Case No: A3/2010/1458

Neutral Citation Number: [2010] EWCA Civ 60
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
Mrs Justice Proudman
HC08CO0626

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2011

Before :

LORD JUSTICE MAURICE KAY VICE PRESIDENT OF THE COURT OF APPEAL
LORD JUSTICE THOMAS
and
LORD JUSTICE ETHERTON

- -

Between :

Franbar Holdings Limited	**Appellant**
- and -	
Casualty Plus Limited & Anr	**Respondent**

- -

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- -

Mr Stephen Moverley Smith QC. (instructed by **Magwells**) for the **Appellant**
Mr David Matthias QC (instructed by **Richard Howard & Co**) for the **Respondent**

Hearing dates : 25th January 2011

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Judgment

LORD JUSTICE ETHERTON :

Introduction

1. This appeal concerns the contractual mechanism for valuing the shares held by the respondent, Franbar Holdings Limited ("Franbar"), in Medicentre (UK) Limited ("the Company") on the exercise of an option by the appellant, Casualty Plus Limited ("Casualty), to purchase those shares pursuant to the terms of a shareholder agreement between them dated 28 July 2005 ("the Agreement"). Casualty claims that the shares are to be valued by reference to accounts of the Company for the year ended 31 December 2006 filed at Companies House ("the 2006 Accounts"). Following the trial of preliminary issues, Mrs Justice Proudman declared in an order made on 26 May 2010 that, among other things, the option price for the shares is to be determined by reference to the accounts of the Company for the year ended 31 December 2005 ("the 2005 Accounts"). Casualty appeals against that part of the Judge's order.

Background

2. The following brief account of the factual background is mostly taken from Franbar's skeleton argument and the Judge's judgment.

3. The Company was formed in order to provide healthcare and medical services. In 2001 Franbar purchased the entire share capital of the Company. In July 2005 Franbar sold 75 per cent of the share capital of the Company to Casualty. At the same time the Agreement was made between Franbar, Casualty and the Company, and in it Franbar was given an option to sell its remaining shares in the Company, and Casualty was given an option to buy those remaining shares. Casualty's option to buy was exercisable on 31st March 2008 and on each subsequent anniversary to 2012 at a price of nine times EBITDA (earnings before interest, charges, taxation, depreciation and amortisation) calculated in accordance with the provisions of Schedule 3 to the Agreement.

4. Under the terms of the Agreement, Franbar and Casualty each nominated two directors of the Company. One of Franbar's nominated directors had to be Mr Karim Lalani. Casualty had the power to nominate a third director. The chairman, nominated by Casualty, had the casting vote in the event of equality of votes. The Judge found that the directors had a brief to protect the interests of the shareholder which respectively had nominated them. Although each nominee understood that he owed duties to the Company as a director, each acted as a representative of his nominating company, acted on its instructions and reported back to it.

5. Franbar and Casualty fell out at the end of October 2007, which led Franbar to commence these proceedings against Casualty in March 2008, alleging several breaches of the Agreement. Franbar, as the minority shareholder, also presented an unfair prejudice petition in March 2008 in relation to the Company, pursuant to the section 994 of the Companies Act 2006 ("CA 2006"), alleging oppression arising out of broadly the same facts ("the Petition"). The Petition was ordered to be heard together with these

proceedings. Franbar says that it and its nominated directors, Mr Lalani and Mr Mark Olbrich, have been excluded from any involvement in the Company's business since the end of October 2007.

6. At the hearing of one of the interim applications in these proceedings in June 2008 Casualty produced draft accounts for the Company for the year ended 31st December 2006. This was the first time that Franbar's representatives saw any accounts of the Company for that year. Those accounts underwent amendment and were, unknown to Franbar, signed and filed as the 2006 Accounts at Companies House on 14 July 2008.

7. On 1 April 2009 Casualty served a notice, which (the parties having extended the effective date for the exercise of the call option by agreement) it is common ground was an effective exercise of Casualty's call option. Franbar and Casualty could not agree the price to be paid for Franbar's shares, and in particular they could not agree whether, as Franbar contended, the price was to be fixed by reference to the 2005 Accounts, or, as Casualty contended, by reference to the 2006 Accounts. With the leave of Master Price, Franbar amended its Claim Form and Particulars of Claim to claim, among other things, that the option price pursuant to Casualty's exercise of its call option is to be determined by reference to the EBITDA in the Company's 2005 Accounts and to seek a declaration to that effect.

8. That issue and another issue were ordered by Master Price on 13 July 2009 to be tried as preliminary issues ("the Preliminary Issues"). The Petition was ordered to be stayed until after the trial of the Preliminary Issues. The trial of the Preliminary Issues took place before the Judge over 3 days in April 2010, and she handed down her judgment on 21 May 2010. As I have said, the Judge, among other things, declared in favour of the 2005 Accounts, and it is against that part of her order that Casualty, with permission of Mummery LJ, appeals.

The Agreement

9. The Agreement contained the following provisions relevant to this appeal:

(1) The Board of the Company was to have responsibility for the overall supervision and management of the Company, but had to obtain shareholder approval before undertaking or adopting any act or proposal that involved any "Reserved Shareholder Matter" (clause 2.1).

(2) Casualty was entitled and obliged to make and maintain the appointment of two directors of the Company; and was entitled to appoint a third as chairman (clauses 2.2 and 2.8).

(3) Franbar was required to appoint Mr Karim Lalani as a director, and was entitled to appoint one other director of the Company (clauses 2.3, 2.6). Franbar was required to maintain the appointment of Mr Lalani, prior to the sale of all the option shares, until he died or became incapacitated (clause 2.4).

(4) Casualty (and Franbar) would procure that all dealings between the Company and Casualty would be carried out on an arm's length basis (clause 2.10).

(5) Casualty and Franbar were to procure that the Company produced its own audited accounts (clause 2.10).

(6) The parties to the Agreement would procure that audited accounts for the Company were available for inspection by the parties and formally adopted not later than 10 weeks following the financial year end of the Company (clause 2.11).

(7) In consideration of £1 paid by Casualty, Franbar granted to Casualty the right, exercisable on 31 March in the years 2008, 2009, 2010, 2011 and 2012, to purchase all of the ordinary shares of the Company held by and registered in the name of Franbar "for a price per share of the Option Price upon the terms and subject to the conditions contained in Schedule 2" to the Agreement (clause 4.3).

(8) Clause 5, headed "Reserved Shareholder Matters", provided that Franbar and Casualty would exercise their powers in relation to the Company so as to procure that its nominated directors, the Board and the Company would not, except with the prior unanimous consent in writing of Franbar and Casualty, do certain specified things, including (clause 5.9) holding any meeting of the shareholders or purporting to transact any business at such meeting, unless authorised representatives or proxies were present for each of the shareholders; and (clause 5.12) making or permitting any material change in the accounting policies and principles adopted by the Company in the preparation of its audited accounts and management accounts except as might be required to ensure compliance with the relevant accounting standards under Part VII of the Companies Act 1985 ("CA 1985") and GAAP, consistently applied.

(9) Clause 14.4 said that the Agreement was the entire agreement between the parties, superseding all other agreements or arrangements between the parties, whether written or oral, express or implied; and that no variations of the Agreement were effective unless made in writing signed by both parties or their authorised agents.

(10) Paragraph 3 of Schedule 2 to the Agreement contained provisions for the exercise of the call option by Casualty in similar terms to clause 4.3.

(11) Schedule 3 to the Agreement contained the provisions for determining the option price. Paragraph 2 of Schedule 3 provided:

"The Option Price will be determined by reference to the EBITDA set out in or determined by reference to the Company's most recent audited annual accounts as have been formally adopted by the Company immediately prior to the exercise date."

(12) Paragraph 3 of Schedule 3 provided:

"The amount of the Option Price per share will be the Company's Adjusted EBITDA, multiplied by nine and finally divided [by] the total number of Shares in issue at the exercise date specified in the relevant Option Notice."

(13) 'EBITDA' was defined (in Schedule 3 paragraph 1) as follows:

"Earnings before interest charges, taxation, depreciation and amortisation as determined by GAAP as amended or updated from time to time".

'GAAP' was defined (in Schedule 1 paragraph 2) to mean:

"accounting principles, concepts, bases and policies generally adopted and accepted in the United Kingdom in the preparation of accounts for limited liability companies."

'Earnings' was defined (in Schedule 3 paragraph 1) to mean:

"The total profit generated by the Company in the ordinary course of business, excluding exceptional and extraordinary revenues and costs."

'Adjusted EBITDA' was defined (in Schedule 3 paragraph 1) to mean:

"the EBITDA adjusted to take account of the factors in paragraphs 4, 5 and 6 of this Schedule 3."

(14) It is common ground that the factors in paragraphs 5 and 6 of Schedule 3 did not apply. The only relevant adjustment was that mentioned in paragraph 4, which provided:

"A management fee for providing head office functions and services is to be charged by Casualty to the Company and deducted from the EBITDA for the relevant financial year. Such management fee will be in respect of such periods and such amounts as set out in the Business Plan".

The judgment and her findings

10. It was not in dispute before Proudman J that the 2005 Accounts were annual accounts adopted by the Company within the meaning of Schedule 3 to the Agreement. Those accounts were discussed and approved in principle at a meeting attended by all the four nominated directors. They were audited by

the Company's auditors, Grant Thornton UK LLP ("the auditors"), who stated their opinion that they gave a true and fair view of the financial position of the company in accordance with GAAP and had been properly prepared in accordance with CA 1985, and that the information in the Directors' Report was consistent with the financial statements.

11. Being satisfied that Mr Lalani and Mr Olbrich, Franbar's nominated directors, had approved the 2005 Accounts, Mr Ketan Patel (who, together with Dr Johan de Plessis, were Casualty's nominated directors), signed the Chairman's Report and Dr du Plessis signed the Financial Statements on 26 October 2007. The 2005 Accounts were duly filed with Companies House at the beginning of November 2007.

12. The Judge concluded ([19]) that Franbar and Casualty were in agreement on the 2005 Accounts, through their nominated directors. She said ([20]) that it was clear on the evidence that Mr Lalani was authorised to consider the 2005 Accounts on behalf of Franbar and that unanimous agreement was reached by Mr Lalani, Mr Olbrich, Mr Patel and Dr du Plessis, both as directors of the Company and on behalf of Franbar and Casualty as shareholders. On the basis of *Re Duomatic Limited* [1969] 2 Ch 365, *Runciman v. Walter Runciman plc* [1992] BCLC 1084, and observations of Mummery LJ in *Euro Brokers Holdings Ltd v. Monecor (London) Ltd* [2003] EWCA Civ 105, the Judge considered that Franbar and Casualty were as bound as if there had been a resolution in general meeting or in a board meeting.

13. Turning to the 2006 Accounts, the Judge observed ([21]) that on 16 January 2008 allegations of misconduct were made against Mr Lalani and he was suspended from his employment with the Company; less than two months later Franbar issued proceedings; and Franbar and its representatives were excluded from the Company's business.

14. The Judge found as a fact ([24]) that Casualty excluded Franbar and its nominated directors from involvement in and consideration of the 2006 Accounts. She said:

> "The defendant took the view that the dispute and ongoing proceedings between the claimant and the defendant precluded the possibility of the claimant's involvement. Further, as the defendant could have carried any vote put to the Board within the Company, a vote on the 2006 accounts seems to have been considered by the defendant as unnecessary."

15. Mr Patel was requested by the Casualty to, and did, sign the Directors' Report in the 2006 Accounts, purportedly "by order of the Board" of the Company, and Dr du Plessis signed the profit and loss account and balance sheet below the statement - "The financial statements were approved by the Board of Directors on 14 July 2008". The 2006 Accounts were filed at Companies House on that day.

16. Mr Patel's evidence in cross examination was that he never really believed that he was signing the 2006 Accounts on behalf of the Board. He said that he

never thought about the matter in much detail. He was required by Casualty to sign and he did so, not realising that the Accounts would be used for any purpose other than fulfilling formal filing requirements enabling Casualty to file its own accounts. He knew the audited accounts contained a disclaimer by the auditors, and he said he did not therefore attach any great importance to them. The Judge considered that his evidence was that he thought he had the de facto power to pass the Accounts, not that he believed that the accounts were validly adopted by the Company.

17. Dr du Plessis is a medical specialist and was in charge of the operational side of the Company's business. He was neither an accountant nor a lawyer. His evidence in cross-examination was that he had authority to sign because Casualty could have outvoted Franbar and carried the Accounts if the matter had in fact been put to a vote. However, he was aware that the 2006 Accounts had not in fact been put either to the Company in general meeting or to the board as a whole, and that Franbar had been wholly excluded from the decision.

18. In rejecting the submission of counsel for Casualty that the lack of formality of the 2006 Accounts was no different from that of the 2005 Accounts, the Judge held ([29]) that there was a crucial difference in that the 2005 Accounts had been approved on behalf of Franbar as well as Casualty whereas the 2006 Accounts were approved unilaterally by Casualty.

19. The Judge rejected ([30]) evidence given on behalf of Casualty by Mr Bhundia that Mr Olbrich had lost interest in the Company, having moved to live in Poland, and that he would not have attended even if he had been summoned to a meeting. Mr Bhundia gave no explanation for excluding Mr Lalani from the decision other than that he was under suspension as an employee of the Company. That was, in the Judge's view, an insufficient reason to exclude Mr Lalani from involvement in the 2006 Accounts as the director nominated by Franbar.

20. The Judge also rejected ([31]), as legally sustainable, the explanation given on behalf of Casualty that Mr Lalani was excluded from participating in the decision on the 2006 Accounts because he had been suspended (on full pay) from his employment with the Company on 16 January 2008 on the basis of allegations of misconduct: he remained the director nominated by Franbar.

21. The Judge also held ([37]) that the fact that Franbar could have been outvoted did not validate the decision to exclude it from the decision altogether; and she referred in that connection to *Harben v. Phillips* (1883) 23 Ch D 14 at 26, and *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 Ch D 160.

22. Having held that, accordingly, the formalities required for approval of the 2006 Accounts had not been observed, and, unlike the position in relation to the 2005 Accounts, had not been agreed to be waived, the Judge then rejected the argument of counsel for Casualty that the requirement in the Companies Acts for approval of accounts was to be distinguished from the requirement in the Agreement that the accounts be those "adopted" by the Company. She also said ([33]) that, in the light of the litigation that was then under way, it was

unrealistic to suggest that the Franbar should have taken some formal steps at that stage to renounce them at Companies House.

23. She then said ([34]):

> "I do not accept that 'adopted' simply means that the Company had treated the 2006 accounts as its accounts by filing them at Companies House, thereby relieving the claimant's nominated directors of their duty to file accounts. In this context I note the requirement of clause 2.11 of the Agreement that audited accounts for the Company be made available for inspection "by the parties or their representatives" and formally adopted within a set time period. The use of the word "adoption" involves (a) formal approval or some conduct by the claimant demonstrating either (b) that it had accepted the accounts informally in such circumstances that it could not be heard to say that it was not bound because formal procedures had not been followed, or (c) that approval of the accounts had been delegated to the directors who in fact signed them. Unilateral adoption by one part of the membership and one half of the directors cannot in my judgment be adoption for the purposes of the Agreement."

24. The Judge then gave a further reason why the 2006 Accounts were not the appropriate accounts for the purposes of Schedule 3 to the Agreement. Unlike the 2005 Accounts, the 2006 Accounts were qualified by the auditors. In their report to the members, in accordance with CA 1985 section 235, the auditors said that, having considered the adequacy of the disclosure made in the financial statements, they were unable to form an opinion as to whether the financial statements gave a true and fair view, in accordance with GAAP, of the state of the company's affairs as at 31 December 2006 and of its loss for the year then ended, and whether the financial statements had been properly prepared in accordance with CA 1985.

25. The Judge considered that accounts qualified in that way by the auditors could not have been accounts within Schedule 3 to the Agreement for the purpose of ascertaining the option price. She said at [42]:

> "I do not believe that it would have been open to the defendant to adopt accounts for the purposes of Sched 3 of the Agreement which had not been certified by the auditors as representing a true and fair picture of the Company's financial statements. It cannot be right that the defendant's representatives could force the accounts through on any basis they liked. Mr Moverley Smith [Casualty's counsel] pointed out that the directors would always owe a duty to the Company (see s. 393 Companies Act 2006) only to approve accounts which they believed to be fair and true. However it seems to me that the Agreement is predicated on the basis that accounts will be binding because they have been independently audited. Under the terms of the Agreement the auditors are the final arbiters of what is a true and fair view of the company's affairs. That cannot apply where the auditors have certified that they are unable to give their opinion on the issue. The position is

> very far in my judgment from some minor qualification on a discrete issue which could be resolved to the auditors' satisfaction. I do not consider that the entire agreement clause derogates from this conclusion."

26. On this aspect of the Preliminary Issues, the Judge said ([43]) that she accepted the expert evidence of Franbar that the reasons cited by the auditors for their disclaimer had the potential to affect the EBITDA. That was because one of the matters mentioned by the auditors was the inability to reconcile cash balances. The Judge considered that, if invoices were or may not be an accurate reflection of the Company's cash position, there was a real risk that the profits will have been misstated in the accounts.

27. The Judge summarised her views at [44], saying:

> "What is required is certainty and fairness between the members. I cannot accept that it is certain or fair to use as the basis for determining the option price accounts which were never agreed by the shareholders or the board of the Company and which were disclaimed by the Company's auditors."

The appeal

28. The Grounds of Appeal in Section 6 of the Notice of Appeal are succinctly and clearly stated in six paragraphs. First, it is said that the Judge erred in construing the words "the most recent audited annual accounts as have been formally adopted by the Company immediately prior to the exercise date" in Schedule 3 to the Agreement. In particular, she failed to distinguish between approving accounts, which is an action of the shareholders, and adopting accounts, which is an action of the Company. Secondly, she failed properly to find that the 2006 Accounts, which (a) had been signed by the finance and operations directors of the Company, and (b) had been filed at the Companies Registry as audited accounts of the Company, had not been formally adopted by the Company. Thirdly, the Judge erred in finding that accounts could only be adopted by the Company if Franbar, its 25 per cent shareholder, had formally approved them or had accepted the accounts informally or had delegated approval to the directors who actually signed the accounts. Fourthly, the Judge erred in failing to find that formal adoption of accounts by a company occurs when a company causes its accounts to be signed and then publishes them by filing them at the Companies Registry. Fifthly, the Judge erred in failing to give any or any sufficient weight to the fact that the finance director, Mr Patel, had authority and de facto power both to sign the 2006 Accounts and to file them on behalf of the Company and had done so.

29. Mr Stephen Moverley Smith QC, for Casualty, elaborated on those grounds in his skeleton argument and his submissions.

30. His first point, in his oral submissions, was that the "formally adopted" annual accounts mentioned in paragraph 2 of Schedule 3 to the Agreement were to be as close as possible to the time of exercise of the option. The Company's accounting period ran to the 31 December, and clause 2.11, he submitted, was

intended to ensure that the Schedule 3 accounts would be available before 31 March in the year following the end of the Company's financial year. He submitted that clause 3.1 of the Agreement also supported the conclusion that the requirement of "formal adoption" of the accounts was essentially intended to identify an operative date: in the case of clause 3.1 it was related to a specified time for distribution of profit by way of dividend.

31. This point was connected to a critical part of Casualty's appeal, namely that the Judge approached the issue of "formal adoption" in fundamentally the wrong way. She considered that the question was one of approval, that is to say whether the 2006 Accounts had been approved by Franbar, the Company's minority shareholder. Casualty's case is that, for the purposes of Schedule 3 to the Agreement, what the Judge should have considered were the steps a company has to take to adopt accounts, and whether those steps had been taken by Casualty in respect of the 2006 Accounts.

32. Casualty contends that two things were necessary for the formal adoption of accounts by the Company: the signing of the accounts on behalf of the Company, and the filing those accounts at Companies House. It says that both were done in respect of the 2006 Accounts. They were undoubtedly filed at Companies House. They were signed by the Company's finance director, Mr Patel, and its operations directors, Dr du Plessis. The Judge found that Mr Patel had de facto power to pass the Accounts. Casualty submits that, by signing the 2006 Accounts, Mr Patel passed them. Dr du Plessis also considered that he had authority to sign them.

33. Mr Moverley Smith accepted that accounts could only be "approved" by a company for the purposes of CA 2006 section 414 if they had been approved at a properly convened meeting of the board of directors. He submitted that, by contrast, the requirement of "formal adoption" of accounts by the Company for the purposes of the Agreement had to be seen in the context of Casualty being a 75 per cent shareholder and Franbar being only a 25 per cent shareholder and the purpose of the requirement being, as Mr Moverley Smith contended, merely for the purpose of identifying the accounts nearest to any exercise of the option in the March following the financial year end of the Company. He submitted that, in that commercial context, the requirement of "formal adoption" could be achieved by accounts being approved by and signed by authority of Casualty and its directors, without first holding any validly convened meeting of the board of directors of the Company. Similarly, while Mr Moverley Smith accepted that the filing of accounts pursuant to the requirements of CA 2006 presupposes that the accounts have been approved by the company in accordance with the requirements of CA 2006 section 414, he submitted that the importance of filing for the purpose of the "formal adoption" of accounts by the Company pursuant to the Agreement was only for the purpose of showing objectively that the Company was treating those accounts as its accounts. In those circumstances, he submitted, it did not matter whether or not the accounts had first been approved by a validly convened meeting of the Board of Directors. He observed that, while there were several provisions in the Agreement intended to protect the interests of Franbar, there was no provision specifying that accounts could

only be "formally adopted" by a validly convened meeting of the board at which all the directors, or at least directors representing Franbar, were present.

34. Franbar has issued a Respondent's Notice in which it seeks to uphold the Judge's decision on the further ground, mentioned by the Judge, namely that it was not open to Casualty to "adopt" accounts for the purposes of Schedule 3 to the Agreement which had not been certified by the auditors as representing a true and fair view of the Company's financial statements. As to that point, Mr Moverley Smith had a two-fold riposte. He submitted that any disagreement or uncertainty on the accounts could be resolved by an expert appointed pursuant to the dispute resolution mechanism in paragraph 7 of Schedule 3.

35. Further, and as an overriding point in his oral submissions, Mr Moverley Smith submitted that the phrase "the most recent audited annual accounts" in paragraph 2 of Schedule 3 is perfectly clear and unambiguous. The 2006 Accounts satisfied that requirement, and the court cannot, by seeking to qualify that phrase, make a new and different contract for the parties. In that connection, he referred to *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10, and especially the observations of Lord Hoffmann, giving the judgment of the Board, at paragraph [19] and the quotation there of part of Lord Pearson's speech in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, at 609.

Discussion

36. I would dismiss this appeal for reasons which can be stated very briefly.

37. I agree with the Judge's conclusion that, having regard to the Agreement as a whole, it cannot have been the intention of the parties that the phrase "formally adopted" in paragraph 2 of Schedule 3 would be satisfied by a process by which accounts were signed by directors nominated by only one of the shareholders without knowledge of the existence of any such accounts by the other shareholder or any of its nominated directors, and without any notice to such other shareholder or its nominated directors, or their knowledge or approval, of the intention to sign those accounts, and, indeed, with the deliberate exclusion of such shareholder and directors from the process .

38. As Mr David Matthias QC, for Franbar, (who we did not consider it necessary to call upon for oral submissions) submitted in his helpful skeleton argument, that conclusion is strongly supported by the provisions of clause 2.11 of the Agreement. The parties agreed in that clause to procure that that audited accounts for the Company would be available for inspection by them or their representatives "and formally adopted" by no later than 10 weeks following the financial year end of the Company. That provision presupposes knowledge of both shareholders and their active participation in the process of formal adoption of audited accounts.

39. The conclusion is also supported, as Mr Matthias further submitted in his skeleton argument, by the fact that the Agreement is generally characterised by an intention to achieve fairness between the partiers. In particular, several

provisions are intended to protect the interests of Franbar, as the minority shareholder, including generally the provisions relating to "Reserved Shareholder Matters" in clause 5. Clauses 5.9 and 5.12 are, in spirit, plainly inconsistent with the one-sided and unfair process by which the 2006 Accounts came to be signed and filed.

40. Furthermore, I agree with the alternative ground on which the Judge relied in reaching her decision in favour of the 2005 Accounts. It is obvious that the reference in paragraph 2 of Schedule 3 to the Agreement to "the most recently audited accounts" cannot have been intended to be a reference to accounts heavily qualified by the Company's auditors in the manner in which the 2006 Accounts were qualified. In particular, it cannot have been intended to be a reference to accounts qualified in a way and for reasons which, as the Judge found in respect of the 2006 Accounts, might affect the EBITDA. It is to be noted that this alternative ground of the Judge's decision was not challenged in the Grounds of Appeal in the Notice of Appeal.

41. It scarcely seems necessary to cite authority for such an interpretation of paragraph 2 of Schedule 3. If any be needed, it can be found in the opinion of the Privy Council in the *Belize* case, on which, as I have said, Mr Moverley Smith also relied. The following paragraphs are particularly relevant:

> *"*[19] The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:
>
> '[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.'
>
> 20. More recently, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn said: 'If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.'

> 21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

42. The phrase "the most recent audited annual accounts" in paragraph 2 of Schedule 3 to the Agreement can only reasonably be understood to have the meaning attributed to it by the Judge in her second and alternative ground for rejecting the 2006 Accounts.

Conclusion

43. For those reasons, I would dismiss this appeal.

LORD JUSTICE THOMAS

44. I agree.

LORD JUSTICE MAURICE KAY

45. I also agree.