Holland Leedon Pte Ltd (in liquidation) *v* Metalform Asia Pte Ltd [2012] SGHC 90

Case Number	: Originating Summons No 1679 of 2007
Decision Date	: 30 April 2012
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Lee Eng Beng SC, Low Poh Ling, Sim Kwan Kiat and Farrah Salam (Rajah & Tann LLP) for the appellant; Chelva Retnam Rajah SC, Chew Kei-Jin and Moiz Haider Sithawalla (Tan Rajah & Cheah) for the respondent.
Parties	: Holland Leedon Pte Ltd (in liquidation) — Metalform Asia Pte Ltd

Arbitration – Award – Recourse against award

Damages – Measure of damages – Rules in awarding

30 April 2012 Judgment reserved.

Belinda Ang Saw Ean J:

(A) INTRODUCTION

1 This appeal is against the Arbitrator's Decision on Summary Determination of Issues dated 17 October 2007 ("the Decision") made in an arbitration between the appellant, Holland Leedon Pte Ltd (in Liquidation) ("HL") and the respondent, Metalform Asia Pte Ltd ("MA") arising out of the sale and purchase of HL's business and assets ("the Business") to MA.

2 The purpose of HL's application for summary determination was to achieve by legal argument an outcome that would render a full blown arbitral hearing unnecessary on three (3) issues alone. In relation to this appeal, HL's decision to obtain a summary determination of the three issues, (of which the first issue is effectively determinative of the other issues), is on the whole ambitious – simply put, while HL may ultimately prevail on a resolution of all factual disputes in its favour, like the Arbitrator, I am unable, at this threshold stage, to conclude that HL's interpretation of the SPA (see [3] below) that seeks to limit the remedy for breach of warranty is the only correct one as a matter of law. The Arbitrator recognised that the final legal result would turn on disputed factual issues, and I would agree with this view.

(B) EVENTS LEADING TO HL'S APPLICATION FOR SUMMARY DETERMINATION OF ISSUES TO THE ARBITRATOR

3 At all material times, HL was in the business of manufacturing and selling top covers for hard disk drives to global manufacturers such as Seagate Technology LLC ("Seagate") and Maxtor Peripherals (S) Pte Ltd ("Maxtor"). By a sale and purchase agreement dated 13 June 2004 and subsequently amended on 29 June 2004 ("the SPA"), the Business was sold by HL to MA for around US$264m. The completion of the acquisition under the SPA was on 1 July 2004.

4 Before long, the parties were in dispute. MA alleged that a number of warranties given under the SPA were breached. Under Schedule 4 read with Clauses 6.1, 6.2 and 6.3.1 of the SPA, HL gave

certain warranties relating to how its business was being operated and HL acknowledged that MA was entering into the SPA in reliance of each of the warranties. However, MA subsequently discovered "short cuts" taken by HL in the manufacturing of products and the business operations did not comply with what were required under HL's contracts with major customers like Seagate and Maxtor. These "short cuts" and non-compliance, which amounted to breaches of some of the warranties under the SPA, were practised by HL.

5 MA commenced SIAC Arbitration No ARB 068/DA17/05 ("the Arbitration") against HL to claim damages for breach of warranties under the SPA in the form of Warranty Claims as defined in the SPA. [note: 1] MA relied on a report prepared by Ernst and Young LLP, Singapore, ("Ernst & Young") to quantify the Warranty Claims at a total sum of S$30,993,960.18. [note: 2] The Warranty Claims consisted of what MA termed (a) one-off costs and (b) recurring costs as defined in paragraph 24(b) of its Statement of Claimant's Case (Amendment No 3) ("the SOC-3"). The bulk of the claims comprise primarily of item (b) recurring costs in the sum of S$27,367,248.

6 The application before the Arbitrator related to item (b) only. Paragraph 24(b) of SOC-3 defines "recurring costs" as follows:

> Recurring costs are recurring annualised costs that are multiplied by 7 (being the multiplier applied to the EBITDA to determine the purchase price for the Business and the Assets pursuant to Clause 4.4.1 of the SPA as set out earlier above ("the purchase multiplier")). As recurring costs arise from breaches of warranties relating to the [Business], such recurring costs would have resulted in an increase in the costs base to [MA] and hence a decrease in the EBITDA applied to determine the purchase price of the Business and the Assets, if [MA] had known of [HL's] relevant breaches of Warranties at the time of purchase. [MA] had therefore paid more than it should have (by 7 x the recurring costs incurred) for the [Business] under the SPA. Thus, applying the purchase multiplier reflects the damages suffered by [MA].

7 HL has objected to MA's formula which uses a multiplier to calculate damages, namely "recurring costs x 7" ("MA's Formula"), arguing that MA 's Formula is nothing more than a veiled attempt to claw back part of the purchase price ("the Purchase Consideration"), and this is not permitted under the SPA. Furthermore, there can be no claim for overpayment of the Purchase Consideration since there was no warranty on EBITDA. On 18 August 2007, HL applied to the Arbitrator for summary determination of three issues under Rule 28.1 of the SIAC Domestic Arbitration rules (see [9] below).

(C) THE ARBITRATOR'S DECISION

8 The Arbitrator decided in MA's favour on all the three issues put to him. It must not be forgotten that the three issues were formulated as questions of law. As such and so far as is material, there were no findings of fact by the Arbitrator. Notably, the Arbitrator was not required to concern himself with issues of breach, causation and remoteness of damages at the summary determination stage. As I will be discussing in detail the Arbitrator's reasoning later in this Judgment, to avoid repetition, I propose, at this juncture, to simply state the Arbitrator's answers to each of the three issues.

9 The three issues on which HL sought summary determination before the Arbitrator were as follows:

(a) Issue 1 – Conclusiveness of Completion Statement

(a) On the true interpretation of the SPA, including Clause 8 of Schedule 2, can [MA] recover any part of the Purchase Consideration paid under the SPA, whether by damages or otherwise, in the absence of the Completion Statement being set aside as no longer binding by reason of fraud or manifest error?

(b) If the answer to (a) is no, can [MA] recover damages in the amount of recurring costs multiplied by 7 as set out in paragraphs 26(iii), 30(xi) to (xiv), 55, 64(iii), 73, 78 and 82 of [the SOC-3]?

(b) Issue 2 – Warranty as to Non-Executive Employees

(a) On the true interpretation of the SPA, including Clause 3.1.8 and Clause 11 of the SPA, does [HL's] obligation in relation to Non-executive Employees extend beyond procuring the transfer of their contracts of employment to [MA]?

(b) If the answer to (a) is no, can [MA] claim the recurring costs (whether multiplied by 7 or otherwise) set out in paragraphs 64(iii) and 82 of [the SOC-3]?

(c) Issue 3 – Warranty as to Seagate and Maxtor Contracts

(a) Assuming the customer contracts with Seagate or Maxtor (if any) referred to by [MA] fall within the ambit of Clause 8.1 of Schedule 4, then, on the true interpretation of the SPA, including Clause 8.1 of Schedule 4, did [HL] warrant to [MA] that all terms of the such customer contracts to which [MA] were party post completion of the SPA will be complied with in all material respects post completion of the SPA?

(b) If the answer to (a) is no, can [MA] claim the recurring costs set out in paragraphs 55, 64(iii), 73, 78 and 82 of [the SOC-3]?

10 On the first question (*ie*, part (a)) in Issue 1, the Arbitrator ruled that MA was not seeking to recover a reduction in the Purchase Consideration, and therefore the first question in Issue 1 did not arise. MA's claim is for damages for breach of warranties. On a true interpretation of SPA, including paragraph 8 of Schedule 2 (which provided for the finality and binding effect of the Completion Statement in the SPA), MA is not precluded from making a Warranty Claim which is for damages for breach of warranties. [note: 3]

11 In relation to the second question (*ie*, part (b)) in Issue 1, **t**he Arbitrator ruled that on the true interpretation of paragraph 8 of Schedule 2, MA was not precluded by the binding effect of the Completion Statement from claiming damages for breach of warranties as pleaded in paragraphs 26(iii), 30(xi) to (xiv), 55, 64(iii), 73, 78 and 82 of the SOC-3. MA was also not precluded from putting forward MA's Formula to calculate damages for breach of warranty. [note: 4] The Arbitrator emphasised, however, that whether the Warranty Claims were "valid, sound or sustainable" was not an issue for determination before him.

12 On the first question (*ie*, part (a)) in Issue 2, the Arbitrator opined that no issue arose for summary determination as MA was not claiming for breach of Clauses 3.1.8 and 11 of the SPA. The application for determination of the first question in Issue 2 was held to be inappropriate and required no consideration. [note: 5]

13 As for the second question (*ie*, part (b)) in Issue 2, the Arbitrator ruled that on a true

interpretation of the SPA including Clauses 3.1.8 and 11, MA could claim as damages recurring costs set out in paragraphs 64(iii) and 82 of the SOC-3. [note: 6]

14 On the first question (*ie*, part (a)) in Issue 3, the question raised an issue that was not put to the Arbitrator. As such, it need not be answered by the Arbitrator. [note: 7]

15 As for the second question (*ie*, part (b)) in Issue 3, the Arbitrator ruled that MA was entitled to make its claim as pleaded in paragraphs 55, 64(iii), 73, 78 and 82 of the SOC-3. [note: 8]

(D) APPLICATION FOR LEAVE TO APPEAL

16 By Originating Summons No 1679 of 2007 ("OS 1679/2007"), HL applied for leave to appeal against the Decision under s 49 of the Arbitration Act (Cap 10 Rev Ed 2002). In summary, the main complaint in OS 1679/2007 relates to the interpretation of the SPA and the applicable measure of damages for the alleged breach of warranties in the SPA. HL complained that the Arbitrator made an error of law, the consequence of which permitted MA to seek (a) damages which had been excluded by the SPA; (b) damages for loss which MA has not suffered and has not even claimed to have suffered; and (c) damages that do not naturally and directly flow from the alleged breaches in question.

17 Philip Pillai J granted leave to appeal against the Decision on 17 September 2010 ("2010 September Order"). MA then sought leave to appeal against the 2010 September Order on 24 September 2010. Pillai J dismissed MA's application on 14 February 2011.

(E) THE APPEAL

18 The questions of law for which HL was given leave to appeal by the 2010 September Order are stated as grounds (a), (b) and (c) in OS 1679/2007, and they are, essentially, the same as the three questions put to the Arbitrator for summary determination (see [9] above). In this Judgment, I will set out the key issues in this appeal and the arguments raised by counsel on both sides. The analysis and discussion will enable me to answer the three issues (see [9] above) stated as grounds (a), (b) and (c) which I will do at the end of this Judgment.

Issues

19 After considering the arguments raised by both sides, this appeal can be effectively disposed of by addressing two main issues:

(a) Issue A: Whether the "final and binding" nature of the Completion Statement has the effect of precluding MA's claim for expectation loss based on diminution in value?

(b) Issue B: Whether the Arbitrator erred in not rejecting MA's formula based on recurring costs multiplied by 7 to recover expectation damages by reference to diminution in value?

20 As I alluded to earlier, a decision on these two main issues will allow me to answer grounds (a), (b) and (c) in OS 1679/2007.

Issue A: Whether the "final and binding" nature of the Completion Statement has the effect of precluding MA's claim for expectation loss based on diminution in value?

21 The primary disagreement, and hence the question that emerged from the arguments advanced

by both sides is whether the "final and binding" nature of the Completion Statement is effective to preclude MA's claim for expectation loss based on diminution in value, and thereby limit the remedy for breach of warranty to damages based on a cost of cure measure only. This concise question better reflects the primary disagreement and also takes into account what was accepted to be the common ground between the parties that (a) the Completion Statement was not challenged for fraud or manifest error; (b) MA was not seeking to re-open, so to speak, the binding Completion Statement, and (c) there was no warranty as to EBITDA.

HL's Arguments

22 HL objects to MA's Warranty Claims amounting to approximately S$30,993,960.18 as claims for overpayment dressed up as Warranty Claims. It argued that such a claim was contrary to the terms of the SPA, specifically in light of Schedule 2 of the SPA (which provided for the calculation and final and binding nature of the Completion Statement) and in view of the fact that no warranty was given on the valuation of the Business. [note: 9] Notably, HL had not given a warranty on EBITDA. As the binding nature of the Completion Statement "locks in the EBITDA", HL argued that "the parties [were] precluded from subsequently arguing that the EBITDA was too high or too low for the purposes of quantifying damages". [note: 10] In other words, MA cannot challenge the original EBITDA by re-calculating and deriving a notional EBITDA to quantify its loss because of the binding effect of the Completion Statement. Therefore, MA's claim is indefensible because it seeks "the difference between the Purchase Consideration and a recalculated Purchase Consideration based on the notionally lower EBITDA". [note: 11]

23 Notwithstanding the alleged breaches of warranties, HL argued that MA still cannot claim for expectation damages for breach of warranties for the very reason that the original EBITDA would have to be challenged in deriving a new notional EBITDA to claim the difference between the Purchase Consideration and a recalculated Purchase Consideration based on a notionally lower EBITDA. It follows from HL's arguments outlined in [22] above, MA's only remedy for breach of warranty is damages based on cost of cure. Alternatively, MA can claim an indemnity but only for actual liability resulting from the breach. HL emphasised that since major customers like Seagate and Maxtor have not made any claims, MA has not suffered any loss. However, HL also submitted that if MA wanted to claim damages on a loss of bargain measure, it would have to plead and prove the difference between the value of the business it had bargained for and the value of the business it had actually received. This appears to be HL's concession that MA can claim damages on a loss of bargain measure, provided MA can prove its loss. [note: 12]

24 HL submitted that the Decision is bad in law because the Arbitrator had erroneously departed from the general principles governing the law of damages. By the Decision, MA was allowed to calculate damages by reference to "recurring costs" multiplied by 7 (*ie*, MA's Formula). This is not a proper way to quantify damages as the claim for "recurring costs" as pleaded is a claim for loss that does not directly and naturally result from the particular warranty breached. If a breach of warranty is alleged, MA has to prove the breach as well as observe the following principles: that (a) damages must be calculated with reasonable certainty and not be speculative; and (b) damages must flow from the breach and be reasonably foreseeable.

MA's Arguments

25 MA argued that it paid the Purchase Consideration for a business that was supposedly conducted and operated in compliance with the warranties given in the SPA, and because of the breaches, the Business that MA acquired was worth less than the price paid under the SPA. Some of

the warranties relate to HL's failure to comply with major customers' requirements. Others relate to costs that should have been incurred by the Business, and these costs would have had the effect of reducing the earnings and, therefore, the EBITDA of the Business. [note: 13] For example, if HL had complied with the contractual requirements of the Seagate and Maxtor contracts (as warranted in Clause 8.1 of Schedule 4 of the SPA), it would have to discard destructively tested or contaminated part or parts of defective FIPG instead of reworking them. This would have given rise to additional operating costs over the financial year ended 30 June 2004 ("FY 2003/2004"). The additional operating costs would be recurring costs that would give rise to a notional difference in the EBITDA.

26 MA is seeking damages for diminution in value and not on a cost of cure measure. MA has a different interpretation of the binding nature of the Completion Statement, and it maintains that it is not prevented by the terms of the SPA from pursuing its Warranty Claims and seeking damages in contract on a loss of bargain basis. The usual method to calculate damages corresponding with a diminution in value arising from a breach of warranty is the difference between the value of the business as warranted and its actual value, according to its true state as at the date of the transaction. MA disagrees with HL that it cannot recalculate the actual value of the business by reference to a new notional EBITDA. By applying recurring costs multiplied by 7 (*ie* using MA's Formula to derive the diminution in value resulting from the breaches of warranties), MA argues that it would be put in the same position it would have been had the warranties which these breaches relate to been true.

Arbitrator's Reasons

27 I now turn to the Arbitrator's narrative of Schedule 2 of the SPA which sets out how the Purchase Consideration was to be calculated. The Arbitrator went through Schedule 2 to put the "final and binding" nature of the Completion Statement in its proper context. Briefly, the Purchase Consideration was based on the Completion Statement prepared in accordance with Schedule 2 of the SPA. A main component of the Purchase Consideration was the EBITDA. MA's accountants evaluated the EBITDA consistent with HL's audited accounts for the financial year ended on 30 June 2004. MA's accountants then prepared an Initial Statement specifying the Purchase Consideration and the value of each component of the Purchase Consideration including the EBITDA. The Initial Statement would constitute the Completion Statement if the Initial Statement was accepted by the parties. [note: 14] (The text of paragraph 8 of Schedule 2 is set out in [37] below).

28 The Arbitrator explained the function of the Completion Statement at paragraphs 30 and 31 of his Decision. The Purchase Consideration was only arrived at after the Completion Statement was prepared according to the procedure or mechanism provided in Schedule 2. The Completion Statement was thus accepted to be final and binding (in the absence of fraud or manifest error) only for the purpose of establishing the Purchase Consideration.

29 I now come to the Purchase Consideration. The formula for the Purchase Consideration can be put as follows:

(EBITDA) x 7 +/- (adjustments pursuant to Clause 4 of the SPA)

30 In this case, EBITDA stands for Earnings Before Interest, Tax, Depreciation and Amortisation for the financial year ended 30 June 2004 (*ie*, FY 2003/2004).

31 The Arbitrator noted that MA was not seeking to impugn the Completion Statement which he accepted was clearly binding and final between the parties. Contrary to HL's contention, the Arbitrator also ruled that MA was not seeking to recover any part of the Purchase Consideration. He

ruled that MA was not precluded by the binding nature of the Completion Statement to seek damages for breach of warranties. The Arbitrator was mindful that if MA succeeded in its claim for damages for breach of warranty, the true character of the remedy would not be lost or affected simply because the outcome turned out to be similar as obtaining damages by way of a reduction in the Purchase Consideration. He stated at paragraph 49 of the Decision:

> In my opinion, [MA] claims as averred or formulated in the [SOC-3] are for damages of breaches of warranties and not a claim for recovery of part of the Purchase Price. Such claims, if successful, could or would, in effect, result in or amount to a reduction of the Purchase Consideration. This, however, does not affect the true nature of the claims.

32 As such, the Arbitrator found that the first question (*ie*, part (a)) in Issue 1 as framed was "much too broad", and inappropriate given MA's pleaded case was for damages for breach of warranties under Clause 6 and Schedule 4 of the SPA and not for recovery of any part of the Purchase Consideration. [note: 15]

33 Having concluded that MA was claiming for breach of warranty, the Arbitrator ruled in answer to the second question (*ie*, part (b)) in Issue 1 that MA was not precluded by paragraph 8 of Schedule 2 of the SPA from (a) recovering damages for breach of warranties, [note: 16] and (b) putting forward a formula based on recurring costs multiplied by 7 as a method of calculating damages for breach of warranty. I will discuss (b) in this Judgment (see Issue B of this appeal).

34 As this Judgment will show, the Arbitrator proceeded (and rightly so) on the understanding that there are several ways in which a claimant can be compensated for his loss, and it was really for a claimant like MA to choose whichever form of compensation it felt was most appropriate to its case. It is at the hearing of the merits that MA would then be put to proof of the breach of warranties as alleged and the resulting loss suffered. [note: 17] The Arbitrator appreciated that the issues of breach and quantification of damages was largely a factual dispute with the legal result (*ie*, whether MA's claim would eventually succeed) turning on these factual issues. Since the arguments put before the Arbitrator were framed as questions purely on construction of the SPA, the Arbitrator was not obliged to enter into the merits of the Warranty Claims as averred or formulated in the SOC-3 [note: 18], or decide on whether the Warranty Claims were "valid, sound or sustainable". [note: 19] In this regard, the Arbitrator emphasised at various paragraphs in the Decision that whether MA could ultimately succeed in its Warranty Claims for damages was not an issue for determination before him. In deciding that MA was not precluded from claiming loss of bargain based on diminution in value of the Business, the Arbitrator did not decide whether MA's case as pleaded by MA would capture the true diminution in value arising from the breach of warranties. In the circumstances, criticisms that the Arbitrator had not considered the nature of the warranties allegedly breached, and the consequences of the breaches that HL should be legally responsible for were, in my view, unfounded, unwarranted and unfair.

Discussion

35 In this section, I will examine the meaning of "final and binding" in the context of the Completion Statement to determine what MA is really precluded from challenging. I will also set out the general rule that requires expression of clear words to limit legally recognised remedies, and in light of this rule, consider whether the words in paragraph 8 of Schedule 2 are clear to limit remedies for breach of warranty to which MA is entitled, if any, to only cost of cure or an indemnity for actual loss, which is not a remedy that MA seeks. In doing so, the reasons why I disagreed with HL's contentions and concluded that the Arbitrator had not erred in this case are set out.

(i) *Meaning of "final and binding" in the context of the Completion Statement*

36 I now examine the meaning of "final and binding" in the context of the Completion Statement to determine what MA is really precluded from challenging. In this analysis, the purpose of the Completion Statement will be scrutinised.

37 It is apposite at this point to set out in more detail the mechanism in Schedule 2 of the SPA used to derive the Purchase Consideration. The mechanism was succinctly explained by the Arbitrator, [note: 20] whose summary I gratefully adopt with modifications:

(a) MA's accountants were to prepare an Initial Statement specifying the components of the Purchase Consideration and the values of each component with adjustments, including EBITDA (Schedule 2, paragraph 1 of the SPA);

(b) HL was to provide MA with the documents and records required to prepare the Initial Statement (Schedule 2, paragraph 4 of the SPA);

(c) MA's accountants evaluated the EBITDA according to HL's audited accounts for the financial year ended 30 June 2004 (*ie*, FY 2003/2004) (Schedule 2, paragraph 2 of the SPA);

(d) MA's accountants were to submit to HL the Initial Statement and a report stating whether the Initial Statement had been prepared in accordance with paragraphs 1 and 2 of Schedule 2 of the SPA. HL would then have to notify MA whether it agreed with the Initial Statement within 15 days of receipt of the report and Initial Statement. If HL agreed or failed to notify MA of its objections within the stipulated time, the Initial Statement would constitute the Completion Statement (Schedule 2, paragraph 5(i) of the SPA).

(e) If HL notified MA that it disagreed with the Initial Statement within the stipulated time, and the parties are not able to resolve their disputes on the Initial Statement within a further 15 days after HL's notification, a partner of a firm of certified public accountants may be appointed as an Expert (Schedule 2, paragraphs 5(ii) and 6 of the SPA). The Expert would resolve the dispute in accordance with Schedule 2, paragraph 7 of the SPA.

(f) The Initial Statement would constitute the Completion Statement if the Initial Statement was accepted by the parties. [note: 21] Paragraph 8 of Schedule 2 of the SPA reads:

> The Initial Statement, adjusted in accordance with the agreement, if any, between the [HL] and [MA] pursuant to [the decision of an appointed certified accountant in] paragraph 6 above or (as the case may be) the decision of the expert in accordance with paragraph 7 above shall constitute the Completion Statement and shall, in the absence of fraud or manifest error be final and binding on the parties.

38 MA's case is that the Completion Statement is only binding where there has been an adjustment or third party determination of a dispute on the Initial Statement. [note: 22] This narrow interpretation is untenable. First, paragraph 7.4 of Schedule 2 already provides that should the parties refer any disagreement to the chosen Expert, "the decision of the Expert is, in the absence of fraud or manifest error, final and binding on the parties". The parties have used the words "final and binding" in paragraph 7.4 with reference to the situation where their dispute is decided by the Expert, and not the courts. If the meaning of paragraph 8 of Schedule 2 is simply to limit the binding and final nature of the Completion Statement to cases where the parties refer their dispute to the Expert, this would

render paragraph 7.4 redundant. Second, to limit the meaning of paragraph 8 of Schedule 2 to cases where the parties dispute and later agree to the Initial Statement would not be in line with the objective intentions of the parties. The Completion Statement should be regarded as binding so long as the parties did not object or resolved any disputes on the Initial Statement within the specified time. In fact, the wording of paragraph 8 of Schedule 2 envisages three situations in which the Initial Statement "shall constitute the Completion Statement". They are: (a) if the Initial Statement is agreed or not objected to within the time stipulated in paragraph 5(i); (b) if the Initial Statement is adjusted by agreement within the time stipulated in paragraph 6; and (c) if the Initial Statement is determined by the Expert pursuant to paragraph 7.

39 The Completion Statement is simply a process (or as the Arbitrator described, a "mechanism or procedure" [note: 23]) provided in the contract to allow parties to settle on a price. The EBITDA and correspondingly the Completion Statement and Purchase Consideration were accepted as the basis on which MA had to complete the purchase. Paragraph 8 of Schedule 2 simply ensures that the parties are bound to agree within a specified time on the purchase price to complete the transaction successfully (see Andrew Stilton, *Sale of Shares and Businesses: Law, Practice and Agreements* (Sweet & Maxwell, 3rd Ed, 2011) at para 12.4.1 ("*Andrew Stilton*"); and generally the observations in *EXAPL Limited v Pact Group (NZ) Limited* [2011] NZHC 1815 at [10]).

40 After the time stipulated for completion lapses, MA simply loses its right to rescind or terminate for any breach of warranty (see Clauses 7.1 and 7.2 of the SPA). Notably, the SPA contemplates other forms of monetary remedies for breach of the SPA. In my view, the "final and binding" nature of the Completion Statement does not exclude or restrict remedies for breach of warranty.

(ii) *No clear wording to exclude or restrict remedies*

41 As a general rule, the law requires clear words be used in the contract to exclude or restrict remedies (*Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [52]). In my view, the wording of paragraph 8 of Schedule 2 falls short of this threshold requirement. As a matter of construction, the meaning of "final and binding" in the context of the Completion Statement is limited in scope and does not have the effect of precluding MA from claiming expectation damages for breach of warranties. Considerably clearer words would have to be used before it can be concluded that MA had relinquished its right to claim damages based on diminution in value.

42 As this court is dealing with a commercial document, the SPA and in particular, paragraph 8 of Schedule 2 has to be construed so as to give it a commercial and reasonable operation. It would not make commercial sense for HL to give warranties in the SPA if MA could have no recourse at all in the event of breach. It should also be noted that Clause 8.4.3 of the SPA expressly allows claims for breach of warranty (that presumably would give rise to a diminution in value) provided notice is given of the breach before 30 September 2006. Again, by Clauses 6.1 to 6.3, HL acknowledges that MA in entering the SPA relies on the warranties given in the SPA, and that the warranties continue to be true and accurate right through to completion of the transaction. Claims for breach of warranty would undoubtedly take the form of damages subject to Clauses 8.2 and 8.3 which set the minimum and maximum amount of damages in respect of HL's liability for breach of warranty.

43 This principle that clear words in the contract are needed to exclude or restrict remedies is illustrated in the case of *Dixons Group plc v Murray-Obodynski and others* [2000] 1 BCLC 1 ("*Dixons*"). In that case, the buyer, Dixons Group, had agreed to purchase a majority of the issued shares from various vendors. The vendors had given warranties that: (a) the value of the net assets shown in the completion balance sheet would not be less than nil (clause 7.2); and (b) the gross margin on sales in the period from the last accounts date to completion would not be less than 16% (clause 7.6). The

agreement also limited the vendors' liability in respect of any breach of warranty to the extent that "provision or reserve in respect thereof [had] been made in the completion accounts" (clause 7.9.3). Dixons Group claimed that the vendors were in breach of the net asset warranty (clause 7.2) and the gross margin warranty (clause 7.6) as the completion accounts showed a negative value for the net assets and a gross sales margin of only 14.8%. Dixons Group claimed damages amounting to "the difference between the value of the business based on the warranted gross margin and the actual value of the business". The vendors resisted the claim by relying on clause 7.9.3 which the appellate court agreed was a form of exclusion clause. The vendors claimed that their liability for breaches of both warranties was reduced to nil because the completion accounts carried a provision for obsolete and returned stock. When the provision of obsolete and returned stock was added back, the gross margin and the net asset value were increased to the extent that the warranties were no longer breached. Provision had thus been made in the completion accounts for these breaches.

44 The focus was on the wording of clause 7.9.3 – *ie*, whether it was effective to reduce liability for any breach of warranty. The English Court of Appeal in *Dixons* held that it was for the vendors, who were relying on the clause, to establish that the buyer's claim was excluded and any ambiguity would generally be resolved against the vendors. In particular, the provision in question within the completion accounts was not in respect of the whole subject matter of the warranty (*ie*, the gross margin/net asset value) but only in respect of one of the items (*ie*, the stock) which contributed to the calculation of gross margin/net asset value. The situation was distinguishable from one where there was a stock warranty (and in this case, there was none). If there was a stock warranty which was breached, a provision for obsolete stock would have had the effect of reducing any liability to the extent of such provision. The appellate court found that although it could be said that a provision on stock would affect cost of sales which would in turn affect the gross margin, it would be "a strained interpretation" to regard the provision of stock as a provision of gross margin. Consequently, the appellate court held that the vendors could not rely on clause 7.9.3 to limit their liability for breach of the net asset value and gross margin warranties. The absence of a warranty as to stock was sufficient indication that the parties intended the warranties to relate to the position after any necessary provision to the constituent elements of the net asset value and gross margin had been made.

45 Another case that illustrates the same general principle is *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 ("*Thomas Witter*"). Jacob J held that a contractual term purporting to confine the parties' agreement to the terms of the contract had to make manifestly clear that the purchaser had agreed only to have a remedy for breach of warranty and that liability for pre-contractual misrepresentations are excluded. Jacob J's comments at p 596 of the report are most apt, and I gratefully adopt what he said as it accurately describes and summarises the case before me:

> Unless it is manifestly made clear that a purchaser has agreed only to have a remedy for breach of warranty I am not disposed to think that a contractual term said to have this effect by a roundabout route does indeed do so. *In other words, if a clause is said to have the effect of excluding or reducing remedies for damaging untrue statements then the party seeking that protection cannot be mealy-mouthed in his clause.* He must bring it home that he is limiting his liability for the falsehoods he may have told. [emphasis added]

46 Accordingly, in the absence of clear express words, paragraph 8 of Schedule 2 does not without more have the effect of limiting MA's remedies for breach of warranty, if any, to damages on a cost of cure measure or an indemnity for actual loss, which are not the kind of remedies that MA seeks. Consequently, MA's remedies for breach of warranty under the SPA are not limited. There is no legal basis to limit MA to a cost of cure remedy or an indemnity for actual loss. It is within MA's rights to claim damages on a diminution in value measure for breach of warranty.

47 HL concedes that MA is entitled to claim damages for breach of warranty so long as MA does not quantify its claim for loss by reference to "inflation of the purchase price". [note: 24] However, MA's claim for the difference between the Purchase Consideration and a recalculated Purchase Consideration based on a notionally lower EITDA is indefensible. [note: 25] HL reminded that MA cannot make use of the figures in the Completion Statement to calculate damages on a loss of bargain measure because there is no warranty on EBITDA. This fact coupled with HL's submissions on the binding nature of the Completion Statement effectively means that the EBITDA in the Completion Statement is immutable and "the parties are precluded from arguing that the EBITDA [is] too high or too low for the purposes of quantifying damages". [note: 26]

48 In support of HL's point that MA's claim in reality is for overpayment or inflation of the Purchase Consideration, and not a claim for diminution in value, HL stated that MA did not plead and prove the difference between the value as warranted and the actual value in fact. In the circumstances, and since it had not pleaded either value, MA is only entitled under the SPA to claim cost of cure, and this is in the nature of one-off costs which MA has claimed. [note: 27]

49 HL's objection is really about the manner in which MA has calculated damages for the diminution in value which HL maintains is consistent with an overpayment claim.

50 I have already commented on the purpose of the Completion Statement, the scope of paragraph 8 of Schedule 2 and concluded that it does not have the binding effect argued for by HL (see [35]-[46] above). In my judgment, the fact that no direct warranty was given on EBITDA also does not *ipso facto* prevent MA from claiming diminution in value as a damages remedy for breach of warranty. I make two short points now and will elaborate on the points in the next section of this Judgment. First, with respect, HL has misunderstood MA's reliance on the contract price as the basis of the "value as warranted". In my view, MA can use the figures in the Completion Statement that made up the Purchase Consideration as the best evidence to derive the value of the Business as warranted. Second, any determination of the correctness or otherwise of the two values (*ie*, the value as warranted and the actual value in fact) in order to work out the loss is a matter of valuation by the experts. MA would have to adduce evidence at the hearing of the merits to show that the breach of warranties would result in costs that would have a permanent impairment to the value of the Business (*ie*, affect earnings in future periods), and the warranties in question would be "material" to a "willing purchaser".

51 For the purposes of this appeal, it is in my judgment appropriate to accept MA's reliance on the price as representing the value of the Business as warranted on the footing that the amount agreed between a willing purchaser and vendor is the *prima facie* evidence of the market value. (HL has not alleged that there is any disparity between the Purchase Consideration and the value of the Business as warranted, they would be assumed to be factually the same for this appeal.) I believe this was also the Arbitrator's approach, and this is acceptable for the determination of a preliminary issue of law. In relation to the actual value in fact, MA put forward Ernst & Young's report dated 8 August 2007 ("Ernst & Young Report") which identified and calculated MA's loss for breach of contract. I will deal with the Ernst & Young's Report as well as the issue whether MA's Formula could capture the diminution in value in Issue B of this Judgment.

Conclusion

52 For all the reasons given above (see [38] to [51]), the Arbitrator was not wrong to conclude that neither the binding effect of the Completion Statement nor the absence of a warranty as to EBITDA precluded MA from assessing loss based on diminution in value. I have earlier stated that the

Arbitrator was mindful that if MA succeeded in its claim for damages for breach of warranty, its true character would not be lost or affected simply because the monetary outcome turned out to be similar as obtaining damages by way of reduction of the purchase price. The Arbitrator also rightly pointed out that MA's recovery of loss of bargain damages must be tied to its ability to prove breach of warranty and resulting loss on the hearing of the merits. Therefore, at this early stage, and for the sake of argument, if MA succeeds in proving the breaches of its Warranty Claims, MA could reasonably argue that loss of bargain assessed by reference to a difference in value is appropriate.

Issue B: Whether the Arbitrator erred in not rejecting MA's formula based on "recurring costs multiplied by 7" to recover expectation damages by reference to diminution in value.

General

53 It is trite law that damages for breach of a warranty in a contract are to be assessed on the basis of what would be required to put a claimant into the position he would have been in had the contractual promise been fulfilled or had the warranty been true. This is sometimes called the expectation loss basis. Expectation loss is also known as loss of bargain. A party that suffers a breach of warranty is hence entitled to claim damages for loss of bargain.

54 It is also not controversial that damages for loss of bargain is calculated or assessed in two ways: either with reference to diminution in value, (*ie*, by taking the market value of the business as warranted and deducting the actual value of the business) or the cost incurred to achieve the performance as promised (*ie*, the cost of cure or reinstatement). As I previously stated, MA is not claiming cost of cure but diminution in value as a result of the breach.

55 As to whether MA's Formula - recurring costs multiplied by 7 to recover expectation damages by reference to diminution in value - is contrary to legal principles, it is a matter that will have to be examined and tested at the hearing of the merits where evidence will be led one way or the other to determine if "recurring cost multiplied by 7 "is an appropriate way to arrive at the difference between the value of the Business as warranted and the actual value of the Business according to its true state as at the date of the transaction.

56 The case of *Devji Gorecia, Mukta Gorecia, AG Property Investments Ltd v Zahir Somani, Hanif Somani, Pearl Hotel Holdings Limited, Pearl Hotels (Gatwick) Limited, Gatwick Worth Hotel Limited* [2008] EWHC 2970 (QB) ("*Gorecia*") demonstrates that the time to adduce evidence of values is at the trial of the merits. In that case, the sellers of a hotel gave a warranty that as far as they were aware, "there [was] no fact or matter not disclosed in writing to the Purchaser... which [would render any information which has been disclosed in writing] untrue or misleading" (*Gorecia* at [5]). The buyer sued the sellers for failing to disclose the fact that the hotel's membership with the Best Western Hotels consortium was under serious threat of termination (*Gorecia* at [9]). The court found that there was indeed a breach of warranty, and damages were to be calculated on the difference in the value of the hotel as warranted (that is, with no threat to its membership of the Best Western Hotels consortium) and the actual value of the hotel on that date (with actual threat to its membership). The parties agreed that the most appropriate manner of assessing this difference between the warranted and actual value was by assessing the value of the hotel's membership and discounting that value, given that it was only a threat and not actual termination (*Gorecia* at [49] to [50]). The assessment of the difference in value was done at the hearing of the merits of the case.

57 Similarly, in *Mediservice Clinics Pty Ltd and Anor v Health 24 Pty Ltd as trustee of the Cenrin Unit Trust and Anor* (1996) NSW Lexis 3721, the buyer bought over the seller's premises which were subject to tenancy. The seller warranted to the buyer of the business that the financial performance

of the business as particularised in two annexures "was not affected by any unusual or non-recurring items". The premises were in fact let at a rate of A$60,000 per annum, which was much higher than the commercial rate of A$10,000 per annum. The tenancy was subsequently lost, and the buyer sued the seller for breach of warranty. It was agreed that the discounted cash flow method was the most appropriate way of calculating damages (page 3 of Lexis printout). Damages were thus calculated on the difference between the present value of a lease yielding A$60,000 per annum as a usual and recurring amount, and the much lower commercial value as a usual and recurring amount (page 18 of Lexis printout).

58 These two cases illustrate that the time to assess the factual viability of MA's method of proving its loss is at a hearing of the merits rather than in this appeal.

59 To summarise, at the hearing of the merits, MA must, *inter alia*, adduce evidence of the following two values:

(a) Evidence of the value of the Business as warranted and this may or may not equate factually with the purchase price. At times, the price may be the best evidence of the value as warranted, or it may be taken as evidence of value where it is otherwise difficult to assess.

(b) Evidence of the actual value according to its true state as at the date of the transaction. This may involve a revised assessment of the value of the business factoring in the true facts.

60 MA will also have to prove through a damage analysis that those costs that arose as a result of the warranties breached would have had a permanent impairment to the value of the Business (*ie*, affect earnings in future periods), and the warranties would be "material" to a "willing purchaser". There is one other related point: the fact that the buyer has sold the Business does not necessarily detract from the fact that shortcomings existed and that they would have an impact on earnings to satisfy customers' requirements. At the hearing of the merits, the Arbitrator will also have to decide if anything turns on the fact that MA has since sold the Business.

61 For the purposes of this appeal, the real issue is whether the Arbitrator in not rejecting MA's Formula based on recurring costs multiplied by 7 was satisfied that the MA Formula is one way of capturing the diminution in value arising from the alleged breaches.

MA's approach to assessing diminution in value

62 The Arbitrator was satisfied that MA's Warranty Claims were made pursuant to the SPA which contained contractual assurances. He was also satisfied that MA is seeking damages for breach of warranties to be assessed on a contractual basis. The Arbitrator also noted that the SPA was completed by MA in reliance of the warranties given by HL, and that MA's claim for loss of bargain is the "difference between the purchase price [MA] had paid (on the basis that the warranties [were] true) and the price representing the true value of the [Business] with the warranties having been established as being untrue". [note: 28] At paragraph 45, the Arbitrator said: [note: 29]

> [MA] paid the Purchase Consideration which included EBITDA multiplied by 7, and this was paid in reliance of the warranties being true and correct. As it turned out, several warranties are not true and correct (so [MA] claims). [MA] has therefore suffered a loss of bargain and this loss is based on the expenses incurred in making good the warranties and such expenses have the effect of lowering the EBITDA multiplied by 7. In other words, [MA] is seeking damages based on the same formula as that used in calculating the Purchase Consideration with a reduced EBITDA which was occasioned by the breaches of warranties.

63 I have several comments to make on paragraph 45 of the Decision. First, it must be remembered that MA's claim for damages for breach of warranties comprises (a) one-off costs and (b) recurring costs, but the Arbitrator was only concerned with item (b) recurring costs which is the second component of MA's claim. Second, the Arbitrator understood MA's loss of bargain to be based on "expenses incurred in making good the warranties ... multiplied by 7". This statement, which is derived from the definition of "recurring costs" in paragraph 24(b) of the SOC-3, gives the impression that MA's damages for loss of bargain are equivalent to "recurring costs x 7". I agree with HL that MA's definition of "recurring costs" in paragraph 24(b) of the SOC-3 (see [6] above) is easily misunderstood as it has combined two separate notions – the multiplier and recurring costs - under one definition. On one hand, "recurring costs" are those expenses that have the effect of increasing operating costs of the business and thus have a permanent effect on earnings in future periods. On the other hand, the multiplier is to determine value by adopting the same valuation methodology used by the parties in the SPA. MA ought to have explained that it was seeking to demonstrate by adopting the same valuation methodology as the Purchase Consideration the actual value it would have placed on the Business had it known of the breach of warranties before completion. Third, even though the calculations in Ernst & Young's Report were based on 2005 figures, it is for MA to prove at the hearing of the merits that they are a good approximation of the costs that would have been incurred by HL in FY 2003/2004 if there were no breach of warranty.

64 When dealing with a claim relating to value as warranted, it can be presumed (unless the contrary is shown) that the business as warranted will be based upon the price. In this case, MA is not challenging the EBITDA in the Completion Statement, *viz* that it was in fact the EBITDA derived from HL's accounts. MA is making use of the information in the Completion Statement to equate the price paid as *prima facie* representing the value of the Business as warranted on the footing that the amount agreed between a willing purchaser and vendor is the best evidence of the market value. Before the Arbitrator, this very assumption was used. [note: 30]

65 As for the actual value of the Business at the time of the transaction, MA put forward Ernst & Young's Report. To make sense of MA's case, one has to read MA as suggesting that the difference in the value of the Business as warranted and the actual value in fact is equivalent to "recurring costs x 7". At this point, it may be apt to observe once again that "recurring costs" is an unfortunate expression as it can be confused with cost of cure which is not MA's claim. From the Ernst & Young Report, MA seeks to identify and quantify its loss by applying the multiple of 7 to the shortfall in the EBITDA. By applying MA's Formula, MA is also seeking to demonstrate by adopting the same valuation methodology as the Purchase Consideration the actual value it would have placed on the Business had it known of the breach of warranties before completion. In this way, the loss of bargain arising from breach of warranties is derived from a comparison of the Completion Statement and evidence of actual value of the Business in fact.

66 I propose to use of the same figures in Ernst & Young's Report to explain arithmetically that the result of MA's Formula is the same as the difference between the value as warranted and the actual value in fact. The workings are set out on the next full page. From the workings, the actual value is found by adopting the same valuation methodology actually used by the parties which will have to be applied to the factual evidence adduced at the merits hearing.

Computation of actual value of the Business	$
EBITDA for FY ended 30 June 2004 per Completion Statement	63,044,023

Less adjustments for recurring costs due to breach of warranties		
Annualised recurring costs per Ernst & Young Report dated 8 August 2007:	$27,367,248 ÷7 =	3,909,606.85

Revised EBITDA		59,134,416.15
		==========

Actual Value of the Business	
	$
Revised EBITDA x 7 = $59,134,416.15 x 7	413,940,913
Less	
One-off costs as per Ernst & Young Report	3,626,712

Actual Value of the Business	410,314,201
	==========

Computation of Loss of Bargain resulting from breaches of warranties

	$
Value as warranted	441,308,161
Actual Value of Business	410,314,201

Damages for Loss of Bargain	30,993,960
	==========

67 In *Andrew Stilton*, the author explained how a formula similar to MA's Formula may be used to calculate the diminution in value of the Business (*Andrew Stilton* at para 10.1.1, p 163):

> *It may be more difficult to determine the market value with the warranty breached and this is likely to depend upon the basis on which the parties arrived at the purchase price... [If] the purchase price had been determined by reference to the company's profits (for example, on a multiple (a price/earnings multiple) of five times the profits for the previous financial year), then if [a] plant in question [the company warranted it owned, but which was actually on lease] were repossessed by the finance company but its absence did not affect the company's capacity to earn profits, its value may be unaffected. If, however the buyer found that the company had to pay £20,000 per year in leasing payments if it wished to continue to use the plant, the reduction in the company's value may well be five times the amount by which the company's earnings are reduced, i.e. £100,000.* [emphasis added]

68 In *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd Rep 423 ("*Senate*"), the claimant's approach was to assess the damages by applying a price/earnings ratio of 13.67 derived from the actual transaction as a

multiplier to the difference between the warranted profit and the actual profit. Although this approach was rejected on the facts of the case, Stuart-Smith LJ observed that such an approach may be appropriate where the purchase price had been arrived in the same way (that is, by multiplying a price/earnings ratio with the profits). In that case, the claimant's approach was rejected because there were so many other factors apart from the earnings which had induced the buyer to pay the price it did. Similarly, in *Club Hotels Operations Pty Limited v CHG Australia Pty Limited* [2005] NSWSC 998, the claimant's damages case failed because the basis for determining the price for the hotel businesses was not the same as each party had conducted their negotiations on different principles in mind.

69 MA is adopting the same methodology used to calculate the Purchase Consideration to quantify its loss, relying on the *dicta* in *Senate* and explained in my workings above (at [66] above). Put another way, MA's case on damages is very much dependent on the basis on which the Business was bought. Difficulties may (depending on the facts) arise with MA's approach, but they are nevertheless factual in nature and ultimately, the Arbitrator will have to make a finding on the sustainability of MA's Formula at the hearing of the merits.

70 At the hearing of the summary determination of the specific issues before the Arbitrator, the latter was only in the position to state the general principles concerning the assessment of awards of damages for breach of contract. Assessment of damages is a fact-sensitive exercise, and the decision maker's task is to render an award of damages that best reflects the nature and value of the party's loss. A case that comes to mind as an illustration is *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 WLR 1438 ("*Lion Nathan*") where the Privy Council had to find in *Lion Nathan* an appropriate measure where the warranty is not as to whether the company had a specified level of profits but whether reasonable care has been exercised in producing a profit forecast. The Privy Council said that the *prima facie* rule for breach of a warranty of quality of goods cannot be applied to a warranty to take reasonable care. To find an appropriate measure of damages rule the court returned to the general principle of which the *prima facie* rule for quality is one example, namely that damages for breach of contract are intended to put the plaintiff in the position in which he would have been if the defendant had complied with the terms of the contract. The court hearing the merits is thus tasked with ensuring that the award of damages represents, as far as possible, the true value of the party's loss. Similarly, whether MA's Formula best reflects its loss would have to be determined on the factual evidence adduced during a hearing on the merits, and its claim should not be *ipso facto* dismissed at this stage.

71 I would also add that although the principles governing the award of damages for breach of contract are trite, difficulties often arise when it comes to application of the principles to the facts. Very often, claimants may find it difficult to put forward a formula that accurately captures their loss (as recognised by Jacob J in *Thomas Witter*). However, any difficulty in assessing the amount of damages should not preclude a claimant from receiving damages as a matter of principle. In most cases, the courts will attempt to find the most appropriate measure. Harvey McGregor in *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) thus noted at para 8-002 that:

> ... [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in Chaplin v Hicks, the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss. Of course, as Devlin J. said in

Biggin v Permanite [(at 438)]: ***[W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.***

[emphasis added in bold italics]

72 These principles have been affirmed in *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131 at [15] and *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [27]-[28] and [30]-[31].

73 Even if compensatory damages have not been proven to a satisfactory degree – for instance, where the court is not in a position to determine the value of the loss in a principled way because of the lack of evidence – nominal damages would be awarded.

74 In the premises, for the reasons given above, contrary to HL's contention, MA's damages claim is not based upon a misconceived approach to legal principles. In my judgment, the Arbitrator was not wrong to accept MA's Formula for the purposes of the summary determination.

(F) RESULT

75 In terms of the issues on appeal, I would answer them as follows:

(1) The first question in Issue 1 is answered "yes".

(2) The second question in Issue 1 is answered: The Arbitrator was right in not rejecting, at the summary determination stage, MA's proposal to use the recurring costs as calculated by MA and pleaded in paragraphs 26(iii), 30(xi) to (xiv), 55, 64(iii), 73, 78 and 82 of the SOC-3 multiplied by 7. MA's damages claim is not based upon a misconceived approach contrary to legal principle. However, the confusion arose because MA presented its loss in a "short cut" computation rather than illustrating the damages as the difference in value of the Business as warranted and the actual value in fact (see [66] above).

(3) The first question in Issue 2 is answered: Does not arise in this appeal.

(4) The second question in Issue 2 is answered: Same answer as (2) above.

(5) The first question in Issue 3 is answered: Does not arise in this appeal.

(6) The second question in Issue 3 is answered: Same answer as (2) above.

76 Accordingly, the appeal is dismissed with costs.

[note: 1] HL's Core Bundle at p 17

[note: 2] SOC-3 at para 21

[note: 3] Arbitrator's Decision at paras 36, 49 and 51

[note: 4] Arbitrator's Decision at paras 52

[note: 5] Arbitrator's Decision at para 60

[note: 6] Arbitrator's Decision at para 61

[note: 7] Arbitrator's Decision at para 67

[note: 8] Arbitrator's Decision at para 72

[note: 9] HL's Appellant's Case at para 13

[note: 10] HL's Skeletal Submissions at para 48(a)

[note: 11] HL's Skeletal Submissions at para 7

[note: 12] HL's Skeletal Submissions at para 90

[note: 13] Arbitrator's Decision at para 19

[note: 14] HL's Core Bundle at pp 49 & 50

[note: 15] Arbitrator's Decision at para 51

[note: 16] Arbitrator's Decision at para 52

[note: 17] Arbitrator's Decision at para 36

[note: 18] Arbitrator's Decision at para 50

[note: 19] Arbitrator's Decision at para 52

[note: 20] Arbitrator's Decision at para 28

[note: 21] HL's Core Bundle at pp 49 & 50

[note: 22] MA's Skeletal Submissions at pp 74-83

[note: 23] Arbitrator's Decision at para 31

[note: 24] HL's Skeletal Submissions at paras 10, 13 & 52

[note: 25] HL's Skeletal Submissions at para 7

[note: 26] HL's Skeletal Submissions at para 48(a)

[note: 27] HL's Skeletal Submissions at para 90

[note: 28] Arbitrator's Decision at para 36

[note: 29] Arbitrator's Decision at para 45

[note: 30] Arbitrator's Decision at para 36