

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2019] SC GLA 98

A948/18

JUDGMENT OF SHERIFF AISHA Y ANWAR

in the cause

MULBERRY BANK AUCTIONS LIMITED

Pursuers

against

MR JOHN SAVAGE ONSTWEDDER

Defender

Pursuer: McLeod; BTO Solicitors LLP
Defender: Scott; Levy & McRae, Solicitors

GLASGOW, 6 November 2019. The Sheriff, having resumed consideration of the cause, sustains the pursuers' fourth plea in law only insofar as excludes from probation the defender's averments in Answer 2 beginning with and including "Explained and averred that in accordance with clause 2.21 . ." to and including "*express, implied or statutory*" where they appear in lines 125 to 129 of the Record and the averments beginning with and including "Any liability to purchaser" to and including "terms and conditions of sale" where they appear in lines 131 to 133 of the Record; and further excludes from probation the defender's averments in Answer 7 beginning with and including "Reference is made to the Pursuers' terms and conditions" to and including "in the event of an incorrect opinion" where they appear in lines 381 to 402 of the Record; Repels the defender's fourth plea in law; reserves all issues of expenses and appoints parties to be heard thereon and on further procedure on a date to be hereinafter assigned.

NOTE:**Background**

[1] The pursuers are a firm of auctioneers, based in Glasgow. The defender is a distiller, trading as Da Mhile Distillery based in Wales.

[2] This dispute relates to the sale by public auction of a cask containing what purported to be "Da Mhile Organic Springbank 1992 Single Malt Scotch Whisky" ("the whisky cask").

[3] On or around 9 May 2017, the defender contacted the pursuers with a view to engaging them in the sale of the whisky cask. The defender had previously instructed the pursuers to sell a cask containing "Da Mhile Springbank 1992 Single Malt Scotch Whisky" at public auction in or around August 2016.

[4] On or around 15 May 2017, the defender issued a letter of instruction to the pursuers in the following terms:

"I, John Savage-Onstwedder acting on behalf of Da Mhile Distillery, residing at Glynhynod Farm, Llandysul, Ceredigion, SA44 5JY, Wales/UK, confirm that I wish to proceed with selling my cask of Springbank Da Mhile 1992 Organic single malt scotch whisky, cask number 232 currently held under bond at: Da Mhile Distillery, Wales, at public auction through Mulberry Bank Auctions, 15 Kelvin Avenue, Glasgow, G52 4LT.
Furthermore, I also agree fully to the terms and conditions of sale at Mulberry Bank Auctions."

[5] The terms and conditions referred to are the pursuers' terms and conditions of business which are incorporated into the pleadings (item 5/4 of process).

[6] The whisky cask was sold by the pursuers, as agents on behalf of the defender, at auction on 8 August 2017 to Mr Harris ("the purchaser"). The whisky cask was sold at a hammer price of £50,000 ("the purchase price").

[7] Title to the whisky cask was transferred by the defender to the purchaser on or around 19 October 2017 upon payment of the purchase price. The pursuers aver that the purchaser also made payment to the pursuers of a premium in respect of the sale in the sum of £6,000.

[8] Upon the transfer of title, attempts were made to move the whisky cask held under bond at the defender's Welsh premises to bond in Scotland on or around 30 January 2018. The purchaser contacted the defender to request the necessary documentation relating to the transfer of the whisky cask to Wales, in order that the same could be provided to the bonded warehouse in Scotland. At this stage, it came to light that the contents of the whisky cask cannot be described as Scotch Whisky in terms of the Scotch Whisky Regulations 2009.

[9] On or around 27 June 2018, the purchaser assigned to the pursuers absolutely all rights in respect of his claim against the defender in respect of the sale, including the right to pursue the claim by any legal means.

[10] Accordingly, the pursuers *qua* assignees seek reduction of the contract of sale between the defender and the purchaser and seek payment by the defender of the sum of £50,000. They also seek payment of a premium, of £6,000.

The Scotch Whisky Regulations 2009 (SI 2009/2890)

[11] The Scotch Whisky Regulations 2009 (SI 2009/2890) ("the Regulations") came into force on 23 November 2009. The Regulations set out detailed provisions regarding the production, storage and movement, labelling, packaging and advertisement of Scotch Whisky. Regulation 3 of the Regulations sets out a detailed definition of Scotch Whisky which includes *inter alia* the requirement that such whisky "has been matured only in Scotland" (Regulation 3(1)(d)).

[12] Regulation 6 provides as follows:

“(1) A person must not label, package, sell, advertise or promote any drink as Scotch Whisky or Scotch if it is not Scotch Whisky.

(2) A person must not label, package, sell, advertise or promote any drink in any other way that creates a likelihood of confusion on the part of the public as to whether the drink is Scotch Whisky.”

[13] Regulation 7 regulates the movement of Scotch Whisky outwith Scotland.

Regulation 7(2) provided a transitional period between the coming into force of the Regulations on 23 November 2009 until 22 November 2012 whereby Scotch Whisky could be moved outwith Scotland, provided that it was not moved in a wooden cask or other wooden holder. Thereafter, in terms of regulation 7(3) “a person must not move any Single Malt Scotch Whisky from Scotland to another country except in a bottle (made of any inert material) that is labelled for retail sale”.

[14] In terms of regulation 27, it is an offence for a person to act in contravention of *inter alia* regulation 6 or 7(2) or 7(3).

[15] The defender admits that the contents of the whisky cask were matured in a bonded warehouse in Campbeltown between 1992 and 2012. The defender admits that in or around 2 July 2012, the contents were moved to his premises in Wales, in an inert container in compliance with regulation 7(2) of the 2009 Regulations. However, the defender, thereafter, refilled the whisky cask with its contents for further maturation in Wales. The defender accepts that by virtue of further maturation in Wales, the whisky cask no longer complies with regulation 3 of the 2009 Regulations and could not be described as single malt Scotch Whisky.

The defences

[16] A number of defences are advanced on behalf of the defender. Put shortly, the defender avers (a) that the defender's liability to the purchaser is excluded in terms of the pursuers' terms and conditions of business; (b) that the pursuers were responsible for any misrepresentation regarding the contents of the whisky cask because (i) the letter of instruction issued by the defender which confirmed that the whisky cask contained "Springbank Da Mhile 1992 single malt Scotch Whisky" had been prepared by the pursuers for execution by the defender and (ii) the defender was entitled to rely upon the expertise of the pursuers' Mr Stewart Smith who is a "whisky and wine specialist", who had visited the defender's premises in July 2017 to inspect the whisky cask and who had been aware that the whisky cask was being stored in Wales; and (c) that Mr Smith, as the pursuers' employee, owed a duty of care to the defender that his description of the lot would be accurate, that the defender was entitled to rely upon Mr Smith's description of the whisky cask, that Mr Smith had failed to provide accurate advice and had thereby breached said duty of care.

Terms and conditions

[17] The pursuers' terms and conditions of business insofar as relevant provide as follows:

"Condition and description of lot

2.21 Whilst the Auctioneer seeks to describe lots accurately, it may be impractical to carry out extensive inspection of each lot. You [defined as any person dealing with the Auctioneer, whether as bidder, buyer or seller] (and any independent experts on Your behalf) are given ample opportunity to view and inspect items before sale, and must satisfy Yourself as to the accuracy of any description apply to a lot. You are deemed to accept that various aspects of the description can involve

matters of opinion, such as authorship, age, provenance, origin, date, condition and estimated selling price. The Auctioneer undertakes that any such opinion shall be honestly and reasonably held and accepts liability for opinions given negligently or fraudulently subject to these Terms. Subject to the foregoing, neither the auctioneer nor its employees nor the seller of any lot accepts liability for the correctness of such opinions and all conditions and warranties, whether relation to description, condition or quality of lots, express, implied or statutory are hereby excluded. Any buyer seeking to return a lot has 21 days from the date of the sale to contact us regarding the matter. Any request will then be dealt with on an individual basis. We do not offer any guarantee that a request to return a lot will be granted.

Seller's warranties

3.2 You, as seller, are deemed to warrant to the Auctioneer that:

3.2.1 You are the true owner of the property consigned or is properly authorised by the true owner to consign it for sale and are able to transfer ownership free from any third party claims:

3.2.2 The information which You supply to the Auctioneer in connection with any lot is to the best of Your knowledge, information and belief, accurate...

3.4 You, as seller, shall indemnify the Auctioneer on demand against any claim in respect of any goods sold on Your behalf, as seller".

Submissions for the pursuers

[18] Ms McLeod helpfully provided a note of arguments on behalf of the pursuers. I set out below a summary of the submissions made both orally and in writing on behalf of the pursuers.

[19] It was the pursuers' position that the defender had failed to set out a relevant or specific defence to the action such that either certain averments required to be excluded from probation or decree *de plano* in favour of the pursuers should be granted. Failing which, the pursuers sought a proof before answer.

[20] With regards to the pursuers' terms and conditions, it was submitted that the terms of clause 2.21 required to be considered in their entirety, including having regard to the other provisions of the contract (such as clause 3.2.2) and having regard to the commercial context (*Wood v Capita Insurance Services [2017] UK SC 24*). Insofar as the pursuers had accepted liability for opinions given negligently or fraudulently in clause 2.21, the issues in dispute in the present case were not matters of opinion; they were matters of fact and law.

[21] It was submitted that the averments *anent* the pursuers or Mr Smith's knowledge of the 2009 Regulations were irrelevant; prior to the 2009 Regulations coming into force, the whisky cask could have continued to mature outwith Scotland and would be capable of being correctly described as "Single Malt Scotch Whisky". It did not follow from the mere fact that Mr Smith was aware that the whisky cask was in Wales, that he must necessarily also be aware that its contents were being matured in Wales in contravention of the 2009 Regulations. The defender had failed to set out averments which allowed the court to make that inference. The defender had failed to aver that Mr Smith was aware of the prior movements of the whisky cask which might have caused him to make further enquiries. Only the defender was aware of those movements.

[22] The defender had also failed to aver on what basis it was said the pursuers or Mr Smith had held themselves out to be experts in the wine and whisky industry. The defender had failed to aver the basis upon which he was entitled to rely upon the "expertise" of Mr Smith.

[23] While the defender averred that the pursuers prepared the letter of instruction in which the contents of the whisky cask were described as "Single Malt Scotch Whisky", it is not disputed that the defender, an experienced distiller, approved that description and

signed the letter of instruction. The description of the contents was the defender's own undertaking.

[24] The defender also failed to relevantly aver the basis upon which it could be said that the pursuers owed the defender any duty of care nor how that duty had been breached, to support his averments regarding the pursuers or Mr Smith's alleged negligent acts or omissions. The pursuers or Mr Smith's alleged negligence was central to the defender's defence and thus full and detailed specification was necessary (*Marine Offshore (Scotland) Limited v Robert Jack and Others* 2017 CSOH 89).

[25] Ms McLeod submitted that it was plain from the pleadings that the defender admitted that that he had misrepresented the contents of the cask. It was plain from the pleadings that (a) there had been a misrepresentation (b) the misrepresentation induced the contract and (c) the misrepresentation had been made by the defender. That misrepresentation was negligent, failing which innocent. An innocent misrepresentation entitled the pursuers *qua* assignees, to reduction of the contract of sale between the purchaser and the defender and to *restitution ad integrum* (McBryde, *The Law of Contract* (3rd Edition) paragraph 15-28 and *Stewart v Kennedy* 1889 16 R 857). There were sufficient pleadings to allow the court to conclude that the misrepresentation had been negligent. In terms of section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, it was competent to seek damages as a result of a negligent misrepresentation. The pursuers were entitled to seek repayment of the sum of £6,000 paid by the purchaser to the pursuers as a result of the defender's negligent misrepresentation.

Submissions for the defender

[26] The defender sought decree of dismissal on the basis that the defender's liability to the purchaser had been expressly excluded by the terms and conditions of business. Failing which, the defender sought a proof before answer on the remaining aspects of his defences and sought the exclusion of certain averments anent loss, from probation. Mr Scott also helpfully provided a note of arguments. I summarise his oral and written submissions below.

[27] The principal argument advanced on behalf of the defender was to the effect that the terms and conditions, namely clause 2.21, expressly excluded any liability on the part of the defender to the purchaser for any representation made under the contract of sale. That included any misrepresentation. Mr Scott referred to *Rainy Sky SA v Kookmin Bank* [2011] WLR 290; *Arnold v Britton* [2015] UKSC 36 and *Wood v Capital Insurance Services supra*. He submitted that the purpose of clause 2.21 was to regulate liability for the "condition and description of lots". Applying the ordinary and natural meaning of the words, the first part of the clause made it clear that the purchaser was to satisfy himself "as to the accuracy of any description applied to a lot". He noted that the pursuers had failed to aver what, if anything, the purchaser had done to so satisfy himself. That in itself, he submitted, rendered the pursuers' case irrelevant. The second part of the clause set out the two situations in which the auctioneer accepted liability, namely for negligent or fraudulent opinions. The third part of the clause sought to exclude liability for any incorrect opinion associated with the description of the lot. The clause excluded liability for opinions expressed by the seller.

[28] Having regard to the language used, it was submitted that the word "opinions" was not limited to a subjective view but was capable of including an opinion on objectively

determinable facts. Clause 3.2.2 provided a remedy for the auctioneer in the event that the seller had provided an inaccurate opinion. It is not open to the purchaser to rely upon that warranty. The purchaser does not have a direct right of relief from the seller if there has been a breach of clause 3.2. The contract envisaged a two stage process, namely, a claim by the purchaser against the auctioneer and thereafter, a right of relief on the part of the auctioneer against the seller in the event of a breach of clause 3.2.

[29] The secondary argument for the defender was that *esto* liability for a misrepresentation had not been excluded by clause 2.21, it was the pursuers and not the defender who had made the misrepresentation complained of. Thirdly, it was submitted that *esto* there was any liability on the part of the defender, the pursuers having breached a duty of care to the defender, the defender was entitled to a right of relief against the pursuers. In respect of both of these lines of defence, the defender's averments met the tests of specification and relevancy and ought to be admitted to probation.

[30] Finally, the defender challenged the pursuers' averments *anent* loss on the basis that the pursuers' pleadings regarding loss did not specify who had in fact suffered any loss. It was submitted that it could be inferred from the pleadings that the purchaser had been reimbursed £56,000 in exchange for assigning his claim. That being the case, the pursuers, who stood in the shoes of the purchaser, had suffered no loss.

Discussion

The pursuers' terms and conditions of business

[31] The parties were at one in relation to the principles governing the interpretation of contractual terms and agreed that those principles could be derived from three recent

decisions of the Supreme Court, namely *Rainy Sky SA v Kookmin Bank* [2011] WLR 2900, *Arnold v Britton* [2015] UKSC 36 and *Wood Capita Insurance Services* [2017] UKSC 24.

[32] The court must consider the ordinary and natural meaning of the language used by the parties. It must also determine what the parties mean by the language used by ascertaining what a reasonable person, having all of the background knowledge reasonably available to both parties at the time of contracting, would have understood the parties to have meant. Where the parties have used unambiguous language, the court must apply it. When considering competing constructions, the court should be concerned to read the contract as a whole in a coherent and consistent manner. Where a term of a contract is open to more than one interpretation, the court can adopt the interpretation which is more consistent with business common sense. The court's task involves an "iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated": *Arnold v Britton* para 77 citing *In re Sigma Finance Corpn* [2010] 1 ALL ER 571, para 10 per Lord Mance.

[33] In the present case, the pursuers' terms and conditions of business are expressed in plain English. They have, one assumes, been professionally drafted. They are stated to govern the pursuers' "contractual relationship with bidders, buyers, sellers and any person dealing with it. . . .", thus the terms and conditions govern both the contract of sale between the purchaser and the defender and the contract of agency between the pursuers and the defender.

[34] Clause 2.21 appears under section 2 of the terms and conditions headed "Buying". Clause 2.21 bears the heading "Conditions and description of lots". The first part of the clause requires the purchaser to satisfy himself as to the accuracy of any description applied to a lot. It thereafter reads as follows:

“You are deemed to accept that various aspects of the description can involve matters of opinion, such as authorship, age, provenance, origin, date, condition and estimated selling price. The Auctioneer undertakes that any such opinion shall be honestly and reasonably held and accepts liability for opinions given negligently or fraudulently subject to these Terms. Subject to the foregoing, neither the auctioneer nor its employees nor the seller of any lot accepts liability for the correctness of such opinions and all conditions and warranties, whether relation to description, condition or quality of lots, express, implied or statutory are hereby excluded.”

[35] It is clear from the language used that the drafter has sought to address liability for those aspects of a description of a lot which are matters of opinion. The drafter has not sought to exclude liability for *all* aspects of a description. Had that been the intention or the purpose of the clause, it would have been a straightforward exercise to simply state so.

[36] Clause 2.21 sets out a non-exhaustive list of what might constitute an opinion. It provides that the auctioneer accepts liability for negligent or fraudulent expressions of opinion. The final sentence of the extract of clause 2.21 set out above, is expressly stated to be subject to the preceding sentence which deals exclusively with liability for opinions. It goes on to exclude liability on the part of the auctioneer, its employees and the seller “for the correctness of such opinions”. The final part of the sentence is somewhat clumsily expressed; *“and all conditions and warranties, whether in relation to description, condition or quality of lots, express, implied or statutory are hereby excluded”*. However, on a proper reading of those words, it is clear that whatever else may be meant by the term “conditions and warranties”, those conditions and warranties are referable to matters of opinion expressed in relation to the description, condition or quality of a lot. Those words cannot be read in isolation and cannot be separated from the preceding words; *“neither the auctioneer nor its employees nor the seller of any lot accepts liability for the correctness of such opinion”*. Reading clause 2.21 as a whole, the ordinary and natural meaning of the words used convey one message, namely subject to the auctioneer’s liability for negligent or fraudulent opinions,

liability on the part of the auctioneer, its employees and the seller for any opinion expressed as part of the description of a lot, its condition or quality, is excluded.

[37] What the clause does not do however is exclude liability for inaccurate statements of fact. Such an exclusion is conspicuous by its absence.

[38] An opinion is a point of view. It is an expression of thought, belief or judgment. It may or may not be informed by a professional assessment. One may or may not agree with that point of view or opinion. A statement of fact on the other hand, is not open to interpretation or debate. One can describe a whisky as bold or subtle, or as peaty or malty; those are expressions of opinion. However, the volume of whisky present in a cask at any particular time is a matter of fact, not an expression of opinion. The alcoholic strength by volume of the contents of a cask of whisky is a matter of fact, not an expression of opinion. Similarly, whether a cask contains 'Scotch Whisky' is a matter of fact and not an expression of opinion. The parties in the present case accept that, as a matter of fact, the cask does not contain Scotch Whisky.

[39] 'Scotch Whisky' is a term defined by law. It is a term which has 'protected status' under the Regulations. Indeed, in terms of regulations 6 and 27 of the Regulations, to sell, advertise or promote any drink as Scotch Whisky when it is not, is a criminal offence. The basis upon which whisky can be defined as 'Scotch Whisky' is clearly and strictly prescribed by law. While legal definitions may generally be the source of much debate, in the present case, the parties are agreed that on a proper reading of the Regulations, the cask does not contain Scotch Whisky.

[40] On behalf of the defender, it was argued that the term "opinion" was not limited to a subjective view expressed in a description; the examples of what might constitute an opinion in terms of clause 2.21 included "authorship, age, provenance, origin, date, condition and

estimated selling price". It was submitted that such opinions included both a subjective and an objective element. That may be correct. However, in my judgment, the language used expressly acknowledges that other aspects of the description can involve matters of fact in respect of which no opinion is necessary or desirable. Clause 2.21 provides that "various aspects of the description *can* involve matters of opinion". Whether any aspect of a description of a lot which refers to matters such as the authorship, age, provenance, origin or date, is properly described as a matter of opinion (for which liability is excluded) or a matter of fact (for which liability is not excluded) will depend upon the particular lot in question.

[41] In my judgment, this interpretation of clause 2.21 is plain from the ordinary and natural meaning of the words used.

[42] Moreover, a reasonable person, having all of the background knowledge reasonably available to both parties at the time of contracting, would have understood the parties to have meant that a distinction was to be drawn between elements of the description of a lot which were expressions of opinions and those which were matters of fact. That background knowledge at the time of contracting would have included (a) an understanding of the significance of the term 'Scotch Whisky'; (b) an appreciation that a product defined as such could fetch a higher price; (c) that it is a criminal offence to sell, advertise or promote any drink as Scotch Whisky when it is not; and (d) that the product was being sold by a distiller who could reasonably be expected to be aware of the terms of the Regulations. A reasonable person would have understood that a description of a lot as 'Scotch Whisky' was a representation of fact made by or on behalf of the seller. A reasonable person would not have understood clause 2.21 as excluding his recourse to a legal remedy for a misrepresentation. As observed by Mr Justice Jacob in *Thomas Witter Ltd v TBP Industries Ltd* (1994) 12 Tr L 145, at 168C:

“if a clause is to have the effect of excluding or reducing remedies for damaging untrue statements then the party seeking that protection cannot be mealy-mouthed in his clause. He must bring it home that he is limiting liability for falsehoods he may have told”.

[43] Having regard to the contract as a whole, the interpretation of clause 2.21 set out above is consistent with other relevant provisions of the terms and conditions. In particular, in terms of clause 3.2, the seller is deemed to warrant to the auctioneer that he is the true owner of the property and is able to transfer ownership free of any third party claims. He is also deemed to warrant that any information supplied by him to the auctioneer in connection with any lot is to the best of his knowledge, information and belief, accurate.

[44] It was contended for the defender that properly construed, clause 3.2 provided for a breach of warranty claim against the seller by the auctioneer. In the event of an inaccurate opinion associated with the description of a lot, the purchaser is entitled to a right of relief from the auctioneer if the auctioneer has been negligent or acted fraudulently. Once the purchaser establishes liability against the auctioneer, the auctioneer may then seek a right of relief from the seller, in the event of a breach of clause 3.2.

[45] That may be correct in so far as the mechanism for the enforcement of remedies is concerned, however we are concerned here with the correct interpretation of clause 2.21 by reference to clause 3.2. The defender argues that the effect of clause 2.21 is to exclude liability on the part of the seller for “any representation under the contract of sale, including any misrepresentation”. If that is correct, the warranties in clause 3.2 are superfluous. Where the seller has provided the auctioneer with factual information in terms of clause 3.2.2, which forms part of a description (such as the volume or alcoholic strength of the contents of a cask of whisky, or confirmation that it is Scotch Whisky) which is inaccurate, the purchaser would have no right of relief against either the auctioneer or the seller, thus

rendering the warranty in clause 3.2 entirely worthless and unnecessary. To state the position more bluntly, the seller may mistakenly, but entirely innocently, represent that a cask contains Scotch Whisky when in fact it contains water or beer. If the lot is described as Scotch Whisky, being a matter of fact and not a matter of opinion, the purchaser would have no remedy against the seller or the auctioneer and the seller's warranty in clause 3.2 would be of no moment.

[46] Turning to the commercial context, one important element of the context is that the terms and conditions are in standard form and there is no suggestion that either the purchaser or the seller had any ability to negotiate the provisions. The terms and conditions apply to both the contract of sale as between the purchaser and the seller and the contract of agency as between the auctioneer and the seller. Auctioneers will sell a variety of lots and the terms and conditions will apply to a variety of products. Where an auctioneer has formed an opinion regarding an aspect of a description of a lot, it makes commercial sense that he undertakes that any such opinions are honestly and reasonably held and that he assumes the risk of negligent or fraudulent opinions. Such an opinion may allow a lot to fetch a greater hammer price. The undertaking provided by the auctioneer may obviate the need for a purchaser to obtain his own professional opinion. However, not all aspects of a description will require an auctioneer to form such an opinion. There are sound commercial reasons as to why a purchaser would not accept an exclusion of liability for aspects of a description which relates to matters of fact, particularly when those facts are uniquely within the seller's knowledge. There are sound commercial reasons why, in those circumstances, the seller warrants the accuracy of the information he supplies, in order to fetch a greater hammer price.

[47] Having examined the ordinary and natural meaning of the words used, both in the wider context of the contract as a whole and having regard to the commercial context, in my judgment, a reasonable person having all of the background knowledge which would have been available to the parties, would have understood that clause 2.21 excluded the seller's liability only in relation to aspects of the description, condition or quality of lot which were expressions of opinion and not in relation to those aspects which were statements of fact. In the circumstances, whether the cask contained Scotch Whisky was, in my judgment, a statement of fact and, accordingly, clause 2.21 does not operate to exclude the seller's liability to the purchaser in relation to the description of the lot as 'Scotch Whisky'.

[48] Accordingly, the defences insofar as they seek to rely upon the terms of clause 2.21 are irrelevant. I shall repel the defender's fourth plea in law and exclude from probation those passages of the defender's averments in Answers 2 and 7 which deal with clause 2.21.

Relevancy and Specification

[49] Parties made a number of submissions regarding matters of relevancy and specification. I regret that I am unable to determine these at this stage having reflected on both parties' pleadings. The pursuers seek reduction and repayment *qua* assignees. However, a number of their averments also relate to the contract of agency rather than the contract of sale. Having dealt with the defender's fourth plea in law, the remaining defences also deal with the contract of agency rather than the contract of sale. Are these advanced against the pursuers *qua* auctioneers rather than *qua* assignees? On one view, those defences may be more correctly advanced by way of a counterclaim. To enable the court to determine the remaining arguments regarding relevancy and specification, I will arrange for

the case to be assigned to a procedural hearing before me, for agents to address the court further on this issue.