Neutral Citation Number: [2023] EWCA Civ 128

Case No: CA-2022-000381
CA-2022-000976

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JUSTICE FREEDMAN
[2021] EWHC 3432 (Ch)
[2022] EWHC 629 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2023

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE WHIPPLE
and
LADY JUSTICE FALK

- -

Between:

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

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- -

Christopher Boardman KC and **Tom Beasley** (instructed by **Payne Hicks Beach LLP**) for the **Appellants**
Peter Knox KC and **Katharine Bailey** (instructed by **Taylor Wessing LLP**) for the **Respondent**

Hearing dates: 17 & 18 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This is an appeal by Astra Asset Management UK Limited ("Astra UK") and Astra Asset Management LLP ("Astra LLP", and together "Astra"). They appeal against decisions by Freedman J that a contract originally entered into by the claimant Musst Holdings Limited ("Musst") with two other entities (the "Octave Contract") had been novated to Astra, that as a result Astra UK was obliged to share certain investment management fees with Musst, and further that it was required to do so on an ongoing basis. There are two relevant judgments, a principal judgment dated 17 December 2021 (the "Judgment") and a further judgment dated 18 March 2022 which followed hearings of consequential matters (the "Consequentials Judgment").

2. The Judgment, which runs to 200 pages, followed a 13-day trial in Spring 2021. It was circulated to the parties in draft in late October 2021, although as already indicated it was only formally handed down in December of that year. The judgment covers a number of issues that are not the subject of appeal. These include a claim for defamation by Astra UK and its parent company Astra Capital International Limited ("Astra Capital") and a related counterclaim seeking termination of the Octave Contract for breach, both of which were dismissed. There is also no appeal against the judge's rejection of Astra's arguments that the fee sharing that had occurred was pursuant to a voluntary arrangement entered into in November 2012 (the "November Arrangement") rather than pursuant to the Octave Contract, that the relevant introductions were in any event not made by Musst or alternatively were made before the "Effective Date" under that contract, or that Musst's claim for fees was precluded because it acted in breach of US securities law.

3. The two grounds on which the decision is challenged are, first, the judge's acceptance of Musst's arguments that the Octave Contract had been novated, initially to Astra LLP and then to Astra UK, or alternatively that there was an estoppel to like effect (the "Novation" issue) and, secondly, the judge's rejection of Astra's arguments that any ongoing liability to pay was dependent on certain strategic characteristics of the funds to which the fees related continuing to exist, rather than (as Musst claimed) the relevant characteristics being required to be in place solely at the point of investment (the "Strategy" issue). Astra claimed that the investment strategy had changed by 31 December 2014 or at the latest by 31 December 2015.

4. The Consequentials Judgment largely addressed issues related to costs but also dealt with the issue of interim payment in respect of the fees owed, and in doing so rejected Astra's argument that Musst's entitlement ceased with effect from 31 December 2015, when it says a fund restructuring occurred (the "Funds" issue). Astra challenges that conclusion. There is a significant overlap between the Strategy and Funds issues.

5. The total amount now in issue has been calculated by Astra as being around US$3.8m. If Astra succeeded on the Funds issue alone it says that figure would reduce to around US$2.3m.

6. References below in square brackets to paragraphs of the judge's decision are, unless otherwise indicated, references to paragraphs of the Judgment.

Factual background

7. The dispute arises out of business dealings between three individuals, Anish Mathur, Saleem Siddiqi and Mr Siddiqi's wife Alexandra Galligan. Mr Siddiqi is the owner of Musst and Mr Mathur is the ultimate owner of Astra UK and the controller at material times of Astra LLP.

8. Mr Siddiqi and Mr Mathur were introduced in 2011. They had discussions about the development of a new business which would attract investors to investing in "synthetic" asset backed securities (or "ABS"), a type of complex financial product which had been trading at very low prices following the financial crash in 2008. Mr Mathur, who at the time was working for Deutsche Bank, had considerable expertise in that area and believed that the value of synthetic ABS would increase substantially within a few years. Mr Siddiqi was able to provide contacts, coordinate distribution activity and bring his own technical expertise to bear in preparing documentation and making technical presentations to clients.

9. Mr Mathur left Deutsche Bank in September 2012. Although the Astra entities had by then been established they did not at that stage have the necessary regulatory approvals to conduct business in their own right, so Mr Mathur had decided to trade under the regulatory umbrella of another organisation, Octave. In October 2012 he established Astra Special Situations Credit Fund Limited ("ASSCFL"). Pursuant to the arrangement with Octave, ASSCFL's initial manager was Octave Investment Management Limited ("Octave Limited") and its investment manager was Octave Investment Management LLP ("Octave LLP"), an LLP of which Mr Mathur became a member. Astra LLP was described as the investment adviser.

10. The dispute relates primarily to two clients, The Observatory and LGT Capital Partners ("LGT"). The initial contacts with both were made via Matrix Money Management Limited ("Matrix"), an organisation that collapsed in late 2012. Ms Galligan, who had been working for Matrix, then moved to work for Musst. The Observatory ultimately agreed to invest US$20 million in February 2013, and LGT agreed to invest US$40 million in June 2013.

11. In each case the investment was made using a further entity, 2B LLC ("2B") in the case of The Observatory and Crown Managed Accounts SPC ("Crown") in the case of LGT. Rather than investing in synthetic ABS via ASSCFL, each of 2B and Crown entered into a contract with Octave LLP to manage, or (in the case of Crown) advise on the management of, the funds held or managed by 2B and Crown respectively. In practice, Astra LLP did the work on behalf of Octave under the umbrella arrangement.

12. The Octave Contract was entered into on 18 April 2013 between Octave Limited, Octave LLP and Musst. It is described as an Introduction Agreement. Its terms are considered in more detail below, but in outline Octave Limited agreed to pay Musst a 20% share of management fees and performance fees received from clients introduced by Musst who invested in a strategy focused on synthetic ABS, whether via ASSCFL or through another fund or managed account. In broad terms, management fees were payable on an ongoing basis and performance fees were payable on a successful realisation of the relevant investments. On the basis that Musst had introduced both 2B and Crown, management fees were initially shared as contemplated by the agreement, with Octave providing copies of its own invoices to 2B and Crown to enable the amounts due to be calculated and checked.

13. The judge found at [370] that it had been anticipated that Mr Mathur would "spin out" of Octave's regulatory umbrella and provide management services under his company's own authorisation. Astra LLP duly obtained FCA authorisation in July 2014, and it and Astra Capital became the investment manager and manager respectively of ASSCFL. The following month, in August 2014, Octave LLP and Astra LLP agreed in correspondence that, for a nominal amount, Astra LLP would take over Octave LLP's investment management responsibilities in relation to, among other things, ASSCFL, 2B and Crown, and that fees payable to, and obligations of, Octave Limited in respect of those arrangements would transfer to Astra Capital, subject to the agreement of the contracting parties. There was no specific mention of the arrangement with Musst. Further, the correspondence did not reflect the fact that the agreements with Crown and 2B had been entered into by Octave LLP and not Octave Limited, and it was therefore Octave LLP that was entitled to any fees.

14. The transfer to Astra LLP was formalised in relation to Crown by an amended agreement dated 5 September 2014 (with an effective date of 1 September) between Astra LLP and Crown, replacing the previous agreement that Crown had had with Octave LLP. On 5 November 2014 Michael Holdom, who worked for Octave and then Astra when the business transferred, emailed Ms Galligan to notify her that "due to the change of Trading Advisor from Octave to Astra Asset Management LLP effective on the 1st September" fees invoiced to LGT (that is, Crown) had been split between Octave and Astra, and asked that Musst "invoice us accordingly". Mr Holdom signed the email as a partner of Octave LLP, but as discussed below the judge found that his authority extended to Astra LLP.

15. Invoices were sent as requested, and thereafter invoices in respect of Crown were issued by Musst to Astra LLP. These continued to be paid, with the exception of an invoice in respect of another account, "Crown AAM 2", in respect of which Mr Holdom sent an email on 30 April 2015 apologising that he had sent a copy of Astra's invoice for that account and explaining that it had been "set up for a new strategy … and therefore is not covered by the Introduction Agreement 'as it does not substantially replicate the investment securities and risk profile of ASSCF'" (as to which, see below).

16. A replacement agreement between Astra LLP and 2B was entered into on 3 February 2015 and following confirmation from Mr Holdom further invoices in respect of 2B were also rendered by Musst to, and were paid by, Astra LLP. The judge found that at this point Octave "dropped out of the picture" (Judgment at [6] and [379]).

17. Later in February 2015, Mark Murray, an in-house lawyer who like Mr Holdom moved from Octave to Astra when the business was transferred, emailed Ms Galligan a revised version of the Octave Contract, replacing Octave Limited and Octave LLP with Astra Capital and Astra LLP respectively. The email referred to "completing some final documentation" in relation to the investment manager migration from Octave LLP to Astra LLP, adding that there were "no substantive changes" to the agreement and it was "effectively a name changing exercise". In fact, in addition to changing references to Octave the document also altered the "Effective Date" from 21 November 2012 to 4 March 2015.

18. Despite some further discussions between that point and May 2015 no revised written agreement was entered into. Matters then went quiet until 12 April 2016 when Mr Murray requested the executed agreement "to tidy up our records". However, a few days later on 20 April Mr Murray sought to withdraw the draft replacement agreement, explaining that Astra UK was going to take over the regulatory permissions and authorisations

previously held by Astra LLP, and in consequence "contracts will be novated" to Astra UK.

19. Astra LLP's business was formally transferred to Astra UK by a deed dated 29 April 2016. The recitals to the deed recorded that the regulatory authorisations held by Astra LLP were to transfer to Astra UK, with Astra LLP ceasing to be authorised. Under the terms of the transfer Astra UK assumed the "Assumed Liabilities", a concept that is broad enough to cover any liabilities that Astra LLP might owe to Musst. In anticipation of the transfer, Astra UK entered into revised agreements with 2B and Crown to replace those with Astra LLP on 21 March and 30 March 2016 respectively.

20. Following the transfer to Astra UK, Mr Holdom signed his emails to Musst as a representative of Astra UK rather than Astra LLP. Musst's next invoice, sent on 13 May 2016, was (in what was accepted to be an error) still addressed to Astra LLP, but it was paid by Astra UK on 25 May. By an email dated 16 May Mr Holdom asked that future invoices be addressed to Astra UK.

21. Thereafter Astra UK did not produce the information required to enable Musst to produce its own invoices. Mr Mathur initially claimed that he was having cashflow difficulties, and then made various proposals which were not accepted. There were discussions between the parties in which Mr Mathur clearly acknowledged the existence of a liability. Musst produced invoices based on estimated figures on 28 July 2016, addressed to Astra UK, but they were not paid. Subsequently liability was denied.

22. Musst brought a claim for breach of the Octave Contract, which it claimed had been novated to Astra LLP then to Astra UK. It sought an order for payment of the revenue share to which it claimed it was entitled either contractually or on the basis of unjust enrichment, and access to information. (Certain other claims were brought in the alternative.) In pre-action correspondence liability was denied on the basis that Musst did not effect the introductions and Astra had not assumed any liability. Astra's case was subsequently developed as already outlined.

The Octave Contract

23. Two of the three grounds of appeal turn on the construction of the Octave Contract, so it is necessary to refer to aspects of it in some detail.

24. The Octave Contract is a professionally drafted agreement, the parties to which are Octave Limited as "Manager", Octave LLP as "Investment Manager" and Musst as "Introducer". Octave Limited and Octave LLP are referred to collectively as Octave. The recitals explain that Octave acts as manager, investment manager or investment adviser to investment funds and/or managed accounts, that it was appointed as a non-exclusive distributor in respect of the "Funds", that the Introducer was willing to introduce Octave to potential investors in the Funds, and that the parties wished to enter into an agreement in respect of the appointment of the Introducer to make such introductions.

25. Clause 1 contains definitions. Clause 2 deals with introductions. Clause 2.1 provides:

> "Manager appoints the Introducer from the Effective Date and subject to the terms of this Agreement on a non-exclusive basis to introduce Prospective Investors and make Introductions to Octave on the terms of this Agreement."

The Effective Date was 21 November 2012. Prospective Investors were any person introduced by the Introducer, other than certain excluded entities. The concept of

Introduction captured not only initial introductions but also any circumstance where a Prospective Investor ultimately invested at the instigation or on the initiative of the Introducer.

26. Clause 3 is entitled "Revenue Share". It relevantly provides as follows:

> "3.1 The Introducer shall be entitled to share in all management and performance fees earned and received by Octave … in respect of each Prospective Investor who makes (directly or indirectly) an investment in a Fund managed or advised by Octave (an **Investor**) for the Current Strategy on or before the Cut-of Date, each such investment being an **Eligible Investment**. For the avoidance of doubt, additional investments made for the Current Strategy directly or indirectly by an Investor into a Fund whether before or after the Cut-off Date are also Eligible Investments.
>
> 3.2 Unless otherwise agreed between the parties, the revenue share shall be 20% of all fees earned by Octave … in respect of any Eligible Investment…
>
> …
>
> 3.6 The Parties hereby acknowledge that, the sole obligor for payment of any costs, fees, expenses or liabilities of an Octave party under this agreement shall be Manager, and that the obligations of Investment Manager hereunder are limited to a) the performance of such actions as may be required by Manager to be undertaken to facilitate the operation or administration of this Agreement, and b) the performance of any such other actions or functions as may be delegated to Investment Manager under any Investment Management Agreement between Investment Manager and Manager or any Fund, it being understood that where this Agreement makes reference to a right or obligation of Octave, Investment Manager is hereby authorised to act as the Manager's delegate with respect to the exercise of such rights or performance of such obligations (any such actions being undertaken at Investment Manager's own cost).
>
> 3.7 The parties hereby agree that a) any new investments made by an investor in a fund under the management of Octave or the Investment Manager following a strategy other than the Current Strategy (a "New Fund") and deriving from the redemption of investments originally made in a Fund following the Current Strategy will not be treated as Eligible Investments under this agreement and this includes a restructuring of ASSCF to turn into a liquid open ended fund following [sic]; and b) should amounts deriving from an Eligible Investment be reinvested in a New Fund by an investor, performance fees are currently expected to become crystallised no later than the date on which such a reinvestment is made, and in any event Revenue Share relating to such performance fees as may become payable with respect to the period during which the investment remained an Eligible Investment would remain payable under this agreement as set out in paragraph 4."

27. The definitions of Current Strategy and Fund are as follows:

> "'Current Strategy' is to invest primarily in synthetic asset-backed securities and on a buy and hold basis with limited or no direct leverage, and such that the investments are intended to operate as if they were closed-ended

> investment pools with capital committed on a locked up basis for several years to be returned to the investors in such funds following realisation of the investments therein.
>
> 'Funds' [means] … ASSCFL, and other funds and managed accounts designed to substantially replicate the investment securities and risk profile of ASSCF, and following substantially the same strategy as set out under the Current Strategy … to which Octave or Manager acts as investment manager. It is understood for the purposes of interpretation of the definition of a Fund that the strategy remains substantially the similar [sic] to the Current Strategy."

The Cut-off Date is defined as the date falling nine months after the date that the agreement is terminated in accordance with its terms.

28. Clause 4 deals with payment of the Revenue Share. Under clause 4.1, the process involves Octave sending statements of particulars of Eligible Investments made, details of fees "due and payable" to Octave (including the provision of copies of invoices produced by Octave for its fees) and the Introducer's revenue share, and also the most recent net asset value of each Eligible Investment as at the most recent valuation date. Clause 4.4 provides that disputes over the statements produced by Octave are to be referred to Octave's auditors for determination, a determination which is to be binding save in the case of manifest error. Under clause 4.5, amounts due are payable within 10 days of receipt by Octave.

29. Clauses 5 and 6 contain further obligations of the Introducer and Octave respectively. These include a provision for references to a Fund to continue to apply to any Fund acquired by or merged with another vehicle (clause 6.8).

30. Clause 9 contains restrictive covenants, and includes the following obligation in clause 9.4:

> "Octave shall do all such things as may be within their power to ensure (i) that responsibility for the management of the Funds and any managed account is retained by Octave and (ii) that the spirit of this Agreement is given full force and effect. Without limiting the generality of the foregoing, Octave shall do all such things and exercise all such rights as may be reasonably within their power so as to ensure that responsibility for the management of any Fund or managed account is not transferred to another party without the consent of Introducer unless such party offers in good faith to enter into an agreement with the Introducer whereby the Introducer continues to receive the revenue share payable hereunder in respect of Eligible Investments on the same terms as … are contained in this agreement (in which event the consent of Introducer shall not be unreasonably withheld)."

31. Clause 11 supports the provisions of clause 4 by requiring Octave to keep up to date records, including recording any Eligible Investments and their "ongoing value", and gives Musst a right to inspect and take copies of those records.

32. Clause 12 provides for contractual termination in certain events, including (following an initial period) by 30 days' notice to the other parties (the date of termination being the "Termination Date"). Clause 13 is headed "Consequences of termination". Clause 13.1 provides that "other than as set out in this clause" (and subject to certain other specified

provisions), neither party will have any further obligation to the other following termination. Clause 13.2 provides as follows:

> "The Introducer shall continue to be entitled to the revenue share in respect of Eligible Investments (as defined in Clause 3) for so long as such Eligible Investments in the Current Strategy are maintained by the Investor; provided that, notwithstanding the foregoing, should this Agreement be terminated following a repeated (after written notification) material breach of the Introducer's obligations hereunder including a sustained failure to comply with its obligations under Clause 2.3, the right of the Introducer to receive revenue share will terminate as of the Termination Date."

(Clause 2.3 imposed various obligations on Musst in relation to Introductions.)

33. Clause 16 (headed "Variation") provides that no "variation" of the agreement will be effective unless it is in writing and signed by the parties. Clause 17 (headed "Assignment") provides:

> "This agreement is personal to the parties and neither party shall assign, transfer, mortgage, charge, subcontract, or deal in any other manner with any of its rights and obligations under this Agreement without the prior written consent of the other party."

The judge's decisions

Novation issue

34. The judge summarised the background to the Novation issue at [152]-[173] and considered it in detail at [321]-[401]. There is no challenge to his summary of the law in respect of novation at [324]-[332], or his earlier summary of the law in respect of estoppel by convention at [307]-[310].

35. After setting out the parties' submissions at length at [333]-[368], the judge set out his analysis and conclusions at [369]-[401]. Addressing the alleged novation from Octave to Astra LLP first, he referred at [369]-[372] to Astra's submission that it would be wrong lightly to infer a novation, but observed that it depended on the facts. Those included that Astra and Octave were closely related, working at the time from the same address and with an overlap of staff, that there had been an anticipation that Mr Mathur would "spin out" of the Octave umbrella, and that the change to Astra was presented as a name changing exercise. The lack of formality was understandable. The contracts between Octave LLP and Crown and 2B were terminated and replaced with contracts entered into by Astra LLP.

36. The judge found at [373]-[376] that in this context the request for Astra LLP rather than Octave to be invoiced was substantive and not merely administrative. The request reflected the transfer of the relevant income stream to Astra LLP, the intention being that the recipient of the income should pay the agreed percentage to Musst, so "following the money". That made commercial sense. Clause 9.4 was not complied with by Octave, and instead there was a *fait accompli*. The fact that there was no express agreement did not preclude an agreement by conduct.

37. The judge observed at [377] that this was not a wholesale novation because it did not go back to the inception of the Octave Contract. It could be described as either taking over Octave's rights and liabilities or alternatively taking on its rights and liabilities in addition

to Octave. At [378]-[379] the judge considered the argument that Musst's case did not address the fact that it was Octave Limited that had obligations under the Octave Contract, not Octave LLP which had only an administrative role, and found that Astra's submissions on that point did not reflect the evidence.

38. As to the draft agreement provided by Mr Murray (see [17] above), the judge found at [375] that it was intended to reflect and formalise an agreement that had already been made. In response to Astra's case that it would only take effect if and when it was executed, the judge relied on case law considering whether a subject to contract stipulation had been waived ([380]-[383]). At [384] the judge said it was a question of fact in each case. He referred to the "defining points" as including: (i) the terms having been agreed through the Octave Contract; (ii) Octave having dropped out and Astra stepping in – that being more than a name change but the "change was with Mr Mathur who used the relevant companies as his vehicle from time to time"; (iii) the fact that by acceding to the request for invoices to be addressed to Astra LLP and by Astra LLP paying, the contract was performed through the changed companies; and (iv) the absence of any significant terms to negotiate. A lack of understanding about the date when Octave's involvement ceased and Astra's started was of no importance, especially following performance. The judge went on at [385]-[386] to find that as soon as Octave had stepped out and Musst agreed to that by addressing invoices to Astra LLP, there was a relationship at least between Musst and Astra LLP, it being immaterial whether this was in addition to or instead of Octave. This was rightly referred to as a change of name exercise, and the reference in correspondence to the draft agreement provided by Mr Murray as being required to tidy up records reflected the fact that the written agreement was a record of what had already been agreed. It was confirmatory of an existing agreement. The contrary argument was contrived and commercially unrealistic.

39. At [387] the judge rejected the submission that Astra LLP merely took on an administrative role as ignoring the context. At [388]-[390] he accepted Musst's analysis that the invoicing and payments amounted to an offer and acceptance, finding that it could be inferred that Mr Holdom and Mr Murray did have authority to alter the legal relations of the Octave and Astra companies. Mr Holdom, who worked for Octave LLP and transferred to Astra LLP, had authority to write the emails he did. Mr Mathur authorised and intended the transfer to Astra which was "fundamental to his business strategy", and he relied on Mr Holdom and Mr Murray to effect the transfer.

40. On the question of consideration, at [391] the judge found that this was provided through the discharge of liabilities of Octave, and also referred to the obligations as being part of the price for Astra acquiring the income stream from Octave and to Musst providing consideration by treating Octave's obligations as discharged to the extent of the monies received. Musst accepted Astra's liability as being in discharge of the liability of Octave or as being additional to it.

41. At [392]-[393] the judge rejected the submission that the "partial novation" offended against clauses 16 and 17 of the Octave Contract. This was not a variation but a new contract with different parties. Clause 17 also did not affect the ability of Astra to take on Octave's liabilities, so it was not necessary to consider whether the requirement for written consent was waived.

42. Turning to the novation to Astra UK, the judge accepted Musst's submission that there was such a novation, either when an invoice was sent on 13 May 2016 (and subsequently paid) or when invoices were issued in July 2016 ([394]-[395]).

43. The judge also found at [397]-[401] that Astra LLP and Astra UK were estopped from denying the novations, observing that it was difficult to see that there would not be a novation by conduct but there would still be an estoppel. In relation to Astra LLP, the parties acted on the common assumption that the Octave Contract had been novated, and that assumption had "crossed the line". Both Musst and Astra had operated on the basis of the Octave Contract and it would be unconscionable for Astra LLP to deny that there was a novation in respect of Crown and 2B, or at least that it had taken on Octave's liabilities. The same applied to the transfer from Astra LLP to Astra UK, which was "more of the same".

Strategy issue

44. The Judgment contains a detailed summary of the law related to the construction of contracts, at [250]-[259]. No challenge is made to that. The Strategy issue is considered at [403]-[447]. In summary, the judge rejected Astra's argument that Musst's right to fees ceased if the funds no longer followed the "Current Strategy", and accepted Musst's arguments that the position needed to be tested only at the point that the relevant investment was made.

45. In reaching his conclusion the judge considered both a textual and contextual approach. In relation to the former he placed emphasis on the use of the word "makes" (or "made") in clause 3.1 and the absence of words stating that entitlement ceased if the Current Strategy was no longer followed. He accepted Musst's submission that clause 3.7 assisted its case. He addressed Astra's reliance on clause 13.2 and the final sentence of the definition of Fund. In doing so he pointed out that the contract was not particularly well drafted but found that the words relied on by Astra were insufficiently clear to produce the result contended for ([420]-[423]).

46. Turning to a contextual approach, the judge concluded at [434] that Musst's construction produced a commercially sensible result, whereas the result produced by Astra's approach was uncommercial. In reaching that conclusion he pointed out among other things that the fees were paid for an introduction, that the main fee would be likely to be a performance fee and that it was not a sensible commercial result for Musst to be deprived of future performance fees as a result of a change in strategy in the years prior to such a fee ever becoming due, such a change not being an unlikely scenario. The point was so difficult to discern that it had not been spotted by Octave or Astra when they continued to pay fees until 2016. It appeared to be a retrospective attempt to justify non-payment. Further, it was not a case of liability continuing for ever, since investments would be the subject of redemptions. In addition, whilst it would be straightforward to determine whether the Current Strategy was being followed at the inception of a fund, it was extremely complex to determine over a period of time whether a fund continued to follow such a strategy, and in this case it had led to numerous points of dispute between experts.

47. The judge went on to consider an argument that the replacement Crown and 2B contracts meant that by that stage the Current Strategy was not followed. He dismissed that argument on the basis that there was no new investment at that point. Rightly, no challenge to that conclusion was pursued before us.

Funds issue

48. As already indicated, the funds issue was considered in the Consequentials Judgment, in the context of determining the quantum of the interim payment. Astra maintained that there was a temporal limitation on the fees, in that they ceased on what it says was a

restructuring of ASSCFL on 31 December 2015, and that as a result of this neither the Crown nor 2B accounts constituted "Funds" thereafter. Astra's position was that performance fees should be payable based on accruals calculated on the assumption that the investments had been redeemed on that date.

49. The judge considered and rejected this argument at [52]-[64] of the Consequentials Judgment, essentially on the basis that the Octave Contract did not provide for payment based on accrued performance fees. He focused in particular on the requirement in clause 3.1 for fees to be received by Astra and on the absence of any mechanism to determine accruals, and said that neither clause 3.7 nor the definition of Funds assisted Astra. He applied similar reasoning to that applied to the Strategy issue, namely that once an investment had been made on the basis of the Current Strategy a change prior to redemption did not affect Musst's entitlement. In the light of his conclusion he did not need to address Musst's argument that the point had been raised too late.

The grounds of appeal

50. For convenience I will describe the grounds of appeal as grounds 1, 2 and 3, although strictly the first and second are the grounds of appeal against the order made at the time the Judgment was handed down and the third is the single ground of appeal from the order made on the hand down of the Consequentials Judgment.

51. The grounds are as follows:

> **Ground 1 (the Novation issue)**: The judge was wrong to hold that the Octave Contract was novated first to Astra LLP and secondly to Astra UK, as regards the contracts with 2B and Crown, and was wrong to find that there was an estoppel to like effect.
>
> **Ground 2 (the Strategy issue)**: The judge was wrong to hold that under the terms of the fee sharing liability as novated, Astra UK was obliged to pay Musst a 20% share of all fees earned and received from the managed accounts on an indefinite basis, whether or not those accounts continued to be Funds, managed by Octave, or following the Current Strategy, all of which were conditions for them to be Eligible Investments.
>
> **Ground 3 (the Funds issue)**: The judge wrongly construed Musst's entitlement to fees pursuant to clause 3 of the Octave Contract. He should have construed the relevant provision so that its entitlement to fees did not continue past the date of ASSCFL's restructuring on 31 December 2015.

52. Permission to appeal was refused by the judge, but was granted by Nugee LJ with a comment that, although he had real doubts about whether there was a flaw in the judge's conclusions, there was sufficient to warrant the grant of permission.

53. There is a Respondent's Notice in respect of Ground 3, which raises the additional argument that the contentions advanced were raised too late. Musst's case is that they should have been pleaded and addressed at trial, whereas they were raised only after the Judgment had been given.

Legal principles

Novation

54. Astra do not dispute the judge's summary of the relevant legal principles to apply in determining whether a novation has occurred. They are well established.

55. As explained in *Chitty on Contracts*, 34th ed. ("*Chitty*") at 22-089ff., a novation takes place where a new contract is substituted for an existing contract. This typically occurs where an existing contract between A and B is replaced by a contract between A and C, with C assuming B's rights and obligations. Consideration is provided by discharge of the old contract, specifically by A agreeing to release B, B providing C in its stead, and C agreeing to be bound.

56. The consent of all parties is required for a novation. Consent can either be provided expressly or can be inferred from conduct. Whether consent has been provided is a question of fact. For example, in *Re Head* [1894] 2 Ch 236 a transfer of funds from a current to a deposit account following the death of a partner in a banking partnership was held to amount to a novation of liability to the surviving partner.

57. However, a novation will only be inferred from conduct if that inference is required to give business efficacy to what happened. As Lightman J explained in *Evans v SMG Television Ltd* [2003] EWHC 1423 (Ch) at [181]:

> "The proper approach to deciding whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened (compare *Miles v Clarke* [1953] 1 WLR 537 at 540). The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct."

58. Mr Boardman, for Astra, relied on the Court of Appeal decision in *MSC Mediterranean Shipping Co SA v Polish Ocean Lines (The "Tychy" (No. 2))* [2001] 2 Lloyd's Rep 403. At [22] the court referred to the acceptance by the trial judge, David Steel J, of a submission that the terms of faxes between the parties were not clear enough to establish a novation, and instead the consent of all parties "must be clearly established on the evidence as being only consistent with the intent of achieving a novation". In fact, rather than accepting that statement quite in those terms, the Court of Appeal referred to it as indicating not that the judge was applying something other than the civil standard of proof, but that where there is an established contract in existence "clear evidence of an intention to produce a novation is likely to be needed if that standard of proof is to be discharged".

59. As *Chitty* explains, a novation differs from an assignment in a number of respects, including the requirement for consent by all parties, the feature that rights and obligations are extinguished and replaced, and the fact that not only rights but obligations are taken over by the new party.

60. *Chitty* also explains at 22-096 and 22-097 that a novation need not be of an entire contract, and that C might be substituted for B only in some respects. Some obligations may be novated and others remain. That is what Musst says occurred here. It says that the effect of what the parties must be taken to have agreed was that Octave remained liable for management fees up to the point that management of the relevant funds transferred, with the management of the Crown fund transferring in September 2014 and

the management of the 2B fund transferring the following February. Musst says that Astra LLP became liable to share fees in respect of each account from the point of transfer, as reflected in the invoicing.

Conventional estoppel

61. No issue is taken with the judge's summary of the principles of estoppel by convention. In the context of non-contractual dealings these have recently been considered in detail by the Supreme Court in *Tinkler v HMRC* [2021] UKSC 39 at [45]-[53], where Lord Burrows approved the approach of Briggs J in Revenue *and Customs Commrs v Benchdollar* Ltd [2010] 1 All ER 174 ("*Benchdollar*"), as slightly modified subsequently, including by this court in *Blindley Heath Investments Ltd v Bass* [2017] Ch 389. In summary, and reflecting Lord Burrows' further explanation:

    a) There must be a common assumption that is not only understood between the parties but is expressly shared between them. Thus the party seeking to rely on an estoppel (C) must know that the person against whom the estoppel is raised (D) shares the common assumption. In short, the common assumption must have "crossed the line".

    b) C must in fact have relied on the common assumption to a sufficient extent, rather than merely relying on his own independent view. This requires C to at least have been strengthened or influenced in its reliance on the assumption by the knowledge that D shared the assumption.

    c) The expression of the common assumption by D must be such that he may properly be said to have assumed some responsibility for C's reliance on it. This requires D to have objectively intended or expected reliance, in the sense of conveying an understanding that he expected C to rely on the common assumption.

    d) That reliance must have occurred in connection with some mutual dealing between the parties.

    e) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit conferred on the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal or factual position.

62. As already indicated, *Tinkler* concerned non-contractual dealings. On the hypothesis that there was no novation, this case can be described as non-contractual as far as the dealings between Astra and Musst are concerned. In any event I note that Lord Burrows (with whose judgment the other members of the court agreed) observed at [78] that whilst it was not necessary to decide the point, the principles just described were in his view a correct statement of the law on estoppel by convention for contractual as well as non-contractual dealings.

Contractual construction

63. The legal principles to apply in construing the Octave contract are also not in dispute. Both parties were content to rely on Carr LJ's analysis of the most relevant Supreme Court cases in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 ("*Network Rail*") at [18] and [19]:

"18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:

i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge

> which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

Ground 1: the Novation issue

The parties' submissions

64. Mr Boardman's principal criticisms of the judge's conclusions were as follows. He submitted that the judge did not find that there was a novation, but instead an unpleaded bi-partite agreement between Musst and first Astra LLP and secondly Astra UK. The judge's conclusion that consideration was provided by accepting payments in discharge of Octave's liability could not stand.

65. Further, the exchanges of correspondence were administrative in nature and did not support the judge's findings. In particular, Mr Boardman submitted that the judge had disregarded the critical distinction between the role of Octave Limited as "Manager" and Octave LLP as "Investment Manager". The Manager had the sole liability under the Octave Contract, with Octave LLP having only an administrative role. The judge had disregarded this in concluding that exchanges between Octave LLP and Astra LLP did anything more than deal with Octave LLP's administrative role in relation to invoicing and payment. Invoices had previously been addressed to and paid by Octave LLP even though it was Octave Limited that had the sole liability, and a change in the addressee to Astra LLP had no effect on the legal position. The judge also wrongly placed reliance on Ms Galligan's subjective understanding of what a name change involved.

66. Mr Boardman further submitted that the judge wrongly concluded that clauses 16 and 17 had no application. A change of party was a variation and the new arrangement with Astra was a dealing.

67. Mr Boardman also submitted that, for the same reasons, the judge was wrong to rely on estoppel in the alternative, there also being no pleaded claim in estoppel against Astra UK.

68. For Musst, Mr Knox submitted in summary that there was no basis for interfering with the judge's evaluation given his factual findings. The pleading issues were also not justified.

Discussion

69. In my view the judge was entitled to reach the conclusions he did on the Novation issue. He applied the correct legal principles. The question whether a novation can be inferred from the parties' conduct is a question of fact, with which this court will not lightly interfere.

70. The judge had the benefit, which we do not, of a consideration of all the evidence. It is quite clear from his decision that he took careful account of the evidence as a whole in

reaching his conclusions. This was not simply a question of looking at a few emails and invoices and determining that they amounted to an offer and acceptance. The judge explained that he was considering the documents to which he referred in their context. As Musst correctly emphasised, this was an evaluative exercise. The comment made by David Richards LJ in *UK Learning Academy v Secretary of State for Education* [2020] EWCA Civ 370 at [41] bears repeating:

> "As has been frequently said, the trial judge is in the best position to assess the evidence not only because the judge sees and hears the witnesses but also because the judge can set the evidence on any particular issue in its overall context. This is true also of an assessment of what a particular document would convey to a reasonable reader in the position of the party who received it, having regard to all that had preceded it."

71. The relevant context in respect of the novation to Astra LLP included among other things:

    a) The anticipation that Mr Mathur would "spin out" of the Octave umbrella. It was obviously known by all parties from the outset that Octave was being used because Astra was not initially authorised and so could not act alone, and the change from Octave to Astra would not have come as a surprise. Mr Mathur had also accepted in cross-examination that the possibility of a transfer had been discussed both with Mr Siddiqi and Ms Galligan, as well as with Octave (Judgment at [335], [370]).

    b) The fact that Astra and Octave were closely related, working from the same address and with an overlap of staff. In reality this was not a new commercial counterparty with which Musst would need to become comfortable before agreeing to a change. Rather, this was Mr Mathur's vehicle and the informality was understandable.

    c) The fact that, consistently with this, Astra presented the change as the name changing exercise which, from a commercial perspective, it was. The judge was entitled to take into account the fact that both parties understood it in that way as part of the relevant context.

    d) The fact that the income stream transferred to Astra LLP, Astra LLP simply replaced Octave LLP under the Crown and 2B contracts, and Octave "dropped out of the picture". In reality it was commercially unrealistic for anyone to proceed on the basis that Octave would have a continuing role, and they did not so proceed.

72. It is also relevant that the judge had rejected Astra's case about the alleged November Arrangement. Against that background, the existence of a novation provides not only a rational basis, but the only rational explanation, for the parties' conduct.

73. It is true that in some passages in the judgment the judge did not clarify whether he was determining that the change from Octave to Astra LLP was a novation or a bipartite arrangement under which Astra LLP took on liabilities in addition to Octave, because he did not consider that it was material. If it was the latter then in my view the judge did not persuasively address how the requirement for consideration would be satisfied (although in fact it could be said to have been provided by Musst's waiver of its rights under clause 9.4: see below). However, when the judgment is read as a whole it is clear that the effect of the judge's findings was that there was a novation first to Astra LLP and then to Astra UK. In particular, at [391] he found that consideration was provided through the discharge of liabilities of Octave, and at [394] he stated that he accepted Musst's submissions and went on to describe the transfer from Astra LLP to Astra UK as a second novation. Further, and critically, he found as a fact that Mr Holdom and Mr Murray did

have authority to alter the legal relations of both Octave and Astra, and that those individuals were relied on by Mr Mathur to effect the transfer from Octave to Astra (see [39] above). In addition, the judge's conclusion that Octave dropped out of the picture is also much more consistent with a novation.

74. The judge also did not explicitly address the point that, for Musst to succeed, Astra LLP would not only have to be found to have assumed Octave's obligations under the Octave Contract, but other references in the contract to Octave, including critically the reference to fees "earned and received by Octave" in clause 3.1, would also need to change. Mr Boardman described this as the "Octave issue". It was raised as part of Ground 2 but it makes more sense to deal with it at this stage.

75. There is no substance in this point. Consistent with the "name changing" exercise that the transfer was regarded by the parties as being, it was obviously part of the novated agreement that references to Octave would be treated as references to Astra. Any other approach, which would leave Astra with a theoretical liability but no fees on which it would bite (because Octave was no longer earning or receiving them), would be wholly unrealistic.

76. Astra further criticise the judge for overlooking the different roles of Octave Limited and Octave LLP as Manager and Investment Manager. Their description as such in the Octave Contract can be understood by reference to the original prospectus for ASSCFL, which describes them as having those respective roles. However, Astra rely on the fact that the separation of roles is not only reflected in the way in which the parties are described in the Octave Contract, but also in its substantive provisions. Under clause 3.6 Octave Limited, as "Manager", is the sole obligor in respect of fees or other amounts due to Musst, and Octave LLP has only an administrative role. Mr Boardman submitted that the judge ignored this in finding that the obligations of both Octave parties were taken on by Astra LLP.

77. In my view the judge was well aware of the contractual arrangements and understood Musst's case that Astra LLP had indeed taken on the obligations of both Octave parties, as the judge found. He was also well aware of the fact that the draft contract sent by Mr Murray in February 2015 (see [17] above) provided for Astra Capital to replace Octave Limited and Astra LLP to replace Octave LLP. In finding that the revised draft was confirmatory of an existing agreement the judge was to that extent wrong (because Astra Capital in fact had no role in the novated contract), but that is a small slip in a lengthy judgment that does not affect the substance of the judge's findings, which were that Astra LLP had taken over from both Octave LLP and Octave Limited under the Octave Contract in respect of each of Crown and 2B.

78. Two other points are notable. First, it was Octave LLP and then Astra LLP that had the contractual relationships with Crown and 2B. Unlike the position with ASSCFL, Octave Limited and Astra Capital played no role in those accounts at all. A finding that the liability "followed the money", as the judge said, makes commercial sense.

79. Secondly, it appears that the protagonists at both Octave and Astra paid scant regard to the existence of separate entities when dealing with each other. The only documentation available in respect of the transfer from Octave to Astra is the correspondence in August 2014 referred to at [13] above. That is correspondence between Octave LLP and Astra LLP alone, but it also purports to address the position as between Octave Limited and Astra Capital. It does so in an incomplete way, apparently assuming that fees under the investment management arrangements being transferred and obligations relating to those

arrangements were in all cases payable to and owed by Octave Limited, which was not the case at least for Crown and 2B, but nevertheless the correspondence does purport to address the position of Octave Limited and Astra Capital. There is no indication that there was any additional relevant documentation to which Octave Limited or Astra Capital were a party, although it is clear from a revised prospectus issued on 12 December 2014 that Astra Capital did replace Octave Limited as the manager of ASSCFL, as well as Astra LLP replacing Octave LLP as the investment manager of that fund. Given the absence of other documentation but its obvious acquiescence in the change, a suggestion that Octave Limited played no part in agreeing to the revised arrangements, and instead retained liability under the Octave Contract, is unrealistic. All the evidence indicates that the revised arrangements were agreed to by personnel at Octave LLP both on behalf of that entity and on behalf of Octave Limited, with distinctions between the individual entities largely being ignored.

80. Three specific provisions of the Octave Contract fall to be assessed in determining whether the judge was entitled to reach the conclusion he did, namely clauses 9.4, 16 and 17.

81. Clause 9.4 required Octave to do "everything within their power" to ensure that they retained responsibility for management of the Funds, and to do everything "reasonably within their power" to ensure that responsibility was not transferred to another party without consent, unless a replacement contract was offered. Mr Boardman criticised the judge for referring to clause 9.4 as if it contained an absolute obligation not to make a transfer without consent, but no attempt was made to comply with its terms at all. Clause 9.4 clearly prohibited Octave from agreeing as it did with Astra during July and August 2014 that Astra should take over responsibility for ASSCFL and the other Funds, without making any attempt to seek Musst's consent. As already indicated, Musst's waiver of Octave's breach would have been capable of constituting consideration for the assumption of liabilities by Astra LLP even if there had not been a novation. It is a basic principle of contract law that consideration must move from the promisee, but that it need not move to the promisor (see *Chitty* at 6-041). Further, bearing in mind that the judge also recorded at [335] that Mr Mathur knew about clause 9.4, it is hard to see why Musst would not also have had at least a potential claim against Astra for inducing breach of contract, which it would also have waived in choosing to accept the revised arrangement without complaint. The judge indicated this point at [399] in the context of estoppel.

82. Turning to clauses 16 and 17, I do not accept that clause 16 applies. A novation is not a variation. A varied contract remains in place. In contrast, a novation is the replacement of a contract by a new contract between different parties. *Chitty* draws the distinction in uncontroversial terms at 22-095. Even on the alternative approach of a bi-partite arrangement, that would be a new contract between Musst and Astra LLP rather than a change in the terms of the contract with Octave.

83. Clause 17 is potentially of greater relevance. It imposed an obligation on Octave not to "assign, transfer … or deal in any other manner with any of its rights and obligations under this Agreement" without prior written consent. Arguably what occurred in this case could be construed as some form of attempted dealing by Octave when it agreed with Astra LLP that the latter should take over Octave's investment management role and thereafter dropped out of the picture. However, it was clearly open to Musst to waive the requirement for prior consent and instead provide consent after that dealing occurred. Although the judge observed at [393] that it was not necessary to determine whether the requirement for written consent was waived on the facts, and did not expressly address whether consent was actually provided, the logical effect of his conclusions about the

correspondence, and Musst's agreement by that correspondence to a novation, is that it amounted to the provision of consent to the transfer.

84. These conclusions are not affected by the Supreme Court's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 ("*MWB*") that "no oral modification" clauses have legal effect, a case on which Astra relied. Clause 16 is clearly such a clause, because it provides that a variation will not be effective unless it is in writing and signed by the parties, but it does not apply on the facts.

85. On the face of it at least, clause 17 is drafted differently. It places a contractual obligation on each party not to transfer or otherwise deal with its rights and obligations without the other party's prior written consent. It is not the same sort of provision that the Supreme Court was considering in *MWB*. Nonetheless, and although Mr Boardman did not refer directly to the most relevant authorities, provisions similar to clause 17 have been held to have resulted in an attempted transfer of any rights without compliance with them having no effect as between the existing contracting parties (see *Linden Gardens Trust v Lenesta Sludge Disposals* [1994] 1 AC 85 at pp.108-109 and *Hendry v Chartsearch* [1998] CLC 1382 at pp.1393-1394, both of which were cited by Gloster J in a case on which Mr Boardman did rely, *CEP Holdings v Steni* [2009] EWHC 2447 (QB) at [37]).

86. However, as Millett LJ recognised in *Hendry v Chartsearch* at p.1394, a breach of a provision requiring prior consent to a transfer is capable of waiver by the other contracting party, in the form of retrospective consent, albeit that that consent would not be the prior consent contemplated by the clause. In this case it is clear that, if and to the extent that clause 17 was engaged, Musst must be treated as having waived the requirement for prior consent.

87. Turning to the position of Astra UK, the evidence in respect of Astra UK is more limited. However, the judge was entitled to consider the relevant documents in their context, and in particular the context of what had occurred on and following the earlier transfer of the Crown and 2B contracts to Astra LLP, and conclude that "this was more of the same". It is notable that in his email of 20 April 2015 (see [18] above) Mr Murray represented that "contracts will be novated" to Astra UK. The subsequent correspondence and invoicing was consistent with this, and Musst raised no objection. It is also clear from [394] that the judge found that there was a novation to Astra UK as opposed to simply a bipartite arrangement: see [73] above.

88. In any event, for the reasons the judge gave, he was entitled to conclude that there was an estoppel by convention as an alternative to a (contractual) novation, in respect of each of Astra LLP and Astra UK. There was an understanding that had crossed the line, conveyance to Musst of an expectation of reliance, actual reliance and the necessary element of unconscionability.

89. In the case of Astra LLP this was supported by the correspondence and invoicing in its factual context, and the payments made by Astra LLP and accepted by Musst. It was also reinforced by the way in which Mr Holdom dealt with the mistake over the Crown AAM 2 fund referred to at [15] above, by referring to the express terms of the Octave Contract and distinguishing that other fund as not being within its scope. The judge had correctly found at [205] (in the context of a discussion of the November Arrangement) that this evidenced the parties treating the payments that Astra LLP was making in respect of Crown as being paid under the terms of the written agreement. Musst's reliance (and detriment) included not pursuing any breach of clause 9.4, whether against Octave or

indeed Astra LLP for inducing the breach of a term of which, through Mr Mathur, it must be taken to have been aware.

90. As already mentioned the evidence in respect of Astra UK is more limited, but again the judge was entitled to consider it in the context of what had previously occurred on the transfer to Astra LLP and to conclude that Astra UK was similarly estopped. Musst obviously relied on what Astra communicated to it about the proposed novation and the fact that the Octave Contract had continued to be performed after the earlier transfer. The initial reasons given for non-payment were unrelated to the subsequent denial of liability.

91. Finally, Mr Boardman raised a number of pleading points. Mr Knox was able to respond to most of them without difficulty, but it is fair to say that estoppel in respect of Astra UK was not particularly clearly pleaded. However, not only was the finding of estoppel in relation to Astra UK made in the alternative to the judge's primary finding of novation, but it was also made on the basis of the same facts and circumstances that led him to conclude that there was a novation. The pleadings contained all the essential facts, which is what CPR 16.4 requires, and (particularly in circumstances where the issue of estoppel as an alternative to novation was before the court in any event) there was no unfairness.

Ground 2: the Strategy issue

The parties' submissions

92. In summary, Mr Boardman submitted that the judge wrongly placed undue weight on the use of the words "makes" and "made" in clause 3.1. That clause had to be read along with the other terms of the agreement. Astra's construction was assisted by clauses 3.7 and 13.2, and by the last sentence of the definition of Funds. Musst's construction produced an uncommercial result, because a decision to follow the Current Strategy for a single day could result in a liability that would continue forever.

93. Mr Knox supported the judge's conclusions, and in particular the weight placed on clause 3.1.

Discussion

94. In my view the judge reached the correct conclusion on the Strategy issue, having carefully considered both a textual and contextual approach.

95. Clause 3.1 is a key provision, as the judge found. It is that clause that sets out what fees Musst is going to be entitled to share in and defines the concept of Eligible Investment. Other provisions of the contract, and the factual background, are also relevant, but the core provision is clause 3.1.

96. Clause 3.1, set out with other relevant parts of clause 3 at [26] above, is relatively clearly drafted. It provides that Musst is entitled to share in "all" management and performance fees "earned and received" by Octave in respect of a Prospective Investor who "makes … an investment in a Fund managed or advised by Octave … for the Current Strategy on or before the Cut-off Date". It defines such an investment as an Eligible Investment. Additional investments "made for the Current Strategy" are also Eligible Investments, even if made after the Cut-off Date.

97. The clear focus is on the point when an investment is made. Leaving to one side for a moment the additional investments referred to in the final sentence of clause 3.1, the definition of Eligible Investment encompasses (a) an investment being made in a Fund

for the Current Strategy, in circumstances where (b) that investment is made before the Cut-off Date. The words "for the Current Strategy" naturally refer back to and describe the type of investment that the investor "makes". Further, the reference to "on or before the Cut-off Date" that follows the words "for the Current Strategy" is obviously a reference to the investment being made on or before that date. This reinforces the conclusion that the question whether the "Current Strategy" requirement is met also relates back to, and is determined by reference to, the date of the investment. Relevant to ground 3, the same is true of the references to "Fund".

98. The final sentence of clause 3.1, dealing with additional investments, uses similar language to the first part of clause 3.1. Analogous points apply.

99. Clause 3.2 provides for the quantification of the revenue share, namely 20%. The fact that it refers to fees earned in respect of Eligible Investments does not affect the meaning of that term and support Astra's construction. The concept of Eligible Investment is defined in clause 3.1 by reference to the date of investment. If something is an Eligible Investment when made, then unless another provision of the contract provides otherwise it will remain so, even if the strategy has changed. Clause 3.2 does not provide otherwise.

100. Clause 3.7 makes clear that a new investment made in a fund not following the Current Strategy is not within the scope of the agreement even if it derives from the redemption of an investment originally made in a "Fund" that was within scope, albeit that it was expected that performance fees would be crystallised at the point of reinvestment. This is unsurprising. It does not follow from the reference in clause 3.7 to "remained" an Eligible Investment that the original investment in the Fund (that is, the Eligible Investment) has to retain the characteristics set out in clause 3.1 throughout its life. The wording in clause 3.7 is consistent with the natural interpretation of clause 3.1, which is that those characteristics are tested only at the point of investment. Put another way, if an Eligible Investment meets the criteria when it is made, which is the point in time referred to in clause 3.1, then it remains an Eligible Investment while it continues to be held, even if there is a change in strategy.

101. A further point is that if Astra's interpretation were correct then it is very odd that clause 3.7 is drafted in such a restricted manner. On Astra's interpretation, not only would any new investment not in the Current Strategy fall outside the scope of the revenue sharing, but any modification to an existing investment or other event that had the effect that the Current Strategy was no longer being followed would also have that result. However, on any reasonable basis there would be a greater need to spell out the latter rather than the former, if that was what the parties intended. The fact that nothing is said about it, but the parties went to the trouble of clarifying that a new investment in a fund not following the Current Strategy was not within scope, supports Musst's argument that a mere change in strategy is not enough, and that the position has to be tested at the point of investment.

102. Clause 3.7 also refers in an unclear manner to a restructuring of ASSCFL. This is discussed under Ground 3. It makes no difference to the point just discussed. Overall clause 3.7 supports Musst's and not Astra's interpretation, as the judge found.

103. Astra also relied on clause 13.2 (see [32] above), in particular the reference to "for so long as such Eligible Investments in the Current Strategy are maintained by the Investor". I agree with the judge that this clause does not rescue Astra's case.

104. While at first sight the reference to "maintained" in clause 13.2 might suggest that whether something is an Eligible Investment is to be tested not only at the point the

investment is made but on a continuing basis thereafter, that is not the proper interpretation of the words in their context.

105. Clause 13 deals with the consequences of termination of the agreement. The starting point under clause 13.1 is that the parties' obligations under the agreement do not survive termination. Clause 13.2 materially qualifies the effect of the termination of the parties' obligations under clause 13.1 by providing for a continuing revenue share following termination. Clause 13.2 therefore plays an important role if the agreement is terminated. Musst continues to be entitled to share in revenue following the termination in all circumstances, unless the agreement is terminated following a "repeated" material breach. The wording relied on by Astra is there to spell out that the revenue share continues to be paid. It would be very surprising if it also had a material effect on the basic test for determining Musst's revenue share.

106. Turning to the language used, clause 13.2 refers to "Eligible Investments in the Current Strategy are maintained" rather than "Eligible Investments are maintained in the Current Strategy", wording which would have been more consistent with Astra's case. The word order used supports the conclusion that the reference here to the Current Strategy is mere surplusage, because the definition of Eligible Investment already encompasses the Current Strategy requirement. Reading clause 13.2 with the definition of Eligible Investment and its focus on the date of investment, the most natural interpretation of the words is that it is getting at whether the investment in question, which was an Eligible Investment in the Current Strategy when made, continues to be maintained.

107. Astra also rely on the last sentence of the definition of Funds (see [27] above), namely:

> "It is understood for the purposes of interpretation of the definition of a Fund that the strategy remains substantially the similar to the Current Strategy."

108. In my view the most obvious and straightforward interpretation of this sentence was one argued neither before the judge nor this court, until it was adopted by Mr Knox after the court raised it during argument. It is that the words confirm that the strategy being followed at the date of the agreement continued at that time to be substantially similar to the Current Strategy. That is what the use of the word "remains" in the present tense is getting at. The inclusion of the sentence would have provided comfort to Musst that Octave would not subsequently be able to claim that the strategy had already altered before the agreement was signed, so that future investments in funds or management accounts, or indeed investments already made prior to the date of the agreement, would not or did not meet the Current Strategy requirement, in the case of future investments even if there was no change after the date of the agreement. These words would have been potentially relevant to both Crown and 2B.

109. In my view this interpretation is the correct one, and may be what the judge had in mind at [421], albeit that I agree with Astra that the wording is not limited to funds and accounts other than ASSCFL as the judge appears to suggest there. For the wording to assist Astra it would have to go much further, making it clear not only that a fund or account that does not follow the Current Strategy cannot be a "Fund" (which is the case anyway), but also overriding the provisions of clause 3.1 that test whether something is an Eligible Investment by reference to the date of investment in the Fund. To do that it would need to be spelt out that the Current Strategy must be followed on a continuing basis (that is, must remain for the future) for an investment to continue to be an Eligible Investment. It is also highly unlikely that such a fundamental point would be dealt with

in a clause containing definitions rather than in the substantive provisions of the agreement.

110. Astra also criticises the judge's observations about the difficulty of determining whether the Current Strategy continued to be followed by a Fund. In my view the judge was entitled to make the comments he did and to take them into account as part of the relevant context. It is indeed one thing to work out whether the Current Strategy is still being followed at the point of investment, but quite another to determine that question on an ongoing basis throughout the life of the investment. That is a far more significant exercise, and there is no obvious mechanism by which it would be done. The provision in clause 4 for disputes to be referred to Octave's auditors appears inadequate to the task.

111. Overall, testing the position only at the point of investment makes far more commercial sense. Musst's role is one of introducer. Once a client has been persuaded to invest in the Current Strategy Musst's work has been done. Thereafter Octave benefits from whatever management and performance fees it can derive from the investment, whatever alteration might subsequently be made to the strategy. It makes sense for Octave (and in turn Astra) to continue to be required to share those fees with the entity that gave it the opportunity to earn them.

112. The Strategy issue also raises another fundamental point, namely how performance fees would be determined if Astra were correct. The judge commented at [427] that it would not be a sensible commercial result for Musst to be deprived of future performance fees as a result of a change in strategy before they ever became due. That comment was entirely justified in the circumstances. Those circumstances included: (a) Octave's unilateral ability to change the strategy (which the judge found at [428] was not an unlikely scenario); (b) the point that if investments were successful then performance fees could be a significant multiple of the management fees – they were, effectively, the real prize; and (c) the fact that, reflecting the illiquid nature of the investments, it was clear on the evidence that performance fees were unlikely to become payable for several years.

113. Astra's position is that the judge misunderstood its case. Rather than Musst being disentitled from future performance fees altogether in the event of a change in strategy, it would be entitled to "accrued" performance fees which would be payable when received by Octave. This issue is discussed under Ground 3, and I would reject the submission for the reasons given there.

Ground 3: the Funds issue

The parties' submissions

114. Mr Boardman submitted that Musst's entitlement to share in fees depended on the relevant investment being in a "Fund", and that definition was not simply applied at the point of investment. Once ASSCFL was restructured the definition was not met. Further, and as already indicated, the judge misunderstood Astra's case. It was not saying that it would have a liability to pay any revenue share without fees being received. Rather, fees needed to be both earned and received in order to trigger a liability to pay, but the obligation to pay only related to amounts earned while the investment was in a "Fund" as defined. Astra's construction was assisted by clause 3.7, including the reference to a restructuring of ASSCFL: it could not be the case that in that event fee sharing would cease in respect of ASSCFL but not in respect of a managed account which replicated it. Further, valuations of assets were undertaken that would allow accrued fees to be determined.

115. Mr Knox submitted that the judge reached the correct conclusion but that, in the alternative, it was not open to Astra to take the point. Astra's case at trial was that the ASSCFL restructuring was a complete defence, and no complaint was made in response to the draft judgment about the judge's failure to address the point. Musst would have wished to put in evidence to address it.

Discussion

116. As with the Strategy issue, I agree with Musst that the judge reached the correct conclusion on the Funds issue by rejecting Astra's argument that Musst's entitlement to fees did not continue past the date of what Astra say was a restructuring of ASSCFL on 31 December 2015.

117. As already explained, neither Crown nor 2B invested in ASSCFL. Instead, each of 2B and Crown entered into a contract with Octave LLP to manage, or (in the case of Crown) advise on the management of, the funds held or managed by 2B and Crown respectively. It was accepted that, when established, these were "managed accounts" within the definition of "Funds".

118. Astra rely on the requirement in the definition of Funds that the managed accounts be "designed to substantially replicate the investment securities and risk profile of ASSCFL and following substantially the same strategy as set out under the Current Strategy …" (emphasis supplied). They say that once ASSCFL was restructured, the managed accounts could no longer satisfy the first of these requirements. In oral submissions, Mr Boardman submitted that this would be the case even if the managed accounts continued to follow the Current Strategy but ASSCFL did not.

119. The key role for the definition of Fund in the agreement is in determining what is an Eligible Investment. As already discussed, on a proper interpretation the question whether something is an Eligible Investment is tested at the point of investment rather than from time to time. If a managed account falls within the definition of Fund at the point of investment and the other requirements are met, then the investment is, and in principle will remain, an Eligible Investment. Thus, if at the time of the investment the managed account: (a) was designed substantially to replicate the investment securities and risk profile of ASSCFL; (b) substantially followed the Current Strategy; and (c) was subject to investment management by Octave, then it was a "Fund" and the investment in it can be an Eligible Investment, both at inception and thereafter.

120. It makes obvious commercial sense for the definition of Funds to refer not only to ASSCFL but also to other funds and accounts substantially replicating ASSCFL's investment approach. That caters for the fact that certain investors might not wish to (or be able to) invest via ASSCFL and instead might use another fund or account, as was the case with Crown and 2B. I also note that it makes no commercial sense for a subsequent change in strategy within ASSCFL which is not followed by such other fund or account to prejudice Musst's entitlement to fees in respect of it. On Mr Boardman's submission that would be the result even if Astra were correct in their argument that the Current Strategy must continue to be followed, and did in fact continue to be followed, by the fund or account in question.

121. As with the Strategy issue, Astra's case is not saved by clause 3.7. The reference to an investment being "originally made in a Fund following the Current Strategy" entirely supports the interpretation that the question whether something is a Fund is tested at the point of investment rather than being determined on a continuing basis.

122. The reference in clause 3.7 to a restructuring of ASSCFL is unclear, partly because the text is incomplete but also because the concept of restructuring is not defined. However, two points can be made. First, the wording refers only to a restructuring of ASSCFL, so as Mr Boardman accepted it can have no direct application to Crown or 2B. (I respectfully disagree with the judge's comment at [59] of the Consequentials Judgment to the contrary effect.) Secondly, the reference to a "liquid open-ended fund" envisages something very different to what is described in the definition of Current Strategy, namely investments on a "buy and hold" and "closed-ended" basis with capital locked up. The references to liquid and open-ended imply a fund with straightforwardly realisable assets and an ability of investors to redeem their investments in the fund without difficulty. It is not particularly surprising that the parties chose to agree that, if that occurred, Musst's entitlement should cease thereafter. As Musst pointed out, such a "restructuring" might well involve a disposal of investments in any event, and (as clause 3.7 envisages) a crystallisation of performance fees. The omission of a reference to other funds or managed accounts being similarly restructured may be a mistake on the part of the draftsman, but that is pure conjecture and is immaterial for present purposes, because the contractual wording is confined to ASSCFL.

123. The judge was also correct to point to the lack of any mechanism for determining accrued performance fees. It would not be a straightforward exercise. Questions would arise not only as to how the value of investments should be determined at the relevant time (31 December 2015 in the case of Funds issue) but also how subsequent variations in performance would affect the position.

124. As to the first of these points, Mr Boardman referred to provisions in the contract entered into between Octave LLP and 2B for the determination of net asset value. However, those provisions are not reflected in the Octave Contract and, if used to determine accrued fees rather than fees actually owed by 2B to Octave LLP, would not be being used for a purpose for which they were designed. A different approach is also taken in the contract between Octave LLP and Crown.

125. Although Octave was required to provide details of net asset value under clause 4.1 of the Octave Contract, I infer that the purpose of this was to enable Musst to check the calculation of fees charged to the clients where net asset value was relevant, and also to assess how the relevant funds were performing with a view to potential future fees. This is illustrated by the fact that Octave LLP's contract with 2B provided for management fees to be calculated by reference to net asset value, and for performance fees to be calculated by reference to the net asset value of cash or assets withdrawn from the managed account.

126. As to the second point (subsequent variations in performance), Mr Boardman suggested that a decline in value after the point in time at which Musst's entitlement to fees ceased would reduce Musst's entitlement, because the previously accrued fee would to that extent not be received by Astra. In reality, that demonstrates the point that an "accrued" fee, determined by reference to a valuation at a point prior to realisation, would in truth not have been "earned" at all for the purposes of clauses 3.1 and 3.2, and not only not received.

127. Further and more complex scenarios are possible, none of which are catered for. For example, if the investment declined in value after the relevant date but then recovered, how if at all would Musst share in the resultant fee?

128. The reality is that a mechanism to share fees on some form of accruals basis would be complex and would raise a number of commercial issues. The Octave Contract contains no hint of this, and there is no legitimate basis for implying it. Rather, the mechanism provided for in the agreement is a relatively straightforward one. Must is entitled to 20% of the fees that Octave/Astra actually derive from a relevant investment, payable within 10 days of receipt.

129. In view of the conclusion reached it is not necessary to determine whether Astra was precluded from raising the Funds issue.

Conclusions

130. In conclusion, I would dismiss the appeal on all grounds.

Lady Justice Whipple:

131. I agree.

Lord Justice Peter Jackson:

132. I also agree.