Neutral Citation Number: [2024] EWHC 284 (Comm)

Claim No: LM-2022-000095

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

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

Date: Monday 19 February 2024

Before:

Ms Lesley Anderson KC sitting as a Deputy Judge of the High Court

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Between :

ASTON MARTIN LAGONDA LIMITED	**Claimant**
- and -	
PREMIER INTERNATIONAL MOTORS GROUP CO. W.L.L.	**Defendant**

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Iain Quirk KC and Robert Harris (instructed by **Slaughter and May)** for the **Claimant**

Jeff Chapman KC and Hannah Bernstein (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing dates: 4, 5, 6, 7, 8, 11, 12 and 14 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS LESLEY ANDERSON KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Lesley Anderson KC :

Introduction

1. The Claimant, Aston Martin Lagonda Limited (**AML**), is an English manufacturer of luxury cars including, as its name implies, those under the Aston Martin (**AM**) brand. The historic home of Aston Martin is in the English town of Newport Pagnell, near Milton Keynes.

2. The Defendant, Premier International Motors Group Co. W.L.L. (**PIMG**) is a company incorporated and registered under the laws of Kuwait with company number 114314 and its principal office is at Arraya Tower, Kuwait. PIMG was appointed by a dealer agreement dated 19 February 2009 to import, sell and service new and used AM cars and parts in Kuwait. PIMG is owned by Pegasus Automotive Group Holding (**Pegasus)** which also owns Regional Steps Trading LLC (**RST**), a company incorporated under the laws of the United Arab Emirates (**UAE**), which was appointed by a dealer agreement dated 12 December 2012 to import, sell and service new and used AM cars and parts in the UAE. Pegasus is a wholly owned subsidiary of Al-Roumi Capital Holding Co. (**Al Roumi Capital**) which is owned by The Al-Roumi Group (**ARG**), the ultimate holding company of which is Al-Roumi Group Holdings Company, a Kuwaiti corporate group which is owned and controlled by the family of Rezam Al-Roumi (**Mr Al Roumi**).

3. Aston Martin Works Limited (**AMW**), is a company incorporated in England and Wales, which also operates from Newport Pagnell. AMW is indirectly owned as to 50% by AML and as to the other 50% by Bespoke Limited (**Bespoke**), a company incorporated in Jersey, which is owned by Al Roumi Capital. AMW specialises in the sale and restoration of AM heritage vehicles (which is what this case is largely about) but its business also includes the sale of new AM vehicles including continuation cars (new vehicles which, according to AMW's web-site, are produced to emulate earlier models which combine the authenticity of the original era cars but with a sympathetic application of modern engineering and performance advancements (**Continuation Cars**)) and the servicing, repair and engine building of vehicles.

4. For completeness, it is convenient also to note that Aston Martin MENA Limited (**AMMENA**), is a Jersey incorporated company which was appointed by AML as its exclusive distributor of new and used AM vehicles and parts in the Middle East, North Africa and Turkey region (**MENA**) pursuant to a distribution agreement dated 19 April 2018. AMMENA is ultimately owned and controlled by ARG. AMMENA has brought separate proceedings in the Commercial Court against AML (including for sums alleged to be due under that agreement) the trial of which concluded as recently as 23 November 2023 and in respect of which judgment was handed down on 20 December 2023: [2023] EWHC 3285 (Comm). I was also told that there is an ongoing shareholder dispute in Jersey concerning AMW's immediate parent company (which is owned 50% by representatives of AML and 50% by representatives of the ARG) and that AML and AMMENA are engaged in arbitration proceedings in relation to other disputes under the distribution agreement. It is perhaps sufficient to say that the cordial commercial relationship which once existed between the parties is now very strained.

5. The present proceedings concern two written contracts for the sale of 33 heritage AM vehicles or, as the parties generally refer to them, the Barter Vehicles (**the Heritage Vehicles**). I will return to their precise terms, meaning and effect later in this judgment. First, there is a written agreement between AML and PIMG (and acknowledged by RST and AMW) dated 21 December 2015 (**the 2015 Agreement**) for the sale of 8 Heritage Vehicles (**the 2015 Heritage Vehicles**) and the repayment of the debts then owed by PIMG and RST to AML. Secondly, there is a written agreement between AML and PIMG dated 30 December 2016 (**the 2016 Agreement**) for the transfer to AML of 25 Heritage Vehicles (**the 2016 Heritage Vehicles**) in consideration of AML issuing a credit note (**Credit Note**) to PIMG, and for the subsequent sale of certain special cars (**Special Cars**).

6. In summary, AML claims that, after taking account of the proceeds of sale of the Heritage Vehicles and agreed offset sums, there is a shortfall due to it under the 2015 Agreement of £1,721,361.51 (**the 2015 Shortfall**) and £5,724,953.34 under the 2016 Agreement (**the 2016 Shortfall**) and that it is entitled to recover £93,253.05 in storage costs (**the Storage Costs**) in connection with the sale of the vehicles. PIMG denies that AML is entitled to the 2015 Shortfall or the 2016 Shortfall or to the Storage Costs and contends, in short, in its defence and counterclaim, that no shortfall would have arisen but for AML's breaches of its obligations under the 2015 Agreement and the 2016 Agreement and that it is entitled to set-off its claims for damages for those breaches and/or for conversion of the 2015 Heritage Vehicles under the Torts (Interference with Goods) Act 1977 (**TIGA 1977**) and/or that any sums found to be due are to be deducted under the Credit Note.

7. I have been assisted by detailed written skeleton arguments and helpful written and oral submissions from Counsel for both parties. I am grateful to them for the way in which they assisted me during the trial.

The Heritage Vehicles

8. According to an extract from Octane Classic Car Price Guide produced by one of the experts: "*Lionel Martin and Robert Barnford built the first Aston Martin in 1914, the 'Aston' coming from the Aston Clinton Hillclimb. From this small acorn grew one of Britain's best-loved sports car marques. The golden era for the manufacturer began in 1948 when industrialist David Brown took over; the iconic DB series cars were fast, beautiful, desirable and expensive. After Brown sold up in 1972, Aston Martin had a number of owners while the long-lived V8 range kept the firm afloat. Ford's takeover in 1987 led to a period of stability and new models such as the DB7 and Vanquish. In 2014, a partnership with Mercedes-AMG was announced, the first fruit of which was the all-new DB11*".

9. It is important to note that the AM range is wide comprising different series of vehicles: including the DB4, the DB5, the DB6 (the DB being derived from David Brown as I have already noted) and that within each series there are often different specifications (such as Mark 1, Mark 2 and the Vantage and the Volante).

10. The 2015 Agreement concerns 8 vehicles which were listed in Schedule 2: (1) a DB6 saloon with chassis or VIN number DB6/2435/L **[Vehicle 4]**; (2) a DB4 Series IV with chassis number DB4/986/R **[Vehicle 2]**; (3) a DB4 saloon with chassis number

DB4/144/L **[Vehicle 6]**; (4) a DB4 saloon with chassis number DB4/566/L **[Vehicle 12]**; (5) a DB6 Mk II with chassis number DB6MK2/4289/R **[Vehicle 19]**; (6) a DB6 saloon with chassis number DB6/3425/LC **[Vehicle 33]**; (7) a DB5 saloon with chassis number DB5/1892/L **[Vehicle 5]** and (8) a DB6 Mk II saloon with chassis number DB6/3030/R **[Vehicle 1]**. Accordingly, there were 4 DB6 series cars, 3 DB4 series cars and one DB5 series car.

11. The 2016 Agreement concerns 25 vehicles identified in Appendix 1 to the Agreement: (1) a DB6 Mk 2 Volante with chassis number DB6MK2VC/3768/R **[Vehicle 20]**; (2) a DB6 Mk 2 Vantage with chassis number DB6MK2/4184/VC **[Vehicle 30]**; (3) a DB6 Mk 2 with chassis number DB6MK2/4316/R **[Vehicle 11]**; (4) a DB6 Mk 2 Volante with chassis number DBMK2VC/3774/R **[Vehicle 21]**; (5) a DB6 Mk 2 with chassis number DB6MK2/4135/R **[Vehicle 24]**; (6) a 1987 V8 Vantage with chassis number L12563 **[Vehicle 16]**; (7) a 1963 DB4 with chassis number DB4/1182/L **[Vehicle 23]**; (8) a 1958 DB4 Series 1 with chassis mark DB4/106/L **[Vehicle 10]**; (9) a 1961 DB4 Series IV with chassis number DB4/790/L **[Vehicle 18]**; (10) a 1970 DB6 Mk 2 Vantage with chassis number DB6MK2/4256/R **[Vehicle 22]**; (11) a 1989 V8 Volante Prince of Wales with chassis number R15733 **[Vehicle 14]**; (12) a 1958 DB2/4 Mk III Convertible with chassis number AM300/3/1522 **[Vehicle 28]**; (13) a 1968 DB6 Volante with chassis number DBVC/3675/R **[Vehicle 31]**; (14) a 1970 DB6 Mk 2 Vantage with chassis number DB6MK2/4271/R **[Vehicle 25]**; (15) a 1962 DB4 Series IV with chassis number DB4/850/L **[Vehicle 8]**; (16) a 1967 DB6 Volante with chassis number DBVC/3617/R **[Vehicle 26]**; (17) a 1959 DB4 Series 1 with chassis number DB4/162/L **[Vehicle 13]**; (18) a 1962 DB4 Series IV Convertible with chassis number DB4C/1058/L **[Vehicle 3]**; (19) a 1959 DB2/4 Mk III Convertible with chassis number AM/300/3/1403 **[Vehicle 32]**; (20) a 1967 DB6 Volante with chassis number DBVC/3611/R **[Vehicle 29]**; (21) a 1970 DB6 Mk II Volante with chassis number DB6MK2VC/3762/R **[Vehicle 15]**; (22) a 1961 DB4 Series II with chassis number DB4/368/L **[Vehicle 9]**; (23) a 1959 DB 4 Series 1 with chassis number DB4/168/L **[Vehicle 17]**; (24) a 1968 DB6 Volante with chassis number DBVC/3682/R **[Vehicle 27]** and (25) a 1967 DB6 Volante Vantage with chassis number DBVC/3660/R **[Vehicle 7]**. As can be seen, there was a number of multiples of cars of series DB4 and series DB6, including Volantes in this batch of vehicles.

12. Although this is how they were identified in the 2015 Agreement and the 2016 Agreements, it is nevertheless convenient also to identify them in the manner which I have done above (as Vehicle 1, 2, 3 etc) as this is the way they have been referred to by the parties, their legal teams and their respective experts in the agreed summary tables annexed to the Agreed Chronology. These helpfully summarise the relevant history of each of the Heritage Vehicles by reference to their ultimate approximate sales dates and contain information about: (i) the sales and costs claimed by AML (**Summary Table 1**); (ii) the pre-sale valuations which were carried out for each vehicle (**Summary Table 2**); (iii) the Experts' assessments of the prevailing market price (**PMP**) or contemporary market value (**CMV**) of the Heritage Vehicles at certain points in time (**Summary Table 3**); and (iv) whether the vehicle had achieved Assured Provenance Certification (**APC**) and the Experts' opinions on the re-work costs and sales process for the vehicle (**Summary Table 4**).

The Contractual Framework

13. A number of issues arise as to the proper construction of the 2015 Agreement and the 2016 Agreement, so it is necessary to set out their main terms. They are each in fairly rudimentary form. It is not clear how or by whom the 2015 Agreement was drafted. The 2016 Agreement appears to have been drafted by AML.

14. It is convenient to deal with one issue of construction which arose during the trial at the outset. In their opening Skeleton Argument at [4(3)], Counsel for AML had submitted, albeit without reference to any authority on the point, that although they used slightly different language in places, the 2015 Agreement and the 2016 Agreement should be construed together. I challenged that in the course of Mr Quirk KC's opening, and he now accepts (as reflected in his Closing Submissions), not least because they were a year apart, that they are not to be read as if they were a single agreement. However, he does submit that the common intention behind both agreements was that the debt that existed as at 2015 and the debt that was created by reason of the purchase of Special Cars in 2016, 2017 and 2018 was to be repaid to AML using the sales proceeds from a selection of barter cars. In my view, he was right to make the concession that the two agreements cannot be construed as one agreement. I accept Mr Chapman KC's submission that the two agreements had distinct purposes and should be read separately. I also accept Mr Chapman KC's submission that the arrangements made were intended to be mutually beneficial and not simply intended to benefit AML, not least because of ARG's significant holding in AML. However, I am equally satisfied that the 2015 Agreement forms part of the admissible factual matrix when construing the 2016 Agreement and that Mr Quirk KC is correct to say that at least part of the common intention behind both agreements is that AML will recover the debts due to it by selling the Heritage Vehicles and retaining the net sale proceeds and that on the evidence before me, in practice, AML and PIMG (and for that matter AMW) did not distinguish between the two sets of Heritage Vehicles when dealing with them.

The 2015 Agreement

15. The 2015 Agreement is dated 21 December 2015 and is in the form of a letter from AML addressed to PIMG (signed for them as parties) and copied to RST and AMW (signed for them by way of acknowledgment).

16. The first recital sets out that PIMG and RST each owe AML sums of money in relation to their respective purchases of AM vehicles and parts and other matters and that summaries of the amounts which remain outstanding and due to AML as at the date of the agreement are set out in the attached Schedule 1 (defined to mean "the Debt"). Although not marked as such, Schedule 1 is in four parts: the first is headed "MC027831 PREMIER VEHICLE ACCOUNT AS AT 21.12.15" and contains a list of invoices dating from 4 December 2014 to 18 December 2015 totalling USD 1,105,623.83; the second, longer list is headed "PP053113 PREMIER PARTS ACCOUNT AS AT 21.12.15" and contains invoices from 23 January 2015 to 30 November 2015 totalling USD 451,812.11; the third is headed "RC027114 REGIONAL STEPS VEHICLE ACCOUNT AS AT 21.12.15" and relates to invoices from 30 April 2013 to 18 December 2015 in a total sum of USD 2,919,910.94; and the final part is headed "RP027114 REGIONAL STEPS PARTS ACCOUNT AS AT 21.12.15" and consists of a list of invoices from 1 April 2015 to 30 November 2015 totalling USD 796,430.72.

17. There is a dispute between the parties as to whether the Debt (so defined) was appropriately converted into the equivalent sterling. Attached to the 2015 Agreement is a schedule titled "PIMG and Regional Steps" which itemises the vehicle debt and the parts debt in a total sum of USD 5,273,777.60. In their Opening Submissions at [A.1(1)], Counsel for AML contends that the Debt totalled USD 5,273,777.60 which converts to £4,223,510.06 on the day before the Claim Form was issued. Although PIMG had initially pleaded a non-admission as to the appropriate exchange rate, early on the second day of the trial, I permitted PIMG further to amend paragraph 6 of its Defence and Counterclaim to plead a positive case that the Debt was in fact in the sum of USD 5,273,770.60 which converts to £3,543,490.96 as at 21 December 2015 (the date of the 2015 Agreement and said to be converted as at the then current spot rate of USD 1.4883) which, PIMG's counsel submits, is the correct date to undertake the conversion exercise. I will return to this below but it is convenient to continue to use the term the Debt in the remainder of this judgment, notwithstanding this difference between the parties.

18. The second recital to the 2015 Agreement recites that the parties wish to repay the Debt by using the proceeds of sale from [the 2015 Heritage Vehicles] and owned by PIMG.

19. Paragraph 1 of the 2015 Agreement contains certain warranties by PIMG as to the 2015 Heritage Vehicles consistent with them being owners of them.

20. By clause 1.2, the parties agreed that, as soon as reasonably practicable after the date of the Agreement and by no later than 30 June 2016, PIMG was to sell the 2015 Heritage Vehicles. PIMG was to be responsible for all fees, costs, taxes and import duties, relating to the sale, transportation, shipping and delivery of the vehicles, including any sales commission.

21. By clause 1.3, the vehicle sales prices were to be determined by PIMG.

22. By clause 1.4, PIMG had the option to sell a vehicle by another agent other than AMW provided the sale proceeds were passed to AML within 10 working days.

23. By clause 1.5, PIMG had the option at any time prior to 30 June 2016 to fully repay the debts either in cash or by selling the 2015 Heritage Vehicles upon which they would no longer be under lien from AML or under any obligation to be sold or AML have any claim to revenues from the sale.

24. By clause 2.1 under the general heading "Repayment of Debts", it was provided that PIMG would use the net revenue from the sale of the 2015 Heritage Vehicles to repay all Debts, whether on its own behalf or on behalf of RST.

25. By clause 2.2, PIMG was to procure that AMW would pay all sales proceeds directly to AML on its behalf and that all sales proceeds were to be paid into AML's bank account in cleared funds within 10 business days of the sale, taking into consideration clause 1.4 if the vehicles were to be sold by another agent.

26. By clause 2.3, all Debts were to be cleared by no later than 30 June 2016 and any surplus sale proceeds would be paid directly from AMW to PIMG.

27. By clause 2.4, if the net sale proceeds were not sufficient to repay all of the Debt, PIMG was to promptly notify AML and forthwith pay to AML all outstanding amounts.

28. By clause 2.5, all payments due to be paid under the Agreement were to be made in GBP.

29. By clause 2.6, any payment obligation which fell due on a day that was not a business day in England would be due and payable on the next succeeding business day.

30. Clause 2.7 provided that: "*AML will have, in addition to any other right or remedy available to it, a lien and power of sale over [the 2015 Heritage Vehicles] for the Debts and all other fees, costs and expenses under or in connection with the sale of [the 2015 Heritage Vehicles]. If any of [the 2015 Heritage Vehicles] remain unsold and any of the Debt remains unpaid (in full or in part) as at 30 June 2016, AML (or AML's appointed agents) is entitled to: (a) take possession of [the 2015 Heritage Vehicles] and retain them in its possession until all Debts are paid in full; and (b) Sell [the 2015 Heritage Vehicles] directly or through AML's appointed agent at [PMP], on the expiry of 5 business days' notice to PIMG*".

31. Clause 2.8 then provides that PIMG irrevocably appoints AML as its attorney to sign, execute and deliver on its behalf all documents and to do all acts and things necessary to enable the registration of AML as owner of the 2015 Heritage Vehicles in exercise of the power of sale in clause 2.8 above, AML shall then bear all taxes and costs as owner of the 2015 Heritage Vehicles. It is not in dispute that the reference to "clause 2.8 above" is an obvious error and should refer to "clause 2.7 above".

32. By clause 3.2, it was agreed that no variation of the Agreement would be effective unless it was in writing and signed by the parties (or their authorised representatives).

The 2016 Agreement

33. The 2016 Agreement is different in style and form from the 2015 Agreement. The parties are AML and PIMG and it is signed by their representatives.

34. There are three recitals. Recital A records that the collection of 2016 Heritage Vehicles had been determined by RM Sotheby's (**RMS**) to have an aggregate value of £14.3m (defined to mean "the Appraised Value"). Recital B states that AML will issue the Credit Note of £14.3 million as payment for the 2016 Heritage Vehicles. Recital C states that PIMG and AML will apply the Credit Note to the payment of (or part payment for) certain Special Cars.

35. By clause 1(a), it is agreed that PIMG sells and transfers to AML legal title to the 2016 Heritage Vehicles in accordance with the terms of the Agreement.

36. By clause 1(b), PIMG accepts the Credit Note as payment for the 2016 Heritage Vehicles.

37. By clause 1(c), title to the 2016 Heritage Vehicles was to transfer to AML immediately upon execution of the Agreement.

38. Clause 1(d) provides for certain warranties by PIMG.

39. By clause 1(e), it is agreed that: "*PIMG will pay the full costs of repatriation of each [2016 Heritage Vehicle] from its current location to [AMW], including transport, insurance, and any applicable taxes and import duties, and (ii) restoration of each [2016 Heritage Vehicle] by [AMW] to the minimum level to gain [APC]. Cars should be brought up to a standard to meet the minimum level of [APC], such costs to be borne by PIMG. Discretion as to the reasonableness of costs versus value of any restoration work is given to the chief executive officer of AML*".

40. By clause 2(a), under the general heading Payment for Special Cars, it was agreed that AML would ship certain Special Cars (those in Appendix 2) to PIMG in 2016 (**2016 Cars**) and in 2017 and 2018 (**2017/2018 Cars**).

41. By clause 2(b), the price of the 2016 Cars was to be offset in full against the Credit Note.

42. By clause 2(c), the price of 2017/2018 Cars was to be offset against the Credit Note until £14.3 million (less the sum already offset for 2016 Cars and any cost incurred by AML on behalf of PIMG under [clause] 1(e)) was exhausted in increments of 50% of the price of each 2017/2018 Car, and PIMG was to pay the balance of each 2017/2018 Car as a condition to each offset.

43. By clause 3(a), under the general heading Price Adjustment, it was agreed that: "*AML will determine if and when to sell any [2016 Heritage Vehicle] after [APC] has been achieved. AML will use its best endeavours to ensure that the cars are sold for as close to [CMV] as possible but gives no warranty or guarantee in this regard*".

44. Clause 3(b) then provides: "*If, when all the [2016 Heritage Vehicles] are sold, the aggregate sales proceeds (net of any costs reasonably incurred by AML to sell the cars) are less than the Appraised Value, PIMG will pay AML the difference between the actual sales proceeds and the Appraised Value on demand and prior to the delivery or any additional new car; and if, when all the [2016 Heritage Vehicles] are sold, the aggregate sales proceeds (net of any costs reasonably incurred by AML to sell the cars) are more than the Appraised Value (the "**Overage**"), AML will pay PIMG the Overage after offsetting any unpaid balance owed by PIMG for Special Cars or otherwise*".

45. There is attached as Appendix 1 to the 2016 Agreement an appraisal of the 2016 Heritage Vehicles prepared by Paul Darvill of RMS for Mr Sheppard of PIMG dated 13 December 2016 and based on an inspection which took place in Kuwait on 8 and 9 December 2016 (**the RMS 2016 Valuation**). As that document records, RMS has thirty-five years' experience in the collector car industry including valuations for auctions, private treaty sales, estate planning and financial services.

46. The RMS 2016 Valuation valued the 2016 Heritage Vehicles on a Fair Market Value basis as "*the most likely sale result at public auctions wherein the buyer may not be*

specifically motivated to purchase a given vehicle" and such that it was "*satisfied that the stated Fair Market Valuations accurately reflect the current market values of the subject vehicles, for a sale between a willing buyer and a willing seller, however it would be reasonable to allow a margin of plus or minus 10% on our Fair Market Valuations to allow for factors such as auction house commissions, currency and market fluctuations*".

47. On Valuation Methodology, the RMS 2016 Valuation identifies three approaches employed in concluding value: the Income Approach, the Cost Approach and the Sales Comparison Approach and that: "*As there are a sufficient number of comparable vehicles in the relevant marketplace on which to base a credible value conclusion, the Sales Comparison Approach has been employed*". It goes on to note that auction sale prices are reported as the total price inclusive of auction house buyer's premium and that private treaty results, when credible and available, will be utilised.

48. Finally, under the State of the Market, the RMS 2016 Valuation states: "*Like any other market, the market that exists for collectable automobiles is subject to volatility. The market for post-war sports cars and Ferraris in particular has been increasingly active in the last several years reflected by a sharp upward price trajectory. As such, it is recommended that this appraisal be reviewed every six to eight months or upon request*".

The Classic Car Market

49. It is convenient at this point to say something generally about the market for classic cars, in particular, the Heritage Vehicles. I was significantly assisted in this regard by the expert opinion evidence from Damian John Nicholas Jones (**Mr Jones**), on behalf of AML, and Brian J E Page MIMI (**Mr Page**), on behalf of PIMG. Mr Jones' evidence was in the form of his first report with exhibit dated 7 August 2023 (**Jones One)** and in his supplemental report with exhibit dated 13 October 2023 (**Jones Two**). Mr Page's first report with exhibit was initially dated 7 August 2023 but was substantially amended with an amended Appendix 4 on 13 October 2023 (**Page One**). His second report with exhibit "BP 2" is also dated 13 October 2023 (**Page Two**). In addition, after meeting on 29 August 2023, Mr Jones and Mr Page provided the Court with a very helpful written joint statement dated 12 September 2023 (**Joint Written Statement**).

50. The proper scope of the expert evidence was determined by Robert Bright KC, sitting as a Deputy Judge of the High Court, in the Directions Order dated 25 November 2022 (sealed by the Court on 28 November 2022) (**the Directions Order**) at [11] which provided that each party had permission to adduce expert evidence from an expert in the field of heritage vehicles on the following issues (**the Expert Issues**):

    (i) The extent to which the price received for each of the 2015 Heritage Vehicles was reflective of the [PMP] that existed on the date the parties entered into the 2015 Agreement;

    (ii) The extent to which the price received for each of the 2015 Heritage Vehicles was reflective of the [PMP] that existed at the point of sale;

(iii) The extent to which the price received for each of the 2016 Heritage Vehicles was reflective of [CMV] that existed at the point of sale;

(iv) The extent to which the restoration, works and/or repair costs incurred in respect of the 2015 Heritage Vehicles – where such costs exceeded £10,000 in respect of any of the 2015 Heritage Vehicles – were reasonably and proportionately incurred given the conditions in which the vehicles had been stored; their state on receipt; and the eventual sale price which was then achieved;

(v) The extent to which the restoration, works and/or repair costs incurred in respect of the 2016 Heritage Vehicles – where such costs exceeded £10,000 in respect of any of the 2016 Heritage Vehicles – were reasonably and proportionately incurred given the conditions in which the vehicles had been stored; their state on receipt; and the eventual sale price which was then achieved;

(vi) The extent to which the sales process followed in respect of each of the Heritage Vehicles ensured that the Heritage Vehicles were sold for as close to [CMV], or to [PMP] as possible.

51. I will return to my assessment of the more contentious parts of their evidence below. Neither of them had been able to inspect any of the vehicles. However, I am able to draw some common threads from their evidence and the evidence of the factual witnesses (all of whom were experts in and/or had significant experience in one way or another in the classic car business).

52. First, it was not in dispute that AMW is a highly respected dealer within the collector car market. Second, there is generally a difference between the price which a classic vehicle will achieve by a retail sale, compared with a sale at auction. Mr Page's evidence (Page One at [37]) was that "*In general, it is more likely for classic cars to receive higher prices when sold by retail rather than at auction*". Mr Jones's evidence (Jones One at [6.5]) is that: "*I would have thought that AMW had just as much chance of maximising the retail price of the Heritage Vehicles as any other retail outlet*". I note for example that in an internal email from Mr Spires to Mr Davey on 4 April 2017 under the general heading: "*Heritage Strategy"* he noted that "*Auction – probably won't realise the best prices and unlikely to create any profit once charges are taken out*". Thirdly, as Mr Page put it "*(t)he most crucial factor which will impact valuation is the condition of the vehicle*" and in a falling market, it is the average/imperfect examples which decrease the most. Fourthly, other factors which are specifically relevant to the value of a classic car include: (i) the availability of accompanying documents which establish its history and provenance; (ii) the rarity of the vehicle; (iii) the identity of previous owners or links with certain franchises (for example, the James Bond franchise); (iv) competition history such as involvement in track events or car shows or being driven by a notable driver; (v) whether the vehicle is right or left-hand drive; (vi) whether the car has been altered from its original specification; (vii) whether the vehicle has been stored or maintained abroad (because the quality maintenance and restoration works may be different from the UK); and (viii) where a vehicle is being imported from abroad, whether the relevant import tax has been paid and the Notification of Vehicle Arrivals (**NOVA**) has been completed.

The Witnesses

53. I heard evidence on behalf of AML from Paul Warren Spires, the Commercial Director (from May 2014) and current President (since May 2018) of AMW (**Mr Spires**); from Mathew ("Mat") Roy Davey, Senior Finance Manager at AMW since he joined in February 2016 (**Mr Davey**) and from Dominic Martin Hall, the former General Manager of Finance for Sales and Marketing and Communications (from February 2016) and now Director of Finance, Financial Planning & Analysis (from October 2018) at AML (**Mr Hall**). Mr Spires relied on 2 witness statements dated 26 May 2023 (**Spires One**) and 26 June 2023 (**Spires Two**). Mr Davey and Mr Hall each made one witness statement dated 26 May 2023.

54. I heard evidence on behalf of PIMG from Abdullah Zidan (**Mr Zidan**) whose evidence in chief was in his witness statements dated 26 May 2023 (**Zidan One**) and 26 June 2023 (**Zidan Two**); Fathi Jamoul (**Mr Jamoul**) whose witness statements are dated 26 May 2023 (**Jamoul One**) and 26 June 2023 (**Jamoul Two**); Richard Quinlan (**Mr Quinlan**) whose amended witness statement is dated 6 June 2023; Rafaat Aql Hassan Abdelall (**Mr Abdelall**), whose witness statement is dated 26 May 2023. Mr Zidan's background is in accounting and business administration. He is currently the President of Al Roumi Capital, the indirect parent company of PIMG, but at the time with which this claim is concerned, he was the Senior Vice President of Investment and Capital Markets at ADEEM. He also sits on the board of AMW. Mr Jamoul no longer works for PIMG but was its General Manager from 2015 reporting initially to Mr Al-Roumi but, from early 2016, to Christopher Sheppard (**Mr Sheppard**). Mr Sheppard died before the Claim Form was issued and PIMG relied as hearsay evidence on certain matters told by him to Mr Quinlan and Mr Jamoul. Mr Quinlan joined the ARG in February 2020 as CFO but left after 3 years. According to Mr Zidan, Mr Quinlan also sits or sat on the board of AMW (along with a Mr El-Howily). Mr Abdelall has a long history in the automotive industry and ran his own business selling cars between 1995 to 2005 before joining ARG in 2007 and has, since its incorporation in August 2009, worked for PIMG. In 2014 he became head of PIMG's classic car division, including as its brand manager for AM, and is responsible, on a day-to-day basis, for the restoration, distribution and any other logistics in connection with the retail or auction sale of its cars. His mission is to sell the cars including formulating and monitoring PIMG's annual sales target. Mr Abdelall's witness statement is dated 26 May 2023. It was made in Arabic and an expert translator, Farnas Faisal (**Mr Faisal**) of TransPerfect London, testified that it was a full and accurate translation of it. In the end, it became apparent quickly that, despite it not being his native language, Mr Abdelall spoke and understood written and spoken English reasonably well and had, for example, sent contemporaneous e-mails in English. In the end, Mr Abdelall gave some of his evidence in English and some with the assistance of Mr Mansour Dhifallah of Thames Translation and I am satisfied that he was able to participate fully and effectively in the proceedings.

55. This is a commercial case involving commercial parties who, notwithstanding their connections, were dealing at commercial arm's length. When assessing their evidence, I was rightly reminded by Mr Chapman KC of the proper approach to evidence based on recollection in this type of case in the well-known decision of Mr Justice Leggatt (as he then was) in *Gestmin SGPS S.A v (1) Credit Suisse (UK) Limited and (2) Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (**Gestmin**) especially his observations at [15] to [22] as to the fallibility of human memory and reconstruction and as to the

effect which civil litigation has on memory. At [22] he cautioned, and I bear firmly in mind in this case because I am dealing with events that largely took place 7 or 8 years ago:

> "*In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*".

56. Gestmin was revisited by Mr Justice Leggatt in *Jeffrey Ross Blue v Michael James Wallace Ashley* [2017] EWHC 1928 (Comm) 1928 at [65] to [69], in particular at [69] and the footnote where the Judge added: "*In addition to the points that I noted in the Gestmin case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light*".

57. Dealing first with the witnesses for AML, in my judgment there were some unsatisfactory features about each of Mr Spires, Mr Davey, and to a lesser extent Mr Hall, when giving evidence. I set them out below when making my specific findings.

58. Mr Spires is an acknowledged expert when it comes to the restoration and sale of heritage AM vehicles. He accepted that he was closely involved with the sale of the Heritage Vehicles but in my view too quickly resorted to stock answers to the effect that he could not remember or recall or did not know especially when asked questions about the sales process and strategy adopted. When pressed in cross-examination for detail, he was often able to respond with specifics. A curious feature of Spires One was that it did not mention the trips he made to Kuwait in 2015 and 2016 or that he had placed values on some of the vehicles he saw on the visits. There were times when, in my judgment, he was unnecessarily reticent to give answers, for example, when asked about the effect of work on the Continuation Cars on sales of the Heritage Vehicles. However, he is clearly highly regarded in the field of heritage AM vehicles (including I note by Mr Zidan) and has a deep understanding of the market for sale, including on matters of provenance and condition. Indeed, if anything I think he underplayed his own role and the way in which others defer to him on these issues. Most importantly, I am satisfied that he was honest when he told me that there was no let up in the need to achieve PMP/CMV even after 1 May 2019.

59. Turning to Mr Davey, a lot of his evidence was not really seriously challenged because it dealt with the mechanics of the costs incurred by AMW and the treatment of the proceeds of sale. I found his evidence on the failure to keep PIMG informed about the progress of the sale of the Barter Cars unnecessarily vague and reticent and his evidence was attended by a couple of long silences in which he seemed to my mind to be working too hard to come up with his answers. In particular, he was asked about an email sent by Dan Balmer, AML's Regional President for the MENA region, to him on 4 February 2019, itself forwarding an email from Mr Jamoul to him earlier that day, in which Mr Jamoul had asked to be given "*updates on the sold cars till (sic) date with values As We need to know the trend of prices as well to maintain A timely reconciled balance of the barter"* and to Mr Balmer's response saying: "*Sure, that's only fair – Mat, can you keep the team in Kuwait updated?*". Mr Davey was simply unable to explain satisfactorily why this explicit instruction from Mr Balmer was ignored. At too many points he resorted to "*it wouldn't be my role"* which was unconvincing given that he was being asked about emails to which he had been party. However, I also accept that he was broadly consistent with Mr Spires on whether AMW was trying to maximise the sale proceeds of the Heritage Vehicles and I accept his evidence that "*Selling the cars is in everyone's interest*".

60. Mr Hall's evidence was directed exclusively to the issue of the Credit Note. I found this part of the oral evidence to be the most opaque and confusing, although in fairness to Mr Hall, this is partly because the inter-company accounting between the parties is complicated and messy, was conducted by informal emails, and because it was not always obvious which of the figures in the various spreadsheets which accompanied the email traffic were being put to him and whether they represented an agreed position, as opposed to a proposal or negotiating position. Although Mr Chapman KC cross-examined Mr Hall to seek to demonstrate, in line with PIMG's case, that no final agreement had been reached as to the various debts (other than the Special Cars) to be applied to the Credit Note, it was not always clear to me that Mr Hall understood what was being put to him. Of some significance, however, is that he was not challenged on his witness statement at [7] that the Credit Note had been fully exhausted by October 2018.

61. Save for Mr Quinlan, whom I found to be straightforward and honest, in both the way in which he gave his evidence, and its contents, there were also unsatisfactory features about the witnesses for PIMG who appeared before me. Whilst I do not consider that they set out deliberately to mislead the Court, I had the impression that the evidence of each of Mr Zidan, Mr Jamoul and Mr Abdelall had been crafted too closely to PIMG's case than was consistent with their true recollection of events and some of it felt like reconstruction rather than recollection.

62. Although it is clear that Mr Quinlan was involved in a general strategy within PIMG to avoid paying what AML now claims as the 2015 Shortfall and the 2016 Shortfall, it was not suggested to him that he was doing so in a dishonest, rather than commercially savvy, way. I accept his evidence in chief at [29] that between 1 May 2021 and receipt of the Original Invoice on 31 January 2022, AML did not provide any updates on the sale of the remaining vehicles.

63. Mr Zidan gave his evidence in a clear and superficially convincing manner. However, although in my judgment nothing really turns on it, his evidence that he did not know

Sheikh Nasser was behind the possible influx of a batch of heritage AM vehicles was wholly unconvincing. Moreover, it seems to me that he overplayed Mr Spires' involvement in the selection of the cars for the 2015 Agreement and 2016 Agreement in a way which was not consistent with the documentary evidence. I think this was so as to deflect that his, and possibly others in PIMG, views on the condition and values of the vehicles at that time were over-optimistic. I agree with Counsel for AML, that despite saying that he followed movements in the market, Mr Zidan exaggerated the extent to which the market has improved since 2020-2021.

64. Mr Jamoul was cross-examined on two main issues. First, on the Credit Note, his evidence in chief (Jamoul One at [36]) was to the effect that, to his knowledge, there was no final agreement reached relating to (or specifying) what would be included within the Credit Note. The term "final" seemed to play into what I now understand to be part of PIMG's case which is that, as evidenced by the 2015 Agreement and the 2016 Agreement, habitually, if the parties reached an agreement, it would be finalised and recorded in writing. In cross-examination, he initially accepted that the Credit Note had been extinguished by the various ARG debts in line with Mr Hall's reconciliations but then shortly thereafter, sought to row back from that by saying that individual balances were not agreed. In short, it struck me that he was seeking to uphold what he perceived to be the PIMG "party" line on the Credit Note. To be fair to him, as I have already noted, the evidence is of a messy inter-company position. The second aspect of his evidence related to the true nature of the relationship between the ARG and PIMG and Sheikh Nasser, the former Prime Minister of Kuwait (**Sheikh Nasser**). For reasons which are not entirely clear to me, Mr Jamoul described Sheikh Nasser variously as being "*an indirect shareholder"* (Jamoul One at [22]); as a "*customer"* (in his cross-examination) and as someone who did not appear on the articles of association of PIMG. It seems to me that whilst this was undoubtedly unclear, and suggestive of some embarrassment on Mr Jamoul's part at being asked about this in Court, nothing really turns on it for this case.

65. Mr Abdelall's evidence was shorter. Unlike Mr Jamoul, he confirmed that it was Sheikh Nasser that had been bringing heritage AMs onto the market and placing them at auction without reserves. However, he was contradictory on the effect that placing multiples of particular types of cars in auction could have on values and it was plain that he was confused as to the two Bonhams' auctions in May 2016 and May 2017.

66. In line with Gestmin, with all of the lay witnesses (other than Mr Quinlan) I approach their testimony with some caution, except where it is corroborated by the documents, or where it aligns with my assessment of the known facts and probabilities.

Factual Background

67. Much of the factual background and evidence as to the performance under the 2015 Agreement and the 2016 Agreement is not in issue. In some instances, there is a discrepancy, presumably because of the time difference between sender and recipient, in the times of emails but nothing turns on this. Insofar as these matters are not agreed, these are also my relevant findings as to those facts.

68. Before entering into the 2015 Agreement and the 2016 Agreement, representatives of both AML and PIMG had physically inspected the 2015 Heritage Vehicles and the

2016 Heritage Vehicles in Kuwait. Although it seems to me that it does not go directly to any of the agreed issues for my determination, as I heard quite a bit of evidence on these visits from a number of witnesses, I will set out my findings on them. It is not now in dispute that the vehicles formed part of the substantial collection of Sheikh Nasser. At the time, some of the vehicles were in PIMG's showroom but others were stored, together with many other vehicles, including heritage vehicles from other manufacturers, in vast storage facilities/warehouses described by Mr Spires as being like "massive aircraft hangars".

69. Mr Spires first visited the facilities in Kuwait on 11 to 14 February 2015 when he inspected all of the 2015 Heritage Vehicles and some of the 2016 Heritage Vehicles. This is consistent with a later email from Mr Jamoul to Mr Spires copied to Mr Zidan dated 22 November 2015 under the heading "14 cars valuation" which states: "*These are the remaining 14 cars from previous car selection (from initial 22 cars), could you please put new prices (valuations) for each Vin nbr".* According to Mr Spires' response to Mr Jamoul sent on 23 November 2015, the valuation of the 2015 Heritage Vehicles at £3m was "*based on a very brief appraisal of the cars in February*" and "*for customs purposes*". First, I note that the term "*brief appraisal*" is consistent with Mr Spires' evidence (Spires Two at [13]) that he did not drive the vehicles or conduct any detailed inspection of them to establish whether they were roadworthy. The impression I have formed from his evidence and that of Mr Zidan (who describes them as being held in a secure facility at which no-one was allowed to go around alone) is that the vehicles were stacked high and wide and access to them carefully controlled on behalf of Sheikh Nasser. The email is not consistent with Mr Zidan's evidence (Zidan One at [13]) that Mr Spires "*spent 2 or 3 days with the cars doing a full detailed analysis, checking each car, testing each part of each car, and assessing the authenticity*". Secondly, I accept Mr Spires' evidence at Spires Two at [13] that "*customs purposes*" is a reference to customs entry values being the value of a non-tax paid item and that customs values should reflect the value of the car and be based on a reasonably good estimate. They are the values which are used by HMRC to calculate the tax payable and therefore should reflect the true estimated value of the car. Insofar as Mr Zidan sought initially at (Zidan One at [12)] to say that customs values are "conservative values", meaning that the estimated true value is something different, I reject his evidence. Indeed, on this point I note that Mr Zidan's evidence is contradicted by his own responsive evidence (Zidan Two at [11]) where he accepts that the customs invoice value represents "*the best estimate of the market values of the vehicles*".

70. I also accept Mr Spires' evidence that he was not involved in the selection of the Barter Cars (as opposed to inspecting a number of vehicles for disposal generally some of which became the 2015 Heritage Vehicles and the 2016 Heritage Vehicles). There is nothing to contradict his evidence that he was not even aware, at the time of his inspection, of the Barter Agreements. In oral evidence, Mr Zidan initially sought to overplay Mr Spires' involvement in the selection of the vehicles but eventually accepted that it was Mr Jamoul and Mr Abdelall. Given his embedded interest in the AM brand and his evidence that the visit was "*spectacular and memorable"*, it is highly likely that Mr Spires expressed views to Mr Zidan about individual cars but I reject that he was involved in choosing, as Mr Zidan suggests, the best cars to achieve the highest margins on sale. Mr Zidan's evidence on this is contradicted by Mr Jamoul, whose evidence in chief was that PIMG's board had not given any instructions on how to select the cars and that it was he and Mr Abdelall who selected the cars for the 2015

Agreement from PIMG's stock based on the price they thought each car was worth, how ready the cars were and which were best for AML (Jamoul One at [[10]). Mr Abdelall's witness statement said that he and Mr Jamoul selected the vehicles for the 2016 Agreement (not the 2015 Agreement) and at [10] that no-one from AML or AMW participated in either the selection of cars to be involved in the 2016 Agreement or the refurbishment process. In short, this evidence is somewhat contradictory which is another reason why, on points of difference, I prefer that of Mr Spires.

71. The second visit to Kuwait by Mr Spires was made between 30 October 2015 to 2 November 2015. He again visited the large hangars and was accompanied by Thilo Martin (**Mr Martin**) who worked for the AM dealership in Geneva and was also a specialist on Rolls Royce cars. On 3 November 2015, Mr Abdelall provided Ian Fenton (a former AML employee but who by then was working for the Kuwaiti shareholders) (**Mr Fenton**), Mr Spires, Mr Martin and copied to Mahmoud Samy (**Mr Samy**) and Mr Al-Roumi attaching a list of cars "*you selected during our visit to the garage*". On 6 November 2015 Mr Spires sent an email to Mr Fenton and Mr Martin with values for around 60 vehicles, at least nineteen of which eventually formed vehicles included in the 2016 Agreement. On the same day, Mr Fenton forwarded the email to Mr Al-Roumi and Mr Zidan (copied to Mr Martin, Mr Samy and Mr Spires) in an email headed "*Feedback to RAR"* (a reference to Mr Al-Roumi) attaching "*AM analysis from Paul"* and noting that the prices shown were retail prices as paid by the end customers. An issue again arises as to nature and extent of the inspection carried out by Mr Spires. According to Mr Zidan (Zidan One at [33]), Mr Spires spent two or three days inspecting the cars on each visit. I think he is probably mistaken about this because in a contemporaneous email dated 28 October 2015 setting up the trip there is reference to him spending "*at least 4 hours on sit[e]"* on 30 October 2015 and "*at least another 4-6 hours on site*". I accept Mr Spires' evidence that he was not permitted to take photographs of the vehicles as this is consistent with Mr Zidan's evidence that security around the facility was generally controlled.

72. Although Mr Spires was unable to produce the handwritten notes he made on this visit, his evidence is that he graded the vehicles he inspected from 1 to 10 (with 1 being a car in poor condition and likely to need a full restoration and 10 being one in excellent condition) and, on his return to the UK he typed his observations into a document which was before me, annexed to Spires Two. The list comprises a mixed bag of different vehicles in, on his estimate, varying conditions. Mr Spires then forwarded his list of values to Mr Fenton, as described above, albeit without his notes and commentary.

73. So far as the condition of the 2015 Heritage Vehicles is concerned, Mr Zidan's evidence in chief (Zidan One at [13]) was that they were "*the crème de la crème*". Mr Jamoul had said at [10] that he had tried to select "*the best cars*". I note that in a later email exchange between Mr Jamoul and Mr Al-Roumi, on 13 and 14 August 2016, Mr Jamoul confirmed so far as 3 of the vehicles were concerned, Mr Al-Roumi's instruction had been that no further work or expenditure was to be incurred on them and, in Mr Jamoul's words "*this is what i told david to do, only very high level cosmetical job (sic)*" and that, in cross-examination, Mr Jamoul, accepted that PIMG envisaged work to be done by AMW on the 2015 Heritage Vehicles. Although Mr Quirk KC is correct to note that he went on to accept (albeit somewhat reluctantly) that such costs would be for PIMG's account, it seems to me that is neither here nor there

because that is a matter of the proper construction of the 2015 Agreement, on which Mr Jamoul's view as to its effect, is inadmissible.

74. Mr Spires' contemporaneous assessment of 19 of the 25 vehicles which became the 2016 Heritage Vehicles was that one was graded 4/10; 3 were graded 5/10; 7 were graded 6/10 and 5 were graded 7/10. Although there is a degree of subjectivity in his assessment, I accept Mr Spires' evidence that the vehicles which became part of the two Barter Agreements were not generally in good condition for the following reasons. First, Mr Spires is acknowledged to be an expert in the field and I can think of no reason why he would not give his honest opinion on the condition of the vehicles. He could not have anticipated that those views would become subject to the intense scrutiny in litigation such as this. Secondly, both experts are of the view that several of the vehicles suffered from problems, including engine problems, body damage and problems arising from the conditions in which they had been kept. Thirdly, on any analysis, there is nothing independently in the documents to corroborate the view expressed by PIMG's witnesses that the vehicles were in very good condition. I reject the evidence that the Heritage Vehicles were the "*the crème de la crème*".

75. On 21 December 2015, the parties entered into the 2015 Agreement. Although Mr Jamoul in his first witness statement at [29] suggested that Mr Spires' third visit was in June or July 2016, I consider that he is obviously mistaken on this. Extracts from Mr Spires' passport confirm that he entered Kuwait on 6 January 2016, and this is consistent with his evidence that the visit was for one night. Mr Spires' recollection is that on this occasion he visited PIMG's dealership rather than the hangar and that he viewed cars that had had some repair work conducted on them. On his return to the UK, on 26 January 2016, Mr Zidan emailed Mr Spires (copied to Mr Fenton, Mr Jamoul, Mr Abdelall, Mr Al-Roumi and Mr Samy) referring to his visit and asking him to advise on the expected sale price of one DB6 vehicle "*that we did not agree on its pricing (as it was not ready yet at the showroom)*". Mr Spires responded the same day to say that whilst it was difficult to be accurate from the information provided, assuming the car was in good working order with EU taxes paid, the sale price would be £360k/395k. It seems to me that this is consistent with the fact that Mr Spires was involved in giving valuations of the cars, albeit on the basis of a limited inspection, and that he may have had **some** hand in their selection. Indeed, he accepted as much in cross-examination. It seems to me that this is an example of Mr Spires underplaying the extent of his involvement in the selection process, whilst Mr Zidan and Mr Jamoul sought to overplay it.

76. It is common ground that between January and June 2016, PIMG attempted to sell the 2015 Heritage Vehicles but was unable to sell any of them. Amongst other things, by a letter dated 25 April 2016, PIMG authorised AMW to enter 3 Heritage Vehicles (and 9 other classic cars) into an auction of, solely AM, classic cars to be held by Bonhams at AMW's premises in Newport Pagnell in May 2016. However, they did not sell. It is however of some significance that PIMG itself tried to sell the vehicles by auction given that at least part of its criticisms of AML/AMW now involve saying that they should not have sold by auction.

77. According to the contemporaneous emails and air waybills which are in the trial bundle, all 8 of the 2015 Heritage Vehicles had arrived in the UK by 5 October 2016.

78. In December 2016, as evidenced by the minutes of an AML meeting held on 15 December 2016 (attended by amongst others Mr Samy and Dr Palmer, the CEO of AML at the time (**Dr Palmer**)), it was agreed that RMS should be asked to value the vehicles which were to become subject to the terms of the 2016 Agreement.

79. So far as the condition of the 2016 Heritage Vehicles is concerned, I have already indicated that I prefer Mr Spires' contemporaneous assessment which was that they were a mixed bag.

80. On 14 December 2016, the day before, Mr Spires had confirmed in an email to Dr Palmer, that he had "*reviewed the list and all except 6 are ones I selected back in November 2015 for disposal. Looking at the values [RSM] have placed against mine over a year ago I suspect there's been an element of "Preparation" carried out on some since my visit. Some values are close and others a fair bit off, but the market has changed, V8s have increased over the last 12 months whilst DB4, 5 and 6 have remained fairly static from a value perspective. Hope this helps a little but I guess it's very much up to the negotiations between the different parties. [RMS] are good people and I'm sure will have carried out a thorough job on their appraisals*". His email concludes: "*Better for my health not to be drawn in, as I would find myself conflicted*." This was a reference to him perceiving that AMW had a foot in both camps by reason of its shared ownership between the Kuwaiti shareholders and AML.

81. As I have already outlined, there was a direct relationship between those vehicles and the proposed Credit Note, and in due course, RMS valued the 2016 Heritage Vehicles at £14.3m and a copy of their appraisal was annexed to the 2016 Agreement. As can be seen a copy of the RMS 2016 Valuation was shared at the time with Mr Spires who acknowledged that he had "*reviewed the list and all except 6 are the ones I selected back in November 2015 for disposal*". This is further evidence to my mind he had some hand in the selection of the vehicles but not specifically for the purpose of the two agreements.

82. On 19 December 2016, Dr Palmer reported to Mr Spires that AML had completed the transaction on the cars and noted: "*We will now need to provide each car with minor brush-up and Provenance certification. We may choose to go into deeper renovation on some, but this will be at AML expense and thus needs to generate a return*".

83. On 30 December 2016, the parties entered into the 2016 Agreement.

The Proper Construction of the 2015 Agreement and the 2016 Agreements

84. The applicable legal principles are well-established. The 2015 Agreement and the 2016 Agreement fall to be construed by me in the manner set out in recent authorities at the highest level on the principles governing the interpretation of commercial contracts, the most recent of which are the decisions of the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company Ltd* [2015] UKSC 72, [2016] AC 742 (concerning implied terms) and *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896; *Re Sigma Finance Corporation* [2010] 1 All ER 571; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance*

Services Ltd [2017] UKSC 24, [2017] AC 1173 (concerning the construction of express terms).

85. First, in construing a contractual provision, regard is to be had to the purpose of the provision and the circumstances in which it was agreed. The principle was stated by Lord Nicholls in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 (HL) as follows at [26]:

> "*The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made*".

86. Second, it has often been said that in cases of ambiguity (such as where there are two possible meanings of the words to be construed), the court is entitled to prefer the construction which is most consistent with business common sense. In *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 Lord Clarke stated the principle as follows at [21]:

> "*... the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. 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*".

87. These principles were considered and endorsed in *Arnold v Britton* [2015] UKSC 36. Lord Neuberger (with whom Lords Sumption and Hughes agreed) considered the proper approach to contractual interpretation at [14]-[23].

88. At paragraph [15] he said:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (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…*".

89. Lord Neuberger went on to emphasise seven factors (although the seventh was concerned with service charge clauses and so is not set out below):

17. *"First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.*

18. *Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.*

19. *The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.*

20. *Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*

21. *The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a*

> *contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.*
>
> 22. *Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any ... approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22)*".

90. In *Wood v Capita Insurance* [2017] UKSC 24 at [11], Lord Hodge, citing Lord Clarke in *Rainy Sky*, stressed that the Court is engaged in a "*unitary exercise; where there are rival meanings, the Court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense*" which is an iterative process.

91. Turning to implied terms, the effect of the judgments of Lord Neuberger, Lord Clarke and Lord Carnwath in *Marks & Spencer* supra, as summarised by the authors of Chitty on Contracts (35th ed 2023) at [17-012] is that: "*in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract: it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract*". Moreover, the task is an objective one: the Court is concerned not with proof of actual intention of the parties when negotiating the contract but rather with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed.

92. In the light of the way in which important parts of the case for PIMG was put by Mr Chapman KC, he reminded me of the legal significance of conditions precedent – namely contingencies which must be fulfilled, in order to bring a particular contractual obligation into operation. He submitted, and I accept, that the issue of whether a contractual mechanism creates a condition precedent is a question of the proper construction of the relevant provision in its contractual context. He reminded me of the observations of Flaux J. in *Astrazeneca UK Ltd v Albemarle International Corp* [2011] 6 WLUK 473 at [249] where he stated that whilst: "*it is not necessary for the relevant provision to use the express words 'condition precedent' or something similar; nonetheless the court has to consider whether on the proper construction of the contract that is the effect of the provisions*" and at [250] that one obligation will only be a condition precedent to another obligation where: "*either the first obligation must for practical reasons clearly be performed before the second obligation can arise or the second obligation is the direct quid pro quo of the first, in the sense that only performance of the first earns entitlement to the second*".

93. A number of points of the proper construction of the 2015 Agreement and the 2016 Agreement arise for my determination.

94. I deal with them first and then will set out my findings on the allegations of breach.

The 2015 Agreement

95. In relation to the 2015 Agreement, 9 issues have been identified by the parties for my determination including as to the proper construction of Clauses 1.2, 1.3, 1.4, 1.5, 2.4 and 2.7 of the 2015 Agreement.

The Appropriate Exchange Rate for the Debt

96. The first issue of construction which arises under the 2015 Agreement is what is the appropriate exchange rate for the Debt?

97. AML's case (see the Re-Amended Particulars of Claim at [4.1]) is that the Debt converts to £4,223,510.06 applying the applicable exchange rate on 4 May 2022, the day before the Claim Form was issued.

98. For PIMG, although originally pleaded as a non-admission, it is now submitted that the 2015 Agreement was executed to offset the Debt, being the sum of USD 5,273,777.60 (itemised over some 18 pages as I have explained in paragraphs [16] and [17] above). It points to the fact that the parties have identified and converted the sums due at the "*Current Spot Rate"* of $1.4883 being the spot rate on 21 December 2015 and submits that, having gone to the trouble of converting the USD debt as at 21 December 2015, the parties then agreed in Clause 2.5 that "A*ll payments due to be made hereunder will be made in GBP*". The parties are to be taken as having converted the USD debt to GBP sterling at the exchange rate in the 2015 Agreement and so, it submits, any claims for any shortfall under the 2015 Agreement should be calculated by reference to the sterling Debt as so defined in Schedule 1. It says AML's choice of 4 May 2022 is arbitrary and would give it a windfall because of subsequent movement in the exchange rates and that had the parties intended to create an obligation which varied with the exchange rate they would have said so and identified the source of the exchange rate to be used. In short, it submits that the Court should calculate any shortfall under the 2015 Agreement by reference to a starting point for the Debt as being £3,543,490.96.

99. In response, Mr Quirk KC for AML made a number of submissions. First, he reiterated that the Debt as claimed in the Particulars of Claim and as defined in the recitals to the 2015 Agreement was for the amounts outstanding and set out in Schedule 1, which are all USD debts. The Debt is for a defined total sum of USD 5,273,777.60 although he also acknowledged that there is a need for two sums which are calculated in GBP to be deducted (being the 2015 Net Proceeds and the sum of £203,619.55 pursuant to the Set-Off Agreement) from the Debt. He rejects the relevance of the parties' conversion of the Debt into sterling at the then current spot rate of $1.4883 because, he submits, the exchange rate would change over time and the fact that Clause 2.5 of the 2015 Agreement provides for payments due under it to be paid in sterling is directed to the prospective sums, for example, any shortfall or overage, to be paid under the agreement itself. He submits that agreeing to fix the exchange rate at the date of the agreement makes no sense given the overriding purpose was for AML to recover the debts due to it from PIMG and the associated parties.

100. AML then pointed to the general rule (reflected in paragraph 10 of the Practice Direction to CPR Part 43 and the commentary in the White Book at [40.2.18]) that

where a claim is made for a debt in a foreign currency, the order will be for either (a) the sum in the foreign currency or (b) the sterling equivalent at the time of payment. He referred me to the observations of Lord Wilberforce in *The Folias* [1979] AC 685 (HL) at 696-697 that giving judgment in the (foreign) currency in which it has been sustained generally produces a fairer result than one which fixes a claimant with a sum in sterling taken at the date of breach or of the loss and to the summary by Evans-Lombe J. in *Barings Plc (In Liquidation) v Coopers & Lybrand (No 8)* [2003] EWHC 2371(Ch) and his conclusion at [30] that: "*The test for the court is to decide what is the currency payment of which will as nearly as possible compensate the claimant in accordance with the principle of restitution and whether the parties must be taken reasonably to have had this in contemplation*".

101. In my judgment, AML is correct on this point for the following reasons. The Debt was identified in USD in the 2015 Agreement, in particular, in the Schedules thereto, and that was largely for the purpose of identifying the historic trading debts (which had all accrued in USD). Although the parties went on to convert the Debt into GBP at the then current spot rate, it seems to me that was not intended to have any substantive (as opposed to presentational or clarificatory) effect thereafter. By Clause 2.5, the parties then expressly agreed that the payments to be made under the Agreement were to be made in GBP (not USD). However, although the effect of the 2015 Agreement was to pledge the 2015 Vehicles to AML, an English company, to enable the Debt to be repaid there is nothing to suggest that the parties were intending to crystallise the Debt (as opposed to future obligations) as being a sterling debt. The oldest parts of the Debt related back to 2013 and converting the Debt to GBP as at the date of the 2015 Agreement would mean that AML would receive far less than the value of the USD debts. I can find nothing in the language of the 2015 Agreement to support the contention that the parties were agreeing that AML was assuming the risk of future currency fluctuations. Taking the language of the two cases I have cited, USD was plainly the currency of their dealings, and the currency in which the parties reasonably contemplated that AML would be repaid the Debt.

AML's Power of Sale – Notice and Prices

102. The next issue of construction which arises under the 2015 Agreement is whether AML was entitled to sell the 2015 Heritage Vehicles or whether, as submitted by PIMG, the power of sale under Clause 2.7 was subject to a condition precedent, alternatively, an innominate term, requiring AML to give PIMG five business days' notice of each sale.

103. Clause 2.7 provided that: "*AML will have, in addition to any other right or remedy available to it, a lien and power of sale over [the 2015 Heritage Vehicles] for the Debts and all other fees, costs and expenses under or in connection with the sale of [the 2015 Heritage Vehicles]. If any of [the 2015 Heritage Vehicles] remain unsold and any of the Debt remains unpaid (in full or in part) as at 30 June 2016, AML (or AML's appointed agents) is entitled to: (a) take possession of [the 2015 Heritage Vehicles] and retain them in its possession until all Debts are paid in full; and (b) Sell [the 2015 Heritage Vehicles] directly or through AML's appointed agent at [PMP], on the expiry of 5 business days' notice to PIMG*".

104. PIMG submits that the natural and ordinary meaning of these words is that AML did not have the power of sale without giving PIMG five business days' notice and

contends that this makes clear commercial sense given that the 2015 Agreement provided AML with the certainty that if it failed to recoup the full amount of the Debt from the sale of the 2015 Heritage Vehicles, PIMG was obliged to pay the shortfall. On its case, the purpose of the notice provision was to safeguard PIMG from circumstances in which AML could both sell the vehicles at an undervalue but seek to recover losses from PIMG. It relies on the observations of Moore-Bick J. in *Glencore Grain Ltd v Goldbeam Shipping Inc* [2002] EWHC 27 (Comm) at [40] that: "*If the parties have stipulated that a notice must be given in order to bring some other provision of the contract into operation, I doubt whether it could ever be dispensed with on the grounds that to give such a notice would be futile*".

105. AML's position is that the giving of notice was not a pre-condition to the existence of AML's power to sell the 2015 Heritage Vehicles, but merely qualified the manner of the exercise of the power. It draws an analogy with the position of a mortgagee exercising a power of sale which, if it chooses to exercise it but fails to comply with the relevant requirements for such exercise (for example, by failing to give notice), good title nevertheless passes to the purchaser and the sale is unimpeachable and the mortgagor's remedy (if any) is claim for damages – see section 104(2) Law of Property Act 1925. AML submits that the requirement of notice appears only once in the 2015 Agreement and would have been much more prominent if it was intended to fetter the power of sale in the manner contended for by PIMG. Its essential purpose was to underline that PIMG was being given one final chance to choose to repay the Debt and so to avoid the consequence of a sale by AML and retain ownership of the 2015 Heritage Vehicles.

106. On this point, I agree with the submissions made on behalf of AML. First, it seems to me that AML is correct to say that the decision in *Glencore Grain*, supra, is not on point. There, the giving of a notice (in a charterparty) served a different purpose of setting the clock running for the purpose of assessing which party was responsible for the delay and for the assessment of damages. I agree with the submissions for AML that Clause 2.7(b) of the 2015 Agreement is different because it is concerned with a power of sale. Secondly, applying the analysis in *Astrazeneca UK Ltd v Albemarle International Corp*, supra, there is nothing here to suggest that the giving of notice to PIMG must, as a matter of practicality, occur before AML's power of sale over the 2015 Heritage Vehicles can be exercised or that the quid pro quo for its exercise is the giving of that notice. Clause 2.7(a) of the 2015 Agreement provides in terms for AML to take possession of the 2015 Heritage Vehicles if PIMG had not otherwise repaid the Debt by 30 June 2016 and, in my judgment, on its proper construction, the purpose of the notice provision was to give PIMG a final opportunity to repay the Debt, not, as PIMG submits, as a fetter on AML's power of sale. If the parties had intended that failure to give the required 5 days' notice would have the consequence that AML was not entitled to sell the vehicles, they would have said so, and provided a mechanism for the return of them to PIMG. The relevant safeguard for PIMG against AML selling the vehicles at an undervalue, and then seeking to recover any shortfall from PIMG, was the express requirement in Clause 2.7(b) for them to be sold at PMP. In my judgment, the requirement to give five days' business notice was not a condition precedent to AML's power of sale. At its highest, any breach would give rise only to a claim by PIMG for damages for breach of contract. In any event, for the reasons I set out below, I am satisfied that there was no breach by AML or at least not one in respect of which PIMG has satisfied me that it would be entitled to any more than nominal damages.

107. Further, although PIMG's originally pleaded case (Re-Re-Re-Re-Re-Amended Defence and Counterclaim at [4.1.1]) was that AML's power of sale was subject to a further condition precedent or innominate term provided by Clause 1.3 of 2015 Agreement, to the effect that vehicle sale prices were to be determined by PIMG, this was not pursued with any degree of vigour by Mr Chapman KC. Rather, his focus in opening and closing was on the different argument as to whether "*prevailing market prices"* meant those prevailing at the time of the agreement in 2015, not those that existed at the point of sale.

108. For the avoidance of doubt, I am entirely satisfied that Mr Chapman KC was right not to persist in arguing that the power of sale by AML was subject to a requirement that vehicle sales prices would be determined by PIMG. I regard that argument as hopeless. Clause 1.3 appears in the section of the 2015 Agreement dealing with the sale by PIMG, of the 2015 Heritage Vehicles and relates to the last opportunity for PIMG itself to achieve such a sale in the window by no later than 30 June 2016, as contemplated by Clause 1.2. It has nothing, in my judgment, to do with the different situation of a sale by AML pursuant to its lien and/or power of sale under Clause 2.7. Indeed, on PIMG's construction, it would be inconsistent with that power of sale which is only intended to arise after PIMG has had an opportunity to find purchasers for the 2015 Heritage Vehicles at prices set by it. I agree with Counsel for AML that it would be commercially absurd to find that PIMG was able to set the prices at which AML might sell because, by setting unrealistic sales prices, it could in effect scupper such sales. It is perhaps a mark of desperation on the part of PIMG that it took this point at all.

What price was AML obliged to achieve on the sale of the 2015 Heritage Vehicles?

109. The next issue of construction of the 2015 Agreement concerns the price which AML was obliged to achieve on the sale of the 2015 Heritage Vehicles. It is not in dispute that Clause 2.7(b) of the 2015 Agreement provided AML with the right to sell the 2015 Heritage Vehicles at "*prevailing market prices"* or PMP. PIMG's position is that the reference to PMP is to be construed as a reference to the prevailing market prices that existed in 2015 at the time of the 2015 Agreement – see the Re-Re-Re-Re-Re-Amended Defence and Counterclaim at [8.3]. It argues that the common objective of the parties in 2015 was for the Debt to be settled and that both parties knew the value of the Debt and were involved in selecting vehicles to meet the Debt which must mean they had in mind that the vehicles would be sold at the prices prevailing in 2015.

110. AML's position is that the only plausible meaning of "*prevailing market prices"* is the prevailing market price of the relevant 2015 Heritage Vehicle at the time of the sale of that 2015 Heritage Vehicle – see the Re-Amended Reply and Defence to Counterclaim at [5.4.1].

111. Although in the course of the trial, I expressed the view that this was a case where I thought that both interpretations were plausible, such that the iterative exercise envisaged by the authorities I have referred to above had to be undertaken, I am satisfied that my initial view was wrong and that Clause 2.7(b) bears only one meaning, that contended for by AML. PIMG's construction has the effect that AML had to achieve the prices for the 2015 Heritage Vehicles irrespective of what had happened in the market since December 2015. I am unable to accept that, viewed objectively, this is

what the parties intended. The very language of "*prevailing"* implies to me that the sale exercise is to be conducted against the (market) conditions which will prevail at some later time (at the point of sale). If the parties had intended that AML was obliged to achieve the prices of the vehicles in 2015, they would have said so. Neither party could anticipate whether the market for heritage AM vehicles would rise or fall and it is only with the benefit of hindsight that PIMG has really pressed this point. I am entirely satisfied that the parties, if asked by the hypothetical bystander whether, if AML managed to sell a vehicle only in, say 2019 or 2020, the relevant PMP was that prevailing in 2015 or at the time of the sale, they would answer the latter.

112. I will return to this later in this judgment because the same point of construction arises in relation to the 2016 Agreement although the language is different.

The Requirement for a Collective Assessment

113. It seems to me that in fact a further issue of construction arises in relation to the 2015 (and also the 2016) Agreement. In addition to those identified by the parties in the Agreed List of Common Ground and Issues, it seems to me that Mr Quirk KC is right to identify a further issue of construction namely whether, in assessing whether there is ultimately a shortfall payable by PIMG to AML on the sale of the 2015 Heritage Vehicles, a collective assessment is required to be undertaken.

114. For AML, he submits that it is clear from both Barter Agreements that a collective, not individual assessment is required. He submits that the references in Clause 2.1 to the use of "*the net revenue from the sale of the Vehicles [being used] to repay all Debts"* and in Clause 2.4 to a payable shortfall arising "*If the net sale proceeds are not sufficient to repay all of the Debt*" mean that the parties contemplated a collective assessment of the position once all the vehicles had been sold.

115. Although it was pointed out to me that, in pre-action correspondence (see its letter dated 27 September 2023 at [5.1] to [5.3]), CMS appeared to argue for a contrary view, it seems to me that Mr Quirk KC is correct to say that this was not carried through into PIMG's pleaded case. In their written closing at [70], Counsel for PIMG rejected (but only in relation to the 2016 Agreement) that a collective assessment was appropriate. As I understand it, PIMG does not take any similar point in relation to the 2015 Agreement, perhaps because, as evidenced by Summary Table 3, it was in relation to only one of the 2015 Heritage Vehicles that Mr Page, was saying that the sale price was too low (at least on PIMG's primary case that PMP was to be assessed as at the date of the 2015 Agreement).

116. For the avoidance of any doubt on the point, I am satisfied, for the reasons submitted on behalf of AML, that a collective assessment was to be undertaken in relation to the 2015 Heritage Vehicles. I will deal separately with the 2016 Agreement later in this judgment.

What was the scope of PIMG's liability for costs under the 2015 Agreement?

117. The next issue of construction which arises in relation to the 2015 Agreement is as to the scope of PIMG's liability for costs and, in particular, was PIMG liable to pay for storage, restoration or repair costs, or commission, and if so, to what extent? The issues

of construction are: (i) whether (a) repair, re-work or restoration costs; (b) import VAT; (c) transportation, insurance and other logistical costs; (d) storage costs are payable either: (a) expressly under Clause 1.2 and/or (b) by virtue of an implied term; (ii) if so, whether such costs were limited, by virtue of an implied term, to those which were reasonably and proportionately incurred and (iii) whether AML was entitled to commission, and if so, whether a commission rate of 5% was applicable.

118. PIMG's primary position is that there is no proper basis on which it can be said that PIMG is liable for (i) any of the claimed costs or (ii) commission. Its secondary position is that if such costs are payable, they are limited, by virtue of an implied term, to such costs as are reasonably and proportionately incurred.

119. On the last point, in its opening Skeleton Argument at [37], Counsel for AML stated that: "*AML accepts that unreasonably incurred costs would not be recoverable under either of the Barter Agreements (even though it is only the 2016 Agreement which expressly mentioned any reasonableness requirement); again whether that conclusion is reached by way of interpretation or implication is immaterial.*" In my judgment, AML was right to make that concession. Counsel for PIMG is correct to say that the Court will readily imply such a term on the basis that it is so obvious that it goes without saying because the parties cannot have intended that AML would have an unfettered right to spend unlimited sums on storage, rework and restoration costs irrespective of the likely cost and its impact on sale values. If authority was needed for that proposition, I accept that it can be found in *Zahid v Duthus Group Investments Ltd* [2018] CSOH 59, 2018 WL 02587797, although I am sure many other examples in the authorities exist.

120. However, a discrete further point then arises because in the same paragraph of their Skeleton Argument, Counsel for AML submitted that the starting point for the Court is to assume that the costs were reasonably incurred and that the burden of proving that they are unreasonable lies on PIMG. I am unable to accept that. I am satisfied that AML is the Claimant and the burden of proving its averments of fact lies upon the person who is required to assert and prove this part of its case – see the observations of Lord Sumption JSC in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 at [53].

121. Clause 1.2 of the 2015 Agreement provides that: "*As soon as reasonably practicable after the date of this Agreement and by no later than 30 June 2016, PIMG will sell the [2015 Heritage Vehicles]. PIMG will be responsible for all fees, costs, taxes and import duties relating to the sale, transportation, shipping and delivery of the [2015 Heritage] Vehicles, including any sales commission*".

122. AML's position (see the Re-Amended Particulars of Claim) at [5.1]) is that, on the proper construction of Clause 1.2, this included any repair or restoration costs for the 2015 Heritage Vehicles. So far as storage is concerned, AML's position (see the Re-Amended Particulars of Claim at [19]) is that the storage costs were incurred in connection with the sale of the 2015 Heritage Vehicles and so recoverable either under Clause 1.2 or, by reason of an implied term. In effect, AML's case is that the second part of the clause stands independently of the first part of the clause such that it was intended to apply to the period after 30 June 2016 and when the vehicles were in the custody of AML, pending sale. It would make no commercial sense to limit it to the period prior to 30 June 2016, it submits, given that the purpose of the 2015 Agreement

was for AML to recover the full Debt and in circumstances where PIMG was obliged to make good any shortfall under Clause 2.4 and where the lien and power of sale over the 2015 Heritage Vehicles created by Clause 2.7 extends to recovery not just of the Debt but of "*all other fees, costs and expenses charged under or in connection with the sale of the Vehicles*".

123. For PIMG, it was submitted that Clause 1.2 is to be read as a whole and that, when the words are read together, Clause 1.2 was only intended to apply when PIMG was selling the vehicles and does not apply to the situation where AML was selling them. Further, it points to the fact that Clause 1.2 provides an exhaustive list of the costs recoverable: "*fees, costs, taxes and import duties relating to the sale, transportation, shipping and delivery of the Vehicles, including any sales commission*" and does not include either storage costs or, restoration or repair costs. Finally, on the restoration, re-work and repair costs, PIMG submits (opening Skeleton Argument at [42.3]) that there is no reason to suppose that it was in the contemplation of the parties or that they foresaw that any repair or restoration costs would need to be incurred at all in relation to the vehicles.

124. I am satisfied that PIMG is correct to submit that as a matter of interpretation of Clause 1.2 of the 2015 Agreement, none of the (a) repair, re-work or restoration costs; (b) import VAT; (c) transportation, insurance and other logistical costs; and (d) storage costs are payable or recoverable under Clause 1.2 itself. Clause 1.2 appears within the group of sections under the heading "Sale of Vehicles" whereas the provisions concerning AML's power of sale and ancillary provisions are in Clause 2 dealing with "Repayment of Debts". In my judgment, Clause 1.2 is limited to the circumstance in which PIMG is selling the vehicles. If I was wrong on that point, I would also accept PIMG's submission that as a matter of construction of Clause 1.2, storage and repair, re-work and restoration works fall outside it.

125. However, I do not accept, on the basis of the evidence I have received, that the parties did not have in their contemplation at the time of the 2015 Agreement that some repair or restoration to the 2015 Vehicles would be required. In short, I reject that the cars were "up to standard" even after PIMG had carried out its own works.

126. However, that is not the end of this point because AML contends that the costs are recoverable either by interpretation of the 2015 Agreement as a whole or by virtue of an implied term. On this, I am satisfied that AML is correct to say that the combined effect of Clause 2.1 (which contemplates there being "net revenue" after any sales of the vehicles by PIMG); Clause 2.4 (which refers to "net sale proceeds") and Clause 2.7 is that AML was entitled, as an incident of its power of sale and/or lien to recover not just the Debt, but also the other fees, costs and expenses charged under or in connection with the sale of the Vehicles. In my judgment, this is sufficient as a matter of construction to include import VAT, transportation, insurance and other logistical costs (as being costs and expenses incurred "*under or in connection with the sale of the Vehicles*"). Separate consideration should be given to the repair, re-work or restoration costs (which according to Summary Table 1 is in a total sum of £290,404.31 in respect of the 2015 Heritage Vehicles) and to the Storage Costs (£93,253.05).

127. I should note in this regard that although Mr Page sought to challenge some of the import VAT and transport costs in his reports, this was not justified. As I have already

set out, the scope of the issues for the experts was limited by the terms of the Order for Directions dated 25 November 2022. The fourth and fifth issues for the expert were expressly limited to consideration of "*restoration, works and/or repair costs*". There was no order to the effect that the experts should opine on other costs. Further, it is clear that those issues were carefully and sensibly calibrated (by reference to costs exceeding £10,000) precisely in order to ensure that these issues were properly curtailed in line with the overriding objective.

128. As to the repair, re-work and restoration costs, in my judgment (and it is now common ground) the proper construction of AML's entitlement in Clause 2.7 to charge PIMG for the relevant "*fees, costs and expenses … under or in connection with the sale of the Vehicles*" is qualified by the requirement that such fees, costs and expenses must have been reasonably and proportionately incurred. On this interpretation, AML was entitled to carry out repair, re-work and restoration costs but only if they were both reasonably and proportionately incurred. I will return to the issue of whether AML is in breach of that requirement later in this judgment.

129. As to the suggested wider implied term contended by AML, I am not satisfied that such implication is necessary to give business efficacy to the contract, or that a term providing for recovery of the repair, re-work and restoration of the 2015 Heritage Vehicles is so obvious that it goes without saying. The parties have twice given separate consideration to the circumstances in which PIMG might expressly be liable for costs (in Clause 1.2 when dealing with a sale by PIMG prior to 30 June 2016 and in Clause 2.7 when dealing with the costs incidental to the sale of the vehicles by AML). The implied term contended for would contradict those express terms.

130. In relation to the payment of commission, although commission is expressly referred to in Clause 1.2 of the 2015 Agreement, I am satisfied PIMG is right, based on the analysis above, to say that this does not extend to a sale by AML. However, as to the principle of commission, it is tolerably clear from Clause 1.2 itself that it was in the contemplation of the parties that commissions might be payable. Further, in my view, Clause 2.4 and Clause 2.7 are sufficiently wide to capture third party commissions because they are costs and expenses under or in connection with the sale of the vehicles. It is not necessary for AML to rely on an implied term but, in line with the reasoning above, I would reject that there is any basis for implying such a term.

131. As to AML/AMW's own commissions PIMG seeks to draw a distinction more generally between sales by auction and retail sales. The evidence before me is that, in relation to sales by AMW on behalf of PIMG prior to June 2016, PIMG and AMW expressly agreed that there would be a 5% rate of commission on retail sales of the 2015 Heritage Vehicles on behalf of PIMG (see for example, the sales contracts between PIMG and AMW and Mr Samy's email to Mr Zidan, copied to Mr Spires and others dated 8 March 2016 which states that a "*commission should be 5% as we have all agreed at Geneva*" and Mr Spires' acknowledged response which refers to "*All sales agreements are at 5% as marked*"). Mr Spires accepted in cross-examination that the 5% commission rate was agreed between the two sides of AMW's board (meaning the ARG side and AML). Mr Zidan confirmed in cross-examination that PIMG was willing to pay 5% on auction sales and this was reflected on the relevant contracts for

sale which provide for a commission of 5% whether the chosen route of sale is "*Private Treaty/Auction/Both (at AMW's discretion)*".

132. However, in relation to auction sales (in respect of which AML claims for AMW's commission at a rate of £5,000 per car), PIMG's position is that no such commission is payable. As put to Mr Spires in cross-examination, PIMG's case is that where a car sells via auction, it is the auctioneer selling the car rather than AMW whose role is simply to pass the car to the auction house.

133. I am satisfied that, whether the sale was by auction or retail, AML was entitled to recover some level of commission in connection with the sales of the 2015 Heritage Vehicles. Although he was not able to articulate specific costs, I am satisfied that Mr Spires was right to say that there was work involved for AMW, even in the case of auction sales, including the marketing of the vehicles, establishing provenance, dealing with the auction house and trying to find buyers. Moreover, for the reasons I have set out, the expectation was that AMW would be paid commission by PIMG on sales prior to June 2016. I can see no basis for distinguishing the position when AMW was undertaking sales on behalf of AML. However, it seems to me that the parties did not contemplate that commission would be payable at any rate higher than 5% on retail sales. In the case of all of the auction sales, bar one, where AMW has charged a fixed fee of £5,000, it was not disputed that this is less than the 5% commission would be. Accordingly, I am satisfied that AML is entitled to recover from PIMG commissions at a rate of 5% in relation to retail sales and in the fixed sum of £5,000 for cars sold by auction.

134. Finally, on the Storage Costs, AML's primary case was that these fell within the costs for which PIMG was expressly made liable pursuant to Clause 1.2 of the 2015 Agreement. For the reasons which I have already set out in relation to the other heads of costs, I am unable to accept that Clause 1.2 applies to the situation where the sale of the 2015 Heritage Vehicles is by AML. However, it is not in issue that the 2015 Heritage Vehicles (and the 2016 Heritage Vehicles for that matter) were in storage and that once they were shipped to the UK, at which point import VAT had to be paid, they had to be kept somewhere. It is part of PIMG's case that AML/AMW ought not to have flooded the market, but rather sell the vehicles over a number of years. The evidence is that AMW's facilities for storage were limited (and I infer from AMW's common ownership that PIMG would have been aware of that). I am satisfied that storage charges can be brought within Clause 2.7 of the 2015 Agreement in the way that I have found other costs can because storage of the vehicles is properly to be regarded as a cost "*in connection with the sale of the Vehicles*". AML's secondary position (see paragraph 19 of the Re-Amended Particulars of Claim) is that it was an implied term of the 2015 Agreement (on the basis that it is so obvious that it goes without saying and/or necessary to give business efficacy to the 2015 Agreement). In view of my conclusions, it is not strictly necessary for any term to be implied. However, for completeness, I am satisfied that, on the strict business efficacy test, there should be implied into the 2015 Agreement a term to the effect that PIMG is to be liable for storage costs but only to the extent that they have been reasonably and proportionately incurred.

If liable, on what date was PIMG obliged to make payment?

135. This is, relatively speaking, a short point. AML claims that the 2015 Shortfall was recoverable as a debt from 1 July 2016 because of the combined effect of Clause 2.3 and Clause 2.4 of the 2015 Agreement. Clause 2.3 provides that: "*All debts must be cleared by no later than 30 June 2016. Any surplus sale proceeds will be paid directly from [AMW] to PIMG*". Clause 2.4 provides that: "*If the net sales proceeds are not sufficient to repay all of the Debt, PIMG will promptly notify AML and forthwith pay to AML all outstanding amounts*".

136. PIMG submits that this is wrong because these clauses are intended to cover the circumstances in which PIMG sold the 2015 Heritage Vehicles. The requirement in Clause 2.4 is for PIMG to notify AML of the outstanding amount. Moreover, PIMG submits, the debt was for an uncertain amount which was dependent on the sale proceeds realised by AML.

137. I have no hesitation in accepting this contention. It simply makes no sense for PIMG to be notifying AML of the resultant balance after the net sale proceeds are applied because the sale was in the control of AML, not PIMG.

138. I also accept that in circumstances where PIMG could not possibly know the balance after the application and deduction of the net sale proceeds by AML, it is necessarily implicit that unless and until AML invoiced PIMG for the relevant amount, no sums were in fact due to AML.

Interest

139. I do not understand PIMG to contest that AML is entitled, in principle, to interest on the 2015 Shortfall but in line with my reasoning at paragraph 138 above, no interest was due until it was provided with the revised invoice on 5 May 2022.

The 2016 Agreement

140. It seems to me that in fact six issues of construction arise in relation to the 2016 Agreement.

Assured Provenance Certification (APC)

141. The first issue is as to the nature of AML's obligation (if any) to achieve APC for each of the 2016 Heritage Vehicles prior to their sale and, in particular, was it a condition precedent to its right of sale, or alternatively, an innominate term breach of which gives rise to a claim by PIMG for damages?

142. The relevant part of Clause 1(e) of the 2016 Agreement provides that PIMG will pay the full costs of "*(ii) restoration of each [2016 Heritage Vehicle] by [AMW] to the minimum level to gain Provenance Certification. Cars should be brought up to a standard to meet the minimum level of [AMW] Provenance Certification, such costs to be borne by PIMG. Discretion as to the reasonableness of costs versus value of any restoration work is given to the chief executive officer of AML*".

143. Clause 3(a) of the 2016 Agreement provides that: "*AML will determine if and when to sell any [2016 Heritage Vehicle] after Provenance Certification has been achieved.*

AML will use its best endeavours to ensure that the cars are sold for as close to [CMV] as possible but gives no warranty or guarantee in this regard".

144. PIMG's case is that the obligation to achieve APC was a condition precedent to AML's right of sale. Its alternative case is that the obligation to achieve APC was an innominate term, the breach of which gives rise to a claim for damages for breach. It submits that the importance of the obligation is self-evident from the wording of the clauses themselves which provide that AML's power to determine if and when to sell the 2016 Heritage Vehicles arose after APC had been achieved. The importance of the clause is emphasised by the fact that, they submit, it was only AML's CEO Dr Palmer, who could exercise his discretion as to the cost of the works relative to their value. Although it is submitted on PIMG's behalf that this is supported by a number of emails including (i) Mr Spires' email to Dr Palmer dated 15 December 2016; (ii) Dr Palmer's email to Mr Spires on 19 December 2016 and (iii) an email chain between Mr Davey and Mr Peter Freedman of AML dated 12-13 February 2021 (all of which stress the importance of provenance certification), these are extrinsic to the task of construction of the obligations themselves.

145. AML denies that there is any condition precedent to its entitlement to sell the 2016 Heritage Vehicles that the vehicle should achieve APC. It points out that, unlike in relation to its case under the 2015 Agreement, PIMG does not pursue a conversion claim pursuant to the TIGA 1977 and that the undisputed effect of the 2016 Agreement was for legal title to the 2016 Heritage Vehicles to be transferred immediately to AML.

146. I am entirely satisfied that, on the proper construction of Clauses 1(e) and 3(a) no such condition precedent or binding contractual obligation to achieve APC arises. Whilst Clause 1(e) refers to the desire that the 2016 Heritage Vehicles "*should*" be brought up to the standard to achieve APC, this is, as Mr Quirk KC submits, permissive not mandatory language. I also agree with his submission that to impose such a strict obligation on AML would undermine the essential purpose of maximising the sales proceeds from the vehicles, which, given the provision for overage in Clause 3(b) of the 2016 Agreement, was in PIMG's interests as much as AML's. Finally, I am unable to read the first sentence of Clause 3(a) of the 2016 Agreement as meaning that AML's entitlement to sell was contingent on achieving APC.

147. It is convenient here to deal also with a related point of construction arising from Clause 1(e) of the 2016 Agreement concerning the discretion not to perform disproportionate restoration work apparently given to Dr Palmer as the chief executive officer of AML. PIMG's pleaded case (Re-Re-Re-Re-Amended Defence and Counterclaim) puts this as the other side of the coin to AML's obligation to achieve APC for the 2016 Heritage Vehicles. In other words, on its case, AML was obliged to achieve at least APC unless its CEO judged that such work was not reasonable as compared with the relevant improvement in the vehicle's value.

148. I agree with this, save that for the reasons set out above, I am not satisfied that there is a condition precedent or binding obligation on AML to achieve APC. Mr Chapman KC did not pursue with any vigour (certainly not by the time of his oral closing) an argument that AML had acted in breach of Clause 1(e) of the 2016 Agreement because the relevant decisions on the costs had been taken by someone other than Dr Palmer or that this gave rise to any discernible loss to PIMG. In my judgment, he was right not to

do so. Mr Quirk KC points to the size and nature of AML (a FTSE 250 company with a market capitalisation of £1.7bn) and submits that the parties did not mean or expect that those decisions would be taken personally. Moreover, I agree with the further submission that any such breach would be technical in nature and not one which created any loss for PIMG.

The Best Endeavours Obligation

149. The second issue of construction which arises in relation to the 2016 Agreement is as to the nature of AML's obligation to use its best endeavours to ensure that the 2016 Heritage Vehicles were sold as close to contemporary market value (CMV) as possible.

150. Although the proper construction of Clause 3(a) of the 2016 Agreement is amongst the Agreed List of Common Ground and Issues for trial, I do not understand AML to deny that it was under an obligation to use its best endeavours to ensure that the 2016 Heritage Vehicles were sold for as close to CMV as possible. However, its case (see the Reply at [8.3.1]) is that, on its proper construction, the obligations in the second sentence of Clause 3(a) are to be construed, in effect, disjunctively such that the obligation on AML was: (i) to use its best endeavours to ensure that the 2016 Heritage Vehicles were sold for as close to CMV as possible or (ii) to show they were in fact sold for as close to CMV as possible.

151. Mr Quirk KC took me on this point to AML's Request for Further Information in relation to the Defence and Counterclaim at paragraph 16.5. Paragraph 16.5 of the Defence and Counterclaim was as follows: "*In any event, it is denied that AML "used its best endeavours" and/or that the 2016 Heritage Vehicles were sold at a price "as close to contemporary market value as possible*"". Request 8 asked: "*Please clarify whether it is the Defendant's case that, where the Claimant sold a 2016 Heritage Vehicle at "contemporary market value" at the material time (which, as the Defendant accepts, "will be the subject of expert evidence in due course (subject to the permission of the court)", the Claimant could nevertheless have been in breach of the second sentence of Clause 3(a) of the 2016 Agreement*". The Response on behalf of PIMG states: "*Not entitled. The Defendant's case is already sufficiently pleaded. Without prejudice to the generality of the Defendant's pleaded case, the Defendant denies in paragraph 16.5 of the Defence that the Claimant sold any of the 2016 Heritage Vehicles at "as close to contemporary market value as possible". If and to the extent the Claimant joins issue on that allegation then it will need to be resolved (including the sub-issue as to the total value received by the Claimant in respect of each sale) and, if the Defendant's case is accepted then the Claimant will be found to have acted in breach of the 2016 Agreement*". This is not, of course, an answer to the question which had been raised in the Request for Further Information, the relevant part of which has not been answered.

152. I explored this point in the course of the trial and in the course of Mr Chapman KC's oral closing in order to establish if PIMG was saying something to the effect that AML could be liable for a breach of the "best endeavours" obligation even if the vehicle achieved CMV. Although understandably reluctant to concede the point, so far as I understood it, the ultimate resting point of his submission was that if I concluded that there was a breach of the best endeavours obligation, but nevertheless the car was sold

for its CMV, then I should take Mr Page's OSP figure and award the difference between OSP and CMV.

153. I set out elsewhere in this judgment my conclusions on Mr Page's use of OSP and I will not repeat them here. I am entirely satisfied that Mr Quirk KC is right as to the proper construction of Clause 3(a) of the 2016 Agreement and that if a 2016 Vehicle was sold at CMV, it is not open to PIMG to say that there has also been a breach of the "best endeavours" provision.

What price was AML obliged to achieve on the sale of the 2016 Heritage Vehicles?

154. I have already dealt in connection with the 2015 Agreement with PIMG's contention that AML, when exercising its power of sale, was obliged to achieve the PMP as at the date of the 2015 Agreement rather than as at the date of the actual sale.

155. PIMG makes the same contention in relation to the 2016 Agreement. In my judgment, the construction contended for by PIMG is wrong. In addition to the reasons which I have already outlined, it seems to me that the wording of the 2016 Agreement is even clearer. Clause 1(a) of the 2016 Agreement provided for PIMG to sell and transfer to AML legal title to all of the 2016 Heritage Vehicles. Clause 1(c) of the 2016 Agreement then provides that title to the 2016 Heritage Vehicles will transfer to AML immediately upon execution of the agreement. Again, the language of Clause 3(a) is that AML will sell as close to "*contemporary market value*" or CMV, as possible, which implies that the relevant sales are to be at the values which are contemporary to another event, namely the point of sale. As I have already set out, the RMS 2016 Valuation was annexed to the 2016 Agreement. Aside from the point that, if the parties had thought about it, they could have specified that the values to be achieved would be those contemporary to the date of the agreement, given that it was being attached, they could simply have said that AML was obliged to achieve at least the values set out in that report. I am entirely satisfied that on the proper construction of Clause 3(a) the reference to "*contemporary market value*" is to be construed as meaning the relevant value which was contemporaneous to the point of sale.

The Requirement for Collective Assessment

156. I am also satisfied that, in relation to the 2016 Agreement, the point about collective assessment is, if anything, even clearer than the 2015 Agreement. Clause 3(b) expressly states that the calculation of any shortfall and/or Overage is to be carried out "*when all the [2016 Heritage Vehicles] are sold*". The relevant assessment is of "*the aggregate sales proceeds (net of any costs reasonably incurred by AML to sell the cars)*". Although Mr Chapman KC submitted, by reference to Clause 3(a) of the 2016 Agreement, that the obligation to achieve CMV was for each vehicle and that AML's construction was commercially absurd, because it would incentivise AML never to achieve sales values sufficient to generate an Overage, this is an example of where I am satisfied that there is no reasonable or viable alternative construction. The point is of some significance given the state of the expert evidence on the ultimate total (or collective) sales prices achieved for the 2016 Heritage Vehicles.

What was the scope of PIMG's liability for costs under the 2016 Agreement?

157. Two points of construction of the 2016 Agreement arise. The first issue is whether PIMG is liable to pay commission charged by AML under Clause 3(b) of the 2016 Agreement and if so, at what rate. The second issue is whether PIMG is liable for Storage Costs pursuant to Clauses 1(e) and/or Clause 3(b) and/or pursuant to an implied term of the 2016 Agreement.

158. As far as commission is concerned, the issue of construction is whether, as AML contends, for the purposes of Clause 3(b) of the 2015 Agreement, commission is a "*cost(s) reasonably incurred by AML to sell the cars*". On the evidence, two types of commission arise: first, in the cases of sales by it, is AMW's own commission in selling the vehicles; the second concerns commission charged to it by third parties, such as auctioneers. I do not understand the latter to be challenged. Mr Chapman KC for PIMG submits that far from being a "*cost"* on sale, commission is a profit earned by a seller. Unlike third party auctioneers, AMW was not a third party, but a subsidiary of AML, owned indirectly as to 50% by AML. He points to the absence of any reference to commission in the 2016 Agreement and compares it to Clause 1.2 of the 2015 Agreement which expressly refers to "*sales commission*" to be borne by PIMG on any sale, prior to 30 June 2016, of the 2015 Heritage Vehicles. He goes on to submit that if liable at all, its liability for commission should be limited to 5% but only for retail, not auction sales on the basis that, AMW was a related party to AML (and PIMG), much as he did in relation to the 2015 Agreement.

159. For AML, Mr Quirk KC makes a number of points. First, he submits that the commissions were earned by AMW, not as seller, but as AML's third-party agent and so no different to the situation where there is a sale by, say, a third-party auctioneer. He submits that AML does not control AMW and nor do AMW's profits necessarily accrue to AML (because for example, they may simply be re-invested in the business). Secondly, he submits that, whether right to do so or not, AMW has in fact charged AML the commission which AML is therefore entitled to recover from PIMG, because it is a "*cost*" of the sale.

160. I am satisfied that AML is correct, in part, on the point of principle. There is a fundamental difference between the 2015 Agreement and the 2016 Agreement in that, whereas in relation to the 2015 Heritage Vehicles, AML was exercising its power of sale as pledgee and/or mortgagee and/or with the benefit of a lien over them, under the 2016 Agreement, AML is selling the 2016 Heritage Vehicles as owner. Thus, Clause 1(a) and Clause 1(c) provide for legal title in the 2016 Heritage Vehicles to pass to AML immediately upon execution of the agreement. There is no express requirement for any sale by AML to be through AMW. In my judgment, viewed objectively, notwithstanding the connection between AMW, AML and PIMG, it was within the parties' contemplation that commission on sales by AML was to be recoverable. I consider that PIMG is wrong to say that no commission is recoverable by AML. AML is entitled to recover commission paid by it to third parties, such as third-party agents and auctioneers, including AMW. For the same reasons I have set out in relation to the 2015 Agreement, I am satisfied that the proper level of commission is 5% (not 10%) on retail sales and the (lower) sum of £5,000 in relation to each vehicle sold by auction.

161. The second issue concerns Storage Costs. It seems to be that there again is a difference between the 2015 Agreement and the 2016 Agreement on this point because the effect

of the 2016 Agreement was that title to the 2016 Heritage Vehicles immediately passed to AML, which was then holding (and selling) them as owner. Whilst Clause 1(e) contemplates that PIMG will meet certain full costs, they relate to (i) the repatriation of the 2016 Heritage Vehicles from Kuwait to AMW and (ii) their restoration to the minimum level to gain APC. Clause 3(b) then entitles AML to deduct from the aggregate sales proceeds of the vehicles "*costs reasonably incurred by AML to sell the cars"*. In my judgment, from the point at which title to the 2016 Heritage Vehicles passed to AML, it cannot be said that their storage is a cost incurred to sell the cars or, at least, one that it was within the contemplation of the parties would be met by PIMG. Clause 3(a) of the 2016 Agreement expressly provides that it was for AML to decide if and when to sell any of the 2016 Heritage Vehicles. It was therefore entirely within its power to determine for how long to hold on to the vehicles.

The Credit Note

162. I have set out above the circumstances in which the Credit Note came about. PIMG transferred legal title to the 2016 Heritage Vehicles in consideration of the issue by AML of the Credit Note (in a sum of £14,300,000 to match the value of the Special Cars). This issue concerns whether PIMG is entitled to an order that the unexhausted balance (if any) on the Credit Note should be paid by AML to PIMG and/or set off against the sums claimed by AML. PIMG's case is that there is an unexhausted balance of £5,384,080 on the Credit Note which ought to be set off against AML's claims.

163. This was a late amendment to PIMG's case and is pleaded as part of its Counterclaim, rather than as a Defence to AML's claim.

164. In the Re-Re-Re-Re-Amended Counterclaim at paragraph [43B], PIMG pleads as follows:

> "*By clauses 2.b and 2.c of the 2016 Agreement, certain sums were to be offset against the £14.3 million Credit Note until that sum was exhausted. In particular: (i) the price of certain Special Cars to be shipped by AML was to be offset in full; (ii) any repatriation or restoration costs incurred by AML on behalf of PIMG under clause 1.c of the 2016 Agreement were to be offset in full; and (iii) the price of certain Special Cars to be shipped by AML in 2017 and 2018 were to be offset in part*".

165. The Re-Re-Re-Re-Amended Counterclaim at paragraph [43C], goes on:

> "*In the premises, if and to the extent that the Court determines that under Clause 1.e of the 2016 Agreement AML was entitled to charge PIMG for any or all of the repatriation and restoration costs as pleaded in paragraph 13 of the Amended Particulars of Claim (and disputed in paragraph 16 above), which fell within Clause 1.e of the 2016 Agreement, such sums should have been offset against the outstanding balance of the Credit Note and are not otherwise recoverable from PIMG by AML*".

166. In the Re-Re-Re-Re-Amended Counterclaim at paragraph [43D], PIMG pleads as follows:

> "*Further or in the alternative PIMG is entitled to and claims all necessary accounts and inquiries into the balance due from AML to PIMG under the Credit Note; a declaration that such balance is due and owing to PIMG; and either (i) an order that the said balance be paid by AML to PIMG and/or (ii) an order that the said balance be set off against any and all sums claimed by AML in these proceedings as damages or otherwise. The unexhausted balance on the Credit Note as at 10 November 2023 is £5,384,080; calculated as set out in paragraphs 3, 4(a) and 4(b) of the letter dated 22 February 2023 from Slaughter and May to [CMS]. It is denied that the sum of £441,000 set out in paragraph 4(c), or the sums set out in paragraphs 7 and 8 of the letter, fall to be deducted from the Credit Note balance*".

167. In summary, PIMG's case is that the language of the 2016 Agreement is exhaustive as to the use of the Credit Note and that it is clear from its terms that the only use to which it should be put was against the 2016 and 2017/2018 Special Cars.

168. AML's response (in its Re-Amended Reply and Defence to Counterclaim at [24A] though to [24D]) is lengthy and I will not reproduce it here. It denies that, on the proper construction of the 2016 Agreement, any repatriation or restoration costs incurred by AML on behalf of PIMG pursuant to Clause 1(e) were to be offset in full against the Credit Note or that they are not otherwise recoverable from PIMG. Moreover, AML's case is that there is no balance on the Credit Note and that PIMG has pleaded no basis on which it is entitled now to seek "*all necessary accounts and inquiries*" in relation to the Credit Note.

169. Accordingly, two issues arise: (i) whether there is an unexhausted balance on the Credit Note and (ii) whether PIMG is entitled to say that the unexhausted balance should be set-off against AML's claim or only against the repatriation or restoration costs to be found due to AML under Clause 1(e). The first is a question of fact not interpretation.

170. So far as the proper construction of the 2016 Agreement on the Credit Note point is concerned, in my judgment, PIMG is wrong to say that the Credit Note was to be used only against the price of the Special Cars (or repatriation or restoration of the 2016 Heritage Vehicles). Although Mr Chapman KC is right to remind me of the general approach to exhaustive definitions in *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542 (and in particular the observations of Arden LJ at [19] that "*non-exhaustive definitions are usually prefaced by the word "include"*), that does not assist me here because the language does not purport to list anything. On the contrary, whilst Clause 2(b) and Clause 2(c) (and Recital (C)) provide expressly for what <u>will</u> be off-set against the Credit Note (the price of the 2016 Special Cars and the 2017/2018 Special Cars respectively) the 2016 Agreement is otherwise silent as to the use of the Credit Note. Although Clause 2(c) of the 2016 Agreement contemplates repatriation and restoration costs also being set-off against the Credit Note, I agree with Mr Quirk KC that AML was thereby entitled so to use the Credit Note but there was no requirement or obligation for it to do so and insofar as it may not have been so used, this does not preclude those costs now being recovered from PIMG. As Mr Quirk points out, some of these costs have been incurred after the time at which PIMG would have purchased the 2017/2018 Special Cars.

171. I will return to the issue of the Credit Note when making my factual findings below.

Interest

172. The next issue of construction on the 2016 Agreement is whether AML is entitled to interest under the Late Payment of Commercial Debts (Interest) Act 1998 (the **1998 Act**) and if so: (i) from what date and (ii) at what rate. On the point of principle, I am satisfied that interest runs on the relevant part of the 2016 Shortfall under the 1998 Act but only from the date of the Original Invoice because that is when the debt (which had to take account of the net sale proceeds from the sale of the 2016 Heritage Vehicles) crystallised. So far as the rate is concerned, in my judgment, AML is right to say that the rate changes in line with the base rate.

Subsequent Events and the Sale of the 2015 and 2016 Heritage Vehicles

173. Having dealt with the proper construction of the 2015 Agreement and the 2016 Agreement, I return to my factual findings and the remaining matters in dispute.

174. It is common ground that in accordance with the 2016 Agreement, legal title to all of the 2016 Heritage Vehicles was transferred to AML and that, in exchange, AML issued the Credit Note to PIMG.

175. It is also common ground (see Summary Table 4) that AML did not obtain APCs for the following 11 of the 2016 Heritage Vehicles: (i) Vehicle 3; (ii) Vehicle 7; (iii) Vehicle 8; (iv) Vehicle 9; (v) Vehicle 10; (vi) Vehicle 13; (vii) Vehicle 14; (viii) Vehicle 15; (ix) Vehicle 26; (x) Vehicle 27 and (xi) Vehicle 28.

176. As evidenced by Summary Table 1, between August 2017 and September 2021, AML sold the Heritage Vehicles. In 2017, two of the 2015 Heritage Vehicles were sold, both by a retail sale; in 2018 four Heritage Vehicles (three 2015 Heritage Vehicles and one 2016 Heritage Vehicle) were sold, all by a retail sale; in 2019, five of the 2016 Heritage Vehicles were sold: four by retail sales, and one by action; in 2020, six Heritage Vehicles were sold: one 2015 Heritage Vehicle and five 2016 Heritage Vehicles, all by retail sale and in 2021, sixteen Heritage Vehicles were sold: two 2015 Heritage Vehicles of which one was sold by a retail sale and one by auction and fourteen 2016 Heritage Vehicles: five by retail sale between January and May 2021, and nine by auction between April and August 2021.

177. In addition to the RMS 2016 Valuation which was annexed to the 2016 Agreement, RMS also prepared a report dated 28 February 2019 on behalf of AML valuing 24 of the Heritage Vehicles (**the RMS 2019 Valuation**).

178. On 15 October 2020, Silverstone Auctions conducted a valuation of 17 of the Heritage Vehicles as part of a proposal put to AMW for their proposed sale at one of its auctions.

179. On 20 November 2020, RMS produced a valuation report in relation to 16 of the Heritage Vehicles.

180. It is common ground that AML sent two invoices to PIMG in relation to the 2015 Agreement: (i) an invoice dated 31 January 2022 which was sent to PIMG on 2 February 2022 (the **Original Invoice**) by which AML demanded payment of part of the

2015 Shortfall which invoice was challenged by PIMG as having been issued for an incorrect amount and which was ultimately cancelled and (ii) a revised invoice which was enclosed with a letter before action sent by AML's solicitors to PIMG on 5 May 2022 (the **Revised Invoice**) by which AML demanded payment of the 2015 Shortfall.

181. It is also common ground that AML these two invoices dealt with the shortfall in relation to the 2016 Agreement: (i) the Original Invoice which claimed the sum of £5,760,123.34 in relation to the 2016 Agreement which invoice was challenged by PIMG as having been issued for an incorrect amount and which was ultimately cancelled and (ii) the Revised Invoice by which AML demanded payment of the 2016 Shortfall (albeit £1,170 of it was erroneously included).

182. It is common ground that AML demanded payment of part of the Storage Costs in the Original Invoice which invoice was challenged by PIMG as having been issued for an incorrect amount and in the Revised Invoice and that AML demanded the balance of the Storage Costs (albeit £247.59 of it was erroneously included) on 17 October 2022 in the Additional Invoice. PIMG has not paid any part of the Storage Costs.

The Expert Evidence

183. It is convenient at this point, before considering my conclusions as to the alleged breaches of contract, arising from how and when the 2015 Heritage Vehicles and the 2016 Heritage Vehicles came to be sold, to say something about my assessment of the expert evidence. My task was not made easier by the fact that Mr Page and Mr Jones come from different backgrounds and disciplines.

184. Mr Page describes himself as a "*vehicle Historian and Assessor, who has owned and worked on a variety of vehicles. I am experienced in the assessment, restoration, repair and maintenance of classic vehicles. I am a full Member of the Institute of Motor Industries (MIMI), a member of the Society of Automotive Historians and past board consultant and General Manager of the Classis British Quality Charter. I have over 30 years of experience of inspecting and evaluating heritage vehicles, having inspected over 5,450 pre-1999 vehicles (including 125 Aston Martin vehicles) since forming a business entitled Classic Assessments in 1993*". His background is in mechanical engineering.

185. Mr Jones says that he has "*had a lifelong interest in motor cars. I joined Sotheby's Motor Car Department days after completing my final exams at the University of Edinburgh in June 1998 and remained there until the Department was scaled back during late 1999. I was hired by Brooks Auctioneers (now Bonhams) the following year and re-joined a former Sotheby's colleague of mine, Julian Shoolheifer, as Cheffins Auctioneers in 2001. I left Cheffins at the closure of their Motor Car Department during 2005 and have been working at H & H Classics Ltd ever since. I have been the Senior Motor Car Specialist at H & H Classics for the past eighteen years and thus been involved in the sale of thousands of classic and collector cars many of which I have researched and catalogued too. H & H Classics is one of only two auction houses that can claim to have both sold a car for over $10,000,000 and a motorcycle for more than $500,000 (the other company being Bonhams)*".

186. In the end, the written expert evidence before me (especially on behalf of PIMG) is extensive and very detailed. Page One (including appendices) runs to 290 pages and its exhibit runs to a further 200 pages and Page Two is 45 pages and has a further 12 page exhibit.

187. Mr Jones was more tentative than Mr Page when giving oral evidence. Moreover, it seems to me that some of the criticisms made by Counsel for PIMG of Mr Jones's evidence in their written closing are justified. Mr Jones had not considered the customs valuations for the vehicles or the documents relating to the sales process by AMW. I found his explanation for not considering the documents produced by Mr Davey in relation to the 2015 Heritage Vehicles to be unconvincing and he was unwilling to concede the point. However, I accept his general point that the vehicle inspection report (**VIR**) was a more reliable guide to the condition of the vehicles. Perhaps unsurprisingly, Mr Jones accepted that he has much less mechanical engineering experience than Mr Page. On matters concerning the nature and extent of the work which was required to be done to the Heritage Vehicles, I prefer the evidence of Mr Page. However, there was a number of unsatisfactory features of Mr Page's evidence which led me to approach it with some caution and generally to accept that of Mr Jones where there was a material difference between them. First, in my judgment, Mr Page inexplicably strayed from the proper scope of the expert evidence (as determined by the Directions Order) by opining on what he termed the "OSP" of the vehicles, meaning the optimal sales price **(OSP**). According to paragraph 11 of Page Two OSP is defined as: "*the best or highest price that could be achieved on the sale of a vehicle. In the case of the Heritage Vehicles, it reflects the price which I consider AML could have achieved for each Heritage Vehicle if their sales methodology was improved*" and at paragraph 14 he says: "*The OSP also takes into account lost sale opportunities in relation to each of the Heritage Vehicles*". Although, in the course of being cross-examined, Mr Page sought to say that OSP was an invention of CMS, PIMG's lawyers, that does not detract from the point that it is for Mr Page himself to determine the proper scope of his instructions and to stay within them. Self-evidently, OSP is something very different from PMP/CMV. I reject the submission that Mr Page was entitled to opine on OSP as part of his comment on the sales process adopted. Secondly, Mr Page took upon himself to give an opinion on costs other than the restoration and re-work costs and to provide values for the Heritage Vehicles in 2023. At the very least, it implied that he was willing to "stretch" his conclusions where it suited PIMG's case. Thirdly, despite him submitting shortly prior to trial what purported to be an Amended version of Page One, the report contained a number of errors, not all of which can be said to be simple errors of transposition. Fourthly, in Page Two, Mr Page seemingly rolled back from the position he had taken in the Joint Written Statement. So, for example, the Joint Written Statement at 6(a) has recorded that: "*[Mr Jones] and [Mr Page] agreed that, in general, the market for heritage Aston Martin vehicles has declined from 21 December 2015 and the present day. The fall in prices can be said to have accelerated after 2018 and to have been further exacerbated by (a) the Covid-19 global pandemic and (b) Brexit. However, some vehicles in very good condition have increased slightly in their values since late 2020*". In Page Two, at [19], Mr Page said that, having "*reconsidered this wording, I think it represents an oversimplification of the market for the Heritage Vehicles between 2015 and 2021. Whilst the market might have ended up in a worse position in 2021 than it was in 2015, between those dates there were several peaks and troughs, including a significant peak in late 2018/early 2019*". In my judgment, there was no good explanation for Mr Page resiling from the view that he had clearly

expressed in the Joint Written Statement, especially on something as significant as the market for heritage AM vehicles. Where there is a difference between Page Two and the Joint Written Statement, I prefer the latter over the former. Finally, it seemed to me that both in his report and orally, Mr Page trespassed into advocacy such as in relation to his defence of the relevance of OSP.

188. In their written closing, Counsel for PIMG, submitted that it was open to me to reject the evidence of both experts, largely on the basis that I should consider that the contemporaneous values provided by Mr Spires, Mr Davey and a Mr Wren (of AMW) for the vehicles were to be preferred. Although I am satisfied that the decision in *Griffiths v TUI (UK) Limited* [2021] EWCA Civ 1442 (per Asplin LJ at [57]) is authority for that proposition, I have no hesitation in rejecting Mr Chapman KC's invitation. First, it was no part of PIMG's case that these were the appropriate PMPs and CMVs for the 2015 and 2016 Heritage Vehicles. Secondly, both parties proceeded on the basis that the best way of determining those values was by the retrospective valuation evidence of the experts (and the Directions Order reflects the Court's approval of this).

189. So far as the market for the Heritage Vehicles is concerned, I therefore accept and proceed on the basis of the experts' conclusions in paragraph 6(a) (set out above).

190. I also accept paragraph 6(b) in the Joint Written Statement: "*Both [Mr Jones] and [Mr Page] agreed that the presence of Aston Martin Assured Provenance Certification was a positive when the Aston Martin vehicles were being offered for sale by a third party. However, both [Mr Jones] and [Mr Page] felt that the effect was lessened when the cars were being offered for sale by [AMW] directly because prospective purchasers maybe likely to put just as much trust in representations made by [AMW] as in an Aston Martin Assured Provenance Certificate*".

191. In addition to their observations on the state of the market which I have referred to in paragraph 6(a) of the Joint Written Statement, I also accept their joint conclusions on the sales process followed in respect of each of the Heritage Vehicles. So, Mr Page and Mr Jones agreed that: (i) putting all of the Heritage Vehicles to market in one go would likely have depressed prices due to too many similar cars being marketed at the same time and that AMW/Mr Spires' strategy of "drip feeding" them over time seemed sensible, although the fact that some vehicle types were offered for sale at the same time, may have had a detrimental effect on values/prices depending upon condition and specification; (ii) without access to AMW's stock list from 2015-2021, it was impossible for the experts to comment on whether the amount of time some of the Heritage Vehicles were left in storage, and so not actively marketed, was reasonable or not but they agreed that from the disclosed documents, some vehicles appear to have spent a considerable amount of time in storage; (iii) the experts were agreed that there were several occasions on which AMW achieved above CMV/PMP for a car and in some cases they did not.

192. There was a further difference in the general approach to values adopted by the two experts. Mr Jones's general approach was to assess the PMP/CMV of a heritage vehicle by reference to the price which it would be expected to achieve at a public auction. In his report he said: "*publicly available auction data is the benchmark for determining market value and … is the most accurate way of doing so"* and "*there is no reliable*

data source for retail sales and sometimes a great deal of difference between an asking price and the actual price paid". He added: "*Conceptually, including the buyer's premium shows what the buyer was prepared to pay for a vehicle on the day*". Mr Page considers that an "open market" valuation should make an allowance for retail pricing which he suggests is typically 10% higher than, say a sale by auction, and might be even higher in other forms of private sale. His view was that auction houses were "poachers" as well as "gamekeepers" who will give a price in order to win the right to conduct the sale. However, as Mr Quirk KC submits, while this is a reason to approach their valuations with caution, it does not undermine the sale prices actually achieved by them or that they constitute the best evidence of what the market is willing to pay. The difficulty it seems to me with Mr Page's approach is that there is no reliable data source for retail sales which almost inevitably take place in private. On this point, I prefer the evidence of Mr Jones.

193. Both experts provided their best assessment of the condition of the Heritage Vehicles. Mr Jones based his assessment largely on the VIRs. Whilst Mr Page criticised this approach in Page One at [56] to [66], this was one of the sections of his report where I felt Mr Page indulged improperly in some advocacy (for example, criticising the extent of disclosure given by AML/AMW; taking issue with some of the terminology used by Mr Spires; questioning Mr Spires' recollection that some of the vehicles were full of sand and at [70] going so far as to comment on what he would have expected AML to do). I have set out above my conclusions on the condition of the vehicles. Mr Page in Page One at [64] agrees with Mr Spires that "*several of the Heritage Vehicles suffered from serious engine issues*".

194. So far as the restoration and/or repair costs for the Heritage Vehicles are concerned, there was also a degree of concurrence between Mr Jones and Mr Page, reflected in paragraph 10 of the Joint Written Statement. So, I accept their evidence that: (i) the invoices raised by AMW were vague on occasion, making an accurate analysis of the hours charged difficult and that if the invoices were inaccurate in terms of chronicling when certain tasks were performed then this could explain why various tasks seemed to have been completed out of sequence and/or in an illogical order; (ii) the invoices raised by AMW showed signs that "*the left hand did not always know what the right hand was doing*"; (iii) however, they saw no evidence of anything underhand or disingenuous in the invoices raised by AMW and whilst Mr Page had concerns about the number of hours certain jobs seemed to take and the order in which others were carried out, he and Mr Jones felt that many of Mr Page's concerns could have been allayed if the invoices were more detailed and (iv) they both felt it would have been more beneficial to have had more detail as to why the cost of AM APC varied from car to car.

The Alleged Breaches of the 2015 Agreement

Did AML act in breach of Clause 2.7(b) by failing to give 5 days' notice to PIMG and/or did PIMG have knowledge and/or consent to and/or give authority for the sales?

195. I have already indicated that, in my judgment, on the question of the proper construction of the 2015 Agreement, the giving of 5 days' notice to PIMG was not a condition precedent to the exercise by AML of its power of sale of the 2015 Heritage

Vehicles. However, it remains to consider whether there was nevertheless a breach of that innominate term such as to give rise to a cross claim for damages.

196. It is not in dispute that AML did not give any formal notice of its intended sales of the 2015 Heritage Vehicles. However, I am entirely satisfied on the evidence before me that PIMG nevertheless knew that AML was intending so to sell following 30 June 2016, that date being the last date for PIMG to achieve a sale of the vehicles itself. First, Mr Jamoul accepted that, from June 2016, he knew that AML was intending to sell the 2015 Heritage Vehicles in order to recover the Debt. Secondly, the fact that the 2015 Heritage Vehicles were being sold is referred to in a number of contemporaneous emails including: (i) the email sent on 29 June 2016 by Mr Wilson (of AML) to Mr Samy (copied to Mr Jamoul); (ii) Mr Samy's response the same day; (iii) Mr Spires' email to Mr Samy sent on 6 July 2016; (iii) Mr Zidan's email sent on 7 July 2016 to Mr Samy which refers to the pledged vehicles which he confirmed he understood to mean that the cars were going to be sold to pay off the Debt in line with the 2015 Agreement. Thirdly, although later on in time, Mr Fenton (an ARG representative) was present at the meeting of AMW's Executive Committee on 18 June 2018 when it was reported that 3 of the Barter Cars had been sold and the aim was to dispose of the rest by 2021. I am satisfied that the underlying purpose of the 5 days' notice was to give PIMG a final opportunity itself to repay the Debt, and this was ultimately achieved, albeit through the informal means I have identified. In my judgment, PIMG has no actionable claim for breach of contract. Alternatively, if I was wrong about that, PIMG has adduced no credible evidence to suggest that such a breach has occasioned it any loss, in particular, as to what it would have done had it exercised its alleged right of first refusal.

Did AML act in breach of Clause 2.7(b) by failing to sell the 2015 Heritage Vehicles at prevailing market prices (PMP)?

197. I have already indicated that, in my judgment, on the proper construction of the 2015 Agreement: (i) the correct date for assessing PMP in relation to the 2015 Heritage Vehicles is as at the date of sale and (ii) that when assessing this, a collective not individual assessment of the vehicles is required.

198. In its written closing submissions at [44], [97], [98] and the preamble to their Annex 2, PIMG raised for the first time an argument that, instead of accepting the experts' evidence on the issue, I should accept that "*prevailing market prices*" in the 2015 Agreement should be construed to mean the prevailing market prices of the 2015 Heritage Vehicles provided by Mr Spires for customs purposes. PIMG's counsel go so far as to submit that this is now PIMG's primary case. I was provided, for example, with a number of customs invoices (totalling c. £3m) for the 2015 Heritage Vehicles. I have no hesitation in rejecting that submission which I regard as an opportunistic attempt to side-step the conclusions of the experts. First, it was not pleaded and although Mr Quirk KC was able to deal with the point in closing, it is not clear to me how PIMG's case on this can be reconciled with their other arguments. Secondly, there is no support at all in the language of the 2015 Agreement, let alone in Clause 2.7 itself, to suggest that the parties intended "*prevailing market prices*" to mean the values submitted for customs purposes. Indeed, the whole argument seems to fly in the face of PIMG's witnesses' own testimony (albeit which I have rejected) that customs values were "conservative". Thirdly, because this was not how PIMG had pleaded its case it

was not reflected in the questions put to the experts. It is of course also inconsistent with my conclusion that the relevant date for assessing the PMP, is the date of sale.

199. According to Summary Table 1, the 2015 Heritage Vehicles sold for a total of £3,030,224.00 (or £3,067,604.00 if "buyer's premium" (being the sum paid by the winner of the auction) is included). Assessed collectively, Mr Jones' evidence is that the 2015 Heritage Vehicles sold for between £512,604.00 and £842,604.00 above PMP. Mr Page's evidence is that two of the 2015 Heritage Vehicles sold below their relevant PMP. However, assessed collectively, Mr Page's evidence is that the 2015 Heritage Vehicles sold for between £240,224.00 and £505,224.00 above their PMPs. It is worth noting in this regard, that supports my view I should reject the submission made on behalf of PIMG that when assessing PMPs for the vehicles I should prefer the customs values of the vehicles (totalling £3m) or, for that matter, the contemporary values proposed by PIMG (totalling £4.8m) or the reserves set by PIMG in the relevant sale or return contracts.

200. I am entirely satisfied, on the basis of this evidence, that the 2015 Heritage Vehicles were sold at, at least, their relevant PMP, at the date of sale.

201. In view of my conclusions on the collective assessment of the 2015 Heritage Vehicles, it is not strictly necessary for me to deal with the two vehicles in respect of which, in Mr Page's assessment, they sold for under their PMPs. However, given that I heard detailed submissions on them, I propose to make some brief (and hence obiter dictum) findings about them.

202. The first is Vehicle 12 (the DB4/566/L). This left-hand vehicle sold in March 2020 for £225,000 by way of retail sale after restoration works of only £14,381.83. Mr Page's opinion is that the relevant PMP was £245,000 to £275,000. The evidence of Mr Spires was that, despite recommendations to the contrary by AMW to AML, the recommended "total body-off" restoration works were not carried out before sale. This is because, as evidenced by the AMW presentation in January 2019, AMW had changed the strategy for this vehicle. Although Mr Page criticises the fact that it was placed in auction in May 2016 with a reserve of £550,000 this was on the instruction of PIMG, not AML. However, the estimated costs of the full restoration were c.£200,000 and Mr Page accepted at (Page One at [6.23]) that AMW made the right decision to sell as a restoration project though he was critical of the time it took AMW to make this decision. Mr Page's evidence (Page One at [6.26]) is that the ultimate price achieved was only "*a little below the sale price I think it should have achieved*". Even with the more modest repair, Mr Page assessed this car as being in a 5/10, borderline 6/10 condition. Unlike Mr Page, Mr Jones has compared the retail sale price with the auction prices of similar cars. Overall, I am not satisfied that Mr Page is right to say that the PMP was higher than that achieved. In particular, I am satisfied that when carrying into effect the change of strategy (from restoration and sale to sale for restoration) AMW was acting to maximise the net sale proceeds.

203. The second vehicle is Vehicle 33 (the DB6/3425/LC). This sold in September 2021 for £167,320 by auction at Bonhams in London after restoration costs of £110,841.22. Mr Page's evidence is that the PMP at the time of sale for this vehicle was between £195,000 and £215,000. Mr Jones considers that the total price paid by the purchaser (which included auction house's buyer's premium) was representative of the car's PMP

at the time of sale, whereas Mr Page considers that it was the return amount after those fees had been deducted which is to be treated as the relevant comparator. In my judgment, Mr Jones is right to include the auction house buyer's premium. I note for example that in the RMS 2016 Valuation it notes that auction prices are generally reported as the total price inclusive of the auction house buyer's premium. PIMG criticises AML for placing this vehicle for sale at a price of £500,000 in March 2017 in four different locations (Shanghai, Paris, Milan, Le Mans and Goodwood) in four years before works had been carried out and submits that AML damaged the car's value. I don't accept that criticism. It smacks of hindsight. No doubt, PIMG would not be complaining if the vehicle had sold at one of those auctions. PIMG also submits that AMW ought to have accepted an offer of £425,000 for this car in March 2018. Although Mr Spires was unable to remember this offer, it seems to be common ground between the experts that the car might have achieved a higher value if sold earlier. But in my judgment, that is the wrong approach because it is looking to OSP not PMP at the time of sale. Mr Jones's evidence (based on his analysis of the likely condition) was that this was a car that "*flattered to deceive"* and looked much better than it actually was. Mr Spires said that this vehicle "*just stuck"*. In short, I am not satisfied, on the evidence, that the course of action adopted was wrong or failed to amount to "best endeavours". Had it been necessary for me to deal with the vehicles on an individual basis, I would have found that that the true PMP was in the range £195,000 to £225,000 and that PMP was not achieved for this vehicle.

204. There is one vehicle (Vehicle 19 = DB6MK2/4289/R) which is only relevant if both my conclusion that the sale prices are to be assessed collectively and my conclusion that the relevant date for comparison is the date of sale not the date of the 2015 Agreement are wrong. This vehicle sold as a trade sale in March 2021 for £195,000. Both experts agree that it sold above its PMP if, as I judge to be correct, the correct date is at the date of sale. In those circumstances, I do not consider it proportionate to consider the position on the alternative basis of a comparison with the relevant PMP at the time of the 2015 Agreement. However, I add that I have seen nothing to suggest that the price achieved was the result of anything wrong done by AMW. I accept, because it is noted in AMW's Executive Committee presentation dated 9 April 2019, that Mr Spires is correct to observe that this was one of several duplicates and that AMW was concerned not to flood the market at the time which is a strategy which both experts seem to accept is correct.

Were the repair, re-work and restoration costs reasonably and proportionately incurred in relation to the 2015 Heritage Vehicles?

205. The relevant repair, re-work and restoration costs for Heritage Vehicles for which more than £10,000 was incurred are set out in Summary Table 1 and the experts' opinions summarised in Summary Table 4. Mr Page challenges the reasonableness and proportionality of the costs in relation to a total of 24 vehicles. So far as the factual evidence is concerned, Mr Davey explained in his first witness statement how the relevant costs were incurred, and the various re-work invoices are in the trial bundles and have been considered carefully by the experts.

206. For AML, Mr Quirk KC criticises Mr Page for what he describes as an "*absurdly granular (and trivial) approach to the analysis*". I consider that to be generally unfair

in that the experts were invited to consider the extent to which the costs were reasonably and proportionately incurred. That is what Mr Page (and to a lesser extent Mr Jones) have done. If that means Mr Page has opined on the reasonableness of AMW replacing a bulb in a glove box light for £95.00, then it is difficult to see why he should be criticised for it. Of greater force, is AML's observation that Mr Page appears to have started from an assumption of bad faith or incompetence on AMW's part whereas Mr Jones took AMW's invoices in good faith. I remind myself that in the Joint Written Statement they agreed that they had found no evidence of anything underhand/disingenuous on the invoices raised by AMW. I am satisfied that, notwithstanding his greater expertise in mechanical engineering, I have to exercise significant caution in simply accepting Mr Page's evidence, even on this topic, because of the way in which I have already criticised the way in which he approached his task.

207. However, the experts agreed, for example, that in relation to one of the 2015 Heritage Vehicles - Vehicle 6 (DB4/144/L) –PIMG should not have been billed £18,910 for the damage to, and subsequent repair to, the bonnet. In relation to Vehicle 33 (DB6/3425/LC), Mr Jones agreed with Mr Page that the work to the dashboard and wiring would not have taken 165 hours. I accept Mr Page's evidence that it is more likely that this work would have taken 14 hours (thereby requiring a deduction of c. £14,000 (151 hours at £95.00 per hour)).

208. Doing my best with this, and dealing with the issue in a proportionate manner, it seems to me that there is some force in some of Mr Page's criticisms. However, this is not a case where PIMG is saying that AMW did not in fact carry out the work, rather that it was not done in a reasonable and proportionate manner. Even taking on board Mr Page's criticisms, AML's estimate of the costs of unreasonable re-work in relation to the 2015 Heritage Vehicles is £68,115.19 and PIMG's estimate is £83,188.17.

209. Either way, it seems to me that Mr Quirk KC for AML is right that, whichever figure is taken, it is subsumed by how much AML out-performed the market in selling the Heritage Vehicles. For this reason, in my judgment, it would not be correct to make any adjustment to the net sale proceeds in relation to the 2015 Heritage Vehicles.

Were the storage costs reasonably and proportionately incurred in relation to the 2015 Heritage Vehicles?

210. The invoices in relation to Storage Costs are summarised in three schedules at H2/2/1 and H2/2/2. PIMG's position is that none of the Storage Costs are recoverable – see the footer to Annex 1 to their written closing submissions which cross refers to paragraph 46 (in the case of the 2015 Heritage Vehicles) and paragraph 74 (in the case of the 2016 Heritage Vehicles).

211. So far as the principle is concerned, it seems to me that once the 2015 Heritage Vehicles had been brought from Kuwait to the UK, it was within the contemplation of the parties that import VAT would be paid to enable them to be removed from a bonded warehouse, and that it could take some time to sell the vehicles. Mr Davey's evidence was that: all of the Heritage Vehicles were initially held at CARS UK (**CARS UK**) in bond upon which AML was charged storage and that once AML had paid the import tax, the cars were taken out of bonded storage; that AMW did not have the space at

Newport Pagnell to store the cars and so the 2015 Heritage Vehicles were relocated over time to a cheaper facility at EM Rogers (**Rogers**) in Northampton. In my judgment, it was reasonable for storage costs to be incurred by AMW for the reasons given by Mr Davey, whose evidence on this point was not really challenged. So far as the amount is concerned, I am satisfied, on the basis of Mr Davey's evidence, that AML/AMW sought to mitigate these costs, where appropriate, for example by moving the vehicles from CARS UK to Rogers and so that the Storage Costs were reasonable and proportionate in amount.

Is AML entitled to recover commissions on the sale of the 2015 Heritage Vehicles, and if so, in what amount?

212. I have dealt with this point earlier in my judgment. I am satisfied that AML is entitled to recover from PIMG commissions but at a rate of 5% in relation to retail sales and in the fixed sum of £5,000 for cars sold by auction.

Is PIMG liable to pay the 2015 Shortfall and has AML properly invoiced PIMG for the 2015 Shortfall?

213. In broad terms, I am satisfied some part of the 2015 Shortfall arises and is due and payable by PIMG to AML. However, it seems to me that PIMG is correct that this was not due as a debt from 30 June 2016, for the simple reason that, until all of the vehicles had been sold and the net sale proceeds accounted for by AML, it was unclear how much was owed by PIMG to AML. I doubt it is necessary to resort to an implied term for that conclusion but, if I am wrong about that, I agree with PIMG's submission that such a term is so obvious as to go without saying. I will deal with the precise amount which is due as part of my judgment on matters consequential to this judgment.

The Alleged Breaches of the 2016 Agreement

Did AML act in breach of Clause 3(a) by either (i) failing to use its best endeavours to sell the 2016 Heritage Vehicles at contemporary market values (CMV) or (ii) by failing to achieve CMV in relation to them?

214. I have already set out my conclusions on the proper construction of AML's obligations under Clause 3(a) of the Agreement and, slightly reformulated this issue to reflect those conclusions. It is necessary now to consider whether AML did in fact achieve CMV for the 2016 Heritage Vehicles or whether, as PIMG alleges, it failed to do so in relation to some or all of the vehicles.

215. As to "best endeavours" obligations, I agree with Mr Chapman KC that this means just that. In contrast to contracts which provide only for a party to take "reasonable endeavours", a "best" endeavours obligation means that "*he must, if necessary to some extent subordinate his own financial interests under the contract to the obtaining of that result*". If authority is needed for that proposition in this Court (which I doubt) I was reminded of the observations in Lewison, *The Interpretation of Contracts* (7th edition, 2020) at [16.54] referring to *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 and Longmore LJ at [70] where he noted that "*best endeavours does not mean second best endeavours*".

216. Mr Chapman KC for PIMG made a number of general observations about the evidence as to the sales process or methodology adopted by AMW in relation to the 2016 Heritage Vehicles. I accept these observations fairly reflect the evidence I heard. First, he points to the fact that, after 1 May 2019, it does appear that AML accelerated its plans to get rid of the remaining vehicles safe in the knowledge that it was entitled to claim back any shortfall from PIMG. Secondly, as evidenced by the AMW Executive Committee presentation dated 13 November 2018 and confirmed by Mr Davey, this coincided with something of a "*bottleneck*" at AMW which had started to build the DB4 Zagato Continuation Cars. I have already referred to the fact that AMW had limited space as one reason why, in my judgment, the parties clearly contemplated that some vehicles would be stored off-site. Thirdly, Mr Chapman KC points to a presentation from McKinsey to AML dated 12 February 2019, which refers under the heading of "opportunities" to "*sell or fire sell barter vehicles*". Fourthly, he relies on an email from Mr Wilson (the CFO of AML) to Fiona Forster and copied to others in AML dated 1 May 2019 in which he said that: "*From my point of view liquidation of the assets is a priority, given they are risk-free to AML"*. Fifthly, although I agree with Mr Chapman KC that Mr Spires was somewhat reluctant to accept the point, it seems that, by 2020/2021 AML was in some financial difficulties (and I note in particular what Mr Quinlan said on this in his witness statement at [20] which was not challenged). Sixthly, he relies upon an email from Mr Davey to Paul Hancock sent on 26 May 2020 containing a summary of the barter cars and noting: "*You'll see the current loss on disposal is £0.8m (sorry, I told you £0.6m) – and is held within the accounts of AML as a PIMG receivable as it is entirely underwritten by the Kuwaiti shareholders"* and further on, after setting out Clause 3 of the 2016 Agreement, the email goes on: "*Even at the time we were handing this 'challenge' the initial valuation of the vehicles felt high, given the condition they were in and the fact that they had not been imported and the relevant taxes had not been paid – that we have limited the loss so far to £(0.8)m is quite an achievement and we have been trying to liquidate the stock for the best return without damaging the market which has since suffered a correction itself of around 20-25%*". Next, Mr Chapman KC notes that, in his email from Mr Spires to Harry Whale of Silverstone Auctions dated 6 October 2020, copied to Mr Davey, Mr Spires said: "*I'm sure you are aware there has been a fairly major change within AML recently and we need to revalue these assets with a view to disposal through auction over the next 6 months*". I accept, contrary to the gloss put on this by Mr Davey, that this meant just that and that there was, in effect, a change of internal emphasis in the strategy within AML/AMW but it seems to me that Mr Quirk KC is also right to say that it was always AMW's strategy to sell the vehicles quickly, provided they did not put too many competing vehicles on the market at the same time. Mr Chapman KC then relies on Mr Davey's email dated 10 December 2020 to Fiona Forster and Kent Brogan (both AML) in which he stated: "*For info, Dom pulled me in with Ken a little earlier to run/summarise various Kuwaiti issues and we ended up running through this deck. He is on board so we have already put the wheels in motion with the auction houses to 'get these cars gone'!*".

217. However, whilst, in my judgment Mr Chapman KC is undoubtedly right to say that these exchanges evidence a renewed determination at the end of 2020 by AML to sell the remaining 2016 Heritage Vehicles (and it is not in issue that nine of the 2016 Heritage Vehicles and one 2015 Heritage Vehicle were sold in the 7 month period between March and September 2021), this does not mean that the strategy was one to

sell at any cost. "*Liquidating*" assets does not carry the suggested implication that this was a "fire-sale". That word is used only by an external consultant, McKinsey, and is not borne out by the evidence, including the evidence of the experts. That there are contemporaneous references to the vehicles being "*risk free*" and to claiming any shortfall from PIMG (or the "*Kuwaiti shareholders*") is scarcely a surprise given that is precisely what was envisaged by Clause 3 of the 2016 Agreement.

218. Given AMW's important reputation and position in the overall market for the sale of AM Heritage Vehicles, and Mr Spires' position within AMW, it seems to me that it would have been commercial suicide for him to associate himself and AMW with a fire-sale strategy.

219. I also accept the submission made on behalf of AML that, at times, PIMG's counsel found themselves having to take inconsistent positions: for example, by complaining that some of the Heritage Vehicles were sold too late/too slowly and that others were sold too early/too quickly; by complaining that some vehicles had had too much work done on them but others too little or that the sales prices for some vehicles were too low whereas others were too high. Perhaps the point comes to this – it reinforces my view that it is necessary and proper to take a collective, rather than car-by-car view of the obligations under the 2016 Agreement.

220. However, to some extent the proof is in the pudding. I refer again to Summary Table 3. Mr Jones's evidence is that the 2016 Heritage Vehicles sold for between £950,910.18 and £2,175.910.00 above their CMVs.

221. Mr Page's evidence is that 6 of the 2016 Heritage Vehicles sold below their CMVs. However, assessed collectively, his view is that the 2016 Heritage Vehicles sold for between £222,512.72 and £972,512.72 above their CMVs.

222. Just as with the 2015 Heritage Vehicles, in deference to the detailed submissions I received, I will set out in brief my conclusions on the 6 of the 2016 Heritage Vehicles which Mr Page says were sold below their relevant CMVs. I reiterate that in view of my conclusions as to: (a) the need for the collective assessment of their values and (b) that the relevant CMV is to be judged at the date of sale not at the date of the 2016 Agreement, these observations are *obiter*.

223. The first vehicle is Vehicle 8 (DB4/850/L). This sold in April 2019 at auction for £297,336.90 (or £335,325.00 with auction house buyers' premium). On the latter basis, which I judge to be the correct one, both experts agree that the amount received was representative of CMV. This car appears to have been in poor condition, with many non-original parts and its chassis had been modified to fit a different gearbox. In short, I accept the submission that a full restoration of this vehicle was not justified by the cost and that this was one of 10 left-hand drive DB4s in the batch and that this justified them being spaced out in the sales pipeline.

224. The next vehicle is Vehicle 10 (DB4/106/L). This sold for £440,000 in October 2019 by retail sale to or via RS Williams. Mr Jones assessed the relevant CMV to be between £350,000.00 and £400,000.00 by reference to prices achieved at public auctions at or around the time of the sale. Mr Page's opinion was that the CMV at the time of sale was £465,000.00. This vehicle was in very poor condition and had only £1,241.00 spent

on it before the sale. Although at one point, a Mr Glazer was lined up to purchase it, I am satisfied that he pulled out of the deal. Although I have rejected Mr Page's general approach to adjusting retail sales by 10%, it is worth noting that deducting 10% from Mr Page's assessment of CMV produces a valuation of £423,000.00 which means that, even on his approach, the car sold for in excess of its CMV.

225. The next vehicle is Vehicle 18 (DB4/790/L). This sold in January 2021 in a retail sale for £365,657.45. Mr Jones' evidence was that the CMV at the time of sale was between £325,000.00 to £350,000.00. Mr Page's relevant range was £410,000.00 to £435,000.00 but his principal justification in the Joint Written Statement appears to be based on an offer of $500,000.00 which he suggests was made on the vehicle but not accepted. This appears to be a misunderstanding and, in any event, based on his flawed approach to OSP. I am satisfied on the basis of the relevant emails that the actual sale was at $500,000.00 which converts to £365,657.45 after deduction of a commission.

226. The next vehicle is Vehicle 27 (DBVC/3682/R). This sold for £345,636.87 (or £396,370.00 with auction house buyer's commission) at a Bonhams auction in Monaco in April 2021. I am satisfied that these were competitive auctions with multiple bidders. Mr Jones' assessment of the relevant CMV (of between £350,000.00 to £400,000.00) was informed by the fact that the relevant VIR shows that the car suffered from misshapen body-work. He also used auction data as comparables.

227. The next vehicle is Vehicle 30 (DB6Mk2/4184/VC). This was sold in May 2021 at a Bonham's auction in London for £190,000.00 (or with the auction house buyer's commission at £218,500). Bonhams has confirmed this was a competitive auction with multiple bidders. In any event, if the buyer's premium is factored in, then the total price just exceeds Mr Page's valuation range of £195,000.00 to £215,000.00 but if the buyer's premium is discounted then the amount is just short of Mr Page's lower figure. As he fairly accepted in cross-examination, valuation is not a precise science and for this vehicle to be sold just outside the range does not evidence any failure on the part of AMW. Deducting 10% from Mr Page's assessment of CMV would mean that the car sold within CMV.

228. The sixth relevant vehicle is Vehicle 31 (DBVC/3675/R). This was sold at the same auction as the previous car for £358,900.00 or (£425,500.00 with auction house buyers' premium). This was a competitive auction with multiple bidders. Although Mr Page had assessed the relevant CMV to be within the range £500,000.00 to £535,000.00, in the Joint Written Statement he revised this view on the basis that it was a bit too high. Mr Jones assessed the range as being between £400,000.00 and £450,000. Although Mr Page thought that the monies spent on this vehicle (£32,517.50 on import costs and £11,007.49 on repair and re-work costs) should have resulted in it achieving a higher sale price, it was sold at a competitive auction.

229. There is a more general point. Although there was some reluctance on the part of PIMG's witnesses (and even Mr Page) to accept it, I am satisfied that AMW was justifiably influenced by a rumour (which eventually came to pass) that Sheikh Nasser was intending to bring into the UK from Kuwait another batch of Aston Martin heritage vehicles and by April 2021, save for some vehicles in very good condition, the market was generally perceived to be falling.

230. I am accordingly satisfied that even if I am wrong to assess the 2016 Heritage Vehicles collectively, PIMG's complaints about the six vehicles which, according to the expert evidence of Mr Page, did not achieve CMV, are not reflective of any failure by AML/AMW to use their best endeavours to achieve CMVs.

Did AML act in breach of an implied term by failing to achieve at least the minimum level of Assured Provenance Certification (APC)?

231. I have set out my conclusions above, that, on its proper construction, the 2016 Agreement did not oblige AML to achieve APC for the 2016 Heritage Vehicles before selling them. It seems to me that the true tenor of the lay and expert evidence I have heard is that, as Mr Spires put it in part of his email to Dr Palmer on 15 December 2016: "*... establishing provenance for each car is key to the values*" and that achieving APC is an established and road-tested way of establishing that provenance. On the other hand, Mr Jones's evidence was that a vehicle having an APC was not always a positive and would not necessarily affect the sale price and Mr Page agreed that it might be appropriate to sell a vehicle in poor condition without an APC.

232. If I am wrong on this and there was a contractual obligation on AML to achieve APC, which it has broken in relation to the 11 vehicles for which it is common ground no APC was achieved, I am nonetheless not persuaded by PIMG that it has suffered any loss, as a result of the breach. Both experts agreed (Joint Written Statement at paragraph 6(b)) that the effect of a vehicle being without APC was lessened when the vehicles were being offered for sale through AMW because of the level of trust prospective purchasers would place in representations made by AMW. That was the position save in relation to three of the 11 Vehicles which were sold at auction (Vehicle 8, Vehicle 27 and Vehicle 28).

Were the repair, re-work and restoration costs reasonably and proportionately incurred in relation to the 2016 Heritage Vehicles?

233. Although in Jones One, Mr Jones had been of the view that all of the repair, re-work and restoration costs for all of the 2016 Heritage Vehicles where works in excess of £10,000 had been carried out on them, had been reasonably incurred and were proportionate, by the time of the Joint Written Statement his position had changed. It is scarcely surprising that his views have modified given that, for the reasons already identified, he acknowledged that Mr Page's background and extensive experience is in mechanical engineering. I regard it as a successful feature of the joint expert meeting that it led to one or other expert modifying their reports or making appropriate concessions. As I have already noted, a significant feature of their evidence was that the invoices were vague and/or recorded works being carried out in an illogical manner. Although Mr Quirk KC urged me to reject those criticisms on the basis that they really amounted to criticisms of AMW's invoicing practices rather than going to the reasonableness of the works themselves, I reject that. It may well be the case, as Mr Jones said, that this is common in the industry, but it seems to me that is no answer here where AMW could reasonably have expected their invoices to be scrutinised by PIMG precisely because of the express provisions in Clause 1(e) and Clause 3(b) of the 2016 Agreement. Put another way, in my judgment AML/AMW should not be able to avoid the consequences of those practices.

234. By the time of the Joint Written Statement, Mr Jones agreed with Mr Page that some of the costs were unreasonable and/or disproportionate in relation to the following of the 2016 Heritage Vehicles: Vehicle 4; Vehicle 6; Vehicle 9; Vehicle 10; Vehicle 12; Vehicle 13; Vehicle 14; Vehicle 18; Vehicle 19 and Vehicle 21. I would in principle have accepted this as evidence that parts of the costs of repair, re-work and restoration costs were not justifiably passed on to PIMG.

235. However, it seems to me that Mr Quirk KC is right to make the overarching submission that even if all of the costs to which Mr Page objects were deemed to be unreasonable, the total is subsumed by the amount by which the experts consider AML outperformed the market in selling the 2016 Heritage Vehicles. In those circumstances, it would be wrong in my judgment, not to permit AML to recover those.

Were the storage costs reasonably and proportionately incurred in relation to the 2016 Heritage Vehicles?

236. For the reasons I have already given, in my judgment there is a material difference between the way in which the storage of the vehicles was to be dealt with under the 2016 Agreement compared with the 2015 Agreement and that AML is not entitled to pass on to PIMG the part of the Storage Costs which relates to the 2016 Heritage Vehicles.

Is AML entitled to recover commissions on the sale of the 2016 Heritage Vehicles, and if so, in what amount?

237. I can see no material distinction between the 2015 Agreement and the 2016 Agreement on the issue of the payment of commission. However, it seems to me that the parties did not contemplate that commission would be payable at any rate higher than 5% on retail sales. In the case of all of the auction sales, bar one, where AMW has charged a fixed fee of £5,000, it was not disputed that this is less than the 5% commission would be less. Accordingly, I am satisfied that AML is entitled to recover from PIMG commissions at a rate of 5% in relation to retail sales and in the fixed sum of £5,000 for cars sold by auction.

Is PIMG liable to pay the 2016 Shortfall and has AML properly invoiced PIMG for the 2016 Shortfall?

238. I am satisfied that a shortfall does arise under the 2016 Agreement but will deal with the precise amount due following the handing down of this Judgment as part of the consequential matters.

The Credit Note

239. I have dealt above with my conclusions on the proper construction of the 2016 Agreement so far as concerns the Credit Note issue and I return now to my factual findings on that issue.

240. The first issue is whether there is an unexhausted balance on the Credit Note. In this regard, I have already noted that Mr Hall's evidence to the effect that it had been exhausted was not really challenged in cross-examination. This is important because

the limitation period in relation to the various historic ARG debts which have been, as a matter of fact at least so far, set-off against the Credit Note has probably expired.

241. It is necessary to consider Slaughter and May's letter dated 22 February 2023 (**the 22 February Letter**). The 22 February Letter was sent in response to CMS's letter dated 8 February 2023 (**the 8 February 2023 Letter**). Essentially, in that letter, CMS said that it was impossible for PIMG to ascertain, on AML's pleaded case, the sums (and transactions from which those sums are derived) AML says it has offset against the £14.3m Credit Note balance to reduce its balance to zero. However, the letter enclosed a spreadsheet entitled "Credit Note Depletion" (**the Credit Note Depletion Spreadsheet**) setting out the sums which PIMG considered were properly deducted from the Credit Note pursuant to Clauses 2(b) and 2(c) of the 2016 Agreement.

242. Reading those two letters together, it seems to be common ground that the relevant offset against the Credit Note in relation to PIMG's receipt of Special Cars in 2016 is £6,293,920.00. So far as concerns the price of the Special Cars shipped in 2017/2018 they set out that there is a dispute as to whether the relevant sum to be deducted is £3,602,309 (as contended by PIMG in the Credit Note Depletion Spreadsheet) or £3,063,000.00 (as contended by AML in the 22 February Letter). The difference of £441,000.00 appears to relate to three additional Special Cars received by PIMG in 2017/2018. Accordingly, as at February 2023, there was a difference between the parties (before the application of further credits and debits) as to the correct outstanding starting balance on the Credit Note: PIMG's position (in the Credit Note Depletion Spreadsheet) was that the relevant balance was £4,403,771 whereas AML's position (in the 22 February Letter) was that the relevant balance was £4,943,000.00.

243. AML's position in the letter dated 22 February 2023 was that further sums (being other ARG debts not related to the Special Cars) have been deducted from the Credit Note totalling £4,943,000.00 such that it was now exhausted. They comprise (taken from the 22 February 2023 letter and using the sub-paragraph numbers in it): (a) an add-back to the Credit Note of £97,000.00 as a result of payments made by PIMG to AML in relation to two Valkyries in around September 2018; (b) an add-back to the Credit Note of an amount totalling £320,000.00 representing the value of the deposit and dealer margin to RST arising from the sale of a Vanquish Zagato Speedster in Oman; (c) an offset of £1,430,000.00 resulting from the inclusion of the balance of the price for the receipt of 5 Vanquish Zagatos in 2017/2018; (d) an offset of £530,000.00 accrued by PIMG in relation to PIMG on-selling vehicles from AML across 2017; (e) an offset of approximately £1,003,000.00 of debts accrued by RST as a result of AML's provision of credit to it across 2016 to 2018 to support RST's on-selling of vehicles; (f) an offset of £1,930,000.00 of debts accrued by Tiboli in relation to vehicle development costs incurred by it in support of the Lagonda Taraf special project across 2016 to 2017 and (g) an offset of £465,000 for part of AMW's debts accrued by PIMG to AMW across 2016 and 2017. The 22 February 2023 Letter was written on the basis that, whilst there might be slight differences between PIMG's records and the amounts actually offset by AML owing to differing applications of foreign exchange rates, any balance on the Credit Note had been exhausted. The 22 February 2023 also notes that these add-backs and offsets followed discussions between AML and PIMG (in particular, Mr Jamoul) as to how the remainder of the Credit Note was to be used and "*this resulted in an arrangement to exhaust the Credit Note by applying its remaining balance against other [ARG] debts*".

244. I have already set out my view (against the construction advanced by PIMG) on the proper construction of the 2016 Agreement so far as concerns the Credit Note. In my judgment, there was nothing to prevent the Credit Note being applied in the way it has been applied. I am also satisfied that, as a matter of fact, the Credit Note has been exhausted if by that term it is meant that is how it has been dealt with in the inter-company accounts between AML and PIMG. The language in the 22 February 2023 Letter is consistent with Mr Hall's unchallenged evidence in his witness statement at [7].

245. It is not strictly necessary to consider the alternative argument, that there was an agreement (or as it is more tentatively described in the language of the 22 February 2023 Letter, "an arrangement") reached in October 2018 for the Credit Note, to be applied in the way that Slaughter & May says in that letter that it has in fact been applied. However, I will do so briefly given that I have received detailed submissions and a substantial amount of the evidence on the Credit Note was directed to it. The first point is that I agree with Mr Chapman KC, that this is not the way in which AML has pleaded its case and no application to amend the Re-Amended Particulars of Claim has been made. Indeed, he goes so far as to say that any proposed amendment would fail *in limine* because (i) it is too late; (ii) inconsistent with the contemporaneous documents and (iii) Mr Khattab and Mr Jamoul had no actual or ostensible authority to reach any final agreement which included the debts, not just of PIMG, but also RST and Tiboli.

246. On 24 September 2018, Mr Hall sent Mr Al-Roumi an email and letter and accompanying spreadsheet recording his position that PIMG, RST, AML International Motors Group and Tiboli together owed a total £7,754,888 to AML and demanding payment by 30 September 2018 failing which it would cancel any remaining Valkyrie orders and use the remaining credit under the 2016 Agreement to offset all debts in age order. Mr Hall said, in cross-examination, and I accept, that the context was the imminent IPO of AML on 3 October 2018.

247. On 25 September 2018, Mr Hall sent a further email to Mr Khattab and Mr Jamoul stating that his team was "*working on the Tiboli true up"* but was not expecting any major change up or down.

248. On 27 September 2018, Mr Hall responded to a request for an update from Mr Khattab, by sending "*the latest reconciliation"* to Mr Jamoul and Mr Khattab for "*your proposal on the payment schedule"*.

249. On 28 September 2018, Mr Khattab emailed Mr Hall attaching a "*worksheet with the proposed roadmap to closing this matter for the benefit of all parties involved"*. However, he added that: "*Lastly, as noted in our conversation, it is important to stress that these debt settlements involve different entities with different shareholders. Particularly, I do not have any say in either Mr Al-Roumi or K's decisions/accounts. While we are doing our best to facilitate an overall resolution, I will need to separately obtain approval from each entity/person*". In his response, Mr Hall sought clarification: "*So, to be clear the is [sic] the request to clear the debt"* and asked: "*Please let me know as I don't want to have the wrong understanding when presenting it internally*". Mr Khattab responded clarifying certain of the requests to which Mr Hall said [at 18.05] that "*I believe it is not going to be acceptable*" but that he would review and

respond as soon as he could. These exchanges were taking place over the weekend. In cross-examination, the highest Mr Hall was able to put it was that "*we've got a roadmap of items there that could be used to allocate off against the credits*" and that he knew Mr Khattab did not have authority on behalf of the ARG. I accept Mr Chapman KC's submission that, at least at that point, Mr Hall had been told that Mr Khattab did not have authority to settle for the other entities.

250. After some time, on 24 October 2018, Mr Hall (apologising for the delay) responded to Mr Khattab on his 28 September 2018 proposal, commenting in some detail on each of its elements and attaching a number of spreadsheets. I am satisfied that no agreement had been reached by this stage for two reasons: first, the language of Mr Hall's email is not final but tentatively moving further towards consensus. So, for example, he asks Mr Khattab "*Please let me know if you have any questions or queries*". Secondly, there is nothing to suggest that Mr Khattab was now authorised to reach an agreement on behalf of the other entities in the ARG.

251. On 29 October 2018, Mr Khattab emailed Mr Hall: "*Could you provide us with the Barter Deal statement of Account since inception and up to date please?*" to which Mr Hall responded to say he would provide "*the ledger account within the hour*". It is perhaps stating the obvious that if Mr Hall had thought agreement had already been reached as to the use of the Credit Note in line with one or other of the proposals, he would have said so. In his further email, Mr Khattab queried whether a spreadsheet which had been sent earlier in October represented the last statement on the Barter Deal to which Mr Hall replied (attaching another spreadsheet) and stating that this was "*the status as at the 30th September (and 29th October) after the credits were utilised for the older debts e.g. Tiboli etc*". Mr Khattab asked for the document to be sent in a simplified format: "*One that can start with a £14.3 Million Balance and move to date. Do you think you can provide me with that?*". Whilst I of course acknowledge that this type of correspondence from a paying party can sometimes be used as a device to generate doubt and so delay (and the trial documents are replete with complaints by AML that this is precisely what PIMG has been doing), having set out these exchanges and looked at some of the spreadsheets generated by Mr Hall, I have some sympathy for Mr Khattab. The position was far from being clear.

252. There were further detailed exchanges between the parties on 30 October 2018 including the provision by Mr Hall of another spreadsheet which led to Mr Khattab querying: "*from your reconciliation I understand that we now have a credit balance of £4,943,330 in the Barter account. Right?*" to which Mr Hall replied: "*This was the balance before the offsets were applied to contra the balances with the oldest debts*". Mr Khattab responded by sending his own reconciliation, which was different from that which had been sent by Mr Hall and stated that the changes: "*reflect our viewing of some of the balances and the credits applied*". In short, as Mr Hall accepted in cross-examination, Mr Khattab was essentially making a counter-proposal. Mr Hall responded at 16.03 and raised some queries including as to "*What date are your proposing to pay this?*" and stated that "*I need the above dates to take this to Andy Palmer and Mark Wilson (and the wider Board)*"**.**

253. In my judgment, whilst it is ultimately not decisive of this issue, it is very clear that no final agreement had been reached on the application of the various set-offs to the Credit Note. Both sides were saying that they had to take the decisions further up their internal

chains of authority and there had been a series of proposals and counter proposals none of which had led to *consensus ad idem* between the parties. There is nothing to suggest that authority was ever obtained on AML's side from Dr Palmer, Mr Wilson or the wider board. On the PIMG/ARG side, there is nothing to suggest that Mr Al-Roumi or anyone else approved it. On this aspect of the case, I consider my objective analysis of the documents to be preferable to the testimony of the witnesses such as Mr Hall and Mr Jamoul whose evidence was, in substance, an expression of their subjective view of what they thought happened or what the contemporaneous documents purport to show.

Other matters

254. PIMG claims damages for conversion pursuant to section 3(2)(c) of TIGA in relation to the 2015 Heritage Vehicles. This was not developed at all in PIMG's written or oral closing arguments. For all the reasons I have given, I am satisfied that AML was entitled to sell the 2015 Heritage Vehicles pursuant to the terms, properly construed, of the 2015 Agreement. I dismiss this claim.

255. I also dismiss PIMG's claims for damages for breach of Clause 1.3 or Clause 2.7(b) of the 2015 Agreement. I am satisfied that there was no such breach and that, in the alternative, PIMG has not satisfied me that it has suffered any loss and damage as a result of such breach.

256. Likewise, I dismiss PIMG's claim for damages for breach of Clause 1(e) or Clause 3(a) of the 2016 Agreement. I am satisfied that there was no such breach and that, in the alternative, PIMG has not satisfied me that it has suffered any loss and damage as a result of such breach.

Disposal

257. I invite the parties to agree, if possible, the terms of an Order which reflects my judgment and to deal with matters consequential on the judgment. If matters cannot be agreed, I will deal with them at the further hearing which has been listed to be heard remotely at 1030 on Friday 1 March 2024.