IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2014 01141

PETER MILLER COX
and others according to the Schedule of Plaintiffs — Plaintiffs

v

RONALD WETTENHALL — First Defendant

and

SWEETT GROUP (AUSTRALIA) PTY LTD (ACN 130 025 204) — Second Defendant

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JUDGE:	JUDD J
WHERE HELD:	Melbourne
DATE OF HEARING:	15 & 16 December 2015
DATE OF JUDGMENT:	23 February 2015
CASE MAY BE CITED AS:	Cox & Ors v Wettenhall & Anor
MEDIUM NEUTRAL CITATION:	[2015] VSC 38

CONTRACT – Contract for expert determination – Provision for calculation of share price – Dispute resolution provision – Alleged errors – Whether expert determination complied with contract – Whether contract varied by letter of instruction to expert.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	J. Shaw	Mason Sier Turnbull
For the First Defendant	C. Smith	Lander & Rogers
For the Second Defendant	J. Foster	Fraser Barrett Baird

HIS HONOUR:

1 By an originating motion filed on 14 March 2014 the plaintiffs sought a declaration that an expert determination made by the first defendant, Ronald Wettenhall, is of no effect. The determination was purportedly made under cl 3.12 of a Share Purchase Agreement. The plaintiffs, Peter Miller Cox, James Anthony Harrington, David Mack Jones and Lyndal Susan Rofe, are vendors of shares under the agreement, dated 28 January 2010. The second defendant, Sweett Group (Australia) Pty Ltd, is purchaser. The shares were held in Padgham & Partners Pty Limited. Padgham carries on business as project managers, cost consultants and quantity surveyors in Australia and India, and derives profit in each place.

2 The expert had been appointed by the parties to resolve a dispute concerning the calculation of the third tranche of the purchase price payable by Sweett Group to the plaintiffs. The expert published his determination on 10 February 2014. The plaintiffs are dissatisfied with the expert's calculation and seek to set it aside.

3 Under the Share Purchase Agreement, the price was to be paid in three tranches. The first tranche was payable on Completion Date as defined, the second tranche was payable on the first anniversary of the Completion Date, and the third tranche, described in the agreement as Tranche 3, was due on the second anniversary of the Completion Date. Tranche 3, the amount in dispute, was to be calculated according to a formula set out in cl 3.5. A component of the calculation was Padgham's profit after tax for the 2011 financial year.

4 The Share Purchase Agreement required Sweett Group, as purchaser, to prepare annual accounts for the Padgham entities to support the calculation of the Tranche 2 and Tranche 3 components of the purchase price. Clause 3.9 provided:

> No later than 90 days after a Group Company's Accounts Date for each of Financial Year 2010 and Financial Year 2011, the Buyer must procure that:
>
> (a) *draft Accounts are prepared* by the Group Company for that Financial Year in accordance with the *Applicable Accounting Standards* and including the PAT for the Group Company for that Financial Year in Dollars (such Accounts, "Earn-Out Accounts");

(b) the Earn-Out Accounts are reviewed by the Investigating Accountant or its suitably qualified delegate; and

(c) *the Earn-Out Accounts are delivered to the Seller*.[1]

5 The Applicable Accounting Standards meant:

(a) in the case of the Group or the Company:

(i) "accounting standards" as defined in the Corporations Act;

(ii) the requirements of the Corporations Act for the preparation and content of accounts; and

(iii) generally accepted accounting principles and practices consistently applied in Australia, including any domestically accepted international accounting standards, except principles and practices that are inconsistent with sub-paragraphs (i) and (ii); and

(b) in the case of Padghams India —

(i) the Indian Generally Accepted Accounting Principles;

(ii) the mandatory accounting standards and statements issued by The Institute of Chartered Accountants of India; and

(iii) the requirements of *The Companies Act* 1956 (India) for the preparation and content of accounts, including any particulars relating to the Conservation of Energy, Technology Absorption and Foreign Exchange Earnings;

6 The Share Purchase Agreement contained a dispute resolution clause directed specifically to a dispute in relation to the Earn-Out Accounts, as defined. Clause 3.12 provided:

(a) A party may notify the others in writing within twenty (20) Business Days *after it receives the draft* Completion Statement or *Earn-Out Accounts if it disputes the draft* Completion Statement or *Earn-Out Accounts* (as the case may be). If no notice of dispute is so given, the Completion Statement delivered pursuant to clause 3.10(a)(iii) will be deemed final and binding on the parties.

(b) *If a party gives notice of a dispute* in relation to the draft Completion Statement or Earn-Out Accounts, the parties will confer in good faith to seek to agree the draft Completion Statement or Earn-Out Accounts, within twenty (20) Business Days after the giving of notice. Failing agreement, *any party may refer the matter in dispute to an Independent Expert for determination in accordance with this clause 3.12*.

[1] Emphasis added.

(c) If a dispute in relation to the draft Completion Statement or Earn-Out Accounts is referred to an Independent Expert under this clause 3.12, *the Independent Expert must be instructed to determine whether the draft* Completion Statement or *Earn-Out Accounts* (as the case may be), *fairly represents*:

(i) in the case of the draft Completion Statement – the Company's financial position as at the Completion Date and the Net Tangible Assets; or

(ii) in the case of Earn-Out Accounts – *the financial position and PAT of the relevant Group Company and has been prepared in accordance with Applicable Accounting Standards and, where applicable, the Normalisation Principles, and, if not, to make the necessary amendments to the Completion Statement or Earn-Out Accounts (as the case may be)*,

within twenty (20) Business Days of receipt of the submission(s) from the parties or the Buyer in accordance with paragraph (d) below.

(d) Each party is entitled to make written submissions to the Independent Expert within ten (10) Business Days of the appointment of the Independent Expert. A copy of any submission made must be given to each other party to this Agreement.

(e) *The determination in writing of, and any amendments to the draft* Completion Statement or *Earn-Out Accounts made by, the Independent Expert will (in the absence of manifest error) be final and binding on the parties and will be deemed to have been given as an expert and not an arbitrator*. The costs of the Independent Expert must be borne as to one half by the Seller and as to one half by the Buyer.[2]

7 When executing the Share Purchase Agreement, the vendors and purchaser executed a document entitled 'Earn-Out Accounts — Normalisation Principles'. The 'Normalisation Principles' were defined in the Share Purchase Agreement to mean:

> a series of adjustments to be made in calculating the [profit after tax] in respect of a Group Company for the purposes of clauses 3.4, 3.5, 3.9 and 3.10 agreed by the parties in writing from time to time …

8 The 'Earn-out Accounts – Normalisation Principles' document executed by the parties was of such a character. The relevant parts of the document are to be found in cls 3 and 4, which provided:

3. Applicable accounting principles, policies and procedures

3.1 For each Group Company, the Income Statement in its Earn-Out Accounts must be prepared in a format consistent, on a line by line basis, with the Reference Income Statement set out in the Schedule

[2] Emphasis added.

and in accordance with, in order of preference:

a) The specific accounting principles, policies and procedures set out in section 4 below;

b) When an item is not covered by the specific accounting principles, policies and procedures set out in section 4, in a manner consistent with the accounting principles, policies and procedures used to prepare the Earn-Out Accounts in accordance with the Share Purchase Agreement; and

c) Where an item is not covered by the accounting principles, policies and procedures referred to in paragraph 3.1(a) or paragraph 3.1(b), in accordance with generally accepted accounting standards in the Relevant Jurisdiction.

4. **Specific accounting principles policies and procedures:**

In respect of each Group Company and with reference to the Reference Income Statement revenue and cost classifications set out in the Schedule:

4.1 gross profit will include all revenue and direct costs relating to operating activities undertaken by employees of the Group Company during the period, adjusted for the following transactions:

a) ***(Origination fee received by External CSG Entity)*** Net revenue of the Group Company relating to work originated by an External CSG Entity but performed by the Group Company will be discounted by 5%;

b) ***(Origination fee received by Group Company)*** A value equal to 5% of any net revenue relating to work originated by the Group Company which was performed by an External CSG Entity will be credited as revenue to the Group Company;

c) ***(Group Company employee working on an External CSG Entity project)*** A value equal to the gross salary cost plus a 15% premium for each Group Company employee who works on an External CSG Entity project will be credited as revenue to the Group Company. The gross salary costs of the employee will remain with the Group Company);

d) ***(External CSG Entity employee working on a Group Company project)*** A value equal to the gross salary of each External CSG Entity employee who works on a project of the Group Company will be treated as a direct cost of the Group Company.

e) ***(Group Company director time)*** If a director of the Group Company spends more than [20] hours in a given calendar month on matters related to an External CSG Entity, a value equal to the proportionate gross salary cost plus a 15% premium will be credited as revenue to the Group Company.;

f) ***(External CSG Entity director time)*** If a director of an External

CSG Entity spends more than 20 hours in a given calendar month on matters related to a Group Company, a value equal to the proportionate gross salary cost will be treated as a cost of the Group Company, provided it is agreed by all parties; and

g) ***(Permanent transfers of direct employees between entities)*** The impact of permanent transfers of direct employees and/or service lines will be considered and agreed upon by both parties as they arise.

h) ***(Relocation Remuneration Adjustment allowance)*** Relocation adjustment allowance to be excluded from rent amount due to the relocation to the Queen Street location. This will apply to all Group Company staff requiring car parking and any remuneration increments or adjustments in relation to the relocation to the city office, provided it is agreed by all parties on a case by case basis.

4.2 indirect costs and administration salary costs:

a) Arising in the Australian business will be fixed at the amounts set in the Reference Income Statement included as Schedule to this document.

b) Arising in the Indian business will be accounted for as incurred, specifically excluding current External CSG Entity costs.

4.3 other costs will be accounted for as incurred.

4.4 taxation will be accounted for as incurred.

4.5 Intercompany activity between the Company and Padghams India will be accounted for under the following accounting principles:

a) Transactions will be accounted for on an arms length basis and in the period in which the related revenue/costs were earnt/incurred (same period for both entities); and

b) Peter Cox and Eileen Duncan shall have 60% and 40% respectively of their gross salaries allocated to Padghams India rather than the Company

4.6 An External CSG Entity may recharge group management fees (Corporate recharges) to Group Companies; however, these are outside the scope of these Normalisation Principles and are excluded from the Earn-Out Accounts.

4.7 All integration costs and costs with regard to the Share Purchase Agreement are excluded from the Earn-Out Accounts.

9 Clause 3.9 did not expressly require that Earn-Out Accounts be prepared in accordance with the Normalisation Principles. They were to be prepared in

accordance with the Applicable Accounting Standards, which made no mention of the Normalisation Principles. Nevertheless, the Normalisation Principles expressly provided that the Earn-Out Accounts must be prepared according to such principles. Moreover, paragraph 3.12(c)(ii) of the dispute resolution clause presupposed that the Earn-Out Accounts had been prepared in accordance, or were to be adjusted so as to conform, with the Normalisation Principles.

10 The expert had been appointed in the absence of Earn-Out Accounts prepared pursuant to cl 3.9. Nor was there evidence of any notification in writing, under cl 3.12(a), in the nature of a 'notice of dispute'. Instead, the parties adopted a less formal approach, relying on a spread sheet, described as the T3 Reconciliation, comprising three versions of the accounts: Padgham Version, Sweett Version and Updated Version. The T3 Reconciliation identified agreed and contentious items.

11 The parties defined their dispute in a letter of appointment dated 7 October 2013, prepared by the plaintiffs' solicitors and sent to the expert. A copy was signed on behalf of Sweett Group. Mr Cody, of the plaintiffs' solicitors, wrote:

> I act on behalf of the above former shareholder vendors (**Sellers**) of their interests in Padgham & Partners Pty Limited (Australian company) and its subsidiary Padgham Cost Management Private (Indian company) Limited to Sweett (Australia) Pty Ltd (formerly Cyril Sweett Australia Pty Ltd) (**Buyer**). The Sellers are in dispute with the Buyer as to the value of the final tranche for the sale of their shares (**T3**).
>
> The Sellers and Buyer have appointed you as an independent expert to carry out an expert determination as to the value of T3 in accordance with the provisions of the Share Purchase Agreement dated 28 January 2010 (**Agreement**).
>
> *Pursuant to clause 3.12 of the Agreement, you must determine whether the Earn-Out Accounts, calculated by the Buyer, as reflected in the T3 reconciliation document fairly represents the financial position and profit after tax (**PAT**) of Sweett (Australia) Pty Ltd in accordance and* [sic] *Australian Accounting Standards and the Normalisation Principles expressed in the Agreement. You must adjust the T3 reconciliation to fairly represent the the financial position and profit after tax (**PAT**) of Sweett (Australia) Pty Ltd in accordance with your determination.*
>
> *Your determination will be final and binding upon the Sellers and the Buyer.*
>
> The Agreement requires the Sellers and the Buyers to file submissions within 10 days of your appointment, and the determination to be provided within 30 days of your appointment.

I *enclose* the following documents by way of attachment to the email to which this letter is attached:

1. Share Purchase Agreement dated 28 January 2010;
2. Company Search Padgham & Partners Pty Ltd;
3. Company Search Sweett (Australia) Pty Ltd;
4. T2 calculation;
5. Original T3 calculation;
6. T3 reconciliation document;
7. Financials for Sweett (Australia) Pty Ltd as at 30 June 2011;
8. Financial Report for Sweett (Australia) Pty Ltd as at 31 March 2011;
9. Profit & Loss for Padgham Cost Management Pte Ltd for period ended 31 March 2010;
10. Balance Sheet for Padgham Cost Management Pte Ltd for period ended 31 March 2010; and
11. Amended statement of claim dated 16 August 2011.

Please advise should you require any further documentation and/or whether you require a preliminary conference.[3]

12 The expert accepted the engagement, responding on 8 October 2013:

I understand that you wish to retain me as an independent expert in respect of a dispute requiring determination. I am instructed that I am to carry out an expert determination as to the value of the Tranche 3 Purchase Price (described as T3) in accordance with the Share Purchase Agreement ('Agreement') dated 28 January 2010.

Prior to undertaking any substantial work on your behalf, I wish to clarify for you the basis upon which I am prepared to act for you, the way in which I would, if retained, charge for work done on your behalf and your obligations in relation to the payment of my costs.

1. PURPOSE AND SCOPE

1.1 I am instructed that you require me to prepare a written report in respect of the above brief, the decision in which will be final and binding on the parties and will be deemed to have been given as an expert and not as an arbitrator.

1.2 The attached correspondence from Mason Sier Turnbull dated 7 October 2013 is a copy of the instructions I have received.

1.3 To the extent you ask me to reach conclusions or form opinions, I am obliged to do so without regard to the impact that my conclusions may have on any litigation.

1.4 I have found that I am often required to perform additional work to that originally agreed resulting from either the findings of my initial engagement or my discussions with solicitors or other advisors.

1.5 I note that it is impractical to obtain instructions on every aspect of my

[3] Emphasis added.

> involvement in this matter and there will often be instances where I will have to use my discretion in determining the work to be performed.

13 There were material differences between the requirements under cls 3.9 and 3.12 and the terms upon which the expert was engaged. The plaintiffs contended that these differences did not relieve the expert of compliance with cl 3.12, as if the differences were of no consequence. An important difference was the absence of Earn-Out Accounts, and the corresponding instruction to base the determination on, and make necessary adjustments to, the T3 Reconciliation. There was also different terminology used to identify the applicable accounting standards.

Conduct following appointment

14 Following his appointment, various communications passed between the expert and the parties until, on 22 October 2013, the expert called for a copy of the Earn-Out Accounts prepared under cl 3.9 for the 2011 year. They had not been prepared and were never provided. On 30 October 2013, the plaintiffs received a report from Courtney Jones & Associate. They had retained Norman Jones of that firm to provide assistance with their submission to the expert. They deployed the report as part of their submissions to the expert. It was plain that the Jones report was prepared on the basis of the T3 Reconciliation. It made no reference to the absence of the Earn-Out Accounts, or the inadequacy of material provided to the expert. Further written submissions were delivered on behalf of the plaintiffs, also dated 30 October 2013. There was no mention in those submissions of the absence of Earn-Out Accounts or the inadequacy of material before the expert.

15 The Sweett Group delivered their written submissions to the expert on 30 October 2013, without mention of Earn-Out Accounts, or any other material that might fit that description, other than the material already available to the expert.

16 On 4 November 2013, the plaintiffs delivered a further written submission to the expert. That submission reconfirmed that the expert was to make his assessment based on the T3 Reconciliation. There was no mention of Earn-Out Accounts.

17 On 19 November 2013, the expert wrote by email to the parties' solicitors, commenting on the T3 Reconciliation. He said:

> All three versions on the spread sheet commence with a calculation headed 'Original Calculation (Andrew Batt)'. I seek your assistance to obtain the financial statements as at 30 June 2011 from which Andrew Batt obtained these financial details. *I note that all parties agree that they are the starting point and assume they represent what the Agreement refers to as the Earn-Out Accounts*.[4]

18 The plaintiffs' solicitors replied the following day:

> 1. You have requested the financial statements as at 30 June 2011 from which Andrew Batt obtained the financial details for T3. [Sweett Group (Australia) Pty Ltd T3 Calculation Reconciliation – Updated Version']. Save that the financial statement were made available for the Indian Company to 31 March 2011 *the Sellers have not been provided with the financial statements as at 30 June 2011*. Norman Jones made an assumption that the financials in the Updated Version were correct, other than as set out in 9.1 and 9.2 of his report.
>
> 2. You have noted that the spread sheet commence with a calculation headed 'Original Calculation (Andrew Batt)' and that all parties agree that they are the starting point and assume they represent what the Agreement refers to as the Earn-Out Accounts. *The Sellers do not dispute that the information in the 'Updated Version' were correct and accept that they form an agreed starting point from which normalisation takes place*. The adjustments indicated are as calculated by the Sweett Group are not agreed to by the Sellers.
>
> *In terms of the spread sheet being a reflection of the 'Earn-Out Accounts' that form the basis of the calculation. The Sellers accept the assumptions, other than the normalisation treatment which forms the basis of the dispute*.[5]

19 On 22 November 2013, the plaintiffs' solicitors wrote to the expert in the following terms:

> I have heard nothing further since my email below[6] and must assume that the Sweett Group has nothing to add to my comments.
>
> Please confirm that you now have sufficient information to proceed with the Expert Determination.

On 25 November 2013, Sweett Group confirmed that it had no further information to add to the response by the plaintiffs' solicitors to the expert dated 20 November 2013.

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4 Emphasis added.
5 Emphasis added.
6 Referring to the email of 20 November 2015 reproduced in [18] above.

20 On 4 December 2013 the expert wrote to the parties:

> My determination has progressed well but there is one issue which I need to address.
>
> *You will be aware that no set of 'Earn-Out' accounts (financial statements) for the T3 calculation has been made available to me. My view has been that the available information would have sufficed but I am now of the opinion that I require access to the Earn-Out accounts for me to appropriately comply with the Agreement clause 3.12(c). I am aware that the parties have agreed on the starting point for the 'normalisation' process but I have now formed the view that this will not be sufficient for the purposes of the Agreement or the determination.*
>
> *The basis for my view is that the scope of my determination will be limited by not having access to the Earn-Out accounts given the requirement for them to be prepared in accordance with Applicable Accounting Standards.*
>
> Of importance in the Earn-Out accounts will be to ensure [sic]:
>
> - That the 31 March Indian financial information and the 30 June 2011 financial information is appropriately consolidated — in this regard, the inter-company balances as at both dates must be reconciled within each company — at present I cannot determine if they are reconciled and I seek such information.
> - That the Normalisation Agreement Reference Income Statement, 2011 Earn-Out benchmarks have been used correctly. This needs to be evidenced as part of reconciling the 30 June Australian profit of $170,698 (per the attached spreadsheet) to the $36,482 trading profit in the T3 calculations already provided.
>
> In respect of Applicable Accounting Standards, I am aware that Padgham & Partners Pty Ltd at 30 June 2009 and Sweett (Australia) Pty Ltd at 31 March 2011 prepared financial statements in the form of Special Purpose Reports (SPR) — in other words there was a consistency of approach BUT different Accounting Standards were adopted in these two sets of financial statements. When the Australian company financial information is provided as part of the Earn-Out accounts, I will need to be made aware of which Accounting Standards have been adopted in their preparation.[7]

21 It would appear that as late as 11 December 2013, the expert still anticipated receipt of Earn-Out Accounts as requested. He sent an email to the parties in which he sought advice on various matters 'pending receipt of the Earn-Out Accounts'.

22 On 23 December 2013, the expert wrote to the parties seeking further information, but not including the Earn-Out Accounts. He proposed an interim determination 'in respect of all the matters I have addressed' by 16 January 2014. The plaintiffs'

[7] Emphasis added.

solicitor responded, on 8 January 2014:

> The Sellers do not believe that there is any benefit to an interim determination on 16 January 2014 as they are unable to assess the potential of the requested information to a [sic] affect such an interim determination and further there appears to be no utility in the provision of an interim determination in relation to T3.
>
> The Sellers request that you continue to exercise your discretion (paragraph 1.5 of the letter of appointment of 8 October 2013) to defer the final decision pending receipt of the *requested information* from the Buyer. The Sellers request that the continued exercise of the discretion be reviewed on 14 January 2014, if the requested documents have not been received by 13 January 2014.[8]

23 The 'requested information', mentioned in the second paragraph by the plaintiffs' solicitor, concerned an intercompany loan reconciliation, and the date upon which a property in Greville Street had been vacated. Those matters were mentioned in the first paragraph of the expert's email of 23 December 2013, as the basis for a proposed interim determination pending receipt. Nothing was said by the plaintiffs' solicitor about the Earn-Out Accounts. He might have, but did not insist that the expert stop work until he had received the accounts. To do so would have been inconsistent with the agreement between the parties and the instruction to the expert that he should proceed on the basis of the T3 Reconciliation. The 'requested information', coinciding with the expert's request of 23 December 2013, was delivered by Sweett Group on 13 January 2014.

24 On 14 January 2014, the plaintiffs' solicitor requested that a final determination be deferred to 30 January 2014 to enable Mr Jones, the plaintiffs' expert, to assess the 'requested information' recently provided by Sweett Group. A written submission on behalf of the plaintiffs was emailed to the expert on 30 January 2014, dealing with intercompany loan reconciliations, the Greville Street property and some other expenses. The plaintiffs well knew that the expert did not have the Earn-Out Accounts. No attempt was made to further defer a final determination, nor did the plaintiffs complain that the expert did not have available to him all material

[8] Emphasis added.

necessary to make his determination. The expert's determination was published on 10 February 2014.

25 The determination, erroneously dated 10 January 2014, commenced:

> The above Parties have sought an expert determination ("Determination") in respect of a commercial dispute arising out of a share purchase transaction. The transaction is evinced by a Share Purchase Agreement dated 28 January 2010 ('Agreement'). *My appointment to make this Determination has been made in accordance with Paragraph 3.12 of the Agreement.*
>
> **1. SUMMARY OF DETERMINATION**
>
> a. *The scope of this Determination has been limited by the Parties not providing a copy of the Earn-Out Accounts prepared in accordance with clause 3.9 of the Agreement.* Therefore I am not able to determine:
>
> i. If the Earn-Out Accounts fairly represent the financial position and PAT of the relevant Group Company, and
>
> ii. If the Earn-Out Accounts have been prepared in accordance with Applicable Accounting Standards, refer paragraph 7.
>
> b. *I have determined that:*
>
> i. *The Normalisation Principles as defined in the Agreement and the Normalisation Agreement apply to the T3 calculation.*
>
> ii. The Peter Cox termination payment settlement and the associated legal fees should not be included in expenses in the T3 calculation.
>
> iii. A Greville Street property rental adjustment is made in favour of the Buyer in the amount of $43,561.
>
> iv. The Related Party Transaction adjustment of $137,648, calculated by the Buyer, should be used in the T3 calculation in favour of the Sellers.
>
> v. The Sellers submission to adjust the T3 calculation for Indian expenses relating to Ex-Gratia payments, loss on sale of fixed assets, bad debts and travel is not accepted.
>
> vi. An adjustment arising from the reconciliation of the loan accounts between the Sweett (Australia) Pty Ltd and Padghams Cost Management Private Ltd requires an increase in expenses of $8,411.
>
> vii. The Determination calculates an adjusted Profit After Tax (PAT) of $333,198 which achieves a T3 calculation of $366,517

per Appendix E.[9]

The issues

26 The plaintiffs complained that in the absence of the Earn-Out Accounts, the expert failed to perform his contract. They insisted that the expert was obliged to require Sweett Group to prepare and deliver Earn-Out Accounts, and to express any opinion in respect of such accounts under cl 3.12(c)(ii). They contended that his failure to do so vitiated his determination. There was a second limb to the plaintiffs' case, in which they challenged the correctness of various adjustments made by the expert, which had the effect of reducing the amount of Tranche 3.

27 Sweett Group responded, contending:

(a) the contract with the expert did not require him to consider and make the determinations under cl 3.12(c)(ii) of the Share Purchase Agreement, because the Expert Determination Agreement had been amended by the parties so as not to require the production of Earn-Out Accounts;

(b) alternatively, the plaintiffs ought to be estopped by their conduct from asserting a requirement that the determination be made on the basis of the Earn-Out Accounts;

(c) alternatively, the plaintiffs had waived any requirement that the determination be made on the basis of the Earn-Out Accounts; and

(d) in any event, relief ought to be refused on discretionary grounds by reason of the conduct of the plaintiffs.

Principles

28 The relevant principles were not in dispute, and are conveniently summarised by Maxwell P in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd*,[10] where his Honour said:

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9 Emphasis added.

10 [2013] VSCA 179 [14]–[22], citations omitted; emphasis added.

14. It is a commonplace in commercial contracts for provision to be made for the determination — whether by an independent expert or by one of the parties — of a particular cost, value or quantity. As a consequence, intermediate appellate courts have frequently had to consider whether, and to what extent, a determination of this kind can be reviewed by a court (or, where the contract so provides, by an arbitrator). As will appear, the applicable principles have been clearly enunciated, and consistently applied, by the appellate courts of several States.

15. The question, first and last, is one of contract. What did the parties bargain for? If the determination given does not satisfy the terms of the contract, then it is of no effect and, at the option of the parties, must be done again. If, on the other hand, the determination complies with the contract, the parties are bound by it.

16. The starting point is the judgment of Lord Denning MR in *Campbell v Edwards*, where his Lordship said:

> 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 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.

17. The recent Australian jurisprudence starts with the judgment of McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*, as follows:

> [A] valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. *In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract?* If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. *The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.*

18. The most comprehensive analysis of the applicable principles is to be found in the judgment of the Full Court of the Supreme Court of Western Australia in *W M C Resources Ltd v Leighton Contractors Pty Ltd*. Ipp J (with whom Kennedy and White JJ agreed) enunciated the principles as follows:

    1. By the contract, the parties agree to be bound by a determination made in accordance with the terms of the contract. If the valuation complies, the parties are bound.

    2. A court (or an arbitrator) will not set aside a determination merely on the ground that it is incorrect or that it reveals

errors. The determination will only be interfered with if it is not made in terms of the contract.

3. There will ordinarily be implied terms of the contract that the process of making the determination will be conducted honestly, bona fide and reasonably.

4. Given that the parties have bound themselves to accept a determination which complies with the contract, a statement in the contract that the determination is 'final and binding' adds little.

5. No different approach is required where, in accordance with the contract, the determination is made by one of the parties to the contract or its representative.

19. The WA Full Court also elucidated the distinction between a determination which involves a 'mechanical' computation and one which requires the exercise of 'discretionary' judgment. The former is characterised by the application of 'detailed fixed and objective criteria as to how the value of amounts to be certified … is to be determined'. Application of the applicable criteria does not involve any exercise of judgment. 'It is a mechanical exercise'. Ipp J said:

> Ordinarily, in cases of this kind … there will only be one uniquely correct value. If the certifying valuer, in these circumstances, arrives at the incorrect value, the valuation will be in breach of the contract. It is for that reason that an incorrect certificate will also be set aside. The court will then have the jurisdiction to determine the correct amount owing in terms of the contract.

20. A 'discretionary' judgment, on the other hand, will typically be required (or authorised):

> where no fixed or readily available standard criteria exist. There may be several possible methods of assessing value, each giving widely different results, but each being reasonable. Many subsidiary factors relevant to the valuation may be uncertain, many contingencies may have to be taken into account, wide ranges of legitimate decisions may apply, and opinions may legitimately differ as to virtually all of the relevant issues.

In such a case, there will be no 'uniquely correct' determination. The determination will 'merely have to be within the terms of the contract'.

21. It is, of course, possible that the parties may contract for a determination which requires both mechanical calculation and the exercise of judgment. *A G L* was such a case. Nettle JA (with whom Maxwell P and Bongiorno AJA agreed) said:

> Therein lies the distinction drawn in some of the authorities, and observed by the judge in this case, between an error in the exercise of a judgment, opinion or discretion entrusted to an expert, and an error which involves objective facts or a mere mechanical or arithmetical exercise. Subject to the contract in question, it is

> easier to suppose that parties to a contract contemplate that an error of the former kind be beyond the realm of review than it is to think that they intend to be fixed with errors of objective fact or in processes of mechanical calculation.
>
> As this case demonstrates, however, matters are likely to be more complex where error occurs in the course of an exercise which is partly comprised of discretion, judgment or opinion and partly constituted of objective fact or mechanical calculation. In some such cases, the overriding discretionary or judgmental character of the exercise may so inform each step in the determination as to put even those steps which are matters of objective fact or mere mechanical calculation beyond the scope of permissible review. In other instances it may appear that, despite the overall character of the exercise, the various steps in the determination are severable, according to whether they are essentially discretionary or judgmental or simply matters of objective fact or mechanical calculation, and that those steps which are of the latter kind are within the scope of permissible review. *The question in each case is what the parties should be presumed to have intended, and that is to be determined objectively from the terms of the contract, bearing in mind the context in which it was created*.

22. Accordingly, the question for determination in the present case is whether what the Superintendent did complied with the contract. If it did, then in accordance with their agreement, the parties are bound by the Superintendent's conclusion.

The contract

29 The plaintiffs contended that the determination did not fall within the terms of the contract. There was some confusion and misunderstanding about the contract and the terms under which the determination had been made. There were two relevant contracts. On the one hand, there was the Share Purchase Agreement which bound the parties to it. There was also a contract of engagement between the parties and the expert. The terms of the contract of engagement did not conform, in a material respect, with the engagement contemplated under cl 3.12. The plaintiffs formulated their case as if there could only be one relevant tripartite contact to which the expert was a party, defined by the terms of cl 3.12. They alleged a breach by the expert of his retainer. They went so far as to make a consequential claim for compensation.

30 The plaintiffs described the relevant contract as the 'Expert Determination Agreement'. They submitted the agreement was contained in the letter of appointment dated 7 October 2013 and the letter of acceptance dated 8 October 2013.

31 Having thus defined the contract, the plaintiffs contended that the expert was required to strictly comply with each and every obligation in cl 3.12, unalloyed by the actual terms of the correspondence. In other words, merely because the expert had been instructed to make his determination on the basis of the T3 Reconciliation, he was not relieved of his obligation under cl 3.12(c)(ii) to consider the Earn-Out Accounts, which in turn, required him to insist upon the preparation of Earn-Out Accounts in compliance with cl 3.9.

32 The plaintiffs contended that the parties had not dispensed with the requirement that the Earn-Out Accounts be prepared under cl 3.9, in accordance with the Applicable Accounting Standards. They argued that, once appointed, the expert 'took control of the process' and, notwithstanding the terms of his appointment, was required to demand the preparation and production of Earn-Out Accounts as defined, and must make his determinations about those accounts under cl 3.12(c)(ii) of the Share Purchase Agreement.

33 In supplementary written submissions, filed in course of his closing address, plaintiffs' counsel emphasised that the expert was not constrained by his instructions because he had the power to require the production of documents, including the Earn-Out Accounts that were necessary for his determination. They emphasised his control of the process. In so doing, the plaintiffs sought to impose on the expert a duty to override his instructions and to minimise, or even neutralise, the significance of their conduct in formulating his terms of engagement and thereafter.

34 While, the parties purported to appoint the expert under cl 3.12 of the Share Purchase Agreement, he was appointed in the absence of Earn-Out Accounts, to adjust the T3 Reconciliation as if it were the Earn-Out Accounts. Quite plainly, the parties to the Share Purchase Agreement were prepared to and did treat the T3 Reconciliation as sufficient for the purpose. They expressly agreed between themselves, and with the expert on his engagement, that the T3 Reconciliation was, for the purpose of cl 3.12, to be treated as the Earn-Out Accounts. The letter of engagement recorded an agreement between the parties to the Share Purchase

Agreement and the expert that the determination would be binding under cl 3.12.

35 The Sweett Group contention that the parties had agreed to amend the Expert Determination Agreement (defined by the plaintiffs as constituted by the letters of engagement and acceptance) was misconceived. There was no amendment to the retainer agreement. The letters constituted the agreement between the parties and the expert on the terms of a binding determination to be made under the Share Purchase Agreement.

36 Insofar as it is necessary to decide, by their agreement, reflected in that correspondence, the parties to the Share Purchase Agreement may be taken to have varied the terms of the dispute resolution process under cl 3.12. A binding determination was to be made in the absence of Earn-Out Accounts. Moreover, the parties to the Share Purchase Agreement must be taken to have agreed that Sweett Group was not required to provide Earn-Out Accounts in compliance with cl3.9. They must also be taken to have agreed that the review and any adjustments to be made under cl 3.12(c)(ii) would take place as if the T3 Reconciliation stood in place of the Earn-Out Accounts. They agreed to substitute the T3 Reconciliation for the Earn-Out Accounts which were otherwise due under cl 3.9.

Performance by the expert

37 Quite clearly, the expert did not express an opinion about accounts that did not exist. The parties had relieved him of that obligation by substituting the T3 Reconciliation for Earn-Out Accounts, and refusing to provide the Earn-Out Accounts. In his determination, the expert stated that the Normalisation Principles had been applied to the T3 Reconciliation. He made consequential adjustments.

38 It was an agreement between the parties to the Share Purchase Agreement that diverted the expert from a consideration of the Earn-Out Accounts, requiring instead that he consider, and where necessary make adjustments to, the T3 Reconciliation. In so doing, the parties agreed upon a convenient modification to the terms of the Share Purchase Agreement, which did not deprive the determination of its binding

effect under cl 3.12(e), notwithstanding the absence of formal Earn-Out Accounts prepared and delivered under cl 3.9.

39 Having told the parties that he required the Earn-Out Accounts 'to appropriately comply with the Agreement clause 3.12(c)', and explaining their utility in providing additional information, the expert was told to complete his work in the absence of such accounts. That was a term of his engagement. The expert did not fall into error by failing to obtain a copy of the Earn-Out Accounts, and expressing the opinion required under cl 3.12(c)(ii) in relation to such accounts. In my opinion the absence of Earn-Out Accounts does not vitiate the determination. The expert performed his contract with the parties, although dissatisfied with the information provided to him.

Waiver and estoppel

40 Insofar as it may be necessary, I would find that by their agreement, the plaintiffs waived their right under cl 3.9 to the preparation and delivery of Earn-Out Accounts. Alternatively, by their conduct they are precluded from now contending that the expert failed to perform his contract in the absence of Earn-Out Accounts. The plaintiffs' conduct includes their agreement with the expert on the scope of his engagement, representations made to the expert and Sweett Group that the T3 Reconciliation was sufficient for the purpose, and the plaintiffs' failure to insist upon the preparation and production of Earn-Out Accounts when sought by the expert.

No error

41 The determination to be made by the expert was not merely a mechanical calculation. He was called on to exercise discretionary judgment. Pursuant to his engagement, the expert was required to determine whether the Earn-Out Accounts, as reflected in the T3 Reconciliation, fairly represented the financial position and profit after tax of the entities in accordance with the *Australian* Accounting Standards (rather than the Applicable Accounting Standards) and the Normalisation Principles.

He was required to make necessary adjustments to the T3 Reconciliation of the kind contemplated under cl 3(12)(c)(ii) of the dispute resolution clause.

42 The second limb of the plaintiffs' case relied on alleged errors made by the expert in arriving at his determination. It was necessary for the plaintiffs to establish that the alleged errors in the determination, which involved the formation of opinions and the exercise of judgment, vitiated the determination. In other words, insofar as the plaintiffs established some error, could it be said that the determination departed from what the parties had agreed in their contract? I have found that the terms of the relevant contract are contained in the letters of appointment and acceptance, which had the effect of amending cl 12.3 of the Share Purchase Agreement.

43 The expert had calculated the amount of Tranche 3 in the sum of $366,517. The calculation of Profit After Tax was at the heart of the calculation. That element was a combination of profit derived from operations in Australia and India. The expert calculated profit at $333,198. The plaintiffs contended that the amount should have been much higher. They relied on the Jones report, employed by them as a part of their submission to the expert. In that report, Mr Jones expressed the opinion that the Normalisation Principles required adjustments to be made, when calculating Profit After Tax, to arrive at a figure that represented 'maintainable earnings'. He defined maintainable earnings as 'those earnings that are achieved in the ordinary course of business'. He went on to argue that such a definition was implied into the Share Purchase Agreement. Mr Jones advocated for adjustments to be made on that basis.

44 The implication of such a principle into the dispute resolution agreement between the parties was not developed by the plaintiffs in argument. Their central contention was that Mr Jones was correct when applying the 'maintainable earnings' principle, and that the expert had wrongly rejected that principle. The plaintiffs' central thesis was that the opinion of Mr Jones ought to have been accepted and applied by the expert, and he wrongly declined to do so.

45 The plaintiffs contended, perhaps in the alternative, that such adjustments were required under the Normalisation Principles because cl 3.1(c) incorporated a requirement that Earn-Out Accounts must be prepared on the basis of maintainable earnings. They submitted that the application of that concept in the present context was required as a 'generally accepted accounting standard'. They also argued that the exclusion of 'abnormal and extraordinary items' was required under cl 3.1(b), because the definition of Applicable Accounting Standards in cl 1 of the Share Purchase Agreement included 'generally accepted accounting principles and practices'.

46 The plaintiffs contended that the expert failed to exclude 'abnormal and extraordinary items'. The contentious items were:

(a) an amount of $53,435, described as ex-gratia payment (India);

(b) a proposed adjustment of $18,320 in relation to the loss on sale of fixed assets (India);

(c) the sum of $75,220 relating to an item described as travel (India).

47 In relation to each of those items, the plaintiffs relied on the Jones report to contend for an adjustment by removing that sum from the calculation of Profit After Tax. The expert dealt with each such item, recording the plaintiffs' argument for an adjustment, and rejecting it.

48 In relation to each proposed adjustment, the expert determined:

> I have previously determined in this report that I do not accept the maintainable earnings approach adopted by Mr Jones in his handling of the 'context' of the Normalisation Principles as defined in the Agreement.
>
> Further, the matter submitted by the Sellers does not fall within the adjustments to direct costs listed in clause 4.1 of the Normalisation Agreement.
>
> In consideration of the foregoing, I determine that the Sellers submission is not accepted.

49 In his determination, the expert made frequent reference to the Normalisation Principles, describing them as an important feature of the agreement. It was not suggested that he failed to have regard to the Normalisation Principles. The plaintiffs' case was that he had misinterpreted those principles by refusing to accept the opinion of Mr Jones and exclude abnormal and extraordinary items.

50 The expert dealt expressly Mr Jones' opinion in his report, and concluded:

> Mr. Jones has interpreted adjustments under the Normalisation Principles as having the same impact on the tranche calculations as adjustments used when determining maintainable earnings in business and enterprise valuations. While this comparison is somewhat analogous, Mr Jones has not adequately considered the specificity of the provisions of the Normalisation Agreement that would apply to the 2011 Earn-Out. There are three categories of 'principles' to be examined, as described in 8(c) above.
>
> i. The first category relates to a list of 'Specific accounting principles policies and procedures' set out in clause 4 of the Normalisation Agreement. The matters listed are not subject to accounting standards or levels of magnitude that may make them abnormal or extraordinary in the ordinary course of financial analysis; these matters are specific and in my opinion would apply to the T3 calculation.
>
> ii. The second category of principles relates to those not covered by the first category but which are used 'in a manner consistent with the accounting principles, policies and procedures used to prepare the Earn-Out Accounts' in accordance with the Agreement, clause 3.9. This clause requires that the Earn-Out accounts be prepared in accordance with Applicable Accounting Standards. Accounting standards do not address the concept of maintainable earnings in the sense developed by Mr Jones. Accounting standards address the timing of financial disclosures, in what format and to what extent are they disclosed to the reader and determining if financial information is on capital or revenue account.
>
> iii. The third category of principles relates to any generally accepted accounting standards in the Relevant Jurisdiction, assumed by me to be Australia and India. Again, the comments in respect of accounting standards in (ii) above equally apply. I note that the Padghams Cost Management Private Limited audited financial statements for the year ended 31 March 2011 have been prepared in accordance with the 'Indian Generally Accepted Accounting principles and comply with the mandatory accounting standards and statements issued by the Institute of Chartered Accountants of India and the Companies Act, 1956'.

In consideration of the foregoing, I determine that the Normalisation Principles

> as defined in the Agreement and the Normalisation Agreement apply to the T3 calculation. *Further, the disputed matters to be examined are not to be determined within the concept of maintainable earnings or some similar refinement that seeks to adjust results 'that are achieved in the ordinary course of business' (Mr Jones, paragraph 7.16) but rather within the scope of the Normalisation Principles and Normalisation Agreement*.[11]

51 The plaintiffs did not advance any evidence, in the nature of admissible expert opinion, that the approach advocated by Mr Jones in his report, deployed by them as part of their submission to the expert, was an applicable accounting principle, policy or procedure, or fell within the definition of applicable accounting standards, or was a generally accepted accounting standard in the Relevant Jurisdiction (as defined in cl 1 of the Share Purchase Agreement). I do not regard the Jones report, exhibited to the affidavit of the expert, as substituting for such evidence. The Jones report was included as an exhibit to Mr Wettenhall's affidavit, sworn 27 June 2014, to inform the court of the course and content of submissions by the parties. He had made frequent reference to the Jones report in his determination. The Jones report was in the nature of a submission which the expert took into account. It does not substitute for admissible expert opinion for the purpose of this trial. Thus, foundation of the second limb of the plaintiffs' case failed for lack of evidence.

52 Furthermore, I am not persuaded by the plaintiffs' contention that the expert rejected the proposition that the exclusion of abnormal and extraordinary items might be appropriate when seeking to ascertain maintainable earnings. The expert was required to apply the Normalisation Principles. He concluded that those principles did not require augmentation by the application of a 'maintainable earnings' approach. Specific adjustments were required under cl 4, which he applied. Some of those adjustments might be characterised as reflecting a 'maintainable earnings approach'. The expert also concluded that the accounting standards to be applied more generally did not require such an approach. The plaintiffs did not establish that they did. They failed to establish that the more general accounting standards, practices and procedures supported the opinion of Mr Jones. Accordingly, the plaintiffs failed to establish that the expert misdirected himself as alleged.

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11 Emphasis added.

53 There was a further alleged error concerning the calculation of taxation. The T3 Reconciliation document disclosed Australian income tax for the 2011 year as nil, and Indian taxation for the same year at $15,466. The plaintiffs argued that under the Normalisation Principles (cl 4.4), taxation was to be accounted for as incurred. Thus, they argued, there was no occasion for any adjustment by the expert. They contended that the expert had, contrary to his obligation under the Normalisation Principles, calculated a liability for Australian company tax as 30 per cent of calculated profit. The amount of his calculated tax liability was $46,409.

54 Unfortunately, Sweett Group left the expert to deal with the alleged errors in his determination. That was unhelpful and unfair. The expert should not have been required to defend his determination. The expert complained that the alleged erroneous adjustment to the Australian company tax was only raised by the plaintiffs in their submissions dated 28 November 2014, and he had not been given an adequate opportunity to respond. Notwithstanding this difficulty, the expert pointed to the fact that the T3 Reconciliation expressly nominated an Australian tax rate of 30 per cent. Furthermore, the T3 Reconciliation, on which the plaintiffs relied for this part of their case, refers to Australian tax of $0, but with the adjacent note 'remove tax and report separately'. On the second page of the T3 Reconciliation there is an amount for Australian tax, calculated on a trading profit, at the rate of 30 per cent.

55 I do not accept the premise of the plaintiffs' contentions on the taxation issue. The reference to nil tax on which they relied, as the amount 'incurred', misunderstood the T3 Reconciliation. The tax liability, for the purpose of the calculation in the T3 Reconciliation, was removed and dealt with separately. There is reference to a calculation on the second page of the T3 Reconciliation.

56 The plaintiffs also advanced some argument about the meaning of 'incurred', although at a very rudimentary level. It had been the plaintiffs' primary contention that, because the T3 Reconciliation identified a nil amount for Australian tax, none

had been incurred. The T3 Reconciliation did not support that analysis. What it did support was an Australian company tax rate of 30 per cent to be applied to profit.

57 The plaintiffs have failed to establish that the expert made the errors identified by them as part of the second limb of their case.

Relief against the expert

58 By their Originating Process, the plaintiffs sought an order for costs against the expert, in addition to a more conventional order that he make a determination pursuant to the contract. Ordinarily, where there is a contest between parties to a contract for an expert determination, the expert will, if joined, notify the court that he or she will abide the outcome, and take no active part in the proceeding. In this case, by reason of the allegation of breach of contract and claim for costs, the expert felt obliged to fully participate in the trial, and was represented by solicitors and counsel.

59 The claims made against the expert were expressed as claims for compensation for breach of contract. They were contingent, unpleaded, and premature at best. Sweett Group made a claim for costs against the expert in the event of a declaration to the effect that he had failed to perform his contract.

60 One consequence of the elevation of the expert's role to that of an active participant at trial was the expectation by the plaintiffs that he would adduce evidence in support of his determination. On the other hand, the Sweett Group stood back and assumed that the expert would address alleged errors in his determination. There was no reasonable basis for either expectation. The expert was not required to support or justify his determination by adducing evidence; nor was it reasonable to assume, and proceed on the basis, that it was up to him to respond to alleged errors.

61 The claims made against the expert for costs must fail. They are misconceived. He ought not to have been required to participate in the trial. The remaining question is: who must pay his costs and on what basis?

Conclusion

62 The plaintiffs have failed to establish that the determination did not conform with the terms of the contract. They have failed to establish any breach of contract by the expert. They have also failed to establish any error made by him in his determination. Accordingly, their claims for relief against the defendants are dismissed.