

JERSEY / JUDGMENT

Busy Bees Holdings Limited v McLachlan and McLachlan [2024] JRC 027 (01 February 2024)

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Court of Appeal 1 February 2024 Before : Ms Clare Montgomery KC, President; Mr James Wolffe KC; and Mr Michael Furness KC. Between Busy Bees Holdings Limited Appellant (1) Robert McLachlan And (2) Dawn McLachlan Respondents Advocate S. J. Alexander for the Appellant. Advocate O. A. Blakeley for the Respondents.

judgment

Michael Furness JA: 1. This is the judgment of the Court.

Introduction

2. This appeal arises out of a dispute over a contract of sale and purchase entered into on 8 November 2019 ("the SPA"). The vendors were Dawn and Robert McLachlan, the Respondents to this appeal ("Mr and Mrs McLachlan"), and the purchaser was Busy Bees Holdings Ltd, the Appellant ("Busy Bees"). The subject matter of the SPA was the shares in two companies; Organic Kids Ltd and Organic Kids (Castle Quay) Ltd. Organic Kids Ltd owned and operated a childcare nursery at La Providence, St Peter, which we will refer to as "OKLP" and Organic Kids (Castle Key) Ltd owned and operated a childcare nursery at Castle Quay, St Helier (which we will refer to as "OKCQ"). We refer to OKLP and OKCQ as "the Nurseries". 3. Following completion of the SPA, a dispute arose because Busy Bees alleged that Mr and Mrs McLachlan were in breach of certain vendors' warranties which they had given under the SPA. This dispute was referred to an independent expert, Advocate John Kelleher ("the Expert"), pursuant to the terms of the SPA. The Expert made a determination, dated 25 April 2022 ("the Determination") in favour of Busy Bees, and directed that Mr and Mrs McLachlan should pay Busy Bees damages in the sum of £1,610,400 plus interest. 4. By a Representation dated 16 May 2022 Mr and Mrs McLachlan applied to the Royal Court to set aside the Determination, on various grounds which we set out below. The Royal Court (Sir William Bailhache, Commissioner, and Jurats Christiensen and Blampied) acceded to that application, for the reasons set out in the Court's judgment of 30 June 2023. By an Act of Court of the same date, the Court: "1. ordered that the award of the joint expert ("the

Expert"), shall be set aside;

2. ordered that the conclusions of fact which the Expert reached shall not be reopened;
3. granted the parties liberty to apply in relation to any difficulties encountered over the remission of the calculation of damages to the Expert or to a different expert if the parties so agree; and
4. directed that, if necessary, it shall hear the parties on the matter of costs." 5. Busy Bees now appeals to this Court against that ruling. It seeks to have the Royal Court's order set aside, a declaration that the award made by the Determination is valid and enforceable, and an order that Mr and Mrs McLachlan pay the costs of the appeal. The factual background 6. The parties are agreed that even if the award made pursuant to the Determination is set aside, they should remain bound by the findings of fact made by the Expert. The Expert made detailed findings of fact. What appears below is a summary of the facts necessary for the purposes of this appeal. The period before the SPA 7. Children's nurseries in Jersey must be licenced under the Care of Children (Jersey) Law . Both of the Nurseries held a licence pursuant to that legislation. The authority responsible for regulating nurseries, and ensuring that they comply with their licences, and the relevant statutory requirements is the Children and Early Years Service ("CEYS"). 8. It is clear from the Expert's findings in paragraphs 80 to 118 of the Determination that during the course of 2019 the Nurseries had been subject of a series of adverse reports from CEYS, following inspection visits, as well as some complaints from parents. For present purposes the main concern expressed by CEYS were that there was a lack of sufficiently qualified staff at both Nurseries. That had led to the Nurseries breaching the legal requirements as to the minimum ratio of staff to children. There were two visits, and reports, made by CEYS in March 2019 about OKLP, two visits and reports in June 2019 about OKCQ, and a report in September or October 2019, following a visit to OKCQ, which the Expert referred to as "the September 2019 Report". As well as giving a detailed account of the failings of OKCQ, as perceived by CEYS, to meet a range of statutory requirements the September 2019 Report contained a section entitled "Next Steps" which read as follows: "We have agreed with the organisation the following emergency measures: 1. A variation to the Conditions of Registration as follows; Currently 45 children attend this setting, 14 children in the pre-school, 16 in the toddler room and 15 in the baby room. 2. Numbers must not increase without permission from CEYS and if there are any changes in the situation, regarding staffing ratios, the organisation must inform CEYS as soon as possible. 3. [OKCQ] will not take on any new children, irrespective of a decrease in numbers, without written permission from CEYS. 4. CEYS will have a robust and ongoing approach to supporting and evaluating progress. As a result, this organisation will be subject to a further full Quality and Compliance Review within the next 12 months to ensure sustained progress is maintained for the safety and welfare of children. If at any time CEYS feels that the requirements are not being met or that the organisation does not have the capacity or resources to improve, then a referral to the Minister will be made under the Daycare [sic] of Children (Jersey) Law 2002 with recommendations to suspend the registration of this

organisation." 9. The September 2019 Report was followed by an email dated 16 September 2019 from CEYS to Mrs McLachlan, which contained the following wording: "We all agreed due to difficulties around staff recruitment and retention standards 1.8, 1.9 and 1.10 are unachievable for [OKCQ] at this time and that more time needs to be allowed for you to develop capacity within your team. We accept your sensible suggestions to mitigate the impact of the recruitment difficulties by maintaining the number of children and ratios at the current level and using your most reliable and knowledgeable staff as team leaders in the baby, toddler and pre-school rooms. To confirm; you currently have 45 children in total, 14 children in the pre-school, 16 in the toddler room and 15 in the baby room. You will not exceed these numbers without confirmation from CEYS that you have capacity within your team to do so. If there is any changes in the situation regarding staffing and ratios you or Leanne [sic] will let us know as soon as is reasonably possible ..." 10. The Expert found that Busy Bees knew nothing about these problems before completion of the SPA. The relevant terms of the SPA 11. The only terms of the SPA which are relevant for present purposes are the warranties given by Mr and Mrs McLachlan which the Expert found to have been breached, and the provision governing the appointment of the Expert. The vendors' warranty covenants are to be found in clause 7 of the SPA. "7. Warranties, Indemnities and Undertakings 7.1. Subject to clause 7.3(c), the Vendors hereby warrant and represent (on a joint and several basis) that the Warranties are true and accurate and the Vendors acknowledge and accept that in entering into this Agreement the Purchaser is relying on the Warranties. 7.2. The Vendors hereby warrant and represent (on a joint and several basis) to the Purchaser that save as set out in clause 7.3(c) they are not aware of any other fact or matter which renders or might upon its disclosure render any such information misleading or incomplete. 7.3. No liability shall attach to the Vendors in respect of a breach of any of the Warranties (other than the Tax Warranties to which the provisions of paragraph 2 of Schedule 7 shall apply) and as such the Purchaser shall not be entitled to make a Claim under this Agreement to the extent that: - ...

- (c) any Claim arising from any transaction matter or thing that is disclosed in the Disclosure Letter or the Disclosure Bundle with sufficient information or particulars to enable the Purchaser to identify the nature and scope of the matter disclosed and to make a reasonable assessment of the impact upon the relevant Company and its assets of the matter disclosed;" 12. The "Warranties" themselves are set out in Schedule 3 of the SPA. So far as material this provides as follows: "15.2 Each Company has obtained all licences and consents required to operate the Business as a setting for at least the number of children currently on its books and is registered under the 2002 Law in relation to the Business and has complied in all material respects with the conditions of such registrations." ... 16 Each of the Warranties is true and correct at the date of this agreement and at Completion" 13. The provisions governing the appointment of the Expert are found in clause 18 of the SPA [G37] which reads, so far as material, as follows: "18. Expert Determination 18.1. Any dispute arising under this Agreement shall in the absence of agreement forthwith be referred to the determination of the Expert whose decision shall be final and binding upon the parties.

18.2. The parties shall use all reasonable endeavours to procure that the Expert shall give his decision as speedily as possible. 18.3. The Expert shall act as an expert and shall be required in every case to allow the parties to make written representations to him and shall provide written reasons for arriving at his decision." The dispute between the parties and the Determination 14. By a letter dated 5 November 2020 Mourants, on behalf of Busy Bees, wrote to Mr and Mrs McLachlan making a range of allegations of breach of warranty under the SPA. After an exchange of correspondence in which the parties set out their positions, the parties agreed on the appointment of Advocate Kelleher as the Expert who was to determine the various points in issue. Advocate Kelleher's appointment took effect from 11 January 2021, and was made on the basis of the "Rules for Expert Determination" promulgated by the Academy of Experts ("the Rules"). By an email dated 22 March 2021 the Expert set out certain modifications to the Rules which the parties had agreed with the Expert, but these are not material to the present dispute. 15. The Expert convened a hearing, which took place on 10 to 12 January 2022. Prior to that hearing the parties had exchanged written submissions, witness statements and bundles of documents. At the hearing witnesses were cross-examined and oral submissions were made. Among the witnesses were Mrs McLachlan and, for Busy Bees, Mr Stephen Ecclestone. Mr Ecclestone is the Group Development Director of the Claimant, and his evidence was important on the question of the quantum of loss suffered by Busy Bees in the event that the Expert determined that the failure to disclose the Nurseries' issues with CEYS, and the agreed caps on numbers, constituted a breach of warranty on the part of Mr and Mrs McLachlan. That computation of loss was set out in a table annexed to Mourant's letter of 5 November 2020, a computation which has come to be referred to in these proceedings as "the Model". 16. The Expert handed down a draft of his Determination on 16 February 2022. On 28 February Advocate Blakeley, who appears for Mr and Mrs McLachlan, wrote to the Expert challenging the findings in the draft Determination on loss and quantum. He made substantially the same criticisms of the draft Determination as he later advanced before the Royal Court. In response to this challenge, the Expert made certain further findings of fact, and added a "Postscript" to the Determination explaining his response to Advocate Blakeley's letter. 17. The Determination in its final form was handed down on 25 April 2022. The Determination made findings as to the regulatory regime which was applicable to the Nurseries at paragraphs 57 to 76, and then turned to consider the factual allegations. After setting out in detail the relevant documentary evidence, and after considering the witness evidence, the Determination made findings as to the status of the Nurseries as at the date of Completion. The key finding so far as concerns OKCQ was that as at Completion it had agreed with CEYS that the number of children would not exceed 45 "without confirmation from CEYS that you have capacity within your team to do so". No such confirmation had been forthcoming at completion (paragraph 255). By contrast, when considering OKLP, the Expert found (at paragraph 262) that he was not satisfied that there was a cap on numbers at OKLP as at Completion. 18. At paragraphs 264 to 329 of the Determination the Expert considered the merits of the thirteen breaches of warranty relied on by Busy Bees. Seven of these claims he dismissed entirely. That left six instances where the Expert found there was at least a technical breach of the

Warranties. These were summarised in paragraph 324 of the Determination: "324 I therefore have found breaches of: 324.1 The warranty in Schedule 3, paragraph 15.2 of the SPA that all Organic Kids' licences and consents were in full force and effect was breached, along with clause 7.2 in this regard. 324.2. The warranty in Schedule 3, paragraph 14 of the SPA that each Company "has at all times complied with the provisions of the said law and all regulations, orders and codes of practice applicable to the Companies and the Business". 324.3. The warranty in Schedule 3, paragraph 15.1 of the SPA that neither of the Companies (or their employees etc.) had contravened the Day Care Law and the Early Years Statutory Requirements in such a way as might result in a sanction. 324.4 The warranty in Schedule 3, paragraph 15.3 of the SPA that the Companies had complied with all the conditions of their Registration. 324.5. The warranty in Schedule 3, paragraph 15.4 of the SPA that the Companies had complied with the Early Years Statutory Requirements. The warranty in Schedule 3, paragraph 15.5 of the SPA that the Companies were not the subject of any outstanding adverse findings, required actions, recommendations etc. by CEYS." 19. Mr and Mrs McLachlan's position in relation to all of these breaches was that they were de minimis and inconsequential. As to that the Expert said this, at paragraphs 326 and 327: ... However, one thing is clear on the evidence, as I have found. That is that there was an agreement in place prior to the Completion Date between CEYS and OKCQ that the number of children at OKCQ would be restricted to present numbers until such time as CEYS was satisfied that the nursery had a sufficient number of qualified staff for the number of children to be increased (subject of course to the ceiling on that number determined by the conditions of Registration). The Claimant was not made aware of this agreement by the Defendants and discovered it only after the Completion Date. 327. The key breach therefore, in my view, is the breach of Warranty at Schedule 3, paragraph 15.2 that the Registration for OKCQ was in "full force and effect" coupled with the Warranty in clause 7.2 that the Defendant were unaware of any fact which "renders or might upon its disclosure render" that representation "misleading or incomplete". On the contrary, they were fully aware of the agreement in place. 20. The Expert proceeded on the basis that it was only this "key breach" which gave rise to loss. It should be noted that this breach only occurred in relation to OKCQ. 21. When considering the implications of the breach, it is relevant to bear in mind what the Expert had to say about the cap imposed on OKCQ. 250. Prior to the Completion Date, there was clearly an issue about ratios and this was caused by a lack of qualified staff and, in turn, by difficulties in recruitment. CEYS was prepared to be pragmatic and allow this to be dealt with by reference to the extant ratios: there was to be no increase in children until the appropriate additional number of staff were recruited. 251. CEYS made it clear any increase in numbers was directly linked to staffing numbers. It did not link it to any other issue of compliance. 22. The Expert then turned to quantum. He began in paragraphs 330 to 339 of the Determination by considering the general law on the quantification of loss in breach of warranty claims. He recited Busy Bees' arguments that (a) the usual basis for assessing damages for breach of warranty on a contract of sale is to compare the value of the asset sold on the assumption that the warranty was true with its actual value (b) that the "as warranted" value of the asset sold is usually taken to be the agreed purchase price, because

that is likely to represent the value of the asset as it is warranted to be and (c) that there is no one basis for carrying out the valuation of the asset "as is", although adopting the method of valuation used by the parties to compute the value of the asset is the natural starting point. He then noted the fact that Mr and Mrs McLachlan had accepted by the date of the hearing that the normal method of calculating damages in a breach of warranty claim is to assess the difference between the price paid for the shares and their actual value as at the completion date (see paragraph 334). He then recorded three points submitted by Mr and Mrs McLachlan by way of qualification of this general proposition. 23. The first of those points was that the quality of the business sold was not affected by the cap on attendances because the Nurseries were always required to operate within the ratios imposed by the terms of its registration and by law, and by hiring more staff Busy Bees could bring the permitted numbers of attendances up to the maximum permitted by the terms of the registrations. The Expert considered that this argument did not address the fact that in the case of OKCQ there was an agreed cap in place which could only be lifted with CEYS consent. That was inconsistent with the warranty that "All ... licences are in full force and effect". That meant that there was a difference in quality between what was sold and what was warranted. 24. Mr and Mrs McLachlan's second point was that Busy Bees should not be permitted to recover more than its actual loss. The Expert should therefore take into account the fact that by 20 May 2020 the caps had been lifted. Reliance was placed on the dicta from *Ageas (UK) Ltd v Kwik Fit (GB) Ltd*

[2014] EWHC 2178 as authority for the proposition that where the value of a company depends on a contingency one should look to post sale events to see if the contingency actually eventuates. The Expert did not find the *Ageas* case a helpful authority (paragraph 336) because the cap on numbers at OKCQ remained in place over a period of time after completion. He also cited a passage from *McGregor on Damages* (paragraph 29-008): "Where the shares are in some way not up to the promised standard this is in the nature of a breach of warranty of quality and the normal measure is of value as warranted less value in fact. This is confirmed and applied in four cases [including *Ageas*] in the circumstances of which it was held that events subsequent to the breach were not to be taken into account." 25. Mr and Mrs McLachlan's third point was that Busy Bees' loss computation failed to take account of their duty to mitigate their loss, and they referred to clause 7.10 of the SPA which provided that: "Nothing in this Agreement shall be deemed to relieve the Purchaser from any duty to mitigate its loss ..." Mr and Mrs McLachlan pointed out that the caps could be removed by the employment of additional staff, so as to allow the caps to be lifted. They submitted it was that cost which is the true reflection of Busy Bees' loss. In response the Expert adopted a passage from *Salzedo, Fraud and Breach of Warranty*, at paragraph 8.29: "It is important to note that if a breach of warranty of quality is established, then it does not avail a vendor to argue that the purchaser would have paid the same even if the correct information had been given in the warranty. That argument confuses the tort and contract measures of loss. A warranty does not amount to an inducement to purchase, but only a contractual undertaking that if matters are not as

warranted, damages will be paid. The enforcement of damages is a matter of enforcing the secondary obligation to pay damages for the breach of the contractual undertaking, not a matter of compensating for reliance on a misstatement. In many circumstances, a tort claim is more beneficial for a claimant, but this is one respect where breach of warranty is a superior claim: the claimant does not need to establish anything about its own conduct in a hypothetical world. If a purchaser buys and the warranty is breached, then damages are the difference between what the vendor promised and what the vendor delivered. The same point means that a defendant vendor is unlikely to be able to get any argument of failure to mitigate off the ground: the purchaser had no opportunity to mitigate the loss because the loss is defined as the receipt of a business worth less than the one that was promised." 26. The Expert noted that the final sentence was quoted with approval in *Equitex EEEF Biomass 2 Ltd v Michael Fox and Ors*

[2021] EWHC 2531 at paras 402, 429-430. 27. The Expert then turned, in paragraphs 340 to 351, to consider the basis of computation in the case before him. He adopted the Model as the basis of his computation. The Model proceeded on the basis of adjusting the EBITDA (earnings before interest tax depreciation and amortisation) of the Companies to take account of the caps on numbers which existed as the date of the contract. The purchase price under the contract was computed as a multiple of EBITDA computed on the assumption that there were no caps in place. The Model reduced the EBITDA for OKCQ by the proportion which the capped numbers bore to the uncapped numbers. That was then multiplied out by the same factors as were used to compute the purchase price to produce a lower value for the businesses of the Companies. 28. The Expert had this to say about the merits of this approach to computation of loss (in paragraph 347: I find that using an EBITDA approach is a reasonable way to proceed, not least given that that was the approach taken to both the parameters of what the Claimant may have been willing to offer and did in fact pay. As I have noted above, to calculate the true 'as is value' of Organic Kids it has created two profit and loss statements, one recreating the picture for OKCQ and OKLP (which in effect uses the data provided by the Defendants to the Claimant at the time of purchase) and the other adjusting that data to take into account the caps on operating capacity. It does so by adjusting the income, staffing requirements and variable costs elements. The calculation and an explanation for it was set out in Maurant's letter dated 5 November 2020. Mr Eccleston also provided an explanation of a number of points in oral testimony, confirmed that the figures had been prepared by a colleague and him and that he had checked the figures, and that they had used a standard EBITDA model. On the evidence before me, I am satisfied that the calculation has been properly and consistently undertaken. 29. In conclusion, the Expert expressed his computation of loss in the following terms: I have found that there were no caps agreed (or indeed imposed) in relation to OKLP, however the calculations in relation to OKLP remain relevant. The results of those calculations as set out in the Claimant's modelling are: 348.1.

Analysis

using the data provided by the Defendants at the Completion Date shows an EBITDA figure for OKCQ of £360,000 and for OKLP of £339,000. Multiplied by a factor of 7.32 this gives figures of £2,635,200 and £2,481,480, respectively, or a total of £5,116,680. 348.2.

Analysis

using the adjusted data shows an EBITDA figure for OKCQ of £140,000. This, as can be seen, is a significantly reduced EBITDA figure with a difference of £220,000. 349. The Claimant states therefore that the true 'as is value' of Organic Kids (Castle Quay) Limited is £140,000 multiplied by a factor of 7.32 (the factor which was in effect used to calculate the original purchase price). This gives a total of £1,024,800. 350. The Claimant's pleaded loss of bargain therefore is what it paid for the Shares (£5,125,000), less the difference between the warranted value of OKCQ and its actual value, namely £1,610,400 (£2,635,200 less £1,024,800).

351. I award the sum of £1,610,400 as damages to the Claimant. This is the difference between the value of the shares in OKCQ as warranted and as it actually was taking into account the agreed restriction on numbers." The proceedings before the Royal Court 30. Mr and Mrs McLachlan sought to challenge the Determination by a Representation dated 16 May 2022, to which Busy Bees was the Defendant. By their Re-Amended Representation of 14 October 2022, Mr and Mrs McLachlan essentially sought to challenge the Determination on three grounds: (a) The Expert had been guilty of procedural unfairness in the way that he had dealt with Mr Ecclestone's evidence on quantum. (b) The Expert had made the Determination in bad faith because it contained two obvious errors which meant he must have known the Determination was wrong (c) Busy Bees, through Mr Ecclestone, had procured the Determination by fraud, in because Mr Ecclestone was in possession of occupancy figures which showed that the Model was erroneous, but nonetheless he advanced it as a genuine basis for the computation of loss. 31. The obvious errors relied on in support of proposition

(b) were (i) that on the Expert's findings of fact there was no, or at most a minimal difference between the value of the business as warranted, and in reality, so only nominal damages should have been awarded and (ii) there was an obvious flaw in the assumptions used by the Expert in his loss computation. 32. Busy Bees' pleaded position was that the Expert's award of damages, and his computation of loss, were fully justifiable, and that, in any event, Mr and Mrs McLachlan were contractually obliged to accept the result of the Determination, even if it could be shown to be wrongly arrived at. It denied the allegations of procedural unfairness, bad faith and fraud. 33. In their pleadings and written submissions both parties accepted that jurisprudence of the Courts of England and Wales on the binding status of expert determinations should be applied in Jersey. There appears to be only one Jersey case relating to this issue, namely *Epoch Properties v British Home Stores*

- [2004] JCA 156 , which we discuss in more detail below. This was not referred to in either party's pre-trial material. In its judgment, the Royal Court, drawing on the parties' written submissions, summarised their positions on the law as follows: "9 As was summarised in the Skeleton Argument of the Representors: (i) The general rule is that the parties to an expert determination are bound by the Award even if it is based on a mistake, and even if the mistake is obvious - see *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 EGLR 103. (ii) However, the parties are not bound by the award if the expert has materially departed from his instructions - see *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277 at 287. (iii) As an expert is subject to an implied (if not expressed) duty of fairness, the expert will materially depart from his instructions if he fails to act fairly with regard to one or other party in a material way - see *Griffin v Wainwright*
- [2017] EWHC 2122 . (iv) The parties are not bound by an award if the expert has made it in bad faith - see *Ackerman v Ackerman*
- [2011] EWHC 3428 . (v) Bad faith includes making an award which the expert knows to be materially incorrect - see *Times Travel (UK) Limited v Pakistan International Airline Corporation*
- [2021] UKSC 40 ;
- [2021] 3 WLR 727 . In his Skeleton Argument, Advocate Alexander rightly emphasised that the appointment of the Expert was pursuant to the contract between the Representors and the Respondent - and accordingly the principle *la convention fait la loi des parties* is a fundamental principle which governs the basis upon which the Court should receive an application of the present kind. He agreed that, if the agreement between the parties did not expressly provide otherwise, an expert's decision will be open to challenge: (i) On the ground of fraud or collusion - as noted by Lord Denning MR in *Campbell v Edwards* [1976] 1 WLR 403 at 407: 'It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.' (ii) The decision of an expert may (but will not inevitably) be set aside if the expert fails to treat the parties fairly by, for example, granting one party more time than the other to complete a particular procedural stage (see *Hickman v Roberts*
- [1913] AC 229); by addressing an issue with only one of the parties (see *Griffin v Wainwright*
- [2017] EWHC 2122); or by failing to act independently and impartially (see *Beevers v Port Philip Sea Pilots* [2007] VSC 556). He argued that the test for partiality requires actual bias, on the basis of *Bernhard Schulte GmbH & Co KG*

- [2004] EWHC 977 (Comm) and not just conflicts of interest or an apparent lack of independence. (iii) If the parties had empowered the expert to make a decision in relation to a particular issue, the fact that the expert has reached the 'wrong' answer is irrelevant if the expert addresses that issue. However, if the parties did not in fact refer a decided issue to the expert, or if the expert answers a different question from the one put to them, then the expert will be taken to have exceeded his jurisdiction and the determination will not be binding - see *Jones v Sherwood Computer Services Limited* [1992] 2 All ER 170." 34. The passages quoted above are a fair summary of the English (and one Australian) authorities on the conclusiveness of an expert determination, and the limited circumstances in which it can be challenged. The acceptance of this case law explains why Mr and Mrs McLachlan's pleaded case was framed in the way that it was - they could not simply argue that the Expert's assessment of loss was wrong. They needed to show the existence of one or more of the three vitiating factors upon which they relied, namely procedural unfairness, bad faith on the part of the Expert, or fraud. 35. In the course of its judgment the Royal Court dismissed Mr and Mrs McLachlan's case on each of these issues. They dismissed the allegation that the Expert had behaved in a procedurally unfair way in paragraphs 25 and 26 of the judgment. The Court found that there was "absolutely no basis" for the contention that Mr Ecclestone had acted fraudulently, in paragraph 45 of the judgment. It dismissed the allegation that Expert had delivered his Determination in bad faith in paragraph 59 of the judgment. Those findings meant that Mr and Mrs McLachlan's pleaded case was bound to fail. However, it is clear that in the course of the hearing Advocate Blakeley (who appeared for Mr and Mrs McLachlan) developed his case to the point of submitting that if the outcome of the Determination was so unreasonable that no reasonable expert could have reached it (a state of affairs described in the judgement as "Wednesbury unreasonable", after the well known decision in *Associated Picture Houses v Wednesbury Corporation*
- [1948] 1 KB 223) that conclusion alone would justify the Court setting aside the Determination, even absent procedural unfairness, bad faith or fraud. This development in the argument is described in the judgment at paragraph 13 of the judgment. "13 The area of potential difference between the parties as to the law was made apparent in further submissions from Advocate Blakeley. He accepted that he had pleaded his case as though the position under English law were also the position under Jersey law - that is, the parties are bound with the expert's decision, right or wrong, if as a matter of contract that is what they have agreed, subject to the exclusions which are mentioned above. However, under English law he submitted that the obligation to act fairly was procedural and not substantive. It would not matter if the mistake leads to injustice if the expert acted procedurally fairly. Advocate Blakeley submitted that we should not follow that, and we should make our own determination of fairness as a matter of substance and not as a matter of procedure. Put another way, he made the submission that if an expert's decision was obviously wrong, it could not be fair." 36. The Court considered Mr and Mrs H's criticisms of the Model in paragraphs 48 to 58 of the judgment. It then embarked on a criticism of the Model. At

paragraphs 54 and 55 it said this: We will come shortly to the criticisms of the model itself, but it is right in our judgment to note that under Clause 3.3 of Schedule 3 the Representors warranted that the EBITDA for OKCQ and OKLP would be not less than \$700,000 for the twelve month period ending on the completion date. The result of the calculations which were adopted by the use of the model revealed a reduced EBITDA for OKCQ which was not only artificial but plainly wrong. Given that the justification provided by Mr Eccleston for his model was that the Respondent had calculated the price it was prepared to pay for the nurseries by applying a multiplier to EBITDA, in our judgment it is impossible to justify as fair the conclusions which the model would require one to adopt. It may well be that EBITDA was reduced for the period from the Completion Date until the restrictions on children numbers at OKCQ were lifted, but that is not the figure which went into the calculations on which the Respondent applied its multiplier; and it is that reduced EBITDA for the period after completion, if there was one, which could have been more properly used (without the application of a multiplier) to calculate the loss because that is the figure which is fairly linked to the breach of warranty. Another way of putting that objection is that we are proceeding on the basis that the value of the nurseries was correctly assessed at the price set out in the SPA of 25.125 million. If the value of the shares as warranted was calculated by the Respondent on the basis of an EBITDA of €700,000, and in fact that EBITDA figure was reached, there would seem to be no rational reason for calculating the value of the shares with the breach of warranty based on a multiplier applied to a lower EBITDA. 37. The other major criticism of the Model advanced by the Royal Court is that it involves making an illogical assumption about the impact on the turnover of the OKCQ business of the imposition of the cap. It is this part of the reasoning of the Royal Court which is supported by Mr and Mrs McLachlan on this appeal. The Royal Court put the matter like this in paragraph 56 of the judgment: "The model assumes that if the cap on the number of children is reduced from 69 to 46, that same percentage reduction will be applied to the occupancy or full-time equivalent children attending the nurseries: we think that is a false assumption and accordingly, the model was wrong in suggesting that full-time equivalent occupancy would necessarily drop from 49.9 to 33.3 simply because the permitted maximum had been reduced. Advocate Blakeley submitted that if the nursery attracted 50.1 full-time equivalent children with a registered maximum of 69, there was no reason why the numbers would necessarily drop to 33 if the permitted maximum was 46. We agree that this is a fair criticism, ... the point that it is not right to assume that there will be the same percentage drop in attendees as the percentage drop in maximum numbers as capped by CEYS seems to us to be a fair one." 38. Then, at paragraphs 59 and 60, under the heading "Conclusions" the Court said this: "59. In our judgment, the assessment of damages by the Expert was unfair, and, because there was a flaw in the analysis of Mr Eccleston which he (the Expert) accepted, the Award was Wednesbury unreasonable. Accordingly, it cannot stand. This is not a case of an Expert making a mistake in carrying out his instructions as in *Jones v Sherwoods Services Limited*

[1992] 1 WLR 277, or Veba Oil Supply and Trading GmbH v Petrotrade Inc

[2001] EWCA Civ 1832 . What the Expert has done is reach a decision which, because it was Wednesbury unreasonable, is not something which either party expected him to do when they agreed on his appointment. For the avoidance of doubt, we do not consider the Expert acted in bad faith - that is that he deliberately issued his award knowing it to have been wrong. 60. An equally valid way of looking at it is to say that the agreement between the parties was that the Expert should act fairly. We do not think that he acted in a procedurally unfair way for the reasons we have given earlier. However, in our view, on this particular contract and the rules which were agreed to apply to the Expert's determination, the obligation to act fairly is substantive as well as procedural. If you had asked the parties prior to the engagement of the Expert whether they would accept that he might come back with an unfair determination and they would still be bound by it, we have no doubt that, faced with that question in the abstract, (both objectively and subjectively) they would have resolutely rejected the suggestion." 39. The Royal Court dismissed the first of Mr and Mrs McLachlan's alleged obvious errors referred to in paragraph 31 above, namely that there was in any event no real loss suffered (see paragraphs 46 and 47 of the judgment). That aspect of the Royal Court's judgment is now the subject of Mr and Mrs McLachlan's Respondents' notice. 40. It is apparent from paragraphs 59 and 60 of the judgment that the Royal Court acceded to Advocate Blakeley's argument that the Expert's decision could be set aside as "unfair" if it is "Wednesbury unreasonable" because "that is not something which either party expected [the Expert] to do". It seems to us that, as Mr Blakely submitted, this proposition is at least arguably inconsistent with the English authorities, which proceed on the basis that a contractual acceptance of an expert determination means accepting the determination even if it is wrong. There is no explanation on the face of the judgment as to the reasons for adopting this approach. However, an examination of the transcript of the hearing before the Royal Court sheds more light on the Court's conclusions. On day one of the hearing, Advocate Alexander (appearing for Busy Bees) drew the attention of the Court to the Jersey case of Epoch Properties . That decision did apply the Wednesbury test to a decision by an expert. The parties and the Court thereafter proceeded on the basis that the law of Jersey permitted an expert determination to be challenged on Wednesbury grounds. Advocate Alexander (who appeared for Busy Bees) accepted that this was the case in the course of his closing submissions. 41. Advocate Alexander's acceptance that Epoch Properties was authority for the proposition that the Determination could be set aside if found to be Wednesbury unreasonable explains why the correctness of that proposition is not challenged in his grounds of appeal. 42. We now turn to consider the merits of the appeal on the basis of the grounds of appeal in the Notice of Appeal, but we return at the end of this judgment to the meaning of the Epoch Properties case and the correctness of the assumption, which prevailed before the Royal Court, that it can be directly applied to the Determination in this case. The Appellant's case 43. The grounds of appeal are as follows: Ground 1: The Royal Court erred in the identification, assessment and application of the

principles it considered to be relevant to loss quantification of the breach of warranty claim determined by the Expert. Ground 2: The Royal Court erred in concluding that the Award, and therefore the decision of the Expert to issue it, was *Wednesbury* unreasonable. Ground 3: The Royal Court erred in ordering that the Award should be set aside. 44. Before addressing the issues raised by these grounds, we make two preliminary observations. 45. The first point to note is that neither this Court nor the Royal Court is sitting as a conventional court of appeal from a judicial decision. This appeal is proceeding on the basis that the Determination can be overturned if it is *Wednesbury* unreasonable. The *Wednesbury* formulation is, of course, routinely applied by the Courts to exercises of discretion. But in this case that is not what the Expert was about. He was engaged in reaching a judgment, which involved findings of fact, rulings on the law, and the application of the law to the facts as found. In reaching that judgment he was empowered by the parties to the SPA to make findings on the law just as much as on the facts. It follows that even if this Court were to conclude that the Determination was predicated on an error of law, that would not justify overturning the Determination if the view taken of the law was one which a reasonable expert could have taken. To put the matter another way, we agree with the formulation set out by Mr Alexander in his written submissions for this appeal where he says (at paragraph 21) "It is, therefore, that matter of quantum that the Court is called to consider in this appeal. In doing so, it is respectfully submitted that the Court should keep in mind that it is not itself being asked to quantify *Busy Bees'* loss, but rather to assess whether the Expert's quantification of that loss was so unreasonable that no expert, acting reasonably, could have reached the same decision. Whether or not the Court agrees with the Award is not what the Court is required to decide: the adjudication of the Claim was delegated by the parties to the Expert by contractual - and binding - expert determination. The Court's task is simply to decide whether in issuing the Award, the Expert acted *Wednesbury* unreasonably (there being no other grounds on which to set aside the Expert's decision)." 46. Our second general observation is that the Determination is a detailed and closely reasoned piece of work. The Expert has clearly taken care to address the parties' contentions, and has given them full consideration. We note that Mr and Mrs McLachlan themselves observe that "the quality of [the Expert's] analysis and reasoning is generally of a high standard" (particular (1)(i) to para 14 of the Re-Amended Representation). The Expert also had the benefit of receiving feedback from Mr and Mrs McLachlan on the draft Determination, which he clearly took into account when reaching his final decision. None of that precludes the possibility that the Expert ended up reaching wholly unreasonable decision, but it does show that he did not do so through an oversight or lack of care. 47. We now turn to *Busy Bees'* case for upholding the Determination. *Busy Bees'* argument (which is essentially the same as the reasoning of the Expert) starts from the proposition that where an asset is purchased which is not in the state or condition the vendor warranted it to be, the measure of damages is the difference between the value of the asset as warranted, and the value of the asset in its actual state - see *McGregor on Damages* 21st Ed at 29-008: "Where the shares are in some way not up to the promised standard this is in the nature of a breach of warranty of quality and the

normal measure is of value as warranted less value in fact. This is confirmed and applied in four cases in the circumstances of which it was held that events subsequent to the breach were not to be taken into account. These are *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd*

[2014] EWHC 2178 , *Hut Group Ltd v Nobahar-Cookson*

[2014] EWHC 3842 *Bir Holdings Ltd v Mehta*

[2014] EWHC 3903 ... In *Lion Nathan v CC Bottlers*

[1996] 1 WLR 1438 the whole of the share capital in a soft drinks company was sold with a warranty that the forecast of profits for a number of months had been calculated with all due care. It was said by Lord Hoffmann that, had there been a warranty as to the actual level of profits, which he referred to as a warranty of quality, then: " ... the damages would prima facie have been the difference between what the shares would have been worth if the earnings had been in accordance with the warranty and what they were actually worth." 48. The first sentence of the above passage is accepted by both parties. Also not in dispute is the proposition that the warranted value will in the ordinary case be taken to be the price payable under the contract. Mr and Mrs Maclachlan accept that the Expert was correct to adopt that approach in this case. There was, however, a dispute before the Royal Court as to extent to which, on the facts of this case, it is right that events subsequent to the breach are not to be taken into account. This is because once Busy Bees took over the running of OKCQ it managed, within about six months, to get CEYS's agreement to lift the cap on numbers, and since then the OKCQ business has been operated as it was warranted it could be operated. Mr and Mrs McLachlan say that the Model over-compensates Busy Bees by, in effect, assuming that the impairment to the business would be indefinite. 49. The question of the circumstances in which it might be permissible to look at post-completion events when evaluating loss following a breach of warranty as to the quality of an asset was considered in *Ageas UK Ltd v Kwik Fit (GB) Ltd*

[2014] EWHC 2178 (QB) . In the course of his judgment Popplewell J says this: The Bwllfa approach *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co*

[1903] AC 426], as applied in *The Golden Victory*

[2007] 2 AC 353 , supports the proposition that when assessing damages for breach of contract by reference to the value of a company or other property at the date of breach, whose value depends upon a future contingency, account can be taken of what is subsequently known about the outcome of the contingency as a result of events subsequent to the valuation date where that is necessary in order to give effect to the compensatory principle. In an appropriate case, the valuation can be made with the benefit of hindsight, taking account of what is known of the outcome of the contingency at the time that the assessment falls to be made by the court. This is so not merely as a cross-check against the reasonableness of prospective forecasting, as Staughton J regarded as permissible in *Buckingham v Franc*

is [1986] 2 All ER 738. It is so whatever view might prospectively be taken at the breach date of the H outcome of the contingency. However, Popplewell J then qualifies these observations: I would, however, sound a note of caution. There are, in my view, two qualifications to the adoption of such an approach. The first is that it can only be justified where it is necessary to give effect to the overriding D compensatory principle. The prima facie rule, from which departure must be justified, is that damages are to be assessed at the date of breach and that only events which have occurred at that date can be taken into account. Secondly, it is important to keep firmly in mind any contractual allocation of risk made by the parties. Party autonomy dictates that an award of damages should not confound the allocation of risk inherent in the parties' bargain. It is not therefore sufficient merely that there is a future contingency which plays a part in the assessment. It is necessary to examine whether the eventuation of that contingency represents a risk which has been allocated by the parties as one which should fall on one or other of them. If the benefit or detriment of the contingency eventuating is a risk which has been allocated to the buyer, it is not appropriate to deprive him of any benefit which in fact ensues: it is inherent in the bargain that the buyer should receive such benefit. 50. Busy Bees adopt the judgment of the Court of Appeal of England and Wales in the recent case of MDW Holdings v Norvill

[2023] 4 WLR 33 . "(i) Where damages fall to be assessed in respect of an anticipatory breach of contract which was accepted, it is appropriate to consider what would have happened if the breach had not occurred and, in that context, events subsequent to the breach may be relevant; (ii) That principle has, however, no application where a party to a contract has, by failing to supply goods or services, committed an actual, rather than anticipatory, breach of contract; (iii) Further, where a claimant has been induced by deceit to buy something, the defendant cannot reduce its liability by showing that a contingency which served to reduce the value of the item at the date of assessment did not eventuate; (iv) There is a strong case for saying that, in general at least, the position should be similar in relation to warranties given on a share sale. Supposing the position to be that the true value of some shares is depressed by a contingency, someone buying them at a higher figure will have paid more than they were worth even if the contingency never happens. Events subsequent to the purchase cannot affect the value at the time of the transaction. The price of a share could typically be said to be a product of a number of contingencies. If a particular risk does, or does not, occur, the price may rise or fall, but that will not retrospectively change the value of the share at an earlier date ... (v) If, none the less, there can be cases in which account can be taken of what happened subsequently as regards a contingency which existed on the date of assessment when determining what, if any, damages are payable for breach of a warranty on a share sale, they must be rare. They would doubtless involve situations in which the buyer might otherwise be said to have gained a "windfall", but the mere fact that the value of the relevant shares has increased since the date of assessment cannot demonstrate such a "windfall": it is inherent in the selection of a date of assessment that subsequent changes in value can fall to be

disregarded. Still less could it be appropriate to categorise a post- assessment rise in value as a "windfall" if it were attributable to steps that the purchaser had itself taken since the transaction. Further, as Popplewell UJ said in *Ageas*, it would be "important to keep firmly in mind any contractual allocation of risk made by the parties"; and (vi) There is no similar bar on using events subsequent to the date of assessment to cast light on events which had happened by that date." 51. The question of allocation of risk (referred to at the end of paragraph (v) of the above passage, as well as in paragraph 38 of *Ageas*, quoted above) is significant in this case. The risk of the business of OKCQ not being able to secure the lifting of the cap on numbers in the foreseeable future lay with Busy Bees. As Blair J observed in *The Hut Group Limited v Oliver Nobahar-Cookson*

[2014] EWHC 3842 (QB) at paragraph 186: "For the avoidance of doubt, it is not suggested that the mere fact that shares sold in breach of warranty later recover their value because the business in fact does well has any effect on quantum assessed as at the date of breach. Any such argument would be insupportable, not least because the buyer is entitled to the benefit of the upside, having taken the risk of the downside." 52. We therefore agree with Busy Bees that the correct measure of loss in a case such as this is generally to be computed by reference to the price the market would have placed on the business as at the date of the breach of warranty, had the market been fully aware of the impairment to the business - in this case, the impairment to the business of OKCQ as a result of the cap on numbers. The actual outcome (in this case, in terms of the turnover and attendances achieved by Busy Bees in the period following the completion of the SPA) is not the correct measure of loss, because that outcome could not have been known as at the date of the contract and therefore could not affect the assessment of value as at that date. That is subject to the possibility that there may be an unusual case where, following *Ageas*, post-completion events might be relevant to the computation of loss. We note that the Expert specifically considered whether this might be such a case, and determined that it was not (see paragraph 336 of the Determination). In our view, that was a conclusion which he was entitled to reach, not least because the risk of not getting the cap lifted remained with Busy Bees following completion. 53. Once the above analysis is accepted, it seems to us, with respect, that the starting point for the Royal Court's assessment set out in paragraphs 54 and 55 of the judgment (quoted in paragraph 36 above) is undermined. In those paragraphs the Model is being criticised because it used hypothetical figures, and not the actual EBITDA achieved by Busy Bees in the period following completion of the SPA, and because it fails to focus on the actual impact of the cap on the business after completion. But as the authorities referred to above make clear, it is neither "artificial" nor "plainly wrong" to fail to use the actual figures to compute loss. What the Court must do is assess what value the market would have placed on the impaired asset as at the date of the breach of warranty. That figure may be more or less than the amount which the purchaser lays out subsequently in order to remedy the defect. 54. The objection to the Model advanced before the Expert was to the effect that the Model should have used the actual post-completion attendance figures. The Expert dealt with this contention in the following

terms, at paragraph 346 of the Determination: "Third, the Defendants took issue with the occupancy percentage applied to the Nurseries in the scenario where numbers were capped. By way of specific illustration, in relation to OKCQ the model calculated that based on the registered capacity of 69, the nursery had achieved an Occupancy Full Time Equivalent of 49.9 which gave an Occupancy Percentage of 73%. In the scenario that numbers had been capped at 46, it then applied the same percentage (in fact it had been rounded down to 72%). The criticism made was that just because numbers were capped did not mean it would only have achieved 72% occupancy i.e. it could have been as high as 100%. Mr Ecclestone accepted the possibility, but indicated that in trying to model what the Claimant argued was the actual position on the Completion Date (i.e. numbers were capped) it was a fair assumption that the percentages would be the same. I find that his approach was a reasonable way to proceed. It was open to the Defendants to have sought disclosure of the actual figures had they wished to do so. 55. Also of relevance are the Expert's comments on this issue in paragraph 25 of the Postscript to the Determination where he said this about Mr Ecclestone's evidence: "One line of questioning included the point that one should not assume that in a capped situation the occupancy rate would only be 72%. It could for example, said Advocate Blakeley, have been 100%. The witness accepted that possibility, but observed that this would not take account of the mix of sessions and age groups at the Nurseries and in the absence of that information it was operating at 72% and therefore it was fair to assume it would operate at the same level if the numbers were capped. It was also put to the witness that, since the actual attendance numbers were now available, the calculation could be more exact. Mr Ecclestone answered this by noting it was potentially possible to blend the figures in a different way, but the model was aimed at reflecting what happened on the Completion Date." 56. Advocate Alexander stresses in his submissions that Busy Bees have always accepted that there is no one correct method for valuing the OKCQ business as at the date of completion. Advocate Alexander submits that Mr Ecclestone's method was a reasonable basis for doing so. Indeed, so far as we can see, once one accepts that it is not appropriate to compute loss on the basis of the actual performance of the business post-completion, the Model appears to be the only basis of valuation which was presented to the Expert. As he observed (in paragraph 344 of the Determination) it had been open to Mr and Mrs McLachlan to provide an expert valuation of their own, but they had declined to do so. Mr and Mrs Maclachlan's case on the Model 57. Advocate Blakeley supports the Royal Court's criticism of the Expert's adoption of the Model as the basis of his loss computation in his written submissions: " The flaw in the Appellant's approach is that one of the figures from its as warranted valuation of OKCQ which it carries into its valuation of the nursery as delivered is the percentage occupancy. In the as warranted valuation this is calculated by expressing the actual number of children attending the nursery (49.9 full time equivalents) as a percentage of the maximum registered occupancy of 69. This was 72%. Then, for the sake of consistency, in the as delivered calculation that occupancy figure of 72% is applied to the (incorrectly) assumed lower maximum occupancy of 45 agreed with CEYS which produces an assumed actual attendance of 33.3 children. That actual

attendance figure generates the figure for income from the nursery as delivered, and after deducting costs, ebitda. The valuation of OKCQ as delivered is the reduced ebitda multiplied by the same multiple as the Appellant used to calculate the value as warranted, namely 7.32. 17. But if the nursery was 72% occupied when its maximum occupancy was 69, there is no reason to suppose that it would also be 72% occupied when its (assumed) maximum occupancy was reduced to 45. Indeed, the percentage would obviously be higher as the same number of children competed for a smaller number of places. So there is no reason to reduce the actual occupancy from 49.9 to 33.3 just because the maximum occupancy was reduced from 69 to 45." 58. As Advocate Blakeley observes in paragraph 32 of his submissions: "This is a short point of logic which does not benefit from extensive legal submissions." It does not, in Advocate Blakeley's view require any analysis of the authorities on damages, which he accepts bear the interpretation placed on them by the Expert. 59. In his oral submissions Advocate Blakeley sought to downplay the significance of the cap. He observed that all nurseries in Jersey were subject to the statutory restrictions which relate the permissible numbers of children to the numbers of suitably qualified staff in the nursery. He stressed that the Expert had made it clear that the cap was only imposed because of deficiencies in staff numbers at OKCQ and was not imposed for any other deficiencies which might have existed in relation to the management of OKCQ. Thus, he argued, all any purchaser of OKCQ had to do was hire more staff, and, without more, the cap would be lifted. He suggested that a phone call to CEYS to tell them that staff numbers had increased would be all that was necessary to get the cap lifted. Thus, he argued that properly understood, the defect in quality which the Expert identified as a result of the relevant breach of warranty was of no real significance. 60. These submissions were deployed by Mr Blakeley in part in support of the proposition that the Royal Court should have set aside the Determination on the ground that it was unreasonable for the Expert to conclude that the cap caused any material loss at all. We deal with that submission below. But if he was wrong about that, Mr Blakeley submitted that properly understood the effect the cap was so limited as to render the Model a wholly unreasonable and irrational basis for computing Busy Bees' loss. 61. Advocate Blakeley's criticisms of the Model are articulated in the passage we have quoted from his written submissions. He identifies two related flaws in the model - one is that it assumes that the cap will remain in place indefinitely whereas, in his view, it was always capable of being lifted without difficulty. The second is that the Model makes the assumption that the percentage occupancy which was assumed by Busy Bees when it thought the maximum occupancy was 69 should also be applied to the reduced maximum of 45 imposed by the cap. 62. In our view, Advocate Blakeley's submissions understate the seriousness with which a purchaser in the market would view the cap. In the ordinary way, a nursery in Jersey is allowed to police its own attendance numbers, increasing or reducing them (if necessary) to keep the ratio of children to staff in line with the statutory requirements. The imposition of the cap was a signal that CEYS did not trust OKCQ to operate in that way. In the light of its past history, as set out in the Determination, CEYS was not prepared to allow OKCQ to increase its attendance numbers without first getting approval. A purchaser

might reasonably assume that approval would likely not be forthcoming unless CEYS was satisfied not only that sufficient staff had been recruited to justify a higher level of attendance, but also that the higher staffing level would be maintained at the nursery for the foreseeable future, and that going forward OKCQ could be trusted to bring the attendance figures down again if staff numbers fell again. We do not think that the cap would have been lifted merely on the say so of OKCQ that it had recruited more staff. Were that the case, the cap was hardly worth imposing. In any event, even if the cap were to be capable of being lifted by the recruitment of additional staff, the fact that this nursery was subject to a particular requirement imposed by the regulator was clearly something about which a purchaser would reasonably be concerned. At the very least we think a purchaser would be concerned that winning back CEYS's trust, and getting the cap lifted, might take more than merely increasing staffing levels. It is clear from the evidence before the Expert that CEYS regarded the past failures of OKCQ as serious. In their letter of 15 April 2021 to Busy Bees (quoted in paragraph 121 of the Determination) CEYS state: "Such were the concerns, that had OKCQ breached those measures put in place [ie the cap], it was our intention to escalate the concerns about the service being provided by OKCQ to the Education Minister, and to seek revocation of OKCO's registration." 63. It is, in any case, not our view of how seriously a purchaser would view the cap, but the Expert's view which matters here. It is clear from the Expert's acceptance of Mr Ecclestone's evidence on quantum that the Expert did consider that the cap had a serious adverse impact on the value of OKCQ. The Expert had ample evidence on which to form that judgment, including the whole history of CEYS's pre-contract dealings with OKCQ, and Mr Ecclestone's evidence, given on behalf of a business which was active in the market for purchasing child care businesses. Mr Ecclestone's evidence was that had Busy Bees known of the cap before purchase it would either have walked away or required the vendors to take remedial action before going ahead with the purchase (see paragraph 142 of the Determination). In our view it cannot be said that no reasonable Expert would have assumed that a purchaser would view the cap as a serious impairment on the value of OKCQ. 64. The question then becomes whether the Model represents an appropriate basis for evaluating the purchase price a purchaser might have paid for the OKCQ business if it had knowledge of the cap. In answering that question, what matters is not whether the Model would be likely to produce an accurate forecast of the impact of the cap on the business of OKCQ, but whether it represents an approach which a purchaser in the market would take when deciding what (if anything) to pay for such a business. We can quite see that, from Mr and Mrs Machlachlan's point of view, the Model could be said to be based on something of a worst case scenario, but that does not mean that it is not a Model which a purchaser would have adopted. 65. In our view, Mr and Mrs McLachlan have not discharged the onus of showing that the approach adopted in the Model was so flawed that no reasonable expert would have accepted it as a basis for valuation. The original basis of valuation of the OKCQ business was based on the assumption that the maximum level of attendance would not be attained, and that a market valuation would assume an attendance rate of only 72% of the maximum. This shows that the assumption was that the

maximum would not in practice represent the operational level of attendance - because the business could not exceed the maximum attendance on any one day, it could not realistically secure maximum attendance on every day. The approach adopted in the Model was to assume that if the business operated on a reduced maximum capacity, the headroom between actual attendance and maximum attendance would remain proportionately the same. We recognise that that is not the only assumption which could be made, but Mr Ecclestone, who has experience of the childcare business as a senior employee of Busy Bees, gave evidence that it was a reasonable basis. He was cross-examined on that evidence and answered questions from the Expert. There was no contrary evidence. We do not consider that the Expert's decision to accept that evidence can be regarded as irrational or illogical. The Respondents' notice 66. The basis of Mrs and Mrs McLachlan's case that the Royal Court's judgment should be upheld on alternative grounds appears in paragraph 1 of the Respondents' notice: "The Royal Court erred in law or fact at paragraph 46 when it dismissed the Respondents' contention that the difference between OKCQ as warranted and as delivered was nil or at worst minimal." 67. Paragraph 46 of the judgment reads as follows: "There is one additional comment which we think ought to be made before we come on to consider the model in more detail. Advocate Blakeley submitted before the Expert and before us that the breaches of warranty which had been found were of little consequence - in his view, any award of his damages should be absolutely minimal. To reach that conclusion would be to acknowledge implicitly that problems with the regulator would be of little concern to a purchaser. We do not agree that that is correct. Any purchaser, when it is acquiring a regulated business which cannot operate without the approval of the regulator and must operate within the conditions which the regulator imposes, is bound to have the closest regard to the regulatory position. It is not just that there were actual restrictions which were agreed between OKCQ and CEYS, as is clear from the September 2019 agreement; it is also, in practice, that it would be obvious to the vendors, as indeed to the purchasers if there had been no breach of warranty, that the regulators would be all over this business for at least twelve months following the completion date. In this case, it appears that CEYS was not satisfied of the position until May 2020. There is all the difference in the world between an operator who can run the business in accordance with its registration and one who is looking over his shoulder at the regulator knowing that any particular breach, in this case of staffing ratios or numbers of children, could result in the registration being suspended." 68. Mr and Mrs McLachlan's case is that the Expert did not find that there were any other issues, apart from the staffing ratio, which CEYS had with the operation of either of the nurseries being sold which would result in any further regulatory action. All Busy Bees had to do was recruit the additional staff which OKCQ needed to operate at the original permitted maximum (which they would have to have done even without the imposition of the cap) and then the cap would be removed. The cap did not, therefore, represent a material impairment of the value of the OKCQ business. 69. We have already addressed this argument in the context of the Model (see paragraphs 62 to 66 above). In paragraph 335 of the Determination, the Expert made the following observation in response to the

submission from Mr and Mrs McLachlan which we are now considering: "The difficulty with that argument is that I have found that OKCQ was not operating in ratio during the September 2019 inspection and it was only by agreement with CEYS that it was permitted to operate with its extant number of staff and children. Furthermore, the agreed cap was still in place at the Completion Date. The Defendants had agreed the cap and that it could only be lifted if CEYS was satisfied that there was capacity within the team to do so. Therefore it was incorrect for the Defendants to warrant that "All licences and consents are in full force and effect." (the Warranty at Schedule 3, paragraph 15.2). There was accordingly a difference in the quality between that which existed and that which was warranted." 70. It seems to us that there was a sufficient basis for the Expert to conclude that the existence of the cap materially impaired the market value of the OKCQ business. It is, indeed, the contrary proposition, that purchasers would be indifferent to the fact that a cap had been imposed, which seems to us to be implausible. In a highly regulated sector such as childcare it would be surprising if a purchaser of such a business would not be concerned to discover that the business was subject to an ongoing regulatory sanction, which it would have to address before the business could realise its full potential. We would expect such a purchaser to consider that fact to impact adversely on the price it was prepared to pay. We do not, therefore, consider that the Expert's finding to that effect was one which no reasonable expert could make. We agree with the Royal Court's treatment of this issue. The relevance of the Epoch Properties case 71. Finally, we wish to make some observations on the Epoch Properties case. As explained above, it came to be accepted at the trial, by both parties and by the Royal Court, that Epoch Properties was authority for the proposition in Jersey law that on the facts of this case the Determination was liable to be set aside on the grounds of Wednesbury unreasonableness. It is for that reason that we have heard no argument on this appeal about whether that is in fact the correct test to be applied in the present case, or whether Mr and Mrs McLachlan are bound by the Determination, even if it is patently wrong. 72. Because we have heard no argument, we express our views with some circumspection, but it does seem to this Court that, to put it at its lowest, the authority of Epoch Properties does not necessarily lead to the conclusion which the parties and Court below seem to have extracted from it. 73. Epoch Properties concerned a contractual provision in a lease under which the President of the Royal Institution of Chartered Surveyors was empowered to appoint a surveyor with a specified area of expertise to determine a rent review. One party to the lease challenged the appointment, but both Royal Court and this Court, on appeal, upheld the appointment. The Court of Appeal approved the Royal Court's statement of the law in the following terms: "25 In summary, the Royal Court decided that- (1) the position of the President when presented with a request for appointment of an expert (or arbitrator) under the terms of such a lease is to be equated with that of an independent expert; (2) if the President asks himself the right questions and exercises his jurisdiction accordingly, his appointment cannot be challenged on the basis that he made a mistake; (3) if the President departs from the instructions as set out in the lease, i.e. if he appoints someone who does not fulfil the criteria laid down in the lease, then his decision is invalid; (4) If the

question whether the President has so departed from his instructions involves an area falling within his expertise (e.g. judgment of a surveyor's appropriateness for the task), he will not be found to have departed from his instructions unless he has reached an unreasonable decision which no reasonable President could have reached (i.e. a test analogous to *Wednesbury* unreasonableness) (*Associated Provnc. Picture Houses Ltd. v. Wednesbury Corp.* (1)). (See *Jones v. Sherwood Computer Services Ltd.*, *Veba Oil Supply & Trading Ltd. v. Petrotrade Inc. (The Robin)* [2001] EWCA 1832 , *Nikko Hotels (UK) Ltd. v. MEPC plc.* [1991] EGLR 103 and *Pontsarn Invs. Ltd. v. Pankki*

[1992] 1 EGLR 148.) To elaborate the point made at para. 25(4), some of the stipulated characteristics are listed in cl. 1(1) of the lease. Thus, if the President appointed a solicitor instead of a chartered surveyor, the court would be bound to find that he had departed from his instructions. But some of the characteristics are subjective, e.g. standing and experience. In such context, the President has to form an appreciation of whether the qualities enjoyed by his potential appointee are of the required level. In relation to them, there is clearly room for differing views. In our view, when deciding whether the President has departed to a material extent from his instructions in those latter areas where the parties have clearly chosen him for his own expertise, the court should apply a test analogous to *Wednesbury* unreasonableness. If the decision of the President as to whether his appointee has the stipulated experience or standing is one to which no reasonable President could come, the court will find that he has departed from his instructions. If, however, the court is merely of the view that he has reached a decision on these matters other than that which the court itself would have, it would not interfere." 74. We observe that *Epoch Properties* concerned the exercise of a power of appointment of an expert, and not a decision by the expert. The Court's analysis proceeded on the basis that the position of an appointing authority is to be equated with that of an independent expert. Further, the issue in *Epoch Properties* (so far as relevant for present purposes) was whether the President had acted within the scope of his authority, which is to say whether he had appointed a surveyor within the description of surveyor he was entitled to select. As such it was in line with the cases cited at the end of paragraph 25 of the Court's judgment, which were all concerned with the distinction between the ambit of the expert's authority (which is for the Court to rule on) and the substance of his or her decision (which, in general, the Court will not interfere with). In *Epoch* , the ambit of the expert's authority was to some extent "subjective" as the Court observed in paragraph 26. By that the Court meant that the parties had entrusted the expert, in some areas, with the task of determining the scope of his own authority. The Court in *Epoch Properties* struck the balance between the expert's right to make a judgment in those areas with the Court's jurisdiction to ensure that the expert does not exceed its authority by restricting the expert to making a determination which was one which was reasonably open to him. In the present case, by contrast, the question whether the Expert acted outside the scope of his instructions is not an issue. 75. What the Court in *Epoch Properties* was not saying was that where parties had submitted an issue to be determined by an expert, and there was no dispute that the expert was

acting within his authority, the expert's determination of the issue could be challenged on the ground that it was *Wednesbury* unreasonable. As noted by the Royal Court in paragraph 13 of its judgment in this case (quoted in paragraph 35 above), Mr Blakeley accepted that his submission to that effect went beyond what had been decided in the English case law. We think he was correct to say that. Whether that departure from the English case law should be approved by the Courts in Jersey is a question for the future, on which we do not express a view. It should not however be assumed that the *Epoch Properties* case is authority for undertaking that departure. Conclusions 76. For the reasons given above, we respectfully disagree with the Royal Court's ruling that the Expert's decision to use the Model as the basis for his computation of loss was a decision which no reasonable Expert could have reached. We also do not consider that the grounds advanced in the Respondents' Notice justify the conclusion that the Expert's decision that the breach of warranty in paragraph 15.2 of Sch 3 of the SPA had a material effect on the value of the shares sold, was a decision which no reasonable Expert could have reached. It therefore follows that this appeal should be allowed, the Royal Court's order should be set aside and the Determination should be declared to be valid and enforceable by *Busy Bees. Authorities Care of Children (Jersey) Law 2002. Ageas (UK) Ltd v Kwik Fit (GB) Ltd*

[2014] EWHC 2178 . *McGregor on Damages* 21st Ed. Salzedo, *Fraud and Breach of Warranty. Equitex EEEF Biomass 2 Ltd v Michael Fox and Ors*

[2021] EWHC 2531 . *Epoch Properties v British Home Stores*

[2004] JCA 156 . *Associated Picture Houses v Wednesbury Corporation*

[1948] 1 KB 223 . *Ageas UK Ltd v Kwik Fit (GB) Ltd*

[2014] EWHC 2178 (QB) . *MDW Holdings v Norvill*

[2023] 4 WLR 33 . *The Hut Group Limited v Oliver Nobahar-Cookson*

[2014] EWHC 3842 (QB) . Page Last Updated: 06 Feb 2024 Back to top About JLJB Accessibility
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