IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2008 HCV 01834

BETWEEN	DWIGHT CLACKEN	FIRST CLAIMANT
AND	LYNNE CLACKEN	SECOND CLAIMANT
AND	MICHAEL CAUSWELL	FIRST DEFENDANT
AND	RICHARD CAUSWELL	SECOND DEFENDANT
AND	EQUIPMENT MAINTENANCE LTD	THIRD DEFENDANT

IN OPEN COURT

Michael Hylton QC, Anna Gracie, Kalaycia Clarke instructed by Rattray Patterson Rattray for the first and second claimants

John Vassell QC, Julianne Mais Cox, Hyacinth Lightbourne instructed by DunnCox for the first, second and third defendants

CONTRACT - CONTRACT TO PURCHASE SHARES - AGREEMENT EMBODIED IN COURT ORDER - PROPER CONSTRUCTION OF THE ORDER - WHETHER CONTRACT FRUSTRATED - WHETHER PERFORMANCE OF CONTRACT MAKES IT FUNDAMENTALLY DIFFERENT FROM WHAT IT WAS WHEN MADE - MISTAKE, COMMON, MUTUAL AND EQUITABLE - EFFECT OF AGREEING THAT THIRD PARTY VALUE SHARES

December 14, 15, 16, 17, 18, 2009, March 15, October 4, 27 and November 12, 2010

SYKES J.

The claim

1. By fixed date claim form dated April 12, 2008, later converted to a claim form, Mr Dwight Clacken and his wife Mrs. Lynne Clacken ('the Clackens') seek the following declarations:

> *1. A declaration that the agreement between the parties which resulted in the consent order of the Honourable Mr. Justice Anderson dated May 29, 2002 has been frustrated and an order that the said consent order be set aside.*
>
> *2. Further or in the alternative, a declaration that the said agreement and consent order be set aside on the basis that at the time the agreement and order were made there was a common or mutual mistake as to the status of the accounts of Equipment Maintenance Limited and/or the ability to perform a valuation on the basis of those accounts.*
>
> *3. An order that the first and second respondents pay the costs incurred by the applicants and the third respondents in these proceedings.*
>
> *4. Such further and/or other relief as this court may deem fit.*

2. The declarations are refused. These are my reasons.

The consent order

3. When Anderson J. on that fateful day of May 29, 2002, made a consent order that captured an agreement fashioned by the parties, little did his Lordship know that the contract entered into between the parties would have generated such fierce litigation that has seen at least three hearings in the Court of Appeal since the order, to say nothing of the numerous applications and cross applications in the Supreme Court. As the claimant, Mr. Dwight Clacken puts it, 'Since the

court order there have been more than 39 court hearings'. All this litigation speaks eloquently of the fortitude and tenacity which the parties have brought to this matter. This trial is merely the latest battle in a very long legal war of attrition. Each advance made by any of the parties, like trench warfare of World War 1, has come at great sacrifice and cost.

4. Anderson J.'s order was made in the following circumstances. EML was incorporated on January 31, 1978. At that time, the only shareholders were the Clackens. Shortly after its incorporation, the Causwells, cousins of Mr. Dwight Clacken, were made part of the company with each holding 33.33% with the Clackens holding 16.66% each. The company was operated as a family company for nearly twenty three years. By 2001, the relationship between the Clackens and the Causwells had deteriorated so badly that October 5, 2001 saw a petition to wind up the company being filed. It was this petition that led ultimately to the agreement that the Causwells would purchase the shares of the Clackens. This agreement was embodied in the order.

5. EML owned two subsidiaries. The shareholders of EML also had their own companies. Windshield Centre Limited ('WCL') and Rodeo Holdings Limited ('RHL') are wholly owned subsidiaries of EML. These three companies became known as and will be referred to as the EML Group. Mr. Clacken also owned a company called Startech Services Limited ('SSL'). Mr. Richard Causwell owned a company named Ranchero Limited ('RL'). Mr. Michael Causwell owned two companies known as Econo Car Rentals ('ECR') and Auto Auctions Limited ('AAL').

6. It is common ground that money was taken from EML for use by EML's shareholders personally or for use by companies owned by the shareholders. This explains why the order empowered the valuer to do the things he was asked to do.

7. The order contains the following terms:

> *1. [The Causwells are to purchase the shares of the Clackens in EML] at a price to be fixed by the*

accounting firm of Peat Marwick Partners of 6 Duke Street in the parish of Kingston.

2. *The valuer is directed to value the [the Clacken's shares] in the said company within ninety (90) days of the date of this order, or such other period as may be approved by the Court from time to time, by reference to the market value of all the assets owned by the Company inclusive of fixed and personal property on a net assets value basis as a going concern and shares at market value in Windshield Centre Limited and Rodeo Holdings Limited, goodwill and receivables of the Company as at the 31st day of December, 2001 without any discount for the fact that the [the Clackens] shareholding is a minority shareholding. The valuer shall take into account any assets or funds from the company which have been diverted, utilized or paid by or to any of the shareholders and/or any of the following companies including but not limited to Ranchero Investments Limited, Startech Services Limited, Econocar Rentals Limited and Auto Auctions Limited and/or paid by the Company and/or its subsidiaries, and for this purpose the valuer is authorised to make such enquiries and examine such records, books and documentation including, but not limited to the affidavits and documentation filed in these proceedings as are necessary to ascertain the value of the said assets or the amount of the said funds or any amount of which the company is entitled to demand repayment from the shareholders concerned and that any such assets, funds and/or amounts shall be brought into account for purposes of the valuations aforesaid and shall attract interest being the Government of Jamaica treasury bill rates as published by the Bank of Jamaica. The valuer may use in-house figures for the financial year ending the 31st day of December, 2001 in the absence of Audited Financial Statement for the*

said year. In the event of any dispute relative to the aforesaid valuation of the assets the valuer's decision in that regard shall be final.

3. The [Causwells] shall pay the [the Clackens] or their legal representatives the purchase price of the said shares as determined by the valuer aforesaid on the following terms:

a. A deposit of 22% of the purchase price to be paid within ninety (90) days after the valuation is delivered to [the Causwells] or their legal representatives whichever is earlier.

b. The balance purchase price is to be paid within one hundred and eighty days (180) thereafter or within such further ninety (90) days if [the Causwells] are unable to pay the balance of the prices within the one hundred and eighty days (180) as stipulated.

c. Interest shall accrue on the balance purchase price at the Government of Jamaica treasury bill rates as published by the Bank of Jamaica from the date the deposit becomes payable until payment and any such interest shall be computed monthly and payable within five (5) days of the end of each month until the balance purchase price is paid.

8. Clause 6 permits the Clackens to exercise all rights and privileges as shareholders until the completion of the purchase of the shares and clause 13 is the liberty to apply provision. The agreed valuer was KPMG Peat Marwick, a firm of accountants.

9. It is now eight years since the order. The Clackens say that the contract that is now in the order should be set aside on two bases. First, they say that the contract is frustrated by reason of delay and any performance of the contract at this point would render the performance radically different from what was contemplated at the time of the contract. On the other hand, the Causwells say that the contract can still be performed. Second, the Clackens say that the parties mistakenly believed, at the time of the contract, that (i) credible and reliable financial statements in relation to EML for the year ending December 31, 2001 existed and could be prepared within a reasonable time and (ii) the valuer would have been able to value the shares within the agreed time frame, namely ninety days from the date of the order.

10. That Anderson J.'s order is a contract is no longer open to question, at least not by this court. That point was decided by the Court of Appeal (***Causwell v Clacken*** SCCA 129/2002 (delivered on February 18, 2004)). The Court of Appeal has also decided that it is the principles applicable to the interpretation of contracts generally that apply to this order (***Clacken v Causwell*** SCCA 111 of 2008 (delivered October 2, 2009)). These are two of the decision of the Court of Appeal since Anderson J. made his order. The third appellate decision is ***Causwell v Clacken*** S.C.C.A. No. 28 of 2008 (delivered October 24, 2008).

11. The first order of business for this court is to determine the meaning of the contract. As the law indicates, before one can speak meaningfully of a contract being frustrated or void on the ground of mistake, there has to be a determination of what it is that the parties agreed. Unless it is known what is agreed then one cannot know what it is that is frustrated. Likewise, unless it is known what is agreed then one cannot know whether the parties contracted on a mistaken basis. I now turn to the principles of contractual interpretation.

The principles of contractual interpretation

12. The Court of Appeal of Jamaica has firmly committed itself to the exposition of the principles enunciated by Lord Hoffman in the important case of ***Investor Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98. Morrison J.A. in ***Goblin***

Hill Hotels Ltd v John Thompson SCCA No. 57/2007 (delivered December 19, 2008) and Smith J.A. in ***Clacken v Causwell*** SCCA 111/2008 (delivered October 2, 2009) expressly adopted the formulation of Lord Hoffman without reservation or qualification. It can now be taken as settled law in Jamaica that Lord Hoffman's propositions are now the law of Jamaica and are to be applied to the construction of contracts. Morrison J.A., in particular, approved Lord Hoffman's further refinement in ***BCCI v Ali*** [2002] 1 A.C. 251, where his Lordship (Lord Hoffman) said that background, for the purposes of interpreting a contract, included the law and proved common assumptions regardless of whether those assumptions were accurate or not (see Morrison J.A. at para. 36 of ***Goblin Hill***). Lord Hoffman also added that admissible background included anything that a reasonable man would regard as relevant. Lord Hoffman's principles can now be set out. His Lordship stated in ***Investor Compensation*** at pages 114 - 115:

> *My Lords, I will say at once that I prefer the approach of the judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. ..... The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.*
>
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: .... .

(5) The "rule" that words should be given their

> *"natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.*

13. This passage, as refined in ***BCCI***, leads to the following observations. Lord Hoffman insists that the meaning of a document is not necessarily determined by the dictionary meaning of the words in the document. This is a necessary corollary of the proposition that a document must be construed against the context and background in which it originated. Given the breadth of Lord Hoffman's propositions, including his Lordship's refinement, it follows that it is entirely possible that when the interpreter, in this case the court, reads the entire document, in its context and background, it may be that the normally understood or conventional meaning of a word or words used in the document may have to yield to another meaning that would not be immediately obvious.

14. Arden L.J. in the case of ***Static Control Components (Europe) v Egan*** [2004] 2 Lloyd's Rep 429, has reaffirmed the ultimate logic of Lord Hoffman's reasoning in ***Investor Compensation***. Her Ladyship was confronted with this submission from counsel. Learned counsel submitted that 'the factual background to the execution of the guarantee is admissible, but, ... it cannot be used to alter or qualify the plain meaning of the guarantee on its face' (para. 23). Her Ladyship rejected this submission as being contrary to authority. This was indeed a very remarkable submission from counsel because the very thing he submitted could not be done was in fact done in ***Investor Compensation***, namely, that the natural and ordinary meaning was rejected because the background and context, when taken into account, made it plain (according to the majority) that the natural and ordinary meaning of the words was not the correct meaning. Thus Arden L.J. in ***Static Control*** was able to say that 'in principle, all

contracts must be construed in the light of their factual background, that background being ascertained on an objective basis. Accordingly, the fact that a document appears to have a clear meaning on the face of it does not prevent, or indeed excuse, the Court from looking at the background' (para. 27). The purpose of this examination of context and background must be for the purpose of determining whether the 'clear meaning' of the document must yield to another meaning when the background and context are examined.

15. Another implication of Lord Hoffman's approach was highlighted by Lord Steyn in ***R (on the application of Westminster City Council) v National Asylum Support Services*** [2002] 4 All ER 654. His Lordship said, reasoning by analogy in the context of statutory interpretation, that, 'in his important judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913 Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction.'

16. Miss Catherine Mitchell in her book *Interpretation of Contracts (Current Controversies in Law)* (2007) highlights some problems with Lord Hoffman's approach. This court agrees with her and summarises her views. She points out that one is never quite sure, in the new approach, which of two persons is given the lead in interpreting a contract. Is it the pedantic lawyer (as in ***Investor Compensation***) or is it the reasonable man (as in ***Mannai Investment Co Ltd v Eagle Star Life Assurance Company*** [1997] A.C. 749)? A number of cases from the House of Lords, including ***Investor Compensation*** have brought home this difficulty with Lord Hoffman's approach in quite a striking manner. In ***Investor Compensation***, the majority gave the pedantic lawyer pride of place because, according to Lord Hoffman, the document in that case was designed to be read by lawyers. In ***Malik v BCCI*** [1998] A.C. 20, a former employee not only received redundancy payment but an additional payment on the signing of a release 'in full and final settlement of all or any claims ... of whatsoever nature that exist or may exist'. At the time of signing the release the House of Lords had not yet decided that an employee could claim 'stigma damages' if they had difficulty in seeking employment because of the

stigma attached to them because they worked with the previous employer. However, despite the apparently clear wording of the release, the majority in the House of Lords held that stigma damages were not covered by the release. Ironically, Lord Hoffman dissented on the basis that the majority had not given sufficient weight to the actual wording of the document. Lord Hoffman's position was that the wording of the release was clear enough; in other words, having looked at the background, there was no reason to give the clear words of the release any other meaning. In the case of ***Mannai Investment Co Ltd v Eagle Star Life Assurance Company*** [1997] AC 749, the reasonable man, by a majority, trumped the pedantic lawyer when a notice to terminate a lease had the wrong date but was saved from invalidity by the majority who held that it was clear that an error had been made and the notice was to be read as if the correct date was in fact present. In the case of ***The Starsin*** [2004] 1 AC 715, the reasonable man triumphed in the House of Lords when the issue before the court was who was the contracting party in a bill of lading.

17. On reading Lord Hoffman's fourth and fifth principles, it seems that there is some tension between the two. If it is the case that the meaning of words is a matter of dictionaries and grammar while the meaning of a document is that which the parties using the words against the relevant background would have been reasonably understood to mean, it would seem that it is difficult to speak of the natural and ordinary meaning of the words, unless one means by 'natural and ordinary meaning' the initial prima facie meaning which the words convey in and of themselves without reference to context and background. Unless this is so, the process of construction cannot even begin. When one speaks of natural and ordinary meaning, it must be that the speaker means the conventional prima facie meaning one arrives at just by reading the document, as in ***Malik***. Unless this is so, one could not even begin to construe the document.

18. Thus dictionaries and grammar are not entirely useless in the process of construction because when one reads the words of a document, the dictionary meaning is where the reader starts. The reason for examining the background and context even after one understands the document by relying on the natural and ordinary meaning is to see

whether the natural and ordinary meaning holds at the end of the process of construction or whether it is displaced.

19. For communication to take place, the parties to the exchange must have an agreed lexicon of the words used if they are to have any meaningful dialogue. It would seem that the conventional meaning is the natural and ordinary meaning which ought to be adopted unless there is something which may yield a different meaning after the background and context are taken into account or maintain their conventional meaning.

20. It would seem to the court that in arriving at the proper construction of the document, the court must limit itself by determining whether the rival interpretations put forward by the contending parties are within the semantic range of the word or words in issue, unless it is clear that the parties have their own dictionary or the trade or business in which the contract is made has developed a particular understanding of certain words and expressions. That is whether the words used are capable of bearing the meaning being attributed to them. If the meaning sought to be placed on the words are beyond the accepted or usual semantic range then that is usually a very strong indication that, unless the parties have a very unusual vocabulary, that meaning is not the one intended. As the former President of the Israeli Supreme Court, writing extra judicially, puts it, 'The language of a text sets its interpretive limits: giving it a meaning it cannot support semantically is not interpretive activity but rather the creation of a new text' (Barak, Aharon, ***Purposive Interpretation in Law***, (2005) Princeton University Press, 57).

21. What this means is that one begins with the actual words used by the parties but in light of Lord Hoffman's approach the interpreter is not confined by those words. As Lord Bingham said in ***BCCI*** 'the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties.' However, despite the breadth of Lord Bingham's views, barring a special type of vocabulary used by the parties, it is the court's view that the ultimate

interpretation must fall within the semantic range of the words used. If this is not so, then the court is rewriting the agreement of the parties - a role it cannot have (in the absence of a claim for rectification) since it is not the author of the agreement. Dictionaries and grammars can assist in determining the semantic range of words. To this extent dictionaries and grammars still have a place in spite of the apparent insistence of Lord Hoffman to the contrary.

22. Before leaving this point, I wish to refer to a recent decision of the House of Lords. In ***Chartbrook Ltd v Persimmon House*** [2010] 1 All ER (Comm) 365, Lord Hoffman not only reaffirmed his position in ***Investor Compensation*** but confirmed the suspicion that much of the work of rectification has now been taken over by the task of construction. His Lordship said at paragraph 25:

> *What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.*

23. This passage appears to be giving the court much power to rewrite agreements - a power not easily reconcilable with the understanding that the courts in interpreting contracts give way to party autonomy which means that the parties are at liberty to state the terms governing their contractual relationship. To be fair, Lord Hoffman insists, inspite of the just cited passage, that this was not the case when he said 'that 'correction of mistakes by construction' is not a separate branch of the law, a summary version of an action for rectification' (para. 23). However the question arises: at what point does correction of mistakes cross over and becomes in fact, though not in name, rectification masquerading as construction of the agreement?

24. In interpreting this consent order, the court has to start with the words actually used in the order. The words are the product of

lawyers. They advised their clients. This does not mean that one cannot find errors in language but where lawyers are intimately involved in drafting a contract one does not lightly conclude that something has gone wrong with the language. The court starts with the proposition that the parties intended the words to have their conventional meaning.

25. If the words used have a range of meaning, then the court has to identify the range of meanings which they can bear semantically. The meaning intended, on an objective view, is arrived at by an examination of the context and background. Under the current understanding, the court does not have to identify any ambiguity before it can look at the context and background. The context and background is now part and parcel of the construction of a contract. If ***Mannai*** is correctly decided, the context and background may even permit the court to substitute a date for the one actually used by the parties.

26. Even this exercise of context and background is not without its problems since there can be a dispute over which aspect of the context and background should predominate since, according to Lord Hoffman, background, conceptually includes anything that a reasonable man would consider relevant. This can range from the state of law (statutes, regulations and case law) to the commercial objective that the parties wanted to achieve. The decision of the Court of Appeal in ***Goblin Hill*** is a classic demonstration of the commercial objective determining the proper interpretation. The case of ***The Starsin*** illustrates how problematic choice of background can be. As Lord Bingham observed at page 747:

> *Taking advantage of their knowledge of the way in which the market works two commercial judges—Colman J [at first instance] and Rix LJ in the Court of Appeal—adopted the mercantile view. The majority in the Court of Appeal—Sir Andrew Morritt V-C and Chadwick LJ—in effect gave preponderant effect to the boilerplate clauses on the back of the bill. In my view it would have an adverse effect on international trade if the latter approach prevails.*

27. What this passage shows is that while all four judges (one at first instance and three in the Court of Appeal) who heard the case before it arrived in the House of Lords agreed that context and background were important and should be examined, they differed on which context and which background should predominate. Two favoured the mercantile background and context while two favoured giving the actual text greater preeminence.

28. The point being made is that despite the fact that the Jamaican Court of Appeal have adopted Lord Hoffman's scheme, there is still the possibility of great uncertainty in contractual interpretation especially where the context and background is like a montage. And then having selected which part of the montage is given greater prominence, the interpreter has a further choice of whether he is looking through the eyes of the pedantic lawyer or a reasonable non-lawyer. It was Lord Steyn in ***Mannai*** who said the 'real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation' (page 768).

The meaning of the contract

29. It is appropriate to indicate that in this case, the reasonable man and not the pedantic lawyer has preeminence in the interpretation of this contract. The reasons are that unlike ***Investor Compensation Scheme***, the agreement was not directed at lawyers. The wording of the contract does not suggest any highly complex legal solutions were intended. It was a plain ordinary common sense document that could easily have been drafted by the parties without the intervention of lawyers.

30. The commercial objective of the contract in the instance case is simply this: to enable the Causwells to purchase the shares of the Clackens. In order to preserve the assets of the company so that the value of the shares of EML was not devalued by imprudent disposition of assets, the order had an injunction which prevented EML from disposing of property held by it. This is found in clause 7 of the order. The effect of this order has been definitively laid down by the Court

of Appeal in ***Clacken v Causwell*** SCCA 111 of 2008 (delivered October 2, 2009).

31. In addition, clause 2 of the consent order fixed December 31, 2001 as the date at which the value of the shares is to be determined. The value of the shares was expressly stated to be the market value as at December 31, 2001. Clause 3 provides for a method of arriving at the interest payable on the purchase price or part thereof in the event that payment is not completed by a particular time.

32. It seems plain to the court that while the parties hoped that the contract would be executed within a relatively short time, as part of the context and background will make clear, the ninety day period to complete the valuation was more hope than a realistically obtainable objective, having regard to the objective fact that EML's records were not the best. The state of the records is part of the background and context, which as will be seen has had a decisive impact on the outcome of this case. The court is not overlooking the plain meaning of the words used ('*the valuer is directed to value the Petitioner's shares in the said Company within ninety (90) days of the date of this order, or such other period as may be approved by the Court from time to time*'), but as Arden L.J. indicated in ***Static Control***, plain meaning does not preclude examination of context and background and as Lord Steyn said in ***National Asylum Support Services***, an ambiguity does not have to be established before context and background can be examined. A critical part of the context is that the order made express provision for extension of time for the completion of the valuation. This can only mean that the parties contemplated that there might be delays.

33. The possibility of delay was in the mind of the parties because of clause 2. Clause 2 states that the valuer is to take into account a number of factors including '*valuer shall take into account any assets or funds from the company which have been diverted, utilized or paid by or to any of the shareholders and/or any of the following companies including but not limited to Ranchero Investments Limited, Startech Services Limited, Econocar Rentals Limited and Auto Auctions Limited and/or paid by the Company and/or its subsidiaries*'.

The valuer was also required '*to ascertain the value of the said assets or the amount of the said funds or any amount of which the company is entitled to demand repayment from the shareholders concerned and that any such assets, funds and/or amounts shall be brought into account for purposes of the valuations aforesaid and shall attract interest being the Government of Jamaica treasury bill rates as published by the Bank of Jamaica.*' By any measure, this was going to be an extensive undertaking. But since this process must end at some point the parties set up a dispute resolution mechanism in order to bring finality to the process of valuation. The valuer was expressly empowered to resolve all disputes relative to the valuation and his decision was final.

34. The valuer was given an important role. The valuer was empowered by the parties '*to make such enquiries and examine such records, books and documentation including, but not limited to the affidavits and documentation filed in these proceedings.*' The parties obviously contemplated that the search by the valuer may take him far and wide. If one goes back to clause 2 of the order, it will be seen that the parties even contemplated the possibility that some of EML's assets or funds may have been diverted to companies other than those named in the order. In effect, the parties created their own Sherlock Holmes who was to be imbued with the spirit of Luca Pacioli, the Franciscan Monk who developed the double entry system of accounting. The valuer, part Sherlock Holmes and part Luca Pacioli, was to detect, account and quantify the diversions.

35. If one looks more closely at clause 2, there are even legal questions involved. The valuer is to identify sums that the company would be entitled to demand repayment of!!

36. It would seem to the court that regarding the dispute resolution mechanism, provided the valuer acted in good faith and used his best judgment, after ascertaining all the facts as best he could, his decision could not be challenged. From the terms of clause 2 the parties contemplated that records would be incomplete or even inaccurate. This would explain why the valuer was empowered to

authorised to make enquiries and examine records, books and documentation. There is nothing in order to suggest that the valuer could not make oral enquiries and use the information so gleaned even if such information was not supported by documentation. In other words the valuer was not restricted to the financial records of EML and its subsidiaries. The order even authorised the use of in-house figures of EML for the year ending December 31, 2001, if audited financial statements for that year were unavailable. From the terms of the order, there was no conceptual limit to what or who the valuer might consult in carrying out his duties. What was expected of him, at the very least, was an honest good faith effort to quantify sums 'diverted, utilised or paid' in the manner indicated by the order. If this construction is correct, then there was the obvious possibility that the process may take a long time though the parties hoped otherwise. In effect, the parties may have hoped that the matter was concluded in a short time but having regard to matters known to them or at least, reasonably available to both sides, it cannot be said that exceeding the ninety days even by a substantial time was not within their contemplation.

37. All this hinted at the possibility that the valuer may be faced with incomplete accounting records yet he was required to use his best efforts and where records were lacking, he could use other sources of information and once his efforts were genuine, honest and showed good faith, then he was to come up with a valuation and such valuation would not be vulnerable to a challenge.

38. As the detailed examination of the evidence will show, the contracting parties contracted against the background of incomplete records and inaccurate records. The parties had set a particular date at which the shares were to be valued. The contract made no specific provision for a rise or fall in the value of the shares. What it did provide for was interest payable on the outstanding balance of the purchase price for the shares if the price was not paid within particular times.

39. It also seems to the court that the parties in this case had in mind the learning contained in the case of ***Jones v Sherwood Computers Service Plc*** [1992] 1 W.L.R. 277. In that case there was supposed to

be a sale of shares. The valuation depended on the amount of shares in a particular period. The contract said that the accountants' valuation would be 'conclusive and final and binding for all purposes' in the event that the parties could not agree. As it turned out they could not agree. The matter was referred to the accountants who did the calculation but gave no reasons. The Court of Appeal held that it all came down to what the parties contracted and whether the accountants acted within the terms of the agreement. In that case, the court found that the accountants acted within the terms of the agreement and unless there was evidence that the accountant did not act within the terms of the agreement the conclusion could not be successfully challenged.

40. This approach by the courts to agreements to abide by good faith valuations done in accordance with the instructions given is not new. In 1794 in the case of ***Belchier v Reynolds*** 96 E.R. 1318, the parties agreed to the sale of a copyhold estate which would be valued by one Mr. Harris. One of the original contracting parties died by the time the valuation was done. The heirs of the deceased party tried to get out of the contract on a number of grounds. In dealing with the result of appointing Mr. Harris the valuer, the Master of the Rolls, Sir John Strange held at page 1320:

> *But whatever be the real value is not now to be considered, for the parties made Harris their judge in that point; they thought proper to confide in his judgment, and must abide by it, unless they could have made it plainly appear, that he had been guilty of some gross fraud, or partiality, on this occasion, which indeed they have not attempted to impute. It is like the case of a submission to arbitrators, whose award will never be set aside but on the plainest proof of fraud, or partiality.*

41. The reason for this strong desire to uphold honest good-faith valuations arrived at by a valuer was stated by the learned Master of the Rolls. His Lordship stated at page 1320:

The difference of the valuations of this estate can never be a reason for the Court to set aside the adjudication, for that is the very point submitted to Mr. Harris's judgment; and, were the Court to set aside awards, where no improper partiality, or collusion, appeared, merely on the merits of the case, awards would answer no end; for those very disputes they are designed to prevent.

42. It is important to note that the case before the Master of the Rolls did not indicate that the agreement said that the valuation of Mr. Harris was to be final and conclusive. In other words, it is not vital for those words to be present to bind the parties because the public policy reason upholding valuations makes such words unnecessary. So strong is the public policy reason for insisting that the valuation provided by an agreed valuer be upheld that even without those words it requires cogent evidence of fraud, partiality or acting outside of the given instructions before a valuation is set aside. The public policy reason for the strong rule is that the law permits the parties to set up their 'judge' and give him whatever power and authority they believe that he ought to have and once the 'judge' has acted in accordance with the instructions given and provided a result, the parties, 'for better or worse' are stuck with that result unless they can show by strong evidence that the grounds for setting aside the 'judgment' exist.

43. In 1858 in the case of ***Collier v Mason*** 53 E.R. 613, 615 another Master of the Rolls, Sir John Romilly, had to remind the parties that:

It is not proved that Mr. Englehart did not exercise his judgment and discretion in the best way he could. It may have been improvident as between these parties to enter into a contract to buy and sell property at a price to be fixed by another person, but that cannot avoid the contract. Here the referee has fixed the price, which is said to be evidence of miscarriage, but this Court, upon the principle laid down by Lord

Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract; or even, in the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the Court would refuse to act on the valuation. But I am satisfied that it is not so here ...

44. So there it is. Once the valuer uses his best good faith effort then a successful challenge to his valuation is very difficult.

45. The court has gone at some length regarding the valuer and his role to make the point that the valuer is required only to give his best good faith assessment of the value of the shares. He is not required to be a man of perfection. He is not required to be an auditor. The information available may be poor; it may be inadequate but he is required to do the best he can with what he has and form a judgment of the value of the shares. Like the Israelites, the valuer may be required to make bricks without straw.

46. Paucity of records may affect the speed at which he does his work but paucity of records, without more, can hardly be a reason not to do a valuation. In any event, in the case before this court, the evidence is that a preliminary valuation was produced. The court is not saying it was correct in all respects but the fact that one was produced shows that a valuation of the shares was indeed possible, albeit that it was done under difficult circumstances. The court now turns to the evidence and then the law on frustration and mistake to see if the Clackens have made their case.

The claimant's case

47. Mr. Dwight Clacken and a number of other witnesses provided the locomotion behind the claim to push it up the steep hills of frustration

and mistake. The court says steep hills because the policy of the law is to hold people to bargains lawfully made. The courts do not lightly relieve persons from performing their contract. This attitude of the courts is consistent with personal autonomy given to an individual to make his own law, by way of contract, that is to govern a particular set of circumstances. If parties choose to make their own law then the courts must seek to uphold that agreement if for no other reason than that is the reasonable expectation of the other contracting party who would wish to have the contract performed according to its terms even if that performance becomes more difficult or even onerous since the time the contract was made.

Evidence of Dwight Clacken

48. Mrs. Clacken did not give evidence in this case. There is therefore no other evidence apart from that of Mr. Clacken on the question of what the Clackens thought or believed at the time they entered the contract. It appears that a critical part of the case for the Clackens is the role of EML's auditor. The evidence in relation to him will be examined now. The auditor for EML was the firm of JB Causwell & Co (the firm). In that firm was a Mr. Basil Cunningham who was the human actor that did the auditing of accounts of the EML Group from 1978. The principal JB Causwell, father of the respondents, died but Mr. Cunningham continued the firm under its original name. Unfortunately, Mr. Basil Cunningham has been disciplined by his professional body. This came about because the Clackens complained to the Public Accountancy Board ('PAB') about Mr. Cunningham's work in relation to the 2001 EML accounts. The ensuing investigation by the relevant accounting body found that his work on EML's accounts amounted to gross negligence.

49. The decision of the PAB was confirmed by the Court of Appeal. This outcome provided the grist for the Clacken mill to attempt to grind out the result that there was mutual mistake in that both parties to the consent order thought that reliable financial statements for the year ending December 31, 2001 existed, or at the very least reliable records existed from which the true financial position of EML could be established.

50. The main thrust of the examination in chief of Mr. Clacken was to show that while he was in charge of EML even if audited financial statements were not done, he kept accurate and reliable records that would facilitate the production of reliable financial statements. However, since his removal as managing director, the management of the company has been less than professional. Mr. Dwight Clacken was removed from his post as managing director of EML in January 2002. He says that he has not been invited to any shareholders' meeting; he has not seen any audited financial statements or even in-house statements since 2001; he is unaware of the current financial status of the company and that he has cooperated fully with the valuer in order to give effect to the valuation provision of the consent order.

51. Mr Clacken stated in his evidence in chief (viva voce amplification) that the firm collected records, did the accounting work and then took back the financial statements for signature. He gave the impression that he was not too involved with what the firm was doing when the accounting records were prepared. In effect, he was saying that he had nothing to do with any inaccurate financial statements produced in respect of EML or its subsidiaries.

52. Mr. Vassell QC responded to this evidence by embarking on a pincer like movement, closing in on Mr Clacken from two directions. The first was to demonstrate that given Mr. Clacken's knowledge of how the records were kept and what Mr. Cunningham had actually done in the past, a reasonable person, in the position of both parties to the contract would not be surprised that the work produced by Mr. Cunningham would be found wanting. This knowledge was known to both parties and not peculiar to Mr. Clacken and so it falls within Lord Hoffman's prescription of knowledge and assumptions available to both parties at the time of the contract. The second part of the pincer concerned the Clacken's accounting evidence produced before the court. This second aspect will be dealt with later.

Dealing with companies outside of the EML group

53. Mr. Vassell cross examined Mr. Clacken on the financial statements of WCL and EML. This is what was revealed. For the 2001 financial statements of WCL there was listed the sum of $3,231,018 as the

value of the inventory for the year 2000. According to Mr. Clacken the true figure was $20m. Mr. Clacken said that this sum ($3,231,018) did not even represent one month's inventory and it was therefore false. It is common ground that Mr. Clacken did not sign the 2000 and 2001 financial statements for WCL. He says that he failed to sign because he did not agree they were accurate.

54. Mr. Clacken's attention was directed to the financial statements for the years 1998 and 1999 of WCL. These statements showed inventory of over $5.2m and $5.5m respectively. He and one of the Causwells signed both financial statements. Under further cross examination he swore that at the time he signed the statements the inventory was approximately $20m. In other words, the 1998 and 1999 financial statements had a very understated figure for the inventory for both years. If the records were as carefully kept as was being suggested what could account for signing financial statements that undervalued the size of the inventory by $15m?

55. Mr. Clacken's explanation for signing the 1998 and 1999 financial statements for WCL when he had the 'correct' information about the inventory was that he trusted Mr. Cunningham. He thought that financial statements were genuine.

56. Mr. Clacken admitted further that his complaint to the PAB against Mr. Cunningham was in relation to EML's financial statements for the year 2001 alone. What is clear from the evidence is that since WCL was a subsidiary of EML then obviously any incorrect assessment of WCL's assets would necessarily have an impact on the value of EML's shares. If follows that if the inventory for WCL was incorrect in 1998 and 1999 to the extent indicated then clearly any correction of these figures would have a severe impact on the value of the shares of EML.

57. There is another important aspect of the evidence on the point of reliability of EML's records. In the agreed bundle of documents there is a letter dated December 22, 2002 from Mr. Dwight Clacken to KPMG Peat Marwick (see volume 1 pp. 84/85). Mr. Clacken explains that the '2000 financial statements for Windshield Centre Ltd and EML were not signed by me mainly because of my objection to stock

figures which were incorrect and an $18m ... book transaction with Econocar Rentals Ltd. which was not reversed as agreed by the auditor, Mr. B. Cunningham of J.B. Causwell & Co. in a directors' meeting'. It turned out after prolonged cross examination by Mr. Vassell that there appeared to be a 'loan' to ECR by EML. This 'loan' was supposed to be 'reversed' at some point and it was not. It seems that this was the loan being spoken of in the cross examination. How does one enter a book transaction of $18m which was to be reversed? From the evidence this transaction was supposed to have taken place years before 2001. This way of keeping records was an objective fact known to Mr. Clacken before the May 29 order. The point is not whether or not there was a loan but rather, the almost loose way in which a this transaction was recorded and then to be reversed. This is part of the matrix of fact known to Mr. Clacken. This is part of the background against which the order is to be understood. If this book transaction took place, it would be known to Mr. Michael Causwell Sr. as well since he is the owner of ECR. Thus both sides of the contract would have known of Mr. Cunningham's lack of detail in preparing the accounting records which in turn would mean that there was the real possibility that the records of EML were inaccurate. In other words, the problems with EML's 2001 financial statements would not have surprised either of the contracting parties.

58. The point being made is not in relation to the probity of the parties but rather that Mr. Clacken had every objective reason to know that the financial statements of EML would not be reliable. Equally, he had objective reason to know that the financial statements of WCL were unreliable with their consequential impact on the reliability of EML's statement. All this would have an impact on the value of EML's shares. As will be shown below, the reliability of financial statements was one of the sore points between the shareholders. Even at this early stage, unless the court has gravely misunderstood what mistake means in contract law, it is difficult to see how it can realistically be said that any of the parties here were labouring under a mistake of any variety whether at common law or in equity, that they thought that reliable records in relation to EML existed or if not in existence, the source documents were available which would have made preparation of accurate financial records possible within the ninety days.

59. The PAB's finding against Mr. Cunningham in relation to the EML 2001 accounts was not new information. It has been established that the financial statements of WCL for the years 1998 and 1999 were understate by at least $15m. It has also been established that the financial statements of WCL for the year 2001 understated the inventory. It has been established that the 'book transaction' between EML and ECR was cause for concern. In all of these goings on Mr. Clacken was unlikely to have been ignorant of what was happening. The court has great difficulty accepting that a managing director of the parent company of subsidiary of the parent company would fail to recognise a grossly understated inventory in a balance sheet.

60. Mr. Clacken was directed to a number of paragraphs in the petition. The paragraphs to which Mr. Clacken referred spoke explicitly to meetings of directors of EML at which the Clackens and the Causwells were present. After he was directed to the paragraphs he was asked, 'As of much of 2001 there were substantial disagreements between the parties regarding the reliability of accounts of EML?' to which he said 'I would agree with this'. In other words, this is background information available or reasonably available (per Lord Hoffman) to both parties which would have been part of the matrix of fact when the consent order was agreed in May 2002.

61. Mr. Vassell did not stop there. He successfully extracted a vital admission from Mr. Clacken. This is how it arose. Mr. Clacken was directed to paragraph 7 of the particulars of claim, specifically, the following words:

> *In particular, the parties understood and believed that credible and reliable financial statements in relation to the Company [EML] for the financial year ending December 2001 existed or could be prepared within a reasonable time.*

62. Mr. Clacken was then asked, whether this pleading was true. He admitted that it would not be correct. Mr. Clacken went further and admitted that his answer would be the same right up to the consent

order of Anderson J. What this meant is that Mr. Clacken was admitting that it was not true to say that the parties understood or believed that credible and reliable financial statements for EML (year 2001) existed or could be prepared within a reasonable time. This is the matrix of fact that would have been reasonably available to both parties. This is yet another reason why the ninety day period was not realistic and why the parties had the power to extend time included in the order. Needless to say, the full extent of the problems with records would not have been appreciated by Anderson J. His Lordship was not conducting a trial but presided over a hearing where the parties were trying to resolve the matter without a full blown trial.

63. Mr. Clacken, under further intense cross examination, accepted that he also had a problem with EML's 2000 accounts as well. So much so that he refused to sign them. It is difficult to exaggerate the significance of this evidence. Here it is that the managing director of a company is refusing to sign financial statements provided by the company's external auditor. This is indeed telling evidence that Mr. Clacken, at the very least, had serious reservations about the reliability of EML's financial records.

64. Under further cross examination Mr. Clacken said, 'When consent order presented to me in May 2002 I accept that I thought that there were substantial errors in the account in at least two respects, that is the current liabilities and the stock figures.' Mr. Clacken further stated that 'I entered consent order in 2002 knowing of these errors but expected them to be corrected in the course of valuation.'

65. The court needs to put these answers in perspective. It has been noted that Mr. Cunningham was disciplined by the PAB because they found out that his work in respect of the EML accounts were less than satisfactory. But these proceedings commenced in 2006, based on a complaint filed by the Clackens in 2005. However, the findings of the PAB, in the respectful view of this court, have nothing at all to do with issues before this court, save that it confirmed Mr. Cunningham's less than careful approach to the preparation of financial records, because Mr. Clacken knew from 2000 that the records for EML appeared to

have been less than reliable. In addition Mr. Clacken knew that WCL's financial statements for 1998, 1999, and 2000 misstated important information. In short, the hearing by the PAB did not tell Mr. Clacken anything that he did not already know. This is not a case where the Clackens and the Causwells entered into the transactions honestly believing that Mr. Cunningham's work was accurate. Both sides knew that it was not.

66. In spite of this background knowledge, Mr. Clacken stated in evidence that he believed that under the consent order the matter could be resolved within the 90 days set out in the original order. The relentless cross examination revealed that Mr. Clacken was aware that the order of Anderson J. made provision for time to be extended and time was in fact extended by the Supreme Court and the Court of Appeal and in respect of the latter court, this was done in 2008.

67. Mr. Clacken also agreed that over 90% of EML's assets were real estate. He even agreed that the real estate was actually valued in 2004. The purpose of this cross examination was directed at the issue of whether it would now be possible to arrive at 2001 valuations given the lapse of time.

68. At this point in the cross examination, Mr. Vassell elicited this promising answer, 'The problem that led to the delay was in terms of the diversion.' The importance of this answer is this. In Anderson J's order, the valuer in determining the value of the shares owned by the Clackens was to '*shall take into account any assets or funds from the company which have been diverted, utilized or paid by or to any of the shareholders and/or any of the following companies including but not limited to Ranchero Investments Limited, Startech Services Limited, Econocar Rentals Limited and Auto Auctions Limited and/or paid by the Company and/or its subsidiaries, and for this purpose the valuer is authorised to make such enquiries and examine such records, books and documentation including*'.

69. Mr. Clacken eventually accepted that there were sufficient records available to determine most of the diversions. Now this is an opinion expressed by Mr. Clacken on an accounting matter. The valuer did

appear to be of the same opinion. The agreed bundle showed that a preliminary list of diversions was prepared by the valuer in 2004 to which the parties were to respond (see volume 1 pp. 287 - 288).

70. What Mr. Vassell has done through his cross examination was to demonstrate that, both parties assumed that the contract could be performed because (a) most of EML's assets were real estate (over 90% of its assets); (b) the sticking point would be the issue of the diversions which both parties accepted could be resolved because sufficient documentation was available to assist the valuer. However in the event that it there were problems of documentation the valuer was empowered to seek information from just about every legitimate source and make a determination of the sums involved.

71. Mr. Clacken agrees that he met with one Mr. Cole regarding a number of cheques (diversions). Mr. Cole was part of the team of the valuer. What is clear from Mr. Clacken's evidence is that after Mr. Cole showed him a number of cheques dating between 1995 - 2001, Mr. Clacken was not able to shed any light on them because there were no supporting documents to explain what they were for. The importance of this evidence is that it will be recalled that Mr. Clacken had said that EML's transactions were properly recorded and things went well until 1997. The cheques here covered as well the period 1995 - 1997, part of the period when things went well. In the absence of supporting documents, it would seem that at least the period 1995 - 1997, the recording was not what it should be. This would be inconsistent with Mr. Clacken's assertion that proper records were kept.

72. The valuer would have been required to examine all these cheques and make such use of them in his task as he was able. The absence of supporting records for these cheques meant that the valuer may have been required to track down the payees in order to determine what the payments were for. In this way he would be able to determine whether they fell within the diversions of clause 2 of the order. This is yet another reason why the ninety day period was not realistic and why the parties, given the knowledge that they actually had, really regarded the ninety days as a hope. Now that the matter has come up

for examination in light of all this the court doubts very seriously whether the valuer's work would have been completed in under a year.

73. As the cross examination went on it became apparent why the diversions may not have much supporting documentation. In one case there was a cheque for US$13,750.00 paid to the Florida Air Academy by EML for the son of Mr. Clacken. The explanation from Mr. Clacken was that this sum paid by EML would be debited against his account and salary from the company. To use plain language, it would be a loan from EML to him which would be recovered from the salary paid to him by EML. If this was indicative of how most or some of the diversions came about it is not surprising that supporting documentation was hard to find.

74. This issue of the diversions was pursued by Mr. Vassell. Eventually, Mr. Clacken said that in respect of a number of diversions raised by the Causwells, he explained them all to Mr. Cole who appeared to be satisfied. Mr. Clacken even said that some of the payments were legitimate and some were diversions. Here, Mr. Clacken was drawing the distinction between lawful and unlawful payments. The value of this evidence is that Mr. Clacken knew that there were diversions which were not properly supported by documentary evidence and this would have been part of the background against which the parties contracted in May 2002. This evidence was directed at undermining the claimants' case that there was mutual mistake. This cross examination has effectively demonstrated that Mr. Clacken was not labouring under any mistake at the time of the contract.

75. Despite this and other revelations, Mr. Clacken insisted that he only signed cheques for legitimate expenses properly incurred by EML and the supporting records were there up to the time his stint as managing director ended. The implication of this evidence was that the new managers had either mislaid, overlooked, or at worse, hid the relevant supporting documentation for the payments made from EML's accounts.

76. After Mr. Clacken gave this expansive explanation, then in the very next breadth he said that when he used the expression 'diversions' he

meant improper payments. The possible implications of this evidence are that (a) there may not be any documentation or (b) if documents exist then they may not have recorded the details of an improper payment.

77. Mr. Vassell next turned to an important phase of the cross examination that was directed at showing that Mr. Clacken, as early as 2004, had made a decision to set aside the consent order. In fact he not only made a decision but it was followed up with an attempt to set aside the court order. These are the admissions on Mr. Clacken's evidence. This date is important because it ties in with the valuation of real estate done in 2004. The valuation showed sharp increases in value of real estate. Also it shows that, Mr. Clacken had made a decision not to make the valuation process work in the way intended by the contract. The upshot being that, in the view of Mr. Vassell, a party cannot decide to breach a contract take steps to do so and then claim that the contract is frustrated.

78. Mr. Clacken stated that he met with Mr. Cole twice and after that he met with a Mr. Heron who had replaced Mr. Cole on the valuer's team. Mr. Clacken denied that he did not intend to comply with court order but the following answers given in cross examination are inconsistent with that assertion. He stated that he made the decision to set aside the consent order before Mr. Heron even contacted him. He said Mr. Heron called him in 2006 but he decided against meeting with Mr. Heron on the advice of his attorney.

79. Mr. Clacken was wilting under the cross examination. Mr. Clacken having been entangled in and by his previous testimony could do nothing but admit the following, which is for all practical purposes, the Causwell's case. First, it is fair to say that 90% of the assets of EML were real estate. Second, the only remaining issue was the diversions. Third, he decided not to meet with Mr. Heron but to set aside the consent order and seek the winding up of the company. Fourth, the value of the real estate had increased substantially in the delay period and the deal was no longer fair. Fifth, it was decided in 2002 to separate and go their separate ways. Sixth, the date of valuation of the shares was set at December 31, 2001. Seventh, he would have

expected to be paid the full value of the shares as at December 31, 2001 even if the value of the share had fallen below the value as of that valuation date. Eighth, his position is that the value of real estate has gone up, the Jamaican dollar has devalued and so it is no longer fair to hold him to the contract.

80. So there it is. Mr. Clacken is admitting that it is not that the contract cannot be performed but rather he thinks it is rather unfair to hold him to the December 31 2001 value when the value of the shares has gone up because of the increase in assets held by the EML Group.

81. In support of his case, Mr. Clacken called Mr. Rodney Campbell, a chartered accountant and partner in the valuer's firm. The court now turns to his evidence.

The accounting evidence: the evidence of Mr. Raymond Campbell

82. Mr. Campbell's position is that the valuer made a decision not to conclude the valuation it had undertaken because of (a) non-payment of sums outstanding and (b) concerns about the credibility of the information presented.

83. The main burden of his evidence was to explain why KPMG Peat Marwick did not or could not complete the valuation of EML's shares. He expressed the view that the absence of the external auditor's working papers can impact on another accountant's ability to prepare credible and reliable financial statements in that the absence of working papers makes the process more difficult. The passage of time only serves to compound the problem, he added. This in turn would adversely affect the valuer's effort to prepare a credible and reliable valuation. Any valuation report would reflect poorly on the credibility of the valuation. He also said the extent of the impact would depend on the errors made.

84. When Mr. Campbell was directed to a report done by Lee, Clarke Chang, his comment was that the report was outside the scope of work of KPMG Peat Marwick. Mr. Campbell then referred to the engagement letter that was entered into for the purposes of valuing the shares. From that letter he said a number of things were missing

in terms of the records available and that information was simply not available in the returned cheques.

85. The court must say, with utmost and profound respect to counsel, that it did not find much of Mr. Campbell's evidence helpful in this particular case. This was not the fault of Mr. Campbell. The evidence was not particularly helpful because he did not have intimate knowledge of the work in this particular case. He functioned at a supervisory level and even then, he did not supervise this particular job. He was therefore left to speak of generalities often time being referred to correspondence not written by him or at his behest.

86. What he did confirm in cross examination is that it was not impossible to do the valuation; it was simply a very difficult process having regard to the gaps in the records of EML. He also said that the less reliable is the underlying information to do the valuation the greater likelihood that the valuer would qualify his report. In other words, the valuer could still get the job done but he would indicate in the report the basis of his valuation and any qualification, if necessary. The valuer would simply have to make the bricks from the straw and mud he received.

87. Additionally, there is the objective evidence that a draft valuation of the shares was in fact done. There was also a list of identified diversions (see volume 1 pp 241-280; 287/288 of the agreed bundle of documents). If the task was so impossible then obviously the work of whomever prepared these drafts is perhaps the accounting equivalent of turning water into wine - an accounting miracle if ever there was one.

The claimants' accounting evidence: the evidence of Paul Saulter

88. This was the second expert called by the Clackens. He describes himself as a retired accountant. He was a fellow of the Institute of Chartered Accountants of Jamaica.

89. After he was sworn, Mr. Vassell took an objection to his evidence. He submitted that (a) the report of Mr. Saulter dated August 18, 2006, was a commentary on a report of a Mr. Ogle when Mr. Ogle's report is

not before the court; (b) the addendum (if that is what it is) of August 29, 2006, is connected to the August 18, 2006, report and this would suggest that it too ought not to be admitted into evidence.

90. Mr. Hylton submitted that at the pre trial review, after a contested hearing, the court had ruled that the affidavit of Mr. Saulter should be admitted into evidence at the trial. The affidavit includes all the exhibits. The report and addendum are exhibits, therefore they are admissible. Mr. Hylton also submitted that there has been no appeal from that order. Mr. Hylton's second point was that Mr. Saulter's affidavit was filed in support of an application to set aside the consent order which is the subject of this trial. The Causwell's applied to strike out the affidavit on the same grounds as that advanced now. Pusey J. ruled that the reports were admissible and relevant. This order of Pusey J. was appealed. The Court of Appeal upheld Pusey J.'s order.

91. Mr. Hylton also submitted that Mr. Saulter's report was relevant because it dealt with the question of the reliability of the financial statements which is the foundation for a valuation. Learned Queen's Counsel also submitted that the first report deals with the 2000 financial statements while the addendum deals with the 2001 financial statements.

92. What this shows is the danger of courts other than the trial court, without the benefit of full evidence tested by cross examination, where there is to be a pending trial deciding questions of admissibility regarding a hotly contested item of evidence. It is humbly submitted that with the best will in the world, courts other than the trial court are not best suited to determine admissibility. It is well known that often times strategies change during the course of a trial and what was considered relevant before trial becomes of no moment. At best, all that courts other than the trial court can really do is to leave admissibility to be determined at trial where there is a sharp dispute between the parties on the admissibility of evidence. When any court other than the trial court makes a determination that a particular item of evidence is admissible, it necessarily is making a number of assumptions that do not necessarily hold true when the actual trial

starts. It assumes, that the proponent of the evidence will be able to establish the relevance of the evidence in light of the issues to be decided by trial court.

93. On a more technical basis, it is the view of this court that the decision of the Court of Appeal on this issue of admissibility is not binding for the reason that the case before that court was Claim No. E 505 of 2001. The claim before me is Claim No. 2008 HCV 0834. It means that the issue of admissibility is not res judicata and therefore it is open to me to consider the question of admissibility.

94. It is difficult to see how Mr. Saulter's opinion on Mr. Ogle's report could be admissible in circumstances where Mr. Ogle's report is not part of the current trial and has no immediate bearing on the issues that are to be determined.

95. I ruled, on December 17, 2009, that the only parts of Mr. Saulter's report and addendum that are admissible are:

    a. in respect of the report of August 18, 2006, from the date down to the word 'information';

    b. paragraph 2;

    c. paragraph 3 - from 'I have examined' and rest of paragraph 3;

    d. the addendum dated August 29, 2006;

96. The letter from Mr. Saulter to Mr. Walter Scott is admissible. The rest of the report of August 18, 2006, is inadmissible because it is largely a commentary on Mr. Ogle's report.

97. At the end of his evidence I did not get from Mr. Saulter that in this particular case, it was not possible to conduct a valuation of the shares. He made a distinction between a valuer and an auditor. He said that a valuer acts on the instructions he receives. For example, if the valuer forms the view that a particular figure is wrong and brings it to the attention of the parties and they say, use it nonetheless, the

valuer has no choice but to act on his instructions. On the other hand, the auditor examines accounts presented to him by the management of the company and simply expresses an opinion on them. He also stated that an auditor does not prepare accounts; that is management's function. The auditor does not correct inaccuracies in accounts; it is the management which does this.

The evidence of Mr. David Delisser

98. Mr. Delisser has 47 years experience as a realtor. His role in the case was to show the dramatic increase in value of the properties held by EML. This was the foundation for the claim that performing the contract now would result in something quite different from what was contemplated by the parties.

99. Miss Hyacinth Lightbourne who cross examined Mr. Delisser unearthed the fact that Mr. Delisser did not actually inspect any of the properties about which he testified. He also said that he did not ask the Causwells for permission to inspect the properties. He also admitted, "I cannot give accurate opinion of value because I did not inspect the properties." This evidence speaks for itself and needs no analysis from the court.

The defendants' case

100. Two witnesses were called on behalf of the defendants. These were Mr. Michael Causwell Sr. and Jr. The court will examine the evidence of Mr. Causwell Sr. first.

Evidence of Mr. Michael Causwell Sr.

101. This evidence was simple, uncomplicated and straightforward. In essence Mr. Causwell was saying that during period 1978 - 2001 although he was a shareholder of EML, the company was run by his brother, Mr. Richard Causwell and the Clackens. Mr. Dwight Clacken and his wife mainly did the accounts and record keeping while Mr. Richard Causwell did the 'on the ground' work of the company. As such, Mr. Causwell Sr., was not involved in the operations of EML to the extent that he would have been in a position to question the reliability of Mr. Cunningham's accounting work.

102. The impression that the court formed was not that the accuracy of Mr. Cunningham's work could never be challenged but rather that he had no reason to question his work because most if not all the information Mr. Cunningham received would have come from Mr. Dwight Clacken and his wife. Mrs. Clacken was responsible for documentation and records. From his perspective, he was not aware of any problems with Mr. Cunningham's work over the year and so he would have no reason to have any problems with it now given that Mr. Cunningham was supposed to be provided with the information by the Clackens.

103. Mr. Hylton sought to take Mr. Causwell Sr. to task about his view that the accounts would be used 'for better or worse' (see para. 21 of witness statement). In particular, Mr. Hylton sought to challenge the view that he had no problems with the accounts of EML. He was directed to various paragraphs of the winding up petition filed. He eventually agreed that he had concerns over the reliability of the accounts but that those concerns were minor.

104. Mr. Causwell Sr. after being referred to other documents agreed that the Clackens were expressing grave concerns over the reliability of the accounts.

105. Pausing at this point, the court observes that the cross examination has confirmed what was said in relation to Mr. Clacken's evidence, namely, that both sides knew from outset that there were problems with Mr. Cunningham's work, or at least, both sides had problems with his work.

106. Mr. Causwell Sr. also said that he thought that the valuation could be done in ninety days. Undoubtedly, Mr. Hylton was seeking to press home his point about frustration by highlighting that even the defendants thought ninety days were sufficient which means that any time significantly beyond that means that the delay became abnormal. The court need not repeat what was said earlier about the ninety day period. The court's position is the same. In any event, Anglo-Jamaican law subscribes to the objective theory of contractual interpretation and so the subjective view of the parties is neither here nor there.

107. What is clear is that Mr. Causwell Sr. sought to minimize his problems with Mr. Cunningham's work but the evidence is overwhelming that both sides were dissatisfied. Also both sides knew of the diversions. Indeed one of the intriguing things about this case is that neither side explored the accounting records of EML with the opposing witnesses in order to determine how these diversions were actually recorded, if they were recorded at all. It will also be recalled that Mr. Clacken had asserted and this was not denied by Mr. Causwell Sr. that at some time in the past there was a book transaction between EML and ECR (Mr. Causwell Sr.'s company). In effect, Mr. Causwell Sr. accepted the evidence of the accounting irregularity regarding EML.

Evidence of Mr. Michael Causwell Jr.

108. This witness joined the company in 2002. The value of his testimony is that he identified himself as the person who dealt with the valuer on behalf of his father and uncle, Mr. Richard Causwell. In his witness statement, Mr. Michael Causwell Jr. sought to lay the blame for any delay squarely at the feet of the valuer and in particular Mr. Cole. Having not heard from Mr. Cole the court is loath to make any adverse findings against him.

109. Cross examination revealed that when Mr. Michael Causwell said that he sent all information requested by the valuer, some of what he sent was not as helpful as he believed. For example, he said that he sent cheques in support of the first two defendants' claim of diversions. The supporting records that would have shown what the cheques were for were not sent. However, he admitted that these cheques without supporting documentation would not indicate the purpose for which the cheques were drawn. The purpose for the cheques would have to be found, he agreed, in the requisition, voucher or cashbook. These were not physically handed over to the valuer.

110. What he did agree is that Mr. Cole was constantly complaining of not getting all the information needed. Mr. Causwell even went as far as accusing Mr. Cole of being biased and not impartial. A careful reading of the examination in chief and cross examination of Mr.

Michael Causwell Jr.'s evidence does not reveal any evidential basis for such serious allegations.

111. If anything, this evidence confirms the court's conclusion that a reasonable man placed as the parties were with the knowledge of the poor state of some of EML's records along with Mr. Cunningham's less than reliable accounting would have known that the valuation could not have been completed in ninety days.

112. It is equally evident to the court that the valuer underestimated the magnitude of the task. Let me make it clear that the court is not saying that the valuer was incompetent - far from it. What the court is saying is that it was the valuer who assumed that records would have been readily available. The valuer had no objective reason to think otherwise when they undertook the assignment. It is obvious that it was not until the valuer got well into the project that even he realised the magnitude of the job at hand (see para. 6 of letter of engagement dated August 21, 2002 in volume 1 pp. 53 - 58 of agreed bundle). The valuer in his letter of engagement indicated that he would rely on 'audited financial statements, draft financial statements and unaudited management accounts of the Company and related information' (see para. 4.4 of letter of engagement).

113. In a letter dated July 10, 2003, the valuer is writing to DunnCox complaining that 'the completions of our valuation report has been severely constrained by the slow response to our requests' by all concerned parties, Indeed the valuer in that letter spoke of an increase in fees to cover additional costs incurred in completing the valuation. The valuer chronicles email and telephone calls of June 10, 12, 20, 23, 25, 27 and July 2 and 3, 2003. All these efforts dedicated to seeking information from the Causwells.

114. The court has looked at a number of letters (written by KPMG Peat Marwick) to various parties. The letters are revealing. In a letter of April 23, 2003 (vol. 1 pp. 104 - 105 of agreed bundle), to DunnCox the valuer is complaining that a number of items was still outstanding. These were:

e. audited consolidated financial returns of EML and its subsidiaries for the year ended December 31, 1996;

f. details of any unrecorded assets or liabilities of EML, WCL or RHL;

g. lack of further information that would assist in tracking payments to SSL

115. By letter dated November 5, 2003 (vol. 1 pp. 133 - 138 of agreed bundle), KPMG Peat Marwick wrote again to DunnCox. The letter indicated that:

h. audited statements for EML, WCL and RHL for the year ended December 31, 2001 were still unavailable;

i. the valuer had not received any information regarding money paid by EML, RHL, AAL, ECR and SSL to directors of EML.

116. Why would the valuer be writing these letters if he had all the relevant information as asserted by Mr. Michael Causwell Jr? The consistent, if not constant, complaint of the valuer was lack of documentation, lack of records, absence of relevant information. In the absence of any evidence of lack of professionalism or lack of impartiality, the court is minded, on a balance of probability, to conclude that the valuer was indeed labouring under a significant disability, namely absent or incomplete documentation. It will be recalled that the valuer was not only asked to determine the diversions but also to determine diversions which EML might be able to claim repayment. This would necessarily involve not just looking at EML's records but also possibly third party records to see the true nature of the transaction and then determine whether the transaction was one which EML could seek repayment of the money.

117. The 'backing and forthing' between the valuer on the one hand and the Causwells and Clackens on the other hand, on the totality of the evidence, is more consistent with poor, inadequate, missing or incomplete records than with any other explanation. I therefore do

not accept Mr. Michael Causwell's characterization of the conduct of the valuer. If reference is made to the letter of engagement one will see that the valuer made clear what documents he would be using. It is too plain to admit of any contradiction that had the documents listed in the engagement letter been reliable and readily available the whole exercise could have gone a substantial way by late 2002. In other words, documenting the accounts of EML was a problem in and of itself apart from the issue of diversions. When diversions are added and the tracing involved is taken into account no reasonable person would conclude that the valuer's task was going to be an easy one. It should come as no surprise that the valuer thought of increasing his fees, once the true magnitude of the job dawned slowly but surely, like the rising winter sun, upon the valuer.

118. It is inconceivable that the shareholders who were also directors of EML, WCL and RHL were unaware of how inadequate the records were. These were all on-going enterprises. Until shown otherwise the court has to assume that they were operating within the law. This would include paying taxes, making consumption tax returns, paying property taxes, meeting expenses and receiving revenue. Surely, the state of the records must have come to light. What the letters have confirmed is that the contracting parties knew exactly what they were getting into regarding incomplete records.

119. I now turn to the various legal doctrines.

The doctrine of frustration

120. Like the doctrine of mistake, the doctrine of frustration is designed to relieve a party from performance of his obligations under a contract. Unlike, mistake, the doctrine of frustration points to a post agreement event that is said to make performance of the contract radically different from what was contemplated at the time the agreement was concluded.

121. In comparison to the number of cases in which frustration is relied on, there are not many reported cases where this doctrine has been successfully pleaded, and such cases as they are do suggest that it is not easily made out. Mere difficulty of performance is not

enough. An example of how difficult the doctrine is to make out is found in the case of ***Davies Contractors v Fareham Urban UDC*** [1956] A.C. 696 where the contractors had a contract to build houses within an eight month period. The contract took twenty two months instead. The result was that the cost of construction exceeded the contract price of the houses. The contractors claimed for an increase above the contracted price on the basis that the contract was frustrated. The contractors sought to argue that when they took the contract it was on the basis that sufficient supplies of labour would be available but that turned out not to be the case.

122. Viscount Simonds with his usual characteristic bluntness dealt trenchantly with the contractor's position 'not because it has any intrinsic merit but because it has acquired from the course of the proceedings a certain specious validity' (page 714). It was rejected out of hand. His Lordship added that regardless of the juridical basis for the doctrine he was firmly of the view that 'the doctrine has been, and must be, kept within very narrow limits' (page 715).

123. Lord Radcliffe took an equally restrictive view of the doctrine of frustration. His Lordship said at pages 728 – 729:

> *So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.*
>
> *There is, however, no uncertainty as to the materials upon which the court must proceed. "The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred" (Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd., per Lord Wright). In*

the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

124. From Lord Radcliffe's judgment we get the judicial methodology. The court must look at the terms of the contract and determine precisely what the parties agreed to do. Then the court looks at what is said to be the frustrating event and determine whether what has occurred made performance of the contract, not merely difficult or more onerous, but substantially different from what was contemplated by the parties.

125. That the doctrine is restrictive can be further illustrated by the case of ***National Carriers Ltd v Panalpina (Northern) Ltd*** [1981] 2 W.L.R. 45 where as late as 1981, there was some doubt over whether the doctrine applied to leases. The House of Lords held that it did. In that case the facts were that the defendants leased a warehouse with only one access road. After the lease was executed the local authority closed the access road because of the derelict condition of another property. The road was reopened twenty months later. The claimant sought to recover unpaid rent. The defendant submitted that the lease was frustrated by reason of the closure. The House rejected this submission.

126. For a more recent flavour of what is required for the doctrine to operate, there is the case of ***E Johnson & Co (Barbados) Ltd v NSR Ltd*** (1996) 49 WIR 27. In that case E Johnson agreed to sell land to NSR Ltd. The purchaser paid the deposit with completion set for a date in the future. After the date of contract and before the

date of completion, a notice was published indicating that the Crown was likely to acquire the land compulsorily. The purchaser chose to rescind the contract by reason of the notice. It grounded its action in the doctrine of frustration. The Judicial Committee of the Privy Council held that the notice was not a frustrating event.

127. One of the difficulties in the instant case is that the Clackens are not relying on a single frustrating event. They are relying on lapse of time or more accurately delay in executing the contract. The court bears in mind Lord Roskill's excellent statement of the dilemma in ***Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No. 2)*** [1982] A.C. 724 where his Lordship said at page 752:

> *Secondly, in some cases where it is claimed that frustration has occurred by reason of the happening of a particular event, it is possible to determine at once whether or not the doctrine can be legitimately invoked. But in others, where the effect of that event is to cause delay in the performance of contractual obligations, it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations "radically different," to borrow Lord Radcliffe's phrase, from that which was undertaken by the contract. But, as has often been said, business men must not be required to await events too long. They are entitled to know where they stand. Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur. Often it will be a question of degree whether the effect of delay suffered, and likely to be suffered, will be such as to bring about frustration of the particular adventure in question. Where*

questions of degree are involved, opinions may and often legitimately do differ. Quot homines, tot sententiae. The required informed judgment must be that of the tribunal of fact to whom the issue has been referred. That tribunal, properly informed as to the relevant law, must form its own view of the effect of that delay and answer the critical question accordingly.

128. Lord Roskill warned that the outcome in any given case is not arrived by comparison of the case for decision with previous cases. His Lordship wisely said at page 752:

> *It should therefore be unnecessary in future cases, where issues of frustration of contracts arise, to search back among the many earlier decisions in this branch of the law when the doctrine was in its comparative infancy. The question in these cases is not whether one case resembles another, but whether applying Lord Radcliffe's enunciation of the doctrine, the facts of the particular case under consideration do or do not justify the invocation of the doctrine, always remembering that the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.*

129. Under the agreement the Causwells were to purchase the shares of the Clackens once they were valued by the valuer. The Clackens for their part were to sell the shares to the Causwells once they were valued by the valuer. The parties agreed to rely on the valuation of a third party. Once the valuation was done then the payment schedule would be activated. There is no evidence to suggest that the Causwells are unable to purchase the Clacken's shares and neither is there any evidence that the Clackens are unable to perform the transfer of the shares.

130. Mr. Hylton Q.C. was careful to make the point that his submission does not rest on the simplistic view of whether or not it is physically possible to transfer the actual shares. Of course that is possible. All that is necessary is for the transfer to be properly executed. So in that sense the contract can be performed. The court entirely agrees with this. What is required of the court is a determination, as Lord Roskill said, of whether the delay in the past and possibly of the future makes performance of the contract something very different.

131. As far as the work of the valuer is concerned none of the expert testimony presented has established that a valuation is impossible. All the valuer has said is that the available records are poor. But that was known by the contracting parties. The evidence of Mr. Clacken makes it plain that there were serious differences between the directors concerning the reliability of the records and the amount of money diverted. Thus the parties to the contract knew from the outset that these difficulties existed. This explains why the valuer was authorised to get his information from, quite literally, any source he could. No restrictions were placed on him. The valuer was even constituted as the final arbiter of fact in the event of any dispute relative to the valuation of the assets. The parties fixed a time at which the shares should be valued.

132. The frustrating 'event' is said to be the delay in completing the contract. To put it another way, the time between the contract in 2002 and now is such that performance of the contract would make performance radically different from what the contract required at the time of contract formation. However, in the doctrine of frustration the court must be able to identify the frustrating event or state with some degree of precision when frustration occurred because it is from that moment in time when frustration is said to have occurred that the contract ends.

133. According to Mr. Hylton Q.C., the delay in this case is so abnormal that it amounts to a frustrating event. In his view, the parties could not have contemplated that two years after the contract was made it would not have been performed. For him, two

years is definitely abnormal enough to amount to frustration. However, he submitted that frustration took place before the two year period. The court formed the view that learned Queen's Counsel was submitting that frustration occurred by reason of the abnormal delay as early one year after the contract and if not then but certainly by the end of the next accounting period, namely December 31, 2002. His reasons for this time period were that the parties, having set ninety days within which to complete the valuation while accepting that this period was not cast in stone certainly could not have intended that upto one year later the contract would not be performed.

134. Mr. Hylton, in support of his submission on frustration, added that the commercial risks undertaken by the parties by agreeing to December 31, 2001 as the date of valuation of the shares meant that the Clackens, while prepared to accept the risk of fluctuation in value of the shares from December 31, 2001 to December 31, 2002 (the next succeeding accounting period after December 31, 2001), were certainly not prepared to go beyond December 31, 2002.

135. It is the view of this court that in light of the undeniable fact that the records of EML and its subsidiaries were poorly kept; in light of the fact that both parties knew that EML's records did not capture all the financial dealings between EML and the shareholders personally and between EML and companies owned by some of the shareholders; in light of the fact that the valuer was to '*take into account any assets or funds from the company which have been diverted, utilized or paid by or to any of the shareholders and/or any of the following companies including but not limited to Ranchero Investments Limited, Startech Services Limited, Econocar Rentals Limited and Auto Auctions Limited and/or paid by the Company and/or its subsidiaries*' it is difficult to agree with Mr. Hylton that frustration occurred if not a year after the contract but certainly the end of the next accounting period, namely December 31, 2002.

136. If one looks at the breadth of what the valuer was to take into account, in the context of poor and inaccurate records, only the very optimistic would have believed that the matter could have been

resolved within ninety days. The valuer was to take into account any asset or funds diverted from EML to shareholders and RL, SSL, ECR and AAL. But the search of the valuer was not limited to these companies. He was to look to see if other companies received any asset or fund from EML. This would undoubtedly involved an examination of the records of the named companies as well as other companies (if identified) to see if they would be able to shed any light on any 'assets or funds' of EML which were 'diverted, utilized or paid' to any of the name companies. This was not going to be a swift exercise. For these reasons, the court concludes that the ninety day period was at best a hope but it was not a realistic time period in light of what is now known about what the parties actually knew, about the unreliability of the EML's records, at the time of the contract. A reasonable man with the knowledge that the parties had at the time of the contract and similarly placed as the parties were at the time of the contract would say that a reasonable construction of the agreement was that ninety days was not an irremovable period.

137. The court has examined and read carefully volume one of the agreed bundles. An examination of the correspondence between attorneys for the Clackens and Causwells, between both sets of attorneys and the valuer is quite revealing and quite consistent with the view expressed by the court that the ninety day period for completion was a pious hope. Although the valuer was identified and agreed upon at the time of the order, the formal process of engagement did not begin until after the order was made. There is correspondence showing that at one point the Causwells wanted to consult their attorneys before agreeing to the letter of engagement sent by the valuer to both parties. There is even a letter from the attorneys for the Causwells indicating a change or addition to the proposed letter of engagement (see letter dated August 19, 2002 from Mrs. Priya Levers to KPMG Peat Marwick). There is correspondence from the valuer complaining about the delay in completing the valuation because of a lack of response to his request for information (see letter dated September 18, 2002 from KPMG Peat Marwick to Livingston Alexander and Levy). There is a letter dated March 25, 2003, from Livingston Alexander and Levy to KPMG Peat Marwick expressing astonishment at the fact that the appraiser

of property held by EML and subsidiaries claimed that he had not received instruction to undertake an asset appraisal.

138. By way of letter dated April 3, 2003 to Livingston Alexander and Levy, KPMG Peat Marwick was remonstrating that the absence of a valuation of the market value of assets had 'materially circumscribed' the completion of the valuation report on the shares of EML.

139. The point the court is making is that when one looks at the mechanics of what had to be done in order to complete valuation within ninety days of the date of the order, it is obvious that it was not going to be done in that time.

140. A draft valuation was eventually prepared by July 8, 2004. The court is not commenting on the adequacy of the draft. The court mentions it to establish the fact that it was possible to arrive at a value of the shares in question despite the difficulties. Indeed the draft valuation says at page 17 paragraph 15 that valuation is a complicated and difficult process. It also says that it is more of an art than a science.

141. The problem was that Mr. Clacken had already decided from 2004, (the evidence does not give the month) not to act in accordance with the terms of the order. Indeed, he had made an attempt in 2004 to have the order set aside. Mr. Hylton submitted that Mr. Clacken's behavior was appropriate given that the contract was frustrated before 2004 and on that premise, Mr. Clacken's behavior did not frustrate the contract but merely recognised that the contract was already frustrated. This submission the court does not accept. The contract was not frustrated in 2004 or even to the end of 2004. Performing the contract in 2004 would not have made it radically different from what was intended in 2002.

142. The context of this contract is one in which the shareholders of the company cannot wait to be rid of each other. The agreement was designed to facilitate the purchase by the Causwells of the Clacken's interest so that the Causwells can continue to operate the

company as a going concern. Thus although the matter initially came to court as a winding up petition, the parties agreed that the company would not be wound up but to continue without the Clackens. This was the commercial objective of the agreement. This objective can still be realised.

143. In the opinion of the court, the delay after the contract was not unforeseeable. A reasonable person having the knowledge of the parties at the time of the contract and taking into account the commercial object would have realised that serious disputes over the amount and extent of the diversions was always a real possibility. The evidence disclosed that some of the diversions were even for personal expenses of some of the shareholders. The parties were so unsure of the nature and extent of the diversions that they empowered the valuer to look at not only the companies named in the order but other unnamed companies. Had the diversions been de minimis it is unlikely that clause two would have been as wide as it is. This conclusion is reinforced by the fact that it was not until mid to late 2004 that the valuer apparently were able to quantify to some extent the diversions (see letter dated October 19, 2004 from KPMG Peat Marwick to Anderson J.). Even in 2004, the valuer was saying that it 'is now incumbent on the parties to the suit to make representations, provide explanations and documentary evidence to substantiate or otherwise, the data in the schedules' (see letter dated October 19, 2004 from KPMG Peat Marwick to Anderson J.). In the same letter the valuer was even proposing that their work in relation to the diversions 'would be supplemented by interviews with Mr. and Mrs. Dwight Clacken and Messrs. Michael and Richard Causwell'.

144. The risk in delay was that the shares value might go up or down. This rise or fall in the value of the shares in turn depended on how far in either direction the assets held by the EML and its subsidiaries moved.

145. Valuing shares of unlisted companies is always going to be difficult since the market value of anything is best determined by the free informed interaction between a willing buyer and a willing seller in a market free from distorting influences. Where shares are not

publicly or even privately traded, it is difficult to know with precision what the value of the shares is. The value is what the market says. In the case at bar, the market will never tell us the value of the shares because none of the companies has publicly traded shares. Any valuation can only be established by the valuer's best good faith effort.

146. Mr. Hylton sought to rely on the PAB's findings in relation to EML's 2001 accounts to say that the state of those accounts was a supervening frustrating event because the valuer was required to use EML's financial statements as the basis of the valuation. In the courts respectful view learned Queen's Counsel's position is not agreeable. The order permitted the use of in house records in the absence of audited financial statements (see para. 2 of Anderson J.'s order). This provision clearly recognised that audited financial statements may not be available for a variety of reasons. The order did not specify and need not have specified the circumstances under which it would be decided that audited financial statements were not available. All that was required was their unavailability. That has happened here. The PAB has found that the 2001 records of EML were very badly prepared.

147. Mr. Cunningham's working papers are no longer available. This does not prevent the shares being valued. In any event, it is not clear to me what value Mr. Cunningham's working papers would have in light of the PAB's findings. The order went on to permit the use of in-house records. Notice that the order permitted not mandated their use . This is the clearest indication that the valuer, in the absence of audited financial statements, was free to use whatever source he could. The valuer was to value not audit. He was not pronouncing up on whether EML adhered to International Financial Reporting Standards. The valuer was simply required to do the best he could with the information available.

148. The court does not accept the contract is frustrated.

149. There is one passage that I need to consider from the judgment of Lord Diplock in ***Sudbrook Trading Estate Ltd v Eggleton*** [1983] 1 AC 44. His Lordship observed that:

> *It may be that where upon the true construction of the contract the price to be paid is not to be a fair and reasonable one assessed by applying objective standards used by valuers in the exercise of their professional task but a price fixed by a named individual applying such subjective standards as he personally thinks fit, and that individual, without being instigated by either party to the contract of sale, refuses to fix the price or is unable through death or disability to do so, the contract of sale is thereupon determined by frustration.*

150. This passage cannot provide assistance to the Clackens because not only is it obiter but also that it is saying that the possibility of frustration can only arise if the price, on a fair construction of the contract is not a fair one arrived at by a professional valuer using objective standards but rather one produced by the valuer arrived at by using subjective standards or that the valuer refuses to fix the price or cannot fix the price. In this case before the court, no one has said that the price cannot be fixed and neither can it be said that the price arrived at for the shares is subjective because no price has yet been fixed. Mistake is now considered.

The doctrine of mistake

151. The common law, as distinct from equity, knows three types of mistake. Chao Hick Tin J.A. in ***Chwee Kin Keong v Digilandmall.com Pte Ltd*** [2005] 1 SLR 502; [2005] SGCA 2, elaborated at paragraph 33:

> *Indeed, in law, there are three categories of mistake, namely, common, mutual and unilateral mistakes. In a common mistake, both parties make the same mistake. In a mutual mistake, both parties misunderstand each other and are at cross-*

purposes. In a unilateral mistake, only one of the parties makes a mistake and the other party knows of his mistake.

152. In the case at bar, the claimants are relying on either common or mutual mistake to set aside the contract. The concept of mistake is well known to the law. What is equally well known is that there are not many reported cases in which a party has been relieved from performing his contract on the ground of mistake. The reason is not hard to see. The courts lean in favour of performance. The effect of the doctrine of mistake is that the contract is nullified from the beginning, that is, although the issue of mistake arises after the contract was concluded, what happens is that the courts say that the concluded contract has no legal effect because of the mistake made. The passage the court is about to cite from that outstanding judge, Lord Atkin, in ***Bell v Lever Brothers*** [1932] A.C. 161, puts it beyond doubt that mistake is kept within tight and narrow bounds. His Lordship said at page 217 - 218:

My Lords, the rules of law dealing with the effect of mistake on contract appear to be established with reasonable clearness. If mistake operates at all it operates so as to negative or in some cases to nullify consent. The parties may be mistaken in the identity of the contracting parties, or in the existence of the subject-matter of the contract at the date of the contract, or in the quality of the subject-matter of the contract. These mistakes may be by one party, or by both, and the legal effect may depend upon the class of mistake above mentioned. Thus a mistaken belief by A. that he is contracting with B., whereas in fact he is contracting with C., will negative consent where it is clear that the intention of A. was to contract only with B. So the agreement of A. and B. to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is

deemed useless, the consent is nullified. As codified in the Sale of Goods Act the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel. I apprehend that if the seller with knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, but I know of no case where a seller has so committed himself. This is a case where mutual mistake certainly and unilateral mistake by the seller of goods will prevent a contract from arising. Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is naturali ratione inutilis. ....

Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess.

153. The restrictive nature of the doctrine was confirmed as recently as 2003 in the case of ***Great Peace Shipping Ltd v Tsavliris Salvage*** [2003] Q.B. 679. In that case the parties contracted on the assumption that the two vessels involved were close to each other. This turned out to be inaccurate. The claimant successfully sued the defendant. The defendant appealed on the ground that the contract was vitiated by mistake. The appeal was dismissed. Lord Phillips M.R. identified what he says were the essential ingredients of common mistake. Mr. Hylton relied on this passage at page 703:

...the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

154. The Master of the Rolls also held at page 703:

In considering whether performance of the contract is impossible, it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the "contractual adventure" which go beyond the terms that are expressly spelt out, in others it will not.

Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. If, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common

mistake.

155. The Master of the Rolls is insisting, rightly so, that mere difficulty of performance is not sufficient to invoke the doctrine of mistake. Mistake arises where the parties have contracted to do something which it was impossible to do at the outset and even then, this position is arrived at only after a careful examination of the contract to see what exactly the parties agreed. This is so because it may be possible that on a proper construction of the contract, one party warranted the existence of a particular state of affairs. If this is the case, the innocent party can bring an action for breach of contract and mistake will not avail the defendant.

156. Thus the judicial function of seeing whether mistake is established begins with a proper construction of the contract to see exactly what was agreed. Once this is determined, then the court looks to see whether the agreement was founded on a basis which was mistaken from the outset. Mistake in this context does not mean merely a misapprehension. It means an erroneous belief that goes to the very foundation of the agreement.

157. It is difficult to see that in the case before the court that there has been a mistake of the kind required by the law. There is no mistake here. Mr. Clacken was not mistaken about the state of the records when he entered the contract. The very terms of the petition made this clear. His admissions in cross examination buttress this conclusion. Equally, the Causwells were not mistaken about the state of the records of the difficulties that would be involved. The court cannot accept the proposition that the parties contracted on the basis that reliable records would exist or that a reliable set of account would be prepared within ninety days of the order.

Conclusion

158. Before leaving this case it is appropriate that there be an explanation for the unacceptably long time that has passed since the matter began. In December 2009 when the trial commenced it soon became obvious that the number of days allocated to the trial during

that month was inadequate. Thereafter serious attempts were made to have the matter heard but the schedules of leading counsel on either side did not coincide. The problem was compounded by the fact that the court was leave for the entire Easter Term (April 2010 to July 2010). Since the final submissions were completed the court has endeavoured to deliver judgment and written reasons in the shortest time possible. The court apologises to the litigants for this thoroughly undesireable state of affairs.

159. The contract entered into by the parties which was embodied in the order of Anderson J. of May 29, 2002, is not frustrated and neither is it vitiated by the doctrine of mistake. The declarations are refused with costs to the defendants to be agreed or taxed.