Neutral Citation Number: [2021] EWHC 2662 (Comm)

Case No: CL-2020-000113

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 07/10/2021

Before :

SIR MICHAEL BURTON GBE
Sitting as a Judge of the High Court

- -

Between :

ASPREY CAPITAL LIMITED	**Claimant**
- and -	
REDIRESI LIMITED	**Defendant**

- -
- -

Daniel Hubbard (instructed by **Scott + Scott UK LLP**) for the **Claimant**
Matthew Cook QC (instructed by **Greenberg Traurig LLP**) for the **Defendant**

Hearing dates: 19 - 23 July, 28 - 29 July, 14 - 15 September 2021

- -

Approved Judgment

....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 7 October 2021 at 10:30 am

SIR MICHAEL BURTON GBE :

1. The claim by the Claimant arises out of an agreement dated 2 June 2017 (the "MOU"), and in particular a bullet point under clause 5 "*Economic and Cost Sharing*" (which the parties have identified by the description "clause 5.1"). It reads: "*Rediresi and Asprey will share all proceeds of the properties above a 6% cap rate on a 50-50 basis"*.

2. My task is to construe what the proper contractual interpretation is of those words, which are on any basis unclear, and which each side interprets differently, so that from the Defendant's point of view it justifies the payment that it made to the Claimant under it and from the Claimant's point of view there is a substantial further sum due.

3. The Claimant ("Asprey") has been represented at the time and before me by its director Mr Christopher Downing and a former director (a director at the relevant time) Mr David Kingsnorth. The Claimant was additionally represented at the time by Mr Meyrick Cox, as consultant, who died in 2020. It was a company which specialised in creating opportunities for investment in housing which was to be sold or leased to housing associations and charities ("social renters") and let by them to "social residents", whose rents would be subsidised by central or local government so as to provide a guaranteed rental income. The Defendant (Rediresi) was a new company set up by Mr Anuuj Gupta, who had been for some time involved in residential property as a partner in Duet Asset Management Ltd (Duet), together, in relation to the events in question, with a Mr Thomasson, who has not given evidence.

4. It is common ground that the valuation of such properties is carried out in the business by reference to rental yield, and it is essential to appreciate that (counterintuitively to a layman) a higher 'cap rate' or yield % leads to a lower valuation and a lower cap rate to a higher valuation. Thus a buyer pays more (and the seller gets more) for a lower percentage yield, and a buyer pays less (and the seller gets less) for a higher percentage yield. Thus if a buyer is buying to make a profit on resale he will want to buy at a high cap rate (less money) and resell at a lower cap rate (more money).

5. In February 2017 Asprey introduced to Mr Gupta (through Mr Cox who had a previous relationship with him), who was then still with Duet, the opportunity to invest in two separate portfolios of properties consisting of social housing, a mix of existing buildings and new build with varying estimated dates of completion, which could be acquired with the benefit of the guaranteed rental stream. The two portfolios are the Hilldale property, owned by a Mr Dan Anders, and Houses for Homes, which latter in the event did not proceed, and I shall not mention this portfolio further. By reference to the state of completion of the properties in the Hilldale portfolio, they were split into tranches, the first of which consisted of three properties.

6. Asprey were agents for the sale of the Hilldale properties (at a 2% commission), but the MOU constituted a partnership intended to form the basis of future collaboration between Asprey and Rediresi in relation to the two then portfolios and any other portfolios, and in the event that 2% commission was shared between them; and the relationship was to be, as described in Recital A of the MOU, that "*Rediresi and Asprey have entered into discussions to partner to acquire and exit affordable housing projects across the UK"*. It is common ground that, by (now numbered) clause 5.2: "*Rediresi and Asprey will share all Rediresi approved costs for the following but not limited to travel expenses, legal costs, accounting costs and tax costs on a 50-50 basis*". The

properties, consisting as they did of social housing, were valued, as discussed above, on the basis of the capitalisation of the rental yield. As will be seen, the purchase of the Hilldale portfolio from Mr Anders was to be at a yield of 6% for the first tranche. The Defendant interprets clause 5.1 above to entitle the Claimant only to 50% of any saving on the acquisition cost by virtue of the purchase price being above a cap rate of 6% (i.e. a lower purchase price) and accounted accordingly. The Claimant contends that the clause provides that it was not only to receive half of any saving if the purchase price was less by virtue of the cap rate being higher than 6% but also half of any gain by virtue of the resale price of the properties being at a lower cap rate (i.e. a higher resale price). In the event, unknown to the Claimant at the time, the Defendant resold at a cap rate of 4.75%. The Defendant contends that the Claimant is entitled to no share of such substantial profit on the resale. There is no doubt that the acquisition and resale of the Hilldale portfolio was very profitable. The Claimant claims £2.5 M. The result is that the Claimant made a return of 3.43% and the Defendant obtained 30.39% (90% of the total profit). The outcome hangs upon my construction of clause 5.1, but there is a fallback defence of estoppel by convention, by virtue of the Claimant having agreed the calculations at the time.

7. I have been addressed by both counsel on the basis of the well-known authorities in relation to construction of a commercial contract, and both parties agree that the most relevant passage is in the speech of Lord Neuberger in **Arnold v Britton** [2015] AC 1619:

> *"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", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd… [2009] 1 AC 1101 para 14. And 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 lease, (iii) the overall purpose of the clause and the lease, (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".*

The facts and circumstances not only arise out of communications which have 'crossed the line' in communications between the parties, but include matters which I am satisfied were, as Lord Neuberger put it in 'Neuberger (iv)', known or assumed by both parties. My aim is to get as close as possible to what I am satisfied the parties intended, and, particularly in the absence of any claim by either side for rectification, in a case such as this in which the words do not immediately conform with either side's interpretation, to interpret the words as best I can so as to decide which party's construction accords best with the words actually used so as to best reflect what they agreed.

8. I am therefore entitled and obliged to take into account the factual matrix, but I must first decide what that factual matrix is, and that requires my making some evidential decisions. I must also emphasise that I must be careful, for the purpose of the main issue in the case, being the construction of clause 5.1 (i.e. leaving aside for the moment the disputed issue, if it arises, of estoppel by convention), in the context of Neuberger (iv) to consider only matters prior to or substantially contemporaneous with the MOU. There was much evidence given before me relating to events after June 2007, and in particular relating to what occurred when the Claimant discovered in December 2018 the fact of the resale and confronted the Defendant, which would not be admissible in relation to construction but only at best to credibility, and of course in particular in relation to the estoppel claim.

9. There is an obvious problem by virtue of the fact that Mr Cox, who actually negotiated the MOU with Mr Gupta, has died, and died before he had made a witness statement, though after he had made some disclosure of his documents, including a WhatsApp message dated August 12, 2017, which is not easy to construe, and a WhatsApp message of 27 March 2017, which I shall address below. Where there is evidence of relevant conversation by him with the Defendant I can at treat that as 'crossing the line'. Mr Thomasson was less involved, and although he might have been able to give some relevant evidence, he has not been called by the Defendant, and his conversations with Mr Kingsnorth of which the latter gave evidence are before me.

10. I consequently heard evidence from three witnesses, Mr Downing, the principal witness for the Claimant, and Mr Gupta, the principal witness for the Defendant, and Mr Kingsnorth. I did not find the evidence of either Mr Downing or Mr Gupta impressive, and counsel on both sides, Mr Hubbard for the Claimant and Mr Cook QC for the Defendant, did not place much if any reliance on the evidence of either of them (much of which was in any event subjective) in closing submissions. Mr Hubbard submitted 18 examples as to which he had considerable justification in asking me to reject the evidence of Mr Gupta, in particular in relation to his evidence in paragraph 26 of his witness statement which he was compelled to abandon in the light of recent disclosure: his explanation of the role of Duet, to which I shall refer insofar as relevant below: and his account of the events (insofar as relevant) when the Claimant discovered the fact of the sub sale and confronted him with it in December 2018, which I do not accept. Mr Cook described Mr Downing's evidence as "*highly unsatisfactory*", and it is right to say that I am satisfied, by reference to the measured evidence of Mr Kingsnorth, that he exaggerated and embellished his evidence in certain respects. Both witnesses were in my judgment going over the top in order to seek to establish their respective cases, Mr Gupta in resisting what he considers to be an unjustifiable claim and Mr Downing in pursuing a claim to which he believes the Claimant is entitled and which he believes the Defendant concealed. However, I found the evidence of Mr Kingsnorth persuasive and reliable, and he was what I called in the course of the hearing my lodestar in respect of the matters of which he gave evidence. I reach my conclusions as to the factual matrix without any or any material reliance on the evidence of Mr Downing or Mr Gupta, and have done so by reference to the contemporaneous documents and, where necessary and admissible, the evidence of Mr Kingsnorth. Mr Hubbard pleaded, but did not actively pursue a case that there was a "wider agreement" of 50-50 shares, and I have not needed to make any findings in relation to it.

The factual matrix

11. I turn to my findings on the factual matrix:

i) The Claimant was acting as agent in respect of the two portfolios at a commission of 2%, and in February 2017 introduced them through Mr Cox to Mr Gupta, then at Duet.

ii) The *Housing Association Investment – Indicative Non-Binding Offer* (the INBO) dated 27 March 2017 was purportedly between Duet (signed on its behalf by Mr Gupta) and Mr Downing. I say 'purportedly' because there is Mr Cox's WhatsApp message to Mr Gupta, which I referred to in paragraph 9 above, dated 27 March 2017, in which Mr Cox says "*Great – which legal BTW? I thought this was outside Duet?",* to which Mr Gupta responded "*Yes but we are putting it on Duet headed paper. Later will say deal didn't work*." The content of this message was not challenged by the Defendant, and it casts considerable doubt on the words used in the INBO, which Mr Gupta explained was intended to be shown to third parties, namely:

> *"3. Duet Background" Duet Group is a global alternative asset manager…*
>
> *5. Funding available: Duet is capable of moving quickly with funding these projects once we have the approval of Duet's investment committee. Duet can allocate tranches of £100 million for a single investment and has the capability of bringing a total of £500 million of funding for this asset class".*

Mr Cox thus knew that, as there appears, Mr Gupta was dealing on his own account, but it seems that, as Mr Cook accepted, Mr Cox did not tell Mr Downing or Mr Kingsnorth; and Mr Kingsnorth continued, in numerous documents thereafter, including those recounting his conversations with Mr Thomasson, to refer to the purchaser as "*the Fund*", and continued to believe that it was Duet. The INBO was, as it said, non-binding, but it provided by clause 8 that the Claimant agreed to grant Duet exclusivity on the transaction of 60 days starting from the acceptance of the indicative offer. Hence the Claimant's role as agent for Hilldale effectively paused, though Mr Downing in an email dated 20 April reported to (inter alios) Mr Cox, that "*the Fund*" had "*confirmed that they are like-minded to proceed with this acquisition*" at a yield of 6%, and that Hilldale was to pay to Asprey a retained agents fee of 2% of the net value of the portfolio on completion of the sale to the Fund.

iii) The 6% yield was agreed between Mr Cox and Mr Gupta at some stage before the INBO, as confirmed by Mr Gupta in evidence.

iv) On 27 April there was a meeting between Mr Thomasson and Mr Kingsnorth to discuss the transaction. Mr Thomasson reported back to Mr Gupta. In the absence of Mr Thomasson, I in any event accept the evidence of Mr Kingsnorth. They agreed that the "*Fund*" was acquiring the first three Hilldale properties at 6%. There was no mention of Rediresi. After a further conversation on 15 May, Mr Kingsnorth reported to Mr Thomasson that "*6. The total current rent roll*

that the Fund will be acquiring is… which at a 6% yield gives a capital value of…".

v) Then, before the MOU on 2 June 2017, which recorded, as set out above, a partnership "*to acquire and exit affordable housing projects*", Rediresi appear. The circumstances are unexplained by Mr Gupta, but there is the following evidence:

a) Mr Cox sent an email ("the Cox email") to (inter alios) Mr Downing and Mr Kingsnorth on 7 June to say that he had " *spoken at some length"* that morning to Mr Gupta and "*the structure that has been set up is designed to cope with yield compression since that is what we had initially promised – yields of 8–9%; and entails the assets being moved through an interim vehicle in order to crystallise the compression….We cannot tinker with this structure which has been tricky to get in place and for the funds [sic] to have confidence in*". I am satisfied that this accurately records the words of Mr Gupta. The *"interim vehicle to crystallise compression"* was Rediresi.

b) Mr Kingsnorth referred on three occasions in his evidence to the interposition of this "*interim vehicle*": (Day 4/162) "*We always thought that they were being sold at 6%… but the introduction of Rediresi.....in order to actually crystallise any yield compression, you need an interim vehicle, and that was done obviously at the time that the MOU was signed.*": (Day 4/189) "*That's what we were told, the fund[..].. acquiring this at 6%. And there was no – even though we inserted Rediresi… I thought that the Rediresi vehicle being inserted, as explained in the* [Cox] *email....was just a mechanism for crystallising the profit*": (Day 4/207) "*When the MOU was signed there was… obviously, as I've said, they introduced the Rediresi, which was the vehicle that was going to be used for yield compression .. but the first three that we effectively had been told that the 6%… They were being sold into the fund at 6%".*

c) In an email from Mr Cox to Mr Kingsnorth and Mr Downing dated 6 June he wrote of a conversation with Mr Gupta "*the other day*", that "*I've also been clear with* [Mr Gupta] *recently that this first group is at 6% and we are getting a 2% fee. When he raised the idea of yield compression the other day, I asked him where he got that from and said I thought it was all at 6%."*

vi) The offer then made for the properties to Hilldale on 7 June 2017 by Mr Gupta on behalf of Rediresi, being a non-binding offer "*to express a non-binding interest*", provided that "*Rediresi assumes a purchase price of 6% yield on today's annual rents for the entire portfolio that is net of 3% stamp duty tax"* and records that *"Hilldale will pay 2% of the purchase price to Rediresi as a brokerage fee, which will be shared on a 50%: 50% basis with Asprey*", thus turning the 2% commission originally owed to the Claimant into a discount from the purchase price which Rediresi is offering to pay Hilldale.

12. The Claimant relies on later agreements allegedly based on similar sharing arrangements between the Claimant and Defendant, but these are as inadmissible in

relation to the construction of the MOU as was the assertion of Mr Gupta to which they were intended as a riposte that he would never have entered into such a sharing arrangement with the Claimant, inevitably part of the evidence of subjective intention which I have disregarded on both sides.

13. It is clear that it cannot be part of the factual matrix, because it necessarily did not "cross the line", that the Defendant was not aware that Mr Downing and Mr Kingsnorth did not know that Rediresi was not a Duet vehicle, and that the Claimant did not know that the Defendant was, as was the case, even before the MOU in serious negotiation with a third party purchaser, PFP, at a cap rate which by August was to be in the 5's and by October was settled at 4.75%.

14. The submissions by the parties in relation to the factual matrix, which I now record, and indeed their respective cases as to construction, to which I shall turn, centre upon the fact that the Defendant's construction of clause 5.1 depends upon its case that the Claimant had no role in relation to resale and no interest at all in the profit resulting upon any resale, while the Claimant asserts that it had introduced the portfolio to the Defendant and was entitled to any increase in the proceeds by reference to the 6% yield in relation to both acquisition and sale.

15. Mr Cook contends that the following can be drawn from the factual matrix:

i) The Claimant contributed no 'added value' to the transaction and certainly had no role in relation to the sale. The Claimant's skills and expertise of which Mr Downing gave evidence, in creating a package fit for sale to social renters, is inapt in this case, as it is common ground that the properties were "*oven ready*", with the guaranteed rents in place. No asset management was required.

ii) The Defendant relies upon the INBO as the starting point to show that the Claimant was already agent and entitled to 2%, and was not entitled to expect any more than would compensate it for the sharing of that 2% and for the impact upon that percentage of its obligation and effort to reduce the purchase price upon which it would be based.

iii) The Claimant had not found a buyer for the project despite considerable time passing before the MOU. So the INBO was, as described by Mr Downing in an email of 27 March, "*a rabbit out of a hat*".

iv) The balance sheet of Hilldale was weak, and the offer letter of 7 June 2017 expressly made the purchase price subject to (among other things) the strength of the balance sheet of the housing association.

v) By the MOU the Claimant was receiving, if it was successful in reducing the acquisition price, a better result than if they had simply been agents receiving their 2% commission on the purchase price.

vi) The Defendant had the responsibility under the MOU to purchase the properties and to fund them. The fact that it was, as Mr Kingsnorth pointed out in evidence, a £100 company, was of no relevance given its responsibility under clause 4 of the MOU for *"funding any approved assets"*.

vii) The MOU gave no role to the Claimant in respect of resale, and there was no provision giving any right to the Claimant to seek or obtain information about the resale, as would be expected if they had an interest in the proceeds.

viii) The 6% was taken as the figure then in play with Hilldale, and clause 5.1 gave the Claimant the opportunity of negotiating with Hilldale in order to reduce the acquisition price for the benefit of both partners.

16. Mr Hubbard responded as follows:

i) The Claimant had not in this case needed to make use of its avowed expertise, but relies upon the very fact that it delivered an oven ready investment to Mr Gupta, who had no previous experience of social housing and no funds.

ii) The Claimant was entitled to expect a substantial share in the collaboration for such introduction, not limited to compensation for the loss of half its agency fee. The purpose of the MOU was for the two parties to go forward on an ongoing basis.

iii) The suggestion that the Claimant had taken months unsuccessfully finding a purchaser for the Hilldale portfolio was inaccurate. The Claimant was only instructed by Hilldale in relation to finding a purchaser for the properties in December/January (as opposed to the earlier efforts of associates of the Claimant to seek to find funding for Hilldale) and had speedily found the Defendant, whereafter there was the agreed 60 day moratorium provided by the INBO.

iv) The alleged weakness of the Hilldale balance-sheet was not a problem, given the guaranteed income stream. It was not a matter which Mr Thomasson had listed as a concern at the meeting of April 27, as set out in detail by Mr Thomasson, referred to in Mr Kingsnorth's email of that date.

v) The new deal in the MOU was not related to whether the Claimant would have remained 2% agent, but it now addressed and provided for the partnership to "acquire and exit affordable housing projects across the UK".

vi) There was not any obligation on the Defendant under the MOU to purchase. As Mr Gupta accepted at Day 6/190, he "*could have walked away*". In any event there was a "*high probability*", though "*no guarantee*", at the time of the MOU, as Mr Gupta accepted at Day 7/112, that there would be a back to back purchase and resale (as was in the event indeed the case), rendering it unnecessary for there to be any funding. This is clearly illustrated by the inclusion in the Defendant's offer of 7 June 2017 to Hilldale, referred to in paragraph 11(vi) above, that the Defendant wished to deduct from the purchase price the stamp duty tax (SDLT) (as again indeed proved to be the case). SDLT, as Mr Gupta accepted, would not be payable by the Defendant if there was a back-to-back transaction, and there would therefore only be a profit (as they would keep the discount without being liable to pay it to the Revenue) if there was a back to back transaction, passing on the liability for SDLT to the ultimate purchaser.

vii) There was no obligation on the Defendant to supply information to the Claimant in relation to any resale, but the agreement was not drafted by lawyers, and there was also no obligation upon the Claimant to supply information to the Defendant in relation to the acquisition negotiations for which it was responsible.

17. Mr Hubbard then adds the following. The 6% was a figure already agreed prior to the interposition of Rediresi *"by way of an interim vehicle to crystallise the yield compression*". Mr Cook accepted (Day 9/63) that "*it is common ground that [Rediresi]was a vehicle to crystallise yield compression*". And Mr Hubbard relies upon the evidence of Mr Kingsnorth (at Day 4/198) that "*the yield compression* [is] *the difference between the purchase and sale"*, and on Mr Gupta's own expressions in the emails of 6 and 7 June referred to in paragraph 11 (v) (a) and (c) above, to assert that yield compression arises when there is a difference between the percentage yield/cap rate on purchase and on resale.

Construction

18. I turn to consider the rival submissions on construction of clause 5.1, irrespective of or supplementary to the factual matrix. Each side contends that clause 5.1 is to be straightforwardly construed in its favour.

19. The passages of the MOU relied upon, now set out together although some of them have already been cited above, are as follows:

> *"WHEREAS:*
>
> *A. Rediresi and Asprey have entered into discussions to partner to acquire and exit affordable housing projects across the UK... B. This MOU sets out the principal terms on which the parties will collaborate in relation to the above.*
>
> *2. Objectives*
>
> *2.1 To acquire and exit affordable housing projects across the UK*
>
> *2.2 As a first step Rediresi is evaluating two assets ("Initial Assets") presented by Asprey:*
>
> *– Hilldale….*
>
> *….*
>
> *2.3 The final approval for investment in the Initial Assets will be subject to completion of market, technical, legal, tax and financial due diligence to the satisfaction of Rediresi, the agreement of Definitive Agreements and Rediresi's final internal approvals.*
>
> *3. Investment structure & Key Terms:*

Rediresi will purchase 100% of the Approved Investments

4. *Roles & Responsibilities*

- *Rediresi will be responsible for funding any approved assets*
- *Asprey will be responsible for obtaining from Hilldale… the binding agreement for exclusivity for at least 4 months for the acquisition of the Approved Investments*
- *Rediresi and Asprey will be responsible for the due diligence requirements of the Seller*

5. *Economic and Cost Sharing*

5.1 *Rediresi and Asprey will share all proceeds of the properties above a 6% cap rate on a 50-50 basis*

5.2 *Rediresi and Asprey will share all Rediresi approved costs for the following but not limited to travel expenses, legal costs, accounting costs and tax costs on a 50-50 basis.*

…

11 *Non-circumvent*

For a period of two years from the signing of this MOU, Asprey… will not attempt… to directly or indirectly enter into capital raising discussions with any entity and/or investor and or any person introduced by Rediresi in relation to the opportunities contemplated under this agreement and each party will not attempt… to directly or indirectly pursue any proposed opportunity introduced by the other Party contemplated under this agreement."

20. The versions of clause 5.1 given by each party can be summarised as follows (though Mr Hubbard hedged his bets with an alternative suggestion):

Mr Hubbard: Rediresi and Asprey will share all proceeds of the properties above what would have been realised if they had been bought and sold at a cap rate of 6%.

Mr Cook: Rediresi and Asprey will share all proceeds of the properties (in the sense of benefit or savings) resulting from a purchase price above a cap rate of 6%.

It can be seen that neither side exactly follows the wording of clause.

21. The Claimant submits that the use of the word "*proceeds*" is entirely consistent with and supports its interpretation. "*Proceeds*" suggests the result of a sale, and indeed Mr Cook accepted in argument on behalf of the Defendant that payment cannot be made until the properties have been sold. On the other hand, the Defendant, on the Claimant's case, has been driven to substitute words, because "*proceeds"* does not fit its argument, since proceeds result from a sale not from an acquisition, and Mr Cook is forced to use the words such as "benefit" or "savings" as a result of a purchase above a cap rate of 6%.

22. The Defendant on the other hand submits that the Claimant is faced with the impossibility for its construction of the words "*above a 6% cap rate*", when they need to say "below" a cap rate of 6% or "above a 6% cap rate on acquisition and below it on sale".

23. The Claimant's case is as follows: –

    i) The 6% cap rate was in place from very early on, as agreed between Mr Cox and Mr Gupta, and as discussed at the meeting between Mr Thomasson and Mr Kingsnorth. 6% was all that was ever discussed, so the incentivisation to both partners, resulting from the provision, is to share all proceeds above what would be recovered from a cap rate of 6% on acquisition and on sale. No other interpretation addresses or fits with the use of the word proceeds. Thus if the acquisition remained at 6% and the sale was also at 6%, there would be no yield compression. If the acquisition was at 6.25% and the sale was at 5.75% then there would be yield compression by reference to 6%.

    ii) The clause was a helpful shorthand between parties who well knew the implication of a cap rate and of yield compression: it would be well understood by people in the business and was not legally drafted.

    iii) Only such an interpretation would reflect the provision, clearly expressed and repeated in the MOU, for a partnership and collaboration and in particular a partnership on an ongoing basis (for a period of at least 2 years, by reference to clause 11 of the MOU) to *acquire and exit.*

    iv) The provision for costs in clause 5.2 means that the Claimant was to share the legal costs of both purchase and resale, consistent with its right to profit both on purchase and sale.

24. The Defendant's response is:

    i) It recognises that the agreement was dedicated to *acquire and exit*, but the Claimant was to be responsible for (and benefit from) the acquisition and the Defendant should be responsible for (and benefit from) the sale. Although there was a partnership, not all partnerships are intended to lead to equal shares of all the profits.

    ii) The costs of acquisition and resale were not in the event differentiated as the solicitors charged a lump fee to cover both as it was a back-to-back transaction, and this was not something that was considered by the Defendant.

iii) The purpose of the MOU was to incentivise the Claimant to achieve a reduction of the purchase price, and, although 6% was certainly the cap rate specified in the documents set out above, there was room for reduction and was in fact such reduction. The purchase price was reduced by (a) the amount of the SDLT discount (b) the deduction of the 2% agency fee from the price paid on acquisition. The Defendant shared with the Claimant half of these deductions. This was the proper effect of clause 5.1 at work. That is the limit of the Claimant's entitlement. Although Mr Gupta originally said in evidence that these agreed deductions did not fall within the MOU, in re-examination he confirmed that they did.

25. The Claimant's answer to (iii) is as follows:

i) The provision for the two deductions from the purchase price was outside the purview of clause 5.1. They were agreed, but neither related to a reduction of the cap rate. The MOU provided in Recital B that it set out the "*principal terms*" of the collaboration. The agreement to share the benefits of the deductions was a separate agreement not covered by the MOU, as Mr Gupta did originally accept. They are both "*discounts*" from the purchase price, as Mr Cook described them at Day 9/89, but they did not alter or affect the cap rate, which remained at 6%. The purchase price remained calculated by reference to the 6% yield, and from that price there were discounts of the 2% fee and the 3% SDLT, but there was no recalculation of the cap rate. This is indeed clear from the very offer letter to Hilldale dated 7 June referred to in paragraph 11 (vi) above.

ii) These discounts therefore do not support the Defendant's argument, and are irrelevant to yield compression, and the "*proceeds*" are what eventuate after yield compression of the cap rates on acquisition and sale, by reference to the cap rate of 6% at each end.

Conclusion

26. I am convinced that the Claimant's interpretation gives much more meaning, and is much closer, to the wording of clause 5.1. I accept the arguments for the Claimant as much more persuasive than those of the Defendant in respect of both the factual matrix and construction. I find the provision for the sharing of the costs on sale persuasive. But, more significantly, I conclude that there are two factors in clause 5.1 of importance: (i) "proceeds" and (ii) "6% cap rate". "*Proceeds"* are what result after a sale not a purchase, and the 6% cap rate fell to be calculated at both purchase and sale, in order to calculate the yield compression which the parties expected or aimed for. It was the 6% cap rate which was key, not simply a reduction in the purchase price. I prefer the Claimant's interpretation, that the Claimant would share in the proceeds if they were more than ("above") that achieved by a 6% cap rate on acquisition and resale, as reflecting the parties' agreement, and in the circumstances the properties were bought at 6% (on later tranches 6.25% and 6.5%), less deductions, and sold at 4.75%. The yield compression foreseen by the interposition of Rediresi thus results in a sum to be shared equally, taking account of what has already been shared.

Estoppel by Convention

27. The Defendant did not disclose to the Claimant that it had prior to the MOU found a third party buyer, PFP, and that, as appears from very recent disclosure, Mr Thomasson was negotiating with Mr Soin of PFP at the same time as his discussions with Mr Kingsnorth, such that, as set out in paragraph 16 (vi) above, Mr Gupta was optimistic of a sale, which eventuated by October as 4.75%. The Claimant only discovered the position in December 2018, and after several confrontations with Mr Gupta (see paragraphs 8 and 10 above), issued these proceedings.

28. The Claimant ran a case that Mr Gupta had misled it by representing that the best resale possible was at 6% and that there had been a resale at that figure. The 12 August What'sApp exchange between Mr Cox and Mr Gupta referred to in paragraph 9 above was relied upon in support of this, but I found it too difficult to construe. The misrepresentation case was not supported by Mr Kingsnorth, whose evidence I preferred that he had simply assumed, in the light of his discussions with Mr Thomasson, that the sale to "*the Fund*", which, uninformed by Mr Cox, he believed to be in-house, was indeed the resale price, at least in relation to the first three properties, even after the interposition of Rediresi, and he was never told anything to the contrary.

29. I am entirely satisfied that he did so assume, and that he calculated the figures due pursuant to clause 5.1 in the belief that there was no yield compression, but only the deductions to be made in respect of the SDLT and the 2% fee. I accept his evidence (at Day 4/214) that when he rendered the invoices to the Defendant pursuant to clause 5.1 "*we calculated the yield compression by taking the yield that we knew we were acquiring at and the yield that we thought it was being sold at..* [and then] .. *calculated the SDLT as a percentage of the purchase price and the fee as a percentage of the purchase price".*

30. Had I found that that such belief was induced by misrepresentation, then there would have been no question of any defence of estoppel by convention arising, but the Claimant submitted that there was no convention to found estoppel in any event. Mr Cook submitted that by reference to **Wilken and Ghaly The Law of Waiver, Variation, and Estoppel** at 10.09 there was a shared assumption between the parties sufficient to give rise to an estoppel by convention. This was pleaded in paragraph 25(f) of the Defence as being a shared understanding as to the (Defendant's version of the) construction of clause 5.1, but this was not pursued, and the case was simply made that both parties believed that the sums paid were due pursuant to clause 5.1, and the payments were made and accepted in that belief and it is not now possible to revisit that.

31. Mr Hubbard, however, points to the Court of Appeal decision in **Ing Bank NV v Ros Roca SA,** per Carnwath LJ which makes it clear at [64(i)] that the relevant common understanding is as to "*the factual or legal basis on which a current transaction is proceeding*". Mr Hubbard is entirely right in my judgment to contend that there is an obvious distinction between a common assumption as to a result and a common assumption as to the legal or factual basis for that result. It is quite clear, and I find, that in this case the basis upon which the Claimant sought and accepted payment was on an assumption that clause 5.1 was in operation <u>because it believed that there had been a resale at 6%,</u> which is not an assumption in accordance with the Defendant's

construction (which I have rejected) that the Claimant had no entitlement in respect of the resale. There was plainly no common assumption.

32. The Defendant's case on estoppel by convention fails and there must therefore be judgment for the Claimant.