IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA338/2022
[2023] NZCA 174

BETWEEN	JAMES HOWARD NIGEL SMALLEY Appellant
AND	GRANT ROBERT WILLIAMSON, IAN PERRY, DAVID MICHAEL HAYES, GRANT TREVOR DAVIES AND JEREMY DANIEL SULLIVAN Respondents

Hearing:	30 March 2023
Court:	Collins, Venning and Gendall JJ
Counsel:	D H McLellan KC and B K McLay for Appellant R W Raymond KC and J M McGuigan for Respondents
Judgment:	16 May 2023 at 9.30 am

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is declined.

B The appeal is dismissed.

C The appellant is to pay the respondents costs on a band A basis with usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Venning J)

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Introduction

[1] James Smalley formerly held shares in Hamilton Hindin Greene Ltd (HHG) and Overview Portfolio Ltd (OPL). The remaining shares were held by the respondents (the continuing shareholders). The companies provided financial advisory and investment services in Christchurch. In September 2018, Mr Smalley issued a transfer notice for the sale of his shares to the continuing shareholders.

[2] The parties could not agree on the value nor, originally, the process for valuing the shares. After some time, in mid-2021, they agreed to instruct Ernst & Young Strategy and Transactions Ltd (EY) to value the shares.

[3] EY issued a valuation report dated 22 December 2021 (the final EY report). Mr Smalley did not accept the valuation. The continuing shareholders sought an order for specific performance requiring Mr Smalley to transfer his shares at the value in the final EY report.

[4] On 21 June 2022 Associate Judge Paulsen entered summary judgment for the continuing shareholders.[1] The Judge ordered Mr Smalley to specifically perform his obligation to transfer his shares in HHG and OPL at the amounts fixed in the final EY report.

[5] Mr Smalley appeals against the order for summary judgment.[2]

Background

[6] Mr Smalley joined HHG as a financial adviser in 2001 and became a shareholder and director in 2013. Ultimately, he came to hold 30 per cent of the shares in both HHG and its related company OPL.

[7] Mr Smalley resigned as a director and employee of the companies in mid-2017. On 23 March 2018 the parties agreed that he would provide his services to the companies as an independent contractor. The companies' shareholders' agreements were varied to enable Mr Smalley to continue to hold shares in the companies while performing services as an independent contractor.

[8] A triggering event occurred in September 2018 that required Mr Smalley to sell his shares to the continuing shareholders. He issued a transfer notice offering to sell his shares on 19 September 2018.

[9] The parties were not able to agree a price for the share transfers. In March 2019 they did agree that Peter Goss, an EY partner, would be appointed to independently determine the value of the shares. However, they were not able to agree the terms on which Mr Goss was to be instructed to conduct the valuation. In December 2019 the parties agreed to submit the issue concerning the terms to arbitration. The parties then took some time to agree upon the terms of the arbitration agreement.

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1 *Williamson v Smalley* [2022] NZHC 1452 (High Court judgment).

2 This Court has jurisdiction to hear the appeal as of right under s 56(4)(b) of the Senior Courts Act 2016.

[10] In the course of the arbitration and following further negotiations the parties finally reached agreement on the terms of reference to Mr Goss and EY. The arbitration was discontinued.

[11] The agreed terms of reference to EY were recorded in a Joint Instruction to Valuer (JIV) sent on or about 16 March 2021. Mr Goss confirmed EY's acceptance of the appointment to value the shares in a letter dated 18 June 2021 which was signed by all parties. The letter of 18 June 2021 attached EY's statement of work, general terms and conditions of appointment and a request for information.

[12] Relevantly, EY's terms of engagement included the following:

(a) EY would apply the following definition of 'fair value':

> Fair value represents a pro rata share of the value that would be negotiated between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller, both acting at arm's length, of 100 percent of the equity in HHG and OPL.

(b) "Our valuation will be prepared in accordance with Advisory Engagement Standard 2 "Independent Business Valuations" ("**AES-2**") as issued by the Chartered Accountants of Australia and New Zealand".

(c) A description of the 'Stage[s] and actions' for the valuation process, which included the provision of a draft report to the parties with the opportunity for feedback.

[13] On 19 October 2021, EY issued a draft report.

[14] Following the provision of further information and submissions from both parties EY issued the final EY report on 22 December 2021. The final EY report valued Mr Smalley's shares in HHG at $522,300 and in OPL at $1,627,900 a total of $2,150,200.

[15] The parties had agreed that payment for the shares would be made 20 working days after the independent valuation was released. The continuing shareholders

sought to settle the transfer in accordance with that agreement. Mr Smalley refused to settle. Instead, on 4 February 2022 his solicitors, Buddle Findlay, wrote to Mr Goss advising that in their opinion the final EY report was not final. They proposed it be treated as a further draft report with the parties to have the opportunity to make further submissions.

[16] The continuing shareholders responded by issuing the application for summary judgment.

The High Court proceedings and judgment

[17] Grant Williamson, one of the continuing shareholders, filed an affidavit to support the application for summary judgment. Mr Williamson detailed the extensive background to the parties' negotiations and discussions regarding the sale and the process leading up to the joint instruction to EY. The continuing shareholders also filed an affidavit by Scott McClay, a corporate finance partner at Deloitte New Zealand. Mr McClay's evidence dealt with Mr Smalley's suggestion that as the final EY report was "qualified" and included a disclaimer, it was not a final report. Mr McClay confirmed the practice of including disclaimers in such reports was common and was not intended to be used as a means to reopen a final valuation.

[18] Mr Smalley filed an opposition to the application which he supported with his own affidavit. In his affidavit Mr Smalley set out his reasons for saying that EY had breached the AES-2 standard and why he considered the continuing shareholders were not entitled to summary judgment. Mr Smalley also filed an affidavit of Craig Melhuish, a chartered accountant and director of Nexia Christchurch Limited. Mr Melhuish expressed the opinion that there were a number of inaccuracies in the final EY report and that EY had not complied with AES-2 in compiling it.

[19] Both Mr McClay and Mr Melhuish had previously been involved in the dispute as they had acted as experts for the respective parties in settling the terms of the JIV. Mr Melhuish had also assisted Mr Smalley in the submissions he made to EY during the course of the valuation exercise.

[20] The Judge first referred to the factual background, and the relevant principles applicable to summary judgment applications and expert valuations. After then considering the parties' submissions and evidence, he adopted a two-stage approach to determining the issue. First, he construed the expert's mandate, in other words, he determined what matters had been referred to EY for decision. Second, he considered whether EY had adhered to the mandate, had asked the right questions and applied the right principles.

[21] The Judge accepted that EY's mandate included the requirement to prepare the valuation applying the definition of fair value in terms of the engagement and the AES-2 standard.[3] He then considered Mr Smalley's and Mr Melhuish's evidence but concluded that EY had understood the valuation was to be prepared in accordance with AES-2 and had not applied some other, incorrect, standard.[4] The Judge noted that the valuation of shares is not an exact science.[5] He considered the "kernel" of what was being alleged was that EY had "applied incorrect capitalisation multiples to calculate the enterprise value of … HHG and OPL."[6] The Judge considered the choice of capitalisation multiples was exactly the sort of matter that the parties must be taken to have left to the expert valuer.[7]

[22] Ultimately the Judge was satisfied the valuation exercise was undertaken by EY in accordance with its mandate and instructions.[8] The Judge also concluded there was nothing ambiguous about the valuation conclusion.[9] He held the final EY report was intended to be final.[10]

[23] Finally, the Judge rejected a submission EY had breached its mandate by communicating directly with the continuing shareholders, in particular on 20 December 2021.[11]

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3 High Court judgment, above n 1, at [75].
4 At [84].
5 At [85].
6 At [88].
7 At [88].
8 At [90].
9 At [96].
10 At [99].
11 At [106]–[108].

[24] The Judge concluded there was no basis for Mr Smalley to resist the sale of his shares at the EY valuation. The continuing shareholders were entitled to specific performance.[12] He entered judgment accordingly.

The issues on appeal

[25] The parties have differing views as to the issues on appeal. Mr Smalley identified the general issue as whether it is reasonably arguable that EY's valuation of his shares in HHG and OPL was undertaken in breach of the mandate given to it by the parties, such that the valuation does not bind the parties.

[26] Mr Smalley also identified the following sub-issues:

(a) whether it is reasonably arguable that EY's valuation failed to comply with AES-2, and that this constituted a breach of its mandate;

(b) whether it is reasonably arguable that EY's reliance on information post-dating the valuation date constituted a breach of its mandate;

(c) whether it is reasonably arguable that EY applied a discount to its valuation by relying on comparator transactions involving an anxious buyer or seller, and that this constituted a breach of its mandate;

(d) whether it is reasonably arguable that EY breached its mandate by including new information in its final valuation report without providing that report to the parties in draft form in order to give the parties the opportunity to give feedback on it.

[27] The respondents accept that the general issue is whether the independent valuation of the shares complied with the parties' mandate. They seek to support the judgment on the following additional grounds:

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12 At [109].

(a) the parties agreed that they would not challenge Mr Goss's valuation "directly or indirectly";

(b) the relevant contractual arrangements did not prescribe a particular valuation approach or specify any particular valuation principles to be applied by Mr Goss to determine share price;

(c) the parties agreed to be bound by EY's terms of engagement. If Mr Goss did not competently carry out his expert determination, the appellant's only action de jure is against EY;

(d) the evidence of Mr Melhuish was not impartial or objective.

Further evidence

[28] Mr Smalley also sought to adduce further evidence on appeal, namely the following documents which formed part of the JIV:

(a) the experts' joint report of Scott McClay and Craig Melhuish dated 18 December 2020; and

(b) addendums to the experts' joint report, being:

(i) the addendum of Craig Melhuish to the joint report of Scott McClay and Craig Melhuish dated 20 May 2021; and

(ii) the addendum to the joint report of Scott McClay and Craig Melhuish dated 27 May 2021.

[29] Mr Smalley argues the evidence is relevant to the interpretation of the mandate because the JIV required the valuer to be provided with the documents and to have regard to them.

[30] The respondents oppose the application on the basis the documents are not fresh and could have been produced at the High Court hearing. They were referred to

by way of background in the affidavit of Mr Williamson in support of the application for summary judgment. Mr Smalley filed voluminous evidence in response to the affidavit and had ample opportunity to adduce the documents if he wished to. Further, to the extent the joint report issued in December 2020 was relevant it was reflected in the JIV agreed in March 2021. Finally, at no stage in the notice of opposition, evidence or synopsis of argument before the High Court, did Mr Smalley take the point or suggest EY had not had due regard to the documents.

[31] The application to adduce the further evidence is made under r 45 of the Court of Appeal (Civil) Rules 2005.

[32] In *Leason v Attorney-General* this Court confirmed:[13]

> [26] Rule 45(1)(b) of the Court of Appeal (Civil) Rules provides that the Court may, on the application of a party, grant leave for the admission of further evidence on questions of fact by affidavit. In general, evidence will only be admitted where it is fresh, credible and cogent.[14] However, this Court has previously indicated that where the appeal is from a summary judgment decision, greater emphasis will be placed on the need for finality.
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> [27] In *Urquhart v Spanbild Holdings Ltd*, this Court held:[15]
>
> > [70] An application under r 45 of the Court of Appeal (Civil) Rules 2005 to adduce further evidence requires the applicant to demonstrate that the evidence is fresh, credible and cogent. ... Particular weight will be accorded in summary judgment proceedings to the need for finality. It will only be in exceptional circumstances that the court will permit further evidence to be filed on appeal.
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> [28] Similarly, in *Lawrence v Bank of New Zealand* the Court held:[16]
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> > [18] ... Litigation would never come to an end if the parties to cases were permitted to adduce further evidence in less than exceptional cases. Particular weight must be accorded to the need for finality in litigation in this context in summary judgment proceedings, whose purpose it is to permit unmeritorious claims and defences to be brought justly and efficiently to a swift end.

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13 *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224.

14 *Erceg v Balenia Ltd* [2008] NZCA 535; and *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZSC 59, [2007] 2 NZLR 1.

15 *Urquhart v Spanbild Holdings Ltd* [2010] NZCA 435.

16 *Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

> While this principle is not, of course, absolute,[17] it is important that it is kept in mind [w]hen considering applications for fresh evidence in summary judgment appeals.

[33] We accept that in this context, evidence which is not fresh, such as that proposed to be adduced by Mr Smalley, should only be admitted in exceptional and compelling circumstances and it will also need to pass the tests of credibility and cogency.

[34] The evidence is suitably credible as it is uncontroversial documentary evidence. As to cogency, the JIV required EY to have regard to the documents and in particular to cls 2, 5(b) and 8 of the Experts' Joint Report. But the requirement to "have regard to" is not synonymous with "take into account", particularly where, as here, the party directed to have regard to the identified matters is an expert appointed to value shares. It was for EY to assess the weight and significance of the matters set out in the Experts' Joint Report. That does not suggest the proposed material is cogent.

[35] Our conclusion that the new evidence is not sufficiently cogent is fortified by reference to the clauses in the Experts' Joint Report which the JIV directed particular regard was to be had to. Clause 2 dealt with the issue of whether the two companies were to be valued separately or as one consolidated unit. Clause 5(b) provided the companies' legal fees relating to the current dispute should be excluded from the assessment of profitability. Finally, cl 8 set out the respective experts' views as to material misstatements in the accounts. The parties' respective experts referred in more detail to those issues in their addendum.

[36] The principal issue in the present case is whether EY went outside its mandate when carrying out the valuation exercise. The additional evidence sought to be adduced does not directly address that issue. Clause 2 of the Experts' Joint Report expressly left it to the valuer to determine whether the two companies were to be valued separately or as one consolidated unit. As to cls 5(b) and 8, even if EY had included the fees or made an error in considering the parties' assessment of the material misstatements in the accounts, that would have been an error or mistake, but it would

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[17] See for example *Napier Heights Holdings Ltd v Crown Health Financing Agency* [2009] NZCA 420. In that case the affidavit evidence was admitted on appeal.

not have amounted to a breach of mandate or otherwise vitiated the valuation. It is plain on the face of the final EY report that EY had regard to the clauses. Both clauses are referred to and expressly considered in the valuation analysis section of the final EY report under the heading "The experts' reports".

[37] For those reasons, the proposed further evidence lacks cogency. Given that the evidence is neither fresh nor cogent, we decline to admit it.

Summary judgment principles

[38] The principles in relation to summary judgment are settled and well understood. They were summarised by this Court in *Krukziener v Hanover Finance Ltd*:[18]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: [*Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 2–3]. The court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: [*MacLean v Stewart* (1997) 11 PRNZ 66 (CA)]. The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as, for example, where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: [*Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341]. In the end the court's assessment of the evidence is a matter of judgment. The court may take a robust and realistic approach where the facts warrant it: [*Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA)].

[39] The Judge correctly directed himself as to the relevant principles. As is usually the case, the issue is the application of the principles to the facts of the particular case.

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[18] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307.

Expert valuation

[40] The Judge also correctly directed himself as to the principles applicable to an expert determination as discussed and considered by this Court in *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Inc*:[19]

> [29] As explained by Ellis J, the conventional approach is that where an expert determination clause provides (as it does in this case) that any determination by the expert shall be "final and binding", those words without any qualification mean there are only very limited grounds on which the determination may be challenged. More particularly, the decisions state that the courts may intervene only where the expert has departed from his mandate in a material respect and failed to do what he was appointed to do. It is not enough to show the expert has made a mistake, was negligent or even patently wrong.

[41] As noted, in the present case the parties agreed that both "will be bound by the Independent Valuation and will not challenge the Independent Valuation, either directly or indirectly".

[42] We also note that in *Peregrine Estate Ltd v Hay* the Court said:[20]

> [25] The process for fixing fair value if an expert is appointed is intended to be expeditious, final and binding. Unlike an arbitration, there is no right of recourse to the court for error of law in the event that either party is dissatisfied with the price fixed by the expert. However, because the expert undertakes his or her task as an expert, not as an arbitrator, he or she is not immune from suit for negligence. The plain intention is that the parties will be bound by the price fixed by the expert as the fair value of the shares for the purposes of the sale. However, a purchasing shareholder may then pursue the expert for loss if he or she considers the amount fixed is unjustifiably high as a consequence of negligent error or omission by the expert.

The terms of EY's mandate

[43] With those principles in mind we turn to consider the points made on behalf of the appellant in more detail. But first it is necessary to set out EY's instructions which formed the basis of the mandate.

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[19] *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Inc* [2015] NZCA 62, [2015] NZAR 492. Footnotes omitted.

[20] *Peregrine Estate Ltd v Hay* [2017] NZCA 496, [2018] 2 NZLR 345.

[44] Mr Stock's letter of 16 March 2021 in which he sought to instruct Mr Goss of EY as valuer included the following terms in the JIV:[21]

> …
>
> (b) The shares should be valued:
>
> (i) at fair value; and
>
> (ii) with no discount to be applied, including on account of:
>
> (A) Mr Smalley's minority holding; or
>
> (B) any compulsion to sell due to the circumstances of the sale.
>
> (c) Both shareholder parties will be bound by the Independent Valuation and will not challenge the Independent Valuation, either directly or indirectly.
>
> (d) The valuer will determine the information he requires from the parties and the dates on which information is to be made available by the parties to enable the Independent Valuation to be carried out. In addition:
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> …
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> (iv) The valuer shall be the sole arbiter of the relevance (or otherwise) of any information provided under, or contemplated by paragraph (d) above.
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> …
>
> (g) Subject to paragraph (b), the valuer will determine the test to be applied in determining the fair value of the shares and will take into account such matters as the valuer considers appropriate.
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> (h) The valuer will submit his draft Independent Valuation to each shareholder party at the same time. Each party will be given the opportunity to provide the valuer with that party's feedback on the draft prior to finalisation of the Independent Valuation. The valuer may set the form and timeframe for the parties to provide feedback in. The valuer may deal with the parties' feedback in any manner the valuer sees fit.
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> …
>
> (k) The shares are to be valued at a current valuation date. Unless the valuer determines otherwise, the valuation date will be the last day of the month immediately preceding the month in which the valuer issues his valuation.

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[21] Emphasis omitted.

(l) The valuer will be provided with a copy of:

(i) the Joint Report of Scott McClay and Craig [Melhuish] dated 18 December 2020 (Experts' Joint Report);

(ii) any addendum to the Experts' Joint Report;

(iii) the exiting shareholder's Particulars of Claim dated 25 September 2020; and

(iv) HHG, OPL and the remaining shareholders' Reply to Particulars of Claim dated 4 November 2020,

(together, the Documents). The valuer shall have regard to the Documents in conducting the Independent Valuation, and in particular in relation to the issues referred to in paragraphs 2, 5(b) and 8 of the Experts' Joint Report.

[45] In EY's letter of 18 June 2021 confirming acceptance of the appointment, EY recorded:

Nature of the Services

The results of our work will be used solely for the purposes of determining the 'fair value' of the exiting shareholder's shares as at the agreed date ("the Purpose"). The [joint] instructions do not define the term fair value, but provide that:

(i) ...no discount [is] to be applied, including on account of:

(A) Mr Smalley's minority holding; or

(B) any compulsion to sell due to the circumstances of the sale. The joint instructions require us to value the shares at their fair value

Given the context we will apply the following definition of fair value:

"Fair value represents a pro rata share of the value that would be negotiated between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller, both acting at arm's length, of 100 percent of the equity in HHG and OPL."

Our valuation will be prepared in accordance with Advisory Engagement Standard 2 "lndependent Business Valuations" ("AES-2") as issued by the Chartered Accountants of Australia and New Zealand.

Paragraph C of the joint instructions provides that:

Both shareholder parties will be bound by the Independent Valuation and will not challenge the Independent Valuation, either directly or indirectly.

Valuation Date

Paragraph (k) of the joint instructions provides that:

> *The shares are to be valued at a current valuation date. Unless the valuer determines otherwise, the valuation date will be the last day of the month immediately preceding the month in which the valuer issues his valuation.*

We will determine the valuation date once we have reviewed the information provided in response to our initial information request, having full regard to the intent of the joint instructions that the valuation date be as near as practicable to the date on which the valuation is issued.

[46] Ultimately EY adopted a valuation date of 31 August 2021, the most recent practicable valuation date preceding the draft report.

[47] Also, EY elected to determine the value of HHG and OPL using the capitalisation of future maintainable earnings (CME) method as opposed to the discounted cash flow (DCF) method.

The appellant's challenge to the summary judgment

[48] The appellant says he has a reasonably arguable defence to the summary judgment application on the basis that EY breached its mandate in a number of ways. Mr McLellan KC, for the appellant, submitted EY breached its mandate by:

(a) failing to adhere to AES-2;

(b) relying on information that post-dated the valuation date;

(c) inadvertently applying a discount; and

(d) relying on significant new information after the draft report feedback period.

[49] Mr McLellan relied on the decision of *Veba Oil Supply and Trading GmbH v Petrotrade Inc* as authority for the strict application of the requirement to comply with the mandate.[22] The defendant sellers had sold 25,000 tonnes of gasoil to the claimant

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22 *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832.

buyers. The contract provided that the quantity and quality of the cargo was to be determined by a mutually agreed independent inspector. The determination was to be final and binding, save for fraud or manifest error. Clause 4 of the contract provided the required specifications, which included a test for density at 15 degrees Celcius, and the method to be used was ASTM: D1298. The inspectors sampled the cargo and confirmed that it met the density requirements, however, the inspectors used test method D4052, rather than the specified method D1298. The Court of Appeal of England and Wales accepted that cl 4 identified both the standard and the method for assessing whether the standard had been reached. What was required was a test conducted by the stipulated method and none other. By using a test outside the contractual instructions, the inspectors had departed from their mandate.[23]

[50] On the issue of whether the departure was material, Simon Brown LJ, supported by Tuckey LJ,[24] approved the following test as to materiality:[25]

> … I would hold any departure to be material unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party.

[51] Mr McLellan submitted that EY had failed to comply with its mandate and the failures could not be described as trivial or de minimus. He argued that this Court's decision in *Peregrine Estate Ltd v Hay*, a case relied on by the respondents, did not alter the position, rather it was consistent with it.[26] In that decision the Court had said:

> [22] The question as to whether Ms Millar's assessment of fair value is final and binding on the parties depends on whether she carried out the valuation exercise dictated by the constitution. We therefore start by examining the express terms of the constitution and then consider whether any other terms should be implied. Finally, we consider whether it is arguable that Ms Millar's valuation complied with the terms of the constitution.

[52] Mr McLellan also relied on the comments of Hoffman LJ in *Mercury Communications Ltd v Director General of Telecommunications* where, in his dissenting judgment, Hoffman LJ explained the distinction between mistakes on matters that have been entrusted to the decision-maker and those falling outside

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23 At [29] per Simon Brown LJ, and at [49] per Dyson LJ.
24 At [38]–[40] per Tuckey LJ.
25 At [26] per Simon Brown LJ.
26 *Peregrine Estate Ltd v Hay*, above n 20.

the scope of that jurisdiction.[27] In *Peregrine* this Court referred to Hoffman LJ's approach with approval:[28]

> [30] In his dissenting judgment in *Mercury Communications Ltd v Director General of Telecommunications*, Hoffmann LJ explained the important distinction between mistakes on matters that have been entrusted to the decision-maker and those falling outside the scope of that jurisdiction. If the expert is required by the terms of the mandate to make a determination in accordance with prescribed principles, he or she must do so. Although the expert must decide what those prescribed principles mean, an error in interpreting them is likely to invalidate the resulting determination. This is because it is ultimately for the Court to determine what the terms of the mandate are and therefore the scope of the expert's jurisdiction. If the expert misinterprets the prescribed principles, he or she will not do what has been asked.

[53] Mr McLellan submitted EY had erred in the present case in interpreting their instructions. They had misinterpreted the prescribed principles of AES-2 and in doing so EY had breached its mandate. The resulting determination was invalid.

[54] During the course of his oral argument Mr McLellan referred to three matters in particular which he submitted were a breach of mandate. First EY took into account two transactions which were not properly comparable. In his evidence Mr Melhuish said that they were "anxious" based transactions. Next, EY had used one third party transaction involving ASB which had occurred after the valuation date in clear breach of the mandate. Then, in the final EY report, EY had removed one of the three comparable transactions and replaced them with six transactions, which Mr Smalley was denied the opportunity to respond to. EY should have issued a further draft report and invited further submissions from the parties.

[55] Mr McLellan argued that, whether taken individually or collectively, the above were breaches of the mandate which provided a reasonably arguable defence to the continuing shareholders' claim for summary judgment.

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27 *Mercury Communications Ltd v Director General of Telecommunications* [1994] CLC 1125 (CA) at 1140 per Hoffman LJ.

28 *Peregrine Estate Ltd v Hay*, above n 20, footnote omitted.

Did EY comply with AES-2?

[56] As noted, EY's terms of engagement included an express term that it would comply with AES-2. Clause 33 of AES-2 provided:

> Sufficient evidence must be gathered by such means as inspection, enquiry, computation and analysis to ensure that the business valuation conclusion and the report are properly supported.

[57] Mr McLellan submitted that Mr Melhuish's evidence, which was not responded to, was that EY had failed to comply with cl 33 of AES-2. In Mr Melhuish's opinion the selection of appropriate multiples is fundamental to the CME valuation method. In addition to the matters Mr McLellan referred to, Mr Melhuish was also of the opinion EY had failed to analyse the quality of the earnings. That meant that it had not gathered sufficient evidence to properly support its valuation.

[58] Despite Mr Melhuish's evidence, the High Court found that the interpretation and application of cl 33 was a matter for EY's professional judgment. In doing so, Mr McLellan submitted the Court fell into error. He submitted it could not be right that a valuer could make any type of decisions about what information, if any, was used to support the valuation and still claim compliance with cl 33. It was at least arguable that professional judgment was not a limitless concept in this context. Mr McLellan referred to the New Zealand Institute of Chartered Accountants 'Code of Ethics' and its definition of 'professional judgment':

> Professional judgment involves the application of relevant training, professional knowledge, skill and experience commensurate with the facts and circumstances, taking into account the nature and scope of the particular professional activities, and the interests and relationships involved. ...

[59] Mr McLellan also referred to the following passage from *Peregrine*:[29]

> [41] In the present case the expert's mandate under the constitution was to fix fair value as between the shareholders, not fair market value or current market value. No particular valuation approach was prescribed. Nor were any particular valuation principles specified. …

and suggested that passage emphasised that where valuation principles were specified, as in this case, failure to comply with them would be a breach of the mandate.

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[29] *Peregrine Estate Ltd v Hay*, above n 20.

[60] Mr McLellan also referred to the case of *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd*.[30] In that case the Court of Appeal of England and Wales had cited the following comments of Hoffman LJ's in *Mercury Communications* with approval:[31]

> … It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion. …

[61] In Mr McLellan's submission, the concepts referred to in cl 33 of AES-2 of sufficient evidence and proper support could be seen as principles. He argued that they had been incorrectly interpreted by EY in its valuation, and that opened the validity of EY's valuation to challenge.

[62] Mr McLellan submitted the Judge was wrong to rely on the comments of the England and Wales Court of Appeal in *Premier Telecom Communications Group Ltd v Webb* that the interpretation of a relevant professional standard was a matter for the valuer.[32] He noted the passage relied on was an obiter dicta comment in circumstances where the Court had already found the relevant standard had been complied with.

[63] In conclusion on this point Mr McLellan noted it was unnecessary for the Court to finally determine the issue. It was sufficient for Mr Smalley to demonstrate there was an arguable case for error. He submitted, given Mr Melhuish's evidence in particular, it was reasonably arguable that the interpretation of AES-2 (including cl 33) was not a matter for EY's absolute discretion.

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30 *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd* [2019] EWCA Civ 1683 at [37].
31 *Mercury Communications Ltd v Director General of Telecommunications*, above n 27 at 1140.
32 *Premier Telecommunications Group Ltd v Webb* [2014] EWCA Civ 994 at [18].

Analysis — EY's compliance with AES-2

[64] We accept that summary judgment will not be appropriate where there is a contested credible area of fact or where there is relevant competing expert evidence. But we agree with the respondents' submission that this is not a case of competing expert evidence. The issue of whether EY conducted its valuation in this case in accordance with its mandate is not a matter for expert evidence. It is a matter of contractual interpretation for the Court.

[65] For a number of reasons we do not consider it is reasonably arguable that EY breached its mandate by failing to prepare the valuation in accordance with AES-2. First, EY applied AES-2 to the valuation process it carried out. It did not apply some other standard. In the Engagement overview section of the final report, EY confirmed that the valuation had been prepared in accordance with AES-2. Later, in the valuation analysis section, EY confirmed that:

> More generally, while we have undertaken considerably more analysis and made considerably more enquiries than is usual in the context of an AES-2 business valuation engagement, we have not performed the full range of financial due diligence procedures which a prospective acquiror might be expected to perform.

[66] We understand that the appellant's contention is that EY applied the AES-2 standard and principles incorrectly. But as the Judge noted, the valuation of shares is not an exact process, and a significant degree of professional judgment was required in respect to a host of matters and considerations to arrive at the appropriate value.

[67] Importantly, the AES-2 standard was not a prescriptive test or method as was the case in *Veba*, for example.[33] EY's approach to the valuation exercise was set out in part 3 of its final report, under "Valuation analysis". As EY explained, in deriving the value it first arrived at an assessment of Future Maintainable Earnings (FME) specifically Earnings before Interest and Tax (EBIT), based on the companies' historical performance. It then assessed the range of EV/EBIT multiples from comparable listed companies and transactions (noting they varied widely). EY then compared the key characteristics of the companies' financial performance with

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33 *Veba Oil Supply and Trading GmbH v Petrotrade Inc*, above n 22.

comparable companies and transactions before forming a view on an appropriate EBIT multiple range, based on the comparative analysis and, importantly EY's professional judgment. It then calculated the enterprise value for the companies based on the assessed multiple and assessed FME and adjusted the result for the (net debt) cash/surplus assets (liabilities) as at the valuation date, 31 August 2021 to arrive at the value. It is apparent from that description of the process that it involved an exercise of judgment by EY at various stages of the process both as to the extent of the information and analysis required and the weight to be given to the information.

[68] As this Court noted in *Peregrine* the Court will uphold the party's bargain to entrust a share valuation to an expert and to be bound by the expert's assessment of value, provided the expert exercises their independent skills and judgment acting honestly and in good faith:[34]

> [41] In the present case the expert's mandate under the constitution was to fix fair value as between the shareholders, not fair market value or current market value. No particular valuation approach was prescribed. Nor were any particular valuation principles specified. The only requirement in the mandate was for the expert to assess the fair value of the particular shares. The parties entrusted the expert to carry out the valuation and agreed to be bound for the purposes of the share transfer by the fair value assessed in the exercise of the expert's independent skill and judgment, acting honestly and in good faith. If the valuation was carried out incompetently, the affected party would have a remedy against the expert but no right to resist the share transfer at the price fixed.

[69] An expert determination complying with the contract is binding even if mistaken or in error.[35] As Lord Denning MR said in *Campbell v Edwards*:[36]

> … 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. …

[70] There is no suggestion that EY exercised its judgment other than in good faith. Further, the appellant's reliance on cl 33 overlooks the position of that clause within the AES-2 standard overall. It is in a section of the AES-2 Standard headed

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34 *Peregrine Estate Ltd v Hay*, above n 20. Footnote omitted.

35 *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Inc*, above n 19, at [29]. See also *Pontsarn Investments Ltd v Kansallis-Osake-Pankki* [1992] 1 EGLR 148.

36 *Campbell v Edwards* [1976] 1 All ER 785 at 788.

'Performance standards and procedures'. The format followed in the standards is that the performance standard is set out in bold and then the following paragraph generally provides information as to the application of the standard. In that context cls 33 and 34 have to be read together as follows:

> **33 Sufficient evidence must be gathered by such means as inspection, enquiry, computation and analysis to ensure that the business valuation conclusion and the report are properly supported.**
>
> 34 When determining the extent of evidence necessary to support the business valuation conclusion, the member should exercise professional judgement, considering both the nature of the business valuation and the use to which the report will be put.

[71] The application of cls 33 and 34 in this case is informed by the further instructions to the valuer, including that EY was to determine the information required and was to be the sole arbiter of the relevance of any information provided. Further, professional judgment by definition (even accepting the definition suggested by the appellant) supports a context specific discretion which vested in EY.

[72] In *Peregrine* the appellant's accountant challenged the valuer's assessment on the basis that she should have adopted a "notional liquidation" methodology and had wrongly applied a minority discount. This Court went on to review the decisions of *Boat Park Ltd v Hutchinson*, *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*, and Hoffman LJ's dissenting judgment in *Mercury Communications Ltd v Director General of Telecommunications*, which was endorsed by the Court of Appeal of England and Wales in *Barclays Bank Plc v Nylon Capital LLP*, and then concluded:[37]

> [32] It is clear from these authorities that the critical question is always whether the valuation has been carried out in accordance with the terms of the particular contract. Errors on the part of the expert in carrying out the valuation assessment will not invalidate the determination unless the error was one the expert was not entrusted to make. Examples are where the expert has valued shares in the wrong company, valued the wrong number of shares, misunderstood the class of shares being valued or the legal rights attaching to them, valued the shares as at the incorrect date, or assessed the market value of the shares when the mandate was to assess their fair value. In mandating

[37] *Peregrine Estate Ltd v Hay*, above n 20, citing *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA); *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (NSWCA); and Hoffman LJ's dissenting judgment in *Mercury Communications Ltd v Director General of Telecommunications*, above n 27, which was endorsed by the Court of Appeal of England and Wales in *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826.

> an expert to assess the fair value of specified shares, the expert is not authorised to: value shares in some other company; value a different number of shares; value shares in another class or having different legal rights; or assess the market value of the shares. That is not because there is an implied term that the expert must act rationally; it is because of the specification in the mandate of the property to be valued and the stipulated basis on which the valuation is to be conducted.

[73] The fundamental issue in the present case is whether it is arguable the valuation was not prepared in accordance with AES-2. Mr Melhuish's opinion on that issue is not determinative. The evidence overall satisfies us that EY conducted the valuation exercise in accordance with AES-2. As noted, EY expressly referred on several occasions in the course of the final EY report to AES-2 and, in part, responded to Mr Smalley's criticism that aspects of AES-2 had not been applied. The present case is quite different to the examples given by this Court in *Peregrine* of situations where it can be said the mandate has been breached.[38]

[74] The authorities relied on by the appellant are also distinguishable from the present situation. In *Veba Oil Supply and Trading GmbH v Petrotrade Inc*,[39] the parties contracted that the analysis of the product was to be carried out using a specific test method. A different test was applied. That was a clear breach of the contractual mandate. In the present case EY agreed to prepare its valuation in accordance with AES-2 and applied that standard. Properly analysed the appellant's complaint is how EY went about its task rather than whether it applied AES-2.

[75] Next, in *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd*,[40] the parties had contracted for the sale of land, subject to determination of its price either by agreement or in accordance with an expert determination. The contract provided for a choice between two valuation dates, whichever was later. The relevant clause in the contract which provided for the valuation, included the following:[41]

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38 For further examples of breach of mandate see: *Jones (M) v Jones (RR)* [1971] 2 All ER 676 (Ch); *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*, above n 37; and *Shell UK Ltd v Enterprise Oil Plc* [1999] 2 All ER (Comm) 87.

39 *Veba Oil Supply and Trading GmbH v Petrotrade Inc*, above n 22.

40 *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd*, above n 30.

41 At [5].

> 6.2 Following the Challenge Expiry Date … the Parties shall appoint a Valuer … and the valuation shall be:
>
> …
>
> 6.2.2 with the valuation date being the Challenge Expiry Date or (if later) the date of valuation.

[76] Although the valuation date was later than the challenge expiry date, the valuer concluded that, on his construction of the contract, the correct valuation date was the challenge expiry date. On appeal the Court of Appeal of England and Wales confirmed the Judge was right to conclude that the expert did not have exclusive jurisdiction to decide the valuation date. The authority of the valuer was to determine the assumed value at the correct date specified in cl 6.2.2, nothing else. If the valuer produced a valuation at some other date he would not have carried out the terms of his appointment and his valuation would not be binding.[42] We return to the issue of the valuation date point raised by the appellants later, but as a matter of principle, again that case is quite different to the present.

[77] The appellant also relies on the dissenting judgment of Hoffman LJ in *Mercury Communications Ltd*.[43] At issue in that case was a challenge to the determination of the Director-General of Telecommunications and whether the jurisdiction of the Court was excluded. Hoffman LJ confirmed the issues between the parties concerned the construction of parts of condition 13, which was not a question for the decision of the Director. However, previously in that judgment, Hoffman LJ had discussed the distinction between mistakes and departures from mandate with reference to goodwill. Hoffman LJ gave the example of if the parties had agreed the value of the company would be determined as three times net profits over the past three years, but the accountant valued the goodwill on a different basis, the Court would set the determination aside on the basis it was not what the parties agreed. However, as Hoffman LJ explained:[44]

> Assume, however, that the parties have in addition agreed certain of the principles upon which the accountants should value the shares. For example, that the goodwill of the company's business shall be valued at three times the net profits over the past three years. If it can be shown that the accountants

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42 At [34].

43 *Mercury Communications Ltd v Director General of Telecommunications*, above n 27.

44 At 1,140. Citation omitted.

> have valued the goodwill on a different basis (as to which there may be evidential difficulties …) the court will set aside the valuation. It is not a valuation to which the parties have agreed.
>
> On the other hand, even in cases in which the parties have agreed principles of valuation, their application may involve questions of judgment which they have left to the decision of the accountants. In the last example, the question of what counts as 'net profits' may be something on which different accountants could hold different views. Here again, as a matter of substantive law, the court will not interfere. As a matter of contract, the parties have agreed that 'net profits' are to be whatever the accountants honestly consider them to be.

[78] Two points can be made. First, Hoffman LJ's example of principles of valuation informs his later references to them. In context the "principles" referred to were akin to stipulating a test method such as in *Veba*, rather than the general standards in the present case. Second, Hoffman LJ accepted the reservation of an exercise of judgment by the valuer in the application of the relevant principles.

[79] In *Barclays Bank plc v Nylon Capital LLP*,[45] a case considered by this Court in *Peregrine*, an expert determination clause provided for the appointment of an accountant to determine any dispute regarding the amount of any allocation of partnership profits. The Bank had sought a declaration it was under no obligation to pay any profits. The defendant argued the proceeding should be stayed given the expert determination provision. In dismissing the appeal the Court held that the Judge had been right to determine the issue of jurisdiction on the application before him.[46] On the true construction of the relevant clause the making of an allocation was a condition precedent to the expert's jurisdiction to make the determination.[47] Again, that case is quite different to the present. The challenges advanced by Mr Smalley, supported by the evidence of Mr Melhuish, are essentially that EY adopted incorrect multipliers for the purpose of calculating its CME. As the Judge noted, however, that is exactly the type of decision the parties entrusted to EY. The appellant essentially says EY erred in how it went about the task. Even if that was correct, it is not a breach of the mandate.

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45 *Barclays Bank plc v Nylon Capital LLP*, above n 37.
46 At [49].
47 At [52].

[80] The present case is closer to the situation considered by the Court of Appeal of England and Wales in *Premier Telecommunications Group Ltd v Webb*.[48] In that case a continuing shareholder agreed to buy out Mr Webb's 40 per cent shareholding. The parties agreed to delegate the valuation to expert valuers, Grant Thornton (GT). The valuation was to be at a fair value on a pro rata basis with no discount to reflect a minority shareholding. The fair value was also to be equal to the market value defined by the International Valuation Standards Board (IVSB) as a valuation between a willing buyer and a willing seller at an arms-length transaction after proper marketing.

[81] One of the grounds of challenge to GT's valuation was that it disregarded the personal circumstances of Mr R, for example, the fact that he did not have a contractual relationship with the group as the willing seller is a hypothetical owner. It was submitted that demonstrated a serious flaw in the valuation. The Court rejected that submission, noting that whether Mr R would be more or less willing to sell because he did not have a contract with the company mattered not.[49] It might well affect the attitude of a willing buyer but that was not being considered. The Court then went on to note:

> 18. That makes it unnecessary to decide whether the interpretation of the IVSB principles was within the scope of the authority delegated to Grant Thornton as part of the valuation or whether, as Mr Harrison submitted, it was a matter which the parties intended to be reserved for the decision of the court. The judge appears to have accepted that it was a matter for Grant Thornton and I agree with him. Their instructions were to value Mr Webb's shareholding on the basis of fair value on a pro rata basis, without discount to reflect a minority shareholding. Instructions given in such broad terms naturally invite the valuer to adopt whatever method he considers appropriate in order to produce a fair valuation. **In this case it was agreed that the IVSB standards would be used and the parties must be taken to have assumed that Grant Thornton were familiar both with the principles they embody and their practical application. In those circumstances I think they must also be taken to have accepted that the interpretation of those standards was a matter for Grant Thornton in the performance of their functions as expert valuers. I am unable to accept the proposition that the interpretation of the IVSB standards lay outside the scope of their mandate.**
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> (Emphasis added.)

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48 *Premier Telecommunications Group Ltd v Webb*, above n 32.

49 At [17].

[82] Similarly, in the present case, the parties must be taken to have accepted that EY would be familiar with AES-2 and the interpretation (where necessary) but more relevantly the application of the required standard was a matter left to EY. Our review of the AES-2 standards confirms the Judge's conclusion that it is not an objective standard. Its application to the valuation fell squarely within the discretion accorded to EY by the mandate.

[83] Ultimately, as the Judge found, the parties had entrusted their decision as to the value of shares to EY because of its (Mr Goss' in particular) expertise. The parties conferred upon EY the power to determine the information required and to be able to call upon either party to provide further information to the extent the valuer deemed appropriate. The valuer was also to be the sole arbiter of the relevance of any information that was provided.

[84] We agree with the Judge that the choice of CME was exactly the sort of matter the parties must be taken to have left to the valuer to decide in the exercise of his expertise. If there were errors in EY's analysis they do not amount to a breach of the mandate.

Post valuation date information

[85] In the draft report EY adopted a valuation date of 31 August 2021.

[86] Mr McLellan noted that in the final EY report, EY had taken into account the acquisition of ASB Superannuation Master Trust in November 2021 as a comparable transaction. He submitted it could not be right that EY was entitled to choose a valuation date and then rely selectively on information arising after that date. EY had failed to adopt the valuation date contrary to the clear instructions in the JIV (cl (k)) and EY's own terms of engagement. While cl 55 of AES-2 provided for exceptions, Mr McLellan submitted there was nothing in the draft or final EY report to indicate that the ASB superannuation transaction could reasonably have been anticipated as at the valuation date of 31 August 2012.

[87] Mr McLellan again referred to *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd*.[50] After noting the expert's only source of authority and jurisdiction was the contract between the parties, the Court of Appeal had held:

> [34] The task of the Valuer set by the opening words of cl 6.2 is to ascertain the Assumed Value of the Property as defined. The clause goes on to set out the basis of valuation 'with the valuation date being the Challenge Expiry Date or (if later) the date of valuation': see cl 6.2.2. The authority of the Valuer is to determine the Assumed Value at the correct date specified in cl 6.2.2; nothing else. And if the Valuer produces a valuation as at some other date he will not have carried out the terms of his appointment and his valuation will not be binding upon the parties.

[88] Mr McLellan submitted that, by specifying a date for the valuation and then, in the course of determining the valuation taking into account information arising months later, EY had abrogated the requirement of the mandate.

[89] In *Great Dunmow* the expert adopted the wrong valuation date. In so doing the expert went outside their mandate. In this case it was for EY to fix the valuation date. EY fixed the valuation date as at 31 August 2021. EY did not adopt an incorrect valuation date as the expert had in *Great Dunmow*. The appellant's complaint is that, in determining the value as at 31 August 2021 EY took into account a transaction that occurred after that date. But EY was aware of that and explained:

> While the announcement is post the valuation date, we consider this to be current New Zealand market evidence for the purpose of our assessment.

[90] Further, cl 55 of AES-2 does not prohibit the valuer from taking account of events occurring after the valuation date:

> In performing the valuation, the member considers circumstances at the valuation date and events occurring up to the valuation date. Events that occur after the valuation date should not normally be taken into account in forming the business valuation conclusion. An exception is where a member using professional judgment based on the information that would have been available at the valuation date, could at that date have reasonably anticipated or foreseen that the subsequent events or circumstances would arise.

[91] The example given of "an exception" is not exclusive. EY's reliance on the ASB transaction as part of the information it took into account as part of its process in

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[50] *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd*, above n 30.

arriving at the value was not a breach of mandate. The valuation date for fixing the value of the shares remained at 31 August 2021 for the purposes of the parties. It was open to EY to consider the ASB transaction even though it was concluded after that date. It was still contemporaneous and relevant to the value of the companies' shares as at 31 August 2021. Ultimately it was a matter for EY's judgment as to the weight to be afforded to the transaction.

Inadvertent application of a discount

[92] Mr McLellan next submitted that EY breached the requirement that no discount was to be applied to the valuation on account of any compulsion by Mr Smalley to sell due to the circumstances of sale, and that EY's selection of comparable transactions included transactions that involved an anxious buyer or seller. The primary basis for the submission was Mr Melhuish's evidence. Mr Melhuish identified two transactions that he considered met that description, namely the acquisition of Craig's Investment Partners and the Ord Minnett transaction.

[93] Mr McLellan submitted the impact of the capitalisation multiples on the final valuation was significant. EY relied on these comparable transactions to fix the capitalisation multiples for its valuation of HHG and OPL. By relying on those transactions EY inadvertently applied a discount to the final valuation and again in doing so acted outside the mandate.

[94] Mr Melhuish's evidence was:

> 38. I note that some of the multiples from the comparable transactions in the [EY] Report are not between non anxious parties, specifically:
>
> (a) Craigs Investment Partners bought by CIP Holdings.
>
> (b) Ord Minnett Pty Ltd bought by Consortium led by Management.

And later:

> 61. …
>
> (i) 2 are anxious based transactions (rather than non-anxious buyers and sellers).

[95] The first point is that Mr Melhuish's evidence on that point is a bare assertion, unsupported by any analysis or other supporting information. Mr Smalley purported to also provide further reasoning to support the submission in his affidavit. But we note the Ord Minnett transaction was included in the draft report and Mr Smalley had the opportunity to comment on it at that time. He did so. EY addressed Mr Smalley's submission about the transaction in the final report:

> Ord Minnett was acquired in 2019 by a consortium led by the company's Management for a total consideration of A$175.2m
>
> - The sale of 70% of the business by shareholder IOOF implied an EV of $164.3m and revenue and EBIT multiples of 1.1x and 6.3x respectively.
> - We have reviewed the submission from Mr Smalley advising that the remaining 30% was transacted at a higher price by the minority shareholder JP Morgan implying higher EV multiples. While this is correct, it is our understanding that this was on account of JP Morgan exercising an existing put option. We therefore consider the transaction involving IOOF's 70% stake provides the better indicator of value at the time of the transaction.
> - While the business is similar in its operations to HHG/OPL, it is considerably larger, employing over 260 advisors in offices across Australia as well as in Hong Kong.

[96] But in any event, even if Mr Melhuish and Mr Smalley are correct and the Ord Minnett and Craigs' transactions were indeed anxious transactions then, as is plain from the process EY undertook in fixing the values, the assessment of multiples from the comparable companies was only part of the overall exercise in fixing the appropriate ultimate value of the shares. Any error in applying them was not a breach of the mandate. On the face of the final EY report, the valuation was fixed in compliance with the mandate. No discount was applied on account of Mr Smalley's minority holding or any compulsion on his part to sell.

Reliance on significant new information after the draft report

[97] In the final EY report EY referred to seven comparable transactions, six of which had not been referred to in the draft report. Mr McLellan submitted that Mr Smalley was deprived of the opportunity to correct factual errors regarding those transactions. He argued it was implicit in the requirement for EY to circulate a draft report that the parties, including Mr Smalley, would have the opportunity to comment

on new material. He noted that the parties intended the feedback would extend to methodology as well.

[98] Mr McLellan submitted the failure to provide another opportunity to comment was material. There were factual errors relating to the six new transactions. As noted, the ASB superannuation transaction post-dated the valuation date. Mr McLellan also referred to Mr Melhuish's evidence as to errors in the comparative transactions. In Mr Melhuish's opinion EY had mistakenly assumed the comparative transactions had multiples based on an EV/EBIT basis, whereas three of the listed comparator transactions were in fact based on different valuation metrics. In relation to the Craigs Investment Partners transaction EY had used the earnings figure from CIP Holdings which was the purchaser rather than the target. It is argued the errors could have been corrected if Mr Smalley had been given the opportunity to respond.

[99] The intention behind the requirement for a draft report was to enable the parties to make further submissions on the substance of the report. It was anticipated that both parties would make submissions. Mr Smalley took advantage of that and did make further submissions. Mr Goss received and engaged in considerable correspondence from Mr Smalley and Mr Melhuish following the release of the draft report. As noted, in its final report, EY specifically addressed Mr Smalley's allegations that AES-2 were not followed during the valuation process and confirmed that the valuation had been conducted in accordance with it. But it was always open to EY as the valuer to accept or reject the submissions on the draft and, even if accepting them, it was up to EY to determine the weight to be given to them in the very subjective process of the valuation. If EY rejected some of the submissions the brief did not anticipate a re-opening of the issue or a further round of submissions.

[100] We note that of the six further comparables, one was the ASB transaction, which we have discussed above, and two were introduced by Mr Smalley in his submissions. The other three effectively drove up the multiplier to the favour or benefit of Mr Smalley. EY increased the relevant multiplier for OPL in Mr Smalley's favour between the draft and final reports.

[101] Further, as is apparent from the process described at [67] the consideration of the comparable transactions was only a part of the overall valuation process which was left to EY's judgment. In that regard it is relevant that the JIV confirmed that it was for the valuer to determine the information it required, and that EY was to be the sole arbiter of the relevance of any information provided. The JIV also expressly confirmed that the valuer could deal with the feedback in any manner the valuer saw fit.

[102] We note that in his email of 21 December 2021 Mr Goss confirmed that he considered the matters most recently raised by Mr Smalley did not impact on the valuation report which he had finalised. We accept he was justified in coming to that conclusion and in issuing the final report at that time without issuing a further draft report, particularly bearing in mind the process undertaken to that date and that almost four months had passed since the date EY had fixed as the valuation date.

Summary

[103] We do not consider that any of the matters raised on behalf of Mr Smalley either individually or collectively are such that it could be said to be arguable that EY was in breach of its mandate.

The respondent's support of the judgment on other grounds

[104] In the circumstances it is unnecessary to consider the respondent's support of the judgment on other grounds.

Result

[105] The application to adduce further evidence on appeal is declined.

[106] The appeal is dismissed.

Costs

[107] The appellant is to pay the respondents costs on a band A basis, and usual disbursements. We certify for two counsel.

Confidentiality

[108] The issue of confidentiality was raised by counsel by memorandum. On our review there is nothing in this judgment which breaches the existing High Court orders. The detail that was included in the original High Court judgment is not included in this judgment. There is no need for any redaction or further order in this Court.

Solicitors:
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