IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2012-470-533
[2012] NZHC 2996

	BETWEEN	MARITEQ FABRICATORS LTD Plaintiff
	AND	QUIGLEY'S TECHNICAL SERVICES LTD Defendant

Hearing: 26 October 2012

Counsel: T J G Allan for Plaintiff
J A MacGillivray for Defendant

Judgment: 12 November 2012

JUDGMENT (NO. 2) OF HEATH J

This judgment was delivered by me on 12 November 2012 at 4.15pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Grove Darlow, PO Box 2882, Auckland
Tompkins Wake, PO Box 258, Hamilton

The application

[1] Mariteq Fabricators Ltd (Mariteq) applies for summary judgment. It seeks specific performance of an obligation that Mariteq alleges Quigley's Technical Services Ltd (Quigley's) agreed to perform when it executed a Deed of Settlement of related proceedings,[1] on 5 December 2011.

[2] Initially, Mariteq sought an interim injunction to compel Quigley's to perform the relevant condition of the Deed. During the course of a hearing on 27 September 2012, it was recognised that the order sought (a mandatory interim injunction) might be inappropriate. Mr MacGillivray, for Quigley's, indicated during that hearing that his client was prepared to deal with the issue on a final basis, by reference to an argument that the Deed had been frustrated. For that reason, I made orders enabling an application for summary judgment to be made so that the issue could be determined.[2]

Background

[3] On 18 December 2006, Quigley's issued proceedings against Mariteq in the District Court at Taupo, claiming a balance allegedly due in respect of construction work it had undertaken. On 16 March 2010, judgment was entered in its favour, in the sum of $32,973.75. Mariteq did not pay the judgment debt and later failed to comply with a statutory demand made against it. In May 2010, Quigley's commenced liquidation proceedings against Mariteq.

[4] While the liquidation proceeding was pending, Mariteq proposed a compromise to its creditors.[3] A meeting of creditors was held on 11 November 2010. Over Quigley's objection, the requisite majority of creditors approved the compromise.

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1 See paras [3]–[5] below.
2 *Mariteq Fabricators Ltd v Quigley's Technical Services Ltd* [2012] NZHC 2516 at paras [8] and [9].
3 Companies Act 1993, Part 15.

[5] Quigley's challenged the compromise, alleging that it was unfairly prejudicial and contained material irregularities. Quigley's issued a second set of proceedings, in which it sought a declaration that it was not bound by the compromise.[4] Following filing of that proceeding, Mariteq obtained advice from an Auckland based insolvency practitioner, Mr Chatfield, on whether creditors were likely to receive more under the compromise than they would on liquidation. Mr Chatfield reported in favour of the compromise.

[6] On 12 September 2011, a judicial settlement conference was held in this Court. While it was unsuccessful, the parties subsequently agreed on a process to resolve both sets of proceedings. The terms were recorded in the Deed of 5 December 2011.[5] It involved establishment of a process to enable Mr Chatfield's opinion to be tested.

[7] Mariteq and Quigley's agreed that an independent accountant[6] would be appointed to report on whether Quigley's would receive a greater dividend through liquidation or under the compromise. A firm, "McDonald Vague (Auckland Office)", was appointed to determine that question, at the cost of Quigley's.[7] The parties intended to be bound by McDonald Vague's opinion, so that, if the report favoured liquidation, Mariteq would consent to an order putting it into liquidation and the compromise proceeding would be discontinued. In the event that the compromise was favoured, Quigley's would discontinue both sets of proceedings, as well as being restricted in the amount for which it could claim to the actual sum payable under the terms of the compromise.[8] Both the liquidation and the compromise proceedings were adjourned until 23 March 2012, to enable the report to be completed

[8] Some problems arose in relation to fees to be charged for release of financial records and information necessary for the report to be completed. While the parties resolved that issue shortly before 23 March 2012 and filed a consent memorandum

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4 Ibid, s 232(2).
5 The relevant terms of the Deed are set out at para [15] below.
6 The term "investigative accountants" was used in the Deed; see cl 1, set out at para [15] below.
7 See cl 1 of the Deed, set out at para [15] below.
8 See cl 3 and 4 of the Deed, set out at para [15] below.

requesting a further adjournment of each proceeding to enable the investigation to continue, Associate Judge Doogue declined an adjournment and made an order putting Mariteq into liquidation. That was done despite a consent memorandum and the lack of any appearance from counsel for Mariteq, due to an oversight. Mr Van Delden and Ms Finnigan of McDonald Vague in Auckland were appointed as liquidators.

[9] Unsurprisingly, Mariteq applied to recall the liquidation order and to terminate the liquidation on the grounds that it had been made in circumstances amounting to a miscarriage of justice. While Quigley's did not oppose the application to recall, it filed two affidavits responding to allegations made by Mariteq. One was from its solicitor, Mr Jass, and the other from Mr Booth, the person at McDonald Vague who was responsible for preparing the report required by the Deed.

[10] Although there are disputes about what actually happened at the recall hearing on 23 April 2012, it appears that concerns were raised by Mariteq about a risk of pre-determination on the part of Mr Booth, having regard to the content of his affidavit. Following the liquidation order being recalled, the proceedings were adjourned until 21 June 2012 for the investigation to be completed. Mr Booth had deposed that the investigation and report required approximately 40 hours for completion.

[11] Formal correspondence then ensued arising out of Mariteq's allegation of partiality on the part of Mr Booth. In a letter from Mariteq's solicitors to McDonald Vague's solicitors dated 2 May 2012, it was stated:

> ... I can now confirm that Mariteq requires:
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> (a) the resignation of McDonald Vague as investigative accountants ("IA"); and
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> (b) an undertaking from a partner of McDonald Vague that no McDonald Vague partner or employee will undertake the liquidation of Mariteq in the event the substitute investigative accountant determines that a liquidator will result in a greater sum payable upon liquidation than that proposed under the compromise proposal.

> The reason for this is self-evident as a result of Mr Booth's affidavit and the response from Mr Beker (copies of which you now hold). Any decision by McDonald Vague is tainted by the actions of Mr Booth. If in the event the IA's decision is adverse to Mariteq's interest, then Mariteq would have good grounds for a judicial review. Mariteq's goal is to have this matter finalised in a timely and cost effective manner. If a new IA is appointed, either by consent or by say INSOL, you will appreciate a new IA removes the argument of pre-determination and lack of impartiality/independence.
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> ....

[12] It appears that there were discussions between the solicitors for Mariteq and McDonald Vague, as a result of which, on 14 May 2012, the solicitors for Mariteq wrote, stating:

> We write concerning the independent accountant appointed pursuant to the Deed of Settlement between the parties.
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> McDonald Vague have confirmed (through their solicitor Graham Jordan) that they will no longer be acting as the independent accountant.
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> The parties need to agree and appoint a replacement independent accountant as a matter of urgency. The original list of suggested independent accountants was as follows:
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> 1. WHK;
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> 2. PricewaterhouseCoopers ("PWC");
>
> 3. Korda Mentha.
>
> Given that the matter is due to be recalled in June the parties urgently need to agree on a replacement. If the parties cannot agree on a replacement independent accountant to carry out the report then we suggest that [the Institute of Chartered Accountants of New Zealand] appoint a replacement on joint application by the parties.
>
> Please respond to us within one working day as to your client's position given the urgency of this matter.

[13] Formal notice of McDonald Vague's decision to withdraw as investigative accountants was sent to Quigley's by McDonald Vague on 18 May 2012. After setting out relevant background, the letter concluded:

> 9. Subsequent to the recalled order, Mariteq notified McDonald Vague that it no longer wished for McDonald Vague to be involved in the investigation, or for any of its partners to consent to again being appointed liquidators of Mariteq. While we do not agree with the reasons provided by Mariteq, we note that this advice makes it impossible for McDonald Vague to complete the engagement. We

have previously discussed this with your solicitors, and hereby formerly resign from the investigation.

10. The recalled order stated that costs were reserved. To date, McDonald Vague has been unable to reach any agreement with Mariteq over liquidators' costs. All funds received by the liquidators, as set out in the affidavit of Jared Booth, were returned to Mariteq following the recall order.

11. It was originally expected that our fees for this assignment would be between $5,000 and $8,000 plus GST and disbursements. Our time exceeds this budget due to the unexpected dispute between Quigley and Mariteq over investigation costs, the unexpected difficulties in obtaining information from Mariteq, and the liquidation. To date we have invoiced fees of $3,726.50 plus GST. We **attach** a further invoice for fees of $4,273.50 plus GST and disbursements of $2.36. the invoice excludes fees and costs relating to the administration of the liquidation and legal costs incurred, which remains under negotiation as discussed above.

[14] Notwithstanding the terms of the 14 May 2012 letter,[9] Quigley's has refused to join in the appointment of a replacement investigative accountant. It takes the view that the actions of Mariteq that led to McDonald Vague's decision to withdraw has had the effect of frustrating the Deed, with the consequence that it is no longer able to be performed.

The Deed

[15] Set out below are those terms of the Deed that require consideration on the present application:

> 1. Mariteq agrees to Quigley appointing [McDonald] Vague (Auckland Office) as investigative accounts ("IA") to determine whether Quigley would receive a greater payment under the Compromise compared to Mariteq being placed in liquidation and the liquidators of Mariteq making a distribution to Quigley ("the investigation"). In order to determine what payment Quigley will receive if Mariteq is placed into liquidation, the IA can take into account any matter he or she considers to be relevant, including (but not exclusively):
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> (a) the value the IA determines should be recovered from:
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> (i) pooling of assets of relating companies (s 271 of the Companies Act)
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> (ii) voidable transactions (s 292 of the Companies Act);

[9] See para [12] above.

(iii) voidable charges (s 293 of the Companies Act);

(iv) transactions at undervalue (s 297 of the Companies Act);

(v) transaction for inadequate or excessive consideration with directors and certain other persons (s 298 of the companies Act);

(vi) setting aside securities and charges (s 299 of the Companies Act);

(vii) liability if proper accounting records not kept (s 300 of the companies Act);

(viii) an application under section 301 of the Companies Act requiring persons to repay money or return property (for instance, directors for breach of their directors' duties);

(b) the costs of a liquidation.

2. The IA will prepare a report (or reports) detailing the Investigation. The report (or reports) shall be made available to each of the parties and Quigley authorizes the IA to disclose such reports (or reports) to Mariteq. The IA will act as an expert whose decision will be final and binding on each of the Parties.

3. Quigley shall meet all costs (direct and indirect) associated with the investigation. If Quigley fails to meet such costs by the 20th of the month following the date of any invoice, then Quigley agrees that:

(a) the Proceedings will be immediately discontinued with no issue as to costs; and

(b) the interim payment already made under the Compromise shall be full and final settlement of the Judgment Sum and Quigley shall have no further claim against Mariteq.

4. If Mariteq is put into liquidation, any amount paid by Quigley under paragraph 3 will be treated as a debt to Quigley and added to the Judgment Sum.

5. Mariteq agrees that it will cooperate with the IA by supplying all relevant documentation/information (not being subject to any legal privilege) requested by the IA and answering (to the extent it is able) any questions from the IA. Quigley shall in the first instance provide the IA with copies of each set of Proceedings.

...

11. Each of the Parties agrees to execute and deliver any documents and to do all things as may reasonably be required by the other party to obtain the full benefit of this Deed according to its true intent.

....

Competing submissions

[16] Mr Allan, for Mariteq, submits that an order requiring Quigley's to appoint another investigative accountant should be made, on the basis that, in terms of cl 11, Mariteq has reasonably required Quigley's to do so. If that interpretation argument were not accepted, he submits that any "frustration" has arisen as a consequence of Quigley's actions in procuring an affidavit from Mr Booth to support its partisan position, meaning that it cannot rely on its own wrongdoing to argue that the Deed is at an end.

[17] Mr MacGillivray submits that the contract has been frustrated because the firm appointed to undertake a binding expert determination can no longer act. He contends that removal of that firm from performing that function means that a fundamental part of the agreement will no longer be capable of being performed. Mr MacGillivray relies on what he says is the analogous position of a situation in which an appointed arbitrator turns out to be partial.[10]

Analysis

(a) Frustration

[18] If a contract were frustrated, in a technical sense, it is no longer necessary for either party to perform obligations under it. Counsel agree that applicable law was accurately set out in Lord Radcliffe's speech in *Davis Contractors Ltd v Fareham Urban District Council*,[11] adopted by our Court of Appeal in *Roberts v Independent Publishers Ltd*.[12] Lord Radcliffe had said:

> . . . frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by

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10 Relying on dicta of Lord Diplock in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289 (HL), at 298.

11 *Davis Contractors Ltd v Fareham Urban District Council* [1956] 2 All ER 145 (HL) at 160.

12 *Roberts v Independent Publishers Ltd* [1974] 1 NZLR 459 (CA) at 472, per Beattie J.

> the contract. *Non haec in foedera veni*. It was not this that I promised to do ...
>
> *There must be . . . such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for*.
>
> (Emphasis added)

[19] Delivering the principal judgment of the Court of Appeal in *Roberts*, Beattie J referred also to Lord Reid's observations in *Davis Contractors Ltd*. Lord Reid said:[13]

> It appears to me that frustration depends, as least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.

[20] Another articulation of the test can be found in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[14] in which Diplock LJ said:

> The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertaking still perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

[21] In *Roberts*, McCarthy P delivered a concurring judgment. Richmond J expressed agreement with what had been said by both McCarthy P and Beattie J. McCarthy P emphasised the narrow nature of the inquiry. The President said:[15]

> I eschew an elaborate enquiry, or a detailed comparative weighing of the situations as they existed when the contract was entered into and after the acquisition by Independent Newspapers Ltd of the control of Independent Publishers Ltd, for as Lord Radcliffe said in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696; [1956] 2 All ER 145, the Courts act in these cases more often upon a general impression of the extent to which the rule governing discharge by frustration is satisfied. ...

[22] Applying those authorities, in my view, the contract was not frustrated when "McDonald Vague (Auckland Office)" resigned as appointed investigative accountants. The fundamental bargain was to have a binding determination of a

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13 *Davis Contractors Ltd v Fareham Urban District Council* [1956] 2 All ER 145 (HL) at 153.
14 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 474 (CA) at 485.
15 *Roberts v Independent Publishers Ltd* [1974] 1 NZLR 459 (CA) at 463.

particular question to resolve existing Court proceedings. In the absence of anything to justify a conclusion that someone was appointed to apply some special skill possessed only by him or her, the need for another person or entity to undertake the task was not something that made the nature of the bargain between the parties "radically different", to adopt Lord Radcliffe's phraseology in *Davis Contractors Ltd*.[16]

[23] In reaching that conclusion, I am particularly influenced by the appointment of a firm rather than a particular individual. In terms of the Deed, the valuation exercise could have been performed by any person in the firm, whether a partner, associate or employee. That does not indicate that Quigley's reposed confidence in a particular person, to the exclusion of others. Nor does it suggest that the person who was to undertake the exercise was someone with a special skill to bring to the task. That tends to distinguish cases in which the Courts may have declined to require a replacement arbitrator to be appointed, other than under some statutory authority.[17]

[24] The underlying object of the agreement was for an independent person to undertake the identified tasks and to report to the parties with an opinion by which they were bound. If another independent person were appointed, the contract remains capable of being performed.

(b) Clause 11 of the Deed

[25] The next question is whether Quigley's should be compelled to join in the appointment of a replacement investigative accountant. That turns on the interpretation to be given to cl 11 of the Deed.[18] If, as a matter of law, Quigley's was under an obligation to do all things that Mariteq required to be done to obtain the full benefit of the Deed[19] it is still necessary to determine whether one of those things would include involvement in the appointment of a replacement investigative accountant. Because that was not an express requirement, a term would need to be implied for that purpose.

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16 See para [18] above.
17 See Arbitration Act 1996, Sch 1, arts 11 and 15.
18 Set out at para [12] above.
19 Clause 11 is set out at para [15] above.

[26] The starting point is *Money v Ven-Lu-Ree Ltd*.[20] In that case, the Privy Council considered whether it was open to an umpire, in an arbitration held under the Arbitration Act 1908, to imply a term into the parties' agreement so that any dispute between accountants appointed by each to assess the valuation of shares could be resolved by arbitration.

[27] On an application to set aside or remit the award for reconsideration, Chilwell J took the view that the umpire had erred in determining that the amount payable could be fixed by arbitration.[21] On appeal, the Court of Appeal reversed that decision.[22] An appeal to the Privy Council was dismissed. Lord Goff of Chieveley, delivering the advice of the Privy Council, addressed the point of principle:[23]

> Their Lordships find themselves to be in agreement with the Court of Appeal. It is now well settled, in New Zealand as in England, that an agreement for sale at a valuation is capable of constituting a binding agreement, even if the machinery established by the parties for the ascertainment of the price should for some reason fail in that respect. So in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, such an agreement was held to be binding and effective, even though one of the parties failed to appoint a valuer, thereby frustrating the operation of the contractual mechanism for the fixing of the price *The House of Lords held that, on its true construction, the agreement was for a sale at a fair and reasonable price by the application of objective standards; that the contractual mechanism for valuation was subsidiary to the main agreement and that, if for any reason the contractual machinery broke down, the Court would substitute its own machinery for the achievement of the parties' contractual intention that a fair and reasonable price be ascertained. So, in the present case, the Court of Appeal held that the umpire had concluded, as he was entitled to do, that the agreement between Mr Money and the other shareholders was in substance an agreement that his shares should be sold to them for a fair and reasonable price, to be ascertained by objective standards, and they further held that the agreement as such was a binding agreement.*
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> *In their Lordships' opinion the Court of Appeal was fully entitled so to read the umpire's award*. Indeed, as Sir Robin Cooke P indicated, on that basis it was strictly speaking unnecessary for the umpire to consider whether a term was to be implied in the agreement that disputes between the parties should be referred to arbitration. This is because, given that the agreement of 9 September 1986 was a binding agreement, the date for valuation of the shares was, by that agreement, fixed as 30 June 1986, and so the umpire was on that basis able to answer the specific question referred to him by the arbitrators. Furthermore, by the consent order of 1 September 1987, the price

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20 *Money v Ven-Lu-Ree Ltd* [1989] 3 NZLR 129 (PC).
21 *Money v Ven-Lu-Ree Ltd* [1988] 1 NZLR 685 (HC).
22 *Money v Ven-Lu-Ree Ltd* [1988] 2 NZLR 414 (CA).
23 *Money v Ven-Lu-Ree Ltd* [1989] 3 NZLR 129 (PC) at 133–134.

> of the shares was to be determined by the arbitrators nominated in the order. It follows that, whether or not an arbitration clause was to be implied in the agreement of 9 September 1986, the applicable arbitration procedure was that now agreed between the parties, and embodied in the consent order of 1 September 1987, whereby the price of the shares was to be determined by the arbitrators nominated in the order.
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> (Emphasis added)

[28] The law in New Zealand has taken a pragmatic approach of this type, for some time. By way of illustration, in *Attorney-General v Barker Bros Ltd*,[24] the Court of Appeal held that if a Court were satisfied that the intention of the parties was to enter into an immediate and binding agreement, it was the duty of the Court to do its best to give effect to that intention, sometimes by curing any apparent lack of certainty through the implication of some "machinery or formula" that can render certain that which has been left uncertain.[25] In contrasting such a case with one in which the parties had no intention to enter into binding arrangements, Richmond P, delivering the principal judgment of the Court with which both Woodhouse and Cooke JJ agreed, said:[26]

> ... I shall now do my best to summarise those principles:
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> (1) If it appears that the true intention of the parties was not to enter into a binding arrangement unless and until certain unsettled terms of their bargain were settled by actual agreement between them, then no contract can come into existence in the absence of such further agreement. This was held to be the position in *May and Butcher Ltd v The King* [1934] 2 KB 17.
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> (2) If, however, the court is satisfied that the real intention of the parties was to enter into an immediate and binding agreement then the court will do its best to give effect to that intention. Thus Lord Wright in *G Scammell and Nephew Ltd v Ouston* [1941] AC 251; [1941] 1 All ER 14 said:
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> > *The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted*. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and

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24 *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495 (CA).
25 Ibid, at 498–495.
26 Ibid, at 498–499.

> with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found. ([1941] AC 251, 268).

(Emphasis added)

[29] There is no doubt that Mariteq and Quigley's intended to enter into a binding arrangement to enable a determination to be made whether Quigley's would receive a greater payment under the compromise, as opposed to a dividend in Mariteq's liquidation.[27] The agreement did not contemplate the possibility of McDonald Vague not completing their task. But each party did agree "to do all things as may reasonably be required by the other party to obtain the full benefit of [the] Deed *according to its true intent*" (my emphasis). The "true intent" was to have a determination of the fundamental question, by an independent person qualified to undertake the task. There are many people in New Zealand who are suitably qualified to do so.

[30] In my view, it is appropriate to imply a term into the Deed that a replacement expert could be appointed if a vacancy in that office existed. Once that is done cl 11 operates to compel Quigley's to comply with Mariteq's requirement to join in the appointment of a replacement investigative accountant; that being a reasonable requirement of the type to which cl 11 refers.

[31] The letter of 14 May 2012, from Mariteq's solicitors to those representing Quigley's can, when read in context, be viewed as evidencing a relevant "requirement", for the purposes of cl 11.[28] Quigley's declined to act on that requirement. In my view, having regard to the true intent of the Deed, it did so unreasonably and in breach of cl 11.

[32] In my view, Mariteq is entitled to an order for specific performance requiring Quigley's to join in the appointment of a replacement investigative accountant, by choosing one from the list set out in the letter of 14 May 2012.[29]

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[27] See cl 1 of the Deed, set out at para [12] above.
[28] The terms of the letter of 14 May 2012 are set out at para [12] above.
[29] See para [12] above.

Result

[33] For the reasons given, I enter summary judgment in favour of Mariteq by ordering that Quigley's perform its obligations under the Deed by appointing a replacement investigative accountant to replace McDonald Vague from the list set out in the letter from Mariteq's solicitors of 14 May 2012. In the event that compliance with this order is not made within five working days of delivery of this judgment, Mariteq may apply to the Court for an order appointing a replacement investigative accountant.

[34] Mariteq is entitled to costs on this proceeding. Costs are awarded on a 2B basis, together with reasonable disbursements, both to be fixed by the Registrar. For the avoidance of doubt this includes costs in relation to the interim injunction proceeding, including the hearing on 27 September 2012.

[35] The liquidation, compromise and injunction proceedings[30] were listed before me on 26 October 2012, when I heard argument on the present application. I have issued a separate Minute in those three proceedings, to which I draw counsel's attention.

[36] I thank counsel for their assistance.

P R Heath J

Delivered at 4.15pm on 12 November 2012

[30] CIV 2010-463-394, CIV 2010-463-878 and CIV 2012-470-533 respectively.