Neutral Citation Number: [2019] EWHC 2191 (Comm)

Case No: F40MA013

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL (QB)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 21st August 2019

Before:

HIS HONOUR JUDGE EYRE QC

- -

Between :

1) ZEDRA TRUST COMPANY (JERSEY) LIMITED **2) OLIVER NOBAHAR-COOKSON**	**Claimants**
- and -	
THE HUT GROUP LIMITED	**Defendant**

- -
- -

Andrew Onslow QC and George McPherson (instructed by **DWF LLP**) for the **Claimants**
Lance Ashworth QC and James Mather (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**

Hearing dates: 4th July 2019

- -

JUDGMENT

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

HH Judge Eyre QC:

Introduction.

1. By a Sale and Purchase Agreement ("the SPA") of 31st May 2011 the Claimants sold the Defendant the entire issued share capital of Cend Ltd. The SPA included a mechanism for determining whether there had been an over-provision for tax and related matters in the accounts and in the treatment of Cend Ltd's affairs. This was with a view to the Claimants being given credit for such over-provision against other sums due from them and potentially receiving a further payment. The SPA provided for the question of whether there had been such over-provision to be determined in the first instance by Cend Ltd's auditors acting as experts.

2. In October 2018 Ernst & Young LLP ("EY") as Cend Ltd's auditors provided a determination that there had been a net over-provision of £18,435. That determination was contained in a report which EY provided to the Defendant. The Defendant in turn provided the Claimants with the first 1½ pages of that report being a section headed "Background" and the "Executive Summary".

3. By the current Part 8 proceedings the Claimants seek an order that the Defendant supplies them with a full copy of the report and any further work output provided by EY to the Defendant together with copies of all written communications between the Defendant and EY in relation to the instruction of EY and other material. The Claimants say that they are entitled to this material either on the basis that the Defendant acted as their agent in instructing EY or that it is an implied term of the SPA that such material be provided to the Claimants. The Defendant denies that any further material is due saying that it was not acting as the Claimants' agent in instructing EY and that the only material to which the Claimants are entitled under the SPA is that which identifies the actual amount of the over-provision.

The Factual Background.

4. The SPA was made on 31st May 2011 and provided for the Claimants to sell the share capital of Cend Ltd for a cash consideration of £31,171,782 together with shares in the Defendant. The SPA defined the "Accounts" as being the accounts of Cend Ltd for the year to 30th September 2010 and contained warranties as to the Accounts (at Schedule 4 (1)) together with a Taxation Covenant (Schedule 7 part 2) and Taxation Warranties (Schedule 7 part 3).

5. At Schedule 7 Part 1 the SPA contained a mechanism for additional consideration to be payable to the Claimants (or to be deducted from the sums payable by them) in the event that the Accounts had made over-provision for taxation liabilities or had understated the company's rights to repayment of taxation or that taxation liabilities were reduced or avoided by the application of reliefs. The current dispute relates to the operation of that mechanism.

6. Schedule 7 Part 1 paragraph 4.1 provided as follows in respect of potential over-provision and windfall rights:

> "The Buyer shall at the request of the Sellers require the Auditors [defined as being the auditors for the time being of Cend Ltd] to determine (as experts and not as arbitrators and at the expense of the Sellers) whether:
>
> a) Any provision for Taxation or for payment for Group Relief or the surrender of a Tax Refund in the Accounts has proved to be an over-provision and if so its amount.
>
> b) Any right to a repayment of Taxation treated as an asset in the Accounts has proved to be understated and if so its amount or, where no right to repayment of Taxation was treated as an asset in the Accounts, whether any such amount should have been treated as an asset in the Accounts and if so the amount; or
>
> c) Any Actual Taxation Liability which arises or would otherwise have arisen (other than one which otherwise have given rise to a corresponding liability of the Sellers under the Tax Covenant) is avoided or reduced or any repayment of an amount of Taxation is obtained in either case by the use of a Seller Relief, and, if so, the amount of Taxation so saved or the amount of that repayment; and
>
> if the Auditors determine that there has proved to be such over-provision, understatement, or amount the amount of such over-provision, understatement, or amount (as the case may be) shall be dealt with in accordance with paragraph 4.3"

7. Paragraph 4.2 made similar provision in relation to reliefs.

8. Paragraph 4.3 set out the way in which the relevant amounts were to be dealt with. It provided for them to be allocated in the following order. First, as a set off against any sums due from the Claimants under the Tax Covenant or for breach of any Tax Warranty; next in the event of an excess this was to be refunded against any previous payment made in respect of the Tax Covenant or for breach of a Tax Warranty; then the remainder of any excess was to be carried forward and set against any future payment due in respect of the Tax Covenant or for breach of a Tax Warranty; and finally in the event of a surplus remaining on the seventh anniversary of completion of the SPA then that surplus was to be paid to the Claimants.

9. Paragraph 4.4 set out the following review mechanism:

> "When such determination by the Auditors as is mentioned in paragraph 4.1 or 4.2 has been made the Sellers or the Buyer may request the Auditors to review such determination (at the expense of the person making the request) in the light of all relevant circumstances including any facts which have become known only since such determination and to determine whether such determination remains correct or whether, in the light of those circumstances, the amount that was the subject of such determination should be amended."

10. Finally paragraph 7 provided thus for the resolution of disputes:

> "7.1 In the event of any dispute under paragraph 3, 4, 5, 6 or 8 of this schedule such dispute shall at the election of either/any party be determined by the Independent Expert (acting as expert and not as arbitrator) and in the absence of manifest error his determination shall be conclusive and binding on the parties. The proper charges and disbursements of the Independent Expert shall be paid and borne on each occasion by the parties concerned such proportions as the Independent Expert may in his absolute discretion consider fair and reasonable.
>
> "7.2 If either party is dissatisfied with any determination of the Auditors the matter shall be referred to the Independent Expert for determination in accordance with the provisions of paragraph 7.1"

11. The Independent Expert was defined as being a member of the Chartered Institute of Taxation or of the Institute of Chartered Accountants independent of the parties and who had had a specialised taxation practice for at least ten years such person to be appointed by agreement between the parties or on application to the president of either of those institutes.

12. The Claimants' solicitors raised the question of the operation of paragraph 4.1 in June 2013. However, it was not until January 2015 that they made reference to the Claimants' right to request a determination by the auditors. There then followed correspondence about the likely cost of that exercise culminating in a letter of 28th May 2015 in which the Claimants' agreement was given to the scope of the works to be undertaken by EY. On 25th August 2015 EY sent a "statement of work" confirming that it would undertake a review pursuant to Schedule 7 Part 1 paragraph 4.1 of the SPA and saying "our output will be by way of an email or report detailing any tax amounts we consider to be over or under provided subject to an appropriate materiality of £5,000 per item as agreed". The statement of work was addressed to the Defendant and James Pochin signed on the Defendant's behalf as Group Legal Director confirming the Defendant's agreement to the arrangements.

13. Nothing was provided to the Claimants as a result of that exercise. The Claimants suspect that EY made a determination or at least provided advice or a report to the Defendant which was not provided to them. However, the Defendant's solicitors have confirmed in correspondence their instructions that no determination was provided by EY pursuant to the 2015 statement of work.

14. In any event it was not until 2017 that the Claimants began pressing as to progress and it was only in June 2018 that the Defendant's solicitors confirmed that the Defendant had requested that EY complete the exercise expeditiously. This resulted in EY sending a new statement of work dated 24th July 2018. This was also addressed to the Defendant. The sections as to the scope of EY's services and the form in which the output was to be provided were the same as those in the earlier statement of work although in the later document those sections were set amidst rather more extensive provisions as to the terms on which EY was acting. The Defendant's agreement to those terms was confirmed by its Director of Tax, Kelly Sutton.

15. On 9th October 2018 the Defendant's solicitors wrote to the Claimants' solicitors saying that EY had completed its report and saying that they enclosed

the report for the Claimant's consideration. The document which was attached consisted of 1½ pages. It was dated 4th October 2018 addressed to the Defendant and headed "Independent review of Cend Ltd tax provision." The first page was entitled "Background" and said that EY had relied on the information provided by the Defendant without taking any further work to verify its accuracy or completeness. The second page was entitled "Executive Summary" and stated:

> "**Corporation Tax**
>
> In respect of corporation tax we have concluded that there was an under-provision of £11,000 in the accounts y/e September 2010.
>
> **Employment Taxes**
>
> In respect of employment taxes based on the information available it has not been possible for us to conclude whether there was any over provision in the accounts for y/e September 2010 primarily because employment taxes do not typically have a separate provision in statutory accounts and are usually included with other creditors. We note that if there were over provision in the accounts for the y/e September 2010 this is likely to be minimal.
>
> **VAT**
>
> In respect of VAT we have concluded that there was an over-provision of £29,435 due to a combination of distance sales obligations and a refund of over-declared output VAT."

16. The Defendant accepts that the document supplied is not a copy of the complete report which had been provided to it by EY but says that the Claimants are not entitled to see any further part of that report.

The Issues.

17. The Claimants seek an order that the Defendant provide it with complete copies of the reports prepared in respect of each of the statements of work; copies of all documentation provided by the Defendant to EY from 2015 onwards; copies of all written communications between the Defendant and EY relating to EY's appointment or to the work undertaken by EY; full details of the calculations underlying the figures set out in EY's report; and an itemised breakdown of the calculation of EY's fees.

18. In the Claim Form as originally formulated the Claimants asserted an entitlement to the information on the footing that the Defendant had been acting as the Claimants' agent in the dealings with EY. On 10th June 2019 (so less than one month before the hearing) the Claimants sought permission to amend the claim form. The proposed amended claim form was revised further and in the form it had reached by the time of the hearing the proposed amendment was to assert as an alternative to the alleged agency a contention that the Claimants' entitlement to the information derived from the correct construction of the SPA or from the implication of a term to that effect. The proposed amended claim form also challenged the validity and binding effect of the determination by EY. However, that latter relief was not sought before me and at the trial the parties

were concerned solely with the question of whether or not the Claimants were entitled to the information sought.

19. The Defendant did not consent to the proposed amendment but as a matter of pragmatism it did not resist the grant of permission. As I explained at the hearing I gave permission for the amendment essentially on the basis that it enabled the true issues between the parties to be determined.

20. It follows that before me the question was whether the Claimants were entitled to be provided with the documents they sought. The Claimants said that they were so entitled either because the Defendant had acted as their agent in the relevant dealings with EY or because a term to that effect was to be implied into the SPA. The Defendant denied that it had acted as the Claimants' agent and denied the implication of the suggested term saying instead that the Claimant was entitled to receive a determination but nothing more and that this was what it had received.

21. It was common ground that the effect of the provision for expert determination and the parties' rights in relation to the same were to be derived from the SPA and that the parties to a contract were entitled to set out the basis and effect of such a determination. It was also common ground that the question of whether or not the Defendant had been acting as the Claimants' agent depended on an assessment of their respective actions in the light of the provisions of the SPA.

Agency.

22. The Claimants say that in engaging EY the Defendant acted as their agent and is accordingly obliged to deliver up all documents held for the purposes of that agency.

23. The Claimants' case is that the nature of the relationship is demonstrated by the terms of paragraph 4.1 which provide that the appointment of EY is to be made at the request of the Claimants and at their expense. They contend that the appointment can only operate to their benefit because a determination by EY could have the effect of finding that a further payment or credit was due to them and could not result in any diminution of the sums due to them let alone requiring a further payment from them. The Claimants say that their request for the Defendant to require a determination from the auditors when seen in the context of paragraph 4.1 authorised the Defendant to engage EY on the Claimants' behalf. They say that this meant that the Defendant had authority to affect the Claimants' relations with a third party and had authority to cause the Claimants to be contractually bound to a third party, namely EY. The Claimants say that the fact that the Defendant chose to engage EY itself rather than to do so in the name of the Claimants is irrelevant. The crucial question is the relationship between the Claimants and the Defendant not between the Claimants and EY and in assessing the nature of the former relationship the relevant consideration is the authority which the Defendant had.

24. It is those aspects of the relationship between the Claimants and the Defendant and particularly the authority given to the Defendant to affect the Claimants' relations with a third party which are said to demonstrate that the relationship is

one of agency. The Claimants also say that when properly considered in context the relationship was to be seen as a fiduciary one where the Defendant was to be regarded as having fiduciary obligations to the Claimants and as being their agent even if it did not have authority to affect their relations with others.

25. The Claimants contend that in accordance with the approach set out in *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] 2 Lloyds Rep 621 at [82] and [87] per Lord Briggs and Hamblen LJ the question whether or not there was an agency is to be determined by reference to the rights and obligations of the parties and the legal effect of their relationship and not by reference to any label or description the parties used. The Claimants say that when regard is had to the position here and in particular to the Defendant's authority to contract on behalf of the Claimants then the parties' relationship in relation to the engagement of EY falls four square within the situation described thus in Article 1(1) of *Bowstead & Reynolds on Agency* (21st ed) 1-001:

> "Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation"

26. However, the Claimants also say that even if the Defendant had no authority to affect their relations with third parties there was still an agency here because of the fiduciary obligations which they say existed. In that regard they rely on *Al Nehayan v Kent* [2018] EWHC 333 at [157] – [159] per Leggatt LJ as demonstrating that the question of whether there is a fiduciary relationship depends on an analysis of the rights and duties in the particular case and point to Article 1(4) of *Bowstead & Reynolds* stating:

> "A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."

27. For the Claimants Mr. Onslow QC said that paragraph 4.1 gave the Defendant a narrow task to perform but one which was under the control of the Defendant and which had the potential to affect the Claimants' interests. It was an exercise in which the Defendant had scope to act to the detriment of the Claimants but where the Claimants were meeting the expense of the exercise. In the light of that the Claimants contend that there was a relationship of trust and confidence and the Defendant owed the duties of a fiduciary and consequently was to be seen as the Claimants' agent.

28. The Claimants say that even in the absence of authority to affect the principal's relations with third parties and even in the absence of a fiduciary relationship there can still be an agency referring in that regard to *Marme Inversiones 2007 SL v NatWest Markets plc* [2019] EWHC 366 (Comm) at [409] – [416] per Picken J.

29. The Claimants pointed out that there can be an ad hoc agency in relation to a particular task in the context of a relationship which does not otherwise give

rise to an agency (in that regard they refer to *UBS v Kommunale Wasserwerke Leipzig* at [88(ii)]). They say that the engagement of EY to give a determination was such a particular task giving rise to an ad hoc agency.

30. The Claimants accepted that there was no reported authority where the court had found there to be an agency in respect of an arrangement such as that in the current case. Mr. Onslow said that nonetheless the particular features of the provisions in the SPA meant that an agency had arisen here reiterating in support of that contention the Claimants' emphasis on the facts that the Defendant was acting at the Claimants' request, at the Claimants' expense, in respect of a matter where the Claimants stood to benefit financially, and where on the Claimants' analysis the Defendant had authority to contract on the Claimants' behalf.

31. The Defendant says that the language and terms of paragraph 4.1 simply do not indicate or give rise to an agency relationship. It argues that there is nothing in that paragraph or elsewhere in the SPA authorising the Defendant to engage EY on behalf of the Claimants or to affect the Claimants' contractual relations with EY or any other third party. It says that there was no need to postulate an agency in order to give effect to the arrangement set out in the SPA whereby the Claimants were entitled to require the Defendant to take a particular step. Similarly the mere fact that the Claimants requested the action in question even when combined with the provision that it be undertaken at the Claimants' expense did not, the Defendant says, constitute the Defendant as the Claimants' agent in respect of that action. Mr. Ashworth QC pointed to the fact that the Claimants and the Defendant had opposing interests in relation to the determination by EY invoking this as a potent factor against the existence of an agency relationship. The Defendant also relies on the approach set out at [88] and [91] of *UBS v Kommunale Wasserwerke Leipzig* – passages to which I will refer in more detail below.

32. The approach I am to adopt as a matter of law is as follows. The starting point is that I must look at the nature of the relationship created by the terms of the SPA remembering that "the question whether or not a particular relationship is that of agency depends upon what the parties have in substance agreed, rather than the label which they choose to place on it" (*UBS v Kommunale Wasserwerke Leipzig* at [87]).

33. In considering that question there is no presumption in favour of an agency: see *UBS v Kommunale Wasserwerke Leipzig* at [88 (i)]:

> "The court should not impose an agency analysis upon a relationship which may better be analysed in other terms, in particular where the intermediary (in that case the car dealer) has its own interest in the transaction as a principal"

34. Picken J described the approach to be derived from *UBS v Kommunale Wasserwerke Leipzig* thus at [415] in *Marme Inversiones 2007 SL v NatWest Markets plc*:

> "…the Court should not feel constrained to find that there is an agency relationship when the facts do not support such a conclusion. Reliance on specific and limited acts which might be capable of being characterised in terms of agency but which, viewed in the round and taken together with other features

> which are either present or absent, do not justify a conclusion that there is an agency relationship ought not to result in such a finding."

35. There can be an ad hoc agency in relation to specific tasks even if undertaken in the context of a relationship which does not more generally give rise to an agency: see *UBS v Kommunale Wasserwerke Leipzig* at [88 (ii)].

36. The "main characteristics" of an agency are "authority to affect the principal's relationships with third parties, fiduciary duty [and] control by the principal". The absence of such characteristics does not preclude a finding of agency but "the absence of any of these main characteristics must nonetheless be a significant pointer away from the characterisation of a particular relationship as one of agency, even though there may be rare exceptions" (*UBS v Kommunale Wasserwerke Leipzig* at [91]). In considering the effect of the absence of such characteristics the approach taken by Picken J in *Marme Inversiones 2007 SL v NatWest Markets plc* is of particular assistance. Thus he said, at [415] – [416]:

> "… whilst the fact that there is no fiduciary relationship and no ability to affect legal relations are not critical to a conclusion that there is an agency relationship, they are, nonetheless, factors which point away from such a conclusion.
>
> 416. It follows, therefore, that Mr Saini QC was right when he submitted that a person may be an agent where he acts on behalf of a principal but has no authority to affect the principal's relations with third parties and that it is not a *sine qua non* that an agent should owe his principal a fiduciary duty. It would be quite wrong, however, to approach matters on the footing that the absence of these features is immaterial, the more so when *both* features are absent, since to do so could result in a finding that there is an agency relationship in situations where such a finding would be wholly inappropriate."

37. In the light of those principles I turn to the effect of the SPA. The kind of arrangement set out at 4.1 is not an uncommon one. It is a contractual provision whereby one party is entitled to require the other party to take a particular step by way of obtaining a report, information, or determination from an identified third party and in relation to an identified issue with the expense of that exercise being borne by the requesting party. Such provisions are commonly used in contracts of various kinds including sale and purchase agreements such as that here but also in leases and sundry other commercial arrangements. An arrangement of this kind can work effectively without the imposition of an agency with the party who is obliged to obtain the report or determination being vulnerable to an application for specific performance if it fails to comply with a properly formulated request.

38. In my judgement the provision is not to be read as giving the Defendant authority to contract with EY on the Claimants' behalf so as to affect the legal relations between the Claimants and EY. There is no need for the provision to be interpreted in that way in order for it to operate effectively and every indication that there is no such authority. Read naturally paragraph 4.1 envisages the Defendant giving instructions to EY with the resulting contractual relationship being between the Defendant and EY. The wording used does not in my judgement contain anything to suggest that the Defendant would be acting

on the Claimants' behalf in obtaining the determination. The fact that the trigger for such instructions is to be a request from the Claimants to the Defendant does not impact on the question of whether the contractual relations were to be between the Claimants and EY or between the Defendant and EY. To the limited extent that it gives any indication it tends to indicate that the Defendant was not to act as the Claimants' agent and that the engagement was to be between the Defendant and EY. This follows from the fact that the provision does not envisage the Claimants making a request to EY or engaging EY themselves. The fact that the determination is to be obtained by a requirement made by the Defendant to EY and not in any other way indicates an intention that the Defendant would engage EY and would do so in its own capacity and as principal.

39. Mr. Onslow said it was relevant to note that the determination could only operate to the benefit of the Claimants. It is correct to say that the determination could not have the effect of causing payment to be due from the Claimants. It had the potential to result in a further payment being due to them. However, it would not necessarily have that effect and the consequence of a determination might be that there was to be no alteration in the figures. Mr. Ashworth's counter-argument that the provision should be seen as operating to the benefit of the Defendant by enabling it to perform its obligations under the SPA was not convincing. However, I do not find the question of the party for whose benefit the provision operated as being of assistance in determining whether it gave rise to an agency. The term did provide a measure of protection to the Claimants and was a means whereby they were guarded against having made over-provision for tax at the time of the SPA but in reality it was a dispute resolution mechanism of a common kind and the potential benefit to the Claimants does not indicate an agency.

40. Similarly there is no need to impose a fiduciary relationship or to see the Defendant as having the obligations of a fiduciary for the provision to work effectively. Indeed, the fact that circumstances are such that the interests of the Claimants and the Defendant are adverse (or at the lowest that each side has interests of its own in the determination) is a powerful factor against the finding of such a relationship (see the quotation from *UBS v Kommunale Wasserwerke Leipzig* at [33] above). Mr. Onslow went so far as to say that in the dealings with EY the Defendant had to suppress its own interests and to prefer the interests of the Claimants. That would follow if the Defendant were the fiduciary of the Claimants but that very consequence in respect of an arrangement governed by contract and where the parties have potentially competing interests shows the inappropriateness of regarding the arrangement as giving rise to a fiduciary relationship. The Claimants' argument that the Defendant owed the duties of a fiduciary because it was in control of a process for which the Claimants were paying and which could affect their interests would have more force if the Defendant did not have its own interest in the matter and if the determination by EY were conclusive. However, the Defendant did have its own interest and moreover the SPA provided at paragraph 4.4 for review of the determination and at 7 for the reference of disputes to an independent expert. Those provisions meant that there was contractual

protection for the Claimants' interests and no need artificially to construct a fiduciary relationship.

41. It follows that the relationship between the Claimants and the Defendant in relation to the appointment of EY was one from which the main characteristics of an agency were absent and where there were significant features inconsistent with an agency. It would be artificial and inappropriate to characterise that relationship as one of agency and I do not do so. The Defendant acted at the request of the Claimants in engaging EY and was performing its obligations under the SPA but it was not acting as the Claimants' agent. It follows that the Claimants have no entitlement to require the Defendant to provide documents to them as its principal.

An Implied Term.

42. The Claimants accepted that the SPA did not expressly say that they were entitled to see the full EY report or the other documents and although they did not in terms abandon the contention that the entitlement arose by interpretation of the express terms the reality of their case was that there was an implied term.

43. The parties were agreed that the approach to be taken to the question of the implication of terms was set out in Lord Neuberger's judgment in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [18] – [21] and by Lord Hughes in *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531 at [7]. My understanding of the effect of those passages is that subject to meeting the requirements of reasonableness, equity, capability of clear expression, and compatibility with the express terms of the contract a term may be implied but may only be implied if it is either (a) necessary in the sense of being necessary for the contract to have business efficacy such that the contract lacks commercial or practical coherence without it or (b) sufficiently obvious to go without saying and such as to have provoked a testy "oh, of course" response from the parties to a notional officious bystander asking about it. Necessity and obviousness are alternative grounds for implication but it will be a rare case where one is present without the other. The requirements for implication of a term are not to be watered down and it is not sufficient that the court concludes that a particular term would be sensible, reasonable, or desirable.

44. The Claimants seek all the documents I have listed at [17] but Mr. Onslow was at pains to emphasise that the claim was not being put on an "all or nothing" basis and that he accepted that there could be scope for an implied term entitling the Claimants to some but not all of those documents.

45. The Claimants' core contention is that they need to see the full EY report together with the other documents in order to decide whether to invoke the review procedure provided for at paragraph 4.4 and/or to make reference to an independent expert under paragraph 7 and for the 4.4 review process to work effectively. Until they know the full basis on which EY came to its conclusion they cannot decide whether to incur the expense of initiating a review nor can they know which circumstances should be drawn to the attention of EY such as to persuade EY that amendment to the determination is appropriate. The

Claimants say that for the review provision to have commercial and practical coherence a party considering whether to require a review and drawing the attention of EY to particular circumstances needs to be in possession of the full report containing the original determination together with the material on which that determination was based.

46. The Claimants say that it is of considerable significance that they and the Defendant have different interests in the question of the determination. They say that it cannot have been envisaged that the Defendant would have the full documentation but would be entitled to determine which parts of that material was provided to the Claimants. Such an entitlement would create an unfair imbalance. In that regard Mr. Onslow placed emphasis on the need for an expert determination process to be fair. He accepted that it is for the parties to a contract to decide what form an expert determination is to take and that the formal requirements of natural justice do not apply but said that the courts will imply such terms as are necessary to ensure that the process operates fairly. He drew my attention to the decision of Vos J in *Ackerman v Ackerman* [2011] EWHC 3428 (Ch) and to passages in *Kendall on Expert Determination* at 7.3-3 and 14.5-7. However, in my judgement it is apparent from those references and from the decision of the Court of Appeal in *Barclay's Bank plc v Nylon Capital plc* [2011] EWCA Civ 826 that it is only in the clearest of cases that the courts will conclude that there has been unfairness such as to invalidate an expert determination. In this regard there is also considerable force in the point made by Mr. Ashworth that the authorities are concerned with alleged unfairness arising from the acts or omissions of the relevant expert rather than from the process which the parties have, *ex hypothesi*, chosen to adopt.

47. The Claimants say that the inappropriateness of the Defendant being entitled to redact the material provided to them is heightened by the fact that they are bearing the cost of the determination exercise. They say that the Defendant is asserting a right to keep hidden from the Claimants parts of a report for which the Claimants are paying and the entirety of which is known to the Defendant. The inappropriateness (the Claimants would say the absurdity) of this assertion is put forward by the Claimants as a reason why a right on their part to see the sundry documents is to be implied on the grounds of obviousness as well as business efficacy.

48. The Defendant says that there is no need for the Claimants to see any further documents and that the provisions of the SPA are capable of working effectively without that happening. It says that the Claimants were entitled to receive a determination made by EY. They have that and as a consequence know EY's assessment of the extent to which there has been over-provision. That is all the Claimants need, the Defendant says, in order to determine whether to seek a review or to decide to invoke the independent expert procedure at paragraph 7. This is because having the figure the Claimants know whether they should be pressing for a different figure. The Defendant says that it is up to the Claimants to decide what representations to make to EY as to relevant circumstances if a review is sought and that the Claimants do not need more than the figure arrived at by EY in order to do that.

49. In support of that contention Mr. Ashworth placed considerable emphasis on the nature of an expert determination. He said it is to be seen as a "quick and dirty" means of resolving a potential dispute. In the SPA the parties have expressly agreed to an expert determination process and are to be taken to have done so on the footing that the benefits of speed and reduced expense resulting from that choice outweigh the disadvantages flowing from the informal and summary nature of the process. The parties having chosen a summary process the court should not, the Defendant says, rewrite the agreement to create a more involved arrangement and it is neither necessary nor obvious that further information should be provided. The mechanism is workable as it stands (because the Claimants can choose to invoke the paragraph 4.4 review) and that is the test. Mr. Ashworth referred me to the decision of the Court of Appeal in *Morgan Sindall plc v Sawston Farms (Cambs) Ltd* [1999] 1 EGLR 90 and the indication there that where there is an expert determination provision the expectation (at least in the case of valuations as in that case) is of a non-speaking determination. Robert Walker LJ explained (at 92 N) that in such cases the courts should resist attempts to obtain material "to turn a non-speaking valuation into a reasoned valuation and then to attack the reasons" proceeding to say:

> "The whole point of instructing a valuer to act as an expert (and not as an arbitrator) is to achieve certainty by a quick and reasonably inexpensive process. Such a valuation is almost invariably a non-speaking valuation, with the expert's reasoning and calculations concealed behind the curtain. The court should give no encouragement to any attempt to infer, from ambiguous shadows and murmurs, what is happening behind the curtain."

50. In the light of that the Defendant says that the Claimants already have more than that to which they were entitled (which would have been simply a bare figure) and that there is no basis for implying a term providing for them to have more information. Such an implication is neither necessary (because the mechanism of the SPA is workable without it) nor obvious (because the parties having chosen an expert determination it is not obvious that they envisaged more information being provided).

51. Mr. Ashworth said that the independent expert provision in paragraph 7 operated separately from paragraph 4 and that the Claimants could invoke paragraph 7.2 requiring determination by such an independent expert without going through the paragraph 4.4 review process. Even accepting for the purpose of the argument that that is a correct interpretation of paragraph 7.2 (a point which in my judgement is not entirely clear cut and which was not substantively addressed before me) I do not regard that as advancing matters greatly. If the proposed implication is necessary for the review provision at paragraph 4.4 to have commercial coherence it is no answer to say that the SPA contains a different process for dispute resolution which can be used instead.

52. Mr. Ashworth pointed out that the SPA was a detailed document drafted by the Claimants' solicitors. He sought to rely on those matters as relevant to the question of implication. However, I find that of little assistance. The nature of the drafting of an agreement can be relevant when the court is considering the interpretation of express terms and in particular whether they are to be given a meaning different from that which might be thought to flow from a natural

interpretation of the language used (see for example per Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [13]). The process of the implication of terms is a different one and the nature of the drafting process will rarely assist in that exercise. Thus the dicta of Bingham MR as summarised in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* at [19] – [20] were making the point that the presence of detailed drafting means that it will often not be possible to say that the parties would have intended some different or additional term. However, that was in the context of explaining why the test for implication was not the presumed intention of the parties but rather the twin test of business efficacy and obviousness and in my judgement the nature of the drafting can play little part in applying that test.

53. Finally, the Defendant says that the term proposed by the Claimants is insufficiently precise. It says that for a term to be implied it must be precise and clearly expressed. That is, of course, an uncontroversial statement of part of the relevant test. The Defendant then says that the term proposed by the Claimants is insufficiently precise notwithstanding the fact that it is being put forward at the eleventh hour after the Claimants have had ample time to consider its formulation. I am unpersuaded by this argument. The proposed term is that the Defendant be required to provide on request "written communications (including instructions) passing between the Defendant and EY in connexion with EY's instruction under paragraph 4.1 and any work output provided by EY to the Defendant pursuant to the Defendant's instructions". That is sufficiently precise to be capable of being included in the SPA by implication if the other requirements are met. To the extent that there is imprecision as to the documents falling within the scope of the proposed term it flows from the fact that only the Defendant and EY know precisely which documents exist and which would be caught by the provision.

54. The Defendant's position has the effect that the SPA is to operate in such a way that one party (here the Defendant) with an adverse interest to the other party (the Claimants) is empowered to decide how much of a document containing a determination that other party should be allowed to see and to be so empowered notwithstanding the other party being the only party entitled to require the determination be made and being the party paying for the determination. In my judgement that would be an unusual arrangement and the unusual nature of the suggested arrangement is relevant to the question of the obviousness of the proposed implied term and supports the Claimants' contentions. The more unusual the effect which an agreement would have in the absence of a proposed term then the more likely it is such a term will satisfy the requirement of obviousness.

55. It is in the context of obviousness that I also find there is force in the Claimants' argument by reference to fairness. If the terms of an agreement appear to operate unfairly as between the parties then there is more scope for the court accepting that a term remedying that unfairness is to be implied as going without saying. However, a considerable degree of caution is needed in that regard because in commercial dealings parties are able to agree terms which operate unfairly as between them. Such terms are not infrequent and can be seen as a reflection of

the commercial bargaining position of the parties. Subject to that caution it is of note that the Defendant's stance would have the result that the Defendant would be entitled to keep from the Claimants information for which the Claimants have paid in circumstances where the Claimants and the Defendant have an adverse interest. That would give a clear impression of unfairness.

56. In my judgement the Claimants are also correct to say that at least some further documentation is needed for the provisions of paragraph 4 to have business efficacy. The terms of paragraph 4.4 clearly envisage a review in which a party informs EY of the circumstances which are said to warrant amendment of the determination. In order to engage effectively in that process the party needs to know the basis of the original determination so as to be able to assess what circumstances were taken into account and so as to point to further relevant circumstances. I accept the Claimants' contention that the process cannot work effectively and lacks commercial coherence if a party has to operate on the basis of only part of the report in which EY set out the determination. That is all the more so if the other party has the full report.

57. In those circumstances I am persuaded that both necessity and obviousness strongly support the implication of a term to the effect that the Defendant is to provide the Claimants with a full copy of a report or other document containing a determination made pursuant to paragraph 4.1. or 4.2. I am persuaded that such a term is necessary for paragraph 4 as a whole (and in particular the review provisions at paragraph 4.4) to operate effectively. However, even if that were not the case I would be satisfied that this is a case where the implication is required on the grounds of obviousness and where exceptionally implication on that ground would be required notwithstanding any failure to satisfy the business efficacy ground of implication. The arrangement which would follow from the acceptance of the Defendant's case would be frankly bizarre. In the light of that I am satisfied that if an officious bystander had in May 2011 asked whether paragraph 4.1 meant (a) that the Defendant could require EY to report to it at the Claimants' expense and then decide to provide only part of the report to the Claimants or (b) that the Defendant was required to provide to the Claimants such determination as was forthcoming from EY in its entirety and without redaction then the parties would have undoubtedly replied "of course not" to (a) and "of course yes" to (b).

58. It follows that I find for the Claimants on the question of the implication of a term providing for the Defendant to supply to them a full copy of the report from EY. In that regard I reject the Defendant's argument that the Claimants were entitled only to a non-speaking valuation and so only to a figure extracted from the report. Business efficacy and obviousness require that the Claimants be provided with the report which comes from EY in response to the request to provide a determination. If that determination had been provided by a simple one-line non-speaking valuation then that is all that the Claimants would have been entitled to receive. However, that is not what was provided and it is not open to the Defendant to convert a speaking valuation into a non-speaking one by a process of redaction.

59. The term to be implied is that the Defendant provide the Claimants with a full and unredacted copy of such document as EY provides to the Defendant by way

of its determination under paragraph 4.1 or 4.2. That would include not only the report of 4th October 2018 but any earlier report or other document purporting to be a determination. The Claimants suspect that there was such an earlier report but this has been denied on behalf of the Defendant in correspondence. I will hear further submissions in due course as to the appropriate relief in the light of my conclusions as to the terms of the SPA but my current assessment is that there is no material before me from which I could conclude that there had been any report other than that of 4th October 2018.

60. In the preceding paragraphs I have addressed the question of the provision to the Claimants of a full copy of EY's report containing the determination. As explained there I am satisfied that an obligation on the Defendant to provide that it is to be implied. I have to consider whether any obligation to provide further or more extensive documentation is to be implied. In that regard I remind myself that the requirements which have to be satisfied before a term is implied are not to be watered down. I also have regard to the fact that the parties agreed in the SPA that the determination should be by way of expert determination by the auditors for the time being of Cend Ltd. It may very well have been sensible, reasonable, and appropriate for the parties to have agreed that the Claimants would be provided with the sundry further documentation and I accept that at least in part it would assist in the paragraph 4.4 review process. Nonetheless I am not satisfied that the implication of such a term is necessary for business efficacy nor that it is to be implied on the grounds of obviousness. In short my reasoning in respect of the particular categories of documents is as follows:

i) The Claimants seek copies of all documentation provided by the Defendant to EY from 2015 onwards together with copies of all written communications between the Defendant and EY relating to EY's appointment and the work undertaken by EY. That material is not necessary for the Claimants to operate the review procedure effectively because with the full report they will be able to assess whether there are circumstances to which reference should be made in a review submission. Moreover, this proposed term has to be seen in the light of the wording of paragraph 4.1 which provides in short terms for the Defendant to make a requirement of the auditors of Cend Ltd. That is a term which can operate effectively without addition of a provision that the supporting material and correspondence be provided to the Claimants.

ii) The Claimants' contention that they should receive full details of the calculations underlying the figures set out in EY's report runs counter to the nature of the exercise of an expert determination. The Claimants need to see the report in its entirety but there is no need for them to see the underlying calculations to the extent that they are not in the report and the choice of expert determination as the route to be followed in paragraphs 4.1 and 4.2 is strongly indicative that the parties did not envisage that either side would see the calculations.

iii) I am conscious that the Claimants are to meet the expense of the EY determination but it is not necessary for that process to be effective that they be provided with an itemised breakdown of the calculation of EY's

fees. The effect of the provision in the SPA was that the Defendant was to require EY to provide the determination but that the Claimants were to bear the cost of that exercise. The Claimants were thereby agreeing to indemnify the Defendant against the cost of the exercise. There is no suggestion in the SPA that that indemnification be limited to the reasonable expenses of the exercise and no scope for implying such a limitation. In the light of that the provision operates effectively without the Claimants having any entitlement to a detailed breakdown of the fee calculation and there is no basis for saying that either party would have regarded it as going without saying that such a breakdown should be provided. This is all the more so as at the time of the SPA it could not be said whether or not the Defendant would be entitled to such a breakdown from EY and so the proposed term would potentially involve the Defendant agreeing to provide material which it would not be given by EY and which it could not require EY to provide.

Conclusion.

61. It follows that a term is to be implied into the SPA providing for the Claimants to be supplied with a full copy of any report or other document containing a determination made by EY pursuant to paragraph 4.1 or 4.2 and the Claimants are entitled to a declaration to that effect with an order giving effect to the consequent obligation on the Defendant.