chart scheme. It is clear from those hard copy invoices that Mears were charging on the basis of ORDR00001 (principally) which featured prominently and obviously. An example is Invoice No RM/1396 dated 28 August 2009 which relates to an address in Grimsby referring to the work as having been completed on 27 July 2009. The invoice describes the problem as having been hot water taps in the bathroom and kitchen reported as dripping; ORDR00001 is invoiced with the description: "Attend tenants home and rectify faults" with the requisite rate of £35.85 claimed. The invoice then identifies three other plumbing codes being relating to other work which might have coincided with the work actually done and the invoice initially seeks a credit for these three related additional different sums but they are then deducted to leave a net sum invoiced of £35.85, plus VAT. For some invoices, more than the £35.85 is claimed where, apparently, additional work over and above simply attending and rectifying the notified fault was recorded as being done. After August 2009, most of the invoicing was done by way of bulk computerised invoicing and by consolidated invoices; in respect of any individual item, checks could have been made on the computer systems to see precisely what was being claimed and for what. Any relatively brief perusal of the consolidated invoices would have determined that there were a very substantial number of individual invoices in the sum of £35.85 or exactly double that amount (£71.70).

20. By 1 September 2009, and probably well before, Mears had provided a "status explanations and details" document to Shoreline which was circulated by Mr Clark internally. This indicated that the only occasion on which the ORDR coded item would be removed from the system on any given job would be when the worker arrived at the address and the tenant was not in and access could not be obtained. By 4 September 2009 Mr Tomkinson had left Shoreline by mutual consent and Mr Critchley was given notice at a meeting on 8 September 2009 that a Celia Hopkins would take charge on an interim basis from October 2009.

21. By the end of October 2009 concerns began to be raised, internally, within Shoreline that, based on invoicing and what had been paid out to Mears, anticipated savings were not being achieved. None of these concerns were expressed to Mears. Mr Bacon and Ms Hopkins began to take steps to investigate. Mr Bacon was highly suspicious of Mears (for reasons which are unclear); for instance, in an e-mail to Ms Hopkins on 19 November 2009 he said that he would "expect nothing less from Mears" other than to have manipulated "a choice of rates to their advantage".

22. Meanwhile and since about April 2009 the parties and their lawyers had been working on the contract documentation. A finalised or near finalised draft contract was with Mears' solicitors by Christmas 2009 as was recorded at a Maintenance Principals Group Meeting on 21 December 2009 attended by Messrs Clark and Bacon and Ms Hopkins for Shoreline and Mr Critchley amongst others for Mears. The contract was to be returned signed to Shoreline on 6 January 2010

23. By 4 January 2010, Ms Hopkins and Mr Bacon amongst others had worked out to their own satisfaction that the Mears contract was costing significantly more than Shoreline had anticipated with the result that the budget was increased by £350,000. This was discussed at a Finance Committee meeting on that day and the Members asked for information why costs had gone up. At some stage in the first half of January 2010, as Mr Critchley said in his third witness statement (and he was not challenged on this), he and Ms Hopkins discussed how the ORDR codes came into being and, on Mr Critchley saying that they had been developed jointly and by agreement, she said that her predecessors had been naive to make that agreement.

24. It was no coincidence that on 20 January 2010 Mr Clark e-mailed Mr Lester:

"You may remember back at the start of the Contract we held a meeting regarding Composite average rates to raise the jobs on Anite. I am certain that you prepared a "paper" for us as an Audit Trail why we did this. Do you happen to still have this, if so could you please forward to me ASAP please..."

This was a reference to the CRED document, which had been sent to Mr Clark at the end of May 2009. Mr Critchley sent to him the CRED document by e-mail on the same day.

25. It is a clear inference which I make that by this stage Ms Hopkins had reached a conclusion that all or a main part of the budget overrun was the result of the deployment of the ORDR00001 rate. On 21 January 2010, she e-mailed Mr Critchley following a brief discussion saying:

"...I have been looking into the SORs attached to the job number and subsequently invoiced to us. This exercise has exposed a serious concern; this being the Initial Ordering Rate...(£35.85) attached to the works request at the point of ordering in the CCC [Customer Call Centre] has not been removed by Mears when the works are completed. At this stage the appropriate SOR as entered should be the only costs attributed to the job.

In effect for a significant number of invoiced jobs to date, an additional £35.85 has been claimed which should not have been."

26. On 25 January 2010, Ms Hopkins instructed all relevant people at Shoreline as follows:

"Following discussions with Lucas [Critchley] today, and in order to ensure that we are not being charged a flat call out rate in lieu of the correct schedule of rate code and/or day-work rate I have instructed the call centre staff NOT to include the following to codes in the placement of jobs to Mears

ORDR00001...

ORDR00002...

Call centre staff will continue to issue jobs to Mears which will contain a description of the trade and priority (see table below); this is in addition to the priority marker within Anite that goes across to Mears.

It is expected that on completion of the works that tradesperson will replace these claims with the actual SORs used..."

Some 50 "Average Additional Work Codes" for routine, urgent and emergency works were listed.

27. She wrote on the same day to Mr Critchley confirming a conversation earlier in the morning saying that Shoreline would "cease from today to use the codes ORDR00001 and ORDR00002" saying it was Shoreline's contention that "these codes served only to assist in raising orders from the call centre, and as such should not have been retained at the invoice stage of works". She went on to say that by maintaining the codes an overpayment had been created which Shoreline would seek to recover. Mr Critchley's response on the same day was to say that he did not "accept that these charges have been made incorrectly" and that Mears had "worked in line with instructions from [Shoreline] from the start of contract till now". He expressed disappointment "that despite my request for the processes to remain until we can come to a joint and amicable decision about how we move forward, a unilateral decision has been taken by [Shoreline] to remove these codes in every job and effectively change the way in which the repairs contract operates without the agreement of the contractor." He said that he would continue to use the two codes until the matter was properly resolved and as a "compromise" he said that he would not invoice Shoreline any repair jobs until the matter was resolved.

28. It is from about this time that the spirit of partnership, which was at the very least advertised in the period leading up to the Contract between the parties and in the contract documentation, began to break down at least at a high level.

29. A meeting was held on 4 February 2010 attended by Messrs Bramley and Clark and Ms Hopkins for Shoreline and Mr Lester and Mr Critchley for Mears. The alleged over charging through the mechanism of the ORDR rates was discussed. Ms Hopkins is recorded in the minutes as saying that "almost every job initiated by the call centre has incurred an extra charge of £35.85." Mr Critchley responded that Mears did not believe that there was any overcharge and that the system had been "running from the beginning of the contract" and the process relating to the ORDR rates had been put in place by both parties, "the partnership" as he put it. Mr Lester indicated that the Commercial Task Team had agreed to the Price List process and that was the way matters had been delivered; it related back to the fact that the "codes were insufficient to run the contract...due to the poor information held by SPS". Mr Critchley said that Shoreline was not paying extra for each job. The minutes do not record Mr Clark challenging the constant assertions being made by Mr Lester and Mr Critchley that the whole arrangement relating to the ORDR rates and codes had been agreed. Ms Hopkins is recorded as saying:

"We accept that we agreed a process, it's the intended purpose of the process, its implementation and outcome we are disagreeing on. Shoreline will not continue with it as it stands."

Mr Lester is minuted as saying that he was:

"...happy to go through the open book with Shoreline as the relationship between the partners is paramount. Taking off the current codes and substituting the other codes will incur a lot of work. A

number of works are not charged for as codes because of the agreement because the cost is included in the £35.85. To work backwards through all of the jobs to ascertain what these should be will be a real problem."

30. On 9 March 2010, Mears wrote to Shoreline setting out their position which at that stage was that the composite codes were incorporated into the contract by agreement and that the "mutually agreed position" was set out in the CRED document. Shoreline wrote to Mears on 10 March 2010, not expressly in response but saying that the CRED document "was produced to facilitate a simplified process for Shoreline to issue the trade/profession to a job and to provide Shoreline with an indicative value of its forward work commitment". It went on that the CRED was not part of the contract and that the contract set the entitlement as being the payment of "defined cost under the NEC"; there was no dispute then taken that the CRED was actually agreed between Messrs Lucas, Critchley, Tomkinson and Clark. This was pointed out by Mears in its response on 26 March 2010. Shoreline's response to this on 9 April 2010 was short saying:

"We do not agree with any of what you say. There is a contract between the parties which have not been amended or altered in any way, and which requires to be applied between the parties..."

31. Following a meeting between the parties on 22 April 2010, Ms Hopkins wrote to Mr Critchley on 23 April 2010 with her findings as to what the defined costs for the period 20 July 2009 to 31 January 2010 were, namely that with the fee it was £2,584,631.58. She accepted that there were 2,129 and 790 emergency jobs within and outside working hours respectively which justified rates equivalent to the ORDR00001 and ORDR00002 rates. In relation to 2,472 other jobs which had attracted the ORDR rates, £46,569.01 (excluding VAT) was deducted where it was the only single code attached; Shoreline disallowed the full value but replaced it with an equivalent of one hour of the appropriate day-work rate for the trade in question. Another £254,326.44 (excluding VAT) was deducted in relation to 7,085 jobs where the ORDR00001 and ORDR00002 rates were used as well as other rates; in that case the whole of the ORDR00001 and ORDR00002 rates were deducted. Taking this into account she identified the total value as £1,899,233.07 and by reference to the Contract between the parties she stated that because the Cost exceeded the Value Mears was limited to the Value. Mears disagreed. Later on 10 May 2010 Shoreline identified some indexation errors and adjusted the total value to £1,909,797.88.

32. Various disputes arose between the parties not limited to the applicability of the ORDR00001 and ORDR00002 rates. On 4 October 2010, Shoreline referred to adjudication a series of issues including whether the Total of the Prices was determinable only by reference to the Price List codes specifically as set out in the Contract. As was made clear in the Referral Notice dated 8 October 2010 this issue raised the question as to the enforceability of the CRED document. In its Response dated 22 October 2010, Mears asserted that there was an agreement between the parties that the CRED "was to be utilised in the valuation of the works and to amend or refine and/or supplement the Price List" (see Paragraph 39). It is of interest that the Reply by Shoreline dated 29 October 2010 did not specifically challenge Mears' evidence and assertion that there was agreement in relation to the contents of the CRED document; the argument was that the signed Contract was effectively conclusive, particularly as the CRED document was not incorporated. The adjudicator issued his decision on 10 November 2010 to the effect that the CRED was a facilitative document. At Paragraph 74, he inferred that it did reflect an arrangement reached between the parties but that Shoreline elected to withdraw from it. He did not consider that he had jurisdiction in effect to deal with any estoppel argument.

33. Although the Contract has continued, it seems clear that relationships have not improved. On 4 July 2012, Mears issued the current proceedings for the recovery of the sums deducted in relation to the ORDR00001 and ORDR00002 rates in early 2010. There is other litigation between the parties involving some £4m of claims by Mears, albeit arising under another contract between the parties.

The Proceedings

34. The original Particulars of Claim were predicated upon the Contract incorporating the CRED or what it represented or upon it being amended to reflect the same with an alternative being that Shoreline was estopped from withholding the sums which were deducted, with the estoppel being based on representations. The Defence was a detailed document running to 24 pages which complained about the lack of particularity in the Particulars of Claim amongst other things and relied upon the primacy of the Contract which it was asserted contained an exhaustive regime governing payment for the Works. The Amended Particulars of Claim dated 8 November 2012 followed. The amendments referred to and relied upon the meetings on 21 May 2009, the production of the CRED which was said to have been agreed upon, agreement at the Core Group Meeting on 27 May 2009 and the meeting of 2 June 2009. The claim based on the Contract or an amendment thereof was abandoned, an estoppel by convention basis was added as was a misrepresentation claim.

35. On 22 November 2012 Shoreline issued an application for summary judgment alternatively to strike out the Particulars of Claim as disclosing no reasonable grounds for bringing a claim. Witness statements were produced on both sides. The Court heard argument on 17 December 2012 and issued judgment on 17 January 2013, dismissing the application. As to Shoreline's assertions that the factual basis of the alleged agreement or convention was so unsound and unreliable that it could not stand, the Court rejected these arguments, referring to the fact that Shoreline "deployed no contemporaneous evidence, such as from Mr Tomkinson or Mr Clark, to challenge what Mr Lester and Mr Critchley said"; much would depend on the inherent credibility of these four witnesses (Paragraph 25 of the judgment). It was held that the basic facts pleaded, if true and factually established gave "rise to an arguably meritorious position for Mears, both on the facts and the law" (see Paragraph 27). In relation to the estoppel by convention, the judgment continued:

"33. In my judgment, it is and remains reasonably arguable that estoppel by convention may well or at least could have application in this case if the facts as pleaded by Mears are found to exist. Essentially, if such facts exist, there is or was arguably a convention or common assumption between the parties and it was something "close" to being a contract and was therefore "expressly shared between them"; the entire contract clause in the R&M Contract may not negative this assumption because it is said to have been understood and agreed that the contract did not have to be amended to reflect the common assumption or convention. The common assumption continued and was arguably acted upon by the parties for six months from July 2009 until January 2010 in that work was booked on the CRED basis and payments made on the basis of the Composite Codes. There was detriment on Mears' case because, as it asserts, (a) it lost the opportunity to quote for the 13,000 plus pieces of work and thus secure adequate payment, and (b) it did not keep records so that it can not now recreate for invoicing purposes all the chargeable work. Of course, SHP has its own answers on the facts such as assertions that in fact (i) Mears has been paid for all the work in accordance with the R&M Contract terms and (ii) what was agreed was not intended to give ultimate rights to payment on the Composite Code basis. However, the Court can not resolve those on this application and without the conflicting evidence being tested.

34. One point, and possibly the best point raised at this stage by SHP, is whether and if so how this particular estoppel by convention can be raised by Mears as Claimant as a "shield" and not a sword. However, I do not see this ultimately as a major potential drawback. In essence, the estoppel is to the effect that the deduction made in or about January 2010 should not have been made by reason of the matters which give rise to the estoppel or put another way SHP was and is estopped from maintaining or retaining that deduction."

As for the estoppel by representation and misrepresentation arguments, the Court said:

"37. In the light of the authorities, the promise to pay pleaded in Paragraph 35 can not as such readily support an estoppel by representation, neither can an agreement as such to use the Composite Codes (as pleaded in Paragraph 35 and Paragraph 36(1)). However, it is arguable that the representation by SHP that there was no need to amend the contract which was in the course of being finalised to allow for the Composite Code payments was a representation of fact, albeit that it was an expression of intention. As Wilken and Ghaly say at Paragraph 9.27, a "representation of present intention may amount to a representation of fact" quoting from the well-known case of **Edgington v Fitzmaurice**[1885] [29 Ch D 459](#), 483. It could be said therefore that the representation was a continuing one all the way up until the time that the contract was signed, sealed and delivered, there being no suggestion that it was withdrawn; it could be said that the representation was continued by conduct in that the parties acted upon it until January 2010 and there was no amendment to the R&M Contract. It would follow that arguably SHP would be estopped from arguing that the R&M Contract needed amending to reflect the "agreement" relating to the CRED and the Composite Codes.

38. In relation to misrepresentation, similar considerations apply in relation to the representation that the R&M Contract did not have to be amended even though the Composite Codes were to be used, in that there was arguably an expression of intention which was continued by being acted upon and by not being withdrawn. As also for the estoppel by representation, it could be said that, if the representation had not been made or was not withdrawn, Mears would not have entered into a contract which prevented it from recovering payment on the basis of the Composite Codes."

36. Leave to appeal having been granted by Richards LJ, the Court Appeal dismissed the appeal in its judgement dated 5 June 2013 ([\[2013\] EWCA Civ 639](#)) with Gloster LJ accepting that the judge had applied the right tests (Paragraph 11) and saying at Paragraph 12 that the real question on appeal was "whether the facts as relied upon by Mears and as analysed by the judge disclosed a legally recognisable claim, in relation to which Mears has a real, as [opposed] to fanciful, prospect of success." She said that it was realistically arguable that, in the particular factual circumstances here, the [entire contract] clause does not operate the bar to any of the claim" (Paragraph 15). She accepted that it was arguable that Mears would not be relying upon the estoppels by convention or misrepresentation as a sword rather than as a shield (Paragraphs 19 and 20). The question of whether there was reliance upon any estoppel would depend on the trial judge's findings of fact (see Paragraph 24). She decided that it was at least arguable that the alleged representations by Shoreline to the effect that there was no need to amend the Contract were indeed representations of fact sufficient to ground an estoppel by representation order or to provide the basis for a claim for misrepresentation (see Paragraph 26). Shoreline was ordered to pay Mears' costs summarily assessed at £63,000.

37. The impending trial (July 2013) was adjourned whilst over some months the parties attempted to settle their differences on this litigation as well other disputes, Mr Justice Ramsey being the mediator. The trial was re-fixed for 9 March 2015 and further directions were given on 21 July 2014 to facilitate

that. By consent, permission to re-amend the Particulars of Claim and to make consequential amendments to the Defence was granted.

38. Although there is no agreed list of issues, which is unfortunate, I have distilled from the pleadings and the opening and closing submissions what remains in issue which can be summarised as follows:

- (a) What was actually agreed, if anything, between Messrs Lester, Critchley, Tomkinson and Clark in May and June 2009 in relation to the Composite Rates and the contents of the CRED document?
- (b) What, if anything material, was represented by Messrs Tomkinson and Clark in May and June 2009?
- (c) To what extent, if at all, did Mears and/or Shoreline rely upon what was agreed in relation to the Composite Rates and the contents of the CRED document and/or any material representations? To what extent was there any material detriment (to the extent that such detriment needs to be established)?
- (d) In the light of the findings on the preceding issues, was there any effective (i) estoppel by convention, (ii) estoppel by representation and/or (iii) misrepresentation on the part of Shoreline?
- (e) Was there any material breach of any express or implied terms of the Contract relating to trust, co-operation and partnership on the part of Shoreline?
- (f) Was the deduction of about £300,000 made by Shoreline without authority in the light of who was the Service Manager at the material time? If so what consequences are there?
- (g) If there was an effective estoppel and/or misrepresentation, what is the recoverable amount?

The Contract

39. There is now very little issue between the parties as to what the Contract between the parties actually means. It is accepted by Mr Speaight QC for Mears that the Contract, although executed in December 2009 had retrospective effect back to July 2009 and, because the Contract contained an "entire agreement" clause, there is no scope for there being any collateral contract; he accepted also that the Contract could not be subject to informal variation because it requires variations to be in writing and signed by the parties (see, for example, Paragraph 11 of his written Opening). It is also common ground that the Contract in terms of payment provided for interim payments to be made by reference to defined cost plus fee but for there to be a reconciliation every six months by reference to the value which was to be related to the Price List (sometimes called by the parties the Schedule of Rates or "SOR"); by that reconciliation, Mears was to be limited to what was recoverable under the Price List (as varied) if the defined cost plus fee exceeded the Price List valuation, this being the pain/gain share arrangement. It seems to be common ground in fact that, invariably or almost invariably, this was going to involve "pain" for Mears because the cost plus fee generally was in practice to exceed the value established by the Price List.

40. Relevant parts of the NEC3 conditions are as follows:

"10.1 The Employer, the Contractor and the Service Manager shall act as stated in this contract and in a spirit of mutual trust and cooperation.

11.2 (12) The Price List is the price list unless later changed in accordance with this contract.

12.3 No change to this contract, unless provided for by the conditions of contract, has effect unless it has been agreed, confirmed in writing and signed by the Parties.

12.4 This contract is the entire agreement between the Parties.

14.4 The Employer may replace the Service Manager after he has notified the Contractor of the name of the replacement.

50.1 The Service Manager assesses the amount due at each assessment date...

50.5 The Service Manager corrects any wrongly assessed amount due in a later payment certificate."

41. The Contract Data provided a number of definitions. The Service Manager was identified as Mr Clark. The "starting date" for the provision of services was 20 July 2009. Payments were to be made monthly. Mears "key persons" were named as Mr Critchley and Mr Lester. The Price List was identified as that which Mears had priced at tender stage. Option C, in the standard NEC3 Term Service Contract form, identified that the Price for Services was to be the "Defined Cost which the Contractor has paid plus the Fee". Clause 52.2 of Option C required Mears to keep records in relation to payments of Defined Cost, amongst other things. Clause 53 identified the pain/gain share provisions. Option W2, also incorporated, which addressed dispute resolution, provided that the ultimate dispute resolution tribunal (here the Court) had "the powers...to review and revise any action or inaction of the Service Manager related to the dispute" (Clause W2.4 (3)).

The Law

42. The primary area of issue revolves around what needs to be established in respect of estoppel by convention, estoppel by representation and misrepresentation. I will address estoppel by convention first. It is common ground that the modern law of estoppel by convention was set out by Lord Steyn in **Republic of India v India Steamship Co Ltd No 2** [\[1998\] AC 878](#) at page 913:

"The plaintiffs rely in the alternative on estoppel by convention and estoppel by acquiescence to defeat the applicability of the bar created by section 34. A general review of the requirement of these estoppels is not necessary. It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: The August Leonhardt [1985] 2 Lloyd's Rep. 28; The Vistafjord [1988] 2 Lloyd's Rep. 343; Treitel, Law of Contracts, 9th ed., at 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.

So far there was no disagreement about the law. But it was argued for the plaintiffs that Staughton L.J. had held in the Court of Appeal that a concluded agreement was a requirement of an estoppel by convention. That argument was based on the observation by Lord Justice Staughton that "it is essential that the assumption be agreed for there to be an estoppel": 20, col. 2. At first glance that observation seems to bear out the argument entirely. But earlier Lord Justice Staughton had referred to an "agreement or something very close to it": 20, col.1. Reading the observations in context I do not accept that the Court of Appeal misdirected itself on this point."

43. Much of the modern law of estoppel by convention stems from the Court of Appeal decision in **Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank**

Ltd 1982 1 QB 84 and the equally authoritative first instance decision of Robert Goff J being appealed from. Robert Goff J, amongst other things, emphasised the following:

(a) He talked about where "an estoppel is alleged to be founded upon encouragement or representation, it can only be unconscionable for the encourager or representor to enforce his strict legal rights if the other party's conduct has been influenced by the encouragement or representation" (page 34 F-G), going on in the following paragraph that it was "no bar to a conclusion that the other party's conduct was so influenced, that his conduct did not derive its origins only from the encouragement or representation of the first party."

(b) He said at Paragraph 105 C-D that it was "not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist."

(c) He said that estoppels may be enforced despite infringement of the general principle that a purely gratuitous promise is unenforceable at law or in equity, one area being where "one party has represented to the other that a transaction between them has an effect which in law it does not have" (Paid 106 G), going on that "it may, in the circumstances, be unconscionable for the representor to go back on his representation".

44. Lord Denning, having said that there are "many cases to show that a course of dealing may give rise to legal obligations" (page 121 A), went on to say at Pages 121 B-D and G-H and 122 A-D and E-G:

"If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret them. If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it - on the face of which each of them - to the knowledge of the other - acts and conduct their mutual affairs - they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to enquire whether that particular interpretation is correct or not - or whether they were mistaken or not - or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on the contract, and cannot be allowed to go back on it...

So I come to this conclusion: When the parties to a contract are both under a common mistake as to the meaning or effect of it - and thereafter embark on a course of dealing on the footing of that mistake - thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them.

Conclusion

The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases...It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been thought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need to consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one

of them does seek to go back on it, the courts will give the other side remedy as the equity of the cases demands.

That general principle applies to this case. Both the plaintiff and the bank proceeded for years on the underlying assumption that the guarantee of the plaintiffs applied to the \$3,250,000 advanced by the bank for the Nassau Building. Their dealings in rearranging the portfolio, in releasing properties and monies, will all conducted on that basis. On that basis the bank apply the surplus of \$750,000 (on the English properties) in discharge of the obligations of the plaintiffs under the guarantee. It would be most unfair and unjust to allow the liquidator to depart from that basis and claim back now the \$750,000. That was ultimately the paramount reason why the judge rejected the liquidator's claim. He summed up his view in this one sentence, ante, p. 108C:

"...I am satisfied that Mr. Foster's conduct, though of course completely innocent, so influenced Mr. Oldfield's conduct, as to render it unconscionable on the part of the plaintiffs now to take advantage of the bank's error."

Later at p. 108G the judge speaks of it being "unconscionable" for the representor to go back on his representation.

In those phrases, the judge is applying the general principle of estoppel which I have stated. I agree with his analysis of the cases and with his conclusion...."

44. Eveleigh LJ dealt with the case "as one of estoppel by convention" (Page 126 A) quoting with apparent approval the passage from Spencer Bower and Turner, Estoppel by Representation:

"When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed."

Brandon LJ considered the facts produced "a classical example of...estoppel by convention" going on at Page131C:

"I turn to the second argument advanced on behalf of the plaintiffs, that the bank is here seeking to use estoppel as a sword rather than the shield, and that is something which the law of estoppel does not permit. Another way in which the argument is put is that the party cannot found a cause of action on an estoppel.

In my view much of the language used in connection with these concept is no more than a matter of semantics...[he then considers an example of the defendant bank issuing proceedings to recover moneys being met by a Defence that the claim was barred by the contract and then pleading in a Reply an estoppel].

In this way the bank, while still in form using the estoppel as a shield, will in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed..."

45. In **Johnson v Gore Wood & Co**[\[2002\] 2 AC 1](#), it would not be unfair to say that, although it was raised, estoppel by convention was not the main issue. Lord Bingham did consider that there was estoppel by convention and quoted (at page 33) with apparent approval the first paragraph of Lord Denning's Conclusion (see above), whilst Lord Millett would not have put the case on estoppel by

convention (see page 61). Lord Goff also quoted the Conclusion in the Texas Bank case but, although finding a broad statement of law "most appealing", he did consider that Lord Denning's observations to the effect that there was a common criteria for the different types of estoppel was too bold; he was reluctant to proceed on the basis of estoppel by convention and he said that "the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them". (Page 41B-C).

46. **Baird Textiles Holdings Ltd v Marks & Spencer plc** [2002] 1 All ER (Comm) 737 was a Court of Appeal case involving a supplier to the well-known retailer between whom there was no expressed or written contract but it was said that there was an implied contractual obligation on the retailer to require garments from it in reasonable quantities and at reasonable prices; it was arguing that the retailer was estopped from asserting that the relationship between the parties was not long term. The Court of Appeal agreed with the first instance judge that no contract was implied, largely on the grounds of lack of certainty. So far as the estoppel was concerned Sir Andrew Morritt V-C said at Paragraph [38]:

"In my view English law, as presently understood, does not enable the creation or recognition by estoppel of an enforceable right of the type and in the circumstances relied on in this case. First it would be necessary for such an obligation to be sufficiently certain to enable the court to give effect to it. That such certainty is required in the field of estoppels such as is claimed in this case as well as in contract was indicated by the House of Lords in Woodhouse AC Israel Cocoa Ltd v Nigeria Produce Marketing Co Ltd [1972] AC 741 and by Ralph Gibson LJ in Troop v Gibson [1986] 1 EGLR 1, 6. For the reasons I have already given I do not think that the alleged obligation is sufficiently certain. Second, in my view, the decisions in the three Court of Appeal decisions on which M&S rely do establish that such an enforceable obligation cannot be established by estoppel in the circumstances relied on in this case. This conclusion does not involve the categorisation of estoppels but is a simple application of the principles established by those cases to the obligation relied on in this. I do not consider that any of the dicta in the line of cases relied on by Baird could entitle this court to decline to apply those principles."

Judge LJ (as he then was) agreed with his brethren albeit making some interesting comments on estoppel. Mance LJ (as he then was) said:

"87. However, not only are we bound in this court by previous authority on the scope of particular types of estoppel, but it seems to me inherent in the doctrine's very flexibility that it may take different shapes to fit the context of different fields. Throughout the passage at pp.103A-107F in Robert Goff J's judgment in the Amalgamated Investment case, to which Mr Field drew our attention, careful attention was paid to context. That there are, on authority, certain distinctions between the characteristics of estoppel in different contexts is also clear. For example, it is established that to found a promissory estoppel, a representation must be clear and unequivocal: Woodhouse AC Israel Cocoa Ltd. v. Nigeria Produce Marketing Co. Ltd. [1972] AC 741. In relation to estoppel by convention, it has been said by Ralph Gibson LJ in Troop v. Gibson [1986] 1 EGLR 1 that

"where both parties have engaged upon a course of negotiation or transactions representing mutually the one to the other that a certain state of affairs is accepted regarding their conduct, then the necessity for proof of some clear and unequivocal statement becomes of less importance. The court must determine what the state of affairs is which the parties have accepted and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity. For my part I think that the extent to which the importance of clear and unequivocal statements is

reduced in cases of estoppel by convention is probably small. In all cases the representation or statement must be sufficiently clear; and, since the doctrine of estoppel, when applied deprives a party of the ability to enforce a legal right for the period of time and to the extent required by the equity which the estoppel has raised, the clarity required will seldom fall below what is unequivocal for the relevant purpose."...

88. How far an estoppel may assist in bringing about a cause of action, without standing alone as "a cause of action in itself", has remained a matter of dispute over subsequent years. It may enlarge the effect of an agreement, by binding parties to an interpretation which would not otherwise be correct: see e.g. *De Tchihatchef v. Salerni Coupling Ltd.* [1932] 1 Ch 330; *The Karen Oltmann* [1976] 2 Ll.R. 708; and per Robert Goff J in *Amalgamated Investment* at p. 106A. In the *Amalgamated Investment* case itself, Lord Denning MR and, on the view I would prefer, Brandon LJ held that both the company and the bank were bound by their conventional treatment of the company's guarantee of its subsidiary's indebtedness to the bank as extending to such subsidiary's indebtedness to the bank's subsidiary (Portsoken), thus entitling the bank to set up sums due under the guarantee, read in this extended sense, against the obligation that it otherwise had to account to the company for realisations which it had made...

92. It is also, on authority, an established feature of both promissory and conventional estoppel that the parties should have had the objective intention to make, affect or confirm a legal relationship. In *Combe v. Combe*, all three judges, echoing what Denning J had said in *High Trees*, referred to the need for a promise or assurance "intended to affect the legal relations between them" or "intended to be binding" (per Denning LJ at p.220, Birkett LJ at p.224 and Asquith LJ at p.225); see also per Oliver LJ in *Spence v. Shell UK Ltd.* [1980] 2 EGLR 68, 73E. In *Amalgamated Investment* at p. 107B, Robert Goff J touched on the same point, when distinguishing cases where parties had represented a transaction to have an effect it does not have (e.g. *De Tchihatchef*) as follows:

"Such cases are very different from, for example, a mere promise by a party to make a gift or to increase his obligations under an existing contract; such promise will not generally give rise to an estoppel, even if acted on by the promisee, for the promisee may reasonably be expected to appreciate that, to render it binding, it must be incorporated in a binding contract or contractual variation, and that he cannot therefore safely rely upon it as a legally binding promise without first taking the necessary contractual steps."

47. **Baird** could be said to be primarily a case on its own facts, which in the context of estoppel by convention were somewhat odd in that there was no express, let alone implied, contract between the parties to which any material convention could attach. The alleged convention arose if at all (which it did not) from an implication. It was, truly, a case in which, once it was established that there was no material underlying contract between the parties, it was always going to be difficult to establish any convention that the (legally) non-existent contract between the parties was to be considered as involving a "long-term" relationship. Therefore, if the estoppel by convention argument was to succeed, it necessarily involved the establishment of a legally binding and enforceable obligation that in some ways the relationship should be considered long-term (and, presumably, non-determinable without a significant notice period); it therefore was an almost classic case of seeking to establish a cause of action ab initio from that uncertain implicit understanding and certainly involved seeking to establish a stand-alone cause of action based on estoppel.

48. A more recent case was the decision of Briggs J (as he then was) in **Revenue and Customs Commissioners v Benchdollar Ltd** [2010] EWHC 1310 (Ch). He quotes with approval statement of Lord Steyn in the **Republic of India** case set out above (Paragraph 42) going on at Paragraph 43:

"For present purposes, that general statement needs to be supplemented by the following passage from the judgment of Peter Gibson J in **Hamel-Smith v. Pycroft & Jetsave Ltd** (unrep) Feb 5th 1987, cited with approval by Bingham LJ in the **Norwegian American Cruises** case ("The Vistafjord") [1988] 2 Lloyd's Rep 343, at 352, and further approved by the House of Lords in **Hiscox v. Outhwaite** [1992] 1 AC 562 at 575 per Lord Donaldson:

"Thus the court is not so rigid and inflexible as to insist on the parties being held to an assumed and incorrect state of fact or law when there is no injustice in allowing a party to resile therefrom (see, for example, **Multon v. Cordell** (1988) 277 Estates Gazette 198). Further, if the estoppel applies it will do so only "for the period of time and to the extent required by the equity which the estoppel has raised" (per Ralph Gibson LJ in **Troop v. Gibson** at p.1144). Thus, once a common assumption is revealed to be erroneous the estoppel would not apply to future dealings between the parties (per Purchas LJ in the same case at p.1144)."

Lord Donaldson summarised the point in **Hiscox v. Outhwaite** as follows:

"Once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings."

Briggs J went on to consider the circumstances in which it would be regarded as unjust or unconscionable for a party to the common assumption subsequently to resile from it, saying in Paragraph 44 that these were "infinitely various". Having reviewed the judgment of Oliver LJ in **Keen v Holland** [1984] 1 WLR 75, he summarises in Paragraph 52:

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

- i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
- ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
- iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
- iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

49. From the cases, one can conclude that the relevant law on estoppel by convention is:

- (a) An estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a "convention".

(b) The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question.

(c) At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably be the case that both parties will have relied upon it. There is nothing prescriptive in the use of "reliance" in this context: acting upon or being influenced by would do equally well.

(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the **Texas Bank** case described that this is what is needed and Lord Denning talks in these terms.

(e) Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed.

(f) The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.

50. Estoppel by representation may in some cases overlap with estoppel by convention but it is, in legal terms, distinct. **Wilken and Ghaly** (The Law of Waiver, Variation, and Estoppel 3rd Ed) summarise the elements of this estoppel at Paragraph 9.01 by reference to two parties A and B as follows:

"First, A makes a false representation of fact to B...Second, in making the representation, A intended or knew that it was likely to be acted upon., B, believing the representation, acts to its detriment in reliance on the representation. Fourth, A subsequently seeks to deny the truth of the representation. Fifth, no defence to the estoppel can be raised by A".

They go on to say at Paragraph 9.04 that the "weight of authority favours the view that estoppel by representation is a rule of evidence rather than of substantive law". The doctrine does not, in itself, amount to a cause of action. The authors consider that representations of present intention can give rise to estoppel by representation but that representations of future intention in simple terms will not at least usually give rise to such estoppel due to running foul of the contractual doctrine of consideration (see for instance Paragraph 9.26). They accept that representations of mixed fact and law may give rise to an estoppel by representation. The editors of **Spencer Bower on The Law Relating to Estoppel by Representation** (4th Ed) go somewhat further and suggest that an estoppel by representation of law may now be raised, quoting **Kleinwort Benson Ltd v Lincoln CC** [1999] 2 AC 349 and **Azov Shipping Co Ltd v Baltic Shipping Co** [1999] 2 Lloyd's Rep 159.

51. In relation to misrepresentation, it is not controversial, broadly, that a misrepresentation arises where a party makes to the other party what is a false statement of fact intended to be relied upon and in fact relied upon by that other party in entering the contract which follows. There has been much debate as to the extent to which the statement of opinion or intention can be a material representation and I am of the view that in certain circumstances such statements can give rise to effective representations that the maker of the statement has reasonable grounds for the opinion or reasonably believes that he can carry out his intention. Professor Cartwright in the 3rd Edition of his book, **Misrepresentation, Mistake and Non-Disclosure** is of the view that the courts "have now abandoned the formal distinction between misrepresentations of law and misrepresentations of fact" (Paragraph 7-11) referring to a first instance decision, **Pankhania v Hackney LBC** (Ch) [2002] All ER (D) 22 and **Brennan v Bolt Burdon**[2004] EWCA Civ 1017, material extracts of this latter decision being:

"8. For two hundred years it was an accepted principle of common law that a contract could not be vitiated by a mistake of law...

Although the principle withstood the criticism, it became subject to a number of exceptions. For example in *Cooper v. Phibbs* (1867) 2LR HL 149 an exception was allowed where the mistake of law was as to private rights. In *The Amazonia* (above) it was held that a contract was void on the basis of a mistake as to foreign law because foreign law is treated by the English courts as a question of fact.

9. The turning point for the general principle came in *Kleinwort Benson Limited v. Lincoln City Council*[1999] 2 AC 349. Kleinwort Benson had made payments to a local authority under swap agreements which were thought to be legally enforceable. Subsequently, a decision of the House of Lords, *Hazell v. Hammersmith and Fulham LBC*[1992] 2 AC 1, established that such swap agreements were unlawful. Thereafter, Kleinwort Benson sought restitution of the payments on the basis of a mistake of law. The majority in the House of Lords (Lords Goff of Chieveley, Hoffman and Hope of Craighead) held that Kleinwort Benson was entitled to succeed upon that basis...Referring to the Law Commission's Consultation Paper number 120 on Restitution of Payments Made Under a Mistake of Law (1991) Lord Goff referred to "the main criticisms" of the previously established principle. He described the distinction drawn between mistakes of fact and mistakes of law as producing results "which appear to be capricious" and to the exceptions and qualifications which "in truth betray an anxiety to escape from the confines of a rule perceived to be capable of injustice" with the result that "the law appeared to be arbitrary in its effect". He added (all this being at page 372):

"As a result of the difficulty in some cases of drawing the distinction between mistakes of fact and law, and the temptation for judges to manipulate that distinction in order to achieve practical justice in particular cases, the rule became uncertain and unpredictable in its application". "

He concluded (at p 375H):

"...the mistake of law rule should no longer be maintained as part of English law...English law should now recognize that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution."

10. Although *Kleinwort Benson* concerned a restitutionary claim rather than a contractual one, it cannot be doubted that its effect now permeates the law of contract. In *Pankhania v. London Borough of Hackney*[2002] EWHC 2441 Ch the question arose as to whether a misrepresentation of law could now found a cause of action. In his lucid and trenchant judgment, Mr. Rex Tedd QC, sitting as a deputy judge, stated (at para 58):

"I have concluded that the 'misrepresentation of law' rule has not survived the decision in Kleinwort Benson. Its historical origin is as an offshoot of the 'mistake of law' rule, created by analogy with it, and the two are logically interdependent.....The distinction between fact and law in the context of relief from misrepresentation has no more underlying principle to it than it does in the context of relief from mistake.....The rules of the common law should, so far as possible, be congruent with one another and based on coherent principle. The survival of the 'misrepresentation of law' rule following the demise of the 'mistake of law' rule would be no more than a quixotic anachronism"

I agree with the view expressed in the **Pankhania** case, clearly approved in the **Brennan** case, albeit obiter. There is little in logic or reason not to extend this to estoppel by representation.

Discussion and Findings

52. I do not have the slightest doubt that there was a clear agreement and convention as between Mr Critchley and Mr Lester on the one hand for Mears and Mr Clark and Mr Tomkinson for Shoreline in relation to the Composite Codes and the CRED document. Apart from the evidence of Messrs Critchley and Lester to that effect, the absence of any real challenge until the proceedings and the de facto admission in January 2010 by Ms Hopkins that there was such an agreement (albeit she said that her predecessors had been naïve in reaching it) corroborates the fact of there being such an agreement.

53. The relevant background is that the actual Contract conditions in relation to which Mears tendered were not materially altered in relation to the payment terms and entitlements during the period between the 18 March 2009 "letter of intent" from Shoreline to Mears up to the time of the execution of the Contract over nine months later and some six months after work actually started. There is no doubt that the "letter of intent" was not an acceptance, as such in contractual terms, of the tender and, indeed, in the light of the Public Contract Regulations requirement for a "standstill" period, actually referred to in the letter, it was not intended to be an acceptance. There was however a clear understanding between the parties that the work, which Mears would be called upon to do, would have to start in June or July 2009 and the parties through extensive liaison and workshop-type meetings worked their way towards that end.

54. There was a clear and expressed mutual belief between representatives of both parties in the period up to the commencement of work that the Price List or Schedule of Rates upon which Mears had been required to tender was likely to be substantially incomplete and that there was therefore a very real risk that extensive variations or changes would need to be made. There was a similar belief that there would be real difficulties in Shoreline's staff, in particular at its call centre when receiving calls from tenants about problems with their dwellings, in identifying and correlating given Price List items with the work being called for by the tenants; this seems to have been a problem because tenants could not necessarily be expected to articulate what the problem was in a way which made it easy for the call centre staff to allocate it to a particular one of the 800 or so items on the Price List. In this context reference should be made to Paragraph 8 above.

55. I have no doubt that Messrs Critchley, Lester, Clark and Tomkinson were all aware not only of these matters but also of what the draft NEC3 contract conditions upon which Mears had tendered required, namely for Mears to invoice and be paid on a monthly basis based on defined cost plus fee with a recalculation every six months, as necessary, by reference to the Price List items.

56. From a relatively early stage after March 2009, both parties were seeking to find a solution to the problems relating to the perceived incompleteness of the Price List and the anticipated difficulties at

the call centre. That solution emerged, as set out in the Background chapter of this judgment. The solution was the creation, application and deployment of composite codes, few in number, against which Mears would be paid. That was in the context of everyone of importance on both sides knowing that these codes were not as such cost but value. Both sides must have known that what was to happen did not reflect what the draft contract terms called for because the composite codes did not reflect cost but value and because the draft contract terms called for cost plus fee to be paid on an interim basis to be reconciled every six months against value. I can only assume and do presume that they did this because it represented a simple solution to the key problems which they had identified and highlighted in the two months after the letter of intent. In the period leading up to June 2009, both parties at a senior and less senior level were wholly prepared to disregard the tendered basis of payment, namely cost on an interim basis.

57. In relation to the four witnesses who were primarily involved in the discussions about the Composite Codes (Messrs Critchley, Lester, Clark and Tomkinson), I consider that the Mears witnesses were not only eminently credible but that their version and recollection of events was borne out not only by the contemporaneous documents but also by the unarguable fact that from July 2009 to January 2010 Shoreline paid out to Mears on many thousands of individual jobs on the basis of the composite codes. I found Mr Clark to be not credible as a witness. He was and was supposed to be the Service Manager whose role was supposed to be a key one on behalf of Shoreline. He was to be contractually charged under Clause 50 with assessing every sum due to Mears, yet he sought to give the impression that he knew little or nothing about the detail of what was being invoiced and paid every month; I found his evidence about his ignorance and lack of involvement in this key role to be unbelievable. I have formed the view that he knew exactly what was going on. I can only assume that, when internally in the autumn of 2009 it began to become apparent to Shoreline that the budget was being exceeded, he sought to distance himself from what was happening and what had been agreed. His evidence about his e-mail of 20 January 2010 to Mr Lester clearly about the CRED document which was actually on his e-mail (and which he must have read at the time) was disingenuous. The only part of this e-mail which rings true is the fact that he referred to the four of them "doing this" and that reflects agreement between the four of them. Both Mr Tomkinson and Mr Clark, given that they no longer worked for Shoreline and indeed had not been involved for many years, had seen very few of the contemporaneous documents when preparing their witness statements or immediately before giving evidence; whilst that was not their fault, this omission did not help the clarity or reliability of their recollection.

58. There is no doubt in my mind that through the meetings on 21 and 27 May and 2 June 2009 Mears and Shoreline, through Messrs Critchley, Lester, Clark and Tomkinson, agreed to the use of the Composite Codes. The oral evidence particularly Mr Critchley and Mr Lester expressly confirms that, the contemporaneous evidence demonstrates clearly that the composite codes were agreed and the CRED document spelt out broadly what was understood and agreed. Mr Lester said, and I accept, that, although the CRED document was not available at the 21 May meeting (because it was drafted shortly thereafter), the substance of what appeared in it was discussed in detail (see for instance Day 2 page 132) and the principles were agreed (Day 2 page 134). The actual CRED document itself spelt out the background difficulties which led to the deployment of the composite codes. Relevant parts of the CRED are as follows:

"Overview

[After setting out historical difficulties]...it became evident that a new streamlined ordering process needed to be established. In the main this meant condensing the bulky SOR [Schedule of Rates/Price List] into an easy to handle schedule for front end users...

Objectives

1. To develop a set of composite codes to allow call takers to raise a job quickly, allocate an appointment, and relieve the necessity for a complex schedule of rates
2. To allow operations team the opportunity to use its expertise to manage all elements of service delivery
3. To reinforce cost certainty on Anite and offer SHP the ability to project and control the repairs budget.

Solution

1. Establish a single code that will allow call takers to identify trade and appointment time, and give a broad description of work
2. Ensure that this single code covers getting an operative to site, affecting minor repairs and establish solutions
3. Additional codes will then be used to complete larger jobs
4. Average additional codes by trade and priority will be included on the original order to cover this and offer SHP greater cost certainty. Unlike the original single code this average rate will be replaced with actual rates once the craft workers are on site
5. This average cost will be reconciled monthly with actual usage figures (see composite rate calculator)...
7. There will be an additional 'Initial Ordering Rate' which will cover a technical visit where required".

59. There were four further pages which were prefaced on Page 3 with the words:

"The way in which the 'Initial Ordering Rate' and the 'Average Additional Work Rate' are to be utilised, and details of what these rates include, are outlined below"

There are then set out in boxes what the ORDR00001 and ORDR00002 rates are for. The former is described as being:

"Emergency call out works other than out of hours service. Receive a call from Employer, attend on site (any trade) and carry out works to make safe and [e]ffect a permanent or temporary repair as appropriate. The rate will include 1 hours labour (this will be from the time the Contractor is notified of the call out until the time that the Contractor leaves site) together with all consumables required. Materials & Equipment will [be] paid extra over the rate at Defined Cost plus the Fee."

The box for this identifies the Initial Ordering Rate as £35.85 to cover both "Emergency" "Urgent" and "Routine" Priority work. There is a similar arrangement set out for the other rate in relation to "Out at Hours" works. There then follows this:

"Each order will be populated with an AAWR [Average Additional Work Rate] to offer cost certainty to SHP. Unlike the IOR [Initial Ordering Rate] this rate will be replaced with actual costs when the

operative is on site. This will ensure that Anite always has either a relatively accurate predicted cost or an actual cost on it is that every individual job."

There then follows a list of AAWRs, 16 in number.

60. There is no doubt that this document and the approach and concept which it contained was agreed to by Messrs Clark and Tomkinson on 27 May and 2 June 2009. It was clear from this document that the Initial Ordering Codes would remain on the system whilst the AAWRs would be taken off and other costs and codes added as called for by what further work was required. The reason for this is that it was by reference to the Initial Ordering Codes that Mears would be paid because, if the Initial Ordering Code for any given job was left on the system, it was by reference to this that Mears would be paid. As this was a value rate, Mears would be paid it and be entitled to keep it because the later six monthly reconciliation would be done by reference to the value and the Price List (or Schedule of Rates). If there was any doubt (and there was not), this was spelt out in clear terms in the flow chart sent to Shoreline on the 9 June 2009, being copied to Messrs Clark, Tomkinson, Macdonald and Bacon, who all knew what was to happen; this was not challenged at all by any of them. The evidence is clear that the Composite Codes were provided largely for the benefit of Shoreline as Mr Critchley confirmed in evidence (Day 2 page 26 transcript). As Mr Critchley also said in evidence, the way matters would work would be that the job would be logged with the Composite Code, usually ORDR00001, and the Mears operative would go to the relevant address and do the work; however, if when he or she got there, it was discovered that more than the anticipated one hour was needed or materials and equipment were called for, that would be recorded and depending on the further work required further sums would be logged and charged. The AAWRs would provide Shoreline with an early indication of what their commitment might be.

61. I accept Mr Lester's evidence that, at the meeting on 21 May 2009, it was said by Mr Tomkinson that there was no need to amend the Contract to take account of the composite codes following a question from Mr Lester as to whether that would be so. Mr Clark could not remember one way or the other whether this was said and therefore was not in a position effectively to challenge the evidence. It was also agreed by all those attending the meeting that the composite codes needed to be based on the original tendered Price List; this had been made clear, probably by Mr Tomkinson, that the composite codes could only be adopted if they could be identified as being based on the tendered rates to avoid there being seen to be any undermining of the tendering process which had been subject to a public procurement process. This was reflected in the composite code rates which were put forward, for instance, with the ORDR00001 rate of £35.85 being one of the rates in the tendered Price List of Mears. As Mr Critchley said in evidence, a large part of Mr Tomkinson's contribution to the meeting on 21 May was about the importance of this code being auditable (Day 2 page 35); Mr Lester also said that Mr Tomkinson with Mr Clark's agreement made it clear that it was important that the composite rates should be "auditable against the schedule of rates" (Day 2 page 136). There would be little point in them being auditable unless they were going to be paid.

62. I have formed the very clear impression that from the three meetings and their context that there was a clear and mutual understanding that Mears would be entitled to be paid on the basis of the Composite Codes for the initial job visits. Whether Mr Tomkinson or Mr Clark used the words: "Shoreline will pay Mears the composite codes" is unclear on the evidence but I am wholly satisfied that there was that clear and mutual understanding based on what was said between them. Mr Lester for instance (Day 2 page 142) did say that something was said by Mr Tomkinson about Mears being paid. Mr Tomkinson was certainly aware that the deployment of the Composite Codes was "a major thing" and that it "was quite an innovative approach in order to get things moving" (Day 3 at page 30)

63. There is no doubt that Shoreline personnel working immediately under Mr Clark added the Composite Codes onto the Shoreline Anite computer system and had done so by about the time the work started. That must have happened because those personnel were instructed to do so and it is not credible that Mr Clark did not know that this was done. It is also not credible, if he was suggesting it (which I believe that he was), that he did not know that month after month Mears was being paid for thousands of jobs on the basis particularly of the main composite code, ORDR00001. He must have known, as must Mr Tomkinson, that the Composite Codes when applied to any individual job would stay on the system and result in payment to Mears. Mr Gothard, a senior technical surveyor working for Shoreline and reporting directly to Mr Clark gave evidence, which I accept, that he spoke to Mr Tomkinson as to whether in effect the Composite Codes should stay on the system and was told not to worry about it (see Day 2 page 156) and his team was instructed by Mr Clark to leave the initial ordering codes on the system. It was and must have been obvious to Shoreline, including Mr Clark and the senior team below him, that the Initial Ordering Rates, in particular ORDR00001, was not only being logged (by them or at least the staff working under them) and that on many thousands of jobs Mears was actually invoicing to and being paid by Shoreline by reference to that code in particular. Mr Gothard assumed that the Composite Codes represented value and were being invoiced by Mears and paid by Shoreline; he accepted in evidence that he knew that the ORDR codes were being invoiced and paid by Shoreline and I have no doubt that Mr Clark in particular knew that as well. He accepted in evidence that it was important what Shoreline paid on an interim basis and that it was important that Shoreline did not overpay. The only other inferences one could draw would be either that Mr Clark was totally incompetent at his job as Service Manager charged with evaluating monthly entitlements for Mears (and I doubt that he was other than competent) or that he delegated total responsibility to others who must have known.

64. In the light of all the evidence of my findings above, I am satisfied to a high degree that there was agreement and therefore a convention between the parties that Mears would be paid against the Composite Codes set out in the CRED and entered onto both parties' computer systems, this being in the context that the Composite Codes represented value or, put another way, a rate equivalent to any of those in the original Price List. The mutual understanding was that Mears would be paid for the work done and entered on those systems and logged under those Composite Codes. This was the parties' shared assumption and for six months both parties acted on it, both by entering thousands of jobs against those Composite Codes and secondly by invoicing and paying accordingly. Both parties therefore relied upon this shared assumption.

65. In my judgment, it would be unjust and unconscionable for Shoreline to deny the convention and common assumption upon which they agreed to operate, at least until the latter part of January 2010 when Shoreline in effect gave notice that it no longer wished to be bound by the convention. This is because the parties organised and ordered their affairs and their business on this project from July 2009 to January 2010 on that basis. It would be almost dishonest for Shoreline to seek to renege from what they agreed to and both parties acted upon. Time and resources were spent by Mears in implementing the Composite Code arrangements and in invoicing on the basis of them. For Mears to seek to re-evaluate and to cost every single one of thousands of jobs would take a vast amount of time and resources and would be an immensely onerous task. Even the more limited and prescriptive re-evaluation which Shoreline did, mostly through the efforts of Mr Gothard, to mark down what Mears had been paid took him a month; he was mostly on a reduction exercise and was not trying to re-create what should have been entered. To re-evaluate the 9,500 jobs, by reference to records and potential witnesses' recollections, would, optimistically, take a minimum of about 3 hours per job,

allowing for some advisory and supervisory checking, which would virtually cost (at a nominal rate of £10 per hour), a sum not dissimilar to the amount which Shoreline has chosen to deduct.

66. There is an added element of unjustness and unconscionability which arises out of the fact that part of the shared common assumption was that there was no need to amend the Contract to reflect the agreement and convention between the parties as to the applicability of the Composite Rates. Whilst it is difficult to know what would have been done in terms of any amendment of the contract, what must be clear by inference is that Mears lost the opportunity to secure amendments to the contract which would have retained its entitlement to be paid by reference to the Composite Code rates at least for the period up to when the Contract was executed.

67. This is not a case in which the "sword" versus the "shield" argument assists Shoreline. The reality is that the estoppel is properly on the facts being relied upon to show that the deduction of some £300,000 by Shoreline was not conscionable or just by reason of the convention between the parties. If that is right, Shoreline is estopped from asserting that it was entitled to make the deduction and, once it is so estopped, the amount deducted should be repaid because there is no remaining good ground to justify its retention.

68. Moving onto estoppel by representation and misrepresentation, MrSpeaight QC made it clear in his closing submissions that, if Mears' case on estoppel by representation failed, "actionable representation could not possibly assist" and that in effect he would not expect the Court then to deal with misrepresentation separately. Mears' pleading in the Re-Amended Particulars of Claim on this is as follows:

"35. SHP is estopped from withholding the Deduction or asserting an entitlement to do so. SHP represented that it promised to pay the sums as correctly calculated under the CRED at the meeting on 27 May 2009. Alternatively SHP represented by its conduct that it would pay the sums as correctly calculated under the CRED. Mears will also rely on the representation set out at paragraph 36 below. Mears suffered the detriment as set out at paragraph 37 to 40 below by relying on the representations".

A raft of further representations were set out in Paragraph 36 which include in effect the convention, the representation that there was no need to amend the Contract in relation to the Composite Codes and the actual payments relating to the Composite Codes made without challenge.

69. It is largely unnecessary to deal with the estoppel by representation because it almost completely overlaps with the estoppel by convention. Although there are distinguishing features between the two types of estoppel, there must be cases, and this is one, where the two are almost interchangeable on the facts. There were representations by word and conduct on the part of Shoreline that it agreed to the deployment of the Composite Codes and to paying Mears for work properly logged against those codes and that the Contract did not need to be amended to reflect such agreement. They were clearly relied upon by both parties with it being unjust and unconscionable for Shoreline to depart from such representations. The representation that there was no need to amend the contract was not a representation either of law or intention but simply a representation that as a matter of practicability this did not need to be done in effect because the parties could rely on their agreement in relation to the Composite Codes. If necessary, I would have found that there was an estoppel by representation here on the grounds pleaded. It is unnecessary to deal separately with the misrepresentation claim.

70. Mears also relied upon a separate cause of action arising out of the trust and partnering language used in the NEC3 conditions. It is essentially pleaded that the Contract should "be interpreted and

applied on the basis of the shared of value and norm of behaviour of partnership" (Paragraph 6C of the Re-Amended Particulars of Claim) and by way of implied term that "any party would not take advantage against the other of the departure by the other from the strict requirements of the contract where the first mentioned party was or ought to have been aware of the departure without warning the other party and affording an opportunity and a reasonable time to the other party to change" (Paragraph 6D). The breach is pleaded at Paragraph 41A and is predicated on the assertion that Shoreline knew by late 2009 that it would be seeking to enforce the strict terms of the Contract (as opposed to payment on Composite Codes) and with that in mind deliberately and consciously encouraged Mears to sign the contract with its entire contract clause. I am not satisfied on the balance of probabilities that there was any such (what could be described as Machiavellian) conduct on the part of Shoreline. That would largely dispose of the complaint. However, I am, further, not satisfied that there would be any such implied term or that the obligation to act in a spirit of mutual trust and cooperation or even in a "partnering way" would prevent either party from relying on any express terms of the contract freely entered into by each party. The "entire agreement" clause does not exclude or limit reliance on any established and effective estoppel, either on its express wording or by way of interpretation.

71. I should address one area of investigation within the trial which arose out of a relatively belated attempt on the part of Shoreline to seek to demonstrate initially by reference to several hundred examples that, by cross-referencing to such work records as there were, it could be demonstrated that Mears would be able to prove its case for contractual payment on the many thousands of invoiced jobs affected by the deductions made in 2010 by Shoreline in relation to the Composite Code payments, the consequence being (so it was suggested) that there was no detrimental reliance. This was never going to be an effective, let alone attractive, way of addressing the points because there is no way that the Court could be confident that the selected examples (eventually about 65) were or were necessarily representative. Amongst other elements of detriment relied upon by Mears in relation to the estoppel assertions, Mears had asserted that it was no longer possible to ascertain the full detail of the individual items of the works affected by the deduction and that it had not kept exact records of every individual item of work carried out stop (see Paragraph 39 of the Re-Amended Particulars of Claim). This was relatively simply denied in Paragraph 53 of the Amended Defence albeit adding that it should be possible to assess the Defined Cost and Fee together with the Total of the Prices. In his third witness statement dated 15 October 2014 Mr Bacon referred to the fact that an expert quantity surveyor had been retained to review the records and explained what the expert had done. This referred to the fact that 254 records were inspected albeit that 219 jobs had a detailed worksheet said to set out the work content (Paragraph 5.18). Paragraph 5.24 stated that the expert confirmed that Mears was likely to have "over 95% of the records available to properly value the jobs in accordance with the Contract". 5% however of the invoiced sum up to January 2010 would still however be a sizeable sum.

72. The reference to an expert was and would prove a serious hurdle for Shoreline because the Court had not given approval for experts as Shoreline and those instructed by them must have been aware. Shoreline's solicitors wrote a few working days before Christmas 2014 to seek to make the most of the expert's argument and work, broadly to the effect that detriment therefore could not be established. Mears' solicitors replied on 21 January 2015 challenging the content and Shoreline's solicitors responded on 2 February 2015 listing some 254 items of work by way of example and threatening a specific disclosure application. Again, this was somewhat optimistic on the part of Shoreline given that the Pre-Trial Review was due on 6 February 2015 with the trial due to follow a few weeks later. Mr Justice Edwards-Stuart then made an order requiring the parties to select 35

items each from the 254 items selected originally by Shoreline with Mears to provide a response on the 70 selected items by 23 February 2015. The items were selected with some overlap, there being left 65 items. Mears responded by way of a witness statement from Mr Pace. Following a discussion on the first day of the trial, I confirmed that the response from Mr Pace in so far as it addressed the 65 items was admissible.

73. Both Mr Bacon and Mr Pace were called and through no fault on their part their cross-examination on this topic was not helpful on the issue. Apart from the fact that they were both giving evidence on a second-hand basis by way of commentary on matters about which they had no direct or personal knowledge, this was partly because the time constraints (not objected to by the parties' legal teams) only enabled very few of the 65 items to be looked at. I have formed the view on the evidence that Mears did not keep as accurate records for the first six months as it would probably have done if the convention on Composite Codes had not been reached, because for instance there was no or less need to do so given that the Composite Codes secured payment irrespective of whether the work took precisely 1 hour and irrespective of what the work was classified as. Mr Pace highlighted a number of uncertainties. The general evidence given not only by Mr Pace but by others and from the type of documentation looked at in terms of such records as there were does demonstrate that the records were not very good if they were to be recording with precision precisely what type of work was done, precisely the number of hours or minutes spent and the plant and materials deployed. If Mears and Shoreline had not agreed on the Composite Codes, it would have been incumbent on Mears in practice to have kept somewhat better records to record the details of the work for the purposes of the Defined Cost (to which neither party was having regard in terms of interim payments on account from July 2009 to January 2010) as well as the correlative Price basis required to effect the six monthly reconciliation of Price against Cost for the purpose of the pain/gain share arrangement. I accept the broad thrust of the evidence about "detriment" given by Messrs Lester and Critchley in this context.

74. An argument was raised by Shoreline somewhat belatedly to the effect that, even if there was an estoppel by convention or representation, it would only go to the part of the sum deducted, namely £46,625.79, and not to the balance of £253,896.24. It is clear why there is no challenge to the lower figure because that part of the deduction simply arose as a result of Shoreline unilaterally re-valuing each of thousands of jobs to which the ORDR00001 rate had been applied on its own by deleting the £35.85 rate and substituting one hour's worth of day work. The higher figure however stems from the removal from thousands of other jobs of the £35.85 rate amount where it was simply one of a number of codes applied to work; this is on the basis that, as it was asserted, the £35.85 was not for any work which was not covered by the other rates. The argument from Shoreline is that the other rates were all inclusive and, in effect, the £35.85 was money for nothing.

75. Reliance was placed by Mr Rowlands QC for Shoreline on the case of **National Westminster Bank plc v Somer International (UK) Ltd**[\[2002\] 1 All ER 198](#) where the bank in question by mistake credited \$76,000 to the Defendant's account and erroneously later indicated that it had come from a customer of the Defendant, M; in reliance on that, the Defendant dispatched goods to the value of some £13,000 to M who later ceased trading and effectively disappeared without paying. It was an estoppel by representation case. The first instance judge and the Court of Appeal resolved that because the Defendant had only suffered detriment in relation to the £13,000 it was not entitled to keep the balance because it will be unconscionable for it to do so (see e.g. Paragraph 48 - Potter LJ). However Potter LJ also said:

"46. Similarly, the point is made that, albeit in *Skyring -v- Greenwood* and *Holt -v- Markham* there was no exact enquiry into the degree to which each defendant had altered his financial position, there was equally no judicial statement that estoppel by representation could not operate pro tanto in an appropriate case. In *Skyring -v- Greenwood*, indeed, it is not clear that there was evidence of any detrimental reliance, the court simply assuming that it had taken place. In *Holt -v- Markham*, while it is clear from the judgment of Warrington LJ at 512 that not all the money had been spent, there is no indication whether the balance which remained was substantial and it is clear that, in addition to mere spending, the defendant had parted with his War Savings Certificates: see per Bankes LJ at 511. It seems to me that those cases do no more than establish that the court will generally think it appropriate to treat the matter broadly and will not require the defendant to demonstrate in detail the precise degree or value of the detriment which he has suffered in circumstances where, as Slade LJ pointed out, "he may find it difficult subsequently to recall and identify retrospectively the nature and extent of commitments undertaken or expenditure incurred as a result of an alteration in his general mode of living". However, it is open to the court, acting on equitable principles, to take the view that some restitution is necessary, albeit the burden upon the defendant of proving the precise extent of his detriment should be a light one. In these circumstances, the court may well have broad regard to, without being bound to follow, the developing lines of the courts' approach in 'change of position' cases. However, the two defences will remain distinct, unless or until the House of Lords rules otherwise."

In similar vein, Peter Gibson LJ said at Paragraph 68:

"I fully accept that the court, when assessing detriment, should not apply too demanding a standard of proof because of the practical difficulties faced by a defendant conducting a business who has been led to believe that the moneys paid by mistake are his (see the remarks of Slade L.J. in *Howlett* at pp. 621, 2)..."

The **National Westminster** case, like others, was about money paid into a bank account by mistake such that it is a windfall in the hands of the account holder.

76. I can and do accept that the concepts of fairness and unconscionability are important facets of estoppel, both by convention and by representation. It must also be the case that one needs to analyse the impact and influence of the convention or representation as the case may be and, to the extent that there has been reliance. The limited consideration in the evidence relating to the 65 items was in the context of those jobs on which only the £35.85 Code item was claimed for. There was no evidence directly from Shoreline that the remainder of the deduction, accounting for the lion's share of £253,896.24, was justified. There simply seems to have been an assumption by Shoreline in the first half of 2010 that the deployment of the £35.85 rate on jobs for which other codes were also deployed meant that the £35.85 charged was superfluous and entirely duplicated by the other coded items relating to those jobs. There was actually little or no evidence to support that assumption as being right. In reality, a number of those jobs, because they exceeded £150 in total, would have been examined by Shoreline personnel before payment was authorised in the July 2009 to January 2010 period without demur and without them raising even the possibility of there being any such duplication. Furthermore, there was positive evidence from Mears to the effect that there were proper explanations as to why an individual job would have more than the £35.85. For instance, Mr Critchley said in unchallenged evidence that where the jobs required materials and equipment to be used this would justify additional charges being identified and payable because the £35.85 expressly did not cover materials and equipment. The £35.85 was in effect to a large extent a callout charge which covered relatively minor repairs such as replacing a washer on a tap (for which there would be no

material charge because it was treated simply as a consumable item); there would be nothing wrong to log work, materials and equipment over and above what was covered by the £35.85 rate. I have no reason to doubt the broad accuracy of the information recorded on both parties' computer systems which identified that not only was the work covered by the £35.85 done but also other work, materials and equipment not envisaged or covered by that rate was done. It was auditable and it was at least to some extent audited from time to time. There is some broad statistical evidence in support of Mears to the effect that, after the ORDR rates were abandoned, the average payment per job substantially exceeded the average when the ORDR rates were being used, which would suggest that if anything there was an under-allowance flowing from the application of the ORDR rates rather than the opposite. The whole argument on the £253,896.24 figure depends upon an assumption made by Shoreline and its legal team which is that the work to which the £35.85 relates was the same as, covered by or subsumed within the other rates entered for thousands of given jobs. There is no factual basis for that assumption and indeed there is reliable evidence which undermines and contradicts it. This is not a case which is anywhere near the **Natural Westminster** windfall type case.

77. Mears also seeks to argue that, because the deduction of some £300,000, when made, was not made by the Service Manager, as such, it was not a valid deduction and, therefore, it should be repaid. Whilst there is no reliable evidence that it was Mr Clark as Service Manager who formally made the deduction, it would be an odd state of affairs if the Contract could be interpreted, unless very clear indeed, to the effect that Mears would be entitled to retain money paid to it to which it was simply not entitled. It is clear, at least, that Mr Clark went along with and approved the deduction, albeit that it was in a letter from Mr Bacon that the deduction was assessed and that it was Mr Bacon who worked out what the deduction should be, although much of the work appears to have been done by Mr Gothard. In my judgment, this (very much) alternative argument is unsound. It is clear that the Court under the dispute resolution clause has wide enough powers to overcome any omission on the part of the Service Manager; if the deduction was otherwise legitimate, there would be no loss suffered by Mears because it would simply have been crediting money to which it was not entitled in any event. It is an irrelevant argument in the light of my findings about relating to estoppel.

78. There was in the Re-Amended Particulars of Claim an additional claim to some £26,000 which has been expressly abandoned by Mears and I therefore make no further comment about it.

Decision

79. There was an effective estoppel, most obviously by convention but also by representation, such that it would be and was unjust and unconscionable for Shoreline to make and retain the deduction of £300,522.03. It is unnecessary to make a finding in respect of the misrepresentation complaint. The other alternative bases of claim put forward by Mears are unsound.

80. There should be judgment in favour of Mears against Shoreline in the sum of £300,522.03.