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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 311 OF 2007

BETWEEN: PHOENIX MERIDIAN EQUITY LTD.
[A company incorporated under the laws of the Cayman Islands]

Plaintiff

- and -

(1) LYXOR ASSET MANAGEMENT S.A.,
A wholly owned subsidiary of Société Générale
[A company incorporated under the laws of France]

(2) SCOTIABANK & TRUST (CAYMAN) LIMITED
[A company incorporated under the laws of the Cayman Islands]

Defendants

Appearances: Mr. Michael Loberg and Mr. Andrew Lenon of Appleby for the Plaintiff

Mr. Colin McKie, Mr. Chris Style and Mr. Justin Pennay of Maples and Calder for the defendants

Before: Hon. Justice Henderson

GRAND COURT CAYMAN ISLANDS

Heard: September 9, 2009

RULING

1. The first Defendant, Lyxor Asset Management SA, seeks leave to re-amend its Amended Defence. Some of the requested amendments are not opposed. I grant leave for those amendments now.

2. The question of substance arises from a request to add two new paragraphs (numbers 41C and D) which plead, or seek to plead, a new defense of estoppel by convention. These paragraphs read:

> "41C Further or alternatively, representatives of Merrill and Permal agreed with SG that the Protected Funds and their predecessors in the Patriot Cayman Trust would pay SG for the principal protection feature through a swap. LAM repeats paragraphs 5A to 5D above. The Investor invested in the Protected Funds and their predecessors on this conventional basis. The parties have acted on this conventional basis in their subsequent dealings at least up until and including the Investor's final investment in January 2005. In the circumstances it would be inequitable to allow the Investor to resile from that convention, and the Investor is estopped by convention from doing so.
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> "41D Further or alternatively, the Investor is estopped by convention from resiling from its acceptance at least up to and including the final investment by the Investor in January 2005 that the NAV of Units in the Protected Funds could be, and in fact was, lower than the NAV of Units in the Leveraged Funds. LAM repeats the particulars pleaded under paragraph 41 above. The parties have acted on that conventional basis in their subsequent dealings at least up until and including

the Investor's final investment in January 2005. In the circumstances it would be inequitable to allow the Investor to resile from that convention, and the Investor is estopped from doing so."

3. The primary issue between the parties is how the investment of the Plaintiff in two funds established by Lyxor and its parent, SG, for the purpose should be valued upon an early redemption. The investment was placed in two protected funds, the value of which was guaranteed by put options.

4. Lyxor's primary case is that the contractual documents, properly construed, include a term that the protection feature would be paid for upon an early redemption by the deduction of the present value of what are termed "management fees" from the amount to be repaid. Lyxor says this is standard industry practice. Phoenix's claim asserts that the contractual documents contain no such term.

5. Estoppel by convention has been addressed recently in the speech of Lord Hoffman in *Chartbrook Limited (Respondents) v. Persimmon Homes Limited and others (Appellants) and another (Respondent)* [2009] UKHL 38. His Lordship began by reaffirming the importance

of the fundamental rule that evidence of pre-contractual negotiations is not ordinarily admissible for the purpose of construing the language of a contract. He then identified two specific cases (rectification and estoppel by convention) which are not exceptions to the rule but "operate outside it" (see paragraph 42).

6. At paragraph 47, His Lordship said this:

> "There are two legitimate safety devices which will in most cases prevent the exclusionary rule from causing injustice. But they have to be specifically pleaded and clearly established. One is rectification. The other is estoppel by convention, which has been developed since the decision in the Karen Oltmann: see Amalgamated Investment & Property Co. Ltd. v. Texas Commerce Bank [1982] QB 84. If the parties have negotiated an agreement upon some common assumption, which may include an assumption that certain words will bear a certain meaning, they may be estopped from contending that the words should be given a different meaning. Both of these remedies lie outside the exclusionary rule, since they start from the premise that, as a matter of construction, the agreement does not have the meaning for which the party seeking rectification or raising an estoppel contends."

7. The passage refers to two requirements which should be the subject of careful attention to avoid the undesirable prospect of pleas of rectification or estoppel by convention becoming a routine device by which pre-contractual negotiations are admitted. The defence must be

specifically pleaded and clearly established. There must be evidence of a common assumption. Each of the parties must be shown to have entered into the agreement while entertaining that assumption. The common assumption must be both unambiguous and unequivocal (see: *SmithKline Beecham plc and others v. Apotex Europe Ltd and others* [2006] 4 All ER 1078, Court of Appeal at 102, and *Baird Textiles Holdings Ltd v. Marks & Spencer plc* [2001] EWCA Civ 274 at para 38). *Spencer-Bower and Turner* on Estoppel by Representation, 3rd ed. (1977) at p. 157 and following describes "estoppel by convention" as requiring proof of "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."

8. The proposed paragraph 41C contains no allegation at all of a common assumption. It makes reference to pre-contractual negotiations, alleges that the parties agreed that the principal protection feature would be paid for by "a swap" transaction, and then asserts that the parties acted on "this conventional basis ... in their subsequent dealings." This is not a plea of estoppel by convention in

the accepted form. It lacks the degree of clarity and certainty which such a plea requires.

9. Paragraph 41D is also deficient. It alleges an "acceptance" by Phoenix that the NAV Units in the Protected Funds could be lower than that of Units in the Leveraged Funds, the explanation for which would be the swap transaction. No common assumption is alleged expressly. The word "acceptance" is used without elaboration. This paragraph also lacks the degree of clarity and certainty required.

10. I have taken into account the particulars provided by Lyxor, specifically paragraph 19. In that paragraph it is alleged that Mr. Rosenberg (for Lyxor) advised Ms. Babitz (an attorney representing Phoenix) of the proposed valuation formula upon an early redemption. The particulars go on to say that:

> "Ms. Babitz did not suggest that there was any relevant issue with which the Investor was not in agreement."

11. That, in my view, is insufficient for a formal allegation of a common assumption shared by Phoenix and Lyxor. It may be that the investor

misunderstood what was being proposed, or that Ms. Babitz misunderstood her client's position.

12. The particulars then assert that:

> "Neither Merrill, nor Permal, nor Gibson thereafter said anything to suggest that the Investor was not in agreement. On the contrary, everyone proceeded on the basis that the Investor was in agreement."

13. Again, I do not consider that this allegation is sufficient to assert the presence of a specific factual or legal assumption on the part of Phoenix which it shared in common with Lyxor.

14. For these reasons the application is refused.

Dated this 9th day of September, 2009

GRAND COURT – CAYMAN ISLANDS

Henderson, J.

Henderson, J.
Judge of the Grand Court