Sale and purchase agreements—entitlement to disclosure of post-completion valuation report (Zedra Trust Company (Jersey) Ltd v The Hut Group Ltd)

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Commercial analysis: The sellers under a share sale and purchase agreement (SPA) were entitled to disclosure of an accounting report, prepared by accountants instructed by the buyer in order to calculate whether additional consideration was payable by the buyer. The report was prepared under a contractual review mechanism undertaken at the request and expense of the sellers. The court required the disclosure of the report to the sellers, not because that provision made the buyer an agent of the sellers when instructing the accountants (it did not), but under an implied term. The case emphasises the importance of including express wording as to a party's information rights under a contract. In its absence, the scope of disclosure required by the general law is likely to be more limited. Written by Seb Oram, barrister, at 3PB Barristers.

Zedra Trust Company (Jersey) Ltd and another v The Hut Group Ltd [2019] EWHC 2191 (Comm)

What are the practical implications of this case?

It is a familiar feature of SPAs that part of the consideration payable by the buyer will be deferred and/or will be subject to a post-completion adjustment to the existing accounts of the target company. In *Zedra Trust* the issue arose because the company's filed accounts had contained provision for tax and related matters, the purchase price had been based on that provision being accurate, and the parties agreed a mechanism to later verify if that provision had been overstated.

It is important to give careful consideration to any contractual adjustment mechanism of that sort. Parties may leave out the detail, expecting the counterparty to cooperate throughout the process. This case is a cautionary tale that this will not always be the case. Unless express provision is made to regulate the disclosure of information by one party to another, the general law may only provide limited assistance.

In particular, in the usual SPA context where the counterparties are negotiating and acting for their own commercial interests, a right to obtain information is not likely to be justified by agency principles. The court was able to find that the accountant's report was bound to be disclosed under an implied term—the relatively high hurdles of necessity and obviousness were satisfied on the facts. But the scope of the required disclosure was narrower than would have been required if agency reasoning had succeeded. For the SPA terms to have business efficacy the buyer was required to disclose the full report, but not the instructions, communications or underlying documentation that was sent by them to the accountants.

What was the background?

The claimant sellers of shares in Cend Ltd (C Ltd), brought a Civil Procedure Rules 1998 (CPR) part 8 claim seeking an order that the buyer disclose the full copy of an accountant's report prepared on the instructions of the buyer, and communications and documents relevant to that report. That report had undertaken a review of C Ltd's accounts in order to determine whether there had been an overprovision for tax and related matters. Before the hearing the buyer had refused to provide the full report but had supplied its 'executive summary' concluding that there had been a small over-provision of £18,435.

The SPA included a mechanism for determining whether there had been such an over-provision in the accounts and, if there had been, potentially entitled the sellers to further payment. Further, the SPA provided for the question of whether there had been such over-provision to be determined by the accountants, acting as experts. The buyer had instructed the accountants pursuant to those provisions.

The relevant terms included:

- an adjustment clause, by which 'the buyer shall at the request of the sellers require the auditors to determine (as experts and not as arbitrators and at the expense of the sellers)' whether any adjustment was due to the price
- a review mechanism. After the accountants had provided any report, they could be requested 'to review such determination…and to determine whether such determination remains correct or…

should be amended.' Either the buyer or the sellers could exercise the review clause, at its own expense
- a dispute resolution clause under which any dispute 'shall at the election of either/any party be determined by the Independent Expert (acting as expert and not as arbitrator) and in the absence of manifest error his determination shall be conclusive and binding on the parties'

The sellers argued that they were entitled to disclosure for two reasons. First, because the adjustment clause created a relationship of agency, by providing that the appointment of the accountant was to be at the request of the sellers and at their expense. That agency entitled the sellers to documents prepared in the course of the agency. Secondly, under a term that needed to be implied in order to give efficacy to the contractual review mechanism and the dispute resolution clause. Unless they were entitled to the requested documents, they could not decide whether to invoke those clauses.

What did the court decide?

The submission that the buyer was the agent of the sellers when instructing the accountant, failed. The court reasoned as follows:

- in principle, the parties can agree to create an ad hoc agency in relation to a particular task in a wider commercial relationship (at para [35])
- the main characteristics that indicate an agency are 'authority to affect the principal's relationships with third parties, fiduciary duty [and] control by the principal.' The absence of those does not preclude a finding of agency but must nonetheless be a significant pointer away from the characterisation of a particular relationship as one of agency (at para [36]—applying *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 and following *Marme Inversiones 2007 SL v NatWest Markets plc* [2019] EWHC 366 (Comm)), [2019] All ER (D) 140 (Feb).
- ultimately one had to look at the nature of the relationship created by the contract (at para [32]). Here, the fact that the SPA was capable of working effectively without the imposition of an agency relationship, and that the interests of the parties in the operation of the price adjustment were adverse, pointed against the creation of an agency (at paras [37]–[41])

But it was appropriate to imply a more limited right to documentation as a result of an implied term. On the familiar principles, such a term was necessary in order for the review mechanism to operate effectively. Even if that were not so, the officious bystander would have considered such a term to be obvious (at paras [55]–[57]). The scope of the term was itself governed by what was necessary, which was only the full report (at para [60]).

Case details

- Court: High Court, Queen's Bench Division (Commercial Court)
- Judge: Judge Eyre QC
- Date of judgment: 21/08/2019

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