1 of 1 DOCUMENT: All England Law Reports/1992/Volume 2 /Jones and others v Sherwood Computer Services plc - [1992] 2 All ER 170

[1992] 2 All ER 170

Jones and others v Sherwood Computer Services plc

COURT OF APPEAL, CIVIL DIVISION

DILLON AND BALCOMBE LJJ

15 NOVEMBER, 7 DECEMBER 1989

Valuer - Valuation - Conclusiveness - Valuation made as expert rather than arbitrator - Agreement for sale of company - Dispute over calculation of company turnover - Parties referring dispute to independent accountants for determination in accordance with contract - Contract providing that experts' determination to be conclusive and binding for all purposes - Experts complying fully with terms of letter of instruction - Plaintiffs seeking to set aside experts' determination on ground of mistake - Whether determination open to challenge on ground of mistake - Whether plaintiffs bound by determination.

The plaintiffs, who were substantial shareholders in a company involved in the development and sale of computer software, entered into a contract with the defendant company, SCS, for the sale of their company to SCS in exchange for shares in SCS. The terms of the contract further provided that the plaintiffs were to receive one share in SCS for every £35,000 by which the amount of 'sales' (as defined in the contract) of products by two subsidiaries of the company being acquired exceeded a specified figure. The contract also provided that, if accountants representing the parties were unable to agree a figure for such sales, a third accountant was to be appointed to determine the matter and that that determination was to be 'conclusive and final and binding for all purposes'. It was specifically provided that the accountant so appointed was to act as an 'expert' and not as an arbitrator. In the event, the parties' accountants were unable to agree on whether two categories of transactions should be included in the 'sales' computation. A third firm of accountants, C & L, were accordingly appointed as 'experts', their terms of reference being to investigate the difference only and then to provide a report stating the amount of sales of products by the two company subsidiaries. In their report C & L stated a figure for the amount of 'sales' which was the same as that arrived at by SCS's accountants, but they gave no reasons for their determination. The plaintiffs claimed that they were entitled to set aside C & L's report and to call on the court to determine whether C & L had made mistakes in relation to the disputed transactions and, if they had, to declare that the plaintiffs were not bound by the determination. SCS subsequently applied to strike out those paragraphs of the statement of claim which sought to challenge C & L's report. The judge dismissed the application and SCS appealed, contending that the plaintiffs could not set aside C & L's report since the matters in issue were within the terms of reference given to C & L and that, under the terms of the contract, the plaintiffs were bound by the experts' report.

Held - Where the parties to a contract expressly agreed that certain matters arising in relation to the contract were to be determined by an independent expert whose determination was to be 'conclusive and final and binding for all purposes', then in the absence of fraud or collusion the expert's determination could only be challenged on the ground of mistake if it was clear from the evidence (including the determination, the terms of the contract and the letter of instruction) that the expert had departed from his instructions in a material respect. It followed that if C & L had departed from their instructions in a

material respect, for example by valuing the wrong number of shares or valuing shares in the wrong company, either party could claim that the report was not binding because C & L would not have done what they were appointed to do, but since it was clear from the evidence that C & L had done precisely what they had been asked to do, namely to decide whether the two classes of disputed transactions were or were not to be included in the total of 'sales' as defined in the contract and to determine the amount of sales accordingly, their determination could not be challenged. SCS's appeal would therefore be allowed and those paragraphs of the statement of claim which sought to challenge C & L's report would be struck out (see p 179 *c* to *f h j*, p 180 *h* to p 181 *a e* and p 182 *f g*, post).

Dictum of Lord Denning MR in *Campbell v Edwards* [1976] 1 All ER 785 at 788 applied.

Dean v Prince [1954] 1 All ER 749 not followed.

Burgess v Purchase & Sons (Farms) Ltd [1983] 2 All ER 4 doubted.

Notes

For third party valuations and the principles on which the court will interfere, see 32 *Halsbury's Laws* (4th edn) para 23, and for cases on the subject, see 34 *Digest* (Reissue) 447-449, *3648-3652*.

For contractual valuation in general, see 49 *Halsbury's Laws* (4th edn) paras 4-7, and for cases on the subject, see 49 *Digest* (Reissue) 47-49, *174-186*.

Cases referred to in judgments

Arenson v Casson Beckman Rutley & Co [1975] 3 All ER 901, [1977] AC 405, [1975] 3 WLR 815, HL; *rvsg* sub nom *Arenson v Arenson* [1973] 2 All ER 235, [1973] Ch 346, [1973] 2 WLR 553, CA.

Baber v Kenwood Manufacturing Co Ltd [1978] 1 Lloyd's Rep 175, CA.

Belchier v Reynolds (1754) 3 Keny 87, 96 ER 1318.

Berry v Tottenham Hotspur Football and Athletic Co Ltd [1935] Ch 718, [1935] All ER Rep 726.

Burgess v Purchase & Sons (Farms) Ltd [1983] 2 All ER 4, [1983] Ch 216, [1983] 2 WLR 361.

Campbell v Edwards [1976] 1 All ER 785, [1976] 1 WLR 403, CA.

Collier v Mason (1858) 25 Beav 200, 53 ER 613.

Dean v Prince [1954] 1 All ER 749, [1954] Ch 409, [1954] 2 WLR 538, CA; *rvsg* [1953] 2 All ER 636, [1953] Ch 590, [1953] 3 WLR 271.

Finnegan v Allen [1943] 1 All ER 493, [1943] KB 425, CA.

Johnston v Chestergate Hat Manufacturing Co Ltd [1915] 2 Ch 338.

Jones (M) v Jones (*RR*) [1971] 2 All ER 676, [1971] 1 WLR 840.

Pappa v Rose (1871) LR 7 CP 32, Ex Ch.

Sudbrook Trading Estate Ltd v Eggleton [1982] 3 All ER 1, [1983] 1 AC 444, [1982] 3 WLR 315, HL.

Sutcliffe v Thackrah [1974] 1 All ER 859, [1974] AC 727, [1974] 2 WLR 295, HL.

Sutherland (Duke) v British Dominions Land Settlement Corp Ltd [1926] Ch 746.

Wright (Frank H) (*Constructions*) *Ltd v Frodoor Ltd* [1967] 1 All ER 433, [1967] 1 WLR 506.

Case also cited

Smith v Gale [1974] 1 All ER 401, [1974] 1 WLR 9.

Interlocutory appeal

The defendants, Sherwood Computer Services plc, appealed with leave of the judge from a decision of Judge Hague QC, sitting as a judge of the High Court in

[1992] 2 All ER 170 at 172

the Chancery Division, on 26 May 1989 whereby he dismissed an application by the defendants to strike out certain paragraphs of a statement of claim of the plaintiffs, Miah Gwnfor Jones, Geoffrey Paul Rees and John Miller, which sought to challenge a report prepared by a firm of chartered accountants, Messrs Coopers & Lybrand, to determine the combined computer software sales of two operating subsidiaries of Corporate Technology Group Ltd, of which the plaintiffs were substantial shareholders, in accordance with the terms of a contract under which the defendants agreed to offer to acquire the entire share capital of the company. The facts are set out in the judgment of Dillon LJ.

Mark Howard (instructed by Norton Rose) for the defendants.

Nicholas Underhill (instructed by Phillips & Buck, Cardiff) for the plaintiffs.

Cur adv vult

7 December 1989. The following judgments were delivered.

DILLON LJ.

This is an appeal by the defendants in the action against a decision of Judge Hague QC sitting as judge of the High Court in the Chancery Division, whereby the judge dismissed a summons by the defendants to strike out certain parts of the statement of claim indorsed on the writ. The judge gave the defendants leave to appeal.

The defendants' summons had been issued on 14 September 1988. It seeks an order that paras 4, 5 and 8 to 13, and paras 1 to 5 of the prayer for relief in the statement of claim be struck out and/or the causes of action pleaded therein be stayed--

> 'on the grounds that they disclose no reasonable cause of action against the Defendants and/or are frivolous and vexatious and/or an abuse of the process and/or ... because the Court has no jurisdiction in respect of these matters ...'

What this rather comprehensive verbiage comes down to, when applied to the circumstances of this case, is that the plaintiffs and the defendants agreed by contract that certain matters arising in relation to their contract should be determined by an expert whose determination should be conclusive and final and binding for all purposes; the plaintiffs now claim to set aside the expert's report and to have the matters in issue decided by the court, but the defendants say that the plaintiffs cannot do that because the matters in issue are within the reference to the expert and the plaintiffs are, under contract, bound by the expert's report. That in such circumstances a striking-out application can be the appropriate course is shown by the decision of this court in *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403.

The contract in question between the plaintiffs and the defendants is a sale agreement dated 13 February 1987 whereby the defendants undertook to offer to acquire the entire share capital of a company called Corporate Technology Group Ltd (the company) on the terms of an agreed offer document and the plaintiffs, who were substantial shareholders in the company, agreed with the defendants that they would accept that offer in respect of their own shareholdings. The company was the parent company of two operating subsidiaries, LG Software Ltd and CTG-Software Ltd. The consideration under the offer document for the acquisition of the ordinary shares in the company was the issue of a specified number of new shares in the defendants, referred to as Sherwood shares, for each ordinary share in the company but in addition there was provision in the offer

document for such further consideration as might become payable in accordance with the provisions of appendix 1.

Appendix 1 provided by paras 1 to 4 and 7 as follows:

> 1. The further consideration under the Ordinary Offer shall be:--
>
> | | |
> |---|---|
> | For each CTG Ordinary share | One new Sherwood share for each whole amount of £35,000 (but not part thereof) by which the amount of the Sales (as determined in accordance with this Appendix) exceeds £2,720,000 |
>
> provided always that in no circumstances shall the further consideration in respect of each CTG Ordinary share exceed 18 new Sherwood shares.
>
> 2. Sherwood shall as soon as practicable after 30th November 1987 and in any event not later than 1st February 1988 cause to be prepared a statement showing the combined software sales of L. G. Software Limited and CTG Software Limited for the period of 12 months ending 30th November 1987 ("Sales"). For the purposes of the said statement :--(a) Sales shall mean sales to any person, firm or company other than a member of the CTG Group (a "customer") of software products comprised in the current and planned

product range (on display as set out in paragraph 5 of Appendix VI) and of related services (including without prejudice to the generality of the foregoing sales of bespoke software and upgrades, manuals and all income derived from the Customer Services Division) provided that the bespoke element of software sales shall be included only to the extent of 50 per cent. thereof; (b) a sale shall be counted only if a customer shall during the relevant period have entered into a binding contract in relation to a relevant product or service (which shall include but not be limited to contracts additional or supplemental to contracts existing at the date hereof); and (c) there shall be excluded from Sales licence and maintenance fees and sales of hardware and there shall also be deducted from the amount of Sales any commissions, licence fees, royalties or similar amounts payable by any company in the CTG Group to third parties.

3. The said statement, when prepared, shall be reviewed by Peat, Marwick, Mitchell & Co (on behalf of Sherwood) and Deloitte Haskins & Sells (on behalf of accepting shareholders under the Ordinary Offer) (together "the Accountants") who shall:--(a) jointly approve such statement as prepared by Sherwood; or (b) make such adjustments thereto as they may jointly agree and shall deliver a copy of such statement, as approved or adjusted, to Sherwood. Sherwood shall provide to the Accountants such access to the working papers from which the said statement is derived as they shall require.

4. If the Accountants are unable either to approve the statement as prepared or to agree the adjustments to be made thereto, the matter shall be referred to an independant chartered accountant or firm of chartered accountants ("the Expert") to be agreed between the Accountants or, failing agreement, to be nominated by the President for the time being of the Institute of Chartered Accountants in England and Wales, who shall be instructed to determine the amount of the Sales and to provide a report stating such amount to Sherwood within the shortest practicable time.

Sherwood shall procure to be provided to the Expert all such information as may reasonably be required by him to enable him to determine the amount of the Sales and provide his report as aforesaid ...

7. The Accountants and the Expert (if any) shall act as experts and not as arbitrators and their or his determination shall be conclusive and final and binding for all purposes.'

What happened under that appendix was that a statement was prepared by the defendants purporting to show the sales for the purposes of para 2, but the accountants, Messrs KPMG Peat Marwick McLintock (Peats) and Messrs Deloitte, Haskins & Sells (Deloittes), were unable to reach an agreement under para 3, since there were two categories of transaction which Deloittes thought should be included as 'Sales' and Peats thought should not be included. Everything else, including the amounts of the figures in respect of the disputed transactions, was agreed.

Consequently Peats and Deloittes jointly appointed Messrs Coopers & Lybrand (Coopers) to be 'the Expert' under para 4. Coopers' terms of reference are set out in a letter of 15 April 1988 from Coopers to the defendants, which provides as far as material as follows:

'CORPORATE TECHNOLOGY GROUP PLC

1. We have been asked by Peat Marwick McLintock and Deloitte Haskins & Sells to act as independant experts to determine the combined software sales of LG Software Limited and CTG-Software Limited for the 12 months ended 30 November 1987, in accordance with schedule 5 to an agreement dated 13 February 1987 relating to the acquisition of Corporate Technology Group plc. We are writing to set out the work we understand is required.

2. In the opinion of Peat Marwick McLintock (acting on behalf of Sherwood Computer Services plc) the turnover, as defined in the agreement for the relevant period, is £2,527,135. In the opinion of Deloitte Haskins & Sells (acting on behalf of former shareholders of Corporate Technology Group plc) the turnover, as defined in the agreement for the relevant period, is £3,065,810. The only difference between the opinions of the two firms of accountants are as follows: a) Peat Marwick McLintock believe sales should exclude and Deloitte Haskins & Sells believe that sales should include turnover relating to Community Charges net of royalties due to Lychgate amounting to £356,525; b) Peat Marwick McLintock believe sales should exclude and Deloitte Haskins & Sells believe that sales should include turnover relating to contracts containing cancellation clauses (including two contracts

relating to Community Charges) amounting to £182,150.

3. You require us to investigate the areas of difference described above but not to review the areas where there is agreement between the two accountants. This will involve reviewing the available evidence at Corporate Technology Group plc, discussing the matter with present (and if necessary former) employees of that company and its subsidiaries and discussing the matter with and examining the working papers of Peat Marwick McLintock and Deloitte Haskins & Sells relating to this matter. If necessary we may seek independent legal advice but we would inform you of this beforehand. At the conclusion of our work we are required to provide a report stating the amount of sales as defined in the agreement for the relevant period. We shall act as experts and not as arbitrators and all parties shall accept our determination as conclusive and final and binding.'

Those instructions were, in my judgment, instructions which the accountants could properly give Coopers under para 4; they could refer matters not agreed between them to Coopers without requiring Coopers to work out afresh all the matters on which they were agreed. The judge rightly regarded Coopers, for the purposes of the striking-out application, as not doing anything more than carrying through the procedure laid down by appendix 1 of the offer document.

There was indeed an assertion for the defendants that the plaintiffs had themselves concurred in and authorised the instructions to Coopers, either because Deloittes were the plaintiffs' agents or because the plaintiffs went along with the inquiries of Coopers, and one of them had a meeting with Coopers with some knowledge of what the disputed issues were. I put that assertion out of mind, however, for the purposes of this judgment, since the extent of the plaintiffs' knowledge is disputed, and cannot be resolved on a striking-out application. If the assertion is correct, the defendants' claim that the plaintiffs are bound by Coopers' determination would be that much the stronger. But, even if the plaintiffs had not specifically authorised or indorsed Coopers' instructions, the position remains, as is common ground, that the plaintiffs did concur in the sale agreement, including the provisions of appendix 1 under which Coopers were appointed.

The upshot was that Coopers sent to the defendants on 28 June 1988 a document signed by them in the following terms:

'Dear Sirs,

CORPORATE TECHNOLOGY GROUP PLC

We have acted as independent chartered accountants to determine the combined software sales of LG Software Limited and CTG Software Limited for the period of 12 months ended 30 November 1987 calculated in accordance with Appendix 1 to the offer document for the acquisition of Corporate Technology Group Plc and Schedule 5 to the Deed dated 13 February 1987 relating to the acquisition of Corporate Technology Group Plc ("the Sales"). We determine that the Sales amount to £2,527,135. We have sent copies of this report to Deloitte Haskins & Sells and to Peat Marwick McLintock.

Yours truly ...'

It is said for the plaintiffs on a subsidiary issue that the document is a nullity--of no effect for any purpose--since it is not a 'report' as required by para 4 of appendix 1 because it does not give Coopers' reasons for reaching their determination. All that para 4 requires the 'Expert's report' to do however is to set out the expert's determination of the amount of sales, and that the document of 28 June 1988 does. The use of the word 'report' in para 4 does not, in my judgment, require the expert to set out the reasoning or calculations which led him to his conclusion. The document is therefore, in my judgment, a sufficient report for the purposes of para 4, and I refer to it hereafter as 'Coopers' report'.

Standing alone, Coopers' report is what is referred to in many cases as 'a non-speaking certificate' since it gives no explanation at all of the conclusion Coopers had reached. A good deal of the judgment of the judge is taken up with the

distinction in the cases between speaking and non-speaking certificates or valuations (though in the end he lays the distinction aside). I shall myself have to refer to that distinction briefly but it is not the issue in this case. It is conceded for the defendants that Coopers' report does not stand by itself but must be looked at in the light of the terms of appendix 1 and their letter of instructions. That concession is plainly right (see the judgment of Harman J on the preliminary

issue in *Dean v Prince* [1953] 2 All ER 636 at 638, [1953] Ch 590 at 592-594). Once, however, the earlier documents are looked at, it is apparent that the figure of £2,527,135 which Coopers in their report determined as the amount of sales is the figure at which Peats had assessed the amount of the sales. Therefore Coopers must have decided that the two classes of disputed transactions fell to be excluded from the total amount of sales. Coopers therefore, in relation to both classes agreed with the conclusions of Peats rather than with the conclusions of Deloittes though it does not necessarily follow that Coopers got to those conclusions for the same reasons, or by the same reasoning, as Peats.

In these circumstances the plaintiffs say that Deloittes have been right all along, and Peats and Coopers are wrong. They say that Coopers have got it wrong because they made mistakes in relation to both classes of disputed transaction--as did Peats--and they say that they are entitled to call on the court to determine whether or not Coopers have made mistakes, and that if Coopers have made mistakes they, the plaintiffs, are not bound by Coopers' determination, notwithstanding that by para 7 of appendix 1 the determination is agreed to be conclusive, final and binding for all purposes. They say that the mistakes, if they were mistakes, would have been mistakes of law, or of mixed law and fact, as to the true construction and effect of the provisions of appendix 1 and particularly of para 2.

It is therefore necessary to see how the law stands on the question of challenging an expert's certificate on the grounds of mistake. We are not of course here concerned with any question of fraud or collusion on the part of the expert.

The cases have been fully analysed by Sir David Cairns in *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175 at 181-183 and by Nourse J in *Burgess v Purchase & Sons (Farms) Ltd* [1983] 2 All ER 4, [1983] Ch 216.

The starting point for the modern statement of the law is, in my judgment, the decision in *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403 and in particular the passage in the judgment of Lord Denning MR, where he said ([1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 407):

> 'It is simply the law of contract. If two persons agree that the price of the property should be fixed by a valuer on whom they both agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.'

That statement was, as a matter of principle and disregarding the earlier authorities, indorsed by Megaw LJ in *Baber v Kenwood* [1978] 1 Lloyd's Rep 175 at 179 and concurred in by the other members of this court in that case. It is in line with the passage, cited by Sir David Cairns in *Baber v Kenwood* [1978] 1 Lloyd's Rep 175 at 181 from the judgment of Strange MR in *Belchier v Reynolds* (1754) 3 Keny 87 at 91, 96 ER 1318 at 1319:

> '... whatever be the real value is not now to be considered, for the parties made Harris their judge in that point; they thought proper to confide in his judgment, and must abide by it, unless they could have made it plainly appear, that he had been guilty of some gross fraud, or partiality.'

Geoffrey Lane LJ in *Campbell v Edwards* [1976] 1 All ER 785 at 789, [1976] 1 WLR 403 at 408 followed and applied

an earlier statement by Lord Denning MR to the same effect in *Arenson v Arenson* [1973] 2 All ER 235 at 241, [1973] 3 Ch 346 at 363.

[1992] 2 All ER 170 at 177

Both *Campbell v Edwards* and *Baber v Kenwood Manufacturing Co Ltd* were cases of non-speaking valuations and it is convenient to say a little at this juncture about the distinction between speaking and non-speaking valuations or certificates, which to my mind is not a relevant distinction. Even speaking valuations may say much or little; they may be voluble or taciturn if not wholly dumb. The real question is whether it is possible to say from all the evidence which is properly before the court (and not only from the valuation or certificate itself) what the valuer or certifier has done and why he has done it. The less evidence there is available, the more difficult it will be for a party to mount a challenge to the certificate. This may lead of course to questions such as whether it is proper to join the certifier as a defendant in proceedings for the purpose of getting discovery from him, a matter considered by Geoffrey Lane LJ in *Campbell v Edwards* [1976] 1 All ER 785 at 789, [1976] 1 WLR 403 at 408-409, and whether it is proper to administer interrogatories to the certifier to discover his reasons, a matter considered in an analagous field in *Berry v Tottenham Hotspur Football and Athletic Co Ltd* [1935] Ch 718, [1935] All ER Rep 726 and *Duke of Sutherland v British Dominions Land Corp Ltd* [1926] Ch 746; but those questions do not arise on this appeal.

To revert to *Campbell v Edwards*, however, what Lord Denning MR said is inconsistent, and was intended by him to be inconsistent, with the law as understood and declared in cases between *Belchier v Reynolds* and *Campbell v Edwards*.

One may note *Johnston v Chestergate Hat Manufacturing Co Ltd* [1915] 2 Ch 338. There a party was entitled under an agreement to a percentage of the net profits (if any) of a company for the whole year. The agreement provided that the words 'net profits' should be taken to mean the net sum available for dividends as certified by the auditors after payment of certain items. Sargant J commented without citing authority (at 344):

> 'Even if the certificate, as an ad hoc certificate, is a proper certificate within the agreement, still, when it is obviously based, as I think it is, on a wrong principle, it does not oust my jurisdiction. It is not even as if this amounted to an arbitration. It is something entirely different, namely, an agreed machinery or method for arriving at a particular sum.'

That approach, however, of treating the certificate as mere machinery for calculation which can automatically be overriden by the court if it appears to be wrong cannot be enough where the expert or certifier is to certify the fair value of property, for which there is no absolute objective criterion, or where, as in the present case, the parties have expressly declared that the determination of the accountants or expert is to be conclusive, final and binding for all purposes and where they have further shown that, as would be inherently likely where an issue of further shares is in question, they want a speedy determination without the delays and complexities of arbitration, let alone court proceedings: see in particular the requirement in para 4 of appendix 1 that the expert is to provide his report 'within the shortest practicable time'.

There is of course authority in *Sudbrook Trading Estate Ltd v Eggleton* [1982] 3 All ER 1, [1983] 1 AC 444 that where parties have agreed on a machinery, by way of a reference to accountants or valuers for ascertaining a particular sum, or even the fair value of property, the court will intervene and provide its own machinery if the agreed machinery has broken down. It does not, however, automatically follow from that that the court will substitute its own machinery where the agreed machinery has operated.

[1992] 2 All ER 170 at 178

More important, in the present context, than *Johnston v Chestergate Hat Manufacturing Co Ltd* [1915] 2 Ch 338 is *Dean v Prince* [1953] 2 All ER 636, [1953] Ch 590 I have already referred to the decision of Harman J on the preliminary issue. The case was one in which the articles of the company provided that if a member died his shares

should be purchased by the directors at such price as should be certified by the auditor to be in his opinion the fair value thereof at the date of the member's death. In his substantive judgment at the end of the trial, Harman J held that the auditor had based himself on an entirely wrong basis, in valuing the shares on break-up value without any increase for the fact that the shares carried control of the company. Harman J brushed aside the argument for the defendant directors that those who committed themselves to the judgment of John Roe or Richard Roe could not complain if either proved to have a very bad judgment.

On appeal the substantive judgment of Harman J was reversed on the ground that in the unusual circumstances of the company in question the basis of valuation adopted by the auditor was appropriate (see [1954] 1 All ER 749, [1954] Ch 409). However both parties and all members of this court took as settled law a dictum of Romilly MR in *Collier v Mason* (1858) 25 Beav 200 at 204, 53 ER 613 at 614:

> '... this Court, upon the principle laid down by Lord Eldon, must act on the valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle ... or even, in the absence of any proof of any of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the Court would refuse to act on the valuation.'

Denning LJ in particular in *Dean v Prince* [1954] 1 All ER 749 at 758, [1954] Ch 409 at 427 stressed that if the courts were satisfied that the valuation was made under a mistake they would not hold it to be binding on the parties. A valuation could be impeached not only for fraud but also for mistake or miscarriage, for instance, if, inter alia, the expert had interpreted the agreement wrongly.

Plainly Lord Denning MR came to change his views between 1954 and 1976. The reason for that was that in 1954 there was an established line of authority, from *Pappa v Rose* (1871) LR 7 CP 32 to *Finnegan v Allen* [1943] 1 All ER 493, [1943] KB 425 to the effect that a valuer who had given a certificate as an expert was not liable to an action unless he was dishonest, but that line of authorities had been overruled by the House of Lords in *Arenson v Casson Beckman Rutley & Co* [1975] 3 All ER 901, [1977] AC 405 and *Sutcliffe v Thackrah* [1974] 1 All ER 859, [1974] AC 727, where the dissenting judgment of Lord Denning MR in *Arenson v Arenson* [1973] 2 All ER 235, [1973] Ch 346 was approved and it was established that the expert could be liable for damages in negligence if he had acted negligently in giving his certificate.

In *Dean v Prince* [1954] 1 All ER 749 at 758, [1954] Ch 409 at 427 Denning LJ had expressed the view that the cases on the immunity of the valuer had no application when the court was considering the validity of the valuation itself. Looking at the problem from the other end, however, the members of this court in *Campbell v Edwards* and *Baber v Kenwood Manufacturing Co Ltd* were concerned to see how a valuer could be liable for a negligent mistake in giving a certificate as an expert if the effect on that mistake was that the certificate was not binding on the parties: see especially the judgment of Geoffrey Lane LJ in *Campbell v Edwards* [1976] 1 All ER 785 at 789, [1976] 1 WLR 403 at 409 and of Megaw LJ

in *Baber v Kenwood* [1978] 1 Lloyd's Rep 175 at 180-181 concurred in by Lawton LJ.

The result is, in my judgment, that in those two cases this court has decided to look at the question of setting aside certificates of experts on grounds of mistake afresh in the light of the principle that the expert or valuer can be sued for negligence (see also per Sir David Cairns in *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175 at 183). In so doing this court has rejected the latter part of Romilly MR's dictum, 'or even in the absence of any proof of any of these things' etc. We also therefore are free to look at the matter afresh on principle, and are not bound by the law as

stated by common consensus in *Dean v Prince*.

On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning MR said in *Campbell v Edwards*, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect, eg if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M) v Jones (RR)* [1971] 2 All ER 676, [1971] 1 WLR 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that, either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.

The present case is quite different, however, as Coopers have done precisely what they were asked to do. They were asked to consider only the points on which Peats and Deloittes were not in agreement, to decide whether the two classes of disputed transactions were or were not to be included in the total of sales as defined in appendix 1, and to determine the amount of sales accordingly; that is what they have done. Under para 7 of appendix 1 a decision of the accountants under para 3, if the accountants are in agreement, is to be as conclusive, final and binding as the decision of the expert if the accountants disagree with each other. But the argument for the plaintiffs has, as it seems to me, to go the length of asserting that if Deloittes had agreed with Peats that the disputed transactions were to be excluded from the total amount of sales and had consequently agreed on Peats' figures as the total amount of sales the plaintiffs could still have applied to the court to determine the true (in the court's view) amount of the sales and to hold the (ex hypothesis) joint view of the accountants not binding. I do not believe that that is the law.

Any number of issues could arise under the various sub-paragraphs of para 2 of appendix 1 as to the application of the wording of those sub-paragraphs to particular facts. All these issues are capable of being described as issues of law or mixed fact and law, in that they all involve issues as to the true meaning or application of wording in para 2. I cannot read the categorical wording of para 7 as meaning that the determination of the accountants or of the expert shall be conclusive and binding for all purposes 'unless it involves a determination of an issue of law or mixed fact and law in which case it shall only be binding if the court agrees with it'.

Accordingly in my judgment, because Coopers did precisely what they were instructed to do, the plaintiffs cannot challenge their determination of the amount of the sales.

There is another line of reasoning which points in the same direction, though I do not found my judgment on it.

There were two classes of disputed transactions which are referred to in Coopers' letter of instructions as (a) and (b). For convenience, class (a) transactions have been referred to as 'Community Charge Contracts' and class (b) transactions as 'Contracts Subject to Ratification'.

[1992] 2 All ER 170 at 180

The contracts subject to ratification, of which there were four, were contracts entered into with local authorities which at 30 November 1987, which was the reference date for the purposes of para 2 of appendix 1, were subject to ratification or confirmation, before dates then still in the future, by the full councils of the authorities concerned. In the event all four were duly ratified or confirmed. The issue is then whether these four contracts were, either as unratified contracts or as a result of their subsequent ratification or confirmation, to be classified as 'binding contracts entered into during the relevant period' within the meaning of sub-para (b) of para 2. For present purposes, however, the important point is that the total amount of these four contracts is only £182,150. If they are treated as sales and added to Peats and Coopers figure of £2,527,135 as the amount of sales, the total is still below the sum of £2,720,000 which is the threshold under

para 1 of appendix 1. Therefore if there was any 'mistake' over the contracts subject to ratification it is a wholly immaterial mistake with no practical effect at all: see the judgment of Roskill J in *Frank H Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 All ER 433 at 457, [1967] 1 WLR 506 at 529, where he refers to an error being 'material' only if it materially affects the ultimate result.

To achieve any practical result, therefore, the plaintiffs have to show that Coopers made a mistake which the court will correct over the community charge contracts.

The question here is a combination of whether the products to which the community charge contracts related were products comprised in the current and planned products range (on display as set out in para 5 of appendix VI) as required by sub-para (a) of para 2 of appendix 1 and also whether the contracts were to be counted as sales under sub-para (b). The factors involved in this in the view of Peats in a letter of 31 March 1988 to the defendants seem to have included (i) whether a community charge program was to be equated with a 'Rateman' program for the purposes of para 5 of appendix VI or at all since the community charge was replacing the rates and (ii) the significance if any of the facts that at the date of the sale agreement of 13 February 1987 the community charge legislation had not even been introduced and the community charge contracts included arrangements whereby alternative products would be provided if the community charge legislation did not proceed.

In these circumstances, however Coopers may have reached their conclusion, it would seem likely that if the court undertook a consideration of the issue it would be involved in questions of the correct accountancy treatment of contracts such as the community charge contracts and, though of course the court can decide such an issue (or any other issue), it would seem to be particularly a matter of the opinion of the accountancy profession which the court would decide, if it had to, by reference to the expert evidence of yet more accountants.

If the parties to an agreement have referred a matter which is within the expertise of the accountancy profession to accountants to determine, and have agreed that the determination of the accountants is to be conclusive, final and binding for all purposes, and the chosen accountants have made their determination, it does not seem appropriate that the court should rush in to substitute its own opinion, with the assistance of further accountants' evidence for the determination of the chosen accountants. When the parties provided in appendix 1 to the sale agreement for a third firm of accountants--in the event Coopers--to act as the expert in the event of disagreement between Peats and Deloittes, they cannot have had in mind merely disagreements between Peats and Deloittes on simple arithmetic, the adding up of the figures of the sales.

Accordingly for the reasons given earlier in this judgment, I would allow this

appeal, and I would strike out paras 1 to 4 of the prayer in the statement of claim. Paragraph 5 of the prayer, however, is in a different position. It asks for rectification, if necessary, in accordance with para 10 of the statement of claim. The claim for rectification in para 10 is put in the final sentence as follows:

> 'If, contrary to that contention, it is held that such software is not so included, the Plaintiffs will seek rectification on the basis that the Agreement does not in that respect reflect the prior express understanding of the parties that "Community Charges" software was part of the planned product range.'

This court has not been concerned on this striking-out application with the strength or otherwise of the evidence of the existence of such a 'prior express understanding'. The argument for the defendants has been that because the plaintiffs

went along with what Coopers were doing they are estopped from claiming rectification which would produce an agreement different from that which Coopers were considering. The legal analysis of that argument however is that the defendants would be claiming to set up an estoppel--estoppel by convention--as a defence to the plaintiffs' claim for rectification. But it is impossible to strike out the claim for rectification on the ground of a defence of estoppel which has not yet been pleaded and which would depend on facts not admitted and not yet approved.

Paragraph 5 of the prayer must therefore stand, and para 10 of the statement of claim must remain to support it. Paragraphs 8 and 9 must also remain to explain para 10, since without para 9 it is not apparent what software is referred to in para 10 and without para 8 it is not apparent what statement is referred to in para 9. Paragraphs 4 and 5 are merely narrative and should remain. Paragraphs 11 and 12 and the last three sentences of para 13 (beginning 'The said purported determination') should however be struck out.

I would allow this appeal accordingly.

It follows from the foregoing that I respectfully differ from much that was said by Nourse J in *Burgess v Purchase & Sons (Farms) Ltd* [1988] 2 All ER 4, [1983] Ch 216. This stems primarily from a difference in our respective assessments of the decisions in *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403 and *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175, which I regard as binding on us as the starting point of the reassessment of the law in this field after the decisions of the House of Lords which I have mentioned but which he, I apprehend, regarded as heretical and illogical departures from the established doctrine enunciated in *Dean v Prince* [1954] 1 All ER 749, [1954] Ch 409; in effect Denning LJ's first thoughts in *Dean v Prince* ought to be preferred to his second thoughts in *Arenson v Arenson* [1973] 2 All ER 235, [1973] Ch 346 and *Campbell v Edwards*. However, it is unnecessary to encumber this over-long judgment with further analysis of *Burgess v Purchase & Sons (Farms) Ltd*, which on any view is not binding on this court.

BALCOMBE LJ.

I have had the advantage of reading in draft the judgment of Dillon LJ. As we are differing from the judge I add a few words of my own.

The principle applicable to a case of this type is that stated by Lord Denning MR in *Campbell v Edwards* [1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 407. It has been cited by Dillon LJ but I will repeat it here:

> 'It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he had
>
> *[1992] 2 All ER 170 at 182*
>
> made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.'

That principle was expressly approved by this court in *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175.

In my judgment that principle cannot be affected by the chance whether the valuation is or is not a 'speaking' valuation. I agree with Dillon LJ that that is not a relevant distinction and it follows that I also respectfully disagree with the judgment of Nourse J in *Burgess v Purchase & Sons (Farms) Ltd* [1983] 2 All ER 4, [1983] Ch 216.

So I apply that principle to the facts of the present case. The contract of 13 February 1987 between the parties provided that the number of Sherwood shares to be issued as consideration for the shares in the company that were being sold should be increased by an amount proportionate to the amount by which the sales of the company's two operating subsidiaries should exceed £2,720,000 during the period of 12 months ending on 30 November 1987. The contract contained a definition of the sales which were to count for this purpose; it also provided for the amount of the sales to be agreed by two named firms of accountants and for a reference to an independent firm of chartered accountants acting as experts in the event of the failure of the two named firms to agree on the amount of the sales. The parties clearly intended by this clause to empower the named accountants--and, in default of agreement by them, the experts--to decide all matters necessary to determine the amount of the sales, and not just to leave to them matters of mathematical calculation. There was good reason for the parties to take this course since the number of new Sherwood shares (marketable securities whose value might fluctuate over a short time-scale) depended upon the determination of the amount of the sales, and therefore a speedy method of determining this figure made sound business sense. In my judgment, therefore, Messrs Coopers & Lybrands did exactly what the parties had contracted they should do--no more and no less--and their report (for such it clearly was) cannot be impugned in the manner which the plaintiffs seek to do in these proceedings.

For these reasons, as well as for those given in greater detail by Dillon LJ, I agree that this appeal should be allowed. I also agree with the order proposed by Dillon LJ.

Appeal allowed. Leave to appeal to the House of Lords refused.

Carolyn Toulmin Barrister.