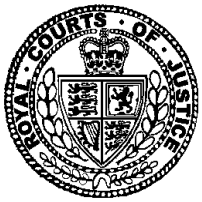

Neutral Citation Number: [2025] EWHC 302 (Comm)

Case No: CL-2023-000888

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/02/2025

Before :

CHRISTOPHER HANCOCK KC SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) MR HUGH HUGHES

(2) MR MAURICE ROCHE

(3) SIR ALAN YARROW **Claimants**

- and -

CSC COMPUTER SCIENCES LIMITED **Defendant**

- -
- -

Joseph Sullivan (instructed by **Fieldfisher**) for the **Claimants**
Tamara Oppenheimer KC and Ruth Flame (instructed by **Bryan Cave Leighton Paisner**) for the **Defendant**

Hearing dates: 25 and 26 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10:30am on 13th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

- -

Christopher Hancock KC:

Introduction and factual background.

1. The Claimants act as representatives of the Sellers of Fixnetix ("**Fixnetix**") (and are referred to in a Share Purchase Agreement dated 10 August 2015 ("**the SPA**") as the Sellers' Representatives). Fixnetix is a company which provides trading infrastructure services to capital markets participants.

2. The Defendant, CSCL, is a company which provides IT services in a variety of industries, including cybersecurity advisory services. In April 2017, CSCL's ultimate parent company (Computer Sciences Corporation, or ("**CSC**")), merged with Hewlett Packard Enterprise, to form DXC (the "**HP Merger**"). CSCL is now part of the DXC group.

3. In early 2015, CSCL entered into discussions with the shareholders of Fixnetix regarding the purchase of Fixnetix's entire issued share capital. These discussions culminated in the SPA. On 25 September 2015, pursuant to the SPA, CSCL purchased the entire issued share capital of Fixnetix for an initial payment of approximately $89,300,000. The SPA also provided for CSCL to pay deferred consideration, not exceeding $25,700,000 in total, if Fixnetix's financial performance met certain targets (the "**Earnout**"), in the first two years following CSCL's acquisition of Fixnetix.

The Relevant Provisions of the SPA

4. Clauses 5.1.2 and 5.1.3 of the SPA provided that the consideration payable by CSCL to the Claimants includes the Year 1 and Year 2 Deferred Consideration, if any. Pursuant to Clause 5.6, the Deferred Consideration payable was to be calculated in accordance with Schedule 10.

5. The relevant provisions of Schedule 10 are as follows:

> *1.* ***INTERPRETATION…***
>
> *…* ***Earnout Business:*** *the business of direct selling of managed services and targeted solutions for market data, trading access, hosting, connectivity and pre-trade risk management for market makers, investment banks, hedge funds, exchange venues, technology partners and proprietary trading houses, facilitating low latency, resilient and secure trading as carried out by the Group prior to and following Completion and whether or not carried on after Completion by members of the Group or other members of the Purchaser's Group.*

***… Year 1 Revenue**: The Earnout Revenue for the twelve month period following the Completion Date.*

***Year 1 Revenue Target**:$80,000,000*

***Year 2 Revenue**: The Earnout Revenue for the twelve month period commencing on the anniversary of the Completion Date*

***Year 2 Revenue Target**: $115,000,000*

2. DETERMINATION AND PAYMENT OF DEFERRED CONSIDERATION

2.1 Promptly following:

2.1.1 in respect of the Year 1 Deferred Consideration Amount, the first anniversary of Completion and in any event no later than the date which falls sixty days thereafter; and

2.1.2 in respect of the Year 2 Deferred Consideration Amount, the second anniversary of Completion and in any event no later than the date which falls sixty days thereafter,

the Purchaser shall prepare and submit to the Sellers' Representatives the Purchaser's determination of the relevant amount, determined in accordance with paragraphs 2 and 3 below. If the Sellers' Representatives disputes the correctness of the Purchaser's determination of the relevant amount, the Sellers' Representatives shall notify the Purchaser in writing of its objections within 20 Business Days of receipt of the Purchaser's calculation of the relevant amount and shall set forth, in writing and in reasonable detail so far as practical within the knowledge of the Sellers' Representatives, the reasons for the Sellers' Representatives objections. The Sellers' Representatives and the Purchaser shall endeavour in good faith to resolve any disputed matters within 10 Business Days of receipt of the Sellers' Representatives notice of objections. If the Sellers' Representatives and the Purchaser are unable to resolve the disputed matters, the Purchaser shall engage the Purchaser's Accountants and the Sellers' Representatives shall engage the Sellers' Acccountants to mediate and resolve only the matters in dispute (in a manner consistent with paragraph 3 below). If the Purchaser's Accountants and the Sellers' Representatives Accountants are unable to mediate and resolve the matters in dispute, the Parties shall engage the Independent Accountants to resolve only the matters in dispute (in a manner consistent with paragraph 3 below) and the determination of the Independent Accountants with respect to the correctness of each matter remaining in dispute shall be conclusive and binding on the Sellers' Representatives (on behalf of the Selling Parties) and the Purchaser. The Parties shall also furnish the Independent Accountants with such other information and documents as the Independent Accountants may reasonably request (including any documents prepared by the Purchaser's Accountants or Sellers' Accountants, as applicable, in connection

with previous attempts to mediate and resolve the matters in dispute) in order for them to resolve the items in dispute. The determination of the Independent Accountants shall be based solely on presentations by the Sellers' Representatives and the Purchaser and shall not be by independent review. In reaching the determination, the only alternatives available to the Independent Accountants shall be to:

(a) Accept the position of the Sellers' Representatives and the Sellers' Accountants;

(b) Accept the position of the Purchaser and the Purchaser's Accountants; or

(c) Accept a position between those two positions.

In resolving any disputed item, the Independent Accountants shall adhere to the definitions contained in this Agreement and the practices and other principles referred to herein. The Independent Accountants will only consider (and make its determination based only upon) those items and amounts as to which the Purchaser and the Sellers' Representatives have disagreed within the time periods and on the terms specified in this section 3.1(e) and shall not conduct an independent review. The relevant Deferred Consideration, as finally determined pursuant to this paragraph 2 (whether by failure of the Sellers' Representatives to deliver notice of objection within the time period specified in this paragraph 2, by agreement of the Sellers' Representatives and the Purchaser or by determination of the Independent Accountants) shall, save in the case of manifest error, be final, non-appealable and binding on the parties"

6. Turning to the provisions of the SPA itself, Earnout Revenue is defined in Clause 1.1 of the SPA as:

> "*the revenues earned (and recognised on an accounting basis as revenue) by any member of the Purchaser's Group (including, with effect from Completion, the Group) from the business of direct selling of managed services and targeted solutions for market data, trading access, hosting, connectivity and pre-trade risk management for market makers, investment banks, hedge funds, exchange venues, technology partners and proprietary trading houses, facilitating low latency, resilient and secure trading as carried on by the Group prior to and following Completion and whether or not carried on after Completion by members of the Group or other members of the Purchaser's Group, calculated using the same accounting principles, policies, treatments, procedures, computations, revenue and cost recognition methodologies, bases of assessment and categorisations under US GAAP as are used by the Purchaser's Group in the preparation of the accounts of the Purchaser's Group.*"

7. The underlined portion of the above quote is defined in paragraph 1.1 of Schedule 10, as set out above, as "**Earnout Business**".

8. Paragraph 1.1 of Schedule 10 provides that the Year 1 Revenue Target was $80,000,000, and the Year 2 Revenue Target was $115,000,000. Pursuant to paragraph 3 of Schedule 10, Deferred Consideration would only become payable if the Earnout Revenue for Year 1 and Year 2 met or exceeded these targets.

9. Paragraph 2.1 of Schedule 10 provided that, promptly following the first and second anniversaries of Completion (and in any event no later than the date which fell sixty days thereafter), CSCL was to "*prepare and submit to* [the Claimants] [CSCL's] *determination of the amount of Deferred Consideration payable, if any* (the "**Year 1 Determination**" or the "**Year 2 Determination**", together the "**Determinations**").

10. Paragraph 2.1 also provides that, if the Claimants disputed the correctness of any Determination, the Claimants were to:

> "*notify* [CSCL] *in writing of its objections within 20 Business Days of receipt of the Purchaser's calculation of the relevant amount and shall set forth, in writing and in reasonable detail so far as practical within the knowledge of* [the Claimants], *the reasons for* [the Claimants'] *objections*…".

11. If such an objection were sent, paragraph 2.1 of Schedule 10 outlined the procedure which the parties must follow in the event of a dispute as to the correctness of any Determination ("**the Dispute Resolution Procedure**"). In short, this procedure provided that the parties would initially negotiate for 10 days, in good faith. If a resolution were not agreed in that time, the parties would appoint their own accountants to mediate. If, following such mediation, a resolution could still not be reached, an independent accountant would be appointed to resolve the dispute raised in the initial documents. As part of this procedure, the parties would be required to "*furnish the Independent Accountants with such other information and documents as the Independent Accountants may reasonably request… in order for them to resolve the items in dispute*." However, as is made clear in the provisions of Schedule 10 I have set out above, the jurisdiction of the Independent Accountants was limited to the resolution of the disputes raised between the parties. There was to be no independent review.

12. Clause 17.2 of the SPA dealt with waiver. It provided as follows:

"The failure to exercise or delay in exercising a right or remedy provided under this Agreement or by law shall not constitute a waiver of the right or remedy or a waiver of any

other rights or remedies and no single or partial exercise of any right or remedy provided under this Agreement or by law shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy."

13. Clause 20.1 of the SPA provided that:

"*Any notice or other communication under or in connection with this Agreement shall be in writing and shall be delivered personally or sent by first class post pre-paid recorded delivery (or air mail if overseas) or by fax to the party due to receive the notice or communication as follows…*"

14. Further, Clause 20.1 provided that for the Sellers, copies were to be sent to Hugh Hughes, Maurice Roche, and Nabarro LLP (the Sellers' legal representatives at the time of entry into the SPA); and for the Purchaser, copies were to be sent to CSCL and Baker, Donelson, Bearman, Caldwell & Berkowitz (the Purchaser's legal representatives at the time of entry into the SPA).

15. Finally, Clause 20.2 provided that:

"In the absence of evidence of earlier receipt, any notice or other communication is deemed given:

20.2.1 if delivered personally, when left at the address specified in clause 20.1;

20.2.2 if sent by mail other than air mail, two days after posting it;

20.2.3 if sent by air mail, six days after posting it;

20.2.4 if sent by fax, on completion of its transmission, provided that within one Business Day of such transmission, a copy is also given by one of the methods set out in the foregoing provisions of this subclause 20.2"

The Year 1 Determination

16. On 29 November 2016, ("**the 29 November 2016 email**"), Ms Lesley Sigall, CSCL's Vice President, GIS Business Operations & Finance, wrote:

"Hi all,

Please find attached the Year 1 Fixnetix Earnout Tracker.

Please review and revert if any questions or concerns. If you wish to have a call to discuss, please advise, and I will schedule.

Thanks.

Lesley"

17. The email was sent to email addresses for each of the Claimants and was copied to three individuals with CSCL email addresses. There was, attached to the email, a three page document containing figures in tables and the statement *"Fixnetix Year 1 Revenue is $64m based on GAAP currency rates."*

18. On 8 February 2017, the Claimants' then solicitors, Nabarro, sent a letter to CSCL with respect to the Year 1 Determination. The letter stated that "*[i]t is not disputed that the Year 1 Revenue Target has not been met*." Instead, Nabarro made allegations of fraudulent misrepresentation against CSCL, namely: (i) that CSCL fraudulently misrepresented that the Year 1 and Year 2 Revenue Targets could be met, when in fact CSCL knew that this would be impossible; and (ii) that CSCL fraudulently misrepresented that they would contribute $43 million 'of business' from within CSCL's group, which would count towards the Year 1 Revenue Target. The allegations were repeated and amplified in a letter dated 6 April 2017 to CSCL's solicitors (BCLP's predecessor, BLP).

19. By a letter dated 11 May 2017 from BLP, CSCL denied all allegations of fraudulent misrepresentation. There has been no further correspondence in relation to these allegations and it was confirmed before me that they were no longer pursued.

20. In a letter dated 23 May 2017, CMS (successors of Nabarro) sought an explanation of how the Year 1 Earnout Revenue was calculated, and raised their concern that some companies within CSCL's group might have been earning further Earnout Revenue which was not included within the calculation. The letter included the following passage:

> *"… it has come to the attention of the Sellers Representatives that other companies within the Purchaser's Group (as defined in the SPA) may have been earning Earnout Revenue (as defined in the SPA). In particular, it appears to the Sellers Representatives that a member of the Purchaser's Group by the name of CeleritiFinTech Services Limited carries on a business which would fall within the definition of Earnout Business and generate Earnout Revenue. The Sellers Representatives are therefore concerned to understand how the process which the Purchaser undertook in preparing its calculation of Year One Earnout Revenue to ensure that all relevant Earnout Revenue from across the entirety of the Purchaser's Group was determined and included."*

21. BLP responded to this request on 5 July 2017, asserting that the concerns were unfounded and contending that the Earnout Revenue had been calculated, and would continue to be calculated, in accordance with the SPA. In this letter it stated:

"*Our client is aware of the definition of Earnout Business under the SPA and the fact that it is not limited to a specific division within the Purchaser's Group; the Year One Earnout Revenue has been calculated accordingly.*

To clarify, CeleriFinTech Services Limited's business houses the legacy Hogan Systems software that CSC contributed to a venture with HCL and it relates solely to core banking software that runs loan management database and bank transaction systems and is no way related to capital markets or low-latency trading platforms that Fixnetix offers. It therefore clearly falls outside the definition of Earnout Business".

22. In a letter dated 18 July 2017, CMS raised a further query regarding the HP Merger and whether revenue from the enlarged group would fall within the scope of the Year 2 Earnout Revenue. In that letter it stated:

"With regard to the calculation of the Year Two Earnout Revenue, the Sellers Representatives note the recent transaction which has created DSX. Based on the Sellers Representatives' experience of competing against HP(E) prior to the acquisition by your client, the Sellers Representatives would be surprised if there was no revenue within the enlarged group which fell within the definition of Earnout Revenue. The Sellers Representatives await with interest the calculation of the Year Two Earnout Revenue in due course and in accordance with the provisions of the SPA."

23. BLP replied on 2 August 2017. Having stated that it was assumed that the merger referred to was that of CSC with Hewlett Packard Enterprise, the letter went on to say:

"Our client has already made enquiries of the Group Head of Banking and Capital Markets Industry as well as the Assistant General Managers (AGMs) on major legacy HPE accounts that are also Fixnetix customers in order to confirm whether any of the HPE business revenue falls within the definition of Earnout Revenue. There was universal agreement that the legacy HPE offering was wholly different from that of the Fixnetix offering and would not fall within the definition of Earnout Business for the purposes of the SPA."

24. The Claimants did not respond specifically to this last letter.

<u>The Year 2 Determination.</u>

25. On 29 November 2017, Mr Schunemann of CSCL sent an email stating:

"All

Please find attached the Year 2 Fixnetix Earnout Tracker.

Please review and revert if any questions or concerns. If you wish to have a call to discuss, please advise and I will schedule"

26. That email was sent to the email address of each of the Claimants and was also copied to three individuals at CSCL. The email included a four page attachment containing figures in tables, with the statement *"Fixnetix Year 2 Revenue is $69m, at budget currency rates"*.

27. On 21 December 2017, CMS sent a letter disputing CSCL's calculation of the Year 2 Earnout Revenue ("**the Dispute Notice**"). That letter stated that "*constitutes notification by* [the Claimant]*, under paragraph 2.1 of Schedule 10 of the SPA, that they dispute DXC's determination of the relevant amount in relation to the Year 2 Earnout"*. The letter went on to state that:

> *"Our client notes that revenue included in the calculation of the Year 2 Revenue, as set out at pages 3 and 4 of the Y2 Tracker, is generated entirely from previous Fixnetix work. However, following feedback from a number of Fixnetix Sellers who have extensive experience of the market and of the Fixnetix business, our clients find it implausible that, despite the merger which created DXC, there is no further revenue within the significantly enlarged DXC group which falls within the definition of Earnout Business in the SPA."*

28. CMS asked for a response to their letter, including a full calculation of the Earnout Revenue, within 10 business days. Mr Hasan of DXC responded on 12 January 2018, stating that the letter had been forwarded to the relevant individuals for review.

29. In fact, however, the next communication was from BLP in a letter dated 23 January 2018 (mistakenly recorded as being sent in 2017). In that letter, it was asserted that the Claimants had failed to copy the Dispute Notice to CSCL's US solicitors, as required by Clause 20.1.2. BLP stated that it was now too late to dispute the determination.

30. By a letter from CMS dated 26 January 2018 CMS raised, for the first time, the question of the validity of the notification of the Year 2 Determination. This line of correspondence culminated in a letter from BLP dated 15 March 2018, setting out the reasons that the Dispute Notice was defective, and explaining that this was not a defect which could be 'cured'. On that basis, CSCL maintained (and still maintains) that, as more than 20 Business Days had elapsed since the Year 2 Determination was served, the Claimants had lost their contractual entitlement to dispute it.

31. BLP's 15 March letter also provided by way of an appendix a list of the services provided by the legacy HP businesses to banking customers, none of which, it was said, fell within the definition of Earnout Business under the SPA. They argued that this explained why, notwithstanding the merger, the Year 2 Revenue Target had not been met. The Claimants did not respond to this letter.

32. Nothing further was heard by CSCL until 2020. It was the evidence of Mr Hughes that, although consideration had been given to issuing proceedings, the Claimants could not afford this prior to obtaining litigation funding, which they did from Fieldfisher. It was also Mr Hughes' evidence that the Claimants were concerned by reports of financial irregularities at the time of the merger with HP. I say nothing about this latter statement, since I have seen no original evidence in this regard.

33. On 7 February 2020 Mr Hughes emailed Mr Deckelman (General Counsel of DXC) requesting that CSCL revisit their calculation of the Year 2 Earnout Revenue on the basis that he (along with the other Sellers' Representatives) had been contacted by other Sellers and informed that "*there is other qualifying revenue within the DXC group from the period in question would* [sic] *count towards the Earnout Target as a result of certain large projects and contracts*". BCLP responded (to CMS) on 4 March 2020, noting that Mr Hughes' challenge only amounted to a general assertion that there was additional Earnout Revenue, with no specific revenue source being identified. In any event, the letter noted that the issue had already been reviewed and confirmed that the criteria for a payment of Deferred Consideration had not been met. Again, the Claimants did not respond to this letter.

34. A further two years elapsed before the Claimants tried once again to suggest that the Determinations were susceptible to challenge. On 17 March 2022, the Claimants' new solicitors (Fieldfisher) wrote to BCLP, stating that they were "*instructed to investigate matters relating to the purported determinations… by you of the Year 1 Deferred Consideration Amount and/or the Year 2 Deferred Consideration Amount*". Fieldfisher also asked for confirmations as to document preservation. The evidence of Mr Hasan of CSCL was that CSCL had previously placed a litigation hold on all relevant documents in February 2017 (following Nabarro's letter), but that when BCLP received no response to its 15 March 2018 letter, the hold was lifted. I consider below the relevance of this.

35. A further 18 months elapsed before Fieldfisher sent a Letter of Claim dated 18 October 2023, alleging (i) that CSCL had failed to serve valid Determinations, and, further or alternatively, (ii) that CSCL must engage with the Dispute Resolution Procedure in relation to the Year 2 Determination. Following the exchange of further correspondence, the Claimants served their Part 8 Claim Form on 22 December 2023.

The issues.

36. The issues between the parties may be summarised as follows:

(1) Do the provisions of Clause 20 apply to Determinations?

(2) If they do, were the Determinations validly served?

(3) If the Determinations have not been validly served, have the Claimants lost the right to rely on such failure by virtue of the principles of election and/or estoppel?

(4) If the Determinations were validly served, or must be treated as having been validly served, have the Claimants served a valid Notice of Dispute?

(5) If the answer to (4) is no, has CSCL lost the right to rely on the absence of such Notice by reason of the principles of election and/or estoppel?

(6) Should I grant the remedies sought, namely specific performance and/or declaratory relief, as a matter of discretion?

37. I deal with each issue in turn, setting out first the parties' contentions and then my discussion and conclusions.

Issue 1: Application of Clause 20 to the Determinations.

The principles of contractual construction.

38. It was agreed that this was a matter of contractual construction. As such, CSCL maintained that a convenient summary of the general principles was given by HHJ Pelling at first instance and adopted and endorsed by the Court of Appeal in Lamesa Investments Ltd v Cynergy Bank Ltd [2021] 2 All ER (Comm) 573 at [18] per Sir Geoffrey Vos C. as follows (omitting passages not relevant for present purposes):

> *"i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36; [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;…*
>
> *iii) In arriving at the true meaning and effect of the contract or order, the departure point in most cases will be the language used by the parties because*

> *(a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17:…*
>
> *vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2…*"

39. For their part, the Claimants relied on the statement of general principle given by Lord Hamblen in Sara & Hossein v Blacks [2023] I WLR 575, where he said, at paragraph 29:

> *"(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
> *(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.*
> *(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated."*

40. It does not seem to me that there was any material difference of principle between the parties in this regard, and, indeed, the parties agreed that this was the case.

CSCL's contentions.

41. CSCL's position was that, on a true and proper construction of the SPA, the Determinations were validly served in accordance with paragraph 2.1 of Schedule 10 because the contractual notice provisions in Clause 20.1 do not apply to service of the Determinations.

42. In support of their argument, it made the following points.

(1) First, Clause 2.1 of Schedule 10 places no requirements on the service of a valid Determination, and merely requires CSCL to "*submit*" its Determination(s) to the Claimants. On a natural and ordinary reading of this provision, no requirements are imposed on the form or content of such Determinations. CSCL was entitled to serve them however it saw fit.

(2) Secondly, this latitude provided to CSCL with regard to the submission of Determinations can be contrasted with other provisions of the SPA.

(a) Most notably, paragraph 2.1 of Schedule 10 states that, if the Claimants wish to object to a Determination, they "*shall notify the purchaser in writing of its objections*" (emphasis added).

(b) By way of further example, Clause 3.3 and Clause 21.3 (among others[1]) also require notification thereunder to be given "*in writing*".

(c) The use of this language in relation to some provisions, and not in relation to other provisions, demonstrates an intention on the part of the parties that such Clauses would be subject to different notice requirements. Had the parties intended the same notice requirements to apply to *all* communications given pursuant to the SPA, the same language would have been used in every Clause which provided for a communication to pass between the parties. Put another way, if the Claimants were correct that any communication of any sort made under or in connection with the SPA must invariably be made in writing, the words "*in writing*" in each of the above provisions would be otiose and superfluous.

(3) Thirdly, having regard to the entirety of the SPA (in the context of which Schedule 10 must be construed), the notification requirements set out in Clause 20.1 only apply to notifications or communications otherwise expressed to be given "*in writing*".

(a) It is the express provision for some communications under the SPA to be given "*in writing*" that indicates that the notice requirements set out in Clause 20.1 were only intended to apply *those* communications. As explained above, if Clause 20.1 were to impose blanket requirements on *all* communications to be given under the SPA, there would have been no need for the parties to use different language in the provisions of the SPA that require the service of a notice and/or other communication between the parties.

(b) It then follows that for those notices or communications which are specified elsewhere in the SPA as needing to be "*in writing*", Clause 20.1 provides the further formalities that need to be complied with; e.g. the method of sending, the addresses and the relevant recipients.

---

[1] The definition of what constitutes "Finally Determined" in Clause 1.1; a change to the "Longstop Date" per Clause 1.1; Clauses 3.4, 4.1, 4.3.1, 4.4, 8.12.2, 8.13, 17.1; paragraph 13.2 of Schedule 3; paragraphs 2.1.2, 2.3 and 2.5 of Schedule 9.

(c) In so far as the Claimants invite the Court to look no further than the words of Clause 20.1 itself, that is not the correct approach. The Court cannot look at Clause 20.1 in isolation but must have regard to the entirety of the SPA.

(4) Fourthly, this construction is consistent with commercial common sense.

(a) Clause 20.1, as with any provision that imposes formality requirements upon a particular communication, necessarily makes the service of such a notice or giving of such a communication more onerous. It is understandable that CSCL and the Claimants, as commercial parties, would want to restrict those formalities to particular communications. There is nothing surprising about the fact that the requirements of Clause 20.1 do *not* apply to all communications under the SPA.

(b) Indeed, given the nature of the information that might be disclosed as part of the Determinations (e.g. spreadsheet excerpts, or factual information conveyed at meetings), and where the parties could envisage the Determination comprising part written and part oral communication, it makes commercial sense for the SPA to provide CSCL with latitude as to the format in which the Determination would be made.

The Claimants' contentions.

43. The Claimants' contentions were short, and were as follows:

(1) First, they argued that the provisions of Clause 20 were clear. It provided that any notice *"or other communication under or in connection with [the SPA]"* was to be in writing and was to be delivered in accordance with the provisions of the Clause.

(2) Secondly, they argued that paragraph 2 of Schedule 10 required CSCL to *"prepare and submit"* to the Sellers Representatives its calculation of the relevant amounts. This, they contended, was clearly a communication under or in connection with the SPA.

(3) Accordingly, they argued, the provisions of Clause 20 applied to such a communication.

Discussion and conclusions.

44. I have considered with care the arguments put forward by both parties. In my judgment, both the literal wording of the contract and considerations of commercial commonsense

militate in favour of the conclusion urged by the Claimants. I reach this conclusion for the following reasons.

(1) It seems to me that the words used in Clause 20 are extremely general. Thus, the Clause refers not merely to notices but also to other communications. This latter word is very broad.

(2) I also consider that it would be undesirable to draw fine distinctions between different forms of communication. It is, in my view, important, in the interests of certainty, to ensure that parties to commercial contracts such as this one have clarity as to how they are expected to correspond.

(3) Finally, in my view it would be illogical and undesirable to hold that formalities such as those laid down in Clause 20 are not applicable to Determinations, which are very important documents, dealing as they do with the consideration payable for the business. Whilst it might well be that the provisions of Clause 20 do not apply to every single communication, they must clearly, in my view, apply to communications of contractual significance. In my judgment, a Determination clearly comes within such category.

45. Accordingly, I hold that the provisions of Clause 20 do indeed apply to the service of Determinations.

Issue 2: What if Clause 20 applies to the service of Determinations?

46. CSCL did not contend that, if the provisions of Clause 20 applied to Determinations, there had nonetheless been compliance with those requirements. I can therefore deal with this issue shortly, and I hold that there was no valid service of the Determinations in relation to either Year 1 or Year 2.

Issue 3: Election and/or estoppel.

The legal tests.

47. I will deal first with the issue of election.

CSCL's contentions.

48. CSCL argued that, as explained by Lord Diplock in Kammins Ballrooms v Zenith Investments [1971] AC 850 (and confirmed by the Privy Council in Delta Petroleum v BVI

Electricity Corpn [2021] 1 WLR 5741) three requirements must be established for a waiver by election.

49. First, there must exist two mutually exclusive courses of action available to the electing party, such that "*adopting one of them necessarily entails forsaking the other*".[2]

50. In this regard, CSCL relied on the decision of the Court of Appeal in The Happy Day [2003] 1 CLC 537. That was a case where a vessel had given a notice of readiness to discharge which was premature and therefore invalid, but had thereafter come in and been discharged by the charterers. The Court of Appeal held that there had been a waiver of the right to rely on the invalidity of the notice. Potter LJ said that:

"65. So far as waiver by election is concerned, the basic proposition is that where two possible remedies or courses of action are to his knowledge open to X and he has communicated his intention to follow one course or remedy in such a manner as to lead Y to believe that his choice has been made, he will not later be permitted to resile from that position: see Scarf v. Jardine, (1882) 7 App. Cas….

…66. Thus, it is clear that whether or not the party entitled to notice has waived a defect upon which he subsequently seeks to rely, will depend upon the effect of the communications or conduct of the parties, the intention of the party alleged to have waived his rights being judged by objective standards. This being so, it seems to me clear that, in an appropriate commercial context, silence in response to the receipt of an invalid notice in the sense of a failure to intimate rejection of it, may, at least in combination with some other step taken or assented to under the contract, amount to a waiver of the invalidity or, put another way, may amount to acceptance of the notice as complying with the contract pursuant to which it is given.

67. Waiver is closely associated with the law of estoppel in that, in the case of estoppel (and at this point I leave aside estoppel by convention), it is necessary for there to have been an unequivocal representation of fact by words or conduct and, in waiver, there must similarly have been an unequivocal communication of X's intention, whether by words or conduct. As observed by Mr. Justice Phillips in Youell and Others v. Bland Welch & Co. Ltd., (The Superhulls Cover-Case) (No 2), [1990] 2 Lloyd's Rep. 431 at p. 450:

"A party can represent that he will not enforce a specific legal right by words or conduct. He can say so expressly - this of course he can only do if he is aware of the right. Alternatively he can adopt a course of conduct which is inconsistent with the exercise of that right. Such a course of conduct will only constitute a representation that he will not exercise the right if the circumstances are such to suggest either that he was aware of the right when he embarked on the course of conduct inconsistent with it or that he was content

[2] Delta Petroleum v BVI Electricity Corpn [2021] 1 WLR 5741 at [21] per Lord Leggatt.

to abandon any right he might enjoy which were inconsistent with that course of conduct." ...

...72. As to point (2), it seems to me that the context in which the conduct of the charterers falls to be judged is not simply the immediate factual context but the commercial context and the purpose of the contractual requirement to serve NOR which is to trigger the charterers' obligation to unload whereby laytime starts to run immediately (in the absence of express provision), or in accordance with a specific regime of the kind provided in cl. 30. In those circumstances, as it seems to me, if (i) in purported compliance with the terms of the charter-party the master serves on the charterers or their agents for service NOR which is in fact invalid because the ship has not yet arrived, and (ii) thereafter the charterers and/or the receivers to whom NOR is required to be given become aware of the actual readiness of the vessel, and (iii) the charterers and the receivers' agents, being aware of the facts giving rise to the invalidity, do nothing to indicate any rejection or reservation in respect of the NOR, but instead commence unloading, then there is every good reason for the reasonable shipowner to assume an intention and acceptance by the charterers that laytime should start to run without the formal necessity of a fresh notice, such intention and acceptance being unequivocally communicated by involvement in the operation of unloading. The only realistic basis on which the conduct of the charterers/receivers could be regarded as equivocal in relation to their intention to waive the invalidity of the notice is to make the assumption that the charterers intend, and reserve the right, later to rely upon the invalidity without disclosing that intention, when, as commercial men, they must be aware that if such intention or reservation were made clear, the shipowner would immediately serve fresh NOR to protect his position. An assumption of lack of fair dealing of that kind is not one which it seems to me appropriate to make on an objective consideration of the parties' intentions for the purposes of the doctrine of waiver....

...78. For the reasons which I have set out, I consider the doctrine of waiver may be invoked and applied in such a case and that the commencement of loading by the charterer or receiver without rejection of or reservation regarding the NOR can properly be treated as the "something else" which Lord Justice Mustill indicated was required to be added to mere knowledge of readiness on the part of the charterers, in order for a finding of waiver or estoppel to be justified. Not only does the commencement of loading manifest an acceptance of the vessel's readiness to load, it also meets the concern of Lord Justice Mustill that to argue (as it was in The Mexico 1) that laytime should begin at the point when the charterers or their agents became aware that the cargo was ready, would give rise to uncertainty and substitute a basis for the computation of laytime which would be a fertile source of dispute. I therefore disagree with the view expressed by Mr. Justice Langley that he could see no basis on which a different conclusion from that reached in The Mexico 1 could be justified by substituting the time when discharge actually commenced for the time when the vessel was first known by the charterers to be ready to discharge. For the same reason I disagree with the Judge when he expressed the view that the reasoning of Mr. Justice Donaldson in The Helle Skou could not stand with that in The Mexico 1, in that it represented an

application of the inchoate notice concept which did not survive that latter case. As already indicated in par. 26 above, I do not read The Helle Skou (which was not referred to in the judgment of Lord Justice Mustill in The Mexico 1), as involving an application of the inchoate notice doctrine. Rather, I consider it to be an authority supportive of the view that the doctrine of waiver is available to assist the owners in the circumstances of this case. I would hold that the arbitrators were correct to find in favour of the owners that laytime commenced at 08 00 on Tuesday Sept. 29, 1998."

51. Secondly, the electing party must have sufficient knowledge of the facts giving rise to the choice, such that he knows that he has the right in question.[3] In this regard, the Defendant submitted that, where a party was legally represented and knew the relevant facts, it was to be inferred that that party knew of its rights, relying on the decision of the Court of Appeal in Peyman v Lanjani [1985] Ch 457 and the recent decision of Julia Dias J in URE v Notting Hill Genesis [2024] EWHC 2537 (Comm). In the latter case the judge set out the relevant principles, as follows:

"92. There was no material dispute between the parties as to the applicable principles, which are derived from those articulated by Lord Goff in the well-known passage in his speech in The Kanchenjunga, [1990] 1 Lloyd's Rep. 370 at 389 and from the decision of the Court of Appeal in Peyman v Lanjani, [1985] Ch. 457 at 487, 494, 500 namely:

i) Where a party (A) becomes entitled to terminate a contract, whether pursuant to a contractual right or a repudiatory breach by the other party or otherwise, it must elect whether to exercise that right or not;

ii) In order to make that election, A must be aware both of the facts giving rise to the right to terminate and of the right itself;

iii) A must actually make a decision. If it does not, the time may come when the law nonetheless deems an election to have been made;

iv) If, with the requisite knowledge set out in ii) above, A acts in a manner which is consistent only with one or other of two inconsistent courses, it will be held to have elected accordingly;

v) An election can be made by any words or conduct which communicates an intention to choose one or other course of action but, particularly where A has elected to abandon a right which it would otherwise possess, such election must be communicated in clear and unequivocal terms.

93.Was Ure aware of its right to terminate and, if so, when? Is knowledge to be inferred from the fact that it was receiving advice from Burges Salmon?"

[3] Kosmar Villa Holidays v Trustees of Syndicate 1243 [2008] Bus LR 931 at [38] per Rix LJ; Insurance Corpn of the Channel Islands v The Royal Hotel Ltd [1998] Lloyd's Rep IR 151 at (161, col 2) per Mance J.

52. In relation to the question of inference, it was submitted that the fact of representation gave rise to a rebuttable presumption that the party had knowledge of its rights (although in that case itself the presumption was rebutted).

53. Thirdly, there must be clear and unequivocal communication of the choice to pursue one inconsistent right over the other.

54. As to this last requirement, the Defendant submitted that a clear and unequivocal communication does not have to be made by express words. In fact, "[m]*ore often it is communicated by a course of conduct which can only be consistent with one course of action*".[4] To establish whether such a course of conduct amounts to an unequivocal communication, the Court undertakes an objective assessment of the impact of such conduct on a reasonable person in the position of the other party to the contract.[5] This includes an assessment of (i) the factual context, (ii) the commercial context, and (iii) the purpose of the contractual right which is said to have been waived.

The Claimants' contentions.

55. The Claimants made the following submissions as to the legal tests to be utilised in this regard.

56. First, they submitted that it was necessary that the party had to make a choice between two inconsistent courses of action, and it was not enough that that party did indeed have a choice. In this regard, I was referred to the decision in The Kanchenjunga [1990] 1 Lloyd's Rep. 391 in which Lord Goff said (at p. 398):

> *"It is a commonplace that the expression "waiver" is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned with waiver in the sense of abandonment of a right which arises by virtue of a party making an election. Election itself is a concept which may be relevant in more that one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform*

[4] Active Media Services v Burmester Duncker & Joly [2021] EWHC 232 (Comm) at [325] per Calver J.
[5] Insurance Corpn of the Channel Islands at (163, col 1) per Mance J.

to the terms of the contract. But this is not necessarily so. An analogous situation arises where the innocent party becomes entitled to rescind the contract, i.e. to wipe it out altogether, for example because the contract has been induced by a misrepresentation; and one or both parties may become entitled to determine a contract in the event of a wholly extraneous event occurring, as under a war clause in a charter-party. Characteristically, the effect of the new situation is that a party becomes entitled to determine or to rescind the contract, or to reject an uncontractual tender of performance; but, in theory at least, a less drastic course of action might become available to him under the terms of the contract. In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it. Instances of this phenomenon are to be found in s. 35 of the Sale of Goods Act, 1979. In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him - for example, to determine a contract or alternatively to affirm it - he is held to have made his election accordingly, just as a buyer may be deemed to have accepted uncontractual goods in the circumstances specified in s. 35 of the 1979 Act. This is the aspect of election referred to by Lord Diplock in Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd., [1971] A.C. 850 at p. 883. But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms (see Scarf v. Jardine, (1882) 7 App.Cas. 345 at p. 361, per Lod Blackburn, and China National Foreign Trade Transportation Corporation v. Evlogia Shipping Co. S.A. of Panama (The Mihalios Xilas), [1979] 2 Lloyd's Rep. 303 at p. 307; [1979] 1 W.L.R. 1018 at p. 1024, per Lord Diplock). Once an election is made, however, it is final and binding (see Scarf v. Jardine, per Lord Blackburn, at p. 360). Moreover it does not require consideration to support it, and so it is to be distinguished from an express or implied agreement, such as a variation of the relevant contract, which traditionally requires consideration to render it binding in English law."

57. The Claimants also referred me to the decision of the Privy Council in Delta Petroleum v BVI, the reference to which is set out above, where Lord Leggatt said, at paragraph 21:

"21. The principle of waiver by election is not needed to explain why a decision to terminate a contract, once communicated, is final and irrevocable. A valid termination has the legal effect of discharging both parties (from then on) from their obligations under the contract. Those obligations could only be reinstated by making a new contract. But the principle is needed to explain why a party who communicates unequivocally an intention to continue with performance thereby loses the right to terminate the contract (in so far as the right was based on facts then in existence and known to the electing party). What is fundamental to the principle of waiver by election and crucial for present purposes is that

it is only capable of applying where a choice must be made between two alternative and inconsistent (in the sense of mutually exclusive) courses of action, such that adopting one of them necessarily entails forsaking the other."

58. Secondly, they contended that party had to have knowledge both of the relevant facts, and of their legal rights, although they accepted that there was a rebuttable presumption that, if the party was being legally advised, they would have the relevant legal knowledge if they had the relevant factual knowledge. In this regard, they accepted the summary given by Julia Dias J that I have set out above.

59. Thirdly, they accepted that the fact of the election needed to be communicated, but that this could be done expressly or impliedly.

CSCL's submissions on the facts.

60. These being the parties' submissions on the law, I turn to their factual contentions.

61. CSCL argued as follows:

(1) First, the Claimants were presented with two mutually exclusive courses of action upon receipt of the Determinations (on the premise that they were invalid for non-compliance with Clause 20.1). The Claimants could have either (a) rejected the Determinations as invalid and required compliant performance from CSCL, or (b) accepted the Determinations as valid, despite their non-compliance with Clause 20.1. They proceeded with the second.

(2) Secondly, the Claimants were aware of the facts giving rise to this election: they had sufficient knowledge of the Determinations and of the terms of the SPA (including through their solicitors) to know that they had the right to take either course of action (a) or (b).

(a) It is indisputable that the Claimants knew of the Determinations, and their content, when they were made. The Claimants engaged in correspondence with CSCL (via solicitors) regarding the Year 1 Determination and the Year 2 Determination.

(b) Further, as parties to the SPA, the Claimants can be taken to be aware of the content of the contract and the rights that they had (and have) thereunder. For example, Mr Hughes (the First Claimant and former Chief Executive Officer of Fixetnix), was involved in the negotiation of CSCL's purchase of Fixnetix's entire issued share capital.

(c) In any event, the correspondence received from Nabarro and CMS following service of the Determinations demonstrates beyond question that the Claimants were positively aware of their contractual rights under the SPA.

(3) Thirdly, the Claimants unequivocally communicated their choice to accept the Determinations as valid, despite their non-compliance with Clause 20.1 of the SPA. A reasonable party in the position of CSCL, considering the relevant (i) factual background, (ii) commercial context, and (iii) purpose of Clause 20.1, would have taken the Claimants' conduct to amount to an unequivocal acceptance of the Determinations as valid.

(a) Following service of the Determinations, the Claimants implicitly accepted the validity of the Determinations served by CSCL. Such a position can *only* be consistent with the Claimants electing to accept the Determinations as valid.

(i) Following the Year 1 Determination, the letter sent by Nabarro on 8 February 2017 stated that "*[i]t is not disputed that the Year 1 Revenue Target has not been met*." That statement constituted an (implicit) acceptance that the Year 1 Determination sent by CSCL, which determined whether the Year 1 Revenue Target had been met, was valid. Moreover, all correspondence sent by the Claimants after this point (prior to service of the Year 2 Determination), raising further issues concerning the calculation of the Year 1 Earnout Revenue, constituted further implicit acceptances that the Year 1 Determination was validly served.

(ii) As to the Year 2 Determination, the service of the Dispute Notice constituted an implicit acceptance that the Year 2 Determination had been validly served. This fact is not altered by CMS' belated argument on 26 January 2018 that the Determination had not been validly served (which was not seriously pursued until Fieldfisher sent the Letter of Claim over 5 years later) because, by that point, the Claimants' rights had already been waived. Again, if the Year 2 Determination had not been validly served, there would be no Determination for the Claimants to object to in their Dispute Notice sent a month earlier. The fact that the Dispute Notice did not comply with the requirements of Clause 20.1 is beside the point and cannot, of itself, have prevented that Notice from unequivocally representing/communicating that the Claimants had waived their right to demand compliant service of the Determinations.

(b) Having regard to the commercial context, a reasonable party in the position of CSCL would understand that, where a party objected to the *substance* of a Determination (e.g. on the basis that Earnout Revenue had been incorrectly calculated), that party was implicitly accepting the *validity* of the Determination itself. Simply put, if no valid Determination had been served, there would be no substance to object to.

(c) Having regard to the commercial purpose of Clause 20.1, such formality requirements are in place to ensure that the party receiving the notice or communication (i) has a clear written record of the content of such a communication, and (ii) is certain to receive it in a timely manner. Since it is clear that the Claimants *actually* received the Determinations promptly (as they were sent by email), and had a written record of them, a reasonable party in the position of CSCL would understand that, where the *purpose* behind Clause 20.1 had been fulfilled (albeit the formal requirements had not been complied with), and the Claimants had not sought to enforce their right to demand compliant service of the Determinations, that the Claimants had waived such a right.

62. Support for this analysis of a clear and unequivocal communication for the purposes of establishing a waiver can be found in The Happy Day, ref supra, in which Potter LJ held that, by commencing discharge, a reasonable shipowner would understand the conduct to amount to an unequivocal communication of the acceptance of the validity of the NOR (and that, therefore, the running of laytime would commence). In the premises, the charterers had waived their right to reject the NOR as invalid.[6]

63. CSCL then argued that, in reliance on the Claimants' conduct, it had altered its position. I consider this below in the context of the plea of estoppel.

64. The Claimants' reliance on Clause 17.2 of the SPA to avoid a finding of waiver, said CSCL, is misplaced and misunderstands CSCL's case on waiver. CSCL does not allege that the Claimants waived their rights by omission, but by their *positive* acts in corresponding with CSCL. As the Claimants implicitly acknowledge in their skeleton, Clause 17.2 cannot operate to prevent the Claimants from having waived, by positive act, their right to demand valid service of the Determinations. On its true and proper construction, Clause 17.2 only purports to prevent waiver by the mere delay or omission to exercise a right, but it does *not* encompass the Claimants' waiver by positive act, which is what is relied upon by CSCL.

[6] At [72].

A similarly worded no-waiver Clause was considered in Tele2 International Card Company v Post Office Limited [2009] EWCA Civ 9, where Aikens LJ held that such a Clause would be inapplicable to an election, given that the Clause was not expressed in such terms.[7] This approach was followed in URE Energy v Notting Hill Genesis [2022] EWHC 1809 (Comm), where Moulder J held (in relation to another similarly worded no-waiver Clause) that such a Clause was of no application where the defendant alleged that a *positive act* of the claimant had constituted waiver.[8]

65. There is nothing to suggest that a different conclusion to the one reached in Tele2 or URE Energy should be reached with respect to Clause 17.2. On its proper construction it is simply not possible to interpret Clause 17.2 as precluding CSCL from being able to rely upon the Claimants' waiver by *positive acts* of their right to demand compliant service of the Determinations.

The Claimants' contentions on election.

66. The Claimants contended that there had here been no election, for various reasons.

(1) First, they said that there was here no obligation to make any choice. If, as they argued was the case, there had been no valid service of a determination, then there was nothing for the Claimants to respond to. They did not have to respond to the determination at all.

(2) Secondly, they argued that there was no evidence that the Claimants had knowledge of their right to elect.

(3) Thirdly, as I understood it, they did not accept that there had been a communication of any election.

(4) Finally, they relied on the "no waiver" Clause in Clause 17.2.

Discussion and conclusions.

67. I have concluded that there has been no valid and binding election by the Claimants. In brief, my reasons for this conclusion are as follows:

(1) In my judgment, the Claimants are correct to say that in order to give rise to an election, there had to be a legal obligation to choose between two alternative courses of action.

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7 At [56].

8 URE Energy at [98(iii)] and [98(v)] per Moulder J. See also, Lombard North v European Skyjets [2022] EWHC 728 (QB) at [86]-[87] per Foxton J.

That is, after all, what the word election connotes – the party has to be put to his or her election. I also accept that the decisions in The Kanchenjunga and Delta Petroleum support this conclusion. Insofar as The Happy Day is inconsistent with this, then the decisions of the Supreme Court must of course take precedence. However, in my view the decision in The Happy Day is not inconsistent with these cases or this proposition, on its facts. There, there was a choice between two inconsistent courses of action, namely reliance on the invalidity of the NOR (which would mean discharge could not commence) or a decision to discharge (which would mean that it was no longer open to the Charterers to rely on an allegation of invalidity of the NOR).

(2) In the current case, however, in the face of an invalid determination, the Claimants were not faced with a straightforward choice between two options. Instead, there was a third course of action open to them, which would have been simply to ignore the determination. If this had been done, then, given that no valid determination had been served, the clock would simply never have been started for the Dispute Resolution Procedure provided for in the contract.

(3) In these circumstances, then, in my judgment, there can have been no election in relation to either determination. I therefore reject CSCL's case on election. In these circumstances, it is unnecessary for me to reach a view on the other points raised by each party.

Estoppel

68. In the further alternative, CSCL submitted that the Claimants are now estopped from denying that the Defendant validly served the Determinations. As Goff J explained in BP Exploration Co (Libya) Ltd v Hunt (No. 2) [1979] 1 WLR 783 at 810E-G, promissory estoppel is established where there is:

> "*(1) a legal relationship between the parties; (2) a representation, express or implied, by one party that he will not enforce his strict rights against the other; and (3) reliance by the representee (whether by action or by omission to act) on the representation, which renders it inequitable, in all the circumstances, for the representor to enforce his strict rights, or at least to do so until the representee is restored to his former position*."

69. CSCL submitted as follows:

(1) As to the representation made by one party that he will not enforce his strict rights against the other, this must be unequivocal,[9] and will be determined objectively.[10] It may be express or implied.

(2) The promisee's reliance on the promise must be such that it is inequitable for the promisor to seek to go back on their promise or representation.[11] This will typically require the promisee to demonstrate that "*he will suffer some detriment if the* [promisor] *is not held to the representation or promise*".[12]

70. CSCL argued that the Claimants are estopped from denying that the Defendant served valid Determinations:

(1) First, the SPA constitutes an existing legal relationship between the Claimants and CSCL.

(2) Secondly, the Claimants clearly and unequivocally represented to CSCL that the Determinations were accepted as valid, notwithstanding the fact that they were not served in accordance with Clause 20.1.

(3) Thirdly, CSCL relied upon the Claimants' representation to this effect, both by taking positive action, and omitting to retain the relevant documents necessary for the Dispute Resolution Procedure.[13]

(a) In relation to the Determinations themselves, in reliance on the Claimants' representations, CSCL has never re-served the Determinations (or even attempted to) in a way that complied with Clause 20.1 of the SPA. Further, following the Claimants' representation that the Year 1 Determination was accepted as validly served, CSCL served the Year 2 Determination in the same manner (via email, and not copied to the Claimants' solicitors).

(b) The Claimants' representations only need to have been *some* inducement, not the sole reason that CSCL acted as it did.[14] Therefore, it does not matter if

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9 The Kanchenjunga [1990] 1 Lloyds Rep 391 at 399, col 2 per Lord Goff.
10 *Chitty on Contracts* at 7-039 citing Bremer Handelgesellschaft mbH v Vanden Avenne-Izegem P.V.B.A. [1978] 2 Lloyd's Rep 109 at (126) per Lord Salmon.
11 *Chitty on Contracts* at 7-045; The Bunga Saga Lima [2005] EWHC 244 (Comm) at [31] per Gloster J.
12 Steria Ltd v Hutchison [2007] ICR 445 at [93] per Neuberger LJ.
13 As set out in The Kanchenjunga at (399, col 2) per Lord Goff, both positive action and omitting to act are sufficient to demonstrate reliance for the purposes of promissory estoppel.
14 See e.g. Brikom Investments Ltd v Carr [1979] QB 467 at (490D) per Cumming-Bruce LJ.

CSCL would have served the Determinations in the same way *anyway* (based upon its position that Clause 20.1 is inapplicable). All that matters is that one of the reasons for CSCL so acting were the representations made by the Claimants.

(c) CSCL, having received no valid objection to the Determinations that would oblige them to engage with the Dispute Resolution Procedure, and the 20 Business Day period following each Determination having long-since elapsed, have not retained the full spectrum of necessary documents and information that they would need to properly engage with, and comply with the requirements of, the Dispute Resolution Procedure. Had CSCL thought, for any reason, that the validity of the Determinations could be called into question (such that the Claimants might still be able to object to the Determinations), steps would have been taken to retain such documents and information. The Claimants do not address this particular detrimental reliance on the part of CSCL. It is now extremely problematic for CSCL to meaningfully engage with, or comply with the requirements of, the Dispute Resolution Procedure. In reliance upon the Claimants' representation as to the acceptance of the validity of the Determinations, CSCL lifted the litigation hold that had been placed on documents, with the consequence that the body of relevant documents and information necessary for such a procedure will have been reduced. It is simply not possible for CSCL to be restored to its pre-representation position in this respect. Moreover, personnel at CSCL who would have been in possession of relevant information have now left the company. Had CSCL not been given the clear impression that the validity of the Determinations was accepted by the Claimants, they could have taken steps to gather relevant information and evidence, prior to the departure of those individuals. Now, years after the event, the Claimants are demanding that the process for disputing the Determinations should start over, but with CSCL's hand(s) tied behind its back. Not only would the outcome of the Dispute Resolution Procedure be unfair in those circumstances (the parties, their respective accountants, and any Independent Accountant could not be furnished with all necessary information to reach a proper conclusion as to any Year 1 or Year 2 Earnout Revenue), but in addition, CSCL would likely be unable to comply with the particular requirements of paragraph 2.1 of Schedule 10.

(d) It is nothing to the point that CMS raised the possibility that the Determinations were not validly served in its letter of 26 January 2018. CMS did not seriously pursue this allegation at the time that it was made. Moreover, CMS sent no response to BLP's letter of 15 March 2018. In those circumstances it was not unreasonable for the litigation hold that had been placed on the relevant documents to be released in November 2018; nor was it unreasonable for CSCL not to take steps to preserve and record evidence for the purposes of possible litigation when it had no good reason to think such litigation would eventuate.

71. Having regard to all the circumstances of this case, and in particular the prejudice that CSCL will encounter if the Claimants are permitted to resile from the position taken previously, estoppel should operate to extinguish the Claimants' right to demand that the Dispute Resolution Procedure should now take place.

The Claimants' contentions.

72. The Claimants submitted that the Claimants' communications with CSCL and conduct following receipt of the 29 November 2016 and 29 November 2017 emails did not give rise to any estoppel because:

(1) They did not comprise clear or unequivocal representations that the Claimants did not require the Defendant to comply with the notice provisions.

(2) In any event, there is no evidence that CSCL acted on such representations to its detriment or conducted its affairs on the basis of the representation.

(3) Insofar as the case rests upon a failure to raise an objection, it is precluded by Clause 17.2 of the SPA.

73. The Claimants did not seek to serve any challenge notice in response to the 29 November 2016 email. Whilst their solicitors did, just over four months later, begin correspondence with CSCL concerning the calculation of the Year 1 Determination, this did not amount to an unequivocal representation that the Defendant was not required to comply with the notice requirements in the SPA required to trigger the 20 business day period for a challenge notice thereunder. Still less did it amount to a representation that they were content to dispense with compliance with the notice requirements by CSCL on the basis that CSCL would still require them to comply with the notice requirements for any challenge notice.

74. Whilst the Claimants did seek to serve a challenge notice in response to the 29 November 2017 email, this did not amount to an unequivocal representation that CSCL was not required to comply with the notice requirements in the SPA. CSCL's argument is that by sending a non-compliant counter-notice, the Claimants were representing that they did not require CSCL to comply with the notice requirements; whilst, simultaneously depriving themselves of the right to challenge the notice (by sending a defective challenge notice). No reasonable person would consider that this is what the Claimants were unequivocally communicating.

75. There is, in any event, no evidence that CSCL detrimentally relied on any communication by the Claimants or conducted its affairs on the basis of any such representation. There is no evidence that, but for the communications following the 29 November 2016 email, CSCL would, at some time thereafter, have sent a compliant notice for the Year 1 Determination. Similarly, there is no evidence that CSCL sent a non-compliant Year 2 Determination because of any such communications (or that it would otherwise have sent a compliant notice).

76. On the contrary, the evidence suggests that CSCL believed – and still believes - that it had no obligation to comply with the notice requirements. It seems likely that it sent the 29 November 2017 email in precisely the same form as the 29 November 2016 email not because of anything the Claimants had done or written, but because the author simply copied the form of the 29 November 2016 email. It is acknowledged that this is conjecture, but this is necessarily so since CSCL has not adduced any evidence on the point, a point on which it bears the evidential burden.

77. Finally, there is some suggestion in the CSCL's pre-action protocol letter of response that its case on waiver rests in part on omissions to exercise the right to insist on compliance with the notice requirements. If this is right, to that extent the case is precluded by Clause 17.2 of the SPA.

Discussion and conclusions.

78. In my judgment, it is necessary to distinguish between the Year 1 Determination and the Year 2 Determination in relation to this question of estoppel.

The Year 1 Determination.

79. The test for promissory estoppel is set out in Chitty on Contracts, 35th ed, at 7-031, as follows (footnotes omitted):

"For promissory estoppel to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on their promise. The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships."

80. In addition to promissory estoppel, then in my judgment it is also necessary to consider estoppel by representation, the requirements for which are set out in Chitty (at 7-005) as follows:

"There are three key requirements for estoppel by representation: (1) a clear representation of fact or (probably) law intended to induce the representee to adopt a particular course of conduct; (2) an act of the representee reasonably taken in reliance on the representation; and (3) the representee must be able to show that they will suffer detriment if the representor is not held to their representation. The burden lies on the representee to establish an estoppel by representation. This may be possible even in the face of an entire agreement clause. Estoppel by representation has been described as an "an estoppel in the strict sense of the term" and is the basis of the majority of claims in estoppel. It has sometimes been described as a rule of evidence, but is best viewed as a substantive rule of law."

81. Looking first at the Year 1 Determination, then in my judgment there was a clear representation that the Determination was valid, by reason of the positive statement that there was no suggestion that the numbers in the Determination were contested.

82. This in turn involved a clear representation that the Claimants did not, and would not, contest the numbers put forward in the Determination as validly served. Instead, the argument was that there had been a misrepresentation as to the way in which the numbers would be calculated (an argument that is no longer pursued).

83. The question therefore becomes whether there has been reliance on this representation of such a type as would make it inequitable or unconscionable for the Claimants to resile from it. I am satisfied, on the evidence before me, that there has been such reliance. In these circumstances, I conclude that the Defendant is correct in saying that the Claimants are estopped from contending that the Year 1 Determination was valid.

The Year 2 Determination.

84. I turn next to the Year 2 Determination.

85. Starting with the position on the basis of my findings so far, then the Determination was not a valid Determination because it was not validly served. As I have set out above, what happened therefore was that the Claimants disputed the figures in the Determination; the Defendant, rather than responding to this dispute substantively, contended that the dispute had been raised too late; and there was then an argument as to the validity of the Determinations and the Dispute Notices. The last correspondence was BLP's letter of 15 March 2028, which sought to explain why the Year 2 Revenue Target had not been met, a letter which met with silence for 2 years. It was in this period that it is said that the litigation hold on documents was lifted.

86. Thereafter, in 2022, the dispute was raised once again, albeit in a rather general manner, and, as I have said, the question of document retention was raised. Then, finally, the Letter of Claim was sent on 18 October 2023.

87. The first question under this heading is therefore whether the Claimants made any unequivocal representation that the Year 2 Determination was valid. In my judgment, there was no such representation. Whilst I have accepted that a statement that the figures in that Determination are correct carries with it an implicit representation that the determination containing those figures is valid, I do not think that the opposite is true. It is perfectly legitimate for a party to say, at one and the same time, that the document setting out the figures has not served to validly commence the Dispute Resolution Procedure, because it has not been validly served, and to take issue with the figures themselves. There is no necessity for the party receiving the figures to choose between contesting the validity of the service of the document and contesting the accuracy of the numbers in that document. The recipient can challenge both.

88. Certainly, in my view, there was here no unequivocal representation that the Determination was valid.

89. Testing this in another way, I do not think that a reasonable party in the position of the Defendant would understand from the service of the Dispute Notice that no point was being taken on the validity of the Determination.

90. Nor do I accept that there was any such reliance on the alleged representation at the time as to make it unconscionable or inequitable for the Claimants to resile from it. By the Claimants' letter of 26 January 2018 the point as to the invalidity of the Determination was taken by the Claimants, so that CSCL knew from that point that the validity of the Determination was contested.

91. This being the case at the time that the Dispute Notice was served, does the expiry of time between 2018 and 2023 add anything to the position? In my judgment, the answer to this question is no. In essence, all that happened in that period was that the parties corresponded, but without ever reaching any landing. Nothing said in this period, in my judgment, constituted a representation that the Determination was valid. In truth, the last time that the Claimants set out their position in relation to this issue was in CMS's letter of 26 January 2018, when, as I have noted, it was asserted that the Determination was <u>not</u> valid. Thereafter, there was no positive representation made by the Claimants to the effect that the Determination was valid, still less an unequivocal representation.

92. Turning to reliance, the specific reliance which is put forward is the lifting of the litigation hold, which resulted in fact from silence in response to BLP's 15 March 2018 letter. I do not regard this as caused by reliance on any positive representation. Nor do I regard it as sufficient to establish inequity or unconscionability.

Issue 4: The Dispute Notice

<u>CSCL's contentions.</u>

93. CSCL submitted that if it establishes either that the Determinations were validly served, or alternatively that the Claimants waived their rights to demand compliant performance or are estopped from denying that CSCL served valid Determinations, the Claimants need to establish that the Dispute Notice was valid; otherwise their claim must fail.

94. CSCL argued that the factual and legal position on this is clear. The Dispute Notice served by the Claimants was invalid as it did not comply with the requirements in Clause 20.1 of the SPA. As more than 20 business days have elapsed since CSCL served the Year 2 Determination on 29 November 2017, the time for the Claimants to object to the Year 2 Determination has now passed.

95. In more detail:

(1) As set out above, the requirements of Clause 20.1 of the SPA were clearly applicable to any objection to CSCL's Determination(s) under the SPA pursuant to paragraph 2.1 of Schedule 10.

(2) The Claimants have unquestionably failed to comply with the requirements of Clause 20.1, given that the Dispute Notice "*was not copied to the firm specified as acting for the Defendant in clause 20 of the SPA*." Compliance with all the requirements of Clause 20.1 of the SPA was a condition precedent for the valid service of an objection to CSCL's Determination(s).[15]

(3) As noted above, the requirement of Clause 20.1 serves an important purpose to ensure receipt in a timely manner. In fact, non-compliance by the Claimants caused a significant delay in CSCL's receipt of the Dispute Notice: Mr Hasan's address had changed from that given in the SPA and, therefore, it took a number of weeks to reach him. It was precisely for that reason that a copy needed to be sent to CSCL's solicitors as provided for in the SPA. In those circumstances, the Claimants' failure to observe the strict requirements of Clause 20.1 is fatal. As noted in Laminates Acquisition v BTR Australia [2004] 1 All ER (Comm) 737 "*Notice clauses of this kind are usually inserted for a purpose, to give some certainty to the party to be notified and a failure to observe their terms can rarely be dismissed on a technicality*".[16]

(4) Accordingly, on a proper construction of the SPA, the Dispute Notice was not a valid objection to CSCL's Year 2 Determination, and the time for filing such objections has long since elapsed. Therefore, the Year 2 Determination must stand as that given on 29 November 2017, where it was determined that no Deferred Consideration would be payable.

(5) A further issue arises in connection with the Dispute Notice, quite apart from its lack of compliance with Clause 20.1. Schedule 10 paragraph 2.1 requires the notice to set out "*in reasonable detail*", so far as practical within the knowledge of the Claimants, the reasons for their objections. It must be seriously in doubt as to whether, irrespective of the notice defect, the Claimants discharged that obligation.

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15 Tees Esk and Wear Valleys NHS Foundation Trust v Three Valleys Healthcare [2018] EWHC 1659 (TCC) at [44] per O'Farrell J.

16 At [29] per Cooke J.

(a) The "reasonable detail" purportedly provided by the Claimants amounts to a single generalised (and speculative) sentence, devoid of (i) any examples of specific clients to whom Earnout Business was sold and from whom Earnout Revenue was generated following the HP Merger; (ii) any examples of specific transactions or contracts which generated Earnout Revenue; and (iii) any examples of specific entities within the DXC group conducting Earnout Business and/or generating Earnout Revenue.

(b) Even if this defect does not provide a further reason for invalidating the Dispute Notice, it raises important questions as to the utility of embarking on the Dispute Resolution Procedure, assuming for these purposes that the Claimants have a contractual basis for requiring performance of that procedure.

(6) Finally, it was denied that CSCL waived its right to demand compliant performance of the Dispute Notice.

(a) First, it was submitted that it was not understood how CSCL's own non-compliance with Clause 20.1 could constitute a waiver of its right to demand compliant performance from the Claimants, particularly in circumstances where the Determinations were *necessarily* sent before the Dispute Notice. No reasonable party in the position of the Claimants would take conduct occurring *before* the Dispute Notice was even served to amount to an unequivocal representation by CSCL that the Claimants were relieved of their obligations to comply with Clause 20.1. Further, although it is not clear whether the Claimants are referring to waiver by election or estoppel in their skeleton argument, for completeness, at the time of serving the Determinations, CSCL did not have two mutually exclusive courses of action to take. Therefore, CSCL's allegedly non-compliant service of the Determinations cannot constitute waiver by election: there was nothing to elect between.

(b) Secondly, it is ambitious (to say the least) for the Claimants to seek to rely on Mr Hasan's 12 January 2018 email - where he is merely acknowledging receipt of the Dispute Notice - as an unequivocal representation that CSCL had waived its right to demand compliant service of the Dispute Notice. There is nothing in the wording of that email, or in the fact of Mr Hasan emailing at all, that could give it the meaning for which the Claimants contend.

(7) The reality is that, upon CSCL reviewing the Dispute Notice (a process which was delayed due to the Claimants' non-compliance with Clause 20.1) it was rejected for such non-compliance. There was no communication or representation from CSCL in the interim that could have indicated to the Claimants that CSCL had waived its rights in this regard.

The Claimants' contentions.

96. The Claimant argued that, if the Court finds that the Claimants waived the obligation on CSCL to comply with the SPA notice requirements in sending its calculations of the Year 1 and Year 2 Deferred Consideration Amounts (or there is an estoppel), then CSCL waived the obligation on the Claimants to comply with those requirements in sending its challenge notice to the 29 November 2017 email (or CSCL is estopped from arguing a failure to comply with those requirements).

97. In the aforementioned circumstances, the Claimant submitted that CSCL's conduct in failing to comply with the notice requirements in sending its calculations of the Year 1 and Year 2 Deferred Consideration Amounts and in responding to the 21 December 2017 Letter (through Mr Hasan's 12 January 2018 email) without raising any issue as to compliance with the notice requirements comprised unequivocal representations that CSCL did not require compliance with the SPA notice requirements in connection with the Schedule 10 process.

98. The Claimants' alternative case, they said, will arise only if the Court finds that CSCL has established reliance in connection with *its* case as to waiver/estoppel. In those circumstances, it can be inferred that the Claimants relied on CSCL's conduct in its dealings concerning the Deferred Consideration determination process.

Discussion and conclusions.

99. I can deal with this issue briefly, in the light of my findings to date.

(1) There is no question of any order in relation to the Year 1 Determination, since I have found that the Claimants are estopped from denying the validity of that Determination.

(2) In relation to the Year 2 Determination, I have found that this Determination was invalid, and there has been no election or estoppel which would preclude the Claimants from relying on this invalidity.

100. The hypotheses for CSCL's argument have thus not been established; and the Claimants' alternative case does not arise.

101. In fact, in my judgment, the simple answer to the issue is that there has been no valid determination in relation to Year 2, and so the contractual clock has never started ticking in relation to that year.

Issue 5: The Exercise of Discretion.

102. The last question that arises is whether I should exercise my discretion to make an order for specific performance or to make a declaration to order CSCL to engage in the Dispute Resolution Procedure. For the reasons already outlined, this issue only arises in relation to Year 2.

The Claimants' contentions.

Specific performance: law

103. The relief sought in connection with the primary claim, and part of the relief sought in connection with the alternative claim, is specific performance of the SPA.

104. There are a number of limitations to the circumstances in which the Court might order specific performance, referred to in *Chitty* in Chapter 31 Section 3. Insofar as the Claimants are aware, the only limitation relied upon by CSCL is the principle that the Court might refuse to exercise its discretion to order specific performance if the order would be unfair to the contract breaker.

105. The Claimants argued that whilst specific performance is a discretionary remedy, this discretion *"is not an arbitrary…discretion but one to be governed as far as possible by fixed rules and principles"*: see Lamare v Dixon (1876) L.R.6 H.L. 414, per Lord Chelmsford (with whom Lord Colonsay agreed) at 423. Specific performance may be refused where it would cause severe hardship to the defendant.[11] However, *"mere pecuniary difficulties"* would *"afford no excuse"*.[12]

106. The doctrine of laches can be applied to a claim for specific performance. The scope of the doctrine was set out by Lord Selborne LC in *Lindsay Petroleum Co v Hurd* (1874) L.R.5 P.C. 221 at p239:

> *"Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might be fairly regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief which otherwise would be just, is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."*

107. As Lord Blackburn stated in *Erlanger v New Sombrero Phosphate Co* (1873) 3 App Cas 1218 at p1279, the question is whether, *"the balance of justice is in favour of granting the remedy or withholding it"*.

108. It is relevant as to whether there is merely delay or also acquiescence on the part of the claimant or prejudice to the defendant. In *Life Association of Scotland v Siddal* (1861) 3 De G.F.& J. 58 Turner LJ stated at p72:

> *"Length of time where it does not operate as a statutory or positive bar operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not, as I conceive, distinct propositions. They constitute but one proposition, and that proposition, when applied to a question of this description, is that the cestui que trust assented to the breach of trust".*

Specific performance: submissions

109. There is no other credible remedy for the Claimants than specific performance. This is not a case in which the Court could use its discretion to refuse specific performance but order damages instead. If the Court finds that the Claimants have established their rights but refuses specific performance, they will be left without any remedy.

110. It seems that CSCL's principal argument as to why relief should be refused is delay. Mr Hughes addresses the reasons for the delay in bringing the claim in his second witness statement. In short, the Claimants, two of whom are elderly gentlemen, have been unable to fund the litigation themselves and were only able to source litigation funding once they approached FieldFisher LLP, which has provided a funding solution through their "Fee Solve" offering.

111. It cannot be said that the Claimants have acquiesced in CSCL's breach of contract: they have made their position clear in correspondence.

112. As to prejudice to CSCL, Mr Hasan refers, in his evidence, to difficulties caused by the passage of time in relation to the availability of documents and the departures of staff. He suggests that this will make any valuation process more difficult. Whilst he refers to individuals having left the business in his statement, he does not give any evidence as to whether those individuals would now refuse to assist in any valuation process, or whether he has made any inquiries as to whether they would be willing to assist. This is surprising in circumstances in which it is clear that at least some former DXC personnel *were* willing to assist Mr Hasan in providing information for his witness statement.

113. He also refers in his statement to a litigation hold on documents which has been released and the unavailability of certain documents held by certain custodians which were the subject of the litigation hold. It is unclear, however, why the documents Mr Hasan refers to would be relevant to the valuation of the revenue falling within the definition of Earnout Revenue in the SPA or whether, even if they were relevant, there is other documentation available to CSCL which would provide an alternative source for the necessary information. Tellingly, Mr Hasan does not say that the relevant financial information is not available, rather he states only that, *"CSCL is investigating whether it even still holds the underlying financial data"*.

114. As Mr Hughes points out in his second witness statement, there are good reasons to be sceptical of any suggestion that the relevant financial data may not be available. As he states, DXC is a public company which commenced trading on the NewYork Stock Exchange on 3 April 2017. It and CSCL are sophisticated corporate entities which generate significant revenues and are subject to strict statutory and regulatory obligations to file financial statements and maintain financial records in the US and UK respectively.

115. Any delay has not caused such prejudice to CSCL as would outweigh the prejudice caused to the Claimants (and those they represent) if relief was refused and it transpires that the Claimants are correct that they (and those they represent) have lost out on over USD 25 million (or even part of this sum) by reason of CSCL's erroneous calculations of Earnout Revenue. To adopt Lord Blackburn's phrase, the *"balance of justice"* is in favour of granting relief. As Mr Hughes states in his second witness statement, all theClaimants want is *"a fair and independent assessment of the Defendant's liability to thesellers"*.

Declarations: law

116. The Court has the power to make binding declarations pursuant to section 19 of the *Senior Courts Act 1981*. It is a discretionary power, in respect of which the applicable principles were set out by Neuberger J (as he then was) in *Financial Services Authority v Rourke* [2002] CP Rep 14:

> *"It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration"*

117. It is submitted that the reasons for which the balance of justice favours the grant of specific performance also support the grant of the declaration sought by the Claimants in their alternative case.

CSCL's contentions.

118. An order for specific performance, CSCL contended, being an equitable remedy, is capable of being resisted on the basis that "*delay on the claimant's part would make it inequitable to grant* [the relief sought]".[17] It may be inequitable to grant the relief where there is "*reasonable and detrimental reliance by others on, or some sort of prejudice arising from, the fact that no remedy has been sought for a period of time*".[18]

119. CSCL submitted that the Claimants were attempting to subvert the carefully crafted contractual scheme for disputing Determinations, and the purpose behind the relevant provisions in Schedule 10 of the SPA, which was intended to set out a short and defined time frame within which, following service of a (compliant) notice of objection, the parties were to try to resolve disputed matters between them (or with the assistance of their respective accountants), and then, if the dispute could not be resolved through that mechanism, to engage an Independent Accountant, with whom the parties were required to furnish "*such other information and documents*" as reasonably requested. CSCL submitted that there are clear commercial reasons for stipulating a short time frame for that entire process.

    (1) First, it enables the parties (particularly CSCL, as the potential paying party) to have reasonable certainty and finality about whether Deferred Consideration is to be payable under the SPA. For CSCL, this enables them to undertake important future financial planning for the business, with the certainty that, if 20 Business Days have elapsed with no objection from the Claimants, CSCL would know the precise sum of Deferred Consideration to be paid (if any).

    (2) Secondly, the passage of time will naturally lead to important documents and information being lost, and members of CSCL's staff leaving the business. As the Dispute Resolution Procedure would require CSCL to have access to comprehensive information regarding the Year 2 Earnout Revenue calculation (particularly in the circumstances where an Independent Accountant were instructed), it is necessary for the Dispute Resolution Procedure to be conducted as close in time to the service of the Year 2 Determination as possible. While paragraph 2.1 of Schedule 10 imposes obligations on both parties to, for example, disclose documents and information to an Independent Accountant, that burden would self-evidently fall more heavily on CSCL, as the party responsible for calculating the Earnout Revenue, and with access (at the time of calculation) to the figures necessary to make that calculation.

120. CSCL pointed out that the Letter of Claim was sent almost 6 years following CSCL's service of the Year 2 Determination and 5 years after the parties last exchanged substantive correspondence in relation to the Claimants' various (unfounded) objections to the Determinations, and argued that this delay had made CSCL's participation in the Dispute Resolution Procedure highly problematic since it had resulted in a situation where CSCL could not participate fully or in a meaningful way. As pointed out in relation to the plea of estoppel, the passage of time is such that CSCL does not have access to the key documents, records or other evidence that it would need in order to (i) attempt to resolve the dispute with the Claimants itself, or, failing that, (ii) provide

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17 P & O Nedlloyd BV v Arab Metals Co (No. 2) [2007] 1 WLR 2288 at [52] per Moore-Bick LJ; see also at [61].

18 Paddico (267) Ltd v Kirklees Metropolitan Council [2014] AC 1072 at [31] per Baroness Hale.

sufficient information and instructions to its own accountants, or, failing that, (iii) meet any reasonable requests for such documents or information from the appointed Independent Accountant. In particular:

(1) All employees of CSCL who were involved in the acquisition of Fixnetix and/or the calculation and issuance of the Determinations have now left CSCL. No individuals remain with knowledge of the relevant issues that would fall to be determined pursuant to the Dispute Resolution Procedure. The mere fact that these individuals *may* be available to assist in any calculation by an Independent Accountant does not alter the fact that CSCL has no means of compelling their assistance.

(2) CSCL no longer has access to a substantial amount of documentation from 2016/2017 that is relevant to the calculation of the Earnout Revenue that the Claimants seek to dispute. The Claimants' mere assertion that these documents may not be relevant, or that otherwise there may be other documents available, was not accepted. CSCL detrimentally relied upon the Claimants' failure to commence proceedings in relation to these issues and, on that basis, lifted the litigation hold that had been placed on documents, with the consequence that the body of relevant documents and information have been reduced. Nor, entirely reasonably, did CSCL take steps to gather relevant information and evidence from individuals at CSCL involved in the relevant events, prior to their departure from CSCL. These facts are not altered because CSCL is a UK private limited company, or because DXC is a US public company.

(3) In the premises, an order requiring CSCL to comply with the Dispute Resolution Procedure would place it in an invidious position.

121. For all these reasons, the delay now makes it inequitable to grant the specific performance sought by the Claimants: CSCL has detrimentally relied on the Claimants' inaction, and would now suffer significant prejudice if required to go through the Dispute Resolution Procedure.

122. As to any prejudice which could be said to be caused to the Claimants by declining to grant the relief sought, the assertion that the Claimants may have lost out on up to USD 25 million is beyond speculative, not least having regard to the fact that they have been unable to identify *any* specific source of Earnout Revenue which they say CSCL should have taken into account but failed to do. In any event this speculative prejudice cannot reasonably weigh in the balance in circumstances where the delay in issuing of the proceedings has been entirely caused by the Claimants; moreover at no point have the Claimants provided any good reason for this delay; the suggestion that litigation funding was not available was denied by CSCL. This is not a case where the Claimants have belatedly become aware of matters which might be said to make the dismissal of the claim and refusal of relief unfair. To the contrary, the Claimants have been intermittently seeking to challenge the determinations since 2017 and yet have failed to find any proper basis on which to do so.

123. Finally, in exercising any discretion that the Court may have (depending upon its findings on the other issues addressed above), the Court may wish to consider, in the light of the inability of the Claimants over a period of 7 years properly to articulate *any* clear factual

basis for challenging the substance of the Determinations, what actual purpose would be served by granting the relief sought.

124. In this latter regard, both parties made submissions as to whether there was any real reason to doubt the accuracy of the figures given, although both said that the material was of dubious relevance to the matters I have to decide.

Discussion and conclusions.

125. In relation to the relevant law, which I have set out above, I do not think that there was any real dispute between the parties. All of the remedies sought by the Claimants involve the exercise of a judicial discretion on my part, and the essential question in this case, in my judgment, is whether the delay on the part of the Claimants in bringing this matter to Court (and the results of such delay, such as the potential loss of evidence and documentation), balanced against the prejudice to the Claimants in losing their claim without even any consideration of that claim, renders it unfair to grant the relief sought.

126. In my judgment, in relation to the Year 2 Determination, the balance of justice lies in favour of the grant of relief. In this regard, I bear in mind the following:

(1) The Claimants did challenge the figures in the Year 2 Determination from the outset. Because that challenge was made, on the basis of my findings, on a timely basis, then my starting point is that the Dispute Resolution Procedure should have been engaged in at this stage. Had it been, the need for this application would have been obviated.

(2) There was, in my view, clearly a substantial delay on the part of the Claimants thereafter. However, I accept the explanation given by the Claimants, namely lack of the necessary funding.

(3) Whether CSCL has suffered real prejudice as a result of this delay is, in my view, still to be seen. In particular, I do not think that the mere lifting of a litigation hold would necessarily result in the loss or destruction of the documentation relevant to the exercise required by the Dispute Resolution Procedure. However, I also accept that CSCL must be able to say, as part of that Dispute Resolution Procedure, that particular relevant documents are no longer available to it, and nothing in the order that I make is intended to deprive CSCL of this right.

(4) Overall, I consider that the speculative prejudice to each party can only really be ruled upon with more certainty by the Dispute Resolution Procedure being activated.

127. Finally, as to what each party has said as to the accuracy of the figures produced so far, I have concluded that it would be undesirable for me to lengthen this judgment further by reference to considerations involving speculation.

Summary of conclusions.

128. For the reasons set out in this judgment, I have concluded as follows:

(1) Neither the Year 1 Determination nor the Year 2 Determination was valid.

(2) The Claimants have not elected to treat the Year 1 or the Year 2 Determination as valid.

(3) The Claimants are, however estopped from relying on the invalidity of the Year 1 Determination.

(4) The Claimants are not estopped from relying on the invalidity of the Year 2 Determination.

(5) In view of the conclusions set out above, the issue of the validity of the Dispute Notice does not arise.

(6) In relation to the Year 2 Determination (but only the Year 2 Determination) I grant the order of specific performance sought, requiring the parties to commence and then engage in the Dispute Resolution Procedure provided for in Schedule 10 to the SPA.

129. I would be grateful if the parties would produce an Order giving effect to the above conclusions.