[2013] UKUT 006 (TCC)
Appeal number FTC/03 & 04/2012

Value Added Tax – Whether original agreement for supply of cars discharged by subsequent agreement – Question of fact remitted by the Court of Appeal for determination by the First-tier Tribunal – Whether material error of law in determination of that question by the FTT – No – Appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

(1) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS
(2) FORD MOTOR COMPANY LIMITED

Appellants

- and -

BRUNEL MOTOR COMPANY LIMITED
(in administrative receivership)

Respondent

TRIBUNAL: MR JUSTICE HENDERSON

Sitting in public at the Rolls Building, London EC4A 1 NL on 11 December 2012

Mr James Puzey, instructed by the General Counsel and Solicitor to HMRC for the First Appellant

Mr Francis Fitzpatrick, instructed by Ford Motor Company Limited for the Second Appellant

Mr David Milne QC and Mr Jonathan Bremner, instructed by DLA Piper LLP for the Respondent

Introduction

1. In Brunel Motor Company Limited v The Commissioners for Her Majesty's Revenue & Customs and Ford Motor Company Limited [2009] EWCA Civ 118, reported as Brunel Motor Company Limited (in administrative receivership) v Revenue & Customs Commissioners and another [2009] STC 1146, to which I will refer as "Brunel (CA)", the Court of Appeal (the Chancellor of the High Court and Richards and Hallett LJJ) allowed the appeal of Brunel Motor Company Limited ("Brunel") from the order made in the High Court by Peter Smith J on 24 January 2008, when he dismissed Brunel's appeal from a decision of the VAT and Duties Tribunal dated 3 April 2007. The background to the hearing in the Court of Appeal was, in outline, as follows.

2. Brunel was the representative company of a VAT group of Ford motor dealers, which carried on business with Ford Motor Company Limited ("Ford") pursuant to a dealership agreement made with Ford on 11 August 1999 and the detailed provisions of a Main Dealer Vehicle Supply Agreement ("the Supply Agreement") dated 1 February 2001. Part B of the Supply Agreement provided for the sale of certain models by Ford to dealers on what was termed the "dealer sold" basis. The dealer sold basis replaced the sale and return basis which had previously applied to the supply of such models, and which continued to apply to cars which were not supplied on dealer sold terms. The essence of the dealer sold basis was that Ford invoiced the dealer for the full price of the car including VAT on "gate release", i.e. when the car left the factory, but the obligation to pay was deferred until the first to happen of a number of specified events, such as the first registration of the car following its onward sale by the dealer to a customer. Meanwhile, Ford retained title to the car until payment of the price in full. Part C of the Supply Agreement contained general provisions, including the retention of title clause (clause 8) and provisions relating to the termination of the Supply Agreement (clause 12).

3. Because of the existence of the VAT group, nothing turns on the separate identities of the group members, or the particular group company to which Ford supplied cars on the dealer sold basis. For convenience, I will use the description "Brunel" to refer to the group as well as to the individual company of that name.

4. On 3 October 2002 Brunel was placed into administrative receivership by FCE Bank Plc ("FCE"), a finance company in the Ford group. Four partners of Baker Tilly, including Bruce Alexander Mackay ("Mr Mackay"), were appointed as joint administrative receivers ("the receivers"). As the Court of Appeal explained (in paragraph [2] of the judgment of the Chancellor, with which the other two members of the Court agreed), this had a number of

consequences. First, Brunel's VAT quarter, which had been due to end on 31 October, came to an end the previous day and a new VAT quarter began on 3 October 2002. Second, the full price of the cars which had been supplied to Brunel on dealer sold terms became immediately due and payable by Brunel to Ford, including the VAT thereon. Third, Ford had the right to repossess the cars which had not been paid for, the right being exercisable in the case of cars sold on the dealer sold basis at the joint election of Ford and FCE. Finally, the Supply Agreement automatically terminated by virtue of Part C clause 12(a) proviso (ii), but without prejudice to the respective rights, liabilities and obligations of the parties in relation to vehicles previously supplied.

5. In particular, Part C clause 12(e) provided that:

> "The return of a Vehicle to Ford or to FCE or its agent pursuant to this clause 12 shall be without prejudice to the other rights and remedies of Ford and/or FCE against the Dealer with respect to such Vehicle and its sale and purchase under this Agreement including without limitation the right to the extent applicable to damages for breach of contract and the recovery of the purchase price of the Vehicle if and to the extent that the same is due and payable but unpaid."

Even after the return of a car to Ford, therefore, the dealer apparently remained liable to Ford for the full amount of the unpaid purchase price. Whether, and if so to what extent, Ford would in fact have been able to sue the dealer for the price of the car in such circumstances is another matter, to which I will need to return later in this judgment.

6. By 2 October 2002 Brunel had bought cars from Ford on a dealer sold basis for a total invoiced consideration of approximately £15.8 million, including £2,359,853 in respect of VAT. None of the consideration had been paid by Brunel to Ford, but in accordance with the relevant VAT regulations the entirety of the VAT either had been (in respect of previous quarters), or (in respect of the current quarter) was due to be, accounted for to HMRC, by Ford as output tax and by Brunel as input tax.

7. Following the appointment of the receivers, Ford exercised its right under the Supply Agreement to repossess the vehicles. What then happened is summarised in paragraphs [3] to [5] of Brunel (CA):

> "3. On 28/29 October 2002, the cars sold but not paid for having been repossessed by Ford, Ford issued (a) vehicle credit notes to [*Brunel*] in respect of each of those sales under the rubric "cancels previous billings" and (b) tax invoices in respect of the same cars for the same price to [*Brunel*] under a

> new customer code. These documents, if correctly reflecting equivalent underlying transactions, would have the effect of discharging the debt due by [*Brunel*] to Ford in respect of the sales effected before 2 October 2002 and recognising the creation, by reason of the second sales, of equivalent debts due by [*Brunel*] to Ford on or after 29 October 2002. For the purposes of VAT it would be necessary to reduce both the output tax paid by Ford and the input tax for which [*Brunel*] sought relief in respect of the original sales and replace them with equivalent liabilities or rights as at the dates of the second sales.
>
> 4. [*HMRC*] considered that the credit notes had been properly issued and in order to give effect to them repaid to Ford the amount of VAT paid in respect of the first sales, namely £2,359,853, and in January 2003 assessed [*Brunel*] as liable in the like sum for input tax wrongly credited to its VAT accounts in respect of the first sales. [*Brunel*], having paid the assessed amount, then sought its return on the basis of two voluntary disclosures made on 31 October 2005. It contended, in effect, that the credit notes had not been properly issued so that its original claim to set off input tax of £2,359,853 had been properly made. By a letter dated 19 December 2005 HMRC rejected the contention of [*Brunel*] on the footing that HMRC could "not ignore the consequences of the credit notes".
>
> 5. [*Brunel*] appealed to the VAT and Duties Tribunal on the ground, in effect, that the credit notes had not been properly issued and had no effect for the purposes of VAT. That appeal was dismissed by the Tribunal (Messrs Michael Johnson and John Lapthorne) on 3 April [2007]. [*Brunel*] then appealed to the High Court, as it was entitled to do on a point of law pursuant to Tribunal and Enquiries Act 1992 s.11, on the ground that the tribunal was wrong to conclude that the credit notes were properly issued by Ford and had effect for VAT purposes. That appeal was dismissed by Peter Smith J on 24 January 2008 …"

8. The judgment of the Court of Appeal in Brunel (CA) contains a full account of the facts as found by the VAT Tribunal (paragraphs [6] to [12]), the historical and (in 2002) current treatment of credit notes for VAT purposes (paragraphs [13] to [21]), the conclusion of the VAT Tribunal (paragraphs [22] to [23]), and the appeal of Brunel to the High Court (paragraphs [24] to [27]). I will not repeat this material, and the present judgment should be read as a sequel to Brunel (CA). In order to make this judgment intelligible, however, I will briefly refer to the key legislative provisions on which the appeal turned, and will then set out most of the final section of the Chancellor's judgment.

9. Article 11C(1) of the Sixth Council Directive on VAT (77/388/EEC), which came into force in 1978, provided that:

> "In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.
>
> However, in the case of total or partial non-payment, Member States may derogate from this rule."

The equivalent provision is now contained in Article 90 of the Principal VAT Directive (Council Directive 2006/112/EC).

10. Article 11C(1) therefore deals with at least two different types of case. The first type comprises cases of total or partial non-payment of the consideration for the supply. In such cases the consideration is not reduced, and remains due, but it is not paid, typically because of the customer's insolvency. In such circumstances, UK national law gives effect to the Article by permitting the supplier to claim bad debt relief under section 36 of the Value Added Tax Act 1994 ("VATA 1994"). In the second type of case, however, the price is reduced after the time of the supply, whether as a result of the operation of the terms of the original agreement under which the supply was made, or where the reduction flows from a rescission or subsequent variation of the agreement. In such cases, relief was provided in national law at the relevant time by regulation 38 of the Value Added Tax Regulations 1995 (SI 1995 No. 2518) ("the 1995 Regulations"). As amended in 1997, and as in force at the relevant time, regulation 38 provided as follows:

> "38(1) Subject to paragraph (1A) below, this regulation applies where –
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> …
>
> (b) there is a decrease in consideration for a supply,
>
> which includes an amount of VAT and the … decrease occurs after the end of the prescribed accounting period in which the original supply took place.
>
> (1A) Subject to paragraph (1B) below, this regulation does not apply to any … decrease in consideration which occurs more than 3 years after the end of the prescribed accounting period in which the original supply took place."

Where the regulation applied, it obliged both the maker and the recipient of the supply in question to make appropriate adjustments in their VAT accounts. By virtue of paragraph (5), every such entry had to be made in the account relating to the prescribed accounting period in which the decrease was given effect in the business accounts of the taxable person, except where that person was insolvent, in which case paragraph (6) required the entry to be made "in that part of the VAT account which relates to the prescribed accounting period in which the supply was made or received".

11. Regulation 24 of the 1995 Regulations defined "increase in consideration" as meaning:

> "… an increase in the consideration due on a supply made by a taxable person which is evidenced by a credit or debit note or any other document having the same effect and "decrease in consideration" is to be interpreted accordingly."

12. It follows from these provisions that, where regulation 38 applied to a decrease in the consideration for a supply, the maker of the supply was obliged to adjust its VAT account to make a negative entry for the relevant amount of VAT, thereby reducing the amount of output tax and its overall VAT liability, while the recipient of the supply was correspondingly obliged to make a negative entry for the relevant amount of VAT in its calculation of allowable input tax, thereby reducing the amount which it was entitled either to reclaim from HMRC or to set off against its output tax.

13. I now turn to the final section of the Chancellor's judgment in Brunel (CA), which is headed "The submissions of counsel and my conclusions". The Chancellor began his analysis as follows:

> "28. Counsel for Brunel submits that both the tribunal and the judge were wrong because the repossession of the vehicles and the issue of the credit notes were the unilateral acts of Ford with no legal effect whether for the purposes of VAT or otherwise. He points out that, as decided by Vinelott J in *Re Liverpool Commercial Vehicles Limited* [1984] BCLC 587, repossession of the vehicles pursuant to a retention of title clause does not nullify the original supply. He suggests that the remedy of Ford was to seek bad debt relief. By contrast he accepted that the parties might have agreed to the rescission of the original contract. He suggested that the tribunal had been invited to conclude that there was such a contract but had declined to do so. He submitted that they had not found facts from which it was legitimate for the judge to conclude that as a matter of law there was such a contract. In summary he

contended that the judge's conclusion was not open to him and the tribunal's decision was wrong in law.

29. By contrast counsel for Ford (and counsel for HMRC, who adopted his submissions) submitted that the facts as found by the tribunal justified the conclusion of a contract on the basis that the repossession of the vehicles and issue of the credit notes amounted to an offer by Ford accepted by the conduct of the administrative receivers to rescind the original supply and replace it by the later one. They contend that both parties had good commercial reasons to do so: the administrative receivers needed stock with which to continue the trade of Brunel so as to be able to sell it on and Ford's only likelihood of being paid depended on Brunel trading out of its difficulties and selling its business. They submitted that the judge's analysis was the only possible one on the basis of the facts as found by the tribunal.

30. In my view the problems in this case have arisen from the fact that neither the tribunal nor the judge clearly identified the issue that had to be determined. Given that the original sales under the terms of the Supply Agreement on the dealer sold basis constituted taxable supplies of goods by one registered person to another they necessarily gave rise to an output tax to be paid and an input tax to be brought into account. Those consequences could only be altered after the event under some statutory authority. The relevant authorities in this case are art 11C(1) of the Sixth Directive and reg 38 of the Value Added Tax Regulations 1995.

31. Article 11C(1) is applicable to "cancellation" or cases where "the price is reduced after the supply takes place". It seems to me to be axiomatic that such cancellation or reduction be pursuant to some legal entitlement whether arising from or conferred by the original contract of supply or subsequently; otherwise VAT would be a voluntary tax in every sense of the word. The legal entitlement might take the form of a remedy, such as rescission for mistake or misrepresentation, a right under the original contract to return the goods in certain specified events or a subsequent agreement discharging the original contract. To the like effect is the definition contained in reg 24. That requires that there shall be "a decrease in the consideration due". The word "due" clearly connotes some legal entitlement to the decrease. Such entitlement may arise either from a term of the original contract of supply, see *Customs and Excise Commissioners v General Motors Acceptance Corporation (UK) Plc* [2004] EWHC 192 (Ch), [2004] STC 577, or under some subsequent rescission or novation. Regulation 24 makes it clear that the credit note is

not of itself sufficient to justify a decrease, it is only evidence of an entitlement to the decrease.

32. So the task of the tribunal and the judge was to ascertain whether Brunel had a legal right to the discharge of the original supply. It was not provided by [*clause 12 of the Supply Agreement*]. There was no vitiating factor in the conclusion of the original contracts of supply. It could only have arisen under some other provision of the original contract or by reason of some subsequent agreement."

14. After discussing, and rejecting, a suggestion which he had himself made in the course of the hearing, to the effect that one particular provision of the Supply Agreement might be read as conferring on Ford the unilateral right to vary the purchase price by the later issue of credit notes, the Chancellor then continued:

> "34. It follows that the taxable consequences of the original supplies of vehicles by Ford to Brunel can only be discharged by some subsequent contractual rescission or novation which is evidenced by the credit notes. It does not appear to me that the tribunal reached any such conclusion. They concluded (see para 14) that the issue of credit notes in respect of repossessed vehicles which have not been paid for was standard practice of Ford. They returned to this question later when they concluded (para 38) that the credit notes served to confirm the cap upon the contractual liability of Brunel which would have been anticipated by the contracting parties as likely to result if the supply agreement was operated in accordance with its terms. Paragraphs 39 to 41 dealt with the absence of any bad debt relief being available to Ford. The conclusion in para 42 repeated that the credit notes had been volunteered by Ford in recognition of its inability to obtain payment from Brunel of the price of the vehicles repossessed. In dismissing the appeal the tribunal was accepting the original view of HMRC that it could not ignore the consequences of the credit notes. In my view they were wrong to have done so.
>
> 35. Peter Smith J accepted, in my view, correctly that the parties were not operating a contractual right conferred by cl 12, or any other clause, of the Supply Agreement. He summarised (see [2008] STC 1058 at [43]) what he described thereafter as a "procedure" the parties did operate … The question appears to me to be whether the conclusion expressed (at [45]) that "the parties have, in effect, agreed that the Supply Agreement should come to an end on the basis that it was rescinded" is justified.

36. The first problem is that I am unclear exactly what it means. I do not understand it to be a conclusion that there was a contract between Ford and Brunel, acting by the administrative receivers, rescinding the earlier contract of supply. If that had been the judge's intention he would not have interposed the words "in effect". Further, if that had been the judge's conclusion I do not think it would have been open to him on the findings of the tribunal. Just as the terms of a contract concluded in whole or part by conduct is a question of fact, see *Carmichael v National Power Plc* [1999] 4 All ER 897 at 903-904, [1999] 1 WLR 2042 at 2049-50, so must be the question of whether there is a contract at all so concluded. If the primary facts found by the tribunal must lead any tribunal properly instructed as to the law to conclude that there was a contract then it is open to the judge to reach that conclusion as one of law. But in any other event the question of whether there was a contract, otherwise than wholly in writing, is a question of fact for the tribunal not the judge.

37. I do not think that the tribunal's findings of primary fact do justify such a conclusion as a matter of law. They are equally consistent with findings of unilateral conduct of Ford in repossessing the vehicles and issuing credit notes to which Brunel submitted because it had neither the power nor the commercial incentive to do anything else. That would not be enough to justify the dismissal of the appeal of Brunel.

38. In my view, therefore, the appeal should be allowed. But it does not follow, as counsel for Brunel accepted, that we should reach the converse conclusion to the effect that the credit notes did not evidence a right of Brunel to the contractual discharge of the original contract of supply and were ineffective for all legal purposes including VAT. It appears to me that the tribunal never asked themselves the right question. They never considered the facts from the correct perspective. Had they done so they might, not would, have concluded that the original contracts of supply had been discharged by subsequent agreement of the parties, to be inferred at least in part from their conduct, of which the credit notes were evidence. In that event reg 38 of the [*1995 Regulations*] would have applied. As Brunel was an insolvent person within para (b)(iii) of the definition of that term contained in reg 24 the consequence would be that the amending entries would have to be made to the VAT account of Brunel for the prescribed accounting period within which the original supply fell, see reg 38(6), not that which followed the appointment of the administrative receivers.

> 39. For these reasons … I would allow the appeal and remit the matter to the Value Added Tax and Duties Tribunal to be reheard and determined in accordance with the judgment of this court."

15. So it was that the matter was remitted for a rehearing on the critical issue whether the original contract of supply of the vehicles had been discharged by a contractually binding subsequent agreement between the parties. In disposing of the matter in this way, the Court of Appeal expressly recognised that the findings of primary fact made by the VAT Tribunal were inconclusive, and did not justify their conclusion that the credit notes were "valid" for VAT purposes. As the Chancellor said in paragraph [37], their findings were "equally consistent with findings of unilateral conduct of Ford in repossessing the vehicles and issuing credit notes to which Brunel submitted because it had neither the power nor the commercial incentive to do anything else". In such a scenario, no subsequent contract would have been concluded, and as a matter of law the terms of the original contract, and the VAT consequences to which it gave rise, would have remained unaltered. Conversely, had the tribunal asked themselves the right question, and considered the facts from the correct perspective, they might, but would not necessarily, have concluded that "the original contracts of supply had been discharged by subsequent agreement of the parties, to be inferred at least in part from their conduct, of which the credit notes were evidence" (see paragraph [38]). The question remitted to the tribunal was therefore a question of fact, but it was a question which required a conclusion to be formed as to whether a legally binding contract had come into existence. Such a conclusion is, at least in part, a conclusion of law, because it requires a proper understanding of the legal principles by reference to which English law determines whether a contract has come into existence.

16. Although the Court of Appeal made its order on 26 February 2009, the further hearing did not take place until nearly two and a half years later, on 16 and 17 June 2011. One reason for this unfortunate delay was the death of the chairman of the original VAT Tribunal, Mr Johnson. In the meantime, the VAT Tribunal had also become the Tax Chamber of the First-tier Tribunal ("the FTT"). In the event, the remitted hearing took place in the FTT before Judge Howard Nowlan and Mr Julian Stafford. Counsel for the parties had all appeared in Brunel (CA), and have also appeared on the present appeal to the Upper Tribunal, namely Mr David Milne QC leading Mr Jonathan Bremner on behalf of Brunel, Mr James Puzey on behalf of HMRC and Mr Francis Fitzpatrick on behalf of Ford.

17. The decision of the FTT ("the Decision") was released by Judge Nowlan on 9 September 2011. I will of course need to consider much of the Decision in

detail later in this judgment, but it may be helpful at this stage to quote the first two paragraphs:

> "***Introduction***
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> 1. This should have been a very simple case, in that the case had already been the subject of a decision by the VAT and Duties Tribunal … in January 2007, the High Court … in January 2008 and the Court of Appeal … in January 2009, and the case was simply remitted to us (following the death of Michael Johnson) to decide whether or not certain original supply agreements had been rescinded by subsequent agreement.
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> 2. We will of course answer the specific question put to us by the Court of Appeal. Indeed the answer to that question is that there was no agreement between [*Ford*] and [*Brunel*] for the rescission of the original supplies of cars to [*Brunel*]. This conclusion was regrettably not a joint conclusion since the Member, Julian Stafford, considered that there was, on the balance of probabilities, an agreement to rescind the contract. I have considered Julian Stafford's views, and remain very firmly of the view that the termination of the Dealer Agreement [*i.e. the Supply Agreement*], the re-possession of the cars by Ford, and the issue of the credit notes by Ford all resulted from unilateral acts by Ford, such that there was no agreed rescission of the supply agreement. I have accordingly exercised my casting vote in favour of the conclusion that there was no agreed rescission of the supply contract. This means that [*Brunel's*] appeal is allowed. I have naturally given considerable thought to this issue, and the views of Julian Stafford, since we were not in full agreement, and will therefore summarise in due course why I felt it appropriate to adhere to my original view."

18. It is thus apparent that there was a division of opinion between the two members of the FTT, and the outcome depended on the exercise by the chairman of his casting vote: see article 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) order 2008, SI 2008 No. 2835, which says that:

> "If the decision of the tribunal is not unanimous, the decision of the majority is the decision of the tribunal; and the presiding member has a casting vote if the votes are equally divided."

19. On the other hand, although the members of the FTT were regrettably divided, their decision was at least primarily one of fact, namely that there was no

agreement between Ford and Brunel for the rescission of the original contract for the supply of cars. Since an appeal to the Upper Tribunal lies only on questions of law (see section 11(1) of the Tribunals, Courts and Enforcement Act 2007), the grounds upon which that decision may properly be challenged are necessarily limited.

20. One type of case in which an appellate court or tribunal may legitimately interfere with a conclusion of fact as being erroneous in point of law is where, although the primary facts and inferences properly drawn from them could in principle warrant a decision either way, the fact-finding tribunal show by statements made in their decision that they have misunderstood the law in a way that has a material bearing on their determination of the facts. This is the type of case referred to by Lord Radcliffe in Edwards v Bairstow [1956] AC 14 at 33, namely:

> "… occasions when the commissioners *[i.e. the General or Special Commissioners, the predecessors of the FTT],* although dealing with a set of facts which would warrant a decision either way show by some reason they give or statement they make in the body of the case *[i.e. the case stated, under the procedure then contained in Section 56 of the Taxes Management Act 1970]* that they have misunderstood the law in some relevant particular."

As Lord Radcliffe went onto say at 36:

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law."

21. On this appeal to the Upper Tribunal from the Decision, brought with permission granted by Judge Berner on 12 January 2012, counsel for Ford submits that the FTT made one or more material errors of law which had a material bearing on their factual determination. If that is right, he accepts that this is a case where a decision either way on the facts would have been possible, so the unfortunate consequence would be that the case would have to be remitted for a second rehearing. These submissions were supported by Mr Puzey on behalf of HMRC.

22. On behalf of Brunel, Mr Milne QC & Mr Bremner submit that the FTT's conclusion was one of fact, that there is no substance in the alleged errors of law made by the FTT, and that the appeal must therefore fail.

The alleged errors of law by the FTT

23. Before I come to examine the Decision, it is helpful to have in mind what the alleged errors of law consisted of. They are set out at some length in paragraph 11 of the joint application for permission to appeal made by Ford and HMRC on 9 September 2011, but in essence boil down to two main contentions. The first contention is that the FTT proceeded on the mistaken basis that the original contracts of supply could be cancelled otherwise than by a legally binding subsequent agreement between Ford and Brunel, and that it was odd or surprising to expect to find any such agreement on the part of Brunel. The second contention is that, although it was common ground between the parties that the question whether there had been a legally binding agreement to vary or rescind the original contract had to be determined objectively, the FTT wrongly looked solely to the subjective understanding of Mr Mackay and the absence of any positive witness evidence from Ford in reaching their conclusion. It is said that each of these alleged errors infected and vitiated the FTT's consideration of the evidence, and that had they directed themselves correctly they ought to have found that, viewed objectively, there was an offer by Ford to rescind the original contracts of supply, thereby cancelling or reducing the debt owed by Brunel to Ford, and that Brunel then accepted this offer by their conduct in accepting the credit notes and the re-supply of the same vehicles under new tax invoices.

24. The relevant underlying principles of law are not in dispute between the parties. It is common ground that, as a matter of law, the terms of a contract can be rescinded or varied only by a subsequent agreement supported by valid consideration or under seal: see, for example, Commissioner of Stamp Duties v Bone [1977] AC 511 at 519F per Lord Russell of Killowen, delivering the opinion of the Privy Council ("A debt can only be truly released and extinguished by agreement for valuable consideration or under seal"). It follows that the mere unilateral issue of the credit notes by Ford could not, by itself, extinguish the indebtedness under the original contracts of supply.

25. Ford's case before the FTT in relation to the nature and terms of the subsequent agreement is explained as follows by Mr Fitzpatrick in his skeleton argument:

> "13. Ford's case was that an offer had been made to Brunel to cancel the amounts outstanding under the original contract of supply of some £15.8 million. Brunel was entitled to accept or reject this offer. Viewed objectively, Brunel's actions in accepting the credit notes and entering into new contracts of supply with Ford was an acceptance of the offer supported by consideration, being the entering into of the new supply

> arrangements, and so was a binding contract rescinding the original debt.
>
> 14. This was supported by the objective commercial context, given that if the old debt had not been eliminated, then Brunel was subject to the old debt of some £15.8 million whilst entering into new supply arrangements giving rise to a further debt of some £15.8 million for the same cars. It would in effect have indebtedness of some £31.6 million relating to cars worth some £15.8 million. In Ford's submission this was a very important factor to consider in determining whether there had been an agreement to rescind the original contracts of supply."

26. Mr Fitzpatrick goes on to submit that, if the FTT mistakenly thought that the existing debt could have been eliminated as a result of unilateral action taken by Ford, this must have had a significant bearing on their consideration of the question whether a subsequent agreement was in fact entered into. If there was no need for such an agreement to eliminate the previous debt, a fact-finding tribunal would be much less likely to conclude that such an agreement was made. If, however, the existing debt could only have been eliminated by the parties entering into an agreement, it is then highly likely, from an objective commercial viewpoint, that such an agreement would have been made, and the FTT ought to have been correspondingly willing so to find.

27. As to the objective nature of the test to be applied in deciding whether there was a subsequent agreement, Mr Fitzpatrick referred to Smith v Hughes (1871) LR 6QB 597 at 607 per Blackburn J, Pagnan v Feed Products [1987] 2 Lloyd's Law Reports 601 at 610 per Bingham J and Covington Marine Corporation v Xiamen Shipbuilding Industry Co [2006] 1 Lloyd's Law Reports 745 at 756 per Langley J. These authorities reflect the objective approach of English law to the question of contract formation, which is of course well-established and underlies the analysis of the Court of Appeal in Brunel (CA). It is sufficient for present purposes to quote what Bingham J (as he then was) said in Pagnan at 610:

> "The general principles to be applied in deciding the issue in this case are not, I think, open to much doubt. The Court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract. The Court is not of course concerned with what the parties may subjectively have intended. As Lord Denning MR put it in *Storer v Manchester City Council*, [1974] 1 WLR 1403 at p. 1408H:

> "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough."
>
> It is furthermore clear that where exchanges between the parties have continued over a period the Court must consider all these exchanges in context and not seize upon one episode in isolation in order to conclude that a contract has been made…"

The Decision of the FTT

28. In the first main section of the Decision, headed "The facts" (paragraphs 4 to 16), the FTT briefly described the dealer sold basis and referred to some of the provisions of the Supply Agreement, including Part C clause 12(e) which they set out. They referred to the appointment of administrative receivers on 3 October 2002, and the fact that on 14 October 2002 Mr Mackay and the same partners of Baker Tilly were also appointed as joint receivers by NatWest Bank ("NatWest"), which was a secured creditor of Brunel. They recorded that Mr Mackay was the only person who gave oral evidence at the hearing, and continued as follows:

> "8… Mr Mackay was periodically appointed by Ford and FCE when dealers went into some form of administration. Mr Mackay had been well acquainted with the procedures when the supplies of cars had been made on the old "sale or return" basis, but this was his first experience of an administrative receivership when cars had been delivered on the "dealer sold" basis.
>
> 9… Mr Mackay was aware of the following. First, in such situations, Ford had a very significant influence on what was going to happen. They intended in this case immediately to exercise their right under the title retention provision to re-take the cars, which they did, possibly on 3 October. They then had two choices. One, their preference, was to re-finance the dealer in the hope that the business would continue in some form. The way in which they sought to achieve this was almost always by re-taking procession of the cars under their title retention clause, and by issuing credit notes to the dealer, releasing the debt owing in respect of the repossessed cars under the old "dealer code". They then closed that old code,

> opened a "new code" for the same company, and re-supplied the cars under the new dealer code. This would mean invoicing the company under the new code, and accounting for VAT on the new supply. With the benefit then of some slightly changed terms, and greater financial assistance (such as an indemnity against losses, in this case) the hope was that the dealer would be able to re-commence business…
>
> 10. The obvious alternative to the preferred procedure just mentioned was that, following the repossession of the cars, Ford might seek to allocate the cars amongst other dealers, who would then be invoiced for the relevant cars…
>
> 11. On 3 October 2002 [*Brunel*] had a debt to Ford… for a VAT-inclusive price of approximately £15.8 million. That debt of course became immediately due and payable, and odd as this may seem, [*clause 12(e) of the Supply Agreement]* appeared to state quite clearly that Ford still maintained a right to the full £15.8 million, notwithstanding that it had re-taken the cars and could dispose of them for full value, as it chose.
>
> 12. One of the other important things that we learnt from Mr Mackay was that, prior to his appointment, he was reasonably clear that Ford's plan for the administrative receivership of [*Brunel*] was that Ford intended to pursue the plan referred to as the preferred plan mentioned in paragraph 9 above. Consistently with this being the Ford objective, we were told that on 28 October, credit notes were issued by Ford to [*Brunel*] cancelling out, or purportedly cancelling out, the debt under the old dealer codes, and then on 29 October the majority of the cars were re-invoiced to [*Brunel*], which was thus invoiced under the new code for those cars…"

29. The FTT then recorded that, under procedures which had been agreed in advance with HMRC, when the credit notes were issued Ford recovered the VAT which it had paid in respect of the original supplies, and Brunel likewise accepted that it had lost its original input tax deduction:

> "[*Brunel*] duly paid that liability, and lost its substantial recovery entitlement. The new supplies… had the obvious VAT implications, the material point in relation to [*Brunel*] being that it had lost a "pre-receivership" recoverable, and now had a substantial input deduction in the VAT period that automatically commenced on the appointment of the administrative receivers."

30. The FTT then dealt with the "acceptance" by Mr Mackay of the credit notes, after he had taken legal advice to verify that Ford did indeed have the right to repossess the vehicles:

> "16. There was a dispute, to which we will refer shortly, as to quite what was meant by the statement that Mr Mackay "then accepted the credit notes". It was contended by [*Brunel*], effectively advancing a point that Mr Mackay may, we surmised, we found rather appealing… that all that was meant was that Mr Mackay "accepted the legal advice" that the repossession was perfectly lawful, whereupon he just dealt with the credit notes in a fairly routine and mechanical manner. It was contended by HMRC that what was meant was that Mr Mackay actually accepted the deal in which the original supply was reversed as a contractual matter, and that the issue of the credit notes just evidenced that acceptance."

31. In the next section of the Decision (paragraphs 17 to 20), the FTT explained the origin of the present dispute. It stems from the changes to Brunel's VAT position, as implemented, which had replaced a pre-receivership receivable with a corresponding post-receivership input tax deduction. This reduced the amount recoverable by NatWest under its security, and led to NatWest suing Baker Tilly to make good its loss. It was this development which led Brunel in 2005 to seek to reverse the earlier treatment of the input tax, by means of a voluntary disclosure to HMRC. Clearly, if Brunel were entitled to restore the status quo, on the basis that nothing ever happened to change the VAT treatment of the original supplies, and if the input tax were to be re-credited in the final accounting period before the receivership, the prejudice caused to NatWest would be remedied and the quantum of its claim against Mr Mackay and his firm correspondingly reduced.

32. A further twist, which it is convenient to mention at this point, is that if Brunel's claim to restore the status quo succeeds, Ford will nevertheless be able to keep the output tax on the original supplies which it recovered from HMRC on the assumption that the credit notes were "valid". The reason for this is that more than three years have elapsed, so any assessment to recover the tax would now be time-barred. This explains why it is very much in the interests of HMRC to argue that the revised VAT treatment of the supplies was correct in law. It is less obvious why Ford should also wish to establish that proposition, since a reversion to the status quo would no longer have any adverse VAT consequences for it. The reason, I was told, is that this is one of a number of similar cases which have arisen, and Ford wishes to ascertain the correct VAT treatment where credit notes were issued in accordance with its standard practice.

33. In the next section of the Decision (paragraphs 21 to 28) the FTT considered various possible VAT analyses, depending on what actually happened, or what might have happened in certain related situations. The purpose of this exercise, as I understand it, was to provide a legal framework within which to locate the question of fact that the FTT had to determine. They said in paragraph 21 that "we were given little guidance in relation to the law, largely because the single issue for us to decide was essentially a contractual issue."

34. Of the various analyses, the most immediately relevant are Case 1 and Case 2:

> "***Case 1***
>
> 24. The most straightforward situation (albeit somewhat odd) appeared to be that if the *[Supply Agreement]* left the whole price still payable (as it appeared to do), and if there was no rescission, by agreement, of the original supplies, then if Ford just issued credit notes to [*Brunel*] unilaterally, that issue of credit notes would not reverse the original supplies, or [*Brunel's*] pre-receivership input deductions. This would ordinarily affect both Ford and the dealer, with Ford failing to recover the earlier paid VAT, and the dealer remaining entitled to the earlier input deduction. This analysis was one of the two analyses that the Court of Appeal considered to be potentially consistent with the facts already established.
>
> …
>
> ***Case 2***
>
> 27. The second possible result (and this is the point principally relevant in this case) is that if we conclude that Ford and [*Brunel*] agreed to rescind the original supply agreement, such that the original debt for the £15.8 million was reversed (presumably largely because the cars had been repossessed by Ford), and the credit notes were then issued to recognise the legal entitlement to the reversal of that original supply, then the original supply, and its initial VAT results, would have properly been reversed for both parties. The position would in other words have been exactly as expected by Ford and HMRC… Critically however, this would only be because the credit notes then reflected and recognised the reversal of the original supplies, which in turn resulted from the agreed rescission of the earlier supplies by the parties. This was the second analysis that the Court of Appeal considered to be potentially consistent with the facts, so far established."

35. In general, it seems to me that these two Cases accurately reflect the possibilities canvassed by the Court of Appeal in Brunel (CA). It is, however, worth mentioning that it would not have been necessary for any agreement to have been concluded before the credit notes were issued. Another possibility, and the primary way in which Ford sought to put its case, was that the issue of the credit notes constituted an offer which only matured into a contract when it was accepted by Brunel's conduct in agreeing to the re-supply of the cars on new terms.

36. By way of further background, the FTT then considered (in paragraphs 29 to 31) cases where, in accordance with clause 6 of Part B of the Supply Agreement, Ford effects a "switch" of a car already supplied on dealer sold terms to dealer A, by reacquiring it for supply to dealer B. As the FTT observed, in such cases the relevant procedure had been agreed in advance between the parties, and it was therefore effective to reverse the earlier supply for VAT purposes. The credit note issued by Ford to dealer A would reflect an agreed cancellation of the original supply pursuant to the terms of the Supply Agreement.

37. In paragraphs 32 to 45 of the Decision, the FTT described the earlier decisions of the VAT Tribunal, of Peter Smith J in the High Court, and of the Court of Appeal in Brunel (CA). They then recorded the contentions of the parties (paragraphs 46 to 54), and commented on some of them.

38. The contentions advanced by Mr Milne QC on behalf of Brunel included submissions that, once the cars had been unilaterally repossessed by Ford, "it is perfectly obvious that [*Brunel*] would "take whatever it could get", if Ford volunteered it", and "it was implicit in common sense, business, and general "dealer relation" terms that the price would have to be waived or greatly reduced to a "net damage" point, even if this was not the right interpretation of the [*Supply*] Agreement." It appears that Mr Milne also submitted that, if any court had to decide whether clause 12(e) in Part C of the Supply Agreement would withstand legal scrutiny, "he considered that it would not".

39. The contentions advanced on behalf of Ford and HMRC were summarised as follows in paragraph 51 (for convenience I replace the FTT's bullet points with numbered sub-paragraphs):

> "(1) the administrative receivers had been conversant with Ford's planning in relation to [*Brunel*] from a point prior to their appointment, and they knew that it was Ford's intention to repossess the cars, issue credit notes, switch the dealer codes and then re-supply the majority of those cars;

> (2) the deal was essentially therefore that [*Brunel*] would be released from its original obligation to pay for the cars, in return for the re-supply of the cars;
>
> (3) in his Witness Statement, issued for the purposes of the original hearing, Mr Mackay had said that he had "accepted" the credit notes;
>
> (4) Mr Mackay could have rejected them, but he accepted them, which meant that he had agreed to the reduction of the price, which was then just matched by the valid issue of the credit notes; and
>
> (5) accordingly, the Case 2 analysis was the correct approach."

The FTT also recorded that they were asked to view Mr Mackay's new evidence with some caution, as it was in his interest to favour the Case 1 analysis because it would tend to undermine the NatWest negligence claim against his firm.

40. I now come to the section of the Decision (paragraphs 56 to 76) in which the FTT set out their conclusions. They began by correctly observing that, if there was a contract to rescind or reverse the original supply agreements, the parties to that contract must have been Ford and Brunel, acting through the receivers. Accordingly, they said they would first examine the evidence given on behalf of Ford, and then that given on behalf of Brunel. They recorded that the only evidence before them from Ford consisted of two witness statements by Mr Mark Duncan, who at the relevant time "had been involved with finance, tax and particularly VAT on behalf of Ford". His first statement, dated 30 October 2006, had been provided for the original hearing before the VAT Tribunal; his second statement was dated 10 June 2010. Neither was challenged by Brunel, so the FTT heard no oral evidence from Mr Duncan.

41. In paragraph 61, the FTT set out paragraphs 10 and 11 of Mr Duncan's first statement, where he gave evidence of his understanding of the agreed VAT treatment in cases where a dealer entered administrative receivership. Where the vehicles were still either at the dealer's premises or held in a vehicle holding centre, "then providing the Dealer and/or administrative receiver were in agreement, Ford could take the vehicles back into Ford's possession and issue a VAT credit note to cancel the original sale, giving the Dealer full value for the vehicles repossessed…". Mr Duncan also said that his "involvement/understanding of the specific VAT treatment employed by Ford in the matter of Brunel is that Ford followed the normal routines agreed with HMRC and issued credit notes to the dealership for these vehicles that were repossessed and reduced its VAT output declaration accordingly."

42. Mr Duncan's second statement included the following clarification of his earlier evidence:

> "7… by reference to Paragraph 10 of my First Statement, as I state there, my understanding was that the process which occurred when a dealer went into administrative receivership (being the issue of credit notes and the re-supply of the vehicles) was one that required the agreement of the dealer or the administrative receiver (as appropriate). The dealer or administrative receiver had a choice as to whether to accept the credit notes and the re-supply of vehicles."

43. The FTT then commented on this evidence, in a passage which I need to set out in full:

> "63. I believe that Julian Stafford and I are in agreement that we do not find any of the three paragraphs that we have quoted (the only relevant ones) to be of any assistance in relation to the issue of what Ford actually agreed with [*Brunel*]. There is certainly no reference to negotiation or indeed to any contact with [*Brunel*] or the administrative receivers. Since Ford actually contended that there had been an agreed rescission of the earlier supplies, it seems distinctly odd that the only Ford witness gave information principally about what had been agreed with HMRC, and nothing about any contact even or agreement with the dealer.
>
> 64. Paragraph 10 of the main Witness Statement contains a crucial proviso that makes the conclusions meaningless, namely the proviso contained in the crucial words "then providing the Dealer and/or administrative receiver were in agreement". That seems to assume the very fact required to sustain the Case 2 analysis. When paragraph 10 appeared to be referring to the election to take repossession of the cars, and the consequent issue of… credit notes, in all situations, and not just in the situation where that was coupled with a re-supply (when manifestly the dealer would have to agree to repurchase the cars) it seems very odd to suppose that dealer would be expected by Ford to have to agree to anything. Without any doubt, Ford had the **unilateral** right to take repossession of cars in the event that a dealer went into administrative receivership, and the suggestion that repossession would depend on securing the dealer's prior agreement would be ridiculous. Asking then, whether the subsequent issue of credit notes cancelling the price still theoretically payable under the "over-kill" Clause 12, required the dealer's agreement, seemed to be an equally odd question. If a dealer was asked whether it was prepared to

agree to the issue of the credit notes, it seems obvious that the dealer would say that having lost the cars, it was a "no-brainer" that it would take any credit note, reflecting the sensible reversal of Ford's "over-kill" provision, and of course it would take whatever Ford volunteered.

65. It seems to me at least to be fairly clear that, except in the situation where the repossession and issue of the credit notes was intertwined with the re-supply, there is no occasion to assume, or even remotely to understand, the extraordinary proposition that the dealer would have to agree to anything in relation to the repossession of the cars or the issue of the credit notes.

66. Neither of us read paragraph 11 of Mr Duncan's original statement to indicate that he had any involvement in any negotiation or rescission agreement between Ford and [*Brunel*] … There was, in other words not a word mentioned about the only presently relevant point, namely whether in fact there was a rescission agreement between Ford and [*Brunel*], in advance of the issue of the credit notes.

67. We find paragraph 7 of the Supplemental Statement to be of no more assistance, albeit that it was obviously written with a view to supporting some point about a new agreement. The critical issue, it seems to us, is that it is obvious that the dealer in administration had to agree specifically to take the cars, and to pay for them under the re-supply transaction. The question is whether some agreement should be assumed to embrace the earlier and, to all appearances, utterly distinct steps of the resumption of possession of the cars, and the then related issue of credit notes. And paragraph 7 appears not to assist us with this question. Equally it appears again that Mr Duncan was someone who knew what had been agreed with HMRC, and he knew what he hoped and expected the VAT treatment would be following repossessions and the issue of credit notes, but it does not sound for a moment as if Mr Duncan had any contact whatsoever with [*Brunel*] and its administrative receivers.

68. Accordingly, on the Ford side of this proposition that there was a new rescission agreement, we have absolutely no evidence that there was such an agreement. Of course, there must have been an agreement for the re-supply, being the supply of cars on the part of Ford, and the agreement of [*Brunel*] to pay for them, but that is, or at least very well may be, an entirely separate question."

44. Having thus dealt with the evidence relied on by Ford, the FTT then turned to the evidence given on behalf of Brunel by Mr Mackay.

45. In paragraph 69 the FTT recorded that "Mr Mackay's evidence during the hearing made the same points repeatedly, as he was asked questions by counsel". They then set out a lengthy extract from his cross-examination by Mr Puzey on behalf of HMRC, which they said gave "a very representative picture". It is unnecessary for me to reproduce this extract. The important point is that Mr Mackay was repeatedly asked to agree that, in one way or another, there was a necessary linkage between his acceptance of the credit notes and his agreement to the re-supply of the cars, but he declined to do so. He said that he thought he had no option but to accept the credit notes, once he had received legal advice that Ford were entitled to repossess the vehicles. He also needed an agreement with Ford in order to continue trading, but that was a separate matter.

46. The FTT then continued (although, in view of his disagreement with Mr Stafford, much of this part of the Decision is written in the first person by Judge Nowlan) as follows:

> "70. I consider it abundantly clear from those extracts, along with many very similar other statements, that Mr Mackay said that he considered the repossession of the cars to be something that resulted solely from Ford's absolute liberty to repossess the cars, and he considered the issue of the credit notes to be something that required no agreement on his part. Once he concluded that the retention of title clause was effective, he concluded that the credit notes were valid, and that all he had to do with them was process them. The subject matter of the agreement with Ford was the separate issue of the re-supply of most of the cars, the further financial support provided by Ford, and [*Brunel's*] acceptance of its liability to pay for the cars under the new supply, and to perform other obligations.
>
> 71. It was suggested to us that Mr Mackay's evidence might have been influenced by the negligence action hanging over his firm. We now address this.
>
> 72. This is perhaps where Julian Stafford and I part company. Julian Stafford was influenced by the fact that it would obviously be enormously in Mr Mackay's personal interests to undermine the case that there was any contractual agreement to rescind the supply contract. He assumed that if this was achieved, the negligence action hanging over Mr Mackay's firm would be dropped. Julian Stafford thus considered that there was an unrealistic, and unconvincing, change of tack on

the part of Mr Mackay, involving he considered a slight play on words, when he repeatedly said that any earlier references to his "accepting the credit notes" indicated only that once he had received legal advice that Ford's unilateral right to take re-possession of the cars was valid, he then simply accepted (meaning "took") the credit notes and processed them. Julian Stafford was also influenced by the fact that he processed the credit notes in the knowledge that that would prejudice NatWest. I, on the other hand consider that Mr Mackay's evidence was not only realistic, but that his summary of events was infinitely the more realistic summary than the alternative contention on the part of both Respondents that [*Brunel*] agreed to a rescission of the earlier contract. I say this for the following reasons [*as before, I replace the bullet points with numbered sub-paragraphs*]:

(1) It cannot be in doubt that Mr Mackay sought legal advice that the retention of title clause was valid, and that it would follow, if it were valid, that Ford would have unilaterally re-taken possession of the cars. If Mr Mackay thought that the rescission of the contract was a matter resulting from an agreement between Ford and [*Brunel*], why was he seeking confirmation that Ford had the unilateral right, which he believed had been exercised, to re-take the cars?

(2) I also have considerable sympathy with the claim by Mr Mackay that when he was advised that the retention of title clause was valid and that Ford had thus exercised a unilateral right to re-take possession of the cars, then the issue of the credit notes was something that he obviously had to accept and process. This seemed to Mr Mackay to be a "no-brainer" in that their issue reflected reality, and the possibility of "rejecting" the credit notes did not occur to him. I entirely understand that. If [*Brunel*] had lost the cars, something clarified by the legal advice, what was the point or the relevance of rejecting a credit note, and thus in some extraordinary manner trying to re-create the absurd result of Ford's "over-kill" drafting, that might re-render [*Brunel*] liable to pay the price for the cars, even though it had lost them?

(3) Addressing a different situation that did not arise in this case, if Ford had simply re-taken possession of the cars, and issued credit notes, without there being any prospect of re-supplying the old dealer under new codes, I cannot believe that anyone would suggest that the dealer should pre-agree to either step. This present case, where obviously [*Brunel*] had to agree to the trade-on proposal, obviously means that [*Brunel*] had to agree to

something, and [*Brunel*] must have agreed to the re-supply contract. Both Respondents have tried to merge the clear feature of that agreement with the notion that it would follow that Ford and [*Brunel*] agreed to the rescission of the original contract. That cannot be right when it is clear that the repossession of the cars was achieved under Ford's unilateral right, and the credit notes were issued by Ford, in accordance with its invariable practice, just as night follows day.

(4) The whole notion of there being an agreement between Ford and [*Brunel*] to rescind the original supply contract seems inherently unrealistic, when on any view it was by unilateral action on the part of Ford that the [*Supply Agreement*] had been terminated (prior to the appointment of the administrators), and by unilateral action on the part of Ford that the title-retention security clause had been operated and the cars re-possessed. There was no suggestion that any of those changes resulted from any agreement of any sort. The suggestion thus, that the only remaining element of the supply agreement, namely the extraordinary liability under clause 12 to pay for cars that had been re-possessed would require some bi-lateral action on behalf of both the parties to eliminate that liability seems rather odd. Were there such a contract, the consideration given by the administrators in return for the release of the liability would appear to have been rather nebulous, and the common sense reason for assuming that the administrators' concurrence would be required for the release rather thin. In addition, we were expressly told that it was Ford's almost invariable practice to release the liability under Clause 12 in these circumstances.

(5) I had personally not doubted the integrity of Mr Mackay's evidence. I understood that there was reason to consider whether Mr Mackay would have been influenced by the negligence action hanging over his firm to twist the facts somewhat, but I considered that his evidence was honest and cogent.

(6) I am somewhat influenced in concluding that there was no agreed rescission of the supply agreement (or of the remaining liability to pay the price under Clause 12, depending on how the rescission question is posed) by the fact that Ford, as a joint respondent, failed to produce any evidence whatsoever of any contact between Ford and [*Brunel*] either between 3 and 29 October, or indeed at any time, to give any credence to the proposition that there was some joint agreement to rescind.

> 73. Whilst Julian Stafford would have reached a different conclusion, my finding of fact is that there was no evidence produced to indicate that either Ford or [*Brunel*] and its administrative receivers agreed to any rescission of the original contract, or anything material in any way to the unilateral right of Ford to repossess the cars, and Ford's consequent and apparently invariable, practice of issuing the credit notes. And far from any conduct leading to the notion of an implicit agreement by conduct, the conduct of Mr Mackay (particularly the points stressed in … paragraph 72 above) suggest to me the very reverse.
>
> 74. I might say that I am somewhat disappointed to reach the above conclusions, because the plain common sense of the situation would rather appear to have been for the VAT implications of the original supplies all to have been reversed. In our view, had the [*Supply Agreement*] not contained the somewhat extraordinary "over-kill" clause, these problems would not have arisen. Had it provided that, rather as the agreement dealt with shifts of cars from one dealer to another, both parties agreed from the outset that if the cars were repossessed, then the original supplies would be reversed, and the price initially owed would fall either to nil, or to an amount equal to any net damage claimed by Ford, then the analysis of Case 3 would have prevailed. It was the result of "over-kill", and slightly offensive drafting that prevented this sensible result from being achieved.
>
> 75. Having decided that the answer to the Court of Appeal's question is that there was no contractual rescission of the original contract…
>
> 76. … it is clear that this Appeal is allowed."

47. No separate reasons were given by Mr Stafford for his dissent, so I must assume that he was content with the explanation given in paragraph 72 of the Decision of why he would have reached the opposite conclusion. One result of this reticence on Mr Stafford's part is that it is unclear on what precise basis he considered that a contract had been concluded. I can only assume that he would have rejected Mr Mackay's evidence about the absence of any linkage between the "acceptance" of the credit notes and the conclusion of the new re-supply agreement, and that he regarded the latter as the consideration for an agreement to rescind the original supply agreements which was evidenced by the credit notes and accepted by conduct.

Submissions

48. On behalf of Ford, Mr Fitzpatrick concentrated his submissions on paragraphs 64, 65 and 72 of the Decision. He criticises the statement in paragraph 64 that "it seems very odd to suppose" that the dealer would be expected by Ford to have to agree to anything, and that it would be "an equally odd question" to ask whether the subsequent issue of the credit notes required the dealer's agreement. Far from this being odd, submits Mr Fitzpatrick, it was only by a legally binding subsequent agreement that the liability to pay the original purchase price for the cars could be eliminated. It would therefore have been entirely natural for the dealer to wish to enter into such an agreement. Mr Fitzpatrick submits that the same fallacy is also to be found in paragraph 65, where it is said to be an "extraordinary proposition that the dealer would have to agree to anything in relation to the repossession of the cars or the issue of the credit notes", except where the repossession and issue of the credit notes were "intertwined" with the re-supply of the cars. Even in the absence of the re-supply, unless the dealer agreed to accept the offer to reduce the debt made by the issue of the credit notes, the debt would remain outstanding. The same fallacies are then repeated, in substantially similar terms, when Judge Nowlan gives his reasons in paragraph 72 for considering Mr McKay's account of events to have been "infinitely … more realistic" than positing an agreed rescission of the earlier contract: see in particular sub-paragraphs (2) and (4).

49. In addition, Mr Fitzpatrick makes two further criticisms of sub-paragraph 72(4). First, he correctly submits that Judge Nowlan was wrong to say that the Supply Agreement had been terminated "by unilateral action on the part of Ford". The true position was that the Supply Agreement terminated automatically on the appointment of the receivers. Secondly, he submits that Judge Nowlan was wrong to say that there was anything "rather nebulous" about the consideration given by the receivers in return for the release of the original liability, on the assumption that a subsequent contract was concluded. The consideration would have been their agreement to enter into the contract for the re-supply of the cars, with the attendant obligation to pay their full price. There is nothing nebulous about that, and it is precisely the undertaking of the new obligation to pay for the cars in full which supports the inference that, as a matter of commercial common sense, the receivers must have intended to eliminate their previous liability in respect of the same vehicles.

50. On behalf of Brunel, Mr Milne QC first takes issue with the assumption underlying Ford's case that in order to eliminate the entire debt of some £15.8 million under the original contracts of supply it would be necessary to find a binding agreement between the parties, and that in the absence of such an agreement Brunel would in effect have been under an obligation to pay for the same cars twice over. This assumption ignores the fundamental distinction in

the law of sale of goods between the existence of a duty to pay the price on the one hand, and the ability of the seller to bring an action for the price to enforce that duty on the other hand. Section 49(1) of the Sale of Goods Act 1979 provides that:

> "Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."

It is therefore a prerequisite of an action for the price of goods that the property in them has passed to the buyer. This condition will not be satisfied where, as in the present case, the seller has exercised a right to repossess the goods. Accordingly, submits Mr Milne, it would simply not have been open to Ford to sue Brunel for the price of the cars once they had been repossessed. The only remedy which the seller would have, in such circumstances, is a remedy in damages, and for that purpose loss would have to be established (e.g. due to a fall in the market value of the goods). For the seller to be able to claim the price, he must show that he continues to be able and willing to deliver the goods: see Chitty on Contracts, 31st edition, para 43-395, footnote 1685. For this reason, says Mr Milne, there was never any question of Ford being able to recover the price of the cars twice over, and there was no substance to the assumed commercial imperative to eliminate the original debt once the cars had been repossessed.

51. Mr Milne further submits that, on a fair reading of the Decision as a whole, there is nothing in the contention that the FTT failed to examine the question of contract formation objectively, and looked instead at the subjective understanding of Mr Mackay. The FTT took all of the relevant background into account before deciding, on the facts, that no agreement for the cancellation of the original supplies had been reached. Paragraph 73 of the Decision shows that Judge Nowlan had Mr Mackay's conduct well in mind, and that he declined to infer the formation of a contract from it.

52. More generally, Mr Milne reminded me of well-known authority on the "need for appellate caution" in reversing a trial judge's evaluation of the facts, and of the deference which should be accorded to findings made by a specialist tribunal such as the FTT: see the observations of Lord Hoffmann in Biogen Inc. v Medeva Plc [1997] R.P.C. 1 (HL) at 45 (in relation to the question whether an invention was "obvious" in patent litigation), and of Jacob LJ in Procter & Gamble UK v Revenue and Customs Commissioners [2009] EWCA Civ 407, [2009] STC 1990, at [11], citing Baroness Hale in A H (Sudan) v Secretary of State for the Home Department [2007] UKHL 49, [2008] 1 AC 678, at [30].

53. Mr Fitzpatrick sought to counter Brunel's reliance on section 49(1) of the Sale of Goods Act 1979 by arguing that its provisions may be modified or excluded by express agreement between the parties, pursuant to the freedom of contract permitted by section 55(1) of the Act. He also argued that, following the termination of the Supply Agreement, there was no longer any contract for the sale of goods in existence, and the effect of clause 12(e) was to create a contractual debt unconditioned by any question of performance by either party. Mr Milne's riposte to these submissions was that the wording of clause 12(e) was insufficiently clear to exclude section 49(1), and that even if it purported to do so, or to create a freestanding debt, it was unenforceable as a penalty clause, because an obligation to pay the full price of the cars after they had been repossessed by Ford could not have been a genuine pre-estimate of Ford's loss in those circumstances.

Discussion

54. In considering these submissions, I begin with the point, which Mr Milne rightly put at the forefront of his oral argument, that what has to be found in order to reverse the VAT consequences of the original supply of cars is a discharge by subsequent agreement of the contract for that original supply. Nothing less will do; and the mere fact that the receivers entered into a subsequent agreement with Ford for the re-supply of the cars, after they had been repossessed, does not of itself entail that the previous contract must have been cancelled.

55. My next point is that there was no positive evidence before the FTT of any conduct on the part of Ford which was consciously intended to lead to a contract to cancel the original agreement. There was no evidence of any negotiations to that end between Ford and Brunel, nor of any response by Ford to such a request by Brunel. On the contrary, the evidence was that in repossessing the vehicles and then issuing the credit notes Ford was acting unilaterally and in accordance with its standard procedure. The expected VAT consequences of that procedure had been agreed between Ford and HMRC, but Brunel had not been party to those discussions. As Mr Duncan explained in his second statement, when he said that the issue of the credit notes and the re-supply of the vehicles required the "agreement" of the receivers, he meant only that they had a choice whether to accept the credit notes and the re-supply.

56. In the absence of any evidence of an express agreement, I consider that the only plausible basis upon which to find a contract to cancel the original supply would have been an agreement by conduct, treating the issue of the credit notes as an offer which was accepted by the conduct of Brunel (through the receivers) in agreeing to the re-supply of the cars. Such an analysis would

certainly have been compatible with Mr Duncan's understanding of the position, even if he did not subjectively consider a contract to be necessary; but, viewed objectively, was it also the right way to interpret Mr Mackay's conduct in accepting the credit notes and agreeing to the re-supply? That, in my view, is the crucial question, and in general terms this was the issue to which the FTT's analysis of Mr Mackay's evidence in paragraphs 69 to 73 of the Decision was directed.

57. It is important to note at this point that, although the question whether a contract was formed has to be judged objectively, it does not follow that evidence of the subjective state of mind of Mr Mackay was either irrelevant or inadmissible. On the contrary, the subjective understanding of Mr Mackay in entering into the relevant transactions could have been highly material in helping the FTT to decide whether, viewed objectively, a contract by conduct came into existence. An enquiry of this nature needs to be carefully distinguished, in my judgment, from the exclusionary rule which prevents the admission of evidence of pre-contractual negotiations as an aid to the construction of a concluded contract. As Lord Hoffmann explained in Carmichael v National Power Plc [1999] 1 WLR 2042 at 2050H:

> "The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration."

See too the observations of Lord Hoffmann ten years later in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, at paragraphs [64] to [65], where he applied the same principle in the context of rectification, and said that such evidence may be significant where "the prior consensus was based wholly or in part on oral exchanges or conduct".

58. In the light of these principles, I consider that Judge Nowlan was fully entitled to examine Mr Mackay's subjective state of mind, and to conclude (having heard his oral evidence) that Mr Mackay saw the repossession of the cars and the issue of the credit notes as separate matters from the subsequent re-supply of the cars under the new contract (paragraphs 70 and 72(3) of the Decision). He was also entitled to conclude that Mr Mackay's evidence was not "influenced by the negligence action hanging over his firm" (paragraph 71), and that his evidence was "honest and cogent" (paragraph 72(5)). It is unfortunate that Mr Stafford's assessment of Mr Mackay's evidence differed from Judge Nowlan's, but this was pre-eminently a matter for the FTT which

heard and saw Mr Mackay give evidence, and Mr Fitzpatrick rightly did not suggest that Judge Nowlan's appraisal of Mr Mackay as a witness betrayed any error of law.

59. Nor am I prepared to conclude that, in the course of his analysis, Judge Nowlan lost sight of the objective nature of the test for deciding whether the original supply contract had been validly discharged. The relevant law had been clearly explained by the Court of Appeal in Brunel (CA), the FTT had the benefit of submissions from very experienced counsel on both sides, and paragraph 73 of the Decision makes it clear that Judge Nowlan had considered, and rejected, the possibility of finding "an implicit agreement by conduct". The problem was that, viewed objectively, Mr Mackay's conduct was ambivalent: it was consistent either with the formation of a contract to discharge the original agreement, or with the absence of such a contract. It was precisely for this reason that the Court of Appeal felt unable to determine the issue itself, and remitted it for a further hearing.

60. In considering what interpretation to place upon Mr Mackay's conduct, Judge Nowlan had a good deal to say, in characteristically colourful language, about the commercial context in which Ford and Brunel found themselves, and the inherent probabilities relating to a contractual discharge of the original agreement. Other judges might have assessed some or all of these factors differently, but I am certainly not prepared to assume that Judge Nowlan's conclusion shows that he must have misunderstood the objective nature of the exercise upon which he was engaged. In short, it seems to me, on a fair reading of the Decision as a whole, that Judge Nowlan considered the facts to be essentially of the nature envisaged by the Court of Appeal in paragraph [37] of Brunel (CA), that is to say "unilateral conduct of Ford in repossessing the vehicles and issuing credit notes to which Brunel submitted because it had neither the power nor the commercial incentive to do anything else".

61. Against this background, I do not consider that the FTT's conclusion is vitiated by either of the two alleged errors of law relied on by Ford. I do not accept that the FTT proceeded on the mistaken assumption that the original Supply Agreement could have been cancelled otherwise than by a legally binding subsequent agreement. The FTT were in no doubt about the question which they had to answer, and they duly answered it. The comments relied on by Ford merely went to the implausibility, as Judge Nowlan saw it, of Brunel thinking it necessary to reverse the original supply by a binding agreement, when the repossession of the cars and the issue of the credit notes had been presented to Brunel by Ford as a *fait accompli*. The comments do not to my mind betray any misunderstanding of the fundamental point that the original agreement could only be validly discharged by a subsequent contract.

62. I would add that Judge Nowlan reached his conclusion that there was no subsequent contract despite what he saw as the "overkill" of clause 12(e) of Part C the Supply Agreement. In my view he was wrong to attach the significance which he did to this provision, because I accept the submissions of Mr Milne that following the repossession of the cars it would no longer have been open to Ford to sue Brunel for their price, and (even if it had been) the provision would almost certainly have been unenforceable as a penalty. Thus the force of one of the points which might objectively have told most strongly in favour of a subsequent agreement is greatly reduced, although (I accept) not eliminated, and the weight of the points which persuaded Judge Nowlan that there was no subsequent agreement is correspondingly increased.

63. As to the second alleged error, I have already explained how the FTT were in my judgment entitled to examine the subjective understanding of Mr Mackay as relevant material to take into account when deciding, objectively, whether a contract by conduct had come into existence.

64. In fairness to Ford and HMRC, I should say that the Decision is in my view open to a number of criticisms. The reasoning is not articulated as clearly as one might have hoped, and there are some internal inconsistencies which a more careful revision would doubtless have eliminated. Furthermore, the FTT appear at times to have wrongly assumed that any subsequent agreement would have to have been concluded before the credit notes were issued, as well as wrongly doubting the sufficiency of the consideration provided by Brunel for any subsequent contract. However, Ford and HMRC do not place separate reliance on these flaws in the Decision, and although they have caused me some concern I do not in the end consider that they had a material impact on the FTT's analysis of the evidence and conclusion.

65. This appeal will therefore be dismissed.

MR JUSTICE HENDERSON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 19 MARCH 2013