



Trinity Term
[2021] UKSC 39
On appeal from: [2019] EWCA Civ 1392

JUDGMENT

Tinkler (Respondent) v Commissioners for Her Majesty's Revenue and Customs (Appellant)

before

Lord Hodge, Deputy President
Lord Briggs
Lady Arden
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON

30 July 2021

Heard on 11 and 12 May 2021

Appellant

Malcolm Gammie CBE QC
Michael Jones QC
Nicholas Macklam
(Instructed by HMRC
Solicitors Office (Bush
House))

Respondent

Roger Thomas QC
Emma Pearce

(Instructed by Wedlake
Bell LLP)

LORD BURROWS: (with whom Lord Hodge, Lady Arden and Lady Rose agree)

1. Introduction

1. Estoppel by convention is notoriously difficult to pin down. It can arise in various contexts. Most commonly, it arises in relation to a contract between the parties. In that context, estoppel by convention may, for example, affect the obligations of the parties or be relevant to the interpretation of the contract. However, this case is concerned with estoppel by convention in relation to non-contractual dealings.

2. As in the highly influential case of *Revenue and Customs Comrs v Benhdollar Ltd* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174 (“*Benhdollar*”), the non-contractual context with which we are concerned is dealings between HMRC and a taxpayer. In *Benhdollar* Briggs J held that estoppel by convention had been established by HMRC so as to prevent the employer taxpayers from relying on the expiry of a statutory limitation period, in relation to some, although not all, of HMRC’s claims. In this case the focus is on estoppel by convention in relation to an enquiry under section 9A of the Taxes Management Act 1970 (“TMA”) by HMRC, who are the appellants, into a tax return of Mr Tinkler, who is the respondent. There are also elements of the law of agency to consider, in relation to the estoppel by convention, because Mr Tinkler engaged tax accountants and advisers, BDO Stoy Hayward (“BDO”), to deal with his tax affairs.

3. The issues raised before the First-tier Tribunal (“FTT”), Upper Tribunal (“UT”), and the Court of Appeal ranged over a wider compass than estoppel by convention. But HMRC’s only ground of appeal to this court is from the Court of Appeal’s decision that Mr Tinkler was not estopped, under estoppel by convention, from denying that a valid enquiry under section 9A TMA had been opened. This judgment first examines the relevant statutory provisions, the facts, and the reasoning of the courts below, before turning to analyse in detail, and to apply, the law on estoppel by convention with particular reference to *Benhdollar*.

4. In formulating this judgment, I have been greatly assisted by the work of commentators. These have included Elizabeth Cooke, *The Modern Law of Estoppel* (2000) especially pp 31-32; *Spencer Bower: Reliance-Based Estoppel: The Law of Reliance-Based Estoppel and Related Doctrines*, 5th ed (2017), (edited by Piers Feltham, Tom Leech QC, Peter Crampin QC, Joshua Winfield) especially chapter 8; Michael Barnes QC, *The Law of Estoppel* (2020) especially chapter 5; *Chitty on*

Contracts, 33rd ed (2018), paras 4-108 to 4-115; *Snell's Equity*, 34th ed (2020), paras 12-011 to 12-016; Rory Derham, "Estoppel by Convention - Part I" (1997) 71 ALJ 860 and "Estoppel by Convention - Part II" (1997) 71 ALJ 976.

2. The relevant statutory framework

5. Section 9A TMA relevantly provides:

“9A. Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ('notice of enquiry') -

(a) to the person whose return it is ('the taxpayer'),

(b) within the time allowed.

(2) The time allowed is -

(a) if the return was delivered on or before the filing date, up to the end of the period of 12 months after the filing date; ...

(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.”

In the present case, where the filing date for the relevant return (for the tax year 2003/04) was 31 January 2005, HMRC had until 31 January 2006 to give a notice of enquiry under section 9A.

6. Section 115 TMA sets out how a notice of enquiry may be given.

“Section 115 - Delivery and service of documents

...

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if so given, sent, served or delivered to or on any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, may be so served addressed to that person -

(a) at his usual or last known place of residence, or his place of business or employment ...”

In line with this subsection, there is no dispute that the notice of enquiry could have been given if it was sent to Mr Tinkler’s usual or last known place of residence. HMRC purported to do so by sending the notice to Mr Tinkler at an address at Heybridge Lane, Cheshire. The FTT found that this was not his usual or last known place of residence.

3. The facts

7. On 11 January 2005, Mr Tinkler signed an engagement letter with BDO, appointing the firm as his “tax agent and adviser”. In that letter Mr Tinkler was asked to sign and return a form published by HMRC, Form 64-8, which authorised HMRC (then the Inland Revenue) to communicate with BDO regarding Mr Tinkler’s tax affairs. Form 64-8 explained to the taxpayer as follows:

“This authority allows us [the Inland Revenue] to exchange information about you with your agent, and to deal with them on any matters within the responsibility of the Inland Revenue. Once we have received your authority we will start sending letters and forms to your agent. But sometimes we need to send them to you as well as, or instead of, your agent.”

8. On 12 January 2005, BDO sent Mr Tinkler’s completed Form 64-8 to HMRC. The Form 64-8 gave Mr Tinkler’s address as Station Road, Appleby, Cumbria. This was the address of a company owned by Mr Tinkler. It was a business address not a residential address.

9. Mr Tinkler’s self-assessment tax return for the year 2003/04 (“the Return”) was provided to HMRC by the due date of 31 January 2005. The Return showed Mr

Tinkler's address as c/o WA Developments Int Ltd at the Station Road address. As a result of the Station Road address being used for both the Form 64-8 and the Return, HMRC's self-assessment computer system was changed, on 24 February 2005, to show the Station Road address rather than the address at Heybridge Lane in Cheshire where Mr Tinkler had previously been living in a rented house. On 15 March 2005, Mr Tinkler wrote to HMRC enclosing the tax he owed (£701,990.96) as shown in the Return. His letter did not include his address. HMRC responded on 1 April 2005 to the Station Road address (which was now his address on HMRC's computer system) pointing out Mr Tinkler's liability to interest and penalties on the late payment. HMRC also wrote to Mr Tinkler at the Station Road address on 3 May 2005 with his self-assessment statement of account.

10. On 1 July 2005, Mr Tinkler's address on HMRC's system was changed back to Heybridge Lane from Station Road. The FTT, at paras 31-32, found as follows in relation to this change of address:

“There was no evidence why this change was made but it is I find more likely than not that it was a change made or requested by Mr Mackay [the relevant HMRC officer], as on the same day Mr Mackay opened or purported to open an enquiry into Mr Tinkler's return for tax year 2003/4. I also find it most likely Mr Mackay amended the [address on the computer system] without any notification from Mr Tinkler or anyone acting on his behalf: as Heybridge Lane had ceased to be a residence of Mr Tinkler nearly a year before and even the lease had expired six months before, it is most unlikely anyone would give notification to HMRC on his behalf that Heybridge Lane was still Mr Tinkler's address ... I accept [Mr Tinkler's] case that the change within the [computer] system was made by Mr Mackay without any notification from, or discussions with, Mr Tinkler or anyone on his behalf.”

11. On the same day (1 July 2005) as the address was changed, HMRC sent a letter addressed to Mr Tinkler at Heybridge Lane informing him of their intention to enquire into the Return (ie that this was the notice opening the enquiry). The letter was headed as a “Notice Under S9A Taxes Management Act 1970”. In the letter, Mr Tinkler was informed that the letter was being copied to “your accountants BDO Stoy Hayward”. The FTT found that the letter arrived at Heybridge Lane but that Mr Tinkler did not receive it because it was not forwarded on to him.

12. By a further letter dated 1 July 2005, HMRC wrote to BDO stating that it was enclosing “for your information a copy of the S9A TMA 1970 notice, which has today been issued to your client” in respect of the Return. It attached a copy of the

letter sent to Mr Tinkler, which had the address crossed out and “Copy” written in manuscript. HMRC’s letter to BDO also raised a number of questions about capital gains in relation to some Ukrainian property transactions.

13. On 6 July 2005, BDO responded by letter and acknowledged receipt of the letter to it of 1 July 2005 advising of HMRC’s intention to enquire into the Return. The letter stated that BDO would respond to the questions raised in relation to capital gains by 22 August 2005 as requested by HMRC. It also referred to a “gilt strip loss” which had mistakenly not been included in the Return. If taken into account, BDO asserted that Mr Tinkler had suffered an income tax loss for 2003/04 of some £2.5m but it pointed out that it could not amend the Return “as the Return is now the subject of a section 9A TMA 1970 enquiry”. A repayment of tax overpaid by Mr Tinkler was nevertheless sought (in relation to that income tax loss) which BDO asserted amounted to £605,319.58 (plus £30,265.98 in overpaid surcharge). HMRC responded by letter dated 12 July 2005, noting the gilt strip loss claimed but saying that “no repayment will be made until after the enquiry has been concluded”.

14. BDO did not adhere to the requested deadline of 22 August 2005 for their reply about the capital gains. HMRC sent reminders to BDO on 26 August 2005 and 25 October 2005. The letter to BDO in October triggered a series of phone calls between BDO and HMRC in which BDO queried why Mr Tinkler had not received a tax repayment he was expecting for some £43,000 (although it does not matter for the purposes of deciding this case, it would appear that that repayment was not directly related to the 2003/04 Return). In fact, on 14 July 2005, HMRC had sent a cheque for £43,138.29 to Mr Tinkler at Heybridge Lane. The letter was never received by Mr Tinkler and the cheque was never cashed. In those phone calls, HMRC were told that Mr Tinkler no longer used the Heybridge Lane address to which the cheque had been sent and HMRC agreed to cancel the cheque and pay instead by BACS transfer. On 1 November 2005, HMRC updated Mr Tinkler’s computer record with Station Road as his address.

15. In a letter to HMRC dated 24 November 2005, BDO provided the information requested about the Ukrainian property transactions. The FTT found that BDO probably liaised with Mr Tinkler’s personal assistant (“PA”) about the answers to the questions raised by HMRC in their letter of 1 July 2005 to BDO. The FTT inferred, from that and from contemporaneous notes written by an HMRC officer, that BDO had told Mr Tinkler and/or his PA of the HMRC enquiry into Mr Tinkler’s 2003-04 return before BDO responded to HMRC about the Ukrainian property transactions on 24 November 2005.

16. HMRC subsequently decided that Mr Tinkler was not entitled to the income tax loss of some £2.5m claimed in relation to his 2003-04 tax return and, on 30 August 2012, issued a closure notice. This made clear that Mr Tinkler was not

entitled to claim that income tax loss so that “the amendment to the Return to claim this loss is incorrect”. The notice went on to clarify that the original tax said to be owed before the enquiry of £701,990.96 was therefore correct.

4. The judgments in the FTT and UT

17. Mr Tinkler appealed to the FTT in relation to the conclusions set out in HMRC’s closure notice. In addition to the arguments made in respect of his substantive appeal, Mr Tinkler amended his notice of appeal (two months before the FTT hearing) to contend that there was a preliminary issue determinative of that appeal, namely that HMRC had failed to give him a valid notice of enquiry and that the closure notice and its conclusions were therefore also invalid. The FTT directed that this preliminary issue be heard separately, followed (if necessary) by the substantive appeal.

18. As regards that preliminary issue, the FTT (Judge Barbara Mosedale) decided as follows, in so far as relevant to this appeal:

(i) Although BDO did not have actual or apparent authority to receive notices of enquiry on behalf of Mr Tinkler, Mr Tinkler’s appeal should be dismissed because Mr Tinkler or his PA knew of the enquiry in November 2005 (having been informed by BDO) before the enquiry window closed in January 2006; and actual knowledge of the enquiry by the taxpayer or his PA (who had actual authority to receive notice of a section 9A enquiry on behalf of Mr Tinkler) was sufficient for the purposes of the required notice of the section 9A enquiry. See especially paras 132-134 of the FTT’s judgment.

(ii) In any event, estoppel by convention here operated (with BDO having actual or apparent authority to represent Mr Tinkler in the enquiry) so that Mr Tinkler was estopped from denying that a valid enquiry had been opened. It would be unconscionable for Mr Tinkler to go back on the shared mistaken assumption that a valid enquiry had been opened. See paras 135-163 of the FTT’s judgment.

19. Mr Tinkler appealed and HMRC cross-appealed (against the conclusion that BDO did not have actual or apparent authority to receive notices of enquiry on behalf of Mr Tinkler): [2018] UKUT 73 (TCC); [2018] STC 2295. The UT came to diametrically opposite conclusions to those of the FTT albeit that, overall, Mr Tinkler’s appeal was dismissed. The UT decided:

(i) BDO did have actual or apparent authority to receive notices of enquiry on behalf of Mr Tinkler. Notice of the enquiry had therefore been given to Mr Tinkler through HMRC's letter to BDO of 1 July 2005.

(ii) Where an enquiry notice has not been properly addressed, the notice cannot become properly given because the intended recipient knows of the enquiry by learning of it from a different source. It was therefore unnecessary to consider whether Mr Tinkler's PA was his agent for receiving notice of the enquiry.

(iii) Estoppel by convention could not here apply because, in line with *Keen v Holland* [1984] 1 WLR 251, the estoppel would undermine the statutory protection given by section 9A TMA. In any event, the requirements of estoppel by convention were not here made out because Mr Tinkler/BDO could not "properly be said to have assumed some element of responsibility for [the common assumption]" (para 62); and it would not be unconscionable for Mr Tinkler to deny that an enquiry had been validly opened.

5. The judgment of the Court of Appeal

20. The UT gave Mr Tinkler permission to appeal against its decision that BDO did have actual or apparent authority to receive notices of enquiry on behalf of Mr Tinkler; and HMRC issued a respondent's notice seeking, if necessary, to uphold the decision on the ground that the UT should have held that there was an estoppel by convention. There were therefore two issues before the Court of Appeal. First, was a valid notice of a section 9A enquiry given by the copy notice sent to BDO? Secondly, if not, was Mr Tinkler estopped, by reason of estoppel by convention, from denying that HMRC had opened a valid enquiry?

21. The Court of Appeal allowed Mr Tinkler's appeal and dismissed HMRC's cross-appeal. The leading judgment was given by Hamblen LJ, with whom Sir Bernard Rix and McCombe LJ agreed: [2019] EWCA Civ 1392; [2019] 4 WLR 138. The Court of Appeal held as follows:

(i) BDO did not have actual or apparent authority to receive a notice of enquiry on behalf of Mr Tinkler. In this respect, the Court of Appeal agreed with the FTT and disagreed with the UT. Although by Form 64-8, Mr Tinkler had conferred wide-ranging authority on BDO to deal with HMRC on his behalf, Form 64-8 made clear that some forms had to be sent to the taxpayer instead of the agent; and the linked website page clarified that a formal notice of enquiry was one such form. In Hamblen LJ's words at para 41:

“Interpreting Form 64-8 together with the linked website page, HMRC are acknowledging that a ‘formal notice of enquiry’ is a form which ‘must’ be sent to the taxpayer ‘instead’ of the agent and that the authority to deal with the agent is limited to correspondence in relation to such inquiries, reflecting an agreement made with professional bodies.”

(ii) Mr Tinkler was not estopped, by reason of estoppel by convention, from denying that HMRC had opened a valid enquiry. In this respect, the Court of Appeal agreed with the UT and disagreed with the FTT (although, in contrast to the UT, Hamblen LJ did not think it necessary to consider whether estoppel would here undermine the statutory protection given by section 9A and “would take some persuading that *Keen v Holland* is analogous” (para 73)). Estoppel by convention could not here be made out for two reasons. Applying the criteria laid down by Briggs J in *Benchdollar* at para 52 (as approved by the Court of Appeal in *Blindley Heath Investments Ltd v Bass* (“*Blindley Heath*”) [2015] EWCA Civ 1023; [2017] Ch 389, para 91, subject to one qualification explained at para 92), BDO had not assumed the requisite element of responsibility for the common assumption; and the requisite unconscionability was also not made out.

22. As regards the first of those two reasons relating to estoppel by convention, Hamblen LJ said the following at paras 63-66:

“63. A striking factual feature of the present case in relation to the alleged estoppel by convention is that any shared mistaken assumption was induced by HMRC’s misrepresentation.

64. In the BDO letter HMRC represented to BDO that an enquiry had been opened by the notice of enquiry sent to Mr Tinkler in the letter. That statement was false.

65. BDO had no reason to doubt the truth and accuracy of what they were being told by HMRC. They thereafter proceeded on the reasonable assumption that what they had been told was true, but at no stage endorsed, affirmed or addressed the truth or accuracy of the statement made to them. The validity of the enquiry was not a matter that was ever referred to or considered in the communications between the parties.

66. In such circumstances, I agree with the conclusion of the UT that BDO/Mr Tinkler never assumed the requisite ‘element of responsibility for the assumption made’. It was HMRC who adopted the relevant mistaken assumption for themselves. BDO played no part in the adoption of that assumption. It was HMRC who occasioned the adoption of that assumption by BDO. BDO did not disabuse HMRC of their mistaken assumption, but it had no reason to do so. It simply assumed that what HMRC told it was true. HMRC did not need or seek assurance from BDO that their assumption was correct, nor was any such assurance given. BDO neither said nor did anything to show that the assumption reflected its own understanding, rather than simply what it had been told by HMRC.”

23. Turning to the second of those two reasons in relation to estoppel by convention, Hamblen LJ said this, at paras 68-70:

“68. The question of whether it is unconscionable to allow an assumption to be resiled from involves a consideration of the overall justice of case. In the present case that includes the fact that the source of the assumption was HMRC’s misrepresentation. It is also relevant that HMRC were at fault in relation to the misrepresentation made. The reason why the enquiry was invalid was because the relevant officer had deliberately made a unilateral decision to send the notice of enquiry to an address at which Mr Tinkler no longer resided rather than to that to which HMRC had been asked to send such correspondence.

69. This is a case in which HMRC have only themselves to blame for what occurred. They were at fault in sending the notice of enquiry to the wrong address. They misled BDO into assuming that an enquiry had been validly opened. BDO did nothing to cause the adoption of the mistaken assumption. In all the circumstances of the present case, any acquiescence by BDO in HMRC’s mistaken assumption is insufficient to found unconscionability.

70. The FTT’s contrary conclusion was based on the unsupportable assertion that HMRC’s responsibility for the mistake is not relevant. In the present case it is highly relevant to any consideration of unconscionability.”

As will be apparent, the Court of Appeal regarded it as important that HMRC had initiated, and been at fault for initiating, the mistaken common assumption that a valid enquiry had been opened.

24. HMRC sought from the Supreme Court, and was granted, permission to appeal solely on the estoppel by convention issue (ie it did not seek permission to appeal the Court of Appeal's decision, explained at para 21(i) above, that BDO did not have actual or apparent authority to receive a notice of enquiry on behalf of Mr Tinkler). This court is therefore concerned only with the law on estoppel by convention as it applies to this case.

6. A preliminary point: the operation of agency and Form 64-8

25. We have seen that, in the light of Form 64-8, the Court of Appeal held that BDO had neither actual nor apparent authority to receive a notice of enquiry on behalf of Mr Tinkler; and there has been no appeal by HMRC on that issue. But neither in this court, nor in the Court of Appeal, has it been submitted by Roger Thomas QC, counsel for Mr Tinkler, that there is any agency objection to HMRC establishing the alleged estoppel by convention. Any such submission would have contradicted the findings of the FTT and would have been bound to fail. It is helpful to clarify why that is so.

26. By filling in and returning Form 64-8, Mr Tinkler was making clear to HMRC that BDO had general authority to deal with HMRC in relation to his tax affairs including dealing with questions arising under an enquiry. That apparent conferral of authority was very wide indeed. As we have seen in para 7, it stated that BDO was authorised to act on behalf of the taxpayer in connection with “any matters within the responsibility of [HMRC]”. There was a limited carve out from that conferral of apparent authority in relation to being given an enquiry notice. But in all other respects, including making clear to HMRC that Mr Tinkler was assuming that a valid enquiry had been opened, BDO had Mr Tinkler's apparent authority to act on his behalf. Put in shorthand, BDO had the apparent authority of Mr Tinkler for the estoppel-raising conduct alleged.

27. The FTT explained this point as follows, at para 143, under the heading “Agency and estoppel”:

“Irrespective of the issue of whether BDO had actual or apparent authority to receive the notice of enquiry, so far as HMRC were concerned BDO clearly had apparent authority to represent Mr Tinkler in the enquiry. This is what Form 64-8

said and there is nothing on HMRC's website to detract from that: far from it, it envisages that the correspondence in the enquiry will be conducted between HMRC and the agent."

The FTT went on to find that, although not necessary to do so (because apparent authority was enough), BDO had Mr Tinkler's express instructions, and hence actual authority, to write the letter to HMRC of November 2005. And at para 145, it concluded that, for the purpose of estoppel by convention, "the actions and beliefs of BDO are properly attributed to Mr Tinkler." I agree.

7. The case law on estoppel by convention prior to *Benchdollar*: six leading cases

28. There are several types of estoppel recognised in English law. These include estoppel by representation, promissory estoppel, proprietary estoppel, estoppel by convention and, most recently, so-called contractual estoppel. Whatever their historical roots, most of these doctrines are nowadays usually regarded as equitable doctrines not least because there is a heavy emphasis in the case law on "unconscionability" (although, wherever possible, one should seek to clarify what that vague phrase means in relation to the particular facts in play). Attempts have been made over the years to try to unify the various estoppels but such unification has proved elusive and the different types of estoppel continue to be seen as having their own particular requirements and effects (see, eg, *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737, paras 36 and 83-84). In seeking to understand estoppel by convention, and its development in English law, it is helpful to look at six leading cases prior to *Benchdollar*.

(1) Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd

29. The Court of Appeal's decision in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* ("*Amalgamated Investment*") [1982] QB 84 was the first recognition by an appellate court in England and Wales of estoppel by convention (although, without using the term "estoppel by convention" and without clearly distinguishing it from some other types of estoppel, Dixon J's judgments in the Australian cases of *Thompson v Palmer* (1933) 49 CLR 507 and *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 are often regarded as first articulating that doctrine in the common law world). The facts concerned parties acting on the basis of an agreed assumption as to the effect of a guarantee (and, in particular, whether it covered certain liabilities to the defendant bank). Although Lord Denning MR preferred not to classify the type of estoppel in question - so that what looks like a description of estoppel by convention was being treated

by him as a general statement of the law on estoppel - the other two judges, Eveleigh and Brandon LJ, made clear that they were treating the relevant estoppel as estoppel by convention.

30. Lord Denning MR said this, at pp 121-122:

“To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641, 657, 677, the parties by their course of dealing adopted a ‘conventional basis’ for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the ‘conventional basis’ on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract - when it would be inequitable to do so, having regard to dealings which have taken place between the parties. ...

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

When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.”

31. At pp 126 and 130-131 respectively, Eveleigh LJ and Brandon LJ made clear that they regarded the relevant estoppel as not being estoppel by representation but rather as being estoppel by convention. Brandon LJ cited with approval the whole of, and Eveleigh LJ the last sentence of, the following passage taken from the 3rd

edition of *Spencer Bower and Turner, The Law Relating to Estoppel by Representation* (1977), p 157:

“This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.”

It should be noted that, despite that passage referring only to a common assumption as to the facts, the doctrine was being applied in that case to a common assumption as to the law ie as to the legal effect of the guarantee.

32. It is important to add that it was no bar to the estoppel by convention that the mistake of the party raising the estoppel (here the bank) had not been instigated by the other party. That is, it did not matter that, as Brandon LJ put it, at p 130, “the bank came to hold its mistaken belief in the first place as a result of its own error alone.” And in Lord Denning MR’s exposition, cited above, his Lordship said that it made no difference to the operation of the estoppel that the common assumption had been induced by a misrepresentation. It is convenient to add here that this point was subsequently reinforced by *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* (“*The Amazonia*”) [1990] 1 Lloyd’s Rep 236, at 247, where Staughton LJ (with whom Mann LJ agreed) said:

“As to unconscionability, it does not seem to me significant who first made the mistake, or who had the better opportunity to ascertain the true position. It was a shared mistake, which could easily be made.”

(2) *Keen v Holland*

33. The decision in *Keen v Holland* [1984] 1 WLR 251 is of primary importance in laying down that estoppel by convention (like other estoppels: see, generally, *Actionstrength Ltd v International Glass Engineering In Gl En SpA* [2003] UKHL 17; [2003] 2 AC 541) cannot apply, in certain circumstances, because it would undermine a statute. The question was whether a tenant was estopped by convention

from alleging that a tenancy agreement fell within the protection of section 2(1) of the Agricultural Holdings Act 1948, in a situation where the landlord had agreed to the tenant's continuing occupation of the property only on the basis that the tenancy would not attract the security of tenure afforded by the Act. The Court of Appeal held that the landlord's argument based on estoppel by convention could not there succeed because, just as an express agreement could not outflank the mandatory provisions of the 1948 Act, so estoppel by convention could not do so. I shall return to that central aspect of the decision later in this judgment. But in obiter dicta, Oliver LJ went on to say that, in any event, the requirements for an estoppel by convention were not satisfied on the facts because the landlord had acted on the mistaken view that the protection would not there apply "for reasons which had nothing to do with the defendant [tenant]" (at p 261). True it was that both parties entered into the contract between them mistakenly thinking that the protection afforded by the 1948 Act did not apply and the tenant knew that the landlord would not have entered into the contract had it known its true legal effect. But that was insufficient for estoppel by convention.

(3) *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)*

34. Although the obiter dicta in *Keen v Holland* were not mentioned, the next case to be considered, *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd ("The August Leonhardt")* [1985] 2 Lloyd's Rep 28, focused on the issue left open by the obiter dicta, namely what conduct is required of the party who is allegedly estopped in order for estoppel by convention to apply. The Court of Appeal made clear that the common mistaken assumption must be one that each party has communicated to the other; and that that is a necessary requirement because it ensures that the party raising estoppel has to some extent relied on the other party's conduct in respect of the common assumption. A common subjective assumption is insufficient. In the language that was used in the case, there must be a statement or conduct (and hereinafter in this context I shall, for shorthand, use the word "conduct" as including words) between the parties that "crosses the line".

35. The question was whether a claim by the assignee of cargo-owners against shipowners for damage to a cargo of sugar was time-barred. The cargo-owners and shipowners agreed an extension to the statutory limitation period provided the charterers of the ship also agreed. The cargo-owners and shipowners each mistakenly thought that the other had secured the charterers' agreement and that the time period had therefore been extended. In fact, neither party had sought the charterers' agreement. It was held that the cargo-owners' claim was therefore out of time. The cargo-owners could not establish estoppel by convention because the shipowners had not communicated to the cargo-owners by conduct crossing the line that the shipowners shared the assumption that the charterers' agreement had been sought and obtained. On the facts, while the cargo-owners had sent a letter to the

shipowners (on 12 January 1982) indicating that they thought the charterers' agreement had been obtained, there was no conduct by the shipowners after that letter which made manifest that the shipowners shared that common assumption.

36. Kerr LJ, giving the judgment of the court, said the following (emphasis added) at pp 34-35:

“[B]oth [parties] assumed, albeit for different and mistaken reasons, that the charterers' agreement had in fact been obtained and that an extension of time ... was therefore in force between the shipowners and the cargo-owners. But this is where the matter stopped, in the sense that *nothing thereafter crossed the line between them*. Mr Short [the representative of the cargo-owners] understandably relied on his assumption by not issuing a writ. But he did not do so in reliance on anything said or done by Mr O'Donovan [the representative of the shipowners] which might have been capable of giving rise to an estoppel. All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring *some manifest representation which crosses the line between representor and representee, either by statement or conduct*. It may be an express statement or it may be implied from conduct, eg a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, *in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. The alleged representor's participation in this conduct can then be relied upon by the representee as a basis for this form of estoppel*. A number of illustrations of situations which have given rise to this form of estoppel were given by Dixon J in the High Court of Australia in *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1938) 59 CLR 641 at p 676. A similar situation existed in the *Amalgamated Investment* case ... which is now the leading authority on this doctrine in this country. The parties negotiated and dealt at length on the basis of their common assumption of a binding contractual nexus between them which did not in fact exist. Having acted on this assumption throughout these negotiations and dealings, neither party was thereafter entitled to rely on the absence of the contractual nexus on which these had been based. But in the present case *there was nothing in*

Mr O'Donovan's conduct after Mr Short's letter of 12 January 1982, which passed across the line so as to enable the cargo-owners to contend that both Mr Short and Mr O'Donovan thereafter proceeded on a common assumption. Each acted - or failed to act - independently from the other on the basis of a mutual mistake which remained uncommunicated between them.

The applicability of the doctrine of estoppel in any given case can also be tested in another way. There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that - *across the line between the parties* - his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism. In the present case, however, Mr O'Donovan's silence and failure to react to the letter of 12 January 1982, were not open to any criticism. He neither said nor did anything from which it could be implied that he - let alone both parties - were acting on the common assumption that the charterers had given their consent to the extension of time. *The position would have been crucially different if, after the letter of 12 January, Mr O'Donovan had in some way manifested to Mr Short his acceptance that the extension to [the time limit] was in force between the parties, and if Mr Short had thereupon further relied upon this.* But there was nothing of the kind here. It was simply a case of an unfortunate misunderstanding which was unknown to both parties and which caused each of them, independently from the other, to take no further action in regard to the time limit until after this had expired.

In these circumstances we cannot agree with Bingham J that any estoppel, by whatever name or description, is capable of being raised against Mr O'Donovan."

37. It may be helpful to stress that what Kerr LJ meant by his use of the expression "crossing the line" is some mutually manifest conduct which is based on the common but mistaken assumption. That is, the party which is alleged to be estopped (on the facts of *The August Leonhardt*, this party was the shipowners represented by Mr O'Donovan) is required to manifest its acceptance or sharing of

the assumption to the party which is alleging the estoppel (this party was the cargo-owners represented by Mr Short). What was in mind, therefore, was communication (whether by speech or conduct, and whether express or implied) crossing an imaginary line, drawn between Mr O'Donovan (standing on one side of the line) and Mr Short (standing on the other side of the line), to the effect that Mr O'Donovan accepted or shared the assumption. On the facts of the case, there was no such communication. Plainly Kerr LJ was not using the expression "crossing the line" to indicate that the parties' collective conduct was required to meet (ie cross) some minimum threshold.

(4) *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)*

38. The next in the sequence of leading cases is *Norwegian American Cruises A/S v Paul Mundy Ltd ("The Vistafjord")* [1988] 2 Lloyd's Rep 343. Here Bingham LJ, giving the leading judgment in which he held that estoppel by convention was successfully made out, clarified the following points.

(i) He entirely accepted as correct Kerr LJ's analysis of estoppel by convention in *The August Leonhardt* with its emphasis on the need for conduct "crossing the line" between the parties (even though it was on that ground that his own decision at first instance in that case was overruled by the Court of Appeal).

(ii) He accepted, by reference to an extensive citation of the unreported decision of Peter Gibson J in *Hamel-Smith v Pycroft & Jetsave Ltd* (judgment delivered on 5 February 1987) that: first, estoppel by convention was not confined to assumptions of fact as opposed to law (as indeed was the case in *Amalgamated Investment*); and, secondly, estoppel by convention was not confined to where the parties were about to enter into a transaction but might extend to where the parties to a transaction regulated their subsequent dealings on a conventional basis; but, thirdly, a necessary requirement of estoppel by convention was that it must be unjust or unconscionable for the party against whom the estoppel was raised to resile from that convention.

(5) *Republic of India v India Steamship Co Ltd (No 2) (The Indian Endurance)*

39. The first case in which the House of Lords clearly confirmed the existence of estoppel by convention was *Republic of India v India Steamship Co Ltd (No 2) ("The Indian Endurance")* [1998] AC 878 (cf Lord Goff's speech in the earlier case of *Kenneth Allison Ltd v AE Limehouse & Co* [1992] 2 AC 105 in which he alone relied on estoppel by convention). On the facts, estoppel by convention was not made out

because there was no common assumption. Lord Steyn set out the elements of the doctrine in a clear and simple form in the following way, at p 913:

“It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd* [1985] 2 Lloyd’s Rep 28 [*The August Leonhardt*]; *Norwegian American Cruises A/S v Paul Mundy Ltd* [1988] 2 Lloyd’s Rep 343, [*The Vistafford*]; *Treitel, The Law of Contract*, 9th ed (1995), pp 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.”

(6) *Johnson v Gore Wood & Co*

40. Finally, before turning to *Benchdollar*, it is noteworthy that, in *Johnson v Gore Wood & Co* [2002] 2 AC 1, estoppel by convention was applied by the House of Lords, albeit as obiter dicta, by Lord Bingham (with whom Lord Cooke and Lord Hutton expressed agreement on this aspect of the case). Lord Bingham cited with approval a passage from Lord Denning MR’s judgment in *Amalgamated Investment*, the core of which has been set out in the final paragraph of para 30 above. His Lordship went on to say, at p 33, that the question was

“whether the parties to the settlement of [the company’s] action (relevantly, Mr Johnson and GW) proceeded on the basis of an underlying assumption that a further proceeding by Mr Johnson would not be an abuse of process and whether, if they did, it would be unfair or unjust to allow GW to go back on that assumption.”

Lord Bingham expressed the view that the answer to both those questions was in the affirmative.

(7) ***Conclusion on the case law prior to Benchdollar***

41. Numerous other cases could be cited in support of the above analysis of the case law. To pick out just one, a particularly clear illustration of there being no conduct “crossing the line” is provided by the Court of Appeal’s decision in *Hillingdon London Borough Council v ARC Ltd (No 2)* [2000] 3 EGLR 97. It can therefore be seen that, coming into *Benchdollar*, estoppel by convention was well-established in English law as were many of its central elements. In the context of non-contractual dealings, it was in the *Benchdollar* case, as we shall now see, that the opportunity was taken to set out the required principles in a statement that has proved highly influential.

8. The exposition and application of estoppel by convention in *Benchdollar*

42. I explained at the start of this judgment that *Benchdollar* is particularly important in this case because it also concerned estoppel by convention in the context of dealings between HMRC and taxpayer(s). Malcolm Gammie QC, counsel for HMRC, submitted that the principles set out by Briggs J in *Benchdollar* are those to be applied in this case, subject to one amendment that was made by the Court of Appeal in *Blindley Heath* in otherwise apparently approving Briggs J’s statement of principles.

43. Mr Thomas also accepted that, with the qualification added by *Blindley Heath*, Briggs J’s statement is a useful summary of the criteria which must be satisfied for estoppel by convention. But he submitted that those criteria are not satisfied on the facts of this case and that, in any event, estoppel by convention is not engaged in this case because, first, there was no transaction or course of mutual dealings between the parties and, secondly, estoppel by convention cannot here override the relevant statutory provision. I deal with those latter two submissions later on (see paras 69-83 below).

44. The facts in *Benchdollar* were that HMRC had been seeking to postpone the expiry of the limitation period running under section 9 of the Limitation Act 1980 in respect of a large number of claims for recovery by HMRC of employers’ national insurance contributions while appeals in respect of liability were ongoing. In order to achieve this, HMRC sought to obtain from the employers in question written acknowledgements of HMRC’s claim, on terms which were expressed not to constitute an acknowledgement of liability. HMRC mistakenly believed that this would amount to an acknowledgement for the purposes of section 29(5) of the Limitation Act 1980 which, if correct, would have extended the period of limitation. That belief was mistaken because all of the purported acknowledgements expressly denied liability for the debt claimed. Apart from contractual arguments (which

failed), HMRC sought to rely on estoppel by convention. And in respect of certain claims (those which were statute-barred before 11 September 2001), the employers were indeed held to be estopped by convention from asserting the ineffectiveness of the acknowledgements or part payments. In contrast, estoppel by convention failed in respect of the claims which were not statute-barred as at 11 September 2001 because, by that date, HMRC had been advised as to the true legal position - ie that the acknowledgements or part payments were ineffective - and could reasonably have taken protective steps (eg by issuing protective claim forms) to stop limitation barring their claims. In respect of those claims, therefore, estoppel by convention did not succeed because it was “not on balance unfair, unjust or unconscionable” (at para 68) for the employers to assert a limitation defence.

45. Having referred to a number of the leading cases on estoppel by convention examined above, including *The Indian Endurance*, *The Vistafjord* and *Keen v Holland*, but not *The August Leonhardt*, Briggs J set out the following very important statement of principles at para 52:

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

46. Applying this to the facts, there were three main types of correspondence between the parties to consider. In types (1) and (2), HMRC wrote to the employer enclosing a form of acknowledgement for the employer to return. The employers duly signed and returned the forms to HMRC. In type (3), the employer wrote to HMRC enclosing a cheque for £1 as part payment, but without prejudice to the employer’s dispute of the debt, together with a copy of HMRC’s Enforcement Office

Manual (which stated *inter alia* that the limitation period would start afresh from written acknowledgement of the debt or part payment). Briggs J decided that estoppel by convention arose in relation to all three types of correspondence. There was a common mistaken assumption and, through that correspondence, the employers assumed a sufficient degree of responsibility for that common assumption and for HMRC relying on it. HMRC did rely on the common assumption in relation to subsequent dealings between the parties; and HMRC's detrimental reliance, coupled with the obtaining by the employers of the anticipated benefit of HMRC's reliance on the shared assumption, meant that it was unfair or unjust for the employers to resile from the common assumption. Estoppel by convention therefore succeeded in relation to those claims which were statute-barred as at 11 September 2001.

47. It is noteworthy that, consistently with *Amalgamated Investment* and *The Amazonia* (see para 32 above), it was not a bar to estoppel by convention that, as regards the first two types of correspondence, the common mistaken assumption was initiated by HMRC; and nor was it a bar that HMRC did so by misrepresenting to the employers that the signing of the enclosed form would be effective to postpone the limitation period.

48. The *Benchdollar* principles brought a welcome degree of clarity to the law on estoppel by convention, at least in the context of non-contractual dealings (for the wider context, see para 78 below). As in all areas of the common law, including equitable doctrines, it is important in guiding behaviour that the law is stated with as much clarity and precision as possible while not depriving the courts of the flexibility needed to develop the law incrementally in response to changes in conditions and attitudes.

49. However, it was unfortunate that Briggs J's first principle made no reference to the need for conduct to have "crossed the line". Soon after *Benchdollar*, Briggs J was presented with the opportunity to make that refinement. In *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* ("*Stena Line*") [2010] EWHC 1805 (Ch); [2010] Pens LR 411 (upheld on appeal without discussing this point at [2011] EWCA Civ 543; [2011] Pens LR 233) Briggs J accepted the submission of counsel that, by reference to *The August Leonhardt*, his first principle should be amended to include that "the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred" (at para 137).

50. Although not referring to *Stena Line*, the same point was made by the Court of Appeal (Longmore LJ, Jackson LJ and Hildyard J) in *Blindley Heath*. On the facts of that case, the parties to a share sale agreement had conducted themselves on the incorrect assumption that there was no earlier shareholder's agreement by which any

sale of the shares first had to be offered to existing shareholders. The parties had forgotten about an earlier shareholders' agreement conferring pre-emption rights. It was held that estoppel by convention applied. The parties had conducted themselves on the basis of a common assumption that there were no valid rights of pre-emption and it would be unconscionable to allow the directors to go back on that assumption. While citing Briggs J's principles with apparent approval, Hildyard J, giving the judgment of the court, at para 92, made clear in relation to the first principle that "something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption."

51. It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.

52. It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from Spencer Bower, *The Law Relating to Estoppel by Representation*, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:

"In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view)."

For a similar statement, using the same wording of C's reliance on "the subscription" of D to the common assumption, see the present edition of that work, Spencer Bower: *Reliance-Based Estoppel*, 5th ed (2017), para 8.26. But this is not to suggest that C must be relying *solely* on D's affirmation of, or subscription to, the common assumption as opposed to C relying on its own mistaken assumption. It is sufficient that, as D intended or expected, D's affirmation of, or subscription to, the common assumption strengthened, or influenced, C in thereafter relying on the common assumption.

53. As I have already said, both counsel submitted that the *Benchdollar* principles, subject to the *Blindley Heath* amendment to the first principle, applied in this case. I agree. This judgment therefore affirms that those principles, as amended by *Blindley Heath*, are a correct statement of the law on estoppel by convention in the context of non-contractual dealings. What I have also sought to do is to explain the ideas underpinning the first three principles which may provide assistance in the understanding and application of those principles.

9. The application of the *Benchdollar* principles (as amended in *Blindley Heath*) to the facts of this case

54. I am now in a position to apply the *Benchdollar* principles, as amended in *Blindley Heath*, to the facts of this case. As we have seen at para 22 above, the Court of Appeal was of the view that HMRC's letter of 1 July 2005 to BDO misrepresented that an enquiry had been opened by the notice of enquiry sent to Mr Tinkler; that BDO at no stage endorsed, affirmed or addressed the truth or accuracy of that statement made to them; and that BDO therefore played no part in the adoption by HMRC of the mutual mistaken assumption.

55. Mr Gammie submitted that, contrary to the Court of Appeal's reasoning, no misrepresentation had been made by HMRC in the letter of 1 July 2005 to BDO not least because the letter was simply a copy of what had been sent to Mr Tinkler at the Heybridge Lane address; and it was true that that letter had been sent to him at the Heybridge Lane address. But in line with the approach of the Court of Appeal, I accept that that letter to BDO did impliedly misrepresent that Heybridge Lane was a correct address for the purposes of sending a notice of enquiry to Mr Tinkler and that, consequently, the enquiry was being validly opened.

56. However, with respect to the Court of Appeal, I do not think anything significant turns on that misrepresentation in this case. In particular, as we have seen by reference to *Amalgamated Investment, The Amazonia* and *Benchdollar*, it is not a bar to estoppel that HMRC initiated the mistake or that, as in *Benchdollar*, HMRC was careless in relation to that mistake or induced the other party's mistake by a misrepresentation. The Court of Appeal regarded those factors as highly relevant to its decision not least in deciding on the unconscionability aspect of estoppel by convention. With respect, this gave those factors far too much weight. On these facts, it was largely irrelevant that HMRC may be said to have initiated the common mistake by a misrepresentation and to have been careless in doing so.

57. More fundamentally, I also respectfully disagree with the Court of Appeal that BDO did not endorse or affirm the truth of the statement. HMRC believed, mistakenly, that it had opened a valid enquiry because the necessary requirement of

giving the taxpayer a notice of enquiry had been complied with. When BDO replied to HMRC on 6 July 2005, it was making the same mistake as HMRC in thinking that a valid enquiry had been opened because it too thought, by reason of the copy letter, that the necessary requirement of giving the taxpayer a notice of enquiry had been complied with. There was therefore a common mistaken assumption that a valid enquiry had been opened. BDO's conduct crossed the line because, by its reply of 6 July 2005, it was indicating to HMRC that it too believed, and was acting on the belief, that a valid enquiry had been opened. Even if BDO's acknowledgement, by its letter to HMRC of 6 July, would otherwise have been insufficient to make clear to HMRC that it shared that mistake, the contents of that letter put that beyond doubt. BDO not only said that it would respond on the questions raised in relation to capital gains by 22 August 2005 as requested by HMRC but also, and in particular, it pointed out that, as regards the gilt strip loss, it could not amend the Return "as the Return is now the subject of a section 9A TMA 1970 enquiry". By its reply, BDO had endorsed or affirmed HMRC's mistaken assumption. Thereafter, HMRC were relying, as BDO expected and intended, on the affirmation of the common assumption.

58. Relevant conduct of BDO in 2005 did not stop there. When BDO did not adhere to the requested deadline of 22 August for their reply about the capital gains, HMRC sent reminders to BDO on 26 August and 25 October. This led to a series of phone calls between BDO and HMRC, before BDO's letter to HMRC dated 24 November 2005, providing the information requested about the Ukrainian property transactions. This was again conduct of BDO affirming to HMRC that BDO was assuming, and acting on the assumption, that a valid enquiry had been opened.

59. One of my essential disagreements with the Court of Appeal's approach to the facts may be expressed by saying that this was not a case where BDO was simply repeating back to HMRC the mistake/misrepresentation (that the notice had been validly served). BDO's conduct went further than that. Indeed, in addition to the positive conduct of BDO referred to in the previous two paragraphs, there is the point that BDO had wide apparent authority to deal with HMRC on behalf of Mr Tinkler. Had there been a problem with the enquiry notice, HMRC would reasonably have expected BDO to raise that problem. Far from doing that, BDO conducted itself, with Mr Tinkler's apparent authority, on the basis that there was a valid enquiry underway. By so doing, BDO affirmed HMRC's mistaken assumption.

60. It is worth adding that the parties proceeded to conduct their dealings, until and after HMRC's closure notice in August 2012, on the assumption that a valid enquiry had been opened. It was not until January 2015, two months before the FTT hearing, that Mr Tinkler amended his notice of appeal to argue that HMRC's notice of enquiry had been invalid.

61. The important points, in relation to the first three of the principles in *Benchdollar*, are that both parties shared a mistaken common assumption; that BDO had made manifest to HMRC that it was sharing, and acting on, that common assumption (eg BDO's conduct on 6 July 2005 and clearly again on 24 November 2005 had "crossed the line"); and that HMRC was thereafter relying, as BDO must have expected and intended, on the affirmation of the common assumption in relation to its subsequent mutual dealing with BDO. As BDO must have intended or expected, BDO's affirmation of, or subscription to, the common assumption strengthened, or influenced, HMRC in thereafter relying on the common assumption. Using the words of the second principle in *Benchdollar*, BDO had "assumed some element of responsibility" for the common assumption and for HMRC's reliance on it.

62. In my view, there is also no difficulty at all in HMRC satisfying the fourth principle in *Benchdollar* that requires the reliance to be "in connection with some subsequent mutual dealing between the parties". HMRC's reliance on the common assumption that a valid enquiry notice had been served was in connection with carrying out the enquiry, which included mutual dealings such as questions being asked by HMRC about the Ukrainian properties which were answered by BDO, and HMRC, in the light of those answers, issuing a closure notice. I examine later, albeit to reject, Mr Thomas' submission that a particular narrow meaning must be given to "mutual dealings".

63. Turning to the fifth and final principle in *Benchdollar*, it is not in dispute that HMRC's reliance was detrimental because, by reason of HMRC acting on the affirmed common assumption that a valid enquiry had been opened, it did not send another notice of enquiry to Mr Tinkler before the expiry of the 12 months' time limit on opening an enquiry into the 2003/04 Return. And if the enquiry were treated as invalid, the 30 August 2012 closure notice - by which HMRC were able to deny BDO's tax claim of over £635,000 (see para 13 above) - would also have to be treated as invalid. Correspondingly, Mr Tinkler would stand to gain some £635,000 if estoppel by convention could not here be established by HMRC.

64. What about unconscionability? This was mentioned as part of the fifth of Briggs J's principles in *Benchdollar*; and in other leaner formulations - such as that of Lord Steyn in *The Indian Endurance* - it has been put forward as playing an even more central role. In most cases, in line with Briggs J's statement of principles, unconscionability is unlikely to add anything once the other elements of estoppel by convention have been established and, in particular, where it has been established that the estoppel raiser has *detrimentally* relied on the common assumption. However, one can certainly envisage exceptional cases where unconscionability may have a useful additional role to play. For example, even if all the other elements of estoppel by convention can be made out, fraudulent conduct by the estoppel raiser would rule out estoppel by convention (see, by analogy, *D and C Builders Ltd v*

Rees [1966] 2 QB 617 in which duress by the promisee in inducing the promise ruled out promissory estoppel). But such examples are likely to be rare. Even though HMRC was primarily at fault on the facts of this case - by carelessly sending the notice of enquiry to the wrong address and its consequent misrepresentation to BDO - I agree with the approach in *Amalgamated Investment, The Amazonia* and *Benchdollar* so that that does not amount to unconscionable conduct barring the establishment of estoppel by convention.

65. Although unnecessary to my decision, I am reinforced in my view that unconscionability here supports the application of estoppel by convention by the findings of the FTT regarding Mr Tinkler's knowledge. As we have seen at para 15 above, the FTT found that Mr Tinkler and/or his PA knew of HMRC's enquiry in November 2005. At that time, Mr Tinkler could have informed HMRC that no notice of enquiry had been received by him. That would have left HMRC with sufficient time, within the 12-month deadline, to issue a replacement notice of enquiry. But Mr Tinkler and/or his PA did not do that. In those circumstances, it may be thought particularly unconscionable for him to raise this point for the first time over nine years later.

66. My conclusion, therefore, is that HMRC have satisfied all the requirements for establishing an estoppel by convention as laid down in *Benchdollar* (as amended in *Blindley Heath*). It remains finally to consider Mr Thomas's further two submissions as to why, in any event, estoppel by convention cannot succeed.

67. Before moving on to those two additional issues, there is one clarificatory point about the general relationship between misrepresentation and the unconscionability element of estoppel by convention. This particular point does not arise on the facts of this case but it is relevant in thinking more generally about estoppel by convention. I have made clear that, on the facts of this case, and in line with *Benchdollar*, HMRC's misrepresentation is no bar to its invocation of estoppel by convention. But one can postulate facts where the invocation of estoppel by convention might be used to try to undermine a claim based on the misrepresentation. Say, for example, A makes a negligent misrepresentation to B that a particular fact (X) is true. X is untrue. B suffers loss by relying on A's negligent misrepresentation. When B finds out the truth, B brings a claim against A for damages for the tort of negligent misstatement. Estoppel by convention is raised by A as a defence to that claim applying the argument that A and B shared a common assumption that X is true, which was relied on by A, so that B is estopped from denying that X is true; and if X cannot be said to be untrue, B cannot establish the alleged misrepresentation by A. This hypothetical example serves to illustrate that one needs an explanation as to why estoppel by convention does not undermine claims for misrepresentation.

68. The best explanation is that, where estoppel by convention would serve to undermine the cause of action for misrepresentation, it would not be unconscionable for the misrepresentee (B in the above example) to be able to deny estoppel by convention even if A has detrimentally relied on B's affirmation of the common assumption. The fifth principle in *Benchdollar* could not therefore be satisfied by A. But, of course, this is not a problem on the facts of this case because estoppel by convention is not here being invoked by HMRC to defeat a cause of action by Mr Tinkler for misrepresentation. Indeed, no such claim against HMRC could possibly succeed because Mr Tinkler has suffered no loss consequent on HMRC's negligent misrepresentation.

10. Two additional issues

69. I now turn to Mr Thomas' submission that, even if the principles of estoppel by convention were otherwise engaged on these facts, that doctrine was inapplicable for two reasons. First, there was no transaction or course of mutual dealings in respect of which the estoppel could attach; and, secondly, estoppel could not operate so as to outflank the statutory protection afforded to the taxpayer by section 9A TMA.

(1) *No transaction or course of mutual dealings between the parties?*

70. As was said at the start of this judgment, estoppel by convention most commonly arises where there is a contract between the parties. It is also true that many statements of the doctrine refer to there being a transaction between the parties: see, eg, the citations set out above at paras 30-31, 39 of all three judges in *Amalgamated Investment* and of Lord Steyn in *The Indian Endurance*. It is also correct that many of the statements of the doctrine by commentators, such as *Chitty on Contracts*, 33rd ed (2018), para 4-108 and *Snell's Equity*, 34th ed (2020), at 12-012, refer to there being a transaction between the parties.

71. However, it would appear that such statements merely reflect the primary contractual or transactional context in which estoppel by convention arises. And there have been wider statements of estoppel by convention that refer to mutual relations or dealings between the parties. These include, in Australia, Dixon J in *Thompson v Palmer* (1933) 49 CLR 507, at 547 who said that estoppel may mean that a person is required to abide by a common assumption "because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment ...". Most relevantly, *Benchdollar* did not involve a transaction between the parties but, as in this case, concerned mutual dealings between HMRC and taxpayer(s). Briggs J's fourth principle (see above para 45)

referred to the reliance of the party raising the estoppel as having occurred “in connection with some subsequent mutual dealing between the parties”.

72. On the facts of this case, while there was no transaction between HMRC and BDO/Mr Tinkler, there were mutual dealings between them subsequent to the common assumption. In particular, questions were asked by HMRC about the Ukrainian properties and they were answered by BDO and in the light of those answers, a closure notice was issued by HMRC.

73. As I understood him, Mr Thomas submitted that “mutual dealings” should be given a narrow meaning whereby the mutual dealings must be a course of mutual dealings analogous to a contract, such as dealings between bailor and bailee. But it is hard to see how any such narrow meaning can be consistent with *Benchdollar*. Moreover, in principle, there seems to be no good reason to confine estoppel by convention by taking a narrow view of mutual dealings and Mr Thomas did not attempt to suggest one.

74. I have considered whether this submission about the scope of estoppel by convention relates to the question whether estoppel by convention can create a cause of action (acting as a “sword”) or, in contrast, can operate only as a defence (acting as a “shield”). In *Amalgamated Investment* Brandon LJ examined this question in the context of estoppel by convention and said, at pp 131-132:

“[W]hile a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case.”

75. As a general proposition about the law on estoppel, Brandon LJ’s comment is too sweeping because it is clear that while, for example, promissory estoppel cannot create a cause of action (*Combe v Combe* [1951] 2 KB 215, *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737), proprietary estoppel can (*Crabb v Arun District Council* [1976] Ch 179).

76. The particular concern about allowing promissory estoppel and estoppel by convention to create a cause of action is that this might undermine the requirement of consideration for the validity of a contract. However, that concern is not relevant to the facts of this case which do not concern contractual dealings. In any event, in

the context with which we are concerned, even if one were to insist that the estoppel by convention can support, but must not create, a cause of action in relation to the mutual dealings between HMRC and a taxpayer, it would appear that that restriction is satisfied. The underlying duty to pay tax is imposed by statute and the estoppel relates merely to the dealings between HMRC and the taxpayer in connection with the procedure by which HMRC determine the correct amount of tax to be paid under the statute.

77. Neither counsel made any submissions on the cause of action/defence issue and it was not referred to in any of the judgments below. I therefore say no more about it. It is sufficient for our purposes to make clear that the scope of estoppel by convention extends to the mutual dealings about tax between HMRC and the taxpayer that were in play in this case.

78. There is one linked point of general importance to the law on estoppel by convention. As we have seen, the facts of *Benchdollar*, like this case, involved mutual dealings between the parties but did not concern a contract or transaction between the parties. Yet the principles laid down by Briggs J (as amended) have been treated as also being applicable to contractual dealings; see, for example, *Blindley Heath*. In *Stena Line* Briggs J himself drew on *The August Leonhardt* (a contractual case) in qualifying his first principle. In *Mitchell v Watkinson* [2014] EWCA Civ 1472; [2015] L & TR 22, para 52, it was suggested that there is no significant difference between the principles for estoppel by convention applicable to non-contractual dealings, set out in *Benchdollar*, and those applicable to contractual dealings set out in *Chitty on Contracts*. While it is possible that there may be some differences required by the relevant contractual or non-contractual context (and, although the *Benchdollar* principles do not refer to the cause of action/defence issue, one must bear in mind what has been said about that issue in para 76 above), it would appear that the *Benchdollar* principles are being viewed as general principles applicable to estoppel by convention. It is significant in this respect, that the present edition of *Spencer Bower: Reliance-Based Estoppel*, 5th ed (2017), chapter 8, centres its whole analysis of estoppel by convention on the *Benchdollar* principles. Although it is unnecessary to decide this in this case - and we heard no submissions on it - there appears to be no good reason to confine them to non-contractual dealings. In my view, the five *Benchdollar* principles, with the *Blindley Heath* amendment to the first principle, comprise a correct statement of the law on estoppel by convention for contractual, as well as non-contractual, dealings.

(2) *Outflanking the statutory protection afforded to the taxpayer by section 9A TMA?*

79. Mr Thomas submitted that, by analogy to *Keen v Holland*, estoppel by convention could not here apply because it would outflank the protection given to

taxpayers by the requirement to give the taxpayer notice of an enquiry laid down by section 9A TMA (which must be within 12 months of the filing of a tax return). That analysis was favoured by the UT. In the light of its decision that the elements of estoppel by convention were not made out, the Court of Appeal did not need to consider this argument although, as we have seen at para 21(ii) above, Hamblen LJ indicated that he was sceptical about its force.

80. We have examined *Keen v Holland* at para 33 above. It is sufficient to recap that it was there held that estoppel by convention could not succeed because, just as an express agreement could not outflank the mandatory provisions of the Agricultural Holdings Act 1948, so estoppel by convention could not do so. Section 2(1) of the Agricultural Holdings Act 1948 had the purpose of protecting agricultural tenants by granting them security of tenure. The parties could not contract out of that provision because that would defeat the protection given to tenants. As contracting out was not possible, it followed that estoppel by convention could not apply either. As Oliver LJ said at p 261:

“Once there is in fact an actual tenancy to which the Act applies, the protection of the Act follows and we do not see how ... the parties can effectively oust the protective provisions of the Act by agreeing that they shall be treated as inapplicable. If an express agreement to this effect would be avoided, as it plainly would, then it seems to us to follow that the statutory inability to contract out cannot be avoided by appealing to an estoppel. The terms of section 2(1) are mandatory once the factual situation therein described exists, as it does here, and it cannot, as we think, be overridden by an estoppel even assuming that otherwise the conditions for an estoppel exist ... Once the protection attaches, the jurisdiction to grant possession is exercisable only subject to the statutory provisions and it is a little difficult to see how the parties can, by estoppel, confer on the court a jurisdiction which they could not confer by express agreement.”

81. The situation with which we are concerned is distinguishable. Section 9A TMA requires that a notice of enquiry is given to the taxpayer; and section 115(2) provides one method by which that notice may be given. But it would have been open to the parties (ie HMRC and Mr Tinkler) to agree expressly the method by which the notice of enquiry was to be given (including, it would seem, that a notice of enquiry given to Mr Tinkler’s tax advisers would have counted). It follows from the TMA being permissive as to the method of giving notice that an estoppel by convention, by which HMRC and Mr Tinkler/BDO operated on the basis that a valid enquiry had been opened (ie that a particular method had been used), does not undermine the purpose of the Act. As, applying the principles of estoppel by

convention, Mr Tinkler is otherwise estopped from denying that HMRC opened a valid enquiry, there is nothing in the statutory provisions, purposively interpreted, that requires the court to reject that estoppel.

82. There is an additional reason, on the facts, supporting that conclusion. We have seen, at para 15 above, that the FTT found that Mr Tinkler and/or his PA knew of HMRC's enquiry in November 2005. Even if, contrary to the view taken in the last paragraph, the purpose of section 9A would otherwise be undermined by the operation of the estoppel by convention, there cannot be any conceivable undermining of the statutory purpose once the taxpayer actually knows of the enquiry. After November 2005, therefore, there has been no conceivable statutory reason why the taxpayer should be protected by rejecting the operation of estoppel by convention.

83. In reaching this conclusion, I should clarify that it is unnecessary to decide whether the FTT's reasoning that actual knowledge of the enquiry by the taxpayer or his PA (who had actual authority to receive notice of a section 9A enquiry on behalf of Mr Tinkler) was, in itself (ie without an estoppel by convention), sufficient to satisfy the required giving of notice of the section 9A enquiry (see para 18(i) above). Resolution of that question would require careful consideration of several cases, including *R (Spring Salmon and Seafood Ltd) v Revenue and Customs Comrs* [2004] STC 444 (in which Lady Smith reasoned that the notice of enquiry need not be in writing and can be given orally) and *Revenue and Customs Comrs v Inverclyde Property Renovation LLP* [2020] UKUT 161 (TCC); [2020] STC 1348. We heard no submissions directly on this issue and, as it unnecessary to decide it, I leave it to one side.

11. Conclusion

84. In my view, the appeal should be allowed because all the necessary elements for an estoppel by convention have been established by HMRC on the facts of this case. The five *Benchdollar* principles, subject to the *Blindley Heath* amendment to the first principle, comprise a correct statement of the law on estoppel by convention in relation to non-contractual dealings (and, although not necessary to decide this, in relation to contractual dealings). I have sought to explain the ideas underpinning the first three *Benchdollar* principles which may provide assistance in the understanding and application of those principles. On the facts of this case, the five principles are all satisfied. Moreover, contrary to Mr Thomas's additional two submissions, the mutual dealings of the parties fall within the scope of estoppel by convention and there is no statutory bar. BDO/Mr Tinkler are therefore estopped from denying that a valid enquiry was opened by HMRC.

85. Standing back from the detail, what Mr Tinkler and his advisers have done is to take at a late stage what can fairly be described, on the facts of this case, as a technical point (that the notice of enquiry was sent to the wrong address) even though that has not caused Mr Tinkler any prejudice. It is entirely satisfactory that, by reference to estoppel by convention, the law has the means to avoid such a technical point succeeding.

LORD BRIGGS:

86. I consider that this appeal should be allowed for the reasons given by Lord Burrows. I add some brief comments of my own because the argument on the appeal has focussed to a considerable extent on my statement of principles in *Revenue and Customs Comrs v Benschdollar Ltd* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174 (“*Benschdollar*”), as amended by me in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch); [2010] Pens LR 411 (“*Stena Line*”), and then by the Court of Appeal to much the same effect in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023; [2017] Ch 389 (“*Blindley Heath*”).

87. It is almost inevitable that an attempt to define the parameters of a relatively new legal doctrine in a few sentences in the course of deciding a particular case at first instance will prove in due course to be inadequate when applied to other cases with, potentially, very different facts. Relevant precedent may not have been considered, as Lord Burrows points out happened in *Benschdollar* because of the omission to deal with *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd* [1985] 2 Lloyd’s Rep 28 (“*The August Leonhardt*”). That omission was put right in *Stena Line* and then in *Blindley Heath*, by emphasising that the necessary sharing of the common assumption had to involve some form of “crossing of the line” by words or conduct on the part of the party to be estopped (“D”). That amendment is not now controversial.

88. More to the point the facts of the earlier case may lead to some aspect of the requirements of the doctrine not being spelt out with the requisite precise detail, because it would have made no difference to the outcome. That is what might be thought to have occurred in *Benschdollar* in relation to the requirement that D be shown to have taken some element of responsibility for the common assumption. It left open an uncertainty whether and if so how this went further than the requirement for a crossing of the line by D. Was it sufficient for D reasonably to expect the estoppel raiser (“C”) to rely on the truth of the underlying assumption, or to rely also upon the fact that D shared it? This is what the editors of Spencer Bower *The Law Relating to Estoppel by Representation*, 4th ed (2004) described as D’s “subscription ... to their common view” in the passage which I cited in *Benschdollar* at para 51. If so it would generally exclude from the benefit of estoppel by convention a C who D

could reasonably think, after crossing the line, would rely exclusively on C's own opinion or advice about the reliability of the common assumption.

89. Like Lord Burrows I do consider that the requirement for some assumption of responsibility by D for the shared assumption does, generally at least, carry with it this additional element. It goes to the heart of what makes it unconscionable for D later to resile from the assumption, after C has relied to some extent on D's earlier subscription to it. That reliance by C may be subordinate to C's reliance upon its own view or advice about the reliability of the assumption, but it must have influenced C's thinking: see *Benchdollar* at para 55. Reliance of that kind, in circumstances where D had no reason to expect or anticipate it, would not make it unconscionable for D then to resile from it, but reliance of that kind which D could reasonably be expected to foresee would do so.

90. The underlying facts found in *Benchdollar* fully demonstrated that the requirement for this element of taking responsibility for the common assumption was met. In the cases where the Revenue originally propounded it, they were seeking to agree with the taxpayers a common basis for postponing the running of time for the initiation of a claim, for both parties' mutual benefit in terms of avoiding the need to spend time and cost on litigation which might later turn out to have been unnecessary. In one case the taxpayer itself propounded the common assumption, for the same mutually beneficial reason. In all the test cases which succeeded the Revenue did rely, albeit to a subordinate extent, on the fact that the common assumption was shared by the taxpayer.

91. The present appeal tests the need for that element of taking responsibility to a more stringent extent. I admit to having been in some real doubt about it. But I am satisfied, for the reasons given by Lord Burrows at para 61, that the requirement was met. On Mr Tinkler's behalf BDO expressly asserted and thereby affirmed the existence of a valid enquiry in circumstances where it was reasonably apparent that the Revenue would rely on BDO's subscription to that common assumption, even if only in the negative sense that the Revenue would not thereafter check that the enquiry had been duly opened, and notice of it duly served on Mr Tinkler, before the limitation period for doing so ran out, as they might have done if no such affirmation had been provided.

92. This short judgment is not intended to replace or re-write the principles for the application of estoppel by convention as set out in *Benchdollar* and amended in *Blindley Heath*. In agreement with Lord Burrows, I consider that they accurately summarise the relevant law.