Neutral Citation Number: [2019] EWHC 3354 (QB)

Case No: QB-2019-003810

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2019

Before :

MRS JUSTICE WHIPPLE

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Between :

David Joseph	**Claimant**
- and -	
Deloitte NSE LLP	**Defendant**

- -
- -

Jonathan Cohen QC and Alexander Robson (instructed by **Farrer & Co**) for the **Claimant**
Paul Goulding QC and George Molyneaux (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing date: 27 November 2019

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Approved Judgment

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

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MRS JUSTICE WHIPPLE

Mrs Justice Whipple:

Introduction

1. The Claimant is an equity partner at Deloitte NSE LLP ("Deloitte") pursuant to the terms of an LLP agreement dated 1 June 2017 (the "LLPA"). Cl 16.2 of the LLPA confers a power on the Board of Deloitte to expel a member by issuing a "Notice of Retirement". The member has a right to ask the Board to reconsider the decision to issue a Notice of Retirement. The member also has a right to put his case to a special meeting of the full partnership ("partners' meeting"). In this case, Deloitte issued a Notice of Retirement to the Claimant. The Claimant asked the Board to reconsider the decision to issue a Notice of Retirement. The Board did that at its meeting on 2 October 2019. The Board's decision on its reconsideration was communicated to the Claimant on 11 October 2019. The Board upheld its earlier decision and decided not to withdraw the Notice of Retirement. Meanwhile, by email dated 10 October 2019, confirmed by email dated 12 October 2019, the Claimant asked for a partners' meeting to be convened.

2. The issue in the case is whether Deloitte is obliged to convene a partners' meeting as the Claimant has requested.

3. The Claimant asserts that his request was within time, on a proper construction of the LLPA or as a result of the necessary implication of a term extending the time to ask for a partners' meeting. Alternatively, he asserts that Deloitte is estopped from now denying his request.

4. Deloitte resists, arguing that the Claimant is out of time under the LLPA, properly construed; that no term can or should be implied in relation to the time for requesting a partners' meeting; and that Deloitte is not estopped from taking the time point against the Claimant.

5. Thus, the issues can be grouped under two headings: contractual analysis and estoppel. I shall deal with the issues in that order.

6. This case was expedited for trial. The urgency arises because as things currently stand, under the Notice of Retirement the Claimant's partnership will terminate on 31 January 2020. If he was to succeed in this claim, it would be necessary to convene a partners' meeting in advance of that date, if his remedy was to be effective. The matter was therefore listed for trial on 27 November 2019. I am grateful to all counsel and their supporting teams for getting this case ready for trial in what has been a very short period of time since the dispute crystallised in early October 2019, noting that the Claim Form was issued on 25 October 2019, barely a month ago.

Facts

7. Clause 16 of the LLPA is headed "Retirement" and deals with the retirement of equity partners. Clause 16.1 permits a partner to give notice of retirement. Clause 16.2 permits the Board of Deloitte to give a Notice of Retirement to the partner, whose period of notice will in most cases be not less than 6 months. The relevant parts of clause 16.2 are set out at Appendix A. The clause involves three distinct stages:

i) Stage 1, where the Board gives a Notice of Retirement.

ii) Stage 2, where the partner "feels aggrieved" in respect of the Board's decision to give him a Notice of Retirement, the partner has the right within 7 days after receipt of the Notice of Retirement to make his or her point of view known to the chairman of Deloitte and to present his or her case to a meeting of the Board by way of written memorandum or personal presentation. At least 7 days' notice of the Board meeting must be given to the partner. Thus, this is a right to ask the Board to review its earlier decision ("Board's review").

iii) Stage 3, where "the Board has not withdrawn the Notice of Retirement" and the partner is "still aggrieved", that partner may "within seven (7) days of the date of such Board meeting" notify the chairman of Deloitte that he or she wishes the Board to convene a partners' meeting "to review the Board's decision to issue a Notice of Retirement", in which case the Board shall convene a partners' meeting within 14 days.

8. On 24 May 2019, the Board decided to give the Claimant Notice of Retirement. The Notice was dated 23 July 2019. The Notice stated that the Claimant's retirement as an equity partner would become effective on 31 January 2020. It also stated that if he felt aggrieved, he had the right within seven days of receipt of the Notice to present his case to a meeting of the Board. He was told that the next meeting of the Board would be in Oslo on 3 October 2019.

9. On 1 August 2019, the Claimant emailed the chairman of Deloitte, Mr Denayer, saying that he had received the Notice of Retirement that day. He asked to present his case to the next Board meeting in Oslo, because he was aggrieved by the decision of the Board. No issue arises over this part of the story: the request was in line with stage 2, as outlined above.

10. The Claimant's request was acknowledged by the General Counsel and Managing Partner of Deloitte, Ms Longley, by email dated 18 August 2019 in which Ms Longley said she would confirm the practical details for the Board meeting in due course. Her email was copied to the Claimant's legal advisors, Quinn Emanuel.

11. On 18 September 2019, Ms Longley again emailed. This is an email on which the Claimant places great significance. These are the relevant passages:

> "Further to my email below, this email is to confirm the practical details for the upcoming board meeting in Oslo, as well as to provide you with the relevant documentation.
>
> The meeting of the NSE Board will be held on **2 October 2019** at **5:30pm** (local Oslo time) at the Deloitte offices in Oslo, Norway (please note that this date has been amended since my email to you below).
>
> […]
>
> The Board Meeting will commence at 5:30pm and I would be grateful if you were available outside the meeting room before

> this time. Please note that the time allocated to you is expected to be from 5.50pm to 6.10pm. The final Board decision following this meeting will be communicated to you by no later than 9 October 2019."

12. On 1 October 2019, the Claimant wrote to Mr Denayer attaching a copy of a written presentation compiled with the assistance of his counsel at Quinn Emanuel and (by now) Farrer & Co. He said that he would not attend the Board meeting, now fixed for the following day, in person, because he had health problems and he referred to his physician's medical advice. He invited the Board to consider his presentation and reverse the decision to issue him with a Notice of Retirement.

13. On 2 October 2019, the Board met and considered the Claimant's presentation.

14. Both Mr Denayer and Ms Longley gave evidence at this trial. They both explained (and neither was challenged on this) that at its meeting on 2 October 2019, the Board decided to uphold its earlier decision to give the Notice of Retirement; Ms Longley was asked to draft a letter to be sent by Mr Denayer to the Claimant which told him of the outcome of the Board's review; Ms Longley did prepare a draft of a letter in the days following the Board meeting but then she became occupied on another urgent matter so the letter was not sent on or before 9 October 2019, despite her assurance in the email dated 18 September 2019 that the Claimant would be told the outcome of the Board's review by that date.

15. On 10 October 2019, the Claimant wrote to Mr Denayer asking to know when he would receive the Board's decision and noting that he had been told that he would have it by 9 October 2019, which date had now been and gone. Further he said:

> "In the event that the Board has decided not to withdraw the Notice of Retirement and pursuant to my rights under the LLP Agreement, I would request that the Board convene a "special meeting of all the Partners" within 14 days to review its decision to issue the Notice of Retirement."

16. On 11 October 2019, Mr Denayer emailed the Claimant to tell him the outcome of the Board meeting on 2 October 2019. It is now established that this email had been drafted for Mr Denayer by Ms Longley. In that email, Mr Denayer apologised for the delay. He said that the Board had decided to uphold the decision to issue a Notice of Retirement. That meant that the Notice dated 23 July 2019 was not withdrawn. As to the Claimant's request for a partners' meeting, Mr Denayer wrote "That is, of course, your right under the firm's Partnership Agreement" but that the Board had now considered the matter on two occasions and the Claimant should take some time to consider his request, because it would be highly unusual in this sort of case to ask for a partners' meeting, and further the Claimant should be aware that confidentiality could not be assured if there were to be such a meeting. Mr Denayer suggested that the Claimant should take the weekend to think about it. Mr Denayer noted that the Claimant's lawyers had been in touch and he would respond separately to them.

17. On 12 October 2019, the Claimant responded to Mr Denayer. He said he did not need the weekend to think about it. He confirmed that he wanted Mr Denayer to convene a partners' meeting on or before 24 October 2019, by reference to the LLPA.

18. It is perhaps necessary at this point to interpose that a Deloitte partners' meeting is a substantial undertaking. There are in the region of 1,700 equity partners in Deloitte, all of whom would be invited to that meeting. Further, the notice to the partners of such a meeting would necessarily be accompanied by details of the matter to be discussed including any written representations by the aggrieved party, together with a draft of any resolution to be put to the partners at that meeting (see Cl 16.2(c) of the LLPA).

19. By now, as I have noted, Farrer & Co were acting on behalf of the Claimant. Freshfields Bruckhaus Deringer were acting for Deloitte. On 15 October 2019, Ms Longley spoke to her team at Freshfields. Without waiving privilege, and after discussion in Court on the morning of the trial, Deloitte voluntarily disclosed parts of two attendance notes recording conversations on 15 October 2019 between Ms Longley and Freshfields. The first records this:

> "Need to understand from Farrers what he's trying to get out of this process. Put it to him and to them that he's out of time. Rather than denying him the right to bring the meeting".

The second contains references to having a "sensible conversation" but that he is "out of time".

20. On 16 October 2019, representatives of the two law firms spoke on the phone; the conversation was "open" and I have been shown attendance notes from each side. There are differences between the two versions. However, the overall picture is that Farrer & Co put the Claimant's case that he wanted Deloitte to convene a partners' meeting, he saw this as his only option and pursued it as a matter of principle; Farrer & Co had no instructions to investigate any form of alternative resolution. Freshfields asked why he wanted a partners' meeting and stressed that once such a meeting was called, no other avenue for resolution would realistically remain open. Freshfields did not state in terms that he was out of time to call for such a meeting, nor did they assert that a meeting would be called pursuant to his request.

21. On 17 October 2019, Freshfields wrote to Farrer & Co. That letter addressed various assertions made on the Claimant's behalf in previous correspondence. It also said, for the first time, that the deadline for submitting a request to convene a partners' meeting was 9 October 2019 and that "Your client submitted his request on 10 October and, as such, there is no obligation on Deloitte to convene a meeting nor does it intend to do so…".

22. There was further correspondence between solicitors. The Claim Form issued on 25 October 2019 sought specific performance of the LLPA in the form of an appeal to the partners by means of a partners' meeting.

Evidence

23. I heard evidence from the Claimant, and from Ms Longley and Mr Denayer for Deloitte. The evidence went to the estoppel argument, which I shall come to shortly. It does not bear on the contractual analysis.

I. Contractual Analysis

Construction of Clause 16.2(b)

24. The Claimant, represented by Mr Cohen QC with Mr Robson, argues that the trigger for exercise of the right to call for a partners' meeting under cl 16.2(b) is an adverse decision of the Board on its review of the Notice of Retirement. He says that the Board's review decision must be communicated before the right to call for a partners' meeting arises. It is pointless to require a partner to invoke the right to a partners' meeting until he or she knows the outcome of the Board review, because the partners' meeting is in effect a right of appeal from that decision of the Board, and can only proceed once the Board has given its review decision. Therefore, time did not start to run until 11 October 2019 when the Claimant was informed of the Board's decision on review. The Claimant argues that Deloitte's construction – based on the proposition that communication of the Board's review decision is not necessary for time to run - is in breach of the express obligation on the Board to communicate its decisions with reasons (see cl 8.2 of the LLPA) and the partners' duty of fairness (see cl 7.2(b)(i)) and good faith (see cl 14.1(a) of the LLPA) owed to one another. Further, Deloitte's construction does not work, because without knowing the outcome of the Board review, the partner cannot know if he is "still aggrieved" or if the Notice of Retirement is still extant – and so the preconditions to the exercise of the right of appeal to the partners cannot exist. Alternatively, he says the Deloitte construction leads to absurdity because the partner must know the outcome of the Board review before deciding whether to ask for a partners' meeting - which meeting, with all its attendant costs and organisation would turn out to be a wasted effort if the Board have already withdrawn the Notice of Retirement. These difficulties with construction arise, the Claimant argues, because there is a gap in the LLPA: it envisages the Board giving its decision at the Board meeting; that makes sense of the 7-day period permitted by clause 16.2(b); but where the decision is not given at the time but comes afterwards, the clause needs adjusting to ensure that the partner still has seven days after learning of the decision to decide whether to seek a partners' meeting.

25. Mr Goulding QC, who acts for Deloitte assisted by Mr Molyneaux, says that the language of clause 16.2(b) of the LLPA is clear and unambiguous. It gives an aggrieved partner seven days from the date of the Board meeting to ask for a partners' meeting to be convened. That provision does not refer to the date on which the Board's review decision is communicated and time therefore runs regardless of whether or when it is so communicated. In this case, the Board meeting was on 2 October 2019 and the Claimant had until midnight on 9 October 2019 to ask for a partners' meeting to be convened. He made no request by that time. His request was made on 10 October 2019 which was out of time. Far from being absurd, such a construction is consistent with commercial common sense, because it brings the issue to a certain close, one way or another after the Board has met; and it means that the Board cannot thwart the partner's right to call for a partners' meeting simply by refusing or failing to communicate the Board's review decision. The two pre-conditions to exercise of the right to call for a partners' meeting can still, in principle, be met whether the partner knows the outcome of the Board's review or not; that is because the Notice of Retirement remains extant unless and until it is withdrawn by the Board (which will not have happened if the decision is awaited); and the partner may in those circumstances still be aggrieved by that Notice.

26. The principles governing the construction of contracts are not in dispute. They are set out in the trilogy of Supreme Court cases: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. Each party relied on different parts of these cases, to assist its arguments. But both parties accepted that the starting point must be the words of the LLPA, assessed in light of the surrounding circumstances.

27. In my judgment, the words of clause 16.2(b) are clear and unambiguous. The partner has seven days from the date of the Board meeting to ask for a partners' meeting. I am not persuaded that there is any reason to depart from those clear words or their unambiguous meaning. I reject the Claimant's case that on a proper construction, the clause should be understood to mean that time runs from the date of notification of the outcome of the Board's review. These are my reasons:

    i) The purpose of the partners' meeting, set out in clause 16.2(b), is for the partners to review the Board's decision to *issue* a Notice of Retirement (ie the stage 1 decision), not for them to review the Board's review decision (stage 2). Thus, the Claimant's arguments are based on a false predicate: the right of appeal to the partners is not from the stage 2 review by the Board, but against the stage 1 Board decision to *issue* a Notice of Retirement. It is not necessary to the working of clause 16.2(b) that the partner or partners should know the outcome of stage 2 before embarking on the stage 3 appeal to the partners.

    ii) The two pre-conditions for the operation of stage 3 can still be met even if the partner has not been informed of the outcome of the Board review (stage 2). The Notice of Retirement remains in place unless and until it is withdrawn. In circumstances where the partner has not been told the result of the Board review, it follows that the Board "*has not withdrawn the Notice of Retirement".* Withdrawal must include communication of that fact to the partner: after all, the Board has given the partner Notice of Retirement and until the partner is told that the Notice has been withdrawn, it remains effective. For so long as the partner is in receipt of a Notice of Retirement, which has not been withdrawn, he may very well be "*still aggrieved".*

    iii) Importantly, and as a matter of construction, the partner is afforded greater protection on this analysis, because the partner's right to call for a partners' meeting cannot be thwarted by the Board delaying its decision on review; the partner can take the matter to his or her fellow partners, regardless. Although the Board is under an obligation to notify the partners of their decisions (cl 8.2) there is no timeframe imposed on that obligation; it is possible to conceive of a situation where the Board has not made or notified its decision even at the 6 month point, when the partner's Notice of Retirement expires. On the Claimant's analysis, in such a scenario the partner would be left without any right of appeal to the partners. That would be an unfair erosion of an important protection afforded to individual partners under the LLPA.

    iv) Further, the Deloitte construction gives the individual partner important leverage over the Board to press for the Board's decision to be reached and communicated swiftly – the partnership would doubtless not be impressed to

be called to a meeting in circumstances where the Board had failed, in the absence of some very good reason, to give a decision on review.

v) The LLPA is a carefully drafted document which sets out the rights and responsibilities of Deloitte's equity partners, a sophisticated user group who can be expected to have entered into the LLPA with their eyes open. That is a further reason why the LLPA should be construed according to its natural meaning.

28. I conclude that the proper construction of clause 16.2(b) is that the 7-day period for a partner to ask for a partners' meeting to be convened runs from the date of the Board meeting and not from the date of notification of the outcome of the Board's review at that meeting.

Implied Term

29. The Claimant suggested that if I was against him on the construction point, I should still imply a term into clause 16.2(b). The implied term was variously phrased, in the Particulars of Claim at [14(b)] that "no appeal against the decision of the Board could or should be made until there was a decision which might be appealed against", in Mr Cohen's skeleton at [19] that "where the decision of the Board is not communicated on the day of its meeting, the 7 day period for an appeal to the members does not begin to run until such communication". In oral submissions he suggested simply that the words "date *of communication of the outcome* of such Board meeting" should be inserted.

30. Deloitte resisted the suggestion that a term should be implied, raising many of the same arguments as already rehearsed in the context of the construction argument.

31. There is no dispute between the parties as to the legal principles. Reference was made to Chitty on Contract 33rd edition at 14-012 and to *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742. In summary, a term can only be implied where it is necessary to give business efficacy to the contract, where it is obvious, where that term is capable of clear expression and where it does not contradict any express term of the contract.

32. In my judgment, there is no basis for implying a term into this contract to the effect that time to request a partners' meeting runs from the date on which the Board review decision is communicated. My conclusion is based on the following reasons:

i) To imply such a term is not necessary to give business efficacy to clause 16.2(b). As stated above, the clause works fine, in fact, in my view, it works rather better, if the time runs from the date of the Board meeting regardless of when the outcome is communicated.

ii) To imply such a term would conflict with the express words of clause 16.2(b) which provide that the partner "may within seven (7) days of the date of such Board meeting" call for a partners' meeting. To change it to "may within 7 days of the date *on which the outcome* of such Board meeting *is communicated"* is to provide for a very different and contrary rule.

iii) It is far from obvious that such a provision was intended by the parties. The contrast between the language of cl 16.2(a) and cl 16.2(b) is telling in this context. In cl 16.2(a), the partner can request a Board review "within seven (7) days *after receipt of such notice*" (my emphasis). This shows that it would have been easy to express the term which the Claimant says should be implied into cl 16.2(b). The absence of such expression is, in my judgment, deliberate.

iv) Again, the LLPA is a carefully drafted document for a sophisticated group of signatories. They can be taken to know and understand the plain words of the LLPA.

33. Further and in any event, in this case the Claimant did, in fact, ask for a partners' meeting even before he knew the outcome of the Board meeting (by his email of 10 October 2019). The Claimant's request was conditional: "In the event that the Board has decided not to withdraw the Notice of Retirement…". That shows that cl 16.2(b) works without needing to imply a term about time running from when the partner is informed about the outcome of the Board review.

34. There is no term to be implied into the LLPA in relation to time for seeking a partners' meeting. The LLPA is clear on the point and the natural meaning should prevail.

Conclusion on contractual analysis

35. The Claimant's contractual arguments fail. The Claimant's request to convene a partners' meeting, dated 10 October 2019, was out of time under the LLPA.

II. Estoppel

36. As an alternative to the contract claim, the Claimant advances his case based on Deloitte being estopped from refusing to convene a partners' meeting. The Claimant puts the estoppel argument in different ways, but at the heart of his estoppel by representation or promissory estoppel claim is a proposition that Ms Longley represented to him, in her email dated 18 September 2019, that the period for seeking a partners' meeting would run from the point at which the Board's decision was communicated. Thus, the Claimant says that he was entitled to assume that he could wait for the Board's review decision before deciding whether to seek a partners' meeting. He says that he did so assume, in fact, and it would now be inequitable and unjust to allow Deloitte to resile from that position. As a further variant on the estoppel argument, he argues that there was an estoppel by convention based on the common understanding which in fact existed between him and Deloitte, to the effect that time would not start to run until the Claimant knew the outcome of the Board review.

37. Deloitte rejects the estoppel argument, in all the forms in which it is advanced. The centrepiece of Deloitte's case is that Deloitte never did, by word or action, represent that the time for seeking a partners' review would run from the date of communication of the Board meeting; further, at no point did Deloitte (by Ms Longley, Mr Denayer, or anyone else) in fact think or believe that was or should be so. Nor, Deloitte adds, does it appear that the Claimant himself thought that to be so,

given his own request for a partners' meeting by an email dated 10 October 2019, the day before the Board review decision was communicated to him.

Estoppel by Representation and Promissory Estoppel

38. Both parties examined the principles underpinning the three types of estoppel, namely estoppel by representation, promissory estoppel, and estoppel by convention, in their skeleton arguments. They agreed that the first two types could, on the facts of this case, conveniently be considered together. They further agreed that both these types of estoppel (estoppel by representation and promissory estoppel) depend, amongst other things, on a clear and unequivocal representation having been made. It is the Claimant's case that Ms Longley represented by her email dated 18 September 2019 not only that the outcome of the Board's review would be communicated to the Claimant no later than 9 October 2019 but also and by necessary implication that time would not run until that communication was received by the Claimant (see, for example, [31] of the Claimant's skeleton). Deloitte denies that reading of Ms Longley's email, and says that the email means what it says and only what it says, and it says nothing at all about the time for seeking a partners' meeting.

39. I accept Deloitte's arguments. The 18 September 2019 email clearly represents that the Board's review decision will be communicated by 9 October 2019. We know, as a fact, that that deadline was not met because the review decision was communicated on 11 October 2019. But that is irrelevant to the issue in this case, which concerns the time for asking for a partners' meeting to be convened. The 18 September 2019 email does not say, anywhere, that the time for seeking a partners' meeting under cl 16.2(b) of the LLPA will run from the date of communication of the outcome of the Board's review. Nor can that statement be implied, necessarily or even reasonably. On a fair reading, this email simply explained the practical arrangements for the Board meeting – date, place, timings – and told the Claimant that he would receive the decision within seven days following that meeting. It made no larger representation than that.

40. That is sufficient to dispose of the Claimant's claim for estoppel by representation or promissory estoppel. But there is one rather unsatisfactory feature of the Claimant's case on estoppel. He says, in his witness statement and in evidence to me, that he understood from Ms Longley's email of 18 September 2019 that he could wait until he had the Board's review decision before deciding whether to ask for a partners' meeting. There is a tension between that evidence and the fact that he did, in fact, ask for a partners' meeting before he knew the outcome of the Board's review. He did not provide a compelling explanation for the timing of his request when questioned; he simply said that on 10 October 2019 he was concerned that Deloitte had not communicated the Board's review decision and that he did not want the matter to drag on and that he had taken legal advice. It is not necessary for me to make any finding about the Claimant's state of mind, in fact. I simply note the tension in the evidence.

41. But *even if* the Claimant really did understand the 18 September 2019 email to say that time would start to run only after he was told of the outcome of the Board's review – and on this I make no finding - I am in any event unable to accept that he was entitled to rely on that understanding without checking it first with Ms Longley. The 18 September 2019 email does not contain a clear and unequivocal representation

to that effect, the language of cl 16.2(b) does not support that assumption, and the Claimant was represented by lawyers at all times. He could and reasonably should have checked the position.

42. The Claimant's case that an estoppel by representation or promissory estoppel operates against Deloitte therefore fails on the threshold, because there was no clear and unequivocal statement by or behalf of Deloitte which is capable of giving rise to such an estoppel. But further, if the Claimant did rely on that email to support his belief that time did not run until the Board review decision was communicated, his reliance was unreasonable in the absence of any attempt to check that his understanding was right. For that further reason there is no estoppel which operates against Deloitte.

Estoppel by Convention

43. The Claimant alternatively suggests that an estoppel by convention operates. It is common ground that for such an estoppel to operate, it is not necessary to identify a promise or representation, instead there must as a starting point be a convention, or a common assumption, which may be formed by words, conduct or even silence, as to a given state of facts or the law. Mr Goulding emphasises that the existence of such a common understanding is a question of fact and that there must be some "conduct passing across the line" to manifest the joint assumption, relying on *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023, [2017] Ch 389 at [88] and [92]-[98].

44. The Claimant suggests that he and Deloitte shared a common assumption that his time for seeking a partners' meeting would run from the date of communication of the Board's review. The Claimant relies not only on Ms Longley's email of 18 September 2019, but also on Mr Denayer's email of 11 October 2019 which referred in terms to "your right under the firm's Partnership Agreement", and on the content of the attendance notes of the open phone call between Freshfields and Farrer & Co on 16 October 2019 in which Freshfields acknowledged the Claimant's rights under the LLPA. The point is, so the Claimant says, that it was not until 17 October 2019 that Deloitte by Freshfields asserted that the Claimant was out of time and that was because, he infers, at all times up to that date Deloitte (and presumably Freshfields) had been operating on the assumption that he was not out of time.

45. There are, as I have mentioned, difficulties with the Claimant's assertion that he believed that time only started to run once he got the Board's review decision. But leaving the Claimant's evidence to one side, the real problem with his estoppel by convention argument is that whatever his own view, it is perfectly plain that Deloitte's view was that time ran from the date of the Board meeting, as the LLPA provides, and there was not any common assumption to contrary effect. Ms Longley said in her witness statement and in oral evidence to me that she thought time ran from the date of the Board meeting. Ms Longley is a lawyer as well as the managing partner of the practice. I would expect her to know the terms of the LLPA and to know how the time provisions in cl 16.2(b) work. Further, she gave a cogent explanation for why she did not initially – in the wake of the Claimant's emails dated 10 and 12 October 2019 - want to tell him that he was out of time to call for a partners' meeting; her explanation was that she was keen to explore alternative avenues with him and head off future litigation if that was possible. That explanation is consistent with the email which Ms Longley drafted for Mr Denayer to send on 11 October 2019. That email is

carefully phrased: it notes the Claimant's request for a partners' meeting and refers to that as "your right" under the LLPA, without making any reference to the time for exercise of that right; the main point to be drawn from the email is the invitation to the Claimant to reconsider his request for a partners' meeting, given that the Board has already considered the Claimant's case twice and that confidentiality issues would arise if such a meeting was convened. It is also consistent with the voluntarily disclosed notes of a discussion between Ms Longley and Freshfields on 15 October 2019 which refer to trying to understand what the Claimant wanted to get out of this process, and wanting to have a sensible conversation, but noting that he was out of time. I accept Ms Longley's evidence.

46. Ms Longley was under no obligation to tell the Claimant that he was out of time under the LLPA. She was at liberty to explore alternative avenues of disposal. It was reasonable for her to conclude that a quiet resolution of this dispute was more likely if Deloitte kept the time point to itself, at least at that early stage. Once it was clear that the Claimant was not interested in a quiet resolution, Freshfields took the time point against the Claimant, as they were entitled to do.

47. Mr Denayer's oral evidence added little. As it turned out, his was the name on the email of 11 October 2019 but Ms Longley had drafted that email for him. He had no knowledge or view of timing issues under the LLPA.

48. Mr Cohen invited me to consider the evidence objectively and to put aside subjective assertions by Ms Longley about what she knew or thought. I am not persuaded I should do that. The nub of convention estoppel is surely that the parties have proceeded on a joint, and manifest assumption that a particular state of affairs exists. Therefore, evidence about what the parties assumed, subjectively, is highly material, although that evidence can of course be tested by reference to all the other evidence in the case. But that is by the by, because even on an objective approach I would not be with Mr Cohen: the evidence in this case all goes one way and is consistent with Deloitte's understanding of and reliance on the time rule in cl 16.2(b); there is no cogent evidence to show that Deloitte believed or assumed, at any stage, that time did not run until after the Board's review decision was communicated to the Claimant. There is, in addition, no point at which Deloitte "crossed the line" to communicate such a belief to the Claimant.

49. On the facts, the Claimant's estoppel by convention argument fails.

Conclusion on estoppel

50. No estoppel operates to prevent Deloitte relying on the time rule in cl 16.2(b).

Conclusion

51. This claim has a narrow compass. The issue is whether Deloitte is obliged to convene a partners' meeting pursuant to the Claimant's request to that effect by email dated 10 October 2019, reiterated in an email dated 12 October 2019. I conclude that Deloitte is not so obliged because the Claimant's requests fell beyond the time permitted under cl 16.2(b) of the LLPA and Deloitte is entitled to rely on the time limit in that clause.

52. This claim is dismissed.

Appendix

Cl 16.2 of the LLPA

"16.2 Notice from the Board

Subject to Clause 7.6(f), and this Clause 16.2, the Board may at any time give to an Equity Partner written notice of retirement (a ***Notice of Retirement***). The Board shall give such period of notice as the National Practice of which the relevant Equity Partner is a National Member would be obliged to give to such Equity Partner or, where none is specified, not less than six (6) months' notice (unless the NSE CEO, the Geography CEO of the relevant National Practice and the Equity Partner concerned shall together agree a shorter notice period) and such Equity Partner's retirement from the Firm shall become effective on the expiration of such notice period (or such shorter notice period as may have been agreed). Any Equity Partner to whom the Board gives notice under this Clause 16.2 shall automatically be treated as also having been given notice of retirement from any National Practice of which he or she is a National Member.

(a) Where any Equity Partner feels aggrieved in respect of any decision of the Board to give him or her a Notice of Retirement, such Equity Partner shall have the right within seven (7) days after receipt of such notice:

(i) to make known his or her point of view to the NSE Chairman; and

(ii) if such Equity Partner so wishes, to present his or her case either by way of written memorandum or personal presentation to a meeting of the Board of which not less than seven (7) days' notice shall have been given to such Equity Partner.

(b) If following the meeting of the Board referred to in Clause 16.2(a)(ii), the Board has not withdrawn the Notice of Retirement and such Equity Partner is still aggrieved, that Equity Partner may within seven (7) days of the date of such Board meeting notify the NSE Chairman that he or she wishes the Board to convene a special meeting of all the Equity Partners pursuant to Clause 3.1 to review the Board's decision to issue a Notice of Retirement to such Equity Partner under this Clause 16.2, in which case the Board shall by notice to the Equity Partners convene such special meeting within fourteen (14) days of the date of such notification to the NSE Chairman.

(c) The notice to the Equity Partners shall be in writing and shall contain sufficient detail of the matter to be discussed, including any written representations submitted by the

aggrieved Equity Partner together with a draft of any resolution to be put to the Equity Partners in respect of such Equity Partner's retirement.

[…]"