Neutral Citation Number: [2013] EWHC 3237 (Ch)

Case No: 7315 of 2013

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

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

Date: 25 October 2013

Before :

MR. RICHARD SNOWDEN QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

(1) CLOSEGATE HOTEL DEVELOPMENT (DURHAM) LIMITED **(2) CLOSEGATE (DURHAM No.2) LTD**	**Applicants**
- and -	
(1) JOSEPH McLEAN **(2) DAVID DUNCKLEY** **(3) BARCLAYS BANK PLC**	**Respondents**

- -

Mark Phillips QC (instructed by Stewarts Law LLP) for the Applicants
Anthony Trace QC and Adam Smith (instructed by Speechly Bircham LLP)
for the First and Second Respondents
Roger Masefield QC (instructed by Addleshaw Goddard LLP) for the Third Respondent

Hearing date: 21 October 2013

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Approved Judgment

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

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MR. RICHARD SNOWDEN QC

RICHARD SNOWDEN QC :

Introduction

1. There is before me an application dated 16 October 2013 ("the Application") by Closegate Hotel Development (Durham) Limited and Closegate (Durham No.2) Ltd ("the Companies"). The Application seeks a Declaration that the purported appointment of Mr. Joseph McLean and Mr. David Dunckley of Grant Thornton (UK) LLP ("the Administrators") as joint administrators of each of the Companies by Barclays Bank plc ("the Bank") was invalid and of no effect.

2. The Administrators were purportedly appointed on 11 October 2013 by the Bank as the holder of qualifying floating charges in respect of the property of the Companies pursuant to paragraph 14 of Schedule B1 to the Insolvency Act 1986. The Companies challenge the validity of those appointments on the basis that paragraph 16 of Schedule B1 to the 1986 Act prohibits the appointment of an administrator while a floating charge is not enforceable. The Companies contend that as at 11 October 2013 the floating charges were not enforceable because the Bank was estopped from making an immediate demand for repayment of the monies owing to it or from exercising any of the rights under its security.

3. The Application is supported by witness statements from the two directors of the Companies, Ms. Geraldine Hunt and Mr. Robert Bishop ("the directors"). Mr. Phillips QC, who appears for the Companies, seeks directions including a tight timetable for the filing of evidence in response from the Bank, disclosure and an expedited trial at which the witnesses can be cross-examined. Mr. Trace QC, who appears for the Administrators and Mr. Masefield QC, who appears for the Bank, oppose the Application and invite me to dispose of it summarily pursuant to CPR 24.2 on the basis that the Companies have no real prospect of establishing that there was an estoppel preventing the Bank from making a demand for the monies owing and appointing the Administrators.

The standing of the Companies to make the Application

4. Before turning to the facts and the question of estoppel, I should deal with a preliminary objection raised by Mr. Trace as to the standing of the Companies to make the Application. Mr Trace submitted that the appointment of the Administrators deprived the directors of the authority to cause the Companies to challenge the appointment of the Administrators; or that it did so unless the directors were prepared to offer an indemnity to the Companies in respect of the costs of the Application.

5. The basis for Mr. Trace's first argument was paragraph 64 of Schedule B1 to the Insolvency Act 1986 which provides that an officer of a company in administration may not exercise a management power without the consent of the administrator. 'Management power' is defined as a power which could be exercised so as to interfere with the exercise of the administrator's powers. Mr. Trace submitted that causing the Companies to challenge the appointment of the Administrators necessarily interfered with the exercise of the Administrators' powers.

6. I do not accept that submission. On the basic point of construction of Schedule B1, in common with Lord Glennie in the Scottish case of Stephen, Petitioner [2012] BCC

537, I think that the concept of a 'management power' as defined in paragraph 64 is primarily intended to catch powers which, if exercised by the directors, could impede the exercise of similar powers by the administrators. I do not think that paragraph 64 is intended to catch a power on the part of the directors to cause the company to make an application challenging the logically prior question of whether the administrators have any powers to exercise at all.

7. I also note, as did Lord Glennie, that there is long-standing authority to the effect that even after the appointment of a provisional liquidators, the board of directors of a company retains a residuary power to instruct lawyers to challenge the appointment of the provisional liquidator, to oppose the petition and, if a winding up order is made, to appeal against the making of that order: see In re Union Accident Insurance Co Limited [1972] 1 WLR 640. There are also numerous reported cases in which the directors of a company have caused the company to take proceedings to challenge the validity of the appointment of a receiver: see e.g. RA Cripps & Son Ltd v. Wickenden [1973] 1 WLR 944 and Sheppard & Cooper Ltd v. TSB Bank plc (No.2) [1996] BCC 965. I see no reason in principle why the position should be any different as regards the appointment of an administrator by a qualifying charge-holder under paragraph 14 of Schedule B1.

8. It would, moreover, be to my mind an anomalous result if it were within the authority of the directors to cause the company to resist an application by a qualifying charge-holder to the court for the appointment of an administrator under paragraph 10 of Schedule B1, but that it was outside their authority to cause the company to challenge the validity of an appointment under paragraph 14 of Schedule B1.

9. Mr. Trace's second point as regards the provision of an indemnity in respect of costs raises more complex issues. Mr. Trace's submissions were based upon dicta of Shaw LJ in Newhart Developments Ltd v Co-operative Commercial Bank Ltd [1978] QB 814 at 819 and 821, and of Chadwick LJ in Sutton v GE Capital Commercial Finance Ltd [2004] 2 BCLC 662 at [45]. Those cases both dealt with the question of whether directors could cause a company to bring proceedings against a third party after the appointment of a receiver.

10. In Newhart, Shaw LJ said, at page 821,

> "What, of course, the directors cannot do, and to this extent their powers are inhibited, is to dispose of the assets within the debenture charge without the assent or concurrence of the receiver, for it is his function to deal with the assets in the first place so as to provide the means of paying off the debenture holders' claims. But where there is a right of action which the board (though not the receiver) would wish to pursue, it does not seem to me that the rights or function of the receiver are affected if the company is indemnified against any liability for costs (as here). I see no principle of law or expediency which precludes the directors of a company, as a duly constituted board (and it is not suggested here that they were not a duly constituted board when they took the step of instituting this action) from seeking to enforce the claim, however ill-founded it may be, provided only, of course, that nothing in the course

> of the proceedings which they institute is going in any way to threaten the interests of the debenture holders."

11. In Sutton, Chadwick LJ referred to Newhart and added, at [51],

> "We should make it clear that nothing that we have said should be taken to suggest that the costs of bringing the APL action should fall on assets which are charged to GE. It is, we suspect, a necessary feature of cases, such as this — where all the assets of the company are charged to the debenture holder, who does not consent to the action being brought — that the director will have to find outside funds. Further, nothing that we have said should be taken to suggest that the defendant would not be entitled to seek an order that the claimant company provide, from outside funds, security for its (the defendant's) costs. But those considerations do not lead to the conclusion that the action is not properly brought."

12. In my view, neither of these cases is authority for the proposition that the directors of a company lack authority to cause a company to commence proceedings against a third party after the appointment of a receiver, or that the existence of such authority is conditional upon an indemnity for costs being provided. Indeed, the reference to an indemnity may not be entirely apposite. As explained by Chadwick LJ, where all of the assets of a company are caught by a floating charge, the position is that as a practical matter the directors who cause a company to bring such proceedings are likely to have to find outside funds to provide assurance to the solicitors that they instruct to act on behalf of the company that their fees and disbursements will be paid from some source other than the charged assets (which will be in the hands of the receiver). Further, the defendant to such proceedings may be entitled to apply for security for his costs of the action on the footing that the charged assets in the hands of the receiver will not be available to meet any adverse costs order against the company.

13. It seems to me that similar considerations might apply in the case of an administration where the administrator is likely to be unwilling to agree to charged assets being used to fund an action in the name of the company of which he does not approve. I also cannot immediately see why payment of the solicitors instructed by the directors rather than by the administrators should qualify for payment as an administration expense under rule 2.67 of the Insolvency Rules 1986 or why a court could or should direct that any order for costs against the company in favour of the defendant must be paid as an administration expense.

14. As I have indicated, the observations of Shaw LJ and Chadwick LJ to which I have referred were made in the context of claims being brought in the name of a company against third parties. In such cases there may well be time for the third party to seek to protect its own position by seeking the provision of security for costs before substantial costs are incurred in defending the action. That may be impracticable where the proceedings in the name of the company are brought on urgently. That is

the case with the present Application, where there was no application by any of the Respondents for security for costs.

15. In such a situation, it seems to me that the respondents to an application such as the present may be thrown back upon the jurisdiction of the court to make third party costs orders against the directors of the applicant company under section 51 of the Senior Courts Act 1981 in an appropriate case. An analogy may be found in cases in which directors who improperly cause a company to resist the appointment of liquidators or provisional liquidators have been ordered to pay the costs of such resistance personally: see e.g. Gamlestaden plc v Brackland Magazines Limited [1993] BCC 194. I making those general comments I emphasise that I am not passing any judgment on the facts of the instant case.

16. In the result on this point, I conclude that the directors do have authority to cause the Companies to challenge the appointment of the Administrators, and that such authority is not dependent upon the provision by them of an indemnity for costs.

The facts

17. I now turn to the facts and to the Companies' case on estoppel. I take the essential facts from the witness statement of Mr. Bishop and the documents exhibited to that statement. Purely for the purposes of their contention that I should dispose of the Application summarily, I was invited by Mr. Trace and Mr. Masefield to accept the facts contained in that statement as true.

18. The Companies are the developers of leasehold land at Riverside, Durham upon which a Radisson SAS hotel has been constructed. That hotel is now operated pursuant to a management agreement by a company called Rezidor Hotels UK Limited.

19. The Bank was the provider of finance for the development, which funding was secured by floating charges granted by the two Companies. At the time of appointment of the Administrators the debt owed to the Bank was said to be in the region of £32.8 million.

20. The relationship between the Companies and the Bank has not been an easy one. The original finance took a lengthy period to negotiate and there was a refinancing in 2007/2008. That led to complaints being made by the Companies against the Bank, and proceedings were issued in this Division by the Companies against the Bank and certain of its group companies on 2 November 2011 under claim number HC11/C03826 ("the High Court Claim"). In those proceedings, the Companies claimed damages in excess of £57 million as a result, among other things, of alleged misconduct in connection with the development and fit out of the hotel by a director appointed by the Bank. The Bank served its defence to the Companies' claim in February 2012, and the Companies served a Reply in April 2012. A case management conference was ordered to take place in September 2012.

21. In parallel to the pursuit of the High Court Claim, in early 2012 the Companies made overtures to the Bank with a view to settling the debt owed to the Bank and the High Court Claim. On 26 June 2012 the Bank responded favourably, indicating that it was "willing to take part in discussions with the aim of reaching a solution to the current

issues". Simultaneously the Bank wrote a second letter dealing with the High Court Claim, and suggesting that "it would be sensible and beneficial for all parties to agree a stay of the litigation whilst [the] discussions take place". That proposal led to the parties agreeing a formal stay of the High Court Claim for 30 days which was embodied in a consent order of 28 August 2012.

22. Thereafter discussions took place between representatives of the Bank and the Companies. In general terms, the Companies made a proposal to the Bank and to the landlord of the hotel for the acquisition of the freehold and leasehold interests in the hotel free of the Bank's security for the payment of a capital sum. The Bank indicated by a letter of 27 September 2012 that if the Companies were to provide confirmation that the indicative offer of finance that it had received to fund this settlement would result in a net payment of over £18 million then it would "treat the offer seriously" and would "seek to hold discussions with [the landlord] in good faith" to determine if the net proceeds could be apportioned between the Bank and the landlord in a way that was mutually acceptable to them. The Bank's letter concluded by stating that, "We can, however, make no comment as to whether such discussions would result in agreement being reached".

23. Whilst the Companies were considering their next move, a further order was made on 16 October 2012 staying the High Court Action until 9 November 2012. That order was expressly subject to the parties having a right to terminate the stay on three business days' notice.

24. The Companies reverted to the Bank with an offer of settlement for a net amount in excess of £18 million on 19 October 2012. The Bank responded on 6 November 2012 to the effect that it would meet with the landlord to discuss apportionment, and suggested a further stay of the High Court Claim for a month. The Companies responded on 9 November 2012 that they were agreeable to a stay until 30 November 2012, subject as before to termination on three working days' notice. The Companies indicated that this would be a final extension and concluded,

> "Certainly, if we do not have a deal finalised and completed by the end of this month, our lawyers will be returning to the High Court at the beginning of December to seek an early CMC and Disclosure".

25. The Bank responded on 15 November 2012 commenting on the Companies' proposals and indicating that it was continuing to engage with the landlord. The letter stated that,

> "We can make no assurance that those discussions will provide a favourable outcome to the Companies; however, we remain open to finding an amicable solution to the dispute between [the Bank] and [the Companies] without having to have recourse to taking further steps in the litigation."

26. As events transpired, a deal was not concluded by the end of November 2012. Some confusion then ensued. On 3 December 2012 a further order staying the High Court Claim was made which purported to grant a stay until 9 November 2012 [sic], terminable on three business days' notice. On the same day, Mr. Bishop emailed the Bank indicating that in his view,

> "...no real progress has been made by you and [the landlord] and we can see no benefit in extending the stay further...We have therefore instructed our lawyers to write accordingly to [the Bank's solicitors] this week...."

27. The Bank responded on 4 December 2012 that it remained open to finding a solution without recourse to taking further steps in the litigation and suggesting a further meeting between the parties. That drew a combative response from Mr. Bishop on 7 December 2012, but he agreed to what he described as "one final meeting" and added,

> "We will not, however, agree any further stay of the litigation to accommodate such meeting as this has been delayed long enough."

28. The supposed "final meeting" took place between the parties on 13 December 2012. Some progress seems to have been made, because on 8 January 2013, a further order was made by consent staying the High Court Claim until 31 January 2013, such stay again to be determinable on the giving of three business days' notice by either party. On 15 January 2013 the Companies sent a revised offer to the Bank and indicated that they had a confirmed offer of finance from The Co-operative Bank.

29. On 25 January 2013 the Bank responded to the revised offer in some detail and concluded,

> "We can make no assurance that the on-going discussions relating to the settlement will provide an outcome favourable to [the Companies]; however, we remain open to progress this settlement proposal without recourse to taking further steps in litigation. The completion of [a] settlement will be [in] full and final settlement of all claims (existing and future) against [the Bank] and [the landlord]. <u>In the meantime, all rights are reserved</u>."
>
> (my emphasis)

30. A further meeting was held between the parties on 30 January 2013. That meeting was attended for the first time by solicitors for the parties who had not been responsible for the conduct of the High Court Claim and whose role would be to finalise and document any settlement. Mr. Bishop's account of that meeting in his witness statement was as follows:

> "Stevan Healy for the Bank emphasised the fact that this was likely to be the last meeting he would need to attend and said that the matter was now "*commercial, not litigation*" and we understood this to mean that good faith commercial negotiations would continue based upon the principle terms [sic] that had now been agreed, and on the basis that any litigation, i.e. actions that had been threatened previously by either side (enforcement by the Bank and the Companies prosecuting their claims) would not be pursued whilst those negotiations were ongoing.
>
> My notes of the meeting confirm that the Bank confirmed its good intentions and [the Companies' solicitors'] notes confirm that Stevan Healy on behalf of the Bank emphasised that "*transparency*" was "*key*"."

31. The Bank followed the meeting up with an email of action points, which, among other things, indicated that the respective litigation solicitors would be contacting each other to discuss a proposed extension of the stay of the High Court Claim.

32. Correspondence between the parties then continued. For its part, each communication from the Bank repeated verbatim the paragraph containing a reservation of rights which had first been included in its letter of 25 January 2013 as set out in paragraph 29 above. A series of further consent orders were also made in the High Court Claim. Each stay was for a limited period, the last of which expired on 30 April 2013, and each order expressly provided that the stay could be determined by the parties on the giving of three business days' notice.

33. After 30 April 2013, no further stay was obtained. The absence of any stay was raised in correspondence between litigation solicitors acting for the parties in early August. In an email dated 6 August 2013, the solicitors for the Companies stated,

> "Given that the claim has not progressed following expiry of the last stay, it may be simpler to leave matters as they stand whilst discussions are ongoing. Having said that, if your client would prefer to have a formal stay in place, my clients would be agreeable to [a] further stay until 30 September 2013."

The response of the Bank's solicitors on 7 August 2013 was that the Bank "was prepared to leave matters as they currently stand."

34. Correspondence continued between the lawyers instructed by the parties over the summer in an endeavour to finalise the terms of settlement. However, reports emerged concerning financial difficulties that were being encountered by The Co-operative Bank, and that institution withdrew its offer of finance to the Companies in late August. On 4 September 2013 the solicitor instructed by the Companies emailed the Bank's solicitors to notify them of this development as follows:

> "Just by way of update, it now seems probable that despite their initial reassurances regarding the facility, the Co-op are unlikely to do the deal my clients were originally offered.
>
> As advised previously, my client has been pursuing other funders in case this situation arose and their financial adviser is currently in negotiations with several alternative funders and we met at the hotel last week to discuss the various funding options and in particular, their likely cost.
>
> As soon as we have a firm offer my clients are comfortable with, I will be in touch with you both to hopefully progress matters."

35. By early October, the Companies had contacted a number of institutions regarding finance for the settlement, and they had received two indicative offers of finance from potential funders. They did not, however, communicate this to the Bank and there was no communication between the parties between the email of 4 September 2013 and 11 October 2013.

36. Shortly after 9 a.m. on 11 October 2013 the Bank emailed the Companies referring to the negotiations that had taken place since 2012 and the communication from the Companies' solicitors on 4 September 2013. The Bank referred to the previous negotiations and asserted that,

> "...the discussions that were taking place had come to an end at the latest on 4 September 2013, but in reality several weeks before then given that progress had stalled and no material information was forthcoming".

The Bank's email then indicated that "after long deliberation" it had determined to make demand on the Companies for the monies owing and indicated that formal demands would be delivered to the Companies' registered office (at its solicitors) the same day.

37. The Companies' solicitors wrote a lengthy letter of complaint to the Bank within hours, objecting to the Bank's demands for repayment on the basis that they were an illegitimate attempt to frustrate the Companies' High Court Claims. The letter did not suggest that there was any understanding or estoppel preventing the Bank from seeking to call in its loans or preventing it from enforcing its security.

38. As foreshadowed in its email, the Bank made formal demands for repayment of the debt, and in the absence of any payment, the Bank appointed the Administrators later on 11 October. Notices of appointment were filed at the Leeds District Registry at 2 p.m.

39. On 12 October 2013, the Companies' solicitors wrote to the Administrators indicating that they had taken advice from Mr. Phillips QC and that they disputed the validity of the appointment of the Administrators. The letter outlined some of the events that I

have set out above; it indicated that the Companies had expended significant sums in the negotiations with The Co-operative Bank; and after referring to the communications between solicitors regarding the stay in August, it concluded that,

> "(1) It was understood that the informal stay would last until at least 30 September 2013 and there was no condition with respect to the continuance of that stay.
>
> (2) The Companies had told the Bank that negotiations were continuing and that any firm offer would be communicated.
>
> (3) The Bank had not responded.
>
> (4) In reliance, the Companies had continued to negotiate in good faith in the reasonable expectation that the Bank would not enforce without reasonable notice to the Companies, which, in the circumstances required reasonable time to conclude negotiations then underway."

On this basis the letter asserted that the Bank had no right to enforce its security on 11 October 2013 and that the appointment of the Administrators was invalid,

> "because whatever its strict legal rights, the Bank was estopped from enforcing those rights without first giving reasonable notice as described above."

40. Apart from a narration of the correspondence and events to which I have referred above, Mr. Bishops' witness statement contains a blend of evidence and submission. However, the thrust of his evidence as to the Companies' understanding of the position can be seen from two short extracts.

41. First, after referring to the letter from the Bank dated 15 November 2012 to which I have referred at paragraph 25 above, Mr. Bishop suggested that the Banks' wording,

> "..led the Companies to consider that the Bank was, at all times, proceeding in good faith, on the basis of a mutual suspension of any action to seek to enforce any formal rights."

42. Further, after giving his account of the meeting on 30 January 2013 to which I have referred in paragraph 30 above, Mr. Bishop commented,

> "The Bank's approach both prior to the meeting, in withdrawing its threat to apply to strike out the High Court Claim, in pursuing a stay and inviting the Companies to negotiate, its conduct in encouraging the Companies to pursue more detailed information in relation to replacement funders

> (including the Co-op) and its comments at the meeting, all led me to conclude that the negotiations were being conducted on a good faith basis and that, should the situation change, the Bank would give the Companies reasonable notice in order to conclude any negotiations then in hand.
>
> At the very latest from the date of this meeting, the Companies also understood (and further committed ourselves) to the negotiations and, and both I and Mrs. Hunt have spent considerable time (I would estimate most days most weeks) and the Companies have spent considerable funds (I would estimate in excess of £700,000) progressing the claim and negotiations."

The Companies' Case

43. In his skeleton argument, Mr. Phillips summarised the Companies' case as follows:

> "It is the Companies' position that there was a mutual understanding between the Bank and the Companies (which the stays of the [High Court Claim] reflected) that the Bank would not enforce its security or take any other formal action against the Companies without reasonable notice. The understanding merely suspended the rights of the Bank for such time as would have allowed any negotiations in hand with a potential funder to be concluded either to a firm offer or a refusal."

44. In oral argument, Mr. Phillips refined his submissions. He contended that there was a promissory estoppel arising because the Companies reasonably understood the communications from the Bank and the course of conduct between them to be a representation that neither side should take any action whilst negotiations between them were continuing. He further submitted that the representation was that this state of affairs would continue until either it was apparent that the negotiations had terminated, or the Bank gave reasonable notice to terminate the negotiations. Mr. Phillips accepted that the length of the period of reasonable notice would have been open to debate, but submitted that the Bank was obliged to give sufficient time for the Company to conclude its negotiations with potential funders.

45. Mr. Phillips submitted that this understanding on the part of the Companies was a reasonable conclusion to draw from what the Bank had said and done, and that this was sufficient to pass any requirement that a representation should be "clear and unequivocal" so as to found a promissory estoppel. He contended that Companies had relied upon such understanding of what the Bank had said and done to their detriment by expending time and money on negotiations with the Bank and potential funders, and by agreeing to the stays of the High Court Claim.

The Respondents' case

46. For the Respondents, Mr. Trace and Mr. Masefield submitted that it was settled law that a promissory estoppel can only arise where there is a clear and unequivocal representation upon which the representee relies to his detriment. They submitted that even taking the evidence of the Companies at its highest, none of the statements made by the Bank could conceivably have amounted to a representation or promise by the Bank of any sort concerning the future exercise of its right to demand repayment of its loan or the enforcement of its security; nor could such a promise relating to the Bank's loan and security be inferred from the stated willingness of the Bank to negotiate with the Companies, or its agreement to the various stays of the High Court Claim. Still less, they contended, was there a representation that clearly and unequivocally established the very particular regime contended for by the Companies.

47. Mr. Trace and Mr. Masefield also submitted that since the basis of a promissory estoppel is a statement made by one party to the other, any statement upon which the Companies could conceivably have relied must already have been known to them, and so there would be nothing to be gained by any process of disclosure of the Bank's internal documents or cross-examination of the Bank's officials as to its internal deliberations or intentions. They therefore contended that I can and should decide this matter summarily on the basis of the materials now before me.

The law on promissory estoppel

48. The law as regards promissory estoppel can be traced back to cases such as Hughes v Metropolitan Railway (1877) 2 App. Cas. 439. In that case, a tenant to whom a notice to repair had been given wrote to the landlord proposing to sell its interest in the premises and stating that "we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement such as we suggest". The landlord responded by a letter which the House of Lords interpreted as assenting to the suggestion that the repairs were to be deferred until it could be ascertained whether an agreement could be made for the purchase. The negotiations came to an end and the issue arose as to whether any of the time during which the negotiations had been continuing should be counted towards the six month period for the carrying out of the repairs under the notice to repair.

49. The House of Lords held that the landlord was estopped from contending that the time should be counted. Lord Cairns LC observed at page 448,

> "...it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

50. I would observe that though couched in relatively general terms, Lord Cairns LC's comments were made against the background of a finding that there was a clear statement by the tenant in correspondence as to his intentions as regards the making of repairs, and an assent to that proposal by the landlord.

51. The importance of precision in the communications between the parties said to give rise to a promissory estoppel has been apparent in subsequent cases. In Low v Bouverie [1891] 3 Ch 82, Bowen LJ said (at page 106) that:

> "an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."

Kay LJ said (at page 113) that:

> "where no fraud is alleged, it is essential to shew that the statement was of such a nature that it would have misled any reasonable man, and that the Plaintiff was in fact misled by it."

52. In Woodhouse AC Israel Cocoa v Nigerian Produce Marketing [1972] AC 741, Lord Hailsham LC gave the leading speech, which was concurred in by Viscount Dilhorne and Lord Pearson. Lord Hailsham LC reiterated the proposition derived from Low v Bouverie that in order to give rise to an estoppel, a representation should be clear and unequivocal, and he indicated that if a representation was not made in such a form, it would not matter that the representee had misconstrued it and relied upon it: see [1972] AC 741 at 755. Lord Hailsham LC also addressed the dictum of Bowen LJ in Low v Bouverie cited above, and said,

> "I am satisfied that, in the second sentence of the above quotation, the meaning is to exclude far-fetched or strained, but still possible, interpretations, whilst still insisting on a sufficient precision and freedom from ambiguity to ensure that the representation will (not may) be reasonably understood in the particular sense required. I do not regard this second sentence as any authority for general qualification of the first. On the contrary, the first sentence governs the second and contains the very proposition for which Low v. Bouverie is rightly cited as an authority."

53. Mr. Phillips drew my attention to Lord Cross's speech (with which Viscount Dilhorne also agreed) which, he suggested, adopted a view of Low v Bouverie that was more favourable to a representee. Lord Cross referred (at page 768) to a decision of

McNair J in Marquess of Bute v Barclays Bank [1955] 1 QB 202 in which McNair J had said that to found an estoppel a representation must be clear and unequivocal "or at least reasonably understood to be clear and unequivocal", and continued,

> "In the course of the argument in this case there was considerable discussion as to what Bowen L.J. and McNair J. may have meant. How, it was said, could a statement which was 'precise and unambiguous' be open to more than one construction and how could someone reasonably understand a statement to be clear and unequivocal which was in fact not clear and unequivocal? But though the language used may be open to criticism the thought behind it is not, to my mind, very obscure. Although words used have only one 'true' construction - namely, that which would be placed on them by the court if called upon to decide their meaning - there are different types and shades of ambiguity. Sometimes the ambiguity of the statement may be obvious to anyone but sometimes it may arise from facts not known to the representee. What, I conceive, Bowen L.J. and McNair J. were saying - rightly or wrongly - was that the question to ask was whether the representee was justified in having no doubt that the words meant what he took them to mean. But one cannot decide questions of this sort without regard to the relationship of the parties for that may be such that the representor ought to be saddled with the risk of the representee putting the best interpretation which he can on language which is undoubtedly equivocal."

54. Lord Salmon added to the debate. He said, at page 771,

> "It is reasonably easy to draft a letter containing a representation, the true meaning of which is clear and unequivocal. I would classify such a letter as 'alpha.' It is, however, quite another matter to be able to draft a letter, or anything else, which is not only clear and unequivocal but is also incapable of having extracted from it some possible meaning other than its true meaning. I would classify such a letter, if it exists, as 'alpha plus.' As I understand Bowen L.J.'s judgment, all he was saying was that the language upon which an estoppel is founded must comply with what I call the 'alpha' standard but that it need not come up to 'alpha plus.'"

55. These authorities were recently considered by the Court of Appeal in Sabrina Soon Duck Park Kim v Chasewood Park Residents Limited [2013] EWCA Civ 239. Patten LJ did not in terms deal with the difference between Lord Hailsham LC and Lord Cross, but acknowledged that there were conceptual issues. He said, at [23],

> "There is no doubt that in order to found a promissory estoppel (in the same way as any other estoppel based on a representation of fact) the representation or promise must be clear and unambiguous. But this principle raises a number of subsidiary questions. Does it mean that the estoppel cannot arise unless there is only one possible meaning of the words used or is the existence of other possible (but perhaps less probable) meanings not fatal to the creation of an estoppel where the Court can say that it was reasonable for the representee to have interpreted the words used in the way he did? There is also an issue about the test to be adopted by the Court. Few, if any, statements are not capable of being interpreted in more than one way. The Court's usual role in construing, for example, a contract is to arrive at the legally correct meaning of the words. Their construction is a matter of law and the Court's function is to resolve any ambiguities in reaching its conclusion. But it is arguable that in the case of estoppel it should not go any further than to identify the existence of any real ambiguities in the language. If the statement is open to more than one reasonable interpretation (one of which is fatal to the estoppel defence) then the representee was not entitled to rely on what was said without further clarification and there is no basis for an estoppel."

56. Patten LJ then observed that the courts have tended to a relatively strict application of the requirement that a representation should be unambiguous. He referred to Lord Hailsham LC's explanation of Bowen LJ's dictum rather than that of Lord Cross, before concluding, on the facts, that it would not have been reasonable for the claimant in that case to rely upon the representation in the manner for which she had contended.

57. On the basis of these decisions, it seems to me that the weight of authority is to the effect that for a plea of promissory estoppel to succeed, there must have been a clear and unequivocal statement; and that if ambiguous words were used which could reasonably be interpreted in several ways (one of which would not support the alleged estoppel) then those words will not found an estoppel unless the representee seeks and obtains clarification of the statement.

Analysis

58. As a preliminary matter, I agree with Mr. Trace and Mr. Masefield that there is no reason why I should decline to adjudicate upon this matter summarily. The essence of a promissory estoppel is the identification of a clear statement made by one party to the other upon which the latter relies to his detriment. It is inherent in that formulation that the party asserting the estoppel must know of the terms of the statement made to him and how he understood it. To the extent that the argument is advanced on the basis of written communications, the documents will speak for themselves, and if the terms of any oral communication are not disputed, then such an argument cannot be assisted by an inquiry into the internal thoughts and deliberations of the representor.

59. It is also clear that the court should not decline to determine a matter summarily merely because of an unparticularised suggestion that something might turn up on disclosure: ICI Chemicals & Polymers v TTE Training [2007] EWCA Civ 725. In this regard, I invited Mr. Phillips at the start of the hearing to identify any particular issues upon which he contended that disclosure or cross-examination was necessary. In the event he identified only the question of what had been said at the meeting on 30 January 2013. But I consider that this point is met by Mr. Trace and Mr. Masefield inviting me to accept as accurate Mr. Bishop's account of what was said.

60. At the start of my analysis, I would observe that this is not a case in which the alleged "clear and unequivocal" statement said to give rise to an estoppel is to be found in the express terms of any single document or oral statement. On the Companies' case, their understanding is said to have been derived by inference from a combination of phrases used in various letters from the Bank, the facts and conduct of negotiations between the parties, and some words uttered at a meeting. It is also not obvious precisely when, in the train of events that I have outlined, the Companies contend that the estoppel against the Bank actually arose.

61. Whilst I do not suggest that it is conceptually impossible for a promissory estoppel to arise by implication from a variety of sources as the Companies contend, I think that the requirement for precision apparent from the authorities to which I have referred means that the court must scrutinise such a claim with particular caution.

62. The evidence demonstrates that from its first letter of 26 June 2012, the Bank indicated a willingness to engage in negotiations with the Companies with the aim, but no assurance whatsoever, that a settlement should be achieved of all issues between them. That would include the indebtedness of the Companies to the Bank as well as the Companies' High Court Claim against the Bank. However, I do not think that the Bank's indication that it was open to participating in such discussions, which was repeated in its letters of 27 September 2012 and 15 November 2012, carried any implication, still less any clear and unequivocal representation, that the Bank was agreeing to a suspension of its rights against the Companies.

63. Moreover, whilst those who were involved in such negotiations on the part of the Companies might have assumed that the Bank would not call in its loan or seek to enforce its security whilst the negotiations were on-going, the Bank's participation in such negotiations would not, of itself, provide any legal basis for a restriction preventing the Bank from exercising its strict legal rights at any time. Companies in financial difficulty frequently enter into settlement or restructuring discussions with their creditors, and it would be a surprising consequence if participation in such discussions alone had the result that the creditors were estopped from enforcing their rights. Indeed, it is frequently the case that companies in such a position seek to protect themselves from enforcement action by the execution of an express standstill agreement with their creditors. Absent such an agreement, in my view something more than the mere existence of settlement negotiations would be required before a creditor's rights would be affected.

64. Further, when the Bank repeated its openness to progress settlement negotiations in its letter of 25 January 2013 and subsequent letters – which are plainly the most relevant when considering the position at 11 October 2013 - the Bank expressly reserved all its rights. In context, that reservation could only sensibly have been understood to be a

reference to the Bank's legal rights to make demand upon the Companies for repayment and to take enforcement action. The Bank had no other relevant rights. I simply do not see how it can be suggested that by expressly reserving all its rights, the Bank was implicitly representing that it would not seek to exercise them in the manner now alleged by the Companies.

65. For completeness I should add that I do not think that the statements made by the Bank in the letter of 27 September 2012 that it would treat an offer from the Companies "seriously" and would seek to hold discussions with the landlord "in good faith" concerning apportionment of any monies offered take the matter any further. They are entirely consistent with the ordinary conduct of negotiations and say nothing about the Bank's ability to exercise its legal rights.

66. Nor is anything added by the Bank's statements in its letters of 15 November 2012 and 25 January 2013 that it was open to finding a solution or settlement statements "without recourse to taking further steps in [the] litigation". In context that plainly referred to the High Court Claim. I cannot derive from those statements any reference, still less any clear reference, to the Bank's rights in respect of its loan and its security.

67. In similar vein, I also do not accept the submission that the Bank made any representation about its rights to call in its loan and enforce its security when it proposed and was prepared to agree a series of stays of the High Court Action. The simple point is that the High Court Action did not concern the exercise of the Bank's rights as lender and secured creditor, but in addition, as Mr. Masefield pointed out, the Companies' case is that the parties were proceeding on the basis of a supposed "mutual suspension of any action" (*per* Mr. Bishop). If that was so, then in the same way as the Companies now suggest that the Bank had represented that it would suspend any enforcement action in relation to the loan and security for an indefinite period until negotiations between the parties had ended, it must follow that the Companies were supposed to stay their High Court Action on the same basis.

68. But that is manifestly not what happened. Instead, each of the stays that were agreed and ordered were for a strictly limited and finite duration, usually of a few weeks, and they were expressly determinable by either side on the giving of three business days' notice. I cannot reconcile the terms of those stays with the alleged "mutual suspension" now advocated by the Companies.

69. I also observe that as set out in paragraphs 24, 26 and 27 above, Mr. Bishop unilaterally threatened to terminate or not extend the stay of the High Court Claim, and in particular did so on 7 December 2012 irrespective of the fact that a "final meeting" between the parties was to take place. Whether or not those comments were merely "sabre rattling" as Mr. Phillips suggested in argument, in my view the very fact that they were made is not consistent with the suggestion that there was a mutual understanding that the parties would each be staying their hands for the duration of the negotiations on the terms now suggested by the Companies.

70. As a final point on this matter, I note that the last agreed stay expired on 30 April 2013. What followed was an offer of a stay until 30 September 2013 (i.e. 11 days before the Administrators were appointed) which was not accepted, and a decision by the litigation solicitors simply to "leave matters as they stand" which meant that there

was no stay of the proceedings in place at all. Even if, for the sake of argument, I were to have accepted that the Companies agreed a stay of the High Court Action in reliance upon a representation by the Bank that it would not seek to call in the loan or enforce its security in return, that mutuality would have ceased at the latest on 30 September 2013.

71. During oral argument, the very brief comments attributed to Mr. Healy at the meeting on 30 January 2013 to the effect that it was "likely to be the last meeting he would need to attend" and that the matter was now "commercial, not litigation" assumed the mantle of the "high water mark" of the Companies' case. But I do not think that these remarks are capable of bearing the meaning that Mr. Bishop attributed to them in his evidence or that Mr. Phillips sought to place upon them in argument.

72. As reported, Mr. Healy's comment as to his future involvement was couched in vague and tentative terms; and if anything, I take the reference to the matter being "commercial, not litigation" to reflect the progress that was being made with the instruction of lawyers to work towards documenting a settlement rather than being engaged in pursuit or defence of the High Court Action. Notwithstanding what Mr. Bishop now says in his witness statement, I do not think that Mr. Healy's brief comments could reasonably be understood to be a statement that the Bank would thereafter suspend its rights in respect of its loan and security against the Companies on the terms now suggested by the Companies. But even if that were a possible meaning of Mr. Healy's words, it is self-evidently not the only reasonable meaning, and on the basis of the authorities that I have referred to above, that is fatal to the alleged promissory estoppel.

73. The position does not improve for the Companies when one turns to consider the precise terms of the estoppel for which they now contend. When considering whether an alleged representation is sufficiently clear and unequivocal to found an estoppel, I think that it must be relevant for the court to consider precisely how the alleged estoppel is supposed to work.

74. As indicated above, Mr. Phillips formulated the terms of the representation on the basis that the Bank would not call in its loan or take enforcement action until either it was apparent that the negotiations had terminated, or the Bank gave reasonable notice to terminate the negotiations. Mr. Phillips accepted that the length of the period of reasonable notice would have been open to debate, but asserted that it would have had to be sufficient for the Company to conclude its negotiations with potential funders.

75. Apart from the complexity of this formulation, which makes it inherently unlikely to have been capable of being read into anything said or done by the Bank, I cannot see how anyone could reasonably have thought that this was a commercially workable regime to which the Bank was committing itself.

76. Under the first limb, the instant case provides a good illustration of the uncertainties that might arise as to whether, and if so when, negotiations would be found to have terminated. The position after 4 September 2013 was that the Companies had told the Bank that their finance from The Co-operative Bank had fallen through, they had not kept the Bank informed of any progress with other potential lenders, and there had been no discussions between the parties. Although the Companies' solicitors had told the Bank that they would be in touch when they had a firm offer of finance to report,

there were no negotiations taking place. The question of whether negotiations had terminated so that (on the Company's case) the Bank was free to enforce its rights is wholly uncertain.

77. As to the second limb, it seems to me that a provision requiring the Bank to give a "reasonable" period of notice fixed by reference to the time that the Company might need to conclude its negotiations with other potential funders would be wholly impracticable. The Bank would not be a party to or otherwise have any knowledge of the existence or status of discussions between the Companies and their potential new financiers, and would be unable to guess, except in an entirely arbitrary way, the reasonable length of time it would be required to specify in any notice.

Conclusion

78. For the reasons set out above, I conclude that the Companies stand no real prospect of establishing that the Bank's statements or conduct amounted to a clear and unequivocal representation that the Bank would not exercise its legal right to require immediate repayment of the Companies' debts or its right to take enforcement action whilst negotiations with the Companies were continuing or until the Bank had given a period of notice to the Companies to enable them to conclude financing negotiations with third parties. I therefore reject the argument of the Companies that the Bank was estopped from appointing the Administrators.

79. Accordingly, I shall dismiss the Companies' Application.

Postscript

80. As a postscript to this judgment, I should record that after the conclusion of the oral argument I received an unsolicited e-mail directly from Mr. Bishop. I did not study its contents in any detail, but sought the assistance of counsel as to the course I should follow. The response of Mr. Phillips was that I should not take it into account and Mr. Trace agreed. Mr. Masefield indicated that he had no objections to my considering the e-mail provided that he could make some submissions on its contents. Having considered those views I determined not to take the contents of the e-mail into account in this judgment and have not done so.