SUPREME COURT OF QUEENSLAND

CITATION:	*Drane v Aqualyng Holdings & Anor* [2017] QSC 233
PARTIES:	**ROBERT MAXWELL DRANE** (plaintiff) **v** **AQUALYNG HOLDINGS AS REG NO 991180958** (first defendant) and **AQUALYNG O&M PTE LTD REG NO 2014122001Z** (second defendant)
FILE NO/S:	SC No 282 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	5 October 2017 (ex tempore)
DELIVERED AT:	Cairns
HEARING DATE:	3, 4 & 5 October 2017
JUDGE:	Henry J
ORDERS:	**1. The Court declares that the contracts mentioned in the pleadings and known as:** **(a) the share sale agreement; and** **(b) the agreement in writing constituted by the plaintiff exercised by written notice to the defendants of the option for the sale by the plaintiff to the defendants of one ordinary share held by plaintiff in the capital of Integrated Chemical and Environmental Systems Pty Ltd ACN 086 243 772, being the put option provided for under the terms of the put and call option deed entered into between the plaintiff and defendants;** **so far as they have not already been performed, ought to be specifically performed and carried into execution, and orders and adjudges accordingly.** **2. The Court further declares that:** **(a) pursuant to clause 9.7(h) of the share sale agreement, the determination of current year**

actual EBITDA as $2,255,303 by Mr Ross Walker of the firm Pitcher Partners, as an independent accountant within the meaning and for the purposes of clause 9.7 of the share sale agreement, is and has been final and binding upon the parties with effect from 12 April, 2017; and

(b) the initial purchase price fixed at $5,845,091 became payable in the manner required by clauses 9.3 and 9.5 of the put and call option deed on and from 3 May, 2017.

3. In performance and execution of the said contracts, the defendants must pay to the plaintiff forthwith:

(a) the sum of $1,043,810, being the adjusted final payment amount payable under clause 4.5(b) of the share sale agreement and calculated in accordance with clause 8.2 of the share sale agreement;

(b) interest in the sum of $204,701 pursuant to clause 8.4(c) of the share sale agreement; and

(c) the initial purchase price to a value of $5,845,091 in the manner required by clauses 9.3 and 9.5 of the put and call option deed.

4. The plaintiff is entitled to damages in addition to specific performance in the sum of $652, 407 being the total of:

(a) $503,478 calculated on a daily basis at six per cent simple on the value of $5,845,091 over 525 days over the period between 29 July 2014 and 5 December 2016; and

(b) $148,929 being 155/365 x $5,845,091 x 6/100.

5. There be liberty to any part to apply on two business days' written notice.

6. The counter-claim be wholly dismissed.

7. The parties have:

(a) 21 days to file and serve written submissions as to costs together with any supporting materials; and

(b) 7 days thereafter to file and serve any written submissions in reply on the understanding the Court will decide costs on the papers unless on receipt of the written submissions the Court decides and notifies the parties that it also requires oral submissions.

CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – SHARE SALE AGREEMENT – DISPUTE RESOLUTION CLAUSE – MANIFEST ERROR – where the parties appointed an independent expert – whether or not the determination of the independent accountant involved "manifest error"
	Drane v Aqualyng Holdings and Anor [2016] QSC 139 *Funtastic Ltd v Madman Film and Media Pty Ltd ('Funtastic')* [2016] VSC 708 *Galaxy Energy International Ltd v Eurobunker SPA*[2001] 2 Lloyd's Rep. 725 *Gibraltar Betting and Gaming Association Limited v Secretary of State for Culture, Media & Sport* [2014] EWHC 3236 (Admin) *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4
COUNSEL:	M Jonsson QC for plaintiff D Pyle for defendant
SOLICITORS:	Preston Law for plaintiff Minter Ellison for defendant

[1] **HENRY J:** I discussed the background of this matter in my reasons for dismissing a summary judgment application by the plaintiff delivered on 17 June 2016; see *Drane v Aqualyng Holdings and Anor*.[1]

[2] In preparation for this week's listed trial of the matter, the parties reached points of consensus, outlined in exhibit 1. The points of consensus show the parties have agreed that the share sale agreement and the plaintiff's exercise by written notice of a put and call option should, to the extent they have not already been performed, be specifically performed and carried into execution. They are also in agreement that an adjusted final payment amount of $1,043,810, being the final payment under the share sale agreement reduced by the tax indemnity the subject of the counter-claim, must be paid by the defendants to the plaintiff forthwith along with interest thereon at the rate of six per cent per annum from 30 June 2014 until payment.

[3] This effectively leaves a single issue for determination by the Court, namely, whether the determination of an independent accountant appointed by the parties under their agreement's dispute resolution procedure involved "manifest error". In the absence of manifest error it is common ground that the parties are contractually bound by that determination.

[4] Before turning to the dispute resolution procedure, it is convenient to identify the source and nature of the dispute. The plaintiff's exercise of the put and call option, pursuant to

[1] [2016] QSC 139.

a put and call option deed executed by the parties, compels the defendants' purchase of a further share, the option share, in the company the subject of the share sale agreement, Integrated Chemical and Environmental Systems, also referred to as ICES. The deed provides for the determination of the option share purchase price by reference, inter alia, to the initial purchase price, of which it provides, at clause 9.2:

> "The Initial Purchase Price is determined as follows:
> Initial Purchase Price = 8 x Current Year Actual EBITDA minus the Sale Shares Price, which amount shall be no less than A$1,802,667 and no more than A$7,802,667.
> The Current Year Actual EBITDA will be determined in accordance with clause 12."[2]

[5] As to the determination of current year actual EBITDA, clause 12, in turn, provides:

> "The Purchaser must procure that:
> (a) the Company prepares the Current Year Accounts;
> (b) the Auditors audit the Current Year Accounts; and
> (c) the Auditors determine the Current Year Actual EBITDA,
> under clause 9 of the Share Sale Agreement as soon as practicable after 30 June 2014 and, in any case, no later than 31 August 2014 or such other date agreed by the parties."[3]

[6] The process thus relates back to the auditor's role under clause 9 of the share sale agreement, particularly clauses 9.1 to 9.4, which provide:

> "**9.1 Completion Accounts – Net Current Assets Amount**
> The Purchaser must as soon as practicable, and in any event no later than 20 Business Days, after the Completion Date procure that the Company prepares the Completion Accounts in accordance with the Accounting Standards and has them audited by the Auditor and following the preparation an audit of the Completion Accounts the Purchaser must procure that the Company gives a copy of the Completion Accounts, together with copies of the working papers relating to the preparation of the Completion Accounts to the Vendor.
>
> **9.2 Current Year Accounts**
> The Purchaser must procure that the Company prepares the Current Year Accounts in accordance with the Accounting Standards and that the Auditor audits the Current Year Accounts as soon as practicable after 30 June 2014.
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> **9.3 Instructions to Auditors – Completion Accounts**
> As soon as practicable after the Completion Accounts are prepared, but in any event no later than 10 Business Days after providing the Completion Accounts to the Auditor, the Purchaser must instruct the Auditors:
> (a) to audit the Completion Accounts as soon as practicable;
> (b) prepare and provide to the Purchaser and the Vendor as soon as practicable after completion of the audit:
> (i) a copy of the audited Completion Account; and

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2 Ex 2, Vol 1, 'Put and Call Option Deed' clause 9.2, p 109.
3 Ex 2, Vol 1, 'Put and Call Option Deed' clause 12, p 112.

(ii) a written report stating the Net Current Assets amount and any adjustment payable.

9.4 Instructions to Auditors – Current Year Actual EBITDA
As soon as practicable after 30 June 2014 and completion of the Current Year Accounts, the Vendor and the Purchaser must jointly instruct the Auditors to:
(a) calculate the Current Year Actual EBITDA based on the Current Year Accounts; and
(b) give the Vendor and the Purchaser a written report confirming the Current Year Actual EBITDA."[4]

[7] It is noteworthy that clause 9.2 requires the company to prepare the current year accounts "in accordance with the Accounting Standards". The agreement defines the term "accounting standards":

"**Accounting Standards** means the Australian Accounting Standards, but if and to the extent that any matter is not covered by Australian Accounting Standards, means generally accepted accounting principles applied in Australia for a company similar to the Company."[5]

[8] However, under clause 9.4, it is necessary for the auditor to calculate the current year actual EBITDA "based" on the current accounts. This is consistent with the share sale agreement's definition of "Current Year Actual EBITDA", which means "the actual Normalised EBITDA for the financial year ending on 30 June 2014 based on the Current Year Accounts".[6] As to EBITDA, it is defined in the share sale agreement, and the deed for that matter, as follows:

"**EBITDA** means the net profit after tax of the Company (as shown in the relevant Accounts), plus, without duplication and to the extent deducted from revenues in determining net profit after tax:
(a) the aggregate amount of net interest expense;
(b) the aggregate amount of Tax expense;
(c) all amounts attributable to depreciations and amortisation, for the Company for the relevant period to which the relevant Accounts relate, as calculated in accordance with the Accounting Principles."[7]

[9] The definition of EBITDA thus involves calculations not in accordance with "Accounting Standards", as is necessary for the preparation of the current year accounts on which they are based, but in accordance with "Accounting Principles". That term is also defined in the share sale agreement:

"**Accounting Principles** means the policies, principles and methodologies used by the Company as for the preparation of the Accounts."[8]

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4 Ex 2, Vol 1, 'Share Sale Agreement' clause 9.1-9.4, p 39.
5 Ex 2, Vol 1, 'Share Sale Agreement' clause 1, p 20.
6 Ex 2, Vol 1, 'Share Sale Agreement' clause 1, p 22.
7 Ex 2, Vol 1, 'Share Sale Agreement' clause 1, p 23; Ex 2, Vol 1, 'Put and Call Option Deed' clause 1.
8 Ex 2, Vol 1, 'Share Sale Agreement' clause 1, p 20.

[10] It can therefore be seen that the company's individual methodologies must necessarily be considered in this process. The definition of normalised EBITDA, a term used in the definition of current year actual EBITDA, is also consistent with an approach whereby, even after reference to the base of the current year accounts, there are adjustments to that base to cater for considerations individual to the company. That definition is:

> "**Normalised EBITDA** means EBITDA after removing/including as the case may be, non-recurring or abnormal expenses or revenue, including, but not limited to, the following adjustments or add-backs:
>
> (a) non-recurring income or expense (eg, the gain loss from stock take);
> (b) revenue or income generated from the Excluded Assets;
> (c) costs or expenses incurred in relation to the upkeep of the Excluded Assets;
> (d) costs or expenses incurred by the Company that are of private or domestic nature in favour of the Vendor and his associates;
> (e) expenditures of a capital nature that were expensed;
> (f) the remuneration paid, or expected to be paid by the company to the vendor, either in the form of franked/unfranked dividends, or in the form of salary; and
> (g) the profit/loss arising on sale of ex-hire plant after accounting for written-down value in relation to the item."[9]

[11] Notable in that non-exhaustive list of items for adjustment is "(e) expenditures of a capital nature that were expensed", expenditures which are the very type of adjustment which was the subject of the dispute resolution procedure here. Significantly, it is an adjustment of a kind specifically contemplated for the purposes of the agreement, as distinct from an adjustment which would necessarily have occurred as a matter of historical pattern in the company's past yearly accounts.

[12] The interim report of the auditors, PwC, identified the potential adjustment, which, if made, would favour the plaintiff vendor, and opted not to make it, stating, inter alia:

> "Capital labour (not adjusted in normalised EBITDA)
>
> The Agreement allows a normalisation adjustment for the write backs of capital costs. The vendor has proposed an adjustment to write back capital labour and associated incidentals in relation to internally constructed hire plant of $136,657. Under AASB 116 – Property, Plant and Equipment, internal labour costs may be capitalised where associated with bringing the asset to workable condition. Similarly the Australian Taxation Office (ATO) issued an interpretive decision in 2011 (ATO ID 2011/42) which requires labour incurred on self-constructed assets to be capitalised and not claimed as a wage deduction. Therefore there is no difference in the substance of treatment of labour costs between the accounting standards and taxation requirements that would cause a temporary difference of the nature identified in the adjustment.
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> On review of the capitalised labour EBITDA adjustment, a transaction listing of labour transactions by project number was provided. The timesheets detail the project time was allocated to and the number of hours, however we were unable to verify the nature of work performed to confirm that activities were capital in nature. We also noted that some of the

[9] Ex 2, Vol 1, 'Share Sale Agreement' clause 1, p 26.

> proposed adjustments pertained to the period after capitalisation of the asset in the fixed asset register. AASB 116 requires that capitalised costs be 'directly attributable to bringing the item to the location and condition for it to be capable of operating in the manner intended by management'. Incidental activities should not be capitalised, nor should abnormal amounts of labour.
>
> As there was insufficient supporting documentation to support the nature of work performed and with consideration to the treatment of prior period costs of the same nature by the management of ICES and their tax advisors, we consider that the nature and value of the adjustment could not be appropriately substantiated to be adjusted under part (d) in the Normalised EBITDA calculation."[10]

[13] The auditor's decision on this and other issues prompted the activation of the dispute resolution procedure. As to this issue, the vendor plaintiff gave a dispute notice pursuant to clause 9.7 of the share sale agreement, dealing with the dispute resolution procedure. The relevant part of the notice identified the matter in dispute as follows:

> "The Vendor disputes the Completion Accounts. The Vendor asserts that the Completion Accounts have not been correctly prepared in accordance with the SSA as the Completion Accounts do not correctly adopt the requirements of Accounting Standard AASB 116 Property, Plant & Equipment and incorrectly treat $136,741 of capital expenditure as operational expenses."[11]

[14] The notice elaborated, referring to the Australian Standard AASB 116, and then continued:

> "(e) The Completion Accounts have not capitalised $136,741 of expenditure relating to the construction of plant and equipment. These costs relate to labour costs of $79,811 and material costs of $56,930 that are properly treated as capital expenditure rather than operational expenditure in accordance with the Accounting Standard (as defined in the SSA).
>
> (f) The amount of $136,741 not capitalised in the Completion Accounts can be reliably measured. They have been extracted from the underlying financial records of the ICES. They have been specifically identified in ICES' MYOB general ledger by the allocation of a job cost code at the time of processing. The material costs are supported by supplier invoices. The labour costs are substantially supported by employee time sheets ..."[12]

[15] The giving of the dispute notice did not result in a resolution. In the absence of such resolution, clause 9.7 of the share sale agreement provides for the appointment of an independent accountant to "determine the matters in dispute". Clause 9.7(f) requires such a determination to occur no later than 20 days after the appointment of the independent accountant. Critically to the issue now before me, clause 9.7(h) provides:

> "The Independent Accountant must act as an expert and not as an arbitrator and its written determination will be final and binding on the parties in the

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[10] Ex 2, Vol 4, p 76.
[11] Ex 2, Vol 11, p 185.
[12] Ex 2, Vol 11, p 186.

> absence of manifest error and with effect on and from the date the Independent Accountant gives its determination to the Vendor and Purchaser, the Completion Accounts, Net Current Assets Amount or the Current Year Actual EBITDA will be deemed to be amended accordingly and will be taken to comprise the final Completion Accounts, Net Current Assets Amount or the Current Year Actual EBITDA."[13]

[16] The purpose of a procedure of this kind in a commercial contract in circumstances similar to the present was aptly described by Almond J in *Funtastic Ltd v Madman Film and Media Pty Ltd ('Funtastic')*[14] as follows:

> "Here, the independent accountant was appointed as an expert, not an arbitrator, in order to provide an expeditious and cost-effective means of resolving disagreements with respect to the draft completion accounts. For this confined purpose, the parties eschewed the more formal rules and procedures of arbitration or curial process. Instead, they agreed to rely on the expertise and skill of the independent accountant, a highly experienced person in the field. The parties granted to the independent accountant a wide discretion to decide matters of procedure for determination of the draft completion accounts and were required to give all reasonable assistance requested by the independent accountant. The SSA contained a tight timetable for the provision of submissions and preparation of the independent accountant's report. The parties were required to instruct the independent accountant to make a decision on the disagreement as soon as practicable after receiving any submissions from the parties. It is evident that there was an emphasis on expedition and prompt resolution of disagreements regarding the draft completion accounts."[15] (Citations omitted.)

[17] It is unremarkable that parties electing for commercial convenience to submit their disputes to the decision of an independent expert would intend that the expert decision be final and binding and impose a demanding standard to be met by a disappointed party seeking to avoid the determination of the independent expert. That standard here requires the defendants to demonstrate manifest error, for in the absence of manifest error, the determination is final and binding. In *Funtastic*, Almond J considered the meaning of "manifest error" in the context of a case similar to the present. He observed:

> "The Oxford English Dictionary defines 'manifest' as 'clear obvious to the eye or mind'. The Macquarie Dictionary similarly defines 'manifest' as 'readily perceived by the eye or the understanding; evident; obvious; apparent; plain'. A 'manifest error' in the context of arbitral awards liable to be set aside for 'manifest error of law on the face of the award' has been variously described as an error that is 'apparent to the understanding of the reader', 'obvious rather than arguable', 'easily demonstrable without extensive investigation', 'an oversight [or] blunder so obvious as to admit no difference in opinion' or 'apparent to the judge upon a mere perusal of the reasoned award'. It is clear that an error that is 'abstruse, obscure or

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13 Ex 2, Vol 1, 'Share Sale Agreement' clause 1, p 41.
14 [2016] VSC 708.
15 Ibid [54].

> inconsequential' will not fall within the definition of 'manifest error'."[16] (Citations omitted.)

[18] Almond J went on to conclude, by reference to the above-discussed purpose of a like dispute resolution procedure to that here, that manifest error is "confined to clear and obvious errors". This is consistent with the view expressed by Thomas J in *Galaxy Energy International Ltd v Eurobunker SPA*,[17] that manifest means "plain and obvious".

[19] In *Gibraltar Betting and Gaming Association Limited v Secretary of State for Culture, Media & Sport*,[18] Green J noted "manifest" is defined in dictionaries as something which is: readily perceived, clear, evident, clearly apparent, obvious or plain.[19] I conclude such descriptions correctly inform the meaning of manifest error. They are consistent with the obviously pragmatic purpose of the dispute resolution procedure adopted by the parties, a procedure which entrusts much to the discretion of the independent expert.

[20] In *TX Australia Pty Ltd v Broadcast Australia Pty Ltd*,[20] a case where the expert determination was said not to be binding "in the case of manifest error, negligence, fraud or error of law", Brereton J observed:

> "The key requirement is that the error be apparent on the face of the determination and reasons."[21]

[21] I respectfully agree, subject to the qualification that whether an error which exists objectively on the face of the determination or reasons is realised to be an error may itself depend upon knowledge of facts which were before the decision-maker. Putting it differently, the need for the error to be manifest in the articulated determination or reasons does not mean the assessment of whether it has that quality must be performed in a vacuum in ignorance of what information the decision-maker worked with. That is because it may sometimes only be in the light of that information that the existence of an error on the face of the determination or reasons will be realised.

[22] Importantly, however, the procedure here stipulated by the contract does not prescribe any requirement for the giving of, let alone for the adequacy of, reasons and merely requires the giving of a written determination by the independent expert. The contract requires the parties to assist the independent expert with any information requested but is silent as to what extent the independent accountant's written determination must detail the minutiae of the independent accountant's decision-making in respect of the information.

[23] It follows the mere fact relevant information, or conflicts in relevant information before the decision-maker, are not specifically addressed or analysed in the written determination, will not of itself constitute manifest error. The methodologically non-

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16 *Funtastic Ltd v Madman Film and Media Pty Ltd ('Funtastic')* [2016] VSC 708, [53].
17 [2001] 2 Lloyd's Rep. 725.
18 [2014] EWHC 3236 (Admin).
19 Ibid [100].
20 [2012] NSWSC 4.
21 Ibid [20].

prescriptive nature of the decision-maker's obligation to determine the matter fortifies the conclusion that a manifest error in the present context is an error which must be clearly apparent on the face of the written determination.

[24] The dispute resolution procedure outlined in clause 9.7 was activated in the present case. Ross Walker, a partner with Pitcher Partners, accountants, was appointed to act as the independent accountant. Mr Walker's written determination took the form of a report dated 12 April 2017. It included a number of determinations, only one of which is the focus of the present controversy. That determination appears in part 9 of his report, headed "DS Expense – Labour and Material Costs".[22]

[25] Mr Walker determined that the expense incurred of $136,741 was of a capital nature and thus should be added back as an adjustment in the determination of the normalised EBITDA in accordance with the share sale agreement. The approach to the determination of that issue, as apparently taken by Mr Walker, and by the parties in their submissions to him, included an application of Australian Accounting Standard AASB 116. It provides for a recognition principal, described in s 7 thereof as follows:

> "7. The cost of an item of property, plant and equipment shall be recognised as an asset if, and only if:
> (a) it is probable that future economic benefits associated with the item will flow to the entities; and
> (b) the cost of the item can be measured reliably…"

[26] As explained above, while this Standard was relevant in the determination of the current year accounts, in point of fact it was the company's own accounting principles which were relevant in the calculation of current year actual EBITDA. However, the common approach of the parties, and seemingly of the independent accountant, was that the cost of the proposed adjustments needed to be measured reliably. If the independent accountant has adopted a test that the cost of the items needs to be measured reliably to be categorised as capital expenditure and has erred manifestly in applying that test here, then it is no answer to such an error to say he did not necessarily need to adopt such a test.

[27] The test that "the cost of the item can be measured reliably", has given rise to a conflict in the professional views of accountants associated with this case. In the upshot, Mr Walker appeared to reach a conclusion, at least inferentially, that the expenditure in the amount of $136,741 could be measured reliably. He said in his conclusion:

> "Conclusion – In our view this is one of the more difficult issues to determine. It is evident that ICES is in the business of plant rental and assembly of the relevant plant and that ICES incurred expenditure in relation to the Disputed Plant. The main issue is whether the expenditure incurred can be measured reliably in order to be capitalised in accordance with Accounting Standards. There have already been a number of accounting experts involved in the assessment of this matter. The Auditor was unable to conclude on the basis there was insufficient information. GT concluded that the expenditure did not meet the definition because they were 'instructed' that the recording of time sheets was not accurate, and

[22] Ex 2, Vol 4, pp 141-144.

> they took into consideration the qualifications on this matter by PwC. On the other hand, Crowe Horwath indicated that they checked a sample of wage entries and were satisfied that the time sheets supported classification as capital expenditure.
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> We were provided with significant supporting documentation by the Vendor in their submission. While it is not absolutely clear that the labour costs and materials relate to the assembling of the Disputed Plant, we have been instructed as the Independent Accountant to make a determination of the matter. Unfortunately, we are unable to act as arbitrator on this issue, which may have resulted in some apportionment of the underlying expenses as part capital and part operating expense.
>
> Given the above, we believe that the better view is that the expense incurred at $136,741 is of a capital nature and should be added back as an adjustment in the determination of Normalised EBITDA in accordance with the definition contained in the SSA."[23]

[28] The independent accountant's written determination briefly reviewed the various materials which were before him. He noted that the PwC interim report reviewed the proposed capitalised labour components of the EBITDA adjustment "which were supported by listing of labour transactions by project number". However, he also noted that PwC concluded there was insufficient supporting documentation to support the nature of the work performed.

[29] It is apparent from a perusal of PwC's interim report that an issue of concern to PwC was that the result pressed by the vendor was inconsistent with historical patterns in the company's past yearly accounting. However, as earlier highlighted, the type of adjustment sought was of a kind specifically contemplated by the agreement.

[30] More relevantly, PwC was concerned that the time sheets did not specify the nature of work performed so as "to confirm that activities were capital in nature". This heralds the significant point that the time sheets were not the sole records relevant to the issue. They fell for consideration in the context of an array of other information, which in combination was capable of identifying which labour costs were attributable to construction and were thus capital, rather than operational expenditures.

[31] As was explained subsequent to PwC's report, in the statutory declaration of the company's former general manager, Matthew Lindsay, himself a certified practising accountant, the relevant records included the entries made in the company's MYOB general ledger. The time sheets completed by staff were relied upon in their preparation of the company's ledgers. However, they were relied upon in the context of the following company procedure:

> "All costs including labour and materials were specifically job coded to the individual capital projects. At completion of the capital project the costs were reviewed and cross-referenced to the capital project time line to ensure

[23] Ex 1, Vol 4, p 114.

> no operational costs were included inadvertently in capital costs. Any operational costs were journaled to an operational expense account."[24]

[32] This heralds the significance of the MYOB job costings as a source of relevant reliable measurement. In their submissions to the independent accountant the defendants relied not only upon the conclusion of PwC, but also upon an accounting report provided by Grant Thornton, which appears to have been premised on instructions about company process inconsistent with the process described above by its former general manager (compare, in particular, paragraph 21 of the Grant Thornton report of 6 December 2016 and paragraph 29 of the statutory declaration of Matthew Lindsay).

[33] The opinion expressed in the Grant Thornton report that "the company did not maintain adequate records to reliably measure the costs incurred by a specific project", did not discretely address the nature of the alleged inadequacy, save for relying upon the nature of the inadequacy already identified by PwC.

[34] In contrast, the plaintiff's submissions to the independent accountant relied upon a report by Crowe Horwath. It reviewed the company's MYOB job costings records, which allowed it to capitalise the full costs for the construction of the relevant items, including the salary and wages costs. It also compared a sample of records and wage entries and records of employee time sheets to verify they were working on the construction of the items in question.

[35] The adjustments occasioned by reference to those combined records confirmed that the 2014 financial year capitalised expenses were indeed $136,741. That Crowe Horwath was able to use the MYOB job costings records to identify the labour cost component of construction costs appears to be powerful evidence of the existence of records allowing the reliable measurement of labour costs which constituted capital expenses, consistently with the requirement of s 7 of the AASB 116 Standard. That conclusion was further supported by Crowe Horwath's confirmation on a checking of samples of wage entries as against employee time sheets.

[36] It is not to the point that, as the defendants emphasise, Crowe Horwath's report did not expressly allude to the Standard's words "measured reliably". Crowe Horwath identified the significance of the MYOB job costings records as a specific source of information, allowing the identification of the labour cost components of construction costs. It was an uncontroversial step for the independent accountant to, in turn, regard such records as reliable measurements.

[37] The evidentiary picture which had emerged by the time the independent accountant was considering the matter was evidently more comprehensive, and to some extent different than that before PwC.

[38] This divergence of itself dispenses with an argument of the defendant's that it was not open to the independent accountant to prefer the assessment of Crowe Horwath over that of PwC. In truth, the independent accountant's task was not to choose between the

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[24] Ex 1, Vol 4, p 115.

assessment of PwC or Crowe Horwath, in any event, as if they were the only options. The very fact that considerably more information was before the independent accountant than PwC demonstrates it is misconceived to expect the independent accountant would necessarily reach the same conclusion as PwC. The fact he did not and the fact his determination happens to be consistent with Crowe Horwath's assessment does not bespeak error.

[39] In light of the breadth of information, including additional information, which Mr Walker was undoubtedly entitled to have regard to, the conclusion that the labour costs of construction could be measured reliably was reasonably open to the independent accountant. It follows I do not accept that a manifest error has occurred by reason of the conclusion reached on the face of the determination being demonstrably unsupported by information before the independent accountant.

[40] Such a proposition is not demonstrable at all on the materials before me.

[41] At trial the defendant's relied upon yet another expert, Ms Faulkner, of KPMG. Her initial report unhelpfully exposed little foundation or reasoning for her opinion. It appeared to assume, erroneously, that PwC's assessment, as auditor, had to stand, unless there was a sufficient basis to "overturn" it. Such an assumption of a starting or default position in favour of a particular conclusion does not appear in the contract's dispute resolution procedure and is contrary to the independent accountant's obligation to arrive at his own independent expert determination of the matters in dispute.

[42] Turning to Ms Faulkner's supplementary report, and ignoring its seeming continued emphasis on the sanctity of PwC's assessment, Ms Faulkner asserted there existed "insufficient documentation to support the nature of the work performed to confirm activities were capital in nature to meet the AASB 116 reliable measurement recognition criteria".

[43] In support of that assertion she highlighted inadequacies in the time sheets. It is clear from the time sheets that they did not contain information about the nature of the work, so that, of themselves, they could not constitute a reliable measurement in the sense contemplated by the Standard. However, on the material before Mr Walker, as already explained, it was apparent the time sheets were but part of a broader process spawning the company's MYOB job costings records. That process, as Mr Lindsay explained, included job coding labour and materials and cross-referencing the capital project timelines to ensure no operational costs were included inadvertently in capital costs.

[44] The defendants submitted there was no evidence that was the process which was followed because Mr Lindsay did not speak to witnessing the actual process and there was no direct evidence from data entry personnel. This imposes an evidentiary demand seldom pressed in respect of business records even at trial, and in any event certainly not imposed by the contract upon the independent accountant. There is no apparent reason why the independent accountant would not have been entitled to give weight to Mr Lindsay's explanation of the process, given Mr Lindsay's role and qualification, particularly if, as seems apparent, the MYOB job costing records were apparently consistent with being the product of the process described.

[45] Ms Faulkner's supplementary report also sought to impeach the reliability of the MYOB records by conducting "a limited review of the figures in the summary table to the MYOB ledger". Her report cites three specific alleged errors or omissions detected by her explaining them in short form only and not providing or annexing greater detail about them. The defendants' counsel acknowledged an absence of detail in the exhibits before me about those alleged three errors or omissions, particularly by reference to what proportion of the relevant overall MYOB ledgers they relate to. Whether such errors were correctly identified as errors by Ms Faulkner and whether, if they are errors, they represent a trend of material significance or mere isolated examples of error is impossible to discern.

[46] Ms Faulkner's evidence at the highest raises the possibility the MYOB job ledgers may have contained some errors or omissions. As much may be said of financial records of any competent company. Her evidence falls considerably short of demonstrating the materials before the independent expert were insufficient to support the conclusion reached.

[47] Ms Faulkner's report was also critical of the independent accountant's expressed view that "it is not absolutely clear that labour costs and materials relate to the assembly of the disputed plant". She reasoned if such is not clear, then, the costs could not be attributable to the disputed plant. Much emphasis was placed upon Ms Faulkner's purportedly expert view that the written determination's use of the words "not absolutely clear" is inconsistent with the conclusion that the relevant costs could be reliably measured. That view is unsustainable. In effect, it introduces an additional requirement to the Standard so as to introduce a test or standard of absolute clarity which must be met before it can be said the measure of the cost of an item is reliable. That is not an express requirement of the Standard. Nor does it arise by implication. Indeed, the fact the Standard contemplates the exercise of a degree of judgment and that, as Ms Faulkner conceded, the preparation of financial statements can in the ordinary course require the use of reasonable estimates requiring the application of judgment, is inconsistent with the measure of cost having to be absolutely clear in order to be reliable.

[48] It is hardly surprising, as explained in the report of the plaintiff's expert, Mr Mitchell, that in discussing reliability of measurement annexure D to the Australian Standard Board's Framework for the Preparation of Financial Statements provides:

> "In many cases, cost or value must be estimated. The use of reasonable estimates is an essential part of the preparation of financial statements and does not undermine their reliability."

[49] None of this is to suggest that the MYOB job costing records are likely to have involved a significant component of estimation when they were generated. Rather, it is to illustrate the inconsistency of reading into the Standard a test of absolute clarity which is at odds with the permissibility of estimation and judgment.

[50] In substance it is apparent the independent expert was of the view that, while the materials were not absolutely clear, they were sufficiently clear to provide a reliable measure.

[51] It remains to acknowledge and dispense with some related other potentially concerning aspects arising on the face of the written determination. As already mentioned, the independent accountant did not expressly state that, on the material before him, the allegedly incurred expenditure could be measured reliably in order to be capitalised. However, as the third sentence of his conclusion demonstrates, it expressly identified that as the main issue. When his remarks are considered as a whole it is inherent in his conclusion, that the expense incurred of $136,741 was of a capital nature and should be added back as an adjustment in the determination of normalised EBITDA, that he must necessarily have concluded the expense could be measured reliably in that it was the pivotal consideration in the determination.

[52] In reaching that conclusion I do not lose sight of the content of the second paragraph of the independent accountant's concluding remarks. I acknowledge minds may differ as to what was meant by the second and third sentences of the second paragraph of the independent accountant's concluding remarks, namely:

> "While it is not absolutely clear that the labour costs and materials relate to the assembly of the disputed plant, we have been instructed as the Independent Accountant to make a determination of the matter. Unfortunately we are unable to act as arbitrator on this issue which may have resulted in some apportionment of the underlying expenses as part capital and part operating expense."

[53] On one view this language raises the possibility the independent accountant misconceived his role, forming the view that he had to make a choice between the two competing conclusions advocated for and thus caused him to lower or ignore the Standard and its requirement of reliable measurement.

[54] As against this, a less concerning interpretation is that the independent accountant was acknowledging in a balanced way that, while the records before him, including the significant supporting documentation provided by the plaintiff, was not absolutely clear on the issue, it was sufficient to reach the requisite standard, namely, that the cost of the disputed items could be measured reliably.

[55] When the language of the independent accountant is considered in the context of his broader conclusion and his earlier analysis of the issue, that less concerning interpretation is the obvious and logical interpretation to adopt. That interpretation is easily reconciled with the regret expressed by the independent accountant that he could not act as an arbitrator, a process which he speculated might have resulted in an apportionment of the underlying expenses as part capital and part operating expenses. That commentary is consistent with the independent accountant's reservation about the lack of absolute clarity, reservation of a kind he may have been able to pursue and resolve in a different way if acting as an arbitrator.

[56] However, as already explained, the holding of a reservation that "it is not absolutely clear" the labour costs and materials related to the assembly of the disputed plant is not inconsistent with the conclusion that, while not absolutely clear, the materials are sufficiently clear to allow the costs of the items to be measured reliably.

[57] It may correctly be observed that the independent accountant's written determination does not expose the full nature and extent of any analysis of the financial materials conducted by him as an independent expert, but the contract's dispute resolution procedure agreed to by the parties did not require any such exposition. In agreeing to this procedure the parties obviously concluded the risk inherent in limiting their capacity to challenge the determination of the independent accountant was countered by the advantage to the parties of the convenience, timeliness and low cost of the procedure. The task which befell the determination of the independent accountant related to matters on which reasonable professional minds might differ and in fact have differed. Differences of professional opinion do not bespeak error.

[58] On the narrow question of whether the independent accountant's determination involved manifest error, the circumstances compel the conclusion that it did not. This Court having concluded an absence of manifest error, his decision must bind the parties.

[59] The parties are agreed as to the orders which must follow in light of my conclusion.

Orders

[60] My orders are:

1. The Court declares that the contracts mentioned in the pleadings and known as:

   (a) the share sale agreement; and

   (b) the agreement in writing constituted by the plaintiff exercised by written notice to the defendants of the option for the sale by the plaintiff to the defendants of one ordinary share held by plaintiff in the capital of Integrated Chemical and Environmental Systems Pty Ltd ACN 086 243 772, being the put option provided for under the terms of the put and call option deed entered into between the plaintiff and defendants;

   so far as they have not already been performed, ought to be specifically performed and carried into execution, and orders and adjudges accordingly.

2. The Court further declares that:

   (a) pursuant to clause 9.7(h) of the share sale agreement, the determination of current year actual EBITDA as $2,255,303 by Mr Ross Walker of the firm Pitcher Partners, as an independent accountant within the meaning and for the purposes of clause 9.7 of the share sale agreement, is and has been final and binding upon the parties with effect from 12 April, 2017; and

   (b) the initial purchase price fixed at $5,845,091 became payable in the manner required by clauses 9.3 and 9.5 of the put and call option deed on and from 3 May, 2017.

3. In performance and execution of the said contracts, the defendants must pay to the plaintiff forthwith:

(a) the sum of $1,043,810, being the adjusted final payment amount payable under clause 4.5(b) of the share sale agreement and calculated in accordance with clause 8.2 of the share sale agreement;

(b) interest in the sum of $204,701 pursuant to clause 8.4(c) of the share sale agreement; and

(c) the initial purchase price to a value of $5,845,091 in the manner required by clauses 9.3 and 9.5 of the put and call option deed.

4. The plaintiff is entitled to damages in addition to specific performance in the sum of $652, 407 being the total of:

(a) $503,478 calculated on a daily basis at six per cent simple on the value of $5,845,091 over 525 days over the period between 29 July 2014 and 5 December 2016; and

(b) $148,929 being 155/365 x $5,845,091 x 6/100.

5. There be liberty to any part to apply on two business days' written notice.

6. The counter-claim be wholly dismissed.

7. The parties have:

(a) 21 days to file and serve written submissions as to costs together with any supporting materials; and

(b) 7 days thereafter to file and serve any written submissions in reply on the understanding the Court will decide costs on the papers unless on receipt of the written submissions the Court decides and notifies the parties that it also requires oral submissions.