Neutral Citation Number: [2022] EWHC 745 (Comm)

Case No: CL-2021-000052

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2022

Before :
CHRISTOPHER HANCOCK QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) ROLLS-ROYCE HOLDINGS PLC — **Claimant/ Applicant**

- and -

(2) GOODRICH CORPORATION — **Defendant/ Respondent**

- and -

(3) ROLLS-ROYCE PLC
(4) ROLLS-ROYCE TOTAL CARE SERVICES LIMITED
(5) ROLLS-ROYCE CORPORATION
(6) ROLLS-ROYCE DEFENSE SERVICES INC.
(7) ROLLS-ROYCE DEUTSCHLAND LTD. & CO. KG
(8) ROLLS-ROYCE BRASIL LIMITADA
(9) ROLLS-ROYCE CANADA LIMITED
(10) ROLLS-ROYCE CONTROLS AND DATA SERVICES LIMITED (FORMERLY ROLLS-ROYCE GOODRICH ENGINE CONTROL SYSTEMS LIMITED)

Third to Tenth Parties

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- -

Daniel Toledano QC and David Caplan (instructed by **Slaughter and May**) for the **Claimant**
Simon Croall QC and Stewart Chirnside (instructed by **Bristows LLP**) for the **Defendant**

Hearing dates: December 7, 9, 2021

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Approved Judgment

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

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Christopher Hancock QC :

Introduction and factual background.

1. This is an application by the Claimant, ("**RR Holdings**"), for summary judgment on its claim for a declaration that it has validly exercised its call option as contained in the agreements set out below. For ease of reference, a summary of my conclusions and decision is set out at paragraph 119 of this judgment.

2. The facts of the matter are set out in the following paragraphs.

3. In 2008, a Joint Venture ("**JV**") was established between various members of the Rolls-Royce Group (**"Rolls-Royce Group"**) and the Goodrich Group (**"Goodrich Group"**). A Joint Venture Company ("**JVC**") was established as a new jointly owned company to carry on the business of the JV, being the design, manufacture and sale of original engine controls equipment.

4. On 31 December 2008, the Defendant ("**Goodrich**"), and various members of the Rolls-Royce Group entered into a number of contracts as part of the arrangements for establishing the JV. Those agreements included the following:

   (i) A Joint Venture Agreement between, *inter alia*, Goodrich, RR Group plc ("**RR Group**") and JVC setting out the terms governing the JV ("**JVA**"). The JVA included at clause 7.7 an option for RR Group to purchase Goodrich's shares in JVC in the event of a Change of Control (as defined) ("the **JVA Call Option**").

   (ii) An Aftermarket Services Agreement ("**ASA**") and an Agreement for the Supply of Goods and Work for Engine Repair Services ("**ECSURS**") between *inter alia* Goodrich and the Third to Tenth Parties [1]which set out the arrangements for the provision and/or supply by Goodrich of Aftermarket Services (as defined).

   (iii) A Put and Call Option Agreement ("**PCOA**") between Goodrich and RR Group pursuant to which Goodrich granted a call option ("the **Call Option**") to RR Group to allow it to acquire Goodrich's engine control systems aftermarket business or "**AM Package**" (as explained further below) to RR Group. It is RR Holdings' attempt to exercise the Call Option on 9 October 2018 by service of a notice dated 8 October 2018 which gives rise to its claim in the present proceedings.

5. Under clause 3.1 of the PCOA, Goodrich granted RR Group the right, exercisable during the "Call Option Period" by service of a notice, to require Goodrich to sell to it the AM Package in accordance with the terms of a Combined Asset and Share Purchase Agreement ("**CASPA**"). The AM Package was defined as the shares and business assets of those companies in the Goodrich Group carrying on the engine control systems aftermarket business for defined Rolls-Royce engines. The Call Option Period was one year commencing on the date RR Group served a Buyout Notice under the JVA exercising the JVA Call Option.

6. Under clause 3.4 of the PCOA, within 40 business days of the exercise of the Call Option, Goodrich was obliged to deliver to RR Group the Call Option Exercise

[1] To clarify, JVC (the Tenth Party) was not a party to the ECSURS.

Preliminary Information Documents (the "**Preliminary Information**"), after receipt of which RR Group would have 40 business days to notify Goodrich whether it wished to withdraw the exercise of the Call Option. The Preliminary Information consisted of documents containing information about Goodrich's aftermarket business (Part 1 of Schedule 3).

7. If the exercise of the Call Option was not withdrawn, Goodrich and RR Group were obliged to enter into the CASPA and Goodrich was obliged to sell the AM Package to RR Group in accordance with its terms. At or around the time they entered into the PCOA, Goodrich and RR Group negotiated and agreed (but did not execute) an agreed form of the CASPA.

8. In 2011, RR Holdings replaced RR Group as the holding company for the Rolls-Royce Group following a share for share exchange under a scheme of arrangement. Thereafter, RR Group continued to exist and to be a member of the Rolls-Royce Group. Its most recent filed accounts describe its principal activity as holding investments in subsidiaries of the Rolls-Royce Group. I was told that, following the scheme of arrangement, the corporate structure of the Group was RR Holdings (as holding company), followed by RR Group, followed by various subsidiaries, including the Third Party ("**RR plc**"), who RR Group were shareholders in.

9. In 2012, Goodrich entered into negotiations to merge with the Charlotte Lucas Corporation, a wholly owned subsidiary of United Technologies Corporation ("**UTC**") with Goodrich surviving the merger as a wholly owned subsidiary of UTC (the "**UTC Merger**"). The Rolls-Royce Group subsequently raised concerns with the US Department of Justice (the "**DoJ**") in relation to the UTC Merger which led to antitrust proceedings being brought by the DoJ against UTC and Goodrich in the US.

10. On 7 June 2012, in anticipation of the merger referred to above, *RR Holdings* (my emphasis) and Goodrich entered into a letter agreement ("**2012 Letter Agreement**") pursuant to which it was agreed *inter alia* that: (i) a Change of Control for the purposes of the JVA would be deemed to have occurred on closing of the UTC Merger ("**Closing**"); (ii) the 2012 Letter Agreement would constitute a Buyout Notice under the JVA effective from the date of Closing triggering the commencement of the Call Option Period under the PCOA; and (iii) the Call Option Period would be extended by one year until the second anniversary of Closing.

11. On 26 July 2012, Closing took place. Accordingly, pursuant to the 2012 Letter Agreement, the Call Option Period was due to expire on 26 July 2014.

12. At or around the same time, as recorded in a proposed final judgment dated 26 July 2012 (the "**Proposed Final Judgment**"), UTC and Goodrich consented to the entry of judgment in United States of America v United Technologies Corporation and Goodrich Corporation (Case no.1:12-cv-01230-KBJ) by which UTC and Goodrich would be ordered to offer "Rolls-Royce" (defined as RR Group, its successors, assigns, subsidiaries, divisions, groups, affiliates and partnerships) an additional new right to purchase the AM Package at the same price as determined under the PCOA but exercisable until 31 December 2023 (the "**Right to Purchase**" or "**RTP**").

13. The RTP ran in parallel to the Call Option under the PCOA and used the same pricing mechanism as under the PCOA but lasted for significantly longer. However, it lacked

a number of significant contractual protections which the parties had negotiated and agreed in relation to the exercise of the Call Option under the PCOA.

14. On 13 December 2012, UTC wrote to Rolls-Royce plc ("RR plc") offering the RTP in accordance with the Proposed Final Judgment ("**RTP Offer Letter**"). On 29 May 2013, the US District Court for the District of Columbia (the "**US Court**") issued an approved final judgment (the "**Final Judgment**"). It was common ground that the Final Judgment was, so far as relevant, in identical terms to the Proposed Final Judgment.

15. On 3 February 2014, *RR Holdings* (my emphasis) and Goodrich entered into a second letter agreement ("**2014 Letter Agreement**") which extended the Call Option Period for a further 3 years until 26 July 2017.

16. On 28 June 2017, *RR Holdings* (my emphasis) and Goodrich entered into a further letter agreement ("**June 2017 Letter Agreement**") which *inter alia* extended the Call Option Period to 31 December 2017 and provided for good faith negotiations to agree, amongst other matters, the modification and application of the framework of the PCOA to the RTP.

17. On 21 December 2017, Goodrich and *RR Holdings* (my emphasis) entered into: (i) a Right to Purchase Agreement ("**RTP Agreement**"); and (ii) a further letter agreement ("**December 2017 Letter Agreement**").

18. Under the RTP Agreement, Goodrich granted *RR Holdings* (my emphasis) a modified form of the RTP ("**Modified RTP**") which was only exercisable in the period 1 January 2020 to 31 December 2023 and which included some of the contractual protections provided for in the CASPA which were absent from the RTP. The purpose of the RTP Agreement was to replace the Call Option with the Modified RTP and to allow the PCOA to expire on the Unconditional Date (as defined) leaving the Modified RTP as the only option to purchase the AM Package. The Modified RTP was conditional on the parties either obtaining Governmental Approval (as defined) or determining that no such approval was required (the "**Condition**") (clause 2.2). It contained express and unqualified obligations on the parties to take all necessary steps to ensure satisfaction of the Condition (clauses 2.3 and 2.4). The Unconditional Date was defined as the first business day following the satisfaction of the Condition or determination that no approval was required (clause 2.5). If the Condition was not satisfied within 6 months (i.e. by 21 June 2018) or such other date as agreed between the parties in writing (the "**Longstop Date**"), the RTP Agreement would automatically expire (clause 2.6) and the only option remaining would be the RTP.

19. On exercise of the Modified RTP, the parties would become bound to enter into a modified version of the CASPA between *RR Holdings* (my emphasis) and Goodrich. The CASPA had been renegotiated in certain respects, but the price payable for the AM Package would still be calculated on the same basis as under the PCOA (clause 2.8). The Modified RTP contained certain contractual protections which had been included under the PCOA but which had been lacking from the RTP ordered in the Final Judgment.

20. As noted above, the relevant parts of the December 2017 Letter Agreement formed part of the same transaction as the RTP Agreement. The December 2017 Letter Agreement provided as follows:

> "*1. Extension of the PCOA and automatic expiry of the PCOA and this Letter Agreement:*
>
> *(a) Notwithstanding any terms to the contrary in the PCOA… [as amended], the parties agree that the Call Option Period … shall automatically expire on the first business day following the day upon which the parties either obtain any necessary Governmental Approval (as defined in the RTP Agreement) or determine no Governmental Approval is required and the RTP Agreement … thereby becomes unconditional in accordance with its terms.*
>
> *(b) If the parties determine that Government (sic) Approval (as defined in the RTP Agreement) is required but are unable to obtain the same on or before the Longstop Date (as defined in the RTP Agreement), this Letter Agreement will automatically expire and the Right to Purchase, as provided for in [the RTP Offer Letter], shall then form the only basis upon which Rolls-Royce or its Affiliates shall be entitled to purchase the AM Package from Goodrich or its Affiliates (including UTC, its ultimate parent).*
>
> *2. Revised right to purchase the AM Package:*
>
> *(a) The parties acknowledge that pursuant to the PCOA and the Right to Purchase Letter, Rolls-Royce has two separate and partially concurrent rights to purchase the AM Package from Goodrich. To provide certainty, the parties have agreed that the PCOA, as amended by paragraph (1) of this Letter Agreement, should expire in accordance with its terms so that, subject to paragraph 2(b) below, only… [the Modified RTP] remains in place until 31 December 2023.*
>
> *(b) In consideration of, among other things, Rolls-Royce agreeing not to exercise the Modified RTP in accordance with the RTP Agreement, which, for the avoidance of doubt, means Rolls-Royce shall not serve the 12 months' RTP Notice on Goodrich earlier than 1 January 2020, Goodrich will, on or around the date of this Letter Agreement, enter into the… [the RTP agreement] which provides all terms and conditions pertaining to the Modified RTP. Consequently, the parties agree, and Rolls-Royce hereby waives any claim to the contrary, that the RTP Agreement (together with any documents referred to therein), shall form the only basis upon which Rolls-Royce or its Affiliates shall be entitled to purchase the AM Package from Goodrich or its Affiliates (including UTC, its ultimate parent), unless the parties agree otherwise or the provisions of paragraph 1(b) above apply.*"

21. The meaning and effect of these provisions is disputed. I address this issue below.

22. On or around 20 March 2018, the DoJ notified the parties that it considered certain terms of the RTP Agreement (and therefore the Modified RTP) to be inconsistent with the Final Judgment and that Governmental Approval was required. Thereafter, Goodrich and RR Holdings entered into discussions with the DoJ with a view to obtaining Governmental Approval but without success.

23. On 21 June 2018, *RR Holdings* (my emphasis) and Goodrich entered into a further letter agreement to extend the Longstop Date in the RTP Agreement for a period of 3 months until 21 September 2018.

24. On 19 September 2018, *RR Holdings* (my emphasis) and Goodrich entered into a further letter agreement pursuant to which they agreed to extend the Longstop Date in the RTP Agreement until 21 October 2018 and that, for the avoidance of doubt, the Longstop Date in the 2017 Letter Agreement should also be 21 October 2018.

25. On 9 October 2018, RR Holdings purported to exercise the Call Option by service of a letter dated 8 October 2018 on Goodrich (the "**Call Option Notice**") in order to trigger the process to allow it to purchase the AM Package.

26. On 16 October 2018, Goodrich wrote to RR Holdings setting out its position that the Call Option had been invalidly exercised and, on 3 December 2018, Goodrich formally disputed the exercise of the Call Option.

27. On 2 February 2021, RR Holdings issued the present proceedings against Goodrich in the Shorter Trials Scheme ("**STS**") and served its Particulars of Claim.

28. On 19 March 2021, Goodrich filed its Defence. At the same time, Goodrich also commenced its Additional Claim against the Third to Tenth Parties for breaches of the exclusivity provisions in the ASA and ECSURS. It is Goodrich's case that the Additional Claim should be heard together with RR Holdings' claim because *inter alia* the price payable for the AM Package under the PCOA and the value of the AM Package is directly affected by whether the Third to Tenth Parties have breached the exclusivity provisions.

29. On 9 April 2021, RR Holdings served its Reply to Goodrich's Defence. On 28 April 2021, the proceedings were transferred out of the STS by consent.

The test for summary judgment.

30. The relevant principles applicable to summary judgment applications which are most often cited are those set out by Lewison J (as he then was) in ***EasyAir Limited v Opal Telecom Limited*** [2009] EWHC 339 (Ch), where he said:

> "*15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91 ;*

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue

> *that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*."

31. This passage was approved by the Court of Appeal in ***AC Ward v Catlin (Five) Ltd*** [2009] EWCA Civ 1098.

32. I was also referred to the decision of the Court of Appeal in ***Mellor v. Partridge*** [2013] EWCA Civ 477 at [3], in which the Court of Appeal made similar points, stating that:

    (i) the Court must consider whether the defence has a "*realistic*" as opposed to a "*fanciful*" prospect of success;

    (ii) a "*realistic*" defence is one that carries some degree of conviction, i.e. it is more than merely arguable;

    (iii) in reaching its conclusion, the Court must not conduct a "*mini- trial*";

    (iv) the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;

    (v) the Court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available to the trial judge and so affect the outcome of the case;

    (vi) short points of law or construction, in respect of which the Court has before it all the evidence necessary for the proper determination of the question, may be determined.

33. Goodrich also submitted that the Court should not grant summary judgment where it considers there is a compelling reason for a trial, even if a party has no real prospect of success. I was referred in this connection to the notes to the White Book at 24.2.4 where a number of examples of the type of circumstances which may engage the second limb are set out.

The issues on this application.

34. The issues on this application were as follows:

    (i) Novation.

        34.i.1. Is Goodrich contractually estopped from denying that there was a novation of the Call Option to RR Holdings?

        34.i.2. Was there a novation of the Call Option to RR Holdings, or is there a triable issue that there was not?

34.i.3. Was any novation, or contractual estoppel, induced by misrepresentation or common mistake?

(ii) As a matter of the construction of the December 2017 Letter Agreement, did RR Holdings have the right to exercise the Call Option when it purported to do so? This issue involves two sub-issues, as follows:

34.ii.1. Was there any right to exercise the Call Option after 31 December 2017?

34.ii.2. Did any such right expire when the parties determined that Governmental Approval would not be forthcoming?

Issue 1: Novation, and contractual estoppel as to such.

35. There was no real dispute about the relevant principles in relation to novation. Novation of a contract takes place when both parties to a contract, and a third party, agree that the third party will step into the shoes of one of the contracting parties, assuming the rights and obligations of that original contracting party. For these purposes, I am content to adopt the tests laid down in Chitty on Contracts, 34th ed, at 4-208-209, where the authors state as follows:

> "*Novation takes place where:*
>
> *"… there being a contract in existence, some new contract is substituted for it, either between the same parties… or between different parties; the consideration mutually being the discharge of the old contract."*
>
> *The second kind of novation ("three-party novation") is the more common, consisting of an agreement or agreements between A, B and C pursuant to which B's rights and obligations under an existing contract with A are assumed by C under a new contract with A. There is a new contract and it is therefore essential that the consent of all parties shall be obtained. Consent may be express (whether oral or written) or may be inferred from conduct. The "proper approach" to deciding whether a novation can be inferred from conduct is*
>
> *"to decide whether that inference is necessary to give business efficacy to what actually happened … The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct."*
>
> *For instance, in Evans v SMG Television Ltd a novation was inferred from conduct where one of the original contracting parties (B) was a company that became effectively dormant and did not perform its contractual obligations, while the new party (C) stepped in, performed those obligations (including the payment of fees), and entered agreements varying the original obligations with A. Whether there has been consent is assessed objectively. It follows that the parties may not appreciate that*

> *their dealings have had the effect of novation, but this does not prevent the novation from being effective.*"

Contractual estoppel.

36. Once again, there was limited disagreement about the basic principles in this respect. Both parties referred me to ***Peekay Intermark Ltd v. ANZ Banking Group Ltd*** [2006] 2 Lloyds Rep 511 (CA) and ***Springwell Navigation Corp v. JP Morgan Chase Bank*** [2010] 2 CLC 705 (CA). If, on the true construction of their contract, the parties agree to arrange their contractual relations on the assumed basis that a certain state of affairs exists, then they may be held to their bargain irrespective of whether that state of affairs in fact exists: see ***Peekay*** at [56]-[57], where the Court said:

> "*56. There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see Colchester Borough Council v Smith [1991] Ch. 448, affirmed on appeal [1992] Ch. 421.*
>
> *57. It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith . However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see E.A. Grimstead & Son Ltd v McGarrigan (C.A.) (unreported, 27th October 1999).*"

and ***Springwell*** at [143]-[144], [156] and [177]:

> "*143. Before I examine Lowe v. Lombank and subsequent cases on this issue, I will try and analyse the matter from principle. If*

A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless Lowe v Lombank is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties. It is, after all, common in marine insurance contracts for an assured to "warrant" that a certain state of affairs has existed in the past and is still existing at the time the insurance contract is concluded or will continue, e.g. that the nationality of a ship was and is British; or that a ship was and is "in Class" with her Classification Society. The shipowner may know that those things are not the case; the insurer may have his suspicions that they are not the case. The parties agree that for the purposes of the insurance contract, the facts as "warranted" by the assured are as he has stated them to be. A "conclusive evidence" clause in a sale contract, viz. that a report on e.g. the amount or condition of a commodity sold under a contract between A and B shall be "conclusive evidence" of the matters stated in the report is to the same effect. The parties are agreeing that the statements in the report shall be the case for the purposes of the contract of sale and the parties cannot go behind that agreement.

144. So, in principle and always depending on the precise construction of the contractual wording, I would say that A and B can agree that A has made no pre-contract representations to B about the quality or nature of a financial instrument that A is selling to B. Should it make any difference that both A and B know at and before making the contract, that A did, in fact, make representations, so that the statement that A had not is contrary to what each side knows is the case? Apart from the remarks of Diplock J in Lowe v Lombank, Mr Brindle did not show us any case that might support the proposition that parties cannot agree that X is the case even if both know that is not so. I am unaware of any legal principle to that effect. The only possible exception might be if the particular agreement between A and B on the certain state of affairs concerned contradicts some other specific or more general rule of English public policy. Like Moore-Bick LJ in Peekay I see commercial utility in such clauses being enforceable, so that parties know precisely the basis on which they are entering into their contractual relationship…

… 156. In contrast to Lowe v Lombank, there is a series of cases which support the proposition that parties can agree that a state of affairs will be the basis of their contractual dealings with one another, even if they know that it is not the case. First there is the decision of the Court of Appeal in Burrough's Adding Machines Limited v Aspinall. The case concerned a dispute

> *about whether the salesman was entitled to commission on the sale of adding machines to banks. The company had, wrongly but without deceit, prepared its accounts of the sales of the machines on the basis that sales to banks were excluded. The salesman knew that sales of adding machines had been made to banks, but did not dispute the accounts at the time they were sent to him. He only raised the issue when he left the company's service some years later. The court held that a term in the contract between the company and its salesman that all statements of account sent by the company to him " shall be deemed to be accepted by the salesman as correct " unless he gave written notice that they were not within 30 days of receiving the account, bound both parties. Therefore the salesman was bound by the agreed statement of facts even if they were not accurate….*
>
> *… 177. I have, effectively, rejected Mr Brindle's argument that there is no juristic concept of "contractual estoppel" which is distinct from the doctrine of "estoppel by convention". To my mind, once it is accepted that there is a separate doctrine of "contractual estoppel" then there is no room for a requirement that the party which wishes to rely on that estoppel must demonstrate that it would be unconscionable for the other party to resile from the conventional state of affairs that the parties have assumed. The reason why that is a requirement in the case of "estoppel by convention" is precisely because there is no contract between the parties. Therefore some other mechanism has to come into play to make the non-contractual "convention" enforceable.*"

37. The issue of contractual estoppel is, in the first instance, a question of construction of the relevant documents. I address the "parties" contentions in this regard first. However, Goodrich also contended that any contractual agreement to the effect that the parties should be treated as having novated the rights and obligations under the PCOA was itself induced by misrepresentation. Since this argument raised separate considerations, I deal with it separately below, after dealing with the position on the basis of the documentation before me.

RR Holdings' contentions.

38. RR Holdings, for its part, contended that Goodrich was contractually estopped from denying that there had been a novation by virtue of the terms of the various agreements between the parties.

39. As noted above, a change of control of Goodrich took place on 26 July 2012, upon the closing of the UTC Merger pursuant to which it became a wholly owned subsidiary of United Technologies Corporation ("UTC") now Raytheon Technologies Corporation.

40. Prior to that date, pursuant to the 2012 Letter Agreement between RR Holdings and Goodrich referred to above :

(i) The parties recited (twice) that the PCOA was an agreement between RR Holdings and Goodrich;

(ii) RR Holdings served a Buyout Notice, effective upon the closing of the UTC Merger (which was, in the event, 26 July 2012), thus triggering the commencement of the Call Option Period under the PCOA (§1(b));

(iii) It was agreed that the Call Option Period would last for two years rather than one (i.e. until 26 July 2014) (§3); and

(iv) The PCOA was amended in a number of other respects (§§4-5).

41. It is common ground on the pleadings that (i) the service of the Buyout Notice was valid and (ii) the extension of the Call Option Period was effective.

42. Pursuant to the 2014 Letter Agreement (again) between RR Holdings and Goodrich referred to above :

(i) The parties again recited that the PCOA was an agreement between RR Holdings and Goodrich; and

(ii) It was agreed that the Call Option Period would be extended until 26 July 2017 (§1).

43. Pursuant to the June 2017 Letter Agreement between (again) RR Holdings and Goodrich :

(i) The parties again recited that the PCOA was an agreement between RR Holdings and Goodrich; and

(ii) It was agreed that the Call Option Period would be extended further until 31 December 2017 (§1).

44. Again, it is common ground on the pleadings that those extensions of the Call Option Period were effective.

45. As already noted above, then in the Proposed Final Judgment dated 26 July 2012, UTC and Goodrich consented to the entry of judgment in United States of America v United Technologies Corporation and Goodrich Corporation by which UTC and Goodrich would be ordered to "*offer to Rolls-Royce a new right for a new period in which Rolls-Royce may purchase or acquire the "AM Package" as defined in the [PCOA] at the price determined using the formula set forth in clause (b) of the definition of "Call Option Price" in the [PCOA] … until … December 31, 2023 …*". The Proposed Final Judgment further provided that UTC and Goodrich agreed to be bound by its provisions pending its approval by the United States District Court for the District of Columbia, and that *"[n]othing in this [Proposed] Final Judgment shall be construed to … affect any agreements between … Goodrich … and Rolls-Royce … relating to the option to purchase or acquire the [AM Package] …*".

46. Pursuant to the RTP Offer Letter dated 13 December 2012, UTC offered the RTP as contemplated by the Proposed Final Judgment.

47. On 29 May 2013, the US Court issued an approved judgment in the abovementioned case, which was in identical terms to the Proposed Final Judgment.

48. On 21 December 2017, RR Holdings and Goodrich entered into both the RTP Agreement and the December 2017 Letter Agreement.

49. The RTP Agreement:

(i) Recited that "[*p]ursuant to the [PCOA], [RR Holdings] was granted a right to acquire [Goodrich's] engine control systems aftermarket business …*" (recital D) and defined the PCOA as *"the agreement between the parties …*" (clause 1.1) (emphases added);

(ii) Recited that the US Court had ordered Goodrich to grant the RTP to "*[RR Holdings] and its affiliates*" (recital E) (emphasis added) and recorded that Goodrich had granted the RTP to RR Holdings and was modifying the same pursuant to the terms of the RTP Agreement (clause 2.1);

(iii) Accordingly granted RR Holdings a modified form of RTP under certain specified conditions (the "**Modified RTP**"), which, pursuant to clause 2.1 and the definition of "*RTP Period*" in clause 1.1, could only be exercised between 1 January 2020 and 31 December 2023; and

(iv) Provided that:

49.iv.1. "*The parties … wish to allow the [Call Option under the PCOA] to automatically expire on the Unconditional Date (as defined below), leaving only the RTP, as modified by this Agreement. For avoidance of doubt, following expiry of the [Call Option], [RR Holdings] and its affiliates shall only have a single right or option to buy the AM Package, which is the RTP as set forth herein*" (recital F);

49.iv.2. "*The Right to Purchase shall be conditional on either the Governmental Approval [i.e. approval by the US Court and/or the DoJ] having been obtained or the parties determining no Governmental Approval is required ("**Condition**")*" (clause 2.2);

49.iv.3. "*The first Business Day immediately following satisfaction of the Condition or determination that no Condition is required is the **Unconditional Date***" (clause 2.5); and

49.iv.4. "*If the Condition is not satisfied within six (6) months of the date of this Agreement, or such other date as mutually agreed in writing between the parties (the "**Longstop Date**") this Agreement shall automatically expire*" (clause 2.6).

50. The December 2017 Letter Agreement:

(i) Recited (again) that the PCOA was an agreement between RR Holdings and Goodrich;

(ii) Provided, under the heading "*Extension of the PCOA and automatic expiry of the PCOA and this Letter Agreement*", that:

50.ii.1. "*Notwithstanding any terms to the contrary in the PCOA [as amended], the parties agree that the Call Option Period … shall automatically expire on the first business day following the day upon which the parties either obtain any necessary Governmental Approval (as defined in the RTP Agreement) or determine that no Governmental Approval is required and the RTP Agreement … thereby becomes unconditional in accordance with its terms*" (§1(a)); and

50.ii.2. "*If the parties determine that Government[al] Approval (as defined in the RTP Agreement) is required but are unable to obtain the same on or before the Longstop Date (as defined in the RTP Agreement), this Letter Agreement will automatically expire and the Right to Purchase, as provided for in [the RTP Offer Letter], shall then form the only basis upon which Rolls-Royce or its Affiliates shall be entitled to purchase the AM Package from Goodrich or its Affiliates (including UTC, its ultimate parent)*" (§1(b)); and

50.ii.3. Provided, under the heading "*Revised right to purchase the AM Package*", that:

50.ii.3.1. "*The parties acknowledge that pursuant to the PCOA and [the RTP Offer Letter], Rolls-Royce has two separate and partially concurrent rights to purchase the AM Package from Goodrich. To provide certainty, the parties have agreed that the PCOA, as amended by paragraph (1) of this Letter Agreement, should expire in accordance with its terms so that, subject to paragraph 2(b) below, only the Right to Purchase, as modified by the RTP Agreement ("Modified RTP") remains in place until 31 December 2023*" (§2(a)); and

50.ii.3.2. "*In consideration of, among other things, Rolls-Royce agreeing not to exercise the Modified RTP in accordance with the RTP Agreement, which, for the avoidance of doubt, means Rolls-Royce shall not serve the 12 months' RTP Notice on Goodrich earlier than 1 January 2020, Goodrich will … enter into the [RTP Agreement] … Consequently, the parties agree, and Rolls-Royce hereby waives any claim to the contrary, that the RTP Agreement (together with any documents referred to therein), shall form the only basis upon which Rolls-Royce or its Affiliates shall be entitled to purchase the AM Package … unless the parties agree otherwise or the provisions of paragraph 1(b) above apply*" (§2(b)).

Goodrich's contentions.

51. In its skeleton argument, Goodrich argued that RR Holdings had failed to distinguish between a contractual estoppel (in the ***Peekay/Springwell*** sense) based on the operative terms of the agreements and an estoppel based on the recitals (which as Lord Toulson suggested in ***Prime Sight Ltd v Lavarello*** [2014] AC 436 (PC) at [30] is a species of estoppel by convention).

52. As to recitals, recitals to an agreement can, Goodrich submitted, give rise to an estoppel under the related doctrines of estoppel by deed and by convention: ***Prime Sight*** at [30]-[31]; ***Chen v. Ng*** [2017] UKPC 27 at [30]. Although, in ***Richards v. Wood*** [2014] EWCA Civ 327 at [16] Lewison LJ stated that estoppels based on recitals to binding agreements were "*part of a sub-species of estoppel known as contractual estoppel*", Goodrich argued that estoppels based on recitals are subject to their own particular rules including the following:

    (i) the mere fact that an agreement recites a certain fact or state of affairs does not necessarily mean that all parties to the agreement are estopped from denying its truth. Where the recital is properly construed as a statement by one party only and is not attributable to the party alleged to be estopped, it has no contractual force and does not create an estoppel: ***Greer v. Kettle*** [1938] AC 156 (HL) at 167 and 170; ***Prime Sight*** at [32];

    (ii) an estoppel based on a recital will only arise based on the express terms of the recital and not by implication: ***Re Distributors and Warehousing Ltd*** [1986] BCLC 129 at 139-140; ***First National Bank plc v. Thompson*** [1996] Ch 231 at 237A, 243E; ***PW & Co v Milton Gate Investments Ltd*** [2004] Ch 142 at [150]-[151];

    (iii) a recital will not create an estoppel where it is based on a common mistake of fact or where one party induced an untrue recital by his own representation to the other party: ***Greer v. Kettle*** at 171; ***Prime Sight*** at [41].

53. In the present case, Goodrich submitted that the recitals to the Letter Agreements and RTP Agreement cannot give rise to a contractual estoppel in the sense described above:

    (i) they were "mere representations", and not contractual warranties;

    (ii) on their true construction, they were statements by RR Holdings only which were not agreed by Goodrich;

    (iii) they did not include any express statement that a novation had taken place and a recital could not give rise to an estoppel based on inference; and

    (iv) they were based on a common mistake and/or were induced by a misrepresentation by RR Holdings.

54. Turning to contractual estoppel properly so called, Goodrich submitted that this arises from the operative terms of the contract agreed by the parties. "Mere representations" as opposed to contractual warranties, notwithstanding that they are made in a contract, do not engage the principle of contractual estoppel: ***Credit Suisse International v. Stichting Vestia Groep*** [2014] EWHC 3103 (Comm) at [303].

55. Here, Goodrich argued that RR Holdings cannot establish a contractual estoppel based on the operative terms of the Letter Agreements and RTP Agreement. None of the agreements relied upon by RR Holdings contain any agreement between the parties to assume that any particular state of affairs existed when they were executed, let alone an agreement that the parties would assume that a novation of RR Group's rights and obligations under the PCOA to RR Holdings had taken place when in fact it had not.

Discussion and conclusions.

56. Having considered the documentation very carefully, I have concluded that RR Holdings' submissions are to be preferred. My reasons for this conclusion are as follows:

(i) It is in my judgment clear from the various contractual documents identified above that both parties were proceeding on the basis that the PCOA had been extended, and that the rights under that extended agreement were vested in RR Holdings. Neither party was of the view that the rights under the PCOA had lapsed, or that those rights were still vested in RR Group. The only viable alternative to these two possibilities, as the parties accepted before me, is that the rights were now vested in RR Holdings, and all the documentary material to which RR Holdings made reference, as set out above, is consistent with this conclusion.

(ii) On the face of the documentation, this was agreed between the parties and was not simply a representation by one party (RR Holdings) to the other. I consider the separate misrepresentation argument below.

(iii) Whilst I agree that there is no express statement that a novation has taken place, the contents of the agreements are only consistent with this conclusion. This is apparent both from the recitals and from the operative terms of the agreements. I consider that this case is very different from the cases relied on by Goodrich and referred to in paragraph 52(ii) above, which were cases concerned only with recitals and not with operative terms.

(iv) Indeed, in my view, the correct analysis is that both parties had agreed that RR Holdings was to be treated as Goodrich's counterparty to the PCOA. Whilst it is correct that the legal analysis that would explain this agreement would be that there had been a novation of the contract from RR Group to RR Holdings, the important fact is that there was an agreement that the two parties to the PCOA were now RR Holdings and Goodrich. The legal mechanism that would lead to this being the case is of secondary importance.

57. Accordingly, I conclude that, on the basis of the current evidence, and subject to the misrepresentation argument, RR Holdings has established the contractual estoppel which it relies on.

58. The only further question that I need to consider before turning to misrepresentation is whether there is further evidence which might reasonably be expected to emerge before trial which would be relevant to a consideration of this issue. I bear in mind in this regard the need for caution which has been emphasised in numerous cases, such as, for example, ***Three Rivers DC v Bank of England (No 3)*** [2001] 2 All ER 513, at paras 94-95. However, I have concluded that in relation to an issue such as this, the overwhelming likelihood is that all of the relevant evidence would be in the files of the two parties, and that the parties and their solicitors will have gone through these files with a fine toothcomb for the purposes of this application. Accordingly, I conclude that there is no real possibility of further relevant material being available which I have not seen.

59. I turn therefore to the issue of misrepresentation.

Misrepresentation.

Goodrich's contentions.

60. Goodrich pointed out that, before me, Mr Hudson's unchallenged evidence was that Goodrich entered into the December 2017 Letter Agreement and the RTP Agreement with RR Holdings as a result of misrepresentations made on behalf of RR Holdings and/or on the basis of a common mistake, to the effect that RR Holdings had replaced RR Group for the purposes of the PCOA. Mr Hudson's unchallenged evidence is that when Goodrich queried which RR entity was the correct contracting party during the negotiations for the December 2017 Letter Agreement and RTP Agreement, it was told that RR Holdings was the correct party by reason of a Deed of Adherence dated 31 December 2011 ("**Deed of Adherence**"). Similarly, when Goodrich changed the reference to RR Holdings in the recital relating to the PCOA in a draft of the 2017 Letter Agreement to RR Group it was provided with a further copy of the Deed of Adherence, which RR Holdings stated in terms evidenced "*the replacement of RR Group by RR Holdings to the JV Agreement (which includes the PCOA and CASPA)*". Mr Hudson also confirms that Goodrich did not question RR Holdings' assertions based on the Deed of Adherence at the time.

61. For the purposes of the hearing before me, I must assume that RR Holdings' assertions were incorrect. The Deed of Adherence only related to the JVA and did not purport to novate RR Group's rights and obligations under the PCOA to RR Holdings. The evidence therefore shows that in 2017 when the parties were negotiating the December 2017 Letter Agreement and the RTP Agreement they were working on the basis of a mistaken belief that the Deed of Adherence somehow constituted a novation of RR Group's rights and obligations under the PCOA to RR Holdings. Moreover, given the Deed of Adherence relied on by RR Holdings was dated 31 December 2011, Goodrich submitted that there is a strong inference that the parties were working on the basis of a similar mistaken belief when the earlier Letter Agreements were agreed. They point out that RR Holdings has produced no evidence to rebut that inference.

62. At any rate, Goodrich argues, the Court cannot be sufficiently sure that was not the case so as to be able to grant summary judgment in the absence of a fuller investigation of the facts and proper disclosure. At present, there is no evidence before the Court in relation to precisely how the 2012, 2014 and June 2017 Letter Agreements came to be agreed in the terms in which they did, but Goodrich submits that such evidence is likely to exist and can reasonably be expected to be available at trial.

RR Holdings' response.

63. RR Holdings' response to the misrepresentation argument was as follows:

    (i) No case had been pleaded to this effect, despite the fact that Mr Hudson's statement had been produced several months before the hearing.

    (ii) The argument focuses exclusively on the December 2017 Letter Agreement and the RTP Agreement, and a representation that is said to have been made in relation to those agreements, in circumstances in which the parties had already

been treating RR Holdings as Goodrich's counterparty under the PCOA for over five years.

(iii) In light of the fact that the parties had already been treating RR Holdings as Goodrich's counterparty under the PCOA for over five years, any representation in 2017 that RR Holdings was Goodrich's counterparty under the PCOA, and therefore the correct party to name as such in the December 2017 Letter Agreement and RTP Agreement, would have been true.

(iv) The gravamen of Goodrich's point seems be that Mr Horsley gave an erroneous explanation as to the reason why RR Holdings was a party to the PCOA (citing a Deed of Adherence which did not apply to the PCOA rather than an inferred novation or a contractual estoppel). However, that apparent error (which must be assumed for present purposes) cannot assist Goodrich in establishing its Novation Defence, even leaving aside the matter of its obvious immateriality, because both the 2017 Letter Agreement and the RTP Agreement contain "*no representation*"/"*non-reliance*" clauses, at §7 and clause 23.1 respectively. Such clauses are effective in accordance with their terms: see ***Peekay*** and ***Springwell***, refs supra and *Chitty on Contracts*, 34th ed at 9-154.

(v) As to the suggested inference that such a misrepresentation might have been made at the time of the earlier agreements, there was no evidence in support of this suggestion. Mr Hudson's evidence was that he had consulted his predecessors and this had produced no positive evidence to support a plea of misrepresentation.

(vi) The suggested case was not only not pleaded, but was inconsistent with Goodrich's case as currently pleaded. Goodrich did not plead that the agreements were voidable; they positively ***accepted*** that the various agreements were valid.

Discussion and conclusions.

64. The first point to note is that, as RR Holdings emphasised, there is no pleaded case based on misrepresentation. This is not however the end of the matter, since in my judgment summary judgment should not be granted if the flaw in Goodrich's case could be cured by amendment.

65. I concentrate for present purposes on the December 2017 Letter Agreement because it is that agreement which is said to give RR Holdings the right to exercise the Call Option.

66. The argument that Goodrich might wish to put forward, as I understand it, is that the December 2017 Letter Agreement and the earlier agreements were induced by misrepresentation, that being the assertion that RR Holdings was party to the agreements because of the earlier Deed of Adherence, a representation I must assume to be false. That, it is argued, would in turn give Goodrich the right to rescind the December 2017 Letter Agreement, thus depriving RR Holdings of the Call Option.

67. However, in my judgment this argument could not succeed for two reasons.

(i) The first is the presence of the non-reliance clauses. These clauses are well recognised and serve a sensible commercial purpose: see the authorities cited above. They would in my judgment deprive Goodrich of the right to rely on the misrepresentation alleged.

(ii) The second is the fact that Goodrich has not exercised the right to rescind the agreement but has instead affirmed it in its pleaded case. Absent rescission, the agreement remains in full force and effect, along with the Call Option contained in it.

Novation by conduct.

68. The relevant legal principles have already been outlined above. Since the assertion is that there has been a novation by conduct, the test is one of business efficacy.

Goodrich's contentions.

69. It is convenient to begin with Goodrich's contentions. It was Goodrich's case that:

(i) the alleged novation by conduct is precluded by clause 15.1 of the PCOA; and

(ii) whether there was a novation by conduct is a fact sensitive issue. RR Holdings advances no evidence to support this conclusion, the available material does not support it and it is an issue which can only be properly determined at trial, there being good reason to believe that further evidence will be available at trial which would affect the outcome of the issue.

70. I deal with each of these points in turn, beginning with Goodrich's case on clause 15.1.

Clause 15.1 of the PCOA.

71. Goodrich contended that RR Holdings' pleaded case was only that there was a novation by conduct. They further contended that any such alleged novation by conduct was precluded by the terms of clause 15.1 of the PCOA because Goodrich's prior written consent was required but not obtained.

72. Clause 15.1 of the PCOA provides:

> "*No party (the "Assignor") shall, nor shall it purport to, assign, transfer, charge or otherwise deal with all or any of its rights and/or obligations (in whole or in part) under this Agreement, nor grant, declare, create or dispose of any right or interest in it (in whole or in part), without the prior written consent of the other party. If the proposed dealing is an assignment and if the proposed assignee (the "Assignee") is a party's Affiliate, such prior written consent shall not be unreasonably withheld or delayed. Any such purported assignment, transfer, charge or other dealing without the prior written consent of the other party shall be null and void.*"

73. In addition, clause 15.3 of the PCOA stated that:

> "*No assignment or novation pursuant to clause 15.1 or clause 15.2 shall be effective until:*
>
> *(A) In the case of an assignment pursuant to clause 15.1 the Assignor procures that the Assignee executes and delivers a deed of adherence in the form set out in Schedule 6;*
>
> *(B) In the case of an assignment pursuant to clause 15.1, the Assignor executes and delivers a guarantee of the performance of the Assignee's obligations under this Agreement in the form set out in Schedule 6; and…*"

74. Finally, Goodrich relied on the provisions of clause 16, which provided that any waiver of a party's rights under the Agreement would only be binding if given in writing. That clause provided as follows:

> "*16.1 Any release, delay or waiver by any party in favour of the other party of any (or any part of) its rights under this Agreement shall only be binding if it is given in writing. Any binding release, delay or waiver shall:*
>
> *(A) Be confined to the specific circumstances in which it is given; and*
>
> *(B) Not affect any other enforcement of the same right or the enforcement of any other right by or against any of the parties.*"

75. Goodrich contended as follows:

(i) The conduct relied upon by RR Holdings in support of the alleged novation by conduct is Goodrich's conduct in entering into the Letter Agreements and the RTP Agreement. However, this was insufficient to establish a novation.

(ii) None of those agreements refer to the alleged or any novation (by conduct or otherwise) or provide Goodrich's consent to it. In any event, they all post-date the alleged novation and so cannot amount to Goodrich's prior written consent as required under clause 15.1.

75.ii.1. First, Goodrich's unchallenged evidence is that there was never any request for a novation (or indeed any discussion at all between the parties about a novation) prior to the purported exercise of the Call Option by RR Holdings on 9 October 2018. A novation by conduct will not ordinarily be inferred in the absence of a distinct request: see ***Chitty on Contracts***, 34th ed, at 22-090.

75.ii.2. Second, the Letter Agreements and the RTP Agreement do not clearly establish the consent of all 3 parties to the alleged novation and they are not consistent only with an intention to achieve a novation. RR Group was not a party to any of the agreements relied on; the agreements do not contain any express reference to any novation; and none of the agreements purport to transfer any rights or obligations under the PCOA

from RR Group to RR Holdings. This absence of written consent from RR Group is fatal to an argument that the parties had given written consent so as to comply with Clause 15.1.

75.ii.3. Thirdly, Goodrich relied on the anti-waiver clause to support an argument that the requirements of clause 15.1 could not be waived by conduct.

RR Holdings' contentions on clause 15.1.

76. Although in their written submissions RR Holdings contended that this provision did not apply to novations, they abandoned this argument in their oral submissions. Instead, Holdings argued that the requirements of clause 15.1 were satisfied by the conduct of Goodrich in entering into the various later agreements to which I have made reference above and that this conduct was sufficient to satisfy clause 15.1.

77. In this connection, RR Holdings argued that since Goodrich had given its consent on numerous occasions, as outlined above, to RR Holdings being treated as its contractual counterparty, then:

(i) It has given prior written consent to RR Holdings being its counterparty; and in any event

(ii) It is estopped from denying that RR Holdings is its counterparty under the PCOA, cutting its argument off at the root.

78. As to the arguments based on the anti-waiver provision, RR Holdings argued that it should also be noted that, in ***MWB Business Exchange Centres Ltd v Rock Advertising Ltd*** [2019] AC 119, Lord Sumption JSC recognised at §16 that "*lack of formality*" arguments could be defeated by establishing an estoppel. That paragraph provides as follows:

> "*16. The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they*

> *agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe.*"

79. A helpful illustration of how that might work was given by the Court of Appeal in ***Kabab-Ji SAL v Kout Food Group*** [2020] 1 CLC 90 at §§74-75, as follows:

> *"74. What emerges is that there is little difference between the UNIDROIT approach and the English approach through the doctrines of estoppel. This is borne out by the example of the exception in the second sentence of Article 2.1.18 given in the Comment on the UNIDROIT Principles:*
>
> *"Yet there is an exception to the general rule. In application of the general principle prohibiting inconsistent behaviour (see Article 1.8), this Article specifies that a party may be precluded by its conduct from invoking the clause requiring any modification or termination to be in a particular form to the extent that the other party has reasonably acted in reliance on that conduct.*
>
> ***Illustration 2.***
>
> *A, a contractor, contracts with B, a school board, for the construction of a new school building. The contract provides that the second floor of the building is to have sufficient bearing capacity to support the school library. Notwithstanding a "no oral modification" clause in the same contract, the parties orally agree that the second floor of the building should be of non-bearing construction. A completes construction according to the modification and B, who has observed the progress of the construction without making any objections, only at this point objects to how the second floor has been constructed. A court may decide that B is not entitled to invoke the "no oral modification" clause as A reasonably relied on the oral modification, and is therefore not liable for non-performance."*
>
> *75. As I pointed out during the course of argument, the oral agreement postulated involves an unequivocal representation that the second floor does not have to be of load-bearing capacity, upon which the contractor relies by building according to that oral modification. In those circumstances, the school board could not rely upon the No Oral Modification clause. The illustration is a classic example of what Lord Sumption JSC said at [16] of his judgment was required by way of estoppel. In other words, Lord Sumption JSC is setting out how English law*

interprets this UNIDROIT principle and is not saying anything different from UNIDROIT."

80. The example given in that case involved an unequivocal representation from which it would have been unconscionable to resile. There is no need for RR Holdings to establish unconscionability in this case: see ***Springwell*** at §177; but such unconscionability would plainly be present were Goodrich allowed to resile from its clear statements and agreements that RR Holdings was its counterparty to the PCOA. For it to make such statements for years, and then to deny them, after a Call Option Notice has been served by RR Holdings, and at a time when RR Group could not itself serve such a notice (as the Call Option Period would have expired), can properly be characterised as unconscionable.

Discussion and conclusions.

81. I can be relatively brief in relation to this argument which, in my judgment, adds nothing to the argument on contractual estoppel that I have already dealt with.

82. I start with a consideration of general principle in relation to novation by conduct.

(i) Whereas contractual estoppel focusses on the conduct of the two parties to the contract – here Goodrich and RR Holdings – and holds those two parties bound by an agreement to assume that a state of affairs exists even where it does not, novation by conduct involves a consideration of whether there has in fact been a novation.

(ii) In this regard, where the novation is said to be inferred from conduct, then it must, in my view, be the case that the conduct of all three parties to what must be a tripartite arrangement has to be considered.

(iii) Where there are in addition formal requirements that must be satisfied in order that a novation be found to exist, then those must be satisfied unless a party is debarred by representation, agreement or conduct, from relying on the failure to rely on the relevant formal requirement.

83. Looking at the facts of this case with those general principles in mind, then the difficulty with RR Holdings' position is that there is no sufficient evidence before me as to the position of RR Group. Whilst I have been asked to infer that RR Group must have consented to the novation, I do not think that it would be right to grant summary judgment based on an inference, particularly where evidence of RR Group's position ought to be easily obtainable.

84. Had there been such evidence, then I would not have concluded that clause 15.1 posed a problem to the grant of judgment. That is essentially because, if there had been evidence of consent to assignment by RR Group, clause 15.1 would have required proof of the consent of the other party – i.e. Goodrich. Here, the requirement for such proof would, in my judgment, have been satisfied by the various agreements to which I have already made reference under the heading of contractual estoppel. Put another way, Goodrich would be estopped from denying that they had given the necessary consent, whether by agreement or by convention. I accept the submission that it would here be unconscionable for Goodrich to deny its consent.

85. I turn to the question of whether the question of whether there was a novation by conduct raises a triable issue.

86. I can be even briefer in this regard.

Goodrich's contentions in relation to this issue.

87. Goodrich argued, in summary, as follows:

(i) It is not necessary to infer a novation by conduct to provide a lawful explanation or basis for the parties' conduct. This is not a case where RR Group has ceased to exist and so a novation is necessary for that reason. Further, the recitals and terms of the agreements, which purport to amend the terms of the PCOA, are equally consistent with a mistaken belief that a novation had already taken place. If the parties were labouring under a mistaken belief that a novation had already taken place, that would provide an obvious and complete explanation for the parties' dealings between 2012 and 2018.

(ii) Mr Hudson's unchallenged evidence, which is consistent with the contemporaneous documents, is that when Goodrich queried which RR entity was the correct contracting party during the negotiations for the December 2017 Letter Agreement and RTP Agreement, it was told that RR Holdings was the correct party based on a Deed of Adherence dated 31 December 2011 ("the Deed of Adherence"). Similarly, when Goodrich changed the reference to RR Holdings in the recital relating to the PCOA in a draft of the December 2017 Letter Agreement to RR Group, it was provided with a further copy of the Deed of Adherence, which RR Holdings stated in terms evidenced "*the replacement of RR Group by RR Holdings to the JV Agreement (which includes the PCOA and CASPA)*". Mr Hudson also confirms that Goodrich did not question RR Holdings' assertions based on the Deed of Adherence at the time.

(iii) However, it is clear (and accepted for the purposes of the hearing before me) that RR Holdings' assertions were incorrect. The Deed of Adherence only related to the JVA and did not purport to novate RR Group's rights and obligations under the PCOA to RR Holdings. The evidence therefore shows that in 2017 when the parties were negotiating the December 2017 Letter Agreement and the RTP Agreement they were working on the basis of a mistaken belief that the Deed of Adherence somehow constituted a novation of RR Group's rights and obligations under the PCOA to RR Holdings. Moreover, given the Deed of Adherence relied on by RR Holdings was dated 31 December 2011, it is submitted there is a strong inference that the parties were working on the basis of a similar mistaken belief when the earlier Letter Agreements were agreed and RR Holdings has produced no evidence to rebut that inference.

(iv) At any rate, the Court cannot be sufficiently sure that was not the case so as to be able to grant summary judgment in the absence of a fuller investigation of the facts and proper disclosure. At present, there is no evidence before the Court in relation to precisely how the 2012, 2014 and June 2017 Letter Agreements came to be agreed in the terms in which they did. However, it is submitted that such evidence is likely to exist and can reasonably be expected to be available at trial.

(v) Alternatively, and without prejudice to Goodrich's primary position as set out above, it is submitted that the terms of the various agreements purporting to amend the PCOA (e.g. to extend the Call Option Period) are arguably equally consistent with RR Holdings agreeing such amendments on behalf of RR Group. There are numerous other terms in the Letter Agreements relied on by RR Holdings which suggest that RR Holdings was purporting to act on behalf of both itself and the other members of the Rolls-Royce Group and there are no clauses in those agreements excluding the effect of the Contracts (Rights of Third Parties) Act 1999.

(vi) The parties' subsequent conduct is also inconsistent with the alleged novation. Goodrich's conduct in (i) querying which RR entity was the correct contracting party and (ii) changing the reference to RR Holdings in the recital relating to the PCOA to RR Group in the draft of the 2017 Letter Agreement, and (iii) RR Holdings' conduct in relying on the Deed of Adherence to justify the references to RR Holdings in the agreements are all inconsistent with a novation having taken place.

RR Holdings' arguments'

88. RR Holdings' essential argument in response to all of the above was that Goodrich was estopped from denying that the novation by conduct had taken place.

Discussion and conclusions.

89. I accept, for the reasons that I have already given, that the evidence at present is insufficient to establish an actual novation by conduct. This is because I do not have sufficient evidence in relation to RR Group.

90. However, this would in the final analysis not have prevented me from granting summary judgment. That is because I also accept that, as between Goodrich and RR Holdings, Goodrich is estopped from denying that such a novation has taken place, whether or not such a novation has in fact taken place.

Misrepresentation?

91. Under this heading, in my judgment, the argument would be the same as that in relation to contractual estoppel. The argument would be that the consent required by clause 15.1 was procured by the misrepresentation considered under the heading of contractual estoppel. For the same reasons that I have already given under that heading, I reject the misrepresentation argument under this heading.

Did the December 2017 Letter Agreement and RTP Agreement permit the exercise of the call option in October 2018?

92. This issue involved two sub-issues, as follows:

(i) Was the Call Option exercisable at all after 31 December 2017?

(ii) Was the Call Option exercisable if the parties had determined that Governmental Approval would not be forthcoming?

Relevant Principles as to construction.

93. There was no dispute between the parties as to the appropriate principles, and I take the following account from Goodrich's skeleton, which included a convenient summary. The relevant principles in relation to the construction of commercial contracts have been authoritatively stated by the Supreme Court in ***Rainy Sky SA v. Kookmin Bank*** [2011] 1 WLR 2900, ***Arnold v. Britton*** [2015] AC 1619 and ***Wood v. Capita Insurance Services Ltd*** [2017] AC 1173:

(i) The Court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of: (a) the natural and ordinary meaning of the provision being construed; (b) any other relevant provisions of the contract being construed; (c) the overall purpose of the provision being construed and the contract in which it is contained; (d) facts and circumstances known or assumed by the parties at the time that the document was executed; and (e) commercial common sense; but (f) disregarding subjective evidence of any party's intentions: see ***Arnold v Britton*** per Lord Neuberger PSC at [15].

(ii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issues covered by the disputed clause or clauses when agreeing the wording of that provision: ***Arnold v Britton*** at [17].

(iii) Where the parties have used unambiguous language, the Court must apply it: ***Rainy Sky*** per Lord Clarke JSC at [23].

(iv) Where the language used by the parties is unclear, the Court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the Court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used: ***Arnold v Britton*** at [18].

(v) In striking a balance between the indications given by the language and those arising contextually, the Court must consider the quality of the drafting of the clause and the agreement in which it appears: ***Wood v Capita Insurance Services*** per Lord Hodge JSC at [11]. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent: ***Wood v Capita Insurance Services*** at [13].

(vi) A Court should not 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, because it is not the function of a Court when interpreting an agreement to relieve a party from a bad bargain: ***Arnold v Britton*** at [20] and ***Wood v Capita Insurance Services*** at [11].

(vii) A Court can only consider facts or circumstances known or reasonably available to both parties at the time that the contract was made: ***Arnold v Britton*** at [21].

94. The terms of clause 2 of the December 2017 Letter Agreement have been set out above.

Goodrich's contentions.

95. Goodrich submitted that clause 2 of the December 2017 Letter Agreement made clear that on execution of the RTP Agreement, the Call Option was extended but only on terms that it would not be exercised, i.e. it would effectively be given up and replaced by either (i) the Modified RTP or (ii) the RTP granted by the Final Judgment, which would then become the only basis on which Rolls-Royce was entitled to purchase the AM Package.

96. This was not only the natural meaning of the relevant language but was also consistent with the terms of the RTP Agreement, the commercial context and purpose of the agreements, namely to remove the uncertainty over the future of Goodrich's aftermarket business caused by Rolls-Royce holding two separate, concurrent options to purchase the AM Package, i.e. the Call Option and the RTP.

97. Thus, the parties had agreed there were only three possible scenarios and provided the outcome for each:

    (i) In the event that Governmental Approval was not required, the Call Option and the PCOA would expire leaving the Modified RTP as the only option to purchase the AM Package (see clause 2(a) of the December 2017 Letter Agreement);

    (ii) In the event the parties obtained any necessary Governmental Approval, the Call Option and the PCOA would expire leaving the Modified RTP as the only option to purchase the AM Package (see clause 2(a) of the December 2017 Letter Agreement);

    (iii) In the event that, either the parties determined that Governmental Approval was required but could not be obtained on or before the Longstop Date, or that Governmental Approval could not in fact be obtained (sub-issue 2 below) the December 2017 Letter Agreement would automatically expire (and with it the Call Option and PCOA) and the original RTP "*shall then form the only basis upon which Rolls-Royce or its Affiliates shall be entitled to purchase the AM Package…*" (clause 1(b)).

98. In fact, scenario (iii) applied.

99. The parties committed themselves to converting the two concurrent options into the Modified RTP. That commitment involved express obligations in the RTP Agreement to co-operate to ensure the Condition was satisfied at all times up to the Longstop Date. This necessarily involved an agreement that the Call Option could not be exercised during the process of obtaining/seeking to obtain the Modified RTP. However, the parties also provided (in clause 1(b)) for the consequence at the point where the process would not be successful by the Longstop Date: the Call Option fell away, and the RTP granted by the Final Judgment would become the only basis on which Rolls-Royce was entitled to purchase the AM Package, i.e. the same result as was agreed in clause 2.6 of the RTP Agreement.

100. The effect of the construction explained above is that RR Holdings agreed not to exercise the Call Option after 31 December 2017 in return for the perceived benefits of the Modified RTP and certain significant economic concessions made by Goodrich which are set out in clauses 3 and 4 of the December 2017 Letter Agreement. RR Holdings also agreed to take the risk that the Modified RTP could not be obtained by agreeing to forego the Call Option in that event. As a result, the purported exercise of the Call Option by RR Holdings on 9 October 2018 was invalid and ineffective.

101. Furthermore, there was a commercial purpose in leaving the PCOA in place whilst at the same time agreeing that the Call Option could not be exercised. The parties would continue to benefit from the various contractual protections offered by the PCOA. For example, under clause 12.4 of the PCOA, Goodrich was prevented from disposing of the AM Package (or any significant part of it) during the Call Option Period.

RR Holdings' contentions.

102. RR Holdings submitted that there were three key problems with Goodrich's construction.

(i) First, as a matter of language, it was submitted that it was not possible to read the proviso that Goodrich needs into §§1(a)-(b) of the December 2017 Letter Agreement. Those paragraphs do not say that only some parts of the PCOA are to survive, nor do they change the PCOA's nature. They simply extend the Call Option Period. It generally requires clear words for a party to be taken to have relinquished a contractual right: see ***Lewison, The Interpretation of Contracts*** (7th Ed) at §7.173. There are no words here removing RR Holdings' right to exercise the Call Option during the extended Call Option Period.

(ii) Second, Goodrich's construction made a nonsense of §§1(a)-(b) of the December 2017 Letter Agreement, and the very concept of an extension of the Call Option Period. If the parties had wanted the Call Option to no longer be exercisable, they would have either let it expire on 31 December 2017 (when it was due to expire but for the December 2017 Letter Agreement), which was only ten days away, or truncated it. They certainly would not have extended it.

(iii) Third, it is trite law that the Court is reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises the relevant clauses: see ***Lewison*** at §§9.101-9.111. Yet Goodrich's argument, which appears to rest on the language of §2 of the December 2017 Letter Agreement, requires the December 2017 Letter Agreement to be read in a way that creates a rank inconsistency between §1 and §2, as §1 would extend the Call Option Period and §2 would negate that extension. On Goodrich's interpretation, §1 would not only be completely nullified by §2, but would be positively misleading. Goodrich's construction is also inconsistent with (i) the express acknowledgement in §2(a) of the December 2017 Letter Agreement that, pursuant to the PCOA and the RTP Offer Letter, RR Holdings "*has two separate and partially concurrent rights to purchase the AM Package*", and (ii) recital F of the RTP Agreement, which provides that "*following expiry of the [Call Option], [RR Holdings] and its affiliates shall only have a single right or option to buy the AM Package, which is the RTP as set forth herein*" (emphases added).

103. On RR Holdings' construction, by way of contrast, it was submitted that it is possible to harmonise §§1 and 2 of the December 2017 Letter Agreement and recital F of the RTP Agreement. §1(a) of the December 2017 Letter Agreement extends the Call Option Period under the PCOA until the Unconditional Date; §1(b) makes clear that if Governmental Approval is not obtained before the Longstop Date, the Call Option Period under the PCOA will expire and the RTP Offer Letter will form the only basis on which RR Holdings will be able to acquire the AM Package; §2 provides, in essence, that once the RTP Agreement becomes unconditional (i.e. once the Unconditional Date is reached, if it is reached), the RTP Agreement shall form the only basis on which RR Holdings will be able to acquire the AM Package; and that is reinforced by recital F of the RTP Agreement. That is a rational and coherent scheme for the parties to have adopted.

104. In relation to various points that RR Holdings anticipated at the time of its skeleton might be made by Goodrich, arising from the pleadings and evidence:

(i) First, they made reference to the potential reliance Goodrich might place on the words "*the RTP Agreement … shall form the only basis on which Rolls-Royce or its Affiliates shall be entitled to purchase the AM Package from Goodrich*" in §2(b) of the December 2017 Letter Agreement. However, RR Holdings responded, the sentence in which those words appear is plainly forward-looking – hence the use of the words "*shall form*". It is concerned with the position as and when the RTP Agreement becomes unconditional, and not before.

(ii) Second, reference was made to a potential argument that as Goodrich's aim was, objectively, to retain the AM Package until at least 2021, and as the parties agreed to it doing so in the event that the RTP Agreement became unconditional, it would have been commercially irrational for the parties to have left open the possibility of RR Holdings exercising the Call Option under the PCOA before the RTP Agreement became unconditional. However, RR Holdings argued, any such argument confuses commercial irrationality on the one hand with compromise on the other.

(iii) RR Holdings then made reference to potential arguments based on Goodrich's subjective intentions and the possibility of further relevant evidence emerging before trial. In fact, I did not understand Goodrich to place any reliance on any such arguments.

Discussion and conclusions.

105. I start by reminding myself of the nature of the application before me. The question, and the sole question, for me is whether the defence put forward has a real, as opposed to a fanciful, prospect of success. This is not the hearing of a preliminary issue; nor is there any application for reverse summary judgment.

106. Applying this test, I have come to the clear conclusion that Goodrich's argument is indeed tenable and has a real prospect of success. That is not of course to say that it will succeed; that is not the test. The question, as Lord Hobhouse put it, in the ***Three Rivers*** case, is not one of probability but possibility.

107. I reach this view purely and simply as a matter of the construction of the contractual documents, applying the principles I have outlined above, which were common ground.

The second sub-issue.

108. Here, the nub of the dispute between the parties can be simply stated. Goodrich argued that the Call Option could not be exercised after that date when the parties determined that Governmental Approval would not be forthcoming, a matter which required factual investigation. RR Holdings, for its part, argued that the option could be exercised at any time before the Longstop Date.

Goodrich's contentions.

109. Goodrich stated that it had adduced evidence that prior to 9 October 2018 the parties had determined that Governmental Approval was required and that it would not be obtained on or before the Longstop Date. On this Application, RR Holdings accepts that if Goodrich's construction of clause 1(b) is correct, then there must be a trial to determine whether in fact the parties determined before 9 October 2018 that Governmental Approval was required and it would not be possible to obtain it on or before the Longstop Date. This was common ground between the parties.

110. Goodrich contended that the words used by the parties (especially when read, as they must be, in context) are inconsistent with RR Holdings' argument:

(i) Clause 1(b) provides for expiry at the time of determination, not on the Longstop Date. RR Holdings' construction requires a rewriting of the clause and the addition of the words "*on the Longstop Date*" to be added after the words "*automatically expire*";

(ii) RR Holdings' construction is that the Call Option was extended until the Longstop Date and was exercisable at any point up to that date. If this had been agreed, simple language could and would have been used: "*This Letter Agreement shall expire on the Longstop Date*." The elaborate scheme in clauses 1(a) and 1(b) would have been unnecessary. In particular, this construction gives no real meaning or purpose to the words which were in fact used "*if the parties determine that Government [sic] Approval… is required but are unable to obtain the same on or before the Longstop Date*".

(iii) Goodrich's construction of clause 1(b) is also consistent with the identical mechanisms agreed in clause 1(a) of the December 2017 Letter Agreement and in the RTP Agreement (clauses 2.2 and 2.5). Both provided that the Call Option Period would expire when the parties determined that no Governmental Approval was required and the Modified RTP therefore became unconditional. In the circumstances, Goodrich's interpretation is to be preferred.

(iv) The parties had agreed to cooperate to obtain Governmental Approval. To allow the Call Option to be exercised whilst this process of cooperation was ongoing would be to cut across the provisions as to cooperation. It was only when both parties concluded that such cooperation would be fruitless that it would make sense for the option to be exercisable.

RR Holdings' contentions.

111. RR Holdings contended that §1(b) means that if the parties determined that Governmental Approval was required but were unable to obtain the same on or before the Longstop Date (as extended), i.e. on or before 21 October 2018, the Call Option Period would expire then i.e. at the end of 21 October 2018. As RR Holdings exercised its Call Option before then, issuing the Call Option Notice on 8 October 2018, it did so in time. This is so for the following reasons.

112. First, §1(b) provides that the December 2017 Letter Agreement will expire *"[i]f the parties determine that Governmen[al] Approval … is required but are unable to obtain the same on or before the Longstop Date*". That wording is entirely straightforward. It is only if the parties "*are unable to obtain [Governmental Approval] on or before the Longstop Date*" that the expiry will occur. The expiry cannot therefore occur before the end of the Longstop Date.

113. Goodrich's construction is not consistent with that language, and proceeds as if §1(b) provided that the December 2017 Letter Agreement will expire *"[i]f the parties determine that Governmen[al] Approval … is required but determine that they will be~~are~~ unable to obtain the same on or before the Longstop Date*". Such a rewriting of the clause is impermissible.

114. Second, RR Holdings' construction is consistent with – and Goodrich's construction is at odds with – clause 2.2 of the RTP Agreement, which provides that the Modified RTP is conditional on either "*Governmental Approval having been obtained or the parties determining that no Governmental Approval is required*". As that clause clearly shows, the point on which a "*determination*" by the parties is potentially relevant is whether Governmental Approval is required. It is not whether, if it is, it will be possible to obtain it before the Longstop Date.

115. Third, it is inherently unlikely that sensible commercial parties would have had the intention that Goodrich's construction would ascribe to them. RR Holdings' construction provides certainty, with both parties knowing where they stand at all times. If Governmental Approval is required but has not been obtained by the Longstop Date, the Call Option will expire then. There is no subjectivity and no real scope for dispute. Goodrich's construction, on the other hand, gives rise to considerable uncertainty and conceptual difficulty, requiring as it does a forward-looking predictive exercise as to what the US authorities might or might not do, and when. All of these considerations militate against Goodrich's construction.

Discussion and conclusions.

116. I have already concluded that this is not an appropriate case for summary judgment. In these circumstances, I am not prepared to express any final views on this point, save to say that, on the current materials, it would be my view that RR Holdings' construction of the contract is to be preferred. I reach this view for the following brief reasons:

    (i) RR Holdings' construction is in my view more consonant with the actual words used in the December 2017 Letter Agreement. The literal meaning of the words draws a distinction between the expiry of the period without Government

Approval where that is necessary, by reference to the Longstop Date (an objective fact) and the determination that such approval is not necessary.

(ii) This construction is also more consonant with the wording of the RTP Agreement, which also draws a distinction between, on the one hand, the determination that Governmental Approval is not necessary, and, on the other, the expiry of the period without the obtaining of such approval.

(iii) This construction is also more workable, since it involves less subjectivity, and is in my judgment therefore more likely to be the correct one.

117. However, since, as I have indicated, I am not prepared to give summary judgment, this point will remain open for argument going forward.

Some other reason for trial?

118. I can deal with this issue very briefly indeed. Since I have decided not to grant summary judgment, this issue does not arise.

Summary of conclusions and disposition.

119. I can summarise my conclusions as follows:

(i) I am not prepared to conclude, on the present evidence, that there was in fact a novation by conduct from RR Group to RR Holdings. That is because I do not have sufficient evidence of RR Group's conduct.

(ii) However, I would conclude that Goodrich are estopped from contending that there was no such novation, whether or not such a novation in fact took place.

(iii) It follows that I would have held that the Call Option was vested in RR Holdings. Nevertheless, since, for the reasons I set out below, I am not prepared to give summary judgment, this issue must remain formally open.

(iv) I am not prepared to hold that Goodrich's case to the effect that there was no right to exercise the option after December 31 2017 has no real prospect of success. For this reason, I am not prepared to grant summary judgment.

(v) On balance I would prefer RR Holdings' construction on the second contractual sub-issue, i.e. whether the question raised by the December 2017 Letter Agreement is whether the parties have determined that Governmental Approval will not be forthcoming. However, I make no final finding in this regard.

(vi) The issue of whether a trial should be ordered even if summary judgment is ordered does not arise.

120. For all of the above reasons, I refuse the application for summary judgment.