Introduction

- Contractual Estoppel arises when parties to a contract have agreed, in that contract, that they are contracting upon a specified state of affairs or basis.
- The “estoppel” precludes either party from later asserting in litigation that the opposite to that state of affairs is true. It serves to prevent parties from “contracting on one basis and litigating on another” (Braithwaite).
- The modern doctrine originates from Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd1: “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.”
- Seen in the context of “no reliance clauses” or “boilerplate” clauses, particularly “basis clauses”. Some guidance to determine the difference between a basis clause and an exclusion clause provided by Christopher Clarke J in Raffeisen Zentralbank Osterreich AG v RBS2: “In this respect the key question, as it seems to me, is whether the clause attempts to rewrite history or parts company with reality...”
- It has become particularly relevant in the area of interest rate swap mis-selling claims.
- Two relatively opposing views of the doctrine:
  - The current view of the senior courts (and, often, the defendants): a necessary doctrine by which parties may agree the basis on which they are entering into a relationship and be held to that agreement.
  - The view of the customer: a “get out of jail free card” which rewrites reality so that the other party is able to rely on a clause stating the contractual position to be one thing when, in fact, the reality is very different, and often unfairly so.

Is it Estoppel?

- The doctrine does not require detrimental reliance.
- Several commentators suggest contractual estoppel cannot be considered estoppel at all. This is a view shared by Andrew Smith J in Credit Suisse v Vestia, Wilken and Ghaly on The Law of Waiver, Variation and Estoppel, and Professor McMeel3.
- Just because it may not be a version of “estoppel” does not mean that the law does not exist; the courts have been applying it for several years.


- Concerned the capacity of a Dutch housing authority to enter derivative transactions with the Bank. An ISDA Master Agreement governed the transactions between the parties and seven swaps contracts were entered.
- Vestia later unable to provide security; Credit Suisse terminated the Master Agreement and sought damages as an Early Termination Amount.

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1 [2006] EWCA Civ 386 per Moore-Bick LJ at [56]-[57]. See also Springwell Navigation Corp v JP Morgan Chase Bank (formerly Chase Manhattan Bank) [2010] EWCA Civ 1221
2 [2010] EWHC 1392 at [314]
3 Wilken and Ghaly state that because, at root, estoppels require detriment, “there is no basis in principle or in authority for the Peekay contractual estoppel being an estoppel”.

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Andrew Smith J held that the swaps were entered into *ultra vires* and were void.

However, the Master Agreement was valid and contained certain warranties which allowed Credit Suisse to enforce the *ultra vires* contracts “as if” they were within Vestia’s capacity.

Vestia contractually estopped from disputing the validity of the swaps because they had: “warranted in the Master Agreement that they would be acting in compliance with their Articles of Association (and so within their capacity) when entering into transactions covered by it.”

Credit Suisse could claim the Early Termination Amount.

Criticised for circumventing underlying principles of *ultra vires* rule and stretching ‘contractual estoppel’ too far, meaning a backdoor enforcement of *ultra vires* contract.

However, Vestia, a financially sophisticated entity, should be held to its agreements; later decisions on capacity do not affect the warranties given in respect of that capacity.

Decision creates a more certain environment for banks to contract with public entities.

**Crestsign v NatWest [2015] 2 All ER (Comm) 133**

Crestsign was a commercial property investment company seeking refinance. A condition of NatWest loan was that Crestsign entered into an interest rate swap.

An interest rate risk manager discussed options and produced a ‘risk management paper’ which explaining the proposals. That paper referred to the terms of business:

“We will not except where we have specifically agreed to do so, provide you with advice on the merits of a particular transaction or the composition of any account, or provide you with personal recommendations (as defined by the FSA) in relation to any transaction or account.”

A loan of £3.5 million with a 5 year term was agreed alongside a 10-year swap to that amount.

The Claimants started losing money on the swap when interest rates fell and a mis-selling claim alleged:

(i) that negligent advice has been given by the Bank on entering the swap;

(ii) that the Bank had breached its duty to give information.

Tim Kerr QC, sitting as a Deputy High Court Judge, gave judgment for the Bank:

- The representative of the Bank had given advice to the Claimant; it was reasonable to expect that the Claimant relied on that advice.
- However, the banks “went out of their way” in the documents to ensure that this duty did not, in fact, arise. The Claimant was contractually estopped from asserting that a state of affairs existed different to that which it had contracted upon.

*Crestsign* listed for the Court of Appeal but settled. One of the grounds was whether a contractual estoppel can be said to have arisen and, if so, what was its impact.

Similar issues have arisen in *Thornbridge v Barclays Bank* [2015] EWHC 3430 (QB). That case is due to go to the Court of Appeal; Thornbridge is applying to appeal on further grounds including whether the ‘basis’ clauses are subject to UCTA.
For further reading and information, see:

- *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582
- *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch), [2015] 2 All ER (Comm) 133
- *Thornbridge v Barclays Bank* [2015] EWHC 3430 (QB)
- McMeel, “Documentary Fundamentalism in the Senior Courts: the myth of contractual estoppel” (2011) LMCLQ 185
- McMeel, “Banks, the Judiciary and “Documentary Fundamentalism”” Counsel, April 2015, 10-12
- Braithwaite, “The Origins and Implications of Contractual Estoppel” (2016) LQR 120