IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2022 03872

SCHOTT AG — Plaintiff

v

MELTON WILLOWS PTY LTD (ACN 006 965 537) AS TRUSTEE FOR THE WILKINSON FAMILY TRUST — First Defendant

EROL CRAIG HARVEY — Second Defendant

ALISON NICHOLA HARVEY — Third Defendant

S ECI 2022 04320

MELTON WILLOWS PTY LTD (ACN 006 965 537) AS TRUSTEE FOR THE WILKINSON FAMILY TRUST & ORS — Plaintiffs

v

SCHOTT AG — Defendant

JUDGE:	Stynes J
WHERE HELD:	Melbourne
DATE OF HEARING:	3 April 2023
DATE OF JUDGMENT:	30 June 2023
CASE MAY BE CITED AS:	Schott AG v Melton Willows Pty Ltd
MEDIUM NEUTRAL CITATION:	[2023] VSC 364

CONTRACT — Share sale agreement — Interpretation — Dispute resolution clause — Expert accountant appointed by parties to calculate an earn out amount — Whether expert complied with the terms of the agreement — Expert's task under the agreement — Whether expert made a 'manifest error' — Consequences of a finding of 'manifest error' — *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708 considered — Matter remitted to the Expert for re-determination.

WORDS AND PHRASES — Meaning of 'having regard to' — Meaning of 'consideration' — *Conlan v Registrar of Titles* [2001] WASC 201 applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff in S ECI 2022 03872 and the Defendant in S ECI 2022 04320	R G Craig with N Moncrief	Lander & Rogers
For the Defendants in S ECI 2022 04320 and the Plaintiffs in S ECI 2022 03872	J P Moore with A J Weinstock	Norton Rose Fulbright

Contents

HER HONOUR:

A Introduction

1 This proceeding concerns the enforceability of an expert determination made by an independent accounting expert engaged by the parties under a Share Sale Agreement ('**SSA**').

2 Pursuant to the SSA, Schott AG (the '**Buyer**') purchased the entire share capital in the company previously known as Minifab (Aust) Pty Ltd ('**Minifab**') from Melton Willows Pty Ltd and other former shareholders (the '**Sellers**'). This acquisition was completed on 1 July 2019 ('**Completion**'). Under the SSA, the purchase price included the possibility of three annual 'earn out payments' to be paid by the Buyer following Completion. These earn out payments were contingent on Minifab's revenue exceeding certain thresholds in the financial years ending 30 June 2020, 30 June 2021 and 30 June 2022.

3 A dispute arose in relation to the second potential earn out payment for the financial year ending 30 June 2021 ('**FY21**'). In particular, the dispute concerns whether the sum of $13,305,893 ('**Disputed Amount**') paid to Minifab by one of its customers, Qorvo Biotechnologies LLC, forms part of Minifab's revenue in the relevant period. If it does constitute revenue, then the earn out payment for that period will be $7,500,000. If it does not constitute revenue, then the earn out payment for that period will be nil.

4 That dispute was referred to expert determination in accordance with the dispute resolution clause in the SSA. The expert found in favour of the Sellers by determining that the Disputed Amount was revenue of Minifab in the relevant period. The effect of the expert determination renders the Buyer liable to pay the Sellers an earn out payment of $7,500,000.

5 By originating motion dated 30 September 2022, the Buyer commenced a proceeding against the Sellers seeking various declarations including:

(a) declarations that the expert made manifest errors in his determination;

(b) declarations about how the Disputed Amount should be characterised; and

(c) declarations that the expert's determination:

(i) was not made in accordance with the SSA and is reviewable;

(ii) further or alternatively, is not final or binding on the parties; and

(iii) further or alternatively, be set aside.

6 By writ dated 25 October 2022, the Sellers commenced a proceeding against the Buyer seeking to enforce the expert's determination.

7 On 15 November 2022, Button J ordered that the two proceedings be managed and tried together with evidence in one being evidence in the other.

8 The Buyer relies on the written and oral submissions of counsel and three affidavits of its solicitor, Gregory McKenzie.[1]

9 The Sellers rely on the written and oral submissions of counsel and an affidavit of their solicitor, Peter Cash.[2]

B Summary of decision

10 For the reasons set out below, I find that the expert made a manifest error in his determination and for that reason, the expert's determination is not final or binding on the parties.

C Background

C.1 Background to the sale of Minifab

11 Prior to the sale, Melton Willows Pty Ltd owned 80.3510% of the share capital in Minifab. Two other shareholders, Mr and Mrs Harvey,[3] owned 9.6133%.

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1 Mr McKenzie swore his affidavits on 30 September 2022, 13 October 2022 and 10 February 2023.
2 Mr Cash affirmed his affidavit on 2 December 2022.
3 The second and third defendants in the Buyer's proceeding and the second and third plaintiffs in the Sellers' proceeding.

12 Together, these three parties (the '**Majority Sellers**') entered into the SSA with the Buyer.

13 The remaining 10.0356% of the share capital in Minifab was owned by 35 individuals (the '**Minority Sellers**'). The Minority Sellers and the Buyer are parties to a separate share sale agreement (the '**Minority SSA**').

14 For the purpose of the present proceedings, suffice to say that under the Minority SSA:[4]

(a) the purchase price payable to the Minority Sellers included 10.0356% of any earn out payments payable under the SSA, calculated on a per share basis; and

(b) the Buyer was liable to pay the Minority Sellers at the same time as payments were due to the Majority Sellers under the SSA.

C.2 The Share Sale Agreement

15 The SSA was executed on 30 May 2019.

16 Under the SSA:[5]

(a) the 'Company' is defined to mean Minifab;

(b) 'Group' is defined to mean Minifab and each of its subsidiaries; and

(c) 'Business' is defined to mean the business carried on by the Group at the date of the SSA, being the business of developing and manufacturing microfluidic products, as may be reorganised within the Buyer Group at any time after Completion.

17 'Completion' of the acquisition under the SSA occurred on 1 July 2019. Following Completion, Minifab became known as 'SCHOTT MiniFAB Pty Ltd'.

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4 Court Book 595, Short Form Share Sale Agreement, cl 4.2(1).
5 Court Book 480, Share Sale Agreement, cll 1.1(17), 1.1(27) and 1.1(70) ('**SSA**').

C.2.1 Clause 11 and Schedule 3

18 Clause 11 of the SSA sets out a regime for the calculation and payment of additional amounts to the Sellers in the three financial years following Completion. If in any of those years the revenue of Minifab reached specified thresholds, then the Buyer would be liable to pay the Sellers specified '**Earn Out Payments**'.

19 The expert determination the subject of these proceedings concerned a dispute about the second Earn Out Payment, being the '**FY21 Earn Out Payment**'.

20 For the purpose of determining whether an Earn Out Payment was payable in a particular financial year, the Buyer was obliged to arrange for Minifab to prepare a draft '**Earn Out Statement**' 20 business days after the finalisation of the audited financial accounts for that financial year.

21 The Earn Out Statement records the revenue of Minifab in the relevant financial year. It is defined to mean, in the context of FY21, 'a statement setting out Revenue for [FY21] and the calculation of the [FY21 Earn Out Payment], prepared in accordance with clause 11 and Schedule 3'.[6] Schedule 3 to the SSA sets out the principles applicable to the preparation of the Earn Out Statements.

22 Clause 11.3 describes the trigger for the FY21 Earn Out Payment. It states:

> **Calculation of FY21 Earn Out Payment**
>
> (1) If FY21 Revenue is greater than or equal to $46,000,000, the FY21 Earn Out Payment will be $7,500,000.
>
> (2) If FY21 Revenue is less than $46,000,000, the FY21 Earn Out Payment will be zero.

23 The term 'FY21 Revenue' as it appears in clause 11.3 means the 'Revenue for FY21 calculated in accordance with the process in clause 11 and Schedule 3'.[7] 'Revenue' is defined in cl 1.1 of Schedule 3 to mean:

> all revenue of the Business whether conducted on a stand-alone basis by the Group or by other entities within the Buyer Group (following a reorganisation

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6 Ibid cl 1.1(45).
7 Ibid cl 1.1(64).

of the Group), being the aggregate of the line items set out under the heading "Revenue" in the Earn Out Statement, for the period between 12:01am on 1 July and the Effective Time in the relevant financial year.

24 The Buyer must pay the Earn Out Payment (if any) shortly after the Earn Out Statement becomes final and binding.[8] The Earn Out Statement is said to become final and binding in one of two ways, either:[9]

(a) if the Seller does not dispute the Buyer's draft Earn Out Statement within the requisite time frame; or

(b) if the Seller does dispute the Buyer's draft Earn Out Statement within the relevant time, and that dispute is then determined by an independent expert.

C.2.2 The hierarchy in clause 1.2 of Schedule 3

25 Clause 1.2 of Schedule 3 to the SSA sets out a hierarchy of principles, policies and procedures that must be followed when preparing the relevant Earn Out Statement. It provides:

> **Part A – Principles and policies**
>
> …
>
> 1.2 The Earn Out Statement must be prepared in the format prescribed in Part B of this Schedule 3 and in accordance with, in order of precedence:
>
> (a) the general and specific principles, policies and procedures set out in clauses 1.3 to 1.8 (inclusive) of this Schedule 3;
>
> (b) where an item is not covered by the accounting principles, policies and procedures referred to in clause 1.2(a) of this Schedule 3, in a manner consistent with the accounting principles, policies and procedures used to prepare the Accounts for the Company; and
>
> (c) where an item is not covered by the accounting principles, policies and procedures referred to in clause 1.2(a) or 1.2(b) of this Schedule 3, in accordance with the Accounting Standards at Completion.

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8 Ibid cl 11.6.

9 Ibid cl 11.5(2).

26 For the purpose of these proceedings, the parties referred to the three sub-clauses in the hierarchy as follows:

(a) Cl 1.2(a) as '**Tier 1**'. The expert referred to it as Level 1;

(b) Cl 1.2(b) as '**Tier 2**'. The expert referred to it as Level 2; and

(c) Cl 1.2(c) as '**Tier 3**'. The expert referred to it as Level 3.

27 A key issue in dispute before the expert and before me was the application of cl 1.2(a), that is the Tier 1 principles, policies and procedures.

28 For convenience, I have set out the balance of Schedule 3, which is relevant to the expert's determination in relation to the application of Tier 1:

> **General principles**
>
> 1.3 The Earn Out Statement must be prepared as at the Effective Time, including customary period-end and cut-off procedures, and regard will only be had to information available to the parties up to the date that the Earn Out Statement is delivered by the Company to the Buyer and the Seller Representative.
>
> 1.4 All items in the Earn Out Statement must be reported in Australian dollars.
>
> 1.5 Unless otherwise provided in this Schedule 3, the Earn Out Statement must be prepared on the basis that each company carrying on the Business will continue to carry on its trading as a going concern.
>
> 1.6 The provisions of this Schedule 3 will be interpreted so as to avoid double counting (whether positive or negative) of any item to be included in the Earn Out Statement.
>
> 1.7 The Earn Out Statement must be prepared on a consolidated basis with balances between each company carrying on the Business eliminated.
>
> **Specific principles – Earn Out Payment**
>
> 1.8 The Earn Out Payment shall be calculated having regard to the line items set out in the Earn Out Statement table in Part B of this Schedule 3.
>
> 1.9 For the purpose of the Earn Out Statement table in Part B of this Schedule 3:
>
> (a) **Sales Manufacturing & Sales Projects** is measured at the value of the consideration received or receivable for the provision of goods and/or services.

(b) **Discounts** are sales discounts offered to customers from time to time. These are netted off against Sales Manufacturing & Sales Projects when offered.

(c) **Customer Penalties** are penalties awarded to a customer by the Business. Such penalties are netted off against Sales Manufacturing & Sales Projects when incurred.

Part B – Earn Out Statement

The following table is the form of the Earn Out Statement:

Revenue	Ledger	$
Sales Manufacturing & Sales Projects	4000	
Discounts	4060	
Customer Penalties	4090	
Total		

C.3 The Buyer's draft Earn Out Statement for FY21

29 On 29 November 2021, the Buyer provided its draft Earn Out Statement for FY21.[10] In the cover letter to the draft Earn Out Statement, the Buyer stated that:

> The consolidated sales revenue in the accounts of SCHOTT MiniFAB for the period 1st July 2020 until 30th June 2021 is AUD 34,912,442. … Based on the accounts the FY21 Earn Out Payment is zero.

30 The Buyer's draft Earn Out Statement records the following under the heading 'MiniFAB consolidated sales numbers':

Revenue	Ledger ID	in A$
Sales	4000	13,416,391
Labour	4030	19,015,448
Equipment Utilisation	4031	231,718
Materials	4040	1,315,491
Expenses	4050	97,978
Contracted Services	4100	994,647
Discounts	4060	-159,231
Intercomapny [sic] Income	4700	0 AUD
Intercomapny [sic] Discounts	4710	0 AUD
Customer Penalties	4090	0 AUD
Total		**34,912,442**

10 Court Book 736, 'Share Sale Agreement: Earn Out Statement' with attachment 'Revenue July 20 to June 2021'.

31 The Sellers disputed the draft Earn Out Statement by providing an Earn Out Review Notice to the Buyer on 21 December 2021.[11]

32 This Earn Out Review Notice made two general complaints about the draft Earn Out Statement, being:

(a) that the Buyer did not provide all supporting information, working papers, calculations and documentations which are reasonably necessary to understand the draft Earn Out Statement; and

(b) that it was not in the format prescribed in Part B of Schedule 3, meaning it was not prepared in accordance with cl 1.2 of Schedule 3.

33 Significantly, and amongst other things, the Earn Out Review Notice recorded the Sellers' position that in order to resolve the dispute, an additional sum of $13,305,893 should be included as 'Revenue' of Minifab, specifically in the line item in the table for 'Sales' (Ledger ID 4000).[12] The inclusion of that sum would mean that the FY21 Revenue would exceed the threshold amount of $46,000,000 in cl 11.3 of the SSA, and consequently trigger the $7,500,000 FY21 Earn Out Payment.

34 The sum of $13,305,893 (being the Disputed Amount) identified in the Sellers' Earn Out Review Notice is a sum that was paid to Minifab by one of its customers, Qorvo Biotechnologies LLC ('**Qorvo**'), in 2020. The parties disagree about whether this Disputed Amount constitutes revenue of Minifab under the terms of the SSA. A large proportion of the parties' submissions, written and oral, were addressed to this disagreement. In short:

(a) it is the position of the Buyer that Qorvo paid money to Minifab in relation to the purchase of equipment. Minifab was acting as agent for Qorvo in that transaction and therefore derived no revenue or consideration on its own account; and

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11 Court Book 739, 'Earn Out Review Notice'. The Earn Out Review Notice was provided in accordance with cl 11.5(1) of the SSA.

12 Ibid [5.3(2)].

(b) it is the position of the Sellers that there was no relationship of agency between Qorvo and Minifab. The Disputed Amount was received by Minifab in its own right. The payment was made by Qorvo to Minifab under a contract of sale between them for the supply by Minifab of equipment, amongst other things.

C.4 The Expert Determination

35 Pursuant to cll 11.5(2) and 9.3 of the SSA, the parties were obliged to refer any unresolved disputed matters in the draft Earn Out Statement to an independent expert accountant for determination. When read together with cl 11.5(2),[13] cl 9.3 states in its relevant part:

> **9.3 Dispute resolution**
>
> …
>
> (4) The Independent Accountant is to determine each Disputed Matter (having regard to the principles specified in Part A of Schedule [3]) … no later than 30 Business Days after the Referral Date …
>
> …
>
> (8) The Independent Accountant will act as an expert and not as an arbitrator in determining the Disputed Matters, and his or her decision will be final and binding on the parties (except in the case of manifest error or fraud).

36 By letter dated 28 February 2022, Neil Gray of Deloitte was engaged by the parties to act as the independent expert accountant ('**Expert**').[14] The letter does not define the matters in dispute between the parties, nor does it identify any specific questions for the Expert to determine.

37 Between 24 March 2022 and 10 August 2022, the parties exchanged numerous rounds of submissions and responses to the Expert's requests for information.

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13 Clause 11.5(2) alters the wording of cl 9.3 so that Schedule 3 is incorporated for any disputed matters involving an Earn Out Statement.

14 Court Book 741, letter from Deloitte to Norton Rose Fulbright and Lander & Rogers dated 28 February 2022.

38 The Expert ultimately delivered his written determination on 29 August 2022 ('**Expert Determination**').[15]

39 In paragraph 1.5 of the Expert Determination, the Expert defined the matter in dispute as follows:

> The dispute relates to whether funds received by MiniFAB from one of its customers in respect of equipment purchases made on behalf of customers by MiniFAB should be treated as Revenue for the purposes of preparing the FY21 Earn Out Statement ('the Disputed Matter').

40 It is common ground that the 'funds' referred to in the above description means the Disputed Amount paid by Qorvo to Minifab.

41 In paragraph 5.1 of the Expert Determination, the Expert explained how he undertook his task:

> … I have first determined which level of the SSA Hierarchy [i.e. which Tier] applies to the Disputed Matter. I then determined whether the Disputed Matter should be considered 'FY21 Revenue' as per the definition set out in the relevant level of the SSA Hierarchy.

42 The Expert's findings can be summarised at a high level as follows:

(a) He found that the Disputed Amount *was not* covered by the Tier 1 principles, policies and procedures in cl 1.2(a) of Schedule 3. He reasoned that cl 1.9(a) of Schedule 3 does not provide adequate guidance in respect of how the Disputed Amount should be accounted for.[16]

(b) He found that the Disputed Amount *was* covered by the Tier 2 principles, policies and procedures in cl 1.2(b) of Schedule 3. He reasoned that this was the case because:[17]

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15 Court Book 1207, 'Independent Accountant Determination – Share Sale Agreement in relation to MiniFAB (Aust) Pty Ltd – Report of Neil Gray' dated 19 August 2022 ('**Expert Determination**').

16 Ibid [5.11].

17 Ibid [5.41] and [5.53].

(i) the transaction giving rise to the Disputed Amount was comparable to another transaction entered into by Minifab in the financial year ending 30 June 2018;

(ii) that comparable transaction was recorded in the relevant financial accounts of Minifab (being the '**Accounts**');

(iii) moneys received by Minifab in relation to that comparable transaction were recorded as revenue in the Accounts; and

(iv) applying the principles, policies and procedures used to prepare the Accounts, the Disputed Amount should be accounted for in the same way.

(c) He concluded that in determining the FY21 Revenue for the purposes of the Earn Out Statement, the Disputed Amount should be accounted for in the same manner as the comparable transaction was accounted for in the Accounts, and accordingly should be included in the FY21 Revenue.[18]

D Issues arising for determination

43 Clause 9.3(8) of the SSA expressly states that the Expert Determination is final and binding on the parties, except in the case of manifest error or fraud.

44 The Buyer asserts that the Expert made numerous manifest errors. Oral and written submissions addressing these alleged errors were extensive. In short compass, the Buyer alleges the following:

(a) The Expert failed to construe the SSA, in particular cl 1.9(a) of Schedule 3, and thereafter apply that proper construction;

(b) If the Expert had performed his role, he would have determined that Tier 1 *did* cover the Disputed Amount but that the Disputed Amount was not Revenue. Consequently, he would have determined that the Disputed Amount should

[18] Ibid [5.54].

not have been included in the Earn Out Statement. In support of this allegation, the Buyer contends that the Disputed Amount was not 'consideration received or receivable for the provision of goods and/or services' (as described by cl 1.9(a) of Schedule 3) because:

(i) Minifab acted as an agent for Qorvo in relation to the purchase of certain equipment;

(ii) Minifab paid the entirety of the Disputed Amount (being the price of the equipment) to the manufacturer of the equipment as Qorvo's agent; and

(iii) therefore, Minifab did not accrue any right, interest, profit or benefit when it received the Disputed Amount;

(c) The Expert failed to have regard to applicable Accounting Standards at Tier 1;

(d) The Expert erred in proceeding to apply Tier 2 in circumstances where the Disputed Amount was covered by Tier 1;

(e) Alternatively, if the Expert did not err by proceeding to apply Tier 2, he made the following errors:

(i) the Expert erred in concluding that the Accounting Standard known as 'AASB 118' was not a principle, policy or procedure used to prepare the Accounts;

(ii) the Expert erred in concluding that, for the purpose of Tier 2, the principles, policies and procedures used to prepare the Accounts included similar or comparable transactions; and

(iii) the Expert erred in relying on a transaction, for the purpose of applying Tier 2, that was not a similar or comparable transaction.

45 For the reasons that follow, I have addressed only the following issues:

(a) **Issue 1** – Was the Expert, in undertaking his task, bound to follow the three-tier hierarchy of principles, policies and procedures set out in cl 1.2 of Schedule 3, or was he merely required to have regard to that hierarchy?

(b) **Issue 2** – Did the Expert make a manifest error in determining whether or not the Disputed Amount was covered by Tier 1 of the hierarchy, being the accounting principles, policies and procedures referred to in cl 1.2(a) of Schedule 3?

(c) **Issue 3** – What is the proper construction of 'consideration' in cl 1.9(a) of Schedule 3?

E Applicable legal principles

E.1 Contract construction

46 The SSA, as a contract, is to be construed objectively, by reference to its text, context (being the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.[19]

47 In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean. That inquiry requires consideration of the language used by the parties within the contract, the circumstances addressed by the contract, and the commercial purpose or objects to be secured by the contract.[20]

48 Recourse may be had to events, circumstances and things external to the contract in identifying the commercial purpose or object of the contract. What may be referred to are those events, circumstances and things external to the contract which are known to the parties, or which assist in identifying the purpose or object of the transaction.

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19 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46] (French CJ, Nettle and Gordon JJ).

20 Ibid [47] (French CJ, Nettle and Gordon JJ).

What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.[21]

49 In searching for the intention of the parties, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.[22]

50 The whole of the contract has to be considered. Preference is given to a construction which supplies a congruent operation to the various components of the whole of the contract.[23]

51 Dispute resolution clauses, in this case cll 9.3 and 11.5(2) of the SSA, are construed using the same principles that apply to other commercial contracts.[24]

E.2 Review of an expert determination for manifest error

52 The authority of an expert derives from the parties' bargain.[25].

53 Whether the Expert's Determination is binding will depend on whether it was made in accordance with the terms of the SSA in the course of performance of the task entrusted to the Expert under the SSA.[26]

54 The question to be determined by the Court in deciding whether the Expert Determination is open to review on the ground of error is whether or not the Expert carried out the task which he was contractually required to undertake.[27]

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21 Ibid [49] (French CJ, Nettle and Gordon JJ).

22 *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429, 437 (Barwick CJ).

23 *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, [16] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

24 *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, [112]-[136] (Austin J); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 534 [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ); *RW Health Partnership Pty Ltd v Lendlease Building Contractors Pty Ltd* [2019] VSC 353, [32]–[33] (Riordan J).

25 *Funtastic Ltd v Madman Film and Media Pty Ltd* [2016] VSC 708, [50] (Almond J) ('***Funtastic***'), citing *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335–6 (McHugh JA); *Vale Belvedere Pty Ltd v BD Coal Pty Ltd* [2012] QCA 77, [14] (Fraser JA); *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4, [18] (Brereton J).

26 *Funtastic* (n 25) [50]; *Legal & General Life of Australia A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335D-G (McHugh JA); *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173, [51] (Nettle JA with whom Maxwell P and Bongiorno AJA agreed) *('**AGL**'); Adnow Pty Ltd (as Trustee for the Adnow Pension Fund) v Greenwells Wollert Pty Ltd* [2016] VSCA 282, [40] (Tate JA, Ferguson JA and Kaye JJA).

27 *Australian Vintage Ltd v Belvino Investments No.2 Pty Ltd* (2015) NSWLR 367, [74]-[75] (Bathurst CJ, with

55 If the Expert carried out that task, the fact that he made errors or took irrelevant matters into account does not render the Determination challengeable.[28] However, if objectively ascertained, the Expert did not perform the task, but rather performed some different task or carried out the task in a way that was not within the contractual contemplation of the parties, then the Determination may be liable to be set aside.[29]

56 The term 'manifest error' is not defined in the SSA. In *Funtastic*,[30] a case which similarly involved a challenge to an expert's determination for manifest error, Almond J considered the ordinary commercial meaning of 'manifest error' with reference to the Oxford English and Macquarie Dictionaries and the meanings ascribed to the term in the context of arbitral awards.[31] For reasons that are equally applicable to this case, Almond J concluded that 'manifest error' is confined to clear and obvious errors and that an error that is 'abstruse, obscure or inconsequential' will not fall within the definition of 'manifest error'.[32]

F Issue 1 — Was the Expert bound to follow the three-tier hierarchy in clause 1.2 of Schedule 3?

F.1 How this issue arises

57 By its written submissions, the Buyer asserted it was uncontentious that in resolving the dispute between the parties, the Expert 'was obliged to follow the three-tier hierarchy set out in clause 1.2 of Schedule 3 of the SSA'.[33]

58 To the contrary, by their written submissions in response, the Sellers asserted that it was a matter of contention and that the Expert was not obliged to follow cl 1.2 of

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whom Beazley P and McColl JA agreed) ('***Belvino***'); *AGL* (n 26), [51] (Nettle JA with whom Maxwell P and Bongiorno AJA agreed).

28 *Belvino* (n 27) [74] (Bathurst CJ, with whom Beazley P and McColl JA agreed).

29 Ibid [75] (Bathurst CJ, with whom Beazley P and McColl JA agreed).

30 *Funtastic* (n 25).

31 Ibid [52]-[53] (Almond J).

32 Ibid.

33 R C Craig and N Moncrief, 'Plaintiff's Submissions', submissions in *Schott AG v Melton Willows Pty Ltd & Ors*, S ECI 2022 03872, 10 February 2023 ('**Buyer's Submissions**') [6].

Schedule 3. They submitted that the SSA '[required] the Expert merely to have regard to the principles, rather than being bound strictly to apply them'.[34]

59 This issue was not raised before the Expert, who did in fact follow the three-tier hierarchy.

F.2 Submissions

F.2.1 The Sellers' submissions

60 The Sellers submit, in summary:

(a) A dispute to be determined by an independent expert is intended to provide 'an expeditious and economical' resolution of the dispute;[35]

(b) In this case, a dispute about accounting was referred to an independent expert for resolution pursuant to an expert determination clause. The dispute was determined by the Expert applying 'his own store of knowledge, his expertise, to his observations of facts, which are of a kind with which he [was] familiar';[36]

(c) While the Earn Out Statement prepared by the Buyer must be prepared in accordance with Schedule 3, including the three-tier hierarchy in cl 1.2, the Expert in carrying out his task was not obliged to follow that hierarchy;

(d) Clause 9.3(4) of the SSA, read with cl 11.5(2), required the Expert to determine a dispute 'having regard to' the principles specified in Part A of Schedule 3. The clause did not provide that the Expert 'must apply' those principles.[37] This was a deliberate drafting decision by the parties;[38]

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34 J P Moore and A J Weintstock, 'Submissions of Defendants', submissions in *Schott AG v Melton Willows Pty Ltd & Ors*, S ECI 2022 03872, 15 March 2023 ('**Sellers' Submissions**') [8].

35 Ibid [1], referring to *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563, 570 [27] (Chesterman J), which was cited with approval in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 314–5 [25] (French CJ, Crennan and Kiefel JJ).

36 Ibid [3], citing *AGL* (n 26) [53] (Nettle JA).

37 Cf the language that was employed in the dispute resolution clause of the share sale agreement considered in *Funtastic*, being cl 7.6(d).

38 Sellers' Submissions (n 34) [7]-[8].

(e) The Expert 'has regard to' stated matters (here, the three-tier hierarchy) if the Expert takes them into account, considers them, and gives them due weight. The Expert is not bound to comply with them.[39]

(f) If the Expert was compelled to follow the three-tier hierarchy, and any deviation from it constitutes an error, it would lead to greater disputation.[40]

(g) Another use of the phrase 'having regard to' in the SSA supports this construction. Clause 1.8 of Schedule 3 says that 'the Earn Out Payment shall be calculated having regard to the line items set out in the Earn Out Statement table in Part B of this Schedule 3'. The table in Part B contains ledger identification codes from Minifab's accounting system. It was plainly not intended that the Buyer's failure to include the Disputed Amount in 'Ledger ID 4000' was binding. The dispute about the Earn Out Payment was to be determined having regard to the line items in the Earn Out Statement, without the Expert being bound by the content of those items;[41]

(h) As the proper construction of the dispute resolution clause required only that the Expert have regard to the principles in Schedule 3, the proceeding must be dismissed. The Expert plainly complied with that obligation. He quoted the principles at length, considered detailed arguments about them, and made his determination with reference to them. It matters not if it might be concluded that the application of the principles should have led to a different result.[42]

F.2.2 The Buyer's submissions

61 The Buyer submits, in summary:

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39 Transcript of Proceedings, *Schott AG v Melton Willows Pty Ltd & Ors and Melton Willows Pty Ltd & Ors v Schott AG* (Supreme Court of Victoria, Stynes J, 3-4 April 2023) ('**Trial Transcript**') 139.8-30, referring to *South Australian Planning Commission v Dorrestijn and C. R. Dorrestijn Nominees Pty Ltd* (1984) 36 SASR 355, 370-371 (Cox J with whom the majority agreed); applied in *Walkerville Town Council v Adelaide Clinic Holdings Pty Ltd* (1985) 38 SASR 161 (King CJ).

40 Ibid 103.19-25.

41 Sellers' Submissions (n 34) [10].

42 Ibid [11].

(a) The three-tier hierarchy is expressed in mandatory language. The contractual language requiring the Expert to have regard to the relevant principles does not transmute their obligation from a mandatory one into a discretionary exercise in which steps in the hierarchy can be ignored or adopted in a different sequence;[43]

(b) When the expression 'having regard to' is used in respect of a particular criterion or factor to be considered by a decision maker, the decision maker is bound to treat such a factor as a central or fundamental element in the making of the relevant decision;[44]

(c) A failure to undertake the contractual task by applying the mandatory three-tier hierarchy would constitute a manifest error.[45]

F.3 Consideration

62 Schedule 3 governs the preparation of Earn Out Statements. Clause 1.2 of Schedule 3 is expressed in mandatory language. It states 'The Earn Out Statement *must* be prepared in the format prescribed in Part B of this Schedule 3 and in accordance with, in order of precedence: [cll 1.2(a) to 1.2(c)]' (emphasis added). That is, Tier 1 (cl 1.2(a)) must be applied first, and it is only where an item is 'not covered' by Tier 1 that the next Tier in the hierarchy may be considered.

63 The task of the Expert is governed by cl 9.3(4) as read with cl 11.5(2). The Expert is required by those clauses 'to determine each Disputed Matter (having regard to the principles specified in Part A of Schedule 3…').

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43 R C Craig and N Moncrief, 'Plaintiff's Reply Submissions', reply submissions in *Schott AG v Melton Willows Pty Ltd & Ors*, S ECI 2022 03872, 29 March 2023 ('**Buyer's Reply Submissions**'), [4].

44 Ibid [4], citing *Telstra Corporation Limited v Australian Competition Tribunal* (2009) 175 FCR 201, [267] (Jacobson, Lander and Foster JJ); *Inderjit v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2019) 272 FCR 528, [29] (Rares, Burley and O'Bryan JJ).

45 Ibid [6], referring to *Belvino* (n 27), [74]-[75] (Bathurst CJ, with whom Beazley P and McColl JA agreed); *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 336 (McHugh JA); *AGL* (n 26), [51] (Nettle JA, with whom Maxwell P and Bongiorno AJA agreed); *Holt v Cox* (1997) 23 ACSR 590, 596-597 (Mason P with Priestly JA agreeing); *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, [26]- [27] (French CJ, Crennan and Kiefel JJ).

64 The meaning of the phrase 'having regard to' in cl 9.3(4) depends on its context.[46]

65 In this case, the task of the Expert is to determine each of the matters disputed by the Sellers in the Earn Out Statement,[47] having regard to the principles in Part A of Schedule 3. The Expert is directed to the same principles applicable to the preparation of the Earn Out Statement. In my view, 'having regard to' in that context requires the Expert to strictly follow the three-tier hierarchy set out in cl 1.2 of Schedule 3 in the same manner as required for the preparation of the Earn Out Statement which the Expert must consider. Such a construction:

(a) facilitates certainty for both the parties and any appointed expert about how the expert is to approach the review and assessment of the Earn Out Statement for the purpose of resolving any dispute; and

(b) ensures consistency between the principles governing the preparation of the Earn Out Statement and any expert's consideration and assessment of it.

66 The Sellers submit that requiring the Expert to follow the three-tier hierarchy would lead to greater disputation. I disagree. In my view, a construction of cl 9.3(4) which allows the Expert to merely consider the principles at each Tier but without being bound to comply with the three-tier hierarchy:

(a) would serve to increase the prospect of disputation by encouraging a disgruntled party to pursue an expert determination in the hope that a different approach to the application of the principles may result in a different, more favourable outcome; and

(b) therefore, does not promote the purpose of cl 9.3, being dispute resolution.

67 Having regard to the considerations set out above, in my view, a reasonable business person would understand 'having regard to' in cl 9.3(4) to mean that the Expert was obliged to comply with the three-tier hierarchy.

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46 *Manns v Kennedy* [2007] NSWCA 217, [112] (Campbell JA, with Santow JA and Bryson AJA agreeing).
47 SSA (n 5), cl 11.5(2).

G Issue 2 - Did the Expert make a manifest error in determining whether or not the Disputed Amount was covered by Tier 1 of the hierarchy?

G.1 How this issue arises: the Expert's Determination

68 The Expert was appointed to determine a dispute about whether the Disputed Amount should be treated as Revenue (as defined by the SSA) for the purpose of preparing the FY21 Earn Out Statement (the '**Disputed Matter**').[48]

69 Section 5 of the Expert's Determination contains his determination. Under the sub-heading titled 'Overview', he explained that he first determined which level of the three-tier hierarchy applied to the Disputed Amount, and then determined whether the Disputed Amount should be considered FY21 Revenue.[49]

70 The Expert first considered the application of Tier 1. In doing so:

(a) He noted that cl 1.2(a) refers to cll 1.3 to 1.8 of Schedule 3. Given the table in Part B of Schedule 3 refers to Revenue from 'Sales Manufacturing & Sales Projects', a phrase he noted was defined in cl 1.9(a), he determined that it was appropriate to consider cl 1.9(a) in assessing the application of Tier 1;[50]

(b) He referred to the definition of 'Revenue' in cl 1.1 of Schedule 3 and formed the view that 'the purpose of this definition is to clarify that all "revenue" of the business of the nature set out in the table in Part B of Schedule 3 of the SSA is included in the Earn Out Statement, regardless of whether the Buyer restructures the group post acquisition'. Therefore, he concluded that this definition was not relevant to the Disputed Matter;[51]

(c) He identified that the specific accounting principle in cl 1.9(a) is directly relevant to the Disputed Matter. He noted that the principle 'requires me to

48 Expert Determination (n 15) [1.5].
49 Ibid [5.1].
50 Ibid [5.2]-[5.3].
51 Ibid [5.4(a)].

interpret the phrases "consideration received or receivable" and the "provision of goods and/or services".'[52]

(d) He then, relevantly, identified areas of dispute between the parties about what constitutes 'consideration received or receivable' and what constitutes 'the provision of goods and/or services'. He wrote:

> [5.7] Regarding what constitutes "consideration received or receivable", the Parties disagree as to whether the funds received by MiniFAB from Qorvo in relation to the equipment purchased by MiniFAB that comprised the production lines is deemed to be consideration. This is because the Parties disagree as to the nature of the relationship between MiniFAB and Qorvo, specifically whether MiniFAB was acting as principal or agent in respect of the equipment.
>
> [5.8] Regarding what constitutes the "provision of goods and/or services", the contract with Qorvo comprised multiple components, including the design, procurement, commission and validating of the production lines. The Parties disagree as to whether the contract comprises a single performance obligation (being the delivery of two production lines) or multiple distinct performance obligations (with the provision of the manufacturing equipment being a distinct performance obligation).
>
> [5.9] It is evident that the issues identified in paragraphs 5.7 and 5.8 above (being principal versus agency relationships and single versus multiple performance obligations within contracts with customers) are not addressed in Clause 1.9(a). The specific accounting principle in clause 1.9(a) only deals with the measurement of revenue generated from Sales Manufacturing & Sales Projects as distinct from principles of recognition of revenue more generally, which is necessary to resolve the Disputed Matter.

(e) He concluded that cl 1.9(a) did not provide 'adequate guidance' in respect of how the Disputed Amount should be accounted for, and therefore reasoned that the Disputed Amount was not covered by Tier 1.[53] He then moved on to consider the application of Tier 2.

71 The Buyer asserts that the approach adopted by the Expert constitutes a manifest error.

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52 Ibid [5.6].
53 Ibid [5.11].

G.2 Submissions

G.2.1 Buyer's submissions

72 The Buyer submitted, in summary:

(a) The Expert correctly determined that it was appropriate to consider cl 1.9(a) in assessing the application of Tier 1 of Schedule 3;[54]

(b) However, the Expert eschewed the fundamental task of construing and applying the provisions of the SSA. He determined that the definition of 'Revenue' in Schedule 3 did not provide sufficient guidance as to the appropriate accounting treatment of the Disputed Amount. In so doing, the Expert failed to ascribe to the term 'Revenue' a contractual meaning and failed to apply that meaning to determine whether the Disputed Amount was Revenue;[55]

(c) The proper construction of 'Revenue' requires consideration of the meaning of the phrases 'consideration received or receivable' and 'the provision of goods and/or services' in cl 1.9(a). The Expert correctly observed that it was necessary for him to interpret those phrases in cl 1.9(a), given they were not defined in the SSA, but he did not take the further step do so;[56]

(d) His failure to construe those words and his consequential failure to apply meaning to the word 'Revenue' was a manifest error.[57]

G.2.2 Sellers' submissions

73 The Sellers submitted, in summary:

(a) The wording in cl 1.9 was not binding on the Expert and therefore it was not essential for him to construe that clause. The parties were careful to refer only

54 Buyer's Submissions (n 33) [83].
55 Ibid [80]-[81].
56 Ibid [84], [89].
57 Ibid [90].

to cll 1.3 to 1.8 in cl 1.2(a). They must be taken to have deliberately excluded cl 1.9 from the application of Tier 1;[58]

(b) Clause 1.9 is concerned with how revenue is 'measured'. It is not directed to how a particular item of revenue is determined;[59]

(c) The Buyer's reasoning in relation to the proper construction of 'Revenue' renders cll 1.2(b) and 1.2(c) (i.e. Tiers 2 and 3) redundant. If the Buyer's construction is correct, every dispute about Revenue will be determined by asking whether an item is 'consideration' for 'the provision of goods and/or services': if the answer is yes, the item is Revenue, if the answer is no, it is not Revenue. That leaves no work for cll 1.2(b) and 1.2(c) to do;[60]

(d) In any event, it is inherent in the Expert's Determination that he must have given cl 1.9(a) meaning to conclude that it was not a relevant principle of revenue recognition. A conclusion that Tier 1 did not provide adequate guidance in respect of how the Disputed Amount should be accounted for was well open to the Expert on a plain reading of cl 1.2(a).[61]

G.3 Consideration

74 The parties' submissions raise two sub-issues for determination:

(a) First, whether or not cl 1.9 forms part of the general and specific principles to be considered by the Expert at Tier 1; and

(b) Second, whether the Expert erred in assessing the application of Tier 1 to the Disputed Amount.

75 In relation to the first sub-issue, for the following reasons, cl 1.9 *does* form part of the general and specific principles, policies and procedures to be considered at Tier 1:

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58 Seller's Submissions (n 34) [19].
59 Ibid [20].
60 Ibid [21].
61 Ibid [17], [24].

(a) The chapeau to cl 1.2 provides that the Earn Out Statement must be prepared in the format prescribed in Part B of Schedule 3 and in accordance with, in order of precedence, cll 1.2(a), (b) and (c). As a consequence, the format prescribed in Part B must be considered in the application of every Tier. The table in Part B sets out the three items of Revenue being 'Sales Manufacturing & Sales Projects', 'Discounts' and 'Customer Penalties'. For the purpose of that table, the parties drafted cl 1.9 which expressly addresses each line item in the table, providing a description of each item and how it is to be measured. It would be an absurd construction of the SSA to require an expert to construe the items in the table in Part B, yet ignore the descriptions of each item provided by the parties in cl 1.9;

(b) Further, if cl 1.2(a) were to be construed so as to exclude consideration of cl 1.9, then cl 1.9 would be redundant both to the Expert and also to the parties in relation to the preparation of the Earn Out Statement. Such a construction is contrary to the principle that the Court should strain against interpreting a contract so that a particular clause is rendered nugatory or ineffective, particularly if a meaning can be given to it that is consonant with other provisions in the contract.[62]

76 In relation to the second sub-issue, in my view, the Expert did manifestly err in determining the application of Tier 1 to the Disputed Amount, because he failed to construe, or incorrectly construed, cl 1.9(a) and consequently failed to make his determination in accordance with the terms of the SSA.

77 The Expert's error is clear and obvious on the face of the Determination and can be explained as follows:

(a) The Expert was required to determine whether the Disputed Amount was 'Revenue' (as defined under cl 1.1) by applying the principles, policies and procedures in the three-tier hierarchy.

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62 *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402, 411 (Lockhart and Hill JJ).

(b) In addressing Tier 1 of the hierarchy, the proper question for the Expert was whether that Tier's principles, policies and procedures covered the Disputed Amount.

(c) One of the Tier 1 principles provides that the Earn Out Payment is to be calculated having regard to the line items set out in the table in Part B.[63]

(d) It is common ground that the item in the table in Part B which is potentially relevant to the Disputed Amount is 'Sales Manufacturing & Sales Projects'.

(e) To determine whether the Disputed Amount was covered by that item, it was necessary for the Expert to consider cl 1.9(a). He did so, identifying it as a specific accounting principle.

(f) Clause 1.9(a) sets out how 'Sales Manufacturing & Sales Projects' is to be measured. In doing so, it describes the items to be measured, being 'consideration received or receivable for the provision of goods and/or services'. To determine if the Disputed Amount fell within 'Sales Manufacturing & Sales Projects' it was necessary for the Expert to construe 'consideration received or receivable for the provision of goods and/or services'. Indeed, he recognised the need to do so at paragraph 5.6 of his Determination.

(g) However, the Expert did not construe that phrase. Instead, he:

(i) identified areas of dispute between the parties about what constitutes 'consideration received or receivable' and what constitutes 'the provision of goods and/or services';

(ii) observed that those disputes are not addressed in cl 1.9(a); and

(iii) concluded that cl 1.9(a) only deals with the *measurement* of revenue rather than the *recognition* of it.

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63 SSA (n 5) cl 1.8 of Schedule 3.

78 The Sellers submit that in any event, to reach the conclusion he came to, it is implicit that the Expert must have given some meaning to cl 1.9(a) and thereby construed it. However, if that is the case, then I consider his construction of cl 1.9(a) and his conclusion that it only addresses the measurement of revenue was erroneous. In my view, it is clear from the text of cl 1.9(a) that this provision addresses both the measurement and the character of the revenue to be measured.

79 The Seller further submits that a construction which requires the Expert, at Tier 1, to determine whether an item is 'consideration received or receivable for the provision of goods and/or services' would leave no work for cll 1.2(b) and 1.2(c) to do. I accept that requiring the Expert to construe and apply cl 1.9(a) at Tier 1 may result in cl 1.2(a) doing much of the heavy lifting in terms of revenue recognition. But I am not troubled by that outcome. It is consistent with the scheme of the hierarchy. That is, cl 1.2 sets out an order of precedence of applicable accounting principles, policies and procedures which moves from the most specific to the more general. In my view, that structure reveals an intention by the parties that the specific principles in Tier 1, which are directed to the three items of Revenue identified in the table in Part B (and further described in cl 1.9), may operate to cover most items of revenue raised for consideration. Further, while some submissions were made, and examples were given from the bar table, about what work may or may not be left for the other provisions to do, there is no evidential basis for me to conclude that cll 1.2(b) and (c) would have no work to do in terms of further revenue recognition, the timing of recognition, or measurement of revenue.

80 Having concluded that the Expert made a manifest error, I find that the Determination is not final or binding on the parties.

H Issue 3 – What is the proper construction of 'consideration' in clause 1.9(a) of Schedule 3?

H.1 How this issue arises

81 Having found that that Expert did make a manifest error, it is not necessary for me to go on to consider the other issues raised by the Buyer (summarised in paragraph 44 above). However, both parties made submissions about the proper construction of the term 'consideration' as used in cl 1.9(a). Further, I am mindful that while an expert may be required as a part of their task to construe a contract, it does not follow that the parties agreed to be bound by that construction such that it is immune from review by the Court.[64]

82 In those circumstances, and in an effort to assist the parties, I have addressed this issue of construction.

H.2 Submissions

H.2.1 Buyer's submissions

83 The Buyer submitted, in summary:

(a) 'Consideration' is a right, interest, profit or benefit *accruing to a party*;[65]

(b) It is necessary to value the consideration in the hands of the party to whom the right, interest or benefit has accrued;[66]

(c) In this case, Minifab acted as an agent for Qorvo in relation to procuring equipment. It received the Disputed Amount as agent, and applied it to procure the equipment. Therefore no right, benefit or interest actually accrued to Minifab.[67]

H.2.2 Sellers' submissions

84 The Sellers submitted, in summary:

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64 *Funtastic* (n 25), [116]-[117] (Almond J), citing *Belvino* (n 27) [77]-[78], [81] (Bathurst CH with whom Beazley P and McColl JA agreed).

65 Buyer's Submissions (n 33) [67], referring to *Currie v Misa* (1875) LR 10 Ex 153 at 162 (Keating, Lush, Quain and Archibald JJ); *Conlan v Registrar of Titles* (2001) 24 WAR 299, [203] (Owen J); *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd (17 October 2013)* [2013] VSC 543, [136] (Almond J).

66 Trial Transcript (n 39) 241.6-7.

67 Buyer's Submissions (n 33) [70].

(a) 'Consideration' in commerce and accounting simply refers to what is received in exchange for a good or service. Most often, it is cash or a cash equivalent. More rarely, the consideration received for providing a good or service is another good or another service;[68]

(b) The Buyer's strained construction of the word 'consideration' should not be accepted. Construing the word 'consideration' does not require the question of whether Minifab acted as an agent for Qorvo to be determined, either generally or in relation to the receipt of the Disputed Amount.[69]

H.3 Consideration

85 'Consideration' is not defined in the SSA.

86 In the decision of *Conlan v Registrar of Titles*,[70] a case on which the Buyer relies, Owen J noted:[71]

> … Any attempt to define the term "consideration" is bound to attract criticism. Once again, putting it in a very broad sense, consideration at common law can be described as the price for which a promise is purchased: see *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 461. Alternatively, it may be described as some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other: see *Currie v Misa* (1875) LR 10 Ex 153 at 162.

87 In this case, I am concerned with the meaning of 'consideration' as it appears in cl 1.9(a). The purpose of that clause is to describe an item of revenue and how it is to be measured for the purpose of including it, and the value attributed to it, in an Earn Out Statement.

88 In my view, for the reasons that follow, a reasonable business person would understand 'consideration' in that context to mean the price paid or payable for the provision of goods or services. This construction is:

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68 Seller's Submissions (n 34) [30].
69 Ibid [29].
70 [2001] WASC 201.
71 *Conlan v Registrar of Titles* [2001] WASC 201, [203] (Owen J).

(a) reasonably open and consistent with the available definitions and ordinary usage of the word;[72]

(b) consistent with the purpose of the Earn Out Statement which is to capture the value of the Revenue received or receivable in a particular Financial Year for the purpose of determining if an Earn Out Payment must be paid; and

(c) easily understood and applied, and is therefore more likely to produce a commercial result.

I Remedy

89 Unfortunately, my decision does not bring an end to the dispute between the parties. This was anticipated by them, and the Buyer submitted that in the event I found the Expert had made a manifest error, I should then proceed to determine whether the Disputed Amount was covered by Tier 1.

90 The Seller disagreed and submitted that if a finding of manifest error were made, the appropriate remedy would be for the matter to be remitted back to the Expert for re-determination.

91 It was the parties' intention, expressed in the SSA, that disputes about the Earn Out Statement be resolved by an independent accounting expert. For that reason, I agree with the Seller that it is appropriate for this matter to be remitted to the Expert for re-determination. Drawing on his expertise and experience, the Expert will be required 'to cut through the conflict and make a decision by engaging his own professional judgment'.[73]

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72 'Consideration' is defined in the Macquarie Dictionary as 'a recompense for service rendered, etc; a compensation'; 'Consideration' is defined in the Oxford English Dictionary as 'something given in payment; a reward, remuneration; a compensation, equivalent' or 'anything regarded as recompense or equivalent for what one does or undertakes for another's benefit'; especially in the law of contracts, 'the thing given or done by the promisee in exchange for the promise'; Justice Owen in *Conlan v Registrar of Titles* [2001] WASC 201 at [203] defined 'consideration' as 'the price for which a promise is purchased' or 'some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other'.

73 *Funtastic* (n 25) [95] (Almond J).

92 Therefore, subject to further submissions from the parties as to the form of order, I propose to:

(a) make declarations to the effect that the Expert made a manifest error with respect to his Determination; and

(b) order that the matter be remitted to the Expert for re-determination in accordance with law.

CERTIFICATE

I certify that this and the 29 preceding pages are a true copy of the reasons for judgment of Stynes J of the Supreme Court of Victoria delivered on 30 June 2023.

DATED this thirtieth day of 2023.

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Associate