OUTER HOUSE, COURT OF SESSION

[2021] CSOH 5

CA31/20

OPINION OF LORD TYRE

In the cause

EASTERN MOTOR COMPANY LIMITED

Pursuer

against

COLIN DONALD GRASSICK AND OTHERS

Defenders

Pursuer: Dean of Faculty; Addleshaw Goddard LLP
Defenders: Jones QC, R Mitchell, sol ad; Brodies LLP

26 January 2021

Introduction

[1] On 1 August 2017, the pursuer and the defenders entered into an agreement ("the SPA") for the sale by the defenders and purchase by the pursuer of the entire issued share capital of Grassick's Garage Limited ("the company"). The principal business of the company was owning and operating a BMW and Mini car franchise dealership.

[2] Upon completion of the purchase, and in accordance with the terms of the SPA, a sum of £250,000 was paid by the pursuer into a retention account, to be held there until Completion Accounts were agreed or determined. The pursuer was obliged to prepare draft

Completion Accounts and to deliver these to the defenders within 60 days after the completion date.

[3] The draft Completion Accounts produced by the pursuer were adjusted by agreement between the pursuer and the defenders. Certain matters, however, remained in dispute. The parties decided to refer these matters to a Price Adjustment Expert for determination, again in accordance with the provisions of the SPA. Mr Greig Rowand, a partner and head of forensic accounting at Henderson Loggie, Chartered Accountants, was appointed by the President of the Institute of Chartered Accountants of Scotland to act as the Price Adjustment Expert. The terms upon which the expert was to be instructed were agreed by the parties and set out in terms of engagement. The expert accepted instruction on that basis.

[4] On 6 March 2020, the expert issued his determination, which was broadly favourable to the pursuer. The pursuer has called upon the defenders to take action to instruct jointly the release of the monies held in the retention account. The defenders have refused to do so. They maintain that in two material respects the expert failed to follow the instructions that he had been given and, in any event, fell into manifest error in making his determination.

[5] In the present proceedings, the pursuer seeks (i) declarator that the expert's determination is binding on the parties; and (ii) an order requiring the defenders to instruct the Royal Bank of Scotland to release from the retention account (a) the sum of £158,068, together with interest accrued thereon, to the pursuer and (b) the sum of £91,932, together with interest accrued thereon, to the defenders.

The Share Purchase Agreement

[6] In terms of the definition of "Ordinary Share Consideration" in paragraph 2 of Part 11 of the Schedule to the SPA, the purchase price of the shares comprised four elements, namely the Actual Net Asset Value, the Business Goodwill, the Contingent Asset Consideration, and the Manufacturers Bonuses. The purpose of preparation of the Completion Accounts was to ascertain the Actual Net Asset Value. The following provisions, all contained in Part 7 (entitled "Completion Accounts") of the Schedule to the SPA, are material to the present dispute.

[7] The term "Completion Accounts" was defined in paragraph 1.1 as meaning the balance sheet of the Company as at the Locked Box Date, to be prepared in accordance with Part 7 of the Schedule. The "Locked Box Date" was defined as close of business on 30 June 2017. Paragraph 6.1 provided as follows:

> "The Completion Accounts will be prepared in accordance with, and in the order shown below:
>
> (a) the specific accounting policies set out in Section D of this Part 7 of the Schedule;
> (b) to the extent not inconsistent with paragraph 6.1 (a), using the same accounting principles, policies, practices, evaluation rules and procedures, methods and bases, (including in respect of the exercise of management judgment) adopted by the Accounts (Accounting Policies), applied on a consistent basis (but only to the extent that the Accounting Policies are in accordance with UK generally accepted accounting practices as at the Locked Box Date); and
> (c) to the extent not inconsistent with paragraphs 6.1 (a) and/or 6.1 (b), in accordance with UK generally accepted accounting practice as at the Locked Box Date."

[8] Among the "specific accounting policies" set out in Section D of Part 7 of the Schedule was the following, in paragraph 15:

> **"Used Vehicle Stock**
> Retailable used vehicle stock will be valued in line with current motor trade valuation. Therefore used vehicle stock at the Locked Box Date will be valued in

> accordance with prevailing CAP clean values on CAP Valuation Anywhere. If a vehicle does not appear in CAP the values will be determined by agreement between the Seller's Representative and the Buyer. Non retailable used vehicle stock (Trade Stock) is expected to be at a minimum. Trade vehicles will be valued at a realistic trade value to be agreed between the Sellers Representative and the Buyer. It is recognised that CAP is not necessarily the best measure of a trade vehicle's value."

[9] As already mentioned, provision was made (in paragraph 7) for production and delivery by the buyer (the pursuer) of a draft of the Completion Accounts. The sellers (the defenders) then had 30 days to notify the pursuer of any proposed adjustments to the draft, which failing the draft would become final and binding. In the event of adjustments being proposed, paragraph 9 required the parties to attempt in good faith to agree the draft. Failing such agreement, paragraph 9.3 entitled either party to require that the draft Completion Accounts be referred for expert determination.

[10] Paragraph 10 provided for any matters in dispute relating to *inter alia* the Completion Accounts to be referred to Price Adjustment Experts, being

> "a firm of independent chartered accountants, or a chartered accountant within a firm that has expertise in preparing completion accounts and/or advising on disputes in relation to the preparation and agreement/determination of completion accounts for companies in the motor trade industry"

and, failing agreement, for nomination of an expert by the President of the Institute of Chartered Accountants in Scotland or by a person appointed by him. Paragraph 10.4 provided *inter alia* as follows:

> "Save as otherwise agreed between the Buyer and the Sellers, the following provisions will apply to the role of Price Adjustment Experts under this paragraph 10:
> …
> (b) the Price Adjustment Experts will act as experts and not as arbitrators;
> …
>
> (e) the Price Adjustment Experts:
> (i) will apply the accounting policies and other matters referred to in paragraph 6 above;
> (ii) will only determine:

(A) what, if any, alteration should be made to the draft Completion Accounts; and

(B) whether or not any of the arguments put to it for modification of the draft Completion Accounts are correct, in whole or in part;

…

(iii) may not determine the scope of their own jurisdiction;

(f) the Price Adjustment Experts' decision as to any matter referred to them for determination will be final and binding on the Buyer and the Sellers, save in the case of manifest error or fraud , in which case the relevant part of their determination will not be effective and will be referred back to the Price Adjustment Experts for correction; …"

The matters referred for expert determination

[11] Four matters were referred for determination by the nominated expert. Three of these related to the Completion Accounts. Two still remain in dispute. Both of the latter concern the proper interpretation of the provision in paragraph 15 (above) for valuation of the company's used vehicle stock. As already noted, paragraph 15 provided for such stock to be "valued in line with current motor trade valuation", and "therefore" to be "valued in accordance with prevailing CAP clean values on CAP Valuation Anywhere". CAP Valuation Anywhere is an online subscription site operated by CAP-HPI, similar in purpose to the more familiar Glass's Guide, providing valuations, revised monthly, of all makes of car. In addition to viewing current and past valuations, users of the website can subscribe for estimated future valuations.

[12] The first matter in dispute concerned the values to be attributed to vehicles, referred to as "qualifying cars", on which the company had paid VAT on acquisition because the cars were ineligible for the second-hand margin scheme for used cars. When a trader sells a qualifying car, he is obliged to account to HMRC for output VAT on the selling price, having previously recovered the input tax that he paid when the car was purchased. As regards

such cars, two matters were common ground. Firstly, the standard UK accountancy treatment of such cars in the motor trader's balance sheet would be to enter them at whichever was the lower of cost or net realisable value, either of which figures would necessarily be **net** of VAT. This practice had been followed by the company in its annual financial statements. Secondly, when valuing any car for trading purposes, no account would be taken of whether it was or was not a qualifying car. In all cases the **gross** value, inclusive of VAT in the case of qualifying cars, would be used. Accordingly, the values of cars that appeared in published valuation guides such as CAP Valuation Anywhere would always (in the case of a qualifying car) be the value inclusive of VAT.

[13] In the Completion Accounts produced by the pursuer, the values attributed to qualifying cars in the company's used vehicle stock were their values net of VAT. The defenders disputed this method of valuation under reference to paragraphs 6.1 and 15 above. They contended that on a proper interpretation of those paragraphs, standard accountancy practice and the practice followed by the company in producing its financial statements were overridden by a specific requirement to use the gross values appearing on CAP Valuation Anywhere. There was, it was contended, no basis in the SPA for substituting net values.

[14] The second matter in dispute concerned the meaning of the word "prevailing" in the phrase "prevailing CAP clean values". Valuations on the CAP Valuation Anywhere website are revised on the third last day of every month. Figures for "July 2017" were therefore published on 28 June 2017. As already noted, the Locked Box Date was 30 June 2017. In the Completion Accounts, the pursuer used the "July 2017" figures as being the values prevailing as at 30 June. The defenders contended that the "June 2017" figures, published on 29 May, ought to have been treated as "prevailing" as at 30 June.

The price adjustment expert's decision

[15] In relation to each of the areas of dispute, the Price Adjustment Expert narrated the issue, as set out in his letter of engagement, and the respective contentions of the parties, before stating his view and conclusion. At paragraph 1.3, he described the two matters that remain in dispute as follows:

- Aspects of the method of valuation of the ex-demonstrator/service loan vehicles (qualifying vehicles only) which form part of the Used Vehicle Stock;
- The date of data to be used in determining the "Prevailing" CAP Clean Value to be applied to the valuation of all Used Vehicle Stock.

[16] As regards the first of these matters, ie the VAT issue, the Price Adjustment Expert stated his opinion as follows:

> "***Our view***
> 4.7 Clause 15 of section D… is silent on the treatment of VAT reclaimed on qualifying cars. We do not necessarily believe this should be read that VAT is ignored as there is a clear industry and HMRC practice for applying VAT to used cars.
>
> 4.8 We do not interpret the second sentence in clause 15… as overriding the first sentence but as the source of the valuation. We believe that the overall intention of the clause is to value the vehicles in line with current motor trade valuation.
>
> 4.9 The normal accounting policy would be to state qualifying vehicles at the lower of cost or net realisable value – in this case based on prevailing CAP clean values. The 'cost' in the accounting records would be net of VAT reclaimed. Alternatively, if the full CAP clean value is included in stock a corresponding VAT liability would be accrued to recognise the liability due to HMRC contained in the stock value. It had been the normal accounting practice of the Company to show qualifying cars net of VAT in their financial records.
>
> ***Conclusion***
> 4.10 It is our opinion that the basis of the valuation of qualifying vehicles in stock at the locked box date is correct in the Completion Accounts. No adjustment is required to the Completion Accounts."

[17] As regards the proper interpretation of "prevailing", the Price Adjustment Expert concluded:

> "***Our view***
> 5.6 There is no definition of '*prevailing*' in the SPA. The definition of 'prevailing' from the Cambridge English Dictionary is '*existing in a particular place or at a particular time*'.
>
> 5.7 As at the date of the Completion Accounts (30 June 2017) the latest values available from CAP at that particular time would be those dated 28 June 2017 regardless of the July label attached to them. The values at 28 June 2017 are widely available to the trade and any transactions would take this value into account. This would also point to the values effective from 28 June 2017 being the prevailing or current values to be used at 30 June 2017.
>
> ***Conclusion***
> 5.8 It is our opinion that the correct data has been used from CAP Valuation Anywhere to value the used vehicles in the Completion Accounts… No adjustment is required to the Completion Accounts."

Expert evidence at the proof

[18] Evidence at the proof in the form of written reports, supplementary reports and oral testimony was given by three expert witnesses. On behalf of the pursuer, expert evidence was provided by Mr Michael Jones FCA, chairman of ASE plc, a company which provides data and professional services (including VAT advice) to the automotive industry including the UK retail automotive sector. His professional experience included advising on sales of motor dealerships and on the terms of share purchase agreements. On behalf of the defenders, expert advice was provided by (i) Mr Neil Owen, director of VAT Advisory Services Ltd, a fellow of the Chartered Institute of Taxation formerly employed as an inspector by HM Customs & Excise with many years' experience of the application of VAT to transactions in the motor trade industry; and (ii) Mr Stuart Preston CA, a partner in Grant Thornton UK LLP and leader of its restructuring and forensic teams in Scotland.

[19] I found the expert evidence to be of limited assistance in the circumstances of this case. In relation to the first issue, Mr Jones and Mr Owen both provided clear and helpful explanations of the application of VAT to purchase and sale transactions by dealers in the motor trade industry, but none of that was controversial and much of it consisted of matters of law. Mr Jones was instructed to, and did, express an opinion as to whether the Price Adjustment Expert had correctly applied "industry and HMRC practice" to the valuation of the used vehicle stock. His opinion, based on his experience, was that, in the context of a sale of shares in a motor dealership where a valuation guide was used to value the used vehicle stock, it was consistent with standard industry practice to adjust the CAP value for VAT in respect of qualifying cars. The explanation given for this practice was that unless such an adjustment was made to record the fact that VAT had been reclaimed by the seller of the shares, and was therefore a future liability of the buyer when the car came to be sold, the VAT account as a provision within the seller's net assets would be incorrect. To this extent, I consider that Mr Jones provided admissible and relevant expert testimony, and I accept his evidence as to standard industry practice in this regard. The explanation that he gave for it is readily comprehensible, and indeed was acknowledged by both Mr Owen and Mr Preston to be correct in accounting terms, although they disagreed with Mr Jones's opinion as to its significance.

[20] Mr Owen was asked to express an opinion as to whether the Price Adjustment Expert had committed a manifest error in determining that the CAP value of qualifying cars fell to be adjusted for VAT. His view was that the expert had erred in finding that such an adjustment was appropriate, and that the threshold of manifest error was met. He went on to describe the error as "fundamental" and "egregious". Those views were, however, based entirely upon Mr Owen's interpretation of paragraphs 6.1 and 15 of Part 7 of the Schedule to

the SPA as requiring standard accounting practice and the seller's own practice to be regarded as expressly overridden by use of the gross values appearing on CAP Valuation Anywhere. As the proper interpretation of the SPA is not a matter falling within Mr Owen's area of expertise, I am unable to attach any weight to his opinion.

[21] Mr Preston was asked to comment on the conclusions in Mr Jones's report. His opinion was that Mr Jones was "incorrect in asserting that 'standard industry practice' should be followed". Like Mr Owen, Mr Preston based his view on his interpretation of the SPA as imposing a specific policy for valuation of used vehicle stock, requiring the use of gross values for qualifying and non-qualifying cars alike, regardless of whether this made good sense in accounting terms. Again, as interpretation of the SPA is not a matter falling within Mr Preston's field of expertise, I am unable to attach any weight to his opinion on this. Additionally, in his oral evidence (though not in his written report), Mr Preston expressed the view that where vehicle stock was held in an account at the lower of cost or net realisable value, this meant that it was held net of input, not output, tax. I am not persuaded that it makes any sense, or is of any relevance, to draw such a distinction. As Mr Jones explained, the concept of net realisable value requires selling costs to be taken into account. In the case of qualifying cars, those selling costs will include VAT which, from the trader's perspective, is output tax for which he will have to account to HMRC. The point, as Mr Jones observed, is simply that where stock with an inherent VAT liability is entered in an account, it is necessary to allow for that liability as a selling cost.

[22] All three experts were asked to express a view on the second issue, ie the proper interpretation of the word "prevailing". Mr Jones agreed with the Price Adjustment Expert's determination; Mr Owen and Mr Preston disagreed with it. Mr Jones's reason for agreeing was that the July 2017 figure was the one that any subscriber would see given as

the "current valuation" if consulting the website on 30 June 2017. Mr Owen's reason for disagreeing was that in circumstances where the website was being consulted to find historical data as at the Locked Box Date, the values for the calendar month into which that date fell were the prevailing ones. In support of his opinion, Mr Owen referred to certain emails sent to the defenders by CAP-HPI in December 2017 which he interpreted as confirming that historical CAP values always related to calendar months. Mr Preston gave no specific reason for disagreeing other than that if he had been performing the expert determination he would have decided that the valuation published at the end of May was the one prevailing on 30 June. All three accepted that the proper interpretation of the SPA was a matter for the court. I did not find any of this evidence to be of assistance in addressing the questions that I have to decide.

[23] In his closing submissions, senior counsel for the defenders submitted that no weight should be attached to the evidence of Mr Jones. It was contended, firstly, that he was not an independent and impartial witness, having previously provided advice on other matters to the pursuer and having been approached by the pursuer in 2017 to act as the expert in relation to the present dispute. Secondly, in any event, his evidence of practice in other sales was irrelevant because there was no evidence that this would have been known to both parties to the SPA at the time of contracting. I reject both of these contentions. I do not regard such prior contact as having of itself disabled Mr Jones from giving independent and impartial evidence on industry practice, and I did not detect any lack of independence or any partiality in either his reports or his oral evidence. The issue upon which I have accepted Mr Jones' evidence as relevant arose in the context of interpretation of paragraph 15 of the SPA. That evidence was not dependent for its relevance or weight upon

both parties having been aware of any particular practice at the time when they concluded the agreement.

Argument for the pursuer

[24] On behalf of the pursuer, it was submitted as a preliminary matter that the defence was incompetent, or at least inappropriate. Any challenge to the decision of the Price Adjustment Expert would have had to be made by means of an application for judicial review. There was here the requisite tripartite relationship for an application to the supervisory jurisdiction of the court. Proceedings would have had to commence within 3 months of the decision, and the expert would have had to be called as a respondent to enable him to protect his interests in relation to his fee and his professional reputation. The setting aside of a decision *ope exceptionis* was competent only where it affected only the parties to the action. Reference was made to *Donald* v *Donald* 1913 SC 274, Lord Salvesen at 281; *Kelly* v *Kelly* 1986 SLT 101, Lord Mackay of Clashfern at 104; *Cavendish Pharmacies Ltd* v *Stephensons Ltd* 1998 SLT (Sh Ct) 66, Sheriff Principal Hay at 68-9. Cases concerning adjudication were not in point and did not impugn the decisions in *Kelly* and *Cavendish Pharmacies*. In any event the analysis of setting aside *ope exceptionis* in the adjudication cases pointed away from it being an appropriate defence in the circumstances of this case. It was clear that the interests of the Price Adjustment Expert were engaged: the errors into which he was said to have fallen had been described as fundamental and egregious, and any fee that he had already been paid could be recovered by an action of repetition.

[25] On the merits of the case, the question for the court to decide was not whether it considered that the Price Adjustment Expert's decision was correct. The parties had contracted to be bound by the decision, and it did not matter whether a mistake had been

made provided that the decision was given honestly and in good faith. There were limited circumstances in which the court could interfere, for example where the expert had departed from his instructions in a material respect. This was not the same thing as "material error", which was expressly provided for in the SPA. Reference was made to *Campbell* v *Edwards* [1976] 1 WLR 403, Lord Denning MR at 407; *Jones* v *Sherwood Computer Services plc* [1992] 1 WLR 277, Dillon LJ at 287; *Veba Oil Supply and Trading GmbH* v *Petrotrade Inc ("The Robin")* [2002] CLC 405, Simon Brown LJ at paragraph 33; and *Walton Homes Ltd* v *Staffordshire CC* [2014] 1 P&CR 10, Peter Smith J at paragraphs 4-7. If the decision of an expert was to be challenged on the basis of departure from instructions, there had to be something of the nature of an excess of jurisdiction or a failure to exhaust jurisdiction. For manifest error, there had to be an error - either of fact or of law - that "leapt off the page" and was, in the circumstances in which it was found, incontrovertible.

[26] As regards the first disputed issue, it could not be said that the Price Adjustment Expert had departed from his instructions. He had answered the question referred to him, namely whether the used vehicle stock fell to be valued inclusive or exclusive of VAT. The defenders' complaint amounted to disagreement as to the answer to the question that was posed; that did not amount to a departure from instructions in answering the question. In making his decision, the Price Adjustment Expert had correctly had regard to the terms of the SPA as a whole, and had not considered the words in paragraph 15 in isolation. In any event, even if the SPA, on a proper construction, mandated insertion of qualifying vehicles at their value gross of VAT, the approach taken by the Price Adjustment Expert was not a material departure because a countervailing provision for VAT liability would have had to be made elsewhere in the Completion Accounts. Any departure from instructions was one of form not substance, and was therefore immaterial. Nor had any manifest error been

identified. At best for the defenders there was a difference of opinion as to the proper approach, and not a "blunder" that leapt off the page.

[27] Nor had the Price Adjustment Expert departed from his instructions in relation to the second issue, or committed any manifest error in this aspect of the dispute. The defenders had failed even to establish that the expert's decision was incorrect. Mr Preston had accepted in cross-examination that if he had been undertaking the valuation exercise and had gone to the CAP HPI website, he would have used the figure listed under "current valuation", as the Price Adjustment Expert had done.

Argument for the defenders

[28] On behalf of the defenders it was submitted that the Price Adjustment Expert's determination should be set aside *ope exceptionis* because he had failed to follow instructions, and *separatim* because the determination contained manifest errors, and that decree instructing release of funds in the retention account should not be pronounced.

[29] It was neither incompetent nor inappropriate for the determination to be set aside *ope exceptionis*. This was a contractual relationship which did not require proceedings by way of judicial review. *Kelly* v *Kelly* was distinguishable because it had required the reduction of an auditor's certificate. *Cavendish Pharmacies* was distinguishable because in the present case the defence did not impugn either the expert's reputation or his entitlement to payment. The situation was analogous to resisting enforcement of the decision of an adjudicator. In *Vaughan Engineering Ltd* v *Hinkins & Frewin Ltd* 2003 SLT 428, Lord Clarke had held that a challenge *ope exceptionis* was not an application to the supervisory jurisdiction of the Court of Session. There was no need for reduction in order to obtain the protection of pleading invalidity. Lord Clarke's decision had been approved in *McKenna* v

South Lanarkshire Council 2013 SC 212 (not an adjudication case), and applied in *SGL Carbon Fibers Ltd* v *RBG Ltd* 2011 SLT 417 and *Carillion Utility Services* v *SP Power Systems Ltd* 2011 SLT 119.

[30] As regards the failure by the Price Adjustment Expert to follow instructions, the following principles, based upon the case law, fell to be applied. The first step was to determine what it was that the expert was instructed to do; the second step was to determine whether the expert departed from his instructions. Where an expert was directed to apply an agreement, he was directed to apply it as properly interpreted and not according to the meaning that he himself thought it should bear. A failure properly to interpret a contract was a failure in law. Such a failure was, in the absence of any agreement of the parties to exclude review, reviewable by the court. Once a material departure from instructions was established, the court was not concerned with the result of that failure. Any departure from instructions was material unless it was trivial and *de minimis*.

[31] In order for the court to review whether the expert had followed his instructions, it was necessary to construe the provisions of the SPA. The usual principles of interpretation of commercial contracts were applicable. In relation to the VAT issue, paragraph 6 was clear in its terms. Primacy was afforded to specific accounting policies set out in Part 7 of the Schedule. Subparagraphs 6.1 (b) and (c) made clear that other policies applied only to the "extent not inconsistent with paragraph 6.1 (a)". The parties therefore intended primacy to apply to the specific accounting policies even if they conflicted with policies applied in preparation of the company's accounts. The parties were well aware of the VAT treatment of used vehicle stock and, in contrast to vehicle parts, made no agreement in paragraph 15 for vehicles to be valued net of VAT. As regards the meaning of "prevailing", the direction in paragraph 15 was to value retailable used vehicles as at the Locked Box Date as defined.

The parties' use of the word "prevailing" had to be read in the context of that direction. It was the clear import of the information obtained from CAP-HPI in the December emails that figures for a particular month published 3 days before the end of a preceding month did not relate to that preceding month.

[32] The Price Adjustment Expert had been well aware of the direction to afford the valuation method specified in paragraph 15 priority over any "accounting" policies. He acknowledged that the Completion Accounts made an adjustment to CAP-HPI values for notional output VAT. His assumption that paragraph 15 was "silent on the treatment of VAT" because it was not expressly mentioned was incorrect. The direction was to apply a method of valuation that did not deduct VAT. The Price Adjustment Expert's belief regarding the parties' overall valuation intention was not a relevant consideration. He disregarded the direction in the SPA to apply a specific accounting policy. The deduction of 20% from the value of the used vehicle stock was a material one. In these circumstances his determination was invalid because it was not in accordance with the parties' agreement. In any event, the application of a "normal accounting policy" that was not either that of the company or UK generally accepted accounting practice was a manifest error.

[33] As regards the meaning of "prevailing", the Price Adjustment Expert's statement that there was no definition in the SPA was patently incorrect. When read in context, "prevailing" referred to 30 June 2017. There was no basis for his finding that it meant the value of cars as they would be in July 2017. In this regard also the expert failed to follow instructions and, *separatim*, committed a manifest error.

Decision

Competency

[34] I address firstly the pursuer's argument that it was incompetent, or at least inappropriate, for the defenders to seek to have the expert's determination set aside *ope exceptionis*. In my opinion this argument falls to be rejected.

[35] In *Vaughan Engineering Ltd* v *Hinkins & Frewin Ltd* (above), the Lord Ordinary (Lord Clarke) rejected an argument that the decision of an adjudicator could only be set aside by means of reduction in an application for judicial review. In so doing, Lord Clarke applied case law on

> "…the means by which the validity of any kind of act or decision which emanates from a person or body, which… are subject to the supervisory jurisdiction of the Court of Session, might be challenged" (paragraph 31).

Lord Clarke further noted that

> "…For more than 100 years the courts in Scotland have allowed the awards or decisions of arbiters to be challenged as being invalid by defenders against whom proceedings for their enforcement have been brought".

He referred to *Nivison* v *Howat* (1883) 11R 182, in which a decision of the Lord Ordinary (Lord Lees) that an action of reduction to challenge the decision of an arbiter was unnecessary was upheld by the Inner House, and concluded that nothing in subsequent case law cast doubt upon the correctness of that decision. Lord Clarke further observed:

> "…At paragraph 8.16, pages 331-332 Clyde & Edwards [Judicial Review, 2000] are to the following effect '.... in Scotland, the exclusivity of the judicial review procedure does not preclude judicial review issues arising outside judicial review. Where the substance of the action is a private right or the issue is raised as a properly pleaded defence, the exclusivity of judicial review is not a ground for insisting that questions as to the legality of a decision-maker's decision only be raised in judicial review'. I pause to observe that if the defenders' submission, in the present case, is sound, that statement of the position is either unsound, or would require to be qualified. Standing the authorship of that passage I would be slow to reach the conclusion that it requires to be regarded as either misconceived or needs significant qualification. The writers go on to say 'The exclusivity of the judicial review procedure relates to

> the power of the court and to the effect of the remedy which can be obtained. It affects neither the power of the court to exercise its ordinary jurisdiction in an ordinary action nor its power to hear a properly pleaded defence to a claim (or in the case of a criminal court, a criminal prosecution)'."

[36] Lord Clarke had previously noted (at paragraph 25) that parties were agreed that the effect of seeking to resist the effect of a deed or writing *ope exceptionis* was not to reduce it and that, strictly speaking, it was not correct to speak of reduction *ope exceptionis*, although this was done from time to time by persons of high authority. The significance of this, as explained by Lord Clarke at paragraph 33, is that it is unnecessary for a defender to invoke the supervisory jurisdiction of the court in order to defend himself. Lord Clarke observed:

> "In a case like the present the defenders, in my judgment, do not need the decision to be quashed by way of its reduction. They simply need to have available to them the shield that has been available in the courts in Scotland for at least well over 100 years (and in the Court of Session for over 150 years), by pleading, in defence, its invalidity."

Lord Clarke did, however, acknowledge at paragraph 35:

> "It has to be accepted that the result of the defenders successfully taking an objection *ope exceptionis*, without having the decision reduced, would be to leave some unfinished business which might not always be altogether satisfactory. While the issue as between the parties to the action would be *res iudicata*, the decision itself still stands. The adjudicator cannot himself revisit it, at the invitation of the pursuers, or, indeed, the defenders for that matter. Moreover, where the attack on the decision involves allegations of dishonesty or fraud or corruption, or the like, against the adjudicator it may be necessary to allow the adjudicator to defend himself (as was expressly recognised by Lord Lees in the case of *Nivison* and by the sheriff in the case of [*Sundt & Co v Watson* (1914) 31 Sh Ct Rep 156]). In the latter situation that opportunity could, it seems, only, nowadays, be provided for the adjudicator, if a petition for judicial review seeking to attack his decision were raised and he was called upon to enter appearance for any interest he may have in the matter. But these considerations only point to the expediency or appropriateness of bringing proceedings for judicial review in particular cases. They do not in themselves support a proposition that defenders can only defend themselves competently in cases like the present by way of proceedings for judicial review to have the decision reduced."

[37] Lord Clarke's decision in *Vaughan Engineering* has been considered and applied in two further cases concerning challenges to the enforcement of adjudicators' decisions. In

SGL Carbon Fibers Ltd v *RBG Ltd*, Lord Glennie revisited the implications of a decision having been held to be unenforceable but not reduced. He observed (at paragraph 47):

> "…In Scotland, as I have observed, resistance to enforcement is now usually accompanied by a petition for reduction of the decision. But I can see no proper basis for holding that, where the decision in the first adjudication is held to be unenforceable, the parties should be entitled to pursue a second adjudication where the first decision has been reduced but not where it has simply been set aside or refused enforcement. [Senior counsel for the pursuer] emphasised that [the adjudicator's] decision, though set aside *ope exceptionis*, remained binding. To my mind the concept of a decision which is binding but unenforceable, having been set aside but not reduced, is, in this context at least, conceptually nonsensical. In so far as it has substance - and I do not seek to question the analysis in *Vaughan Engineering* - it turns on the vagaries of Court of Session and Sheriff Court procedure which is now of little relevance…"

[38] In *Carillion Utility Services Ltd* v *SP Power Systems Ltd*, Lord Hodge noted (paragraph 42):

> "In this case SP has succeeded in challenging the validity of the decision without seeking its reduction. That course of action is competent, as [senior counsel for the defender] submitted: *Vaughan Engineering Ltd v Hinkins & Frewin Ltd* 2003 SLT 428, Lord Clarke at paragraphs 33-35."

[39] In my opinion all of these observations apply with equal force to a challenge to the decision of an expert appointed by parties to determine a dispute, in pursuance of a term of their contract. The principle that the validity of decisions of persons appointed to resolve disputes may be challenged by defenders in enforcement proceedings is a general one, established long before a specific procedure was introduced for invoking the supervisory jurisdiction of the Court of Session. As the authorities cited above make clear, a distinction must be drawn between, on the one hand, resisting *ope exceptionis* the enforcement of a decision whose validity is challenged and, on the other, reducing that decision. In the present case, as in the adjudication cases, the defenders have no need to reduce the decision of the Price Adjustment Expert; it is sufficient for them to move the court to refuse to enforce it. That is achieved by defending the action for enforcement and does not require

separate proceedings for judicial review. The fact that the decision would stand unreduced would appear, in the context of the present case, to be of little practical consequence.

[40] Nor am I persuaded that, even if not incompetent, it would be inappropriate for the decision to be set aside *ope exceptionis*. This is not a case of the kind envisaged by Lord Lees in *Nivison* v *Howat* where it is necessary for the decision-maker to be allowed to become a party to the proceedings. No allegation of misconduct or impropriety is made. The fact that one of the defenders' expert witnesses expressed a view (outwith the scope of his expertise) that the Price Adjustment Expert had made egregious and fundamental errors does not, in my opinion, amount to impugning the expert's reputation to a degree requiring that he be given an opportunity to enter the proceedings in order to defend his own decision. Nor am I satisfied that a finding by the court that the expert's decision should be set aside *ope exceptionis* would found an action for repetition of his fee: cf *Stork Technical Services* v *Ross* 2015 SLT 160.

[41] When one appreciates the distinction between setting aside *ope exceptionis* and reduction, it can be seen that the case of *Kelly* v *Kelly* relied upon by the pursuer is not in point. The action was for implement of a share purchase agreement, in terms of which the parties had agreed that the fair value of the shares would be certified by the company's auditors. The defenders resisted enforcement on the ground that the auditors had made factual errors in arriving at their valuation. Lord Mackay of Clashfern held that where the point founded upon by the defenders did not appear on the face of the auditor's valuation, the auditors' certificate was to be taken as valid unless it was subject to a decree of reduction. The point was therefore a different one, not in any way in conflict with the line of authority in relation to resisting enforcement of arbiters' and other experts' decisions to which I have referred.

[42] In *Cavendish Pharmacies*, the sheriff principal, who was referred *inter alia* to *Nivison* v *Howat* and *Sundt & Co* v *Watson*, took the view that the reduction [sic] of a valuation certificate *ope exceptionis* touched the interests of the valuers in relation to their professional reputation and fees, and was therefore not appropriate. The case was sisted to allow the raising of an action of reduction in which the valuers could be called as parties. This case pre-dated Lord Clarke's analysis in which the distinction between reduction and challenge *ope exceptionis* was made clear (and indeed was decided without analysis of whether or on what basis payment of the valuers' fee could be resisted). As with *Kelly* v *Kelly*, it is distinguishable on the ground that it was concerned with a challenge to an *ex facie* valid certificate. Were it not for the certification aspect, the learned sheriff principal's decision that the valuers' interests were sufficiently engaged to necessitate their being allowed to defend their valuation in an action of reduction would respectfully appear to me to be difficult to sustain against the background of authority to which I have referred. It does not persuade me that there is anything in the circumstances of the present case that would make it "inappropriate" to set aside the Price Adjustment Expert's decision *ope exceptionis*. For these reasons I repel the pursuer's plea to the competency of the defence.

The merits of the defence

[43] In England, the starting point of the modern law in relation to challenge of an expert's determination is the following observation by Lord Denning MR in *Campbell* v *Edwards* at 407:

> "It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it…"

[44] In *Jones* v *Sherwood Computer Services plc*, Dillon LJ (at page 287) drew a distinction between, on the one hand, a material departure by an expert from his instructions and, on the other, a mistake made by the expert while doing what he was asked to do:

> "On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning MR said in *Campbell v Edwards*…, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect—eg, if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M) v Jones (RR)* [1971] 1 WLR 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that—either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.
>
> The present case is quite different, however, as Coopers have done precisely what they were asked to do…"

In relation to the nature of the mistake alleged, Dillon LJ observed:

> "Any number of issues could arise under the various sub-paragraphs of paragraph 2 of appendix 1 as to the application of the wording of those sub-paragraphs to particular facts. All these issues are capable of being described as issues of law or mixed fact and law, in that they all involve issues as to the true meaning or application of wording in paragraph 2. I cannot read the categorical wording of paragraph 7 as meaning that the determination of the accountants or of the expert shall be conclusive, final and binding for all purposes 'unless it involves a determination of an issue of law or mixed fact and law in which case it shall only be binding if the court agrees with it'."

[45] "Mistake" in this context may therefore mean either a mistake of fact or of law. In *Walton Homes Ltd* v *Staffordshire CC* (above) at paragraph 7, Peter Smith J described an acceptance by counsel that all determinations by an expert "as to fact and law" were binding on the parties as "an inevitable concession" in the light of *Jones* v *Sherwood Computer Services plc.*

[46] The distinction between the two species of challenge to an expert's determination was summarised by Simon Brown LJ in the *Veba* case at paragraph 26 as follows:

> "(i) A mistake is one thing; a departure from instructions quite another. A mistake is made when an expert goes wrong in the course of carrying out his instructions. The difference between that and an expert not carrying out his instructions is obvious.
>
> …
>
> (iii) Under the modem law the position is the same as it was with regard to a departure from instructions, different with regard to mistakes. As Lord Denning explained in *Campbell v Edwards*, if an expert makes a mistake whilst carrying out his instructions, the parties are nevertheless bound by it for the very good reason that they have agreed to be bound by it. Where, however, the expert departs from his instructions, the position is very different: in those circumstances the parties have not agreed to be bound…"

[47] In *Redding Park Development Co Ltd* v *Falkirk Council* [2011] CSOH 202, Lord Menzies stated at paragraph 13:

> "There is little Scottish authority on the legal basis for challenging the determination of an independent expert, but such an expert is a creature of contract, and it is necessary to look to the contract to find the requirements and extent of his jurisdiction. In this respect the exercise of ascertaining the jurisdiction of an independent expert is the same as the exercise of ascertaining the jurisdiction of an adjudicator. I was referred to *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 (particularly at 286H to 287C) and to my own decision in *RBG Ltd v SGL Carbon Fibers Ltd* [2010] CSOH 77. The same principles apply in the present case."

I respectfully agree, and propose to apply the principles identified in the English *dicta* above to the circumstances of the present case.

[48] The defenders' first contention is that the Price Adjustment Expert's determination should be set aside because he departed from his instructions. On the face of it this would seem to be a difficult argument to advance. At paragraph 15 above, I have narrated the expert's description of the two matters that still remain in issue, and at paragraphs 16 and 17 I have narrated his decision in relation to those matters. It is quite clear that he addressed and answered the questions that had been referred to him, namely (i) the correctness or

otherwise of the treatment of VAT on qualifying cars in the Completion Accounts, and (ii) the correctness of applying "July" data from the CAP Valuation Anywhere website.

[49] The defenders' point is, however, put somewhat differently. It is contended that the expert departed from his instructions because he failed to apply the terms of the SPA as correctly construed in law. In my opinion this contention is misconceived. It blurs the distinction between departure from instructions and making a mistake while carrying out instructions. When one examines the questions that were referred to the Price Adjustment Expert for determination, it is clear that these to some extent concerned the proper construction of paragraphs 6.1 and 15 of the SPA. In other words, the expert was asked to determine questions of mixed fact (industry practice) and law (interpretation of the SPA). The observations of Dillon LJ in *Jones* v *Sherwood Computer Services Ltd*, quoted above, are exactly in point. Where, as here, the parties have chosen to remit issues of contractual interpretation to an expert for determination, it is not open to one of the parties to contend that the expert has departed from his instructions merely because he disagrees with the expert's conclusion. That would be to misunderstand the distinction clearly drawn in the case law. The fact that the alleged mistake could be characterised as an issue of law, or of mixed fact and law, makes no difference. Any challenge to the expert's determination here must therefore be based upon the terms of the SPA relating to the reference of matters in dispute to an expert, and in particular upon paragraph 10.4(f) of Part 7 of the Schedule, which stated that the expert's determination would be final and binding on the parties, save in the case of manifest error or fraud.

[50] In the absence of any suggestion of fraud, I turn to consider whether it has been demonstrated that the expert committed a manifest error in his determination of either of the issues still in dispute. The expression "manifest error" is a familiar one in the field of

public procurement, in which context it has been observed that "…the word manifest does not require any exaggerated description of obviousness. A case of manifest error is a case where an error has clearly been made" (*Lion Apparel Systems Limited* v *Firebuy Limited* [2007] EWHC 2179, Morgan J at paragraph 38, applied *inter alia* by Lord Malcolm in *Shetland Line (1984) Ltd* v *Scottish Ministers* [2012] CSOH 99 at paragraph 26). In my view a test of "whether an error has clearly been made" can appropriately be adopted in construing the words "manifest error" as they appear in the SPA. But it is important to emphasise that it is not the task of the court to decide the case on the basis of whether or not it agrees with the determination of the expert.

[51] I am not satisfied that it has been demonstrated that an error has clearly been made by the Price Adjustment Expert in relation to either of the disputed issues. In relation to VAT treatment, the crux of the expert's decision is in paragraph 4.8 of his determination, where he declines to interpret the second sentence in paragraph 15 as overriding the first sentence but rather as specifying the source of the valuation, and concludes that the overall intention of the clause is to value the vehicles in line with current motor trade valuation. The expert then goes on to note that normal accounting practice would be to state vehicle values in accounting records net of VAT, and it should be recalled in this context that the SPA defined "Completion Accounts" as meaning the balance sheet of the Company as at the Locked Box Date. Support for the expert's conclusion is provided by (i) Mr Jones's evidence that it was consistent with standard industry practice in share purchases and sales to adjust the CAP value for VAT in respect of qualifying cars, and (ii) the consensus among the experts that if no adjustment were made, either to used vehicle stock value or to the VAT account, the Completion Accounts would not balance. The argument to the contrary is founded on no more than the opinion of the pursuers' experts that the SPA should be

construed differently. In my opinion that is far from sufficient to establish that an error has clearly been made.

[52] I am equally satisfied that manifest error has not been demonstrated in relation to the Price Adjustment Expert's interpretation of the phrase "prevailing CAP clean values". The essence of the expert's reasoning is that transactions taking place in the trade on 30 June 2017 would have taken into account the values published as on the website as being effective from 28 June 2017. The expert regarded the availability of the latest values as carrying greater importance than the July label attached to them. In my opinion it cannot be said that that conclusion is obviously wrong. I accept that the contrary view advanced by the defenders was arguable, but that is wholly insufficient to establish manifest error. Nor do I attach any significant weight to the views expressed by the operators of the CAP-HPI website in emails sent to the defenders; the issue is the proper interpretation of the word "prevailing" in the SPA, and the operators' answers to different questions put to them cannot be determinative of that issue. The defenders' contention, in my view, amounts to no more than disagreement with the expert's determination.

Disposal

[53] No issue was taken by the defenders with the sums said by the pursuer to be payable to the parties respectively from the retention account, in the event of a finding in favour of the pursuer on the merits of the case. I shall therefore sustain the pursuer's second and third pleas in law, repel the defenders' first to fifth pleas, and grant decree in terms of the first and second conclusions. Questions of expenses are reserved.