Neutral Citation Number: [2025] EWHC 140 (Comm)

Case No: LM-2024-000036

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

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

Date: 27 January 2025

Before :

PAUL MITCHELL KC
(Sitting as a Deputy High Court Judge)

- -

Between :

WH HOLDING LIMITED	**Claimant**
- and -	
E20 STADIUM LLP	**Defendant**

- -

Paul Downes KC (instructed by **Gateley Plc**) for the **Claimant**
Thomas Plewman KC (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 12 December 2024

- -

JUDGMENT

PAUL MITCHELL KC:

Introductory

1. This is a claim for declaratory relief commenced by WH Holding Limited ("**WHH**") by a Part 8 claim form on 18 December 2023. WHH contends that it is not bound by a reasoned expert determination because that determination contains what WHH says are "manifest errors".

2. WHH and the Defendant, E20 Stadium LLP ("**E20**"), are two of the three parties to a Concession Agreement made on 22 March 2013 ("**the Agreement**"). By the Agreement, E20 (described as "the Grantor") granted a 99-year concession to WHH

(described as "the Concessionaire") that permitted WHH to run sporting events at the London Stadium in the Queen Elizabeth Olympic Park ("**the Stadium**"). One of the effects of the Agreement was to give West Ham United Football Club Limited ("**the Club**") the use of the Stadium as a home ground, and the Club was a party to the Agreement.

3. The costs of constructing the Stadium had been met from public funds as part of the investment in the 2012 London Olympics. At the date of entry into the Agreement, most of the shares in WHH were held (directly and indirectly) in large part by Mr David Sullivan ("**Mr Sullivan**") and Mr David Gold ("**Mr Gold**") (now deceased). Mr Sullivan and Mr Gold, persons owned or controlled by them, and their "family members" (as also defined in the Agreement) were categorised in the Agreement as "**Relevant Shareholders**". Within Clause 20 of the Agreement were provisions which were described to me as an "anti-embarrassment" clause. The broad effect of the provisions in question was to ensure that E20 was able to share in gains that might in future be made by a Relevant Shareholder if such Relevant Shareholder effected a transaction which amounted to a sale or transfer of any interest in the Club. The formulation is accepted by the parties as encompassing dealings by Relevant Shareholders with their shareholdings in WHH, which owned 100% of the Club.

4. I shall consider the operation of Clause 20 in detail below. It suffices at this stage to say that if the provisions of Clause 20 were met, then WHH was obliged to pay to E20 a sum which was termed a "**Stadium Premium Amount**". The Stadium Premium Amount was effectively a share of the profits that had been made by the Relevant Shareholder, but payable by WHH rather than by the Relevant Shareholder personally.

5. On 10 November 2021, a number of shareholders in the Club entered a series of agreements with an entity called 1890 Holdings AS ("**1890 Holdings**"). Among those shareholders were various Relevant Shareholders. A dispute then arose between WHH and E20 regarding the effect of the anti-embarrassment provisions of Clause 20 having regard to a put and call option agreement ("**the Option**") entered by Mr Sullivan and 1890 Holdings. Stated shortly, WHH contended that following the provisions of Clause 20, no Stadium Premium Amount was due as a result of the Option; whereas E20 contended that the correct application of Clause 20 resulted in WHH being obliged to pay it a Stadium Premium Amount of £3.6 million.

6. Clause 50 of the Agreement provided that any dispute which related to Clause 20 was to be referred to an expert, whose decision was to be final and binding "in the absence of manifest error". The parties agreed to put their dispute regarding whether any Stadium Premium Amount was due in relation to the Option before an expert. The expert determined the issue in favour of E20 in a reasoned written opinion; but WHH contends that the expert made two errors which should be recognised as "manifest errors". If WHH is correct in relation to one or both of those contentions, then the expert's determination is not binding on WHH and E20.

7. WHH was represented before me by Mr Paul Downes KC and E20 by Mr Thomas Plewman KC. I am grateful to them both for their very helpful and focussed written and oral submissions.

8. The judgment below comprises five parts, as follows:

   i) Part 1: the contractual framework for the expert determination.

   ii) Part 2: the law relating to expert determination and manifest error exception clauses.

iii) Part 3: the dispute between the parties and how the expert resolved it.

iv) Part 4: did the determination contain "manifest errors"?

v) Part 5: conclusion.

Part 1: the contractual framework for the expert determination

9. Clause 50 of the Agreement provides, in relevant part:

> "Any dispute between the Grantor and the Concessionaire which… relates to… [Clause] 20 (Usage Fee for Use of the Stadium and Other Payments)… must be determined by an expert in accordance with this Clause 50 (Expert Determination) (a **Matter for Expert Determination**), [and] shall be resolved in accordance with this Clause 50 (Expert Determination).
>
> 50.2. A Matter for Expert Determination shall be referred at the request of either the Grantor or the Concessionaire (a **Request**), for determination by an independent expert. The Grantor and the Concessionaire shall agree on the appointment of the expert and shall agree with the expert the terms of his appointment.
>
> 50.3 The expert appointed may be an individual… and shall be generally recognised as an expert with a specialist capacity or area of knowledge in relation to the relevant issues that both the Concessionaire and the Grantor agree is relevant to the Matter for Expert Determination.
>
> 50.5 An expert appointed pursuant to this Clause 50 (Expert Determination) shall act on the following basis:
>
> (a) on his appointment, the expert shall confirm his neutrality, independence and the absence of conflicts in determining the Matter for Expert Determination;
>
> (b) the expert shall comply with the terms of this Agreement and act as an expert and not as an arbitrator
>
> (c) the expert's determination shall (in the absence of manifest error) be final and binding on the Grantor, the Club and the Concessionaire and not be subject to appeal;
>
> (d) the expert shall decide the procedure to be followed in the determination and shall be requested to make his determination in writing within 30 days after his appointment or as soon as practicable thereafter;
>
> (e) the expert shall determine how and by whom the costs of the determination, including the fees and expenses of the expert, are to be paid; and
>
> (f) pending the expert's decision as to the costs of the determination, the costs shall be borne equally by the Concessionaire and the Grantor".

10. The dispute between WHH and E20 having arisen, on 14 December 2022 the parties entered into an agreement with the expert they had jointly chosen to determine that dispute, Mr Terence Mowschenson KC. I refer to this agreement as "the Expert Agreement".

11. The recitals to the Expert Agreement contained a definition of "the Dispute" to be resolved by the expert: "whether a Stadium Premium Amount is due to the First Party [E20] from the Second Party [WHH] in respect of an Option Agreement entered into by the Second Party [WHH] on 10 November 2021". I note in passing that this definition was erroneous: WHH had not entered any Option Agreement on 10 November 2021. The option agreement that gave rise to the dispute was the Option as described above, to which the relevant parties were Mr Sullivan and 1890 Holdings.

12. The Expert Agreement recorded that the expert had agreed to accept the reference on the following terms, in relevant part:

> "2. The Parties agree that the Expert will resolve the Dispute by expert determination ("the Expert Determination"). The Expert will act as an expert, not as an arbitrator.
>
> 4. The Expert Determination will lead to a binding determination which must be in accordance with the Agreement [this term was not defined in the Expert Agreement, but presumably the parties were referring to the Agreement as defined earlier in this judgment].
>
> 8. The Parties and each of them agree with each other, and with the Expert, that the Expert shall:
>
> (1) decide any issues of fact or opinion on the material provided to the Expert by the Parties and each of them
>
> (2) be under no duty to the Parties or to each of them to make any inquiries or investigations of his own and
>
> (3) be entitled to proceed to give his Decision should one or both Parties fail to act in accordance with the procedures decided by the Expert
>
> 10. The Decision of the Expert shall include reasons and will accord with clause 14 of the Agreement [the reference to Clause 14 of the Agreement is erroneous, as that clause concerns public liability insurance]
>
> 18. The Parties agree that they are not permitted to challenge the Decision in any legal proceedings or otherwise, save where such challenge arises as a result of manifest error or fraud on the part of the Expert.
>
> 19. The Parties expressly acknowledge that the Expert shall not be liable to the Parties for any act or omission whatsoever in connection with this Expert Determination.
>
> 21. Neither Party will call the Expert as a witness, consultant, or in any other capacity in any litigation or arbitration or other dispute resolution process in relation to the Dispute and the Expert will not act voluntarily in such capacity without the written agreement of both parties".

13. The contractual framework accordingly provided as follows.

14. First, the expert was instructed to act as such and not as an arbitrator. The difference between the two was described by Cooke J in *Bernhard Schulte GmbH & Co v Nile Holdings Ltd* [2004] EWHC 977 (Comm), [2004] 2 Lloyd's Rep 352, at [95]:

> "There is an essential distinction between judicial decisions and expert decisions, although the reason for the distinction has been variously expressed.

> There is no useful purpose in phraseology such as 'quasi judicial' or 'quasi arbitral' as Lord Simon made plain in *Arenson* [*Arenson v Arenson* [1977] AC 405] and although the use of the word 'expert' is not conclusive, the historic phrase 'acting as an expert and not as an arbitrator' connotes a concept which is clear in its effect. A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves."

15. Here, the express provisions of the expert's remit did not forbid him from carrying out his own investigations, forming his own opinion or coming to his own conclusions. He was not obliged to make his determination within the bounds of the submissions made to him by the parties; he was retained to resolve the dispute by using his expertise to make a correct determination.

16. Second, the expert's instruction to decide any issues of opinion put before him, in my judgment, clearly covers his deciding issues of law.

17. Third, neither of the parties were to have recourse to the expert in respect of any act or omission of his "whatsoever". The only remedy open to a party in any circumstance, therefore, was to establish that the expert determination was not binding as a result of manifest error or fraud on the part of the expert.

Part 2: the law relating to expert determination and manifest error exception clauses

The starting point: agreements are to be kept to

18. Where two parties to a contract have agreed that an expert shall be tasked with determining a question of importance to them and that they will be bound by the determination, the starting point is that they will be held to their agreement as long as the expert has not departed from his instructions and absent fraud or bad faith: *Jones & Ors v Sherwood Computer Services plc* [1992] 1 WLR 277, CA.

19. It was once the law that any mistake on the part of the expert made while loyally seeking to comply with his instructions would vitiate the entire report, but that view of the law was rejected in the 1970s for the reasons explained by Simon Brown LJ in *Veba Oil Supply & Trading GmbH v Petrotrade Inc ("The Robin")* [2001] EWCA Civ 1832, [2002] CLC 405 at [22]:

> "I come next to this court's decision in *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 upholding an expert's report on the basis that the experts had done precisely what they had been instructed to do. In the course of a judgment which considered a large number of authorities, Dillon LJ noted first, the development of the law in the mid-1970s establishing that an expert could be liable for damages if he had acted negligently in giving his certificate (see the House of Lords' decisions in *Sutcliffe v Thackrah* [1974] AC 727 and *Arenson v Arenson* [1977] AC 405); secondly, that this required reconsideration of the principle that a certificate could be vitiated for mistake (how could an expert be liable for a negligent mistake in giving a certificate if the effect of that mistake was that the certificate was not binding on the parties?); and thirdly, that accordingly, in *Campbell v Edwards* [1976] 1 WLR 403 and *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Ll Rep 175, this court 'look[ed] at the question of setting aside certificates of experts on

grounds of mistake afresh in light of the principle that the expert or valuer can be sued for negligence'."

The 'manifest error' exception

20. *Veba* was decided on the basis that the experts had materially departed from their instructions: they had been instructed to assess the quality of gasoil by using the American Society of Testing and Materials' method number D1298, but they had not used that method. It followed that the parties had not received the determination they had agreed to be bound by. The contract between the parties had also provided they would not be bound by the expert's determination as to quality if it contained "manifest error". Simon Brown LJ considered what might amount to a manifest error and what the consequences of such an error would be:

> "30. Although that conclusion is sufficient to dispose of the appeal, I would touch briefly on the alternative basis for decision relied upon by the Buyers, the reference in clause 10 to 'manifest error'. Morison J below went no further than to say that he was 'inclined to the view that there was a manifest error here, due to the wrong test being used'.
>
> 31. Morison J had previously considered the meaning of "manifest error" in *Conoco (UK) Ltd v Phillips Petroleum (unreported, 19 August 1996)* where, following *dicta* in earlier cases, he held that manifest error referred to: 'oversights and blunders so obvious as to admit of no difference of opinion'.
>
> 32. The question then arising is whether it is relevant to consider whether the error is one that affected the result. Considering that question in *Conoco v Phillips*, Morison J said this:
>
> > '… it seems to me that there is no room for any debate as to whether the oversight or blunder would or would not have made any material difference to the result. If it could be shown that there was a manifest error then in my judgment that would be an end of the case. If fraud was shown, I cannot accept that it would be open to debate as to whether the fraud did or did not affect the result; so also would manifest error.'
>
> 33. I confess to some difficulty with this approach. Fraud, of course, would vitiate the determination irrespective of whether it affected the result: 'Fraud or collusion unravels everything' (per Lord Denning in *Campbell v Edwards*). The exception for 'manifest error', however, seems to me of a rather different character and to be designed essentially to fill the gap in the law created by the development to which I have already referred: the overthrow of the *Dean v Prince* principle of setting aside determinations for mistake. Nowadays, if parties wish to contract on the basis that they will not be held to mistakes made by the expert in the course of carrying out his instructions, they must needs include a term like this with regard to manifest error. But if they do, is it then really to be said that provided only the mistake is obvious, the determination will be avoided irrespective of whether it could affect the outcome? In this context I am inclined to think not. Take the very error committed in *Frank H. Wright (Constructions) Limited v Frodoor*, the erroneous inclusion of a 'not' in the report. I do not think that that ought properly to be regarded as a 'manifest error'. Rather I would extend the 'definition' of manifest errors as follows: 'oversights and blunders so obvious *and obviously capable of affecting the determination* as to admit of no difference of opinion'. (emphasis added)".

21. It is worth noting that even though what Simon Brown LJ termed, at [26(iii)] "the modern law" regarding the effect of expert mistakes was founded on the realisation that experts could be sued for negligence, it has nowhere been said that for an expert's error to be recognised as "manifest" it must effectively be found that the expert has acted negligently. It is perfectly possible to be in error, particularly regarding the law, without being negligent. The difficulty is identifying whether any error that has been established should be characterised as "manifest".

22. As in *Veba* itself, a common circumstance in which the court is required to consider the effect of alleged mistakes by an expert is in the context of expert certification of facts. Such certification is usually provided for in conclusive evidence clauses, by which the parties to a contract have agreed what shall amount to adequate proof of a relevant fact. Clauses such as this exist to prevent disputes arising between the parties by providing for a reliable external measurement of a critical value. Doubtless for the reason given by Simon Brown LJ in *Veba*, it is common for the parties to provide in such clauses for a measure of protection against error on the part of the expert, by way of a "manifest error" exception: a certificate will be binding in the absence of manifest error.

23. There are many cases in which challenges to an expert determination of a single datum have been considered and much of the law relating to the meaning of "manifest error" exceptions has been developed in the context of contracts providing for the certification of a fact within a conclusive evidence clause: see, for example, *Society of Lloyds v Fraser* [1998] Lloyd's Rep IR 156 CA (maximum potential liability of an insurer); *Galaxy Energy International Ltd (BVI) v Eurobunker SpA* [2001] Lloyd's Rep 725 and *Veba* (technical characteristics/ quantity and quality of product shipped in bulk); *IIG Capital LLC v Van der Merwe* [2008] EWCA Civ 542 and *North Shore Ventures v Anstead Holdings* [2011] EWCA Civ 230, [2011] 2 Lloyd's Rep 45 (sum owed by a debtor which must be paid by a guarantor); *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264, [2018] BLR 225 (certification of completion of milestones in a contract to repair, maintain, manage and operate a road network).

24. The parties before me were agreed that the most authoritative summary of the usual likely meaning of "manifest error" is that contained in the recent decision of the Supreme Court in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, [2023] 1 WLR 575. That case concerned a lease which provided that a landlord's certification of the amount due from the tenant by way of its share of the total cost of providing various services and expenses was conclusive evidence of the sum due from the tenant "in the absence of manifest or mathematical error or fraud". The landlord had served certificates on the tenant in support of claimed service charges for two years, which the tenant then refused to pay on the basis that the certificated total costs towards which it was being asked to contribute included items of expenditure that were unnecessary and fell outside the terms of the lease. The landlord sued and sought summary judgment; the tenant defended by asserting that the certificates were not conclusive evidence of any sums due because they contained manifest errors. Lord Hamblen JSC said this at [30] to [34]:

> "Manifest error
>
> 30. The narrowness of the permitted defences of 'manifest or mathematical error or fraud' is relevant to the implications of the interpretation that the landlord's certification is conclusive subject only to those defences. 'Mathematical error' and 'fraud' are self-explanatory terms but the meaning of 'manifest error' is less clear. Whilst its precise meaning may depend on the particular contract and

context in which it is used, there are a number of authorities which have considered the meaning of these words in conclusive evidence clauses.

31. An often cited and applied explanation of the meaning of 'manifest error' is that given by Lewison J in *IIG Capital LLC v Van Der Merwe* [2008] 1 All ER (Comm) 435 at para 52: "A 'manifest error' is one that is obvious or easily demonstrable without extensive investigation." This formulation was approved by the Court of Appeal in the same case [2008] 2 Lloyd's Rep 187 (per Waller LJ at paras 33–35) and more recently in *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] BLR 225 (per Jackson LJ at paras 83–87).

32. Guidance as to what is meant by being 'obvious or easily demonstrable' is provided by the Court of Appeal's decision in *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 All ER 703 in which it was stated that manifest errors were 'oversights and blunders so obvious *and obviously capable of affecting the determination as to admit of no difference of opinion*' (per Simon Brown LJ at para 33, his emphasis). This has been applied in a number of recent first instance decisions – see, for example, *Septo Trading Inc v Tintrade Ltd* [2021] 1 Lloyd's Rep 258 (Teare J), *Flowgroup plc v Co-operative Energy Ltd* [2021] Bus LR 755 (Deputy High Court Judge Adrian Beltrami QC), *Euler Hermes SA (NV) v Mackays Stores Group Ltd* [2022] EWHC 1918 (Comm) (Deputy High Court Judge Philip Marshall QC).

33. What is meant by being demonstrable 'without extensive investigation' may depend on the context. Unless the contract makes it clear that only the certificate can be considered, extrinsic evidence will be admissible—see *Amey Birmingham* at para 87. Although it may not be necessary to be able to demonstrate the error immediately, in most cases this will need to be done readily – ie by an investigation limited in both time and extent. In so far as the decision of the Court of Appeal in *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] Ch 31 suggests otherwise, I agree with Flaux J's observation in *ABM Amro Commercial Finance plc v McGinn* [2014] 2 Lloyd's Rep 33, at paras 51–52 that it 'has to be viewed with some circumspection' and that on any view it cannot depend on 'a full blown trial'.

34. It is therefore clear that the permitted defences of 'manifest or mathematical error or fraud' are indeed narrow. An arguable error will not suffice, however well founded the allegation of error may ultimately prove to be".

The 'manifest error' exception in expert dispute resolution clauses

25. As Lord Hamblen JSC observed at [30], the precise meaning of "manifest error" depends on the particular contract and the context in which it is used; likewise, the degree of investigation which is permissible to demonstrate the error. One context of particular relevance to the instant claim is where contracting parties agree that in the event a dispute arises between them, they will remit that dispute for resolution to an expert (acting as such and not as an arbitrator). In such circumstances, and as happened here, the parties usually agree that the expert shall give reasons for the conclusions he or she has reached.

26. The parties were agreed that I should consider the decision of Thomas J in *Invensys plc v Automotive Sealing Systems Ltd* [2002] 1 All ER (Comm) 222. In that case, Thomas J held at [17]:

"In construing the present terms of reference to the Expert in this case, although it is clear that the parties desired finality, they provided for the exception of

'manifest error' in a determination which was to contain reasons. Therefore, although very substantial weight must be given to the parties' desire to obtain finality, they must have contemplated an examination of the reasoning of the determination to see if it disclosed any manifest error"

27. Thomas J went on in that case to consider what material he could consider when examining the reasoning of the expert. At [21] to [22], he held as follows:

> "21. It seems to me that in deciding whether there was a manifest error, then it is permissible to refer to documents expressly referred to in the determination and forming an essential part of the determination. As the Expert's conclusion concerns the interpretation of that agreement, it is difficult to see how the reasoning can be examined without reference to the whole of that agreement; it is common place in an appeal on a question of law under the Arbitration Act 1996 which revolves on the interpretation of a contract to look at the whole of the contract, even if only a clause or two is expressly referred to in the Award; that is because in interpreting a clause of an agreement, the clause has to be interpreted in the context of the agreement as a whole. It therefore seems to me permissible, in considering whether there is a manifest error in the determination, to have regard to the terms of the original agreement. For similar reasons it seems to me that it is also permissible to examine the submissions expressly referred to; an essential part of the determination was based upon the Expert's understanding of the submissions and in the further reasons the Expert has expressly referred to certain paragraphs. As it is not possible to determine whether there was a manifest error without examining those further paragraphs to which the Expert has made specific reference, I consider that it is permissible to examine them.
>
> 22. Thus, construing this particular agreement for an expert determination where the parties have provided for a reasoned determination which is to be final and binding save for manifest error, it is in my judgment permissible to examine the additional materials that form an essential part of those reasons. However it is important, as was said in *Toepfer v Continental Grain*, to stress that finality is an important factor; that it is not enough that the Expert has made a mistake; there must be a manifest or plain and obvious error. The effect of the word 'manifest' must not be diluted; the finality of the determination must not be subject to attack because another view could, in the light of further argument, properly be taken of the matters dealt with during the determination. It must be proved by the party disputing the determination that there was a manifest error in the determination".

28. The parties prepared a bundle for this hearing containing a range of material, some of which must have been before the expert: I note, in this connection, that in the skeleton arguments the parties prepared for the oral hearing before the expert there are references to documents in a bundle. I do not have a copy of that bundle. There was also an agreed attendance note of the hearing, which, although clearly not a transcript, gave a sense of what oral submissions were made to the expert. I have proceeded on the basis indicated by Thomas J in *Invensys* and in Parts 3 and 4 of this judgment I have taken into account:

i) The Agreement;

ii) The written submissions made to the expert;

iii) The agreed attendance note of oral submissions made to the expert;

iv) The expert's written determination;

v) Such documents as are mentioned in (ii), (iii) and (iv) above.

29. Having regard to the guidance in *Sara & Hossein Asset Holdings* and *Invensys*, in my judgment my consideration of these materials cannot amount to impermissible "extensive" investigation: it is, rather, investigation of the type that the parties must be taken to have agreed could take place in the event that one of them challenged the outcome of a reasoned expert determination on the basis that it contained a manifest error. It is also relevant, in my judgment, that there was no possible remedy for an aggrieved party other than by challenging a determination on the ground of manifest error or fraud: a fairly thorough examination of the expert's determination is consistent with the fact that this would be the one and only chance of avoiding its consequences if they were indeed affected by error.

The Court's task

30. At first glance, it might be thought that the court's task when addressing WHH's challenge in this case is in substance no different to the determination of an appeal: the court has all the material before the expert; it has his reasoned determination; and, given the expert was a very experienced commercial barrister, the determination under challenge looks similar to a judgment. For all these superficial similarities to the determination of an appeal, however, that is not the court's task. Rather, the position is as follows:

i) The expert was not sitting as an arbitrator and there can be no appeal from his decision;

ii) On the contrary, the parties have agreed to be bound by the expert's determination "in the absence of manifest error";

iii) WHH has asserted to E20 that it is not bound by the expert's determination because, it contends, there are manifest errors in that determination;

iv) It is not the court's role to decide that the expert erred in law. Even if the court might reach a different conclusion to the expert on a legal question, that does not automatically lead to the conclusion that the expert's determination contained a manifest error: *Walton Homes Ltd v Staffordshire County Council* [2013] EWHC 2554 (Ch), [2014] 1 P&CR 10, per Peter Smith J at [46].

v) As Mr Adrian Beltrami QC, sitting as a deputy high court judge, held in *Flowgroup* at [32], there is no reason why, when an expert has been retained to make a determination on matters of contractual interpretation, the party challenging that determination should not have to satisfy what Mr Beltrami QC called "the manifest error test", by which he meant (judgment at [18]) the definition given by Simon Brown LJ in *Veba*.

vi) In short, the court's role is to decide if WHH has proved the manifest errors it contends for. As Thomas J put it in *Invensys* at [48]:

> "It is not enough for the purchasers to show that their interpretation of the agreement is right; they have to show that the Expert's interpretation of the agreement was obviously wrong"

31. Having set out the framework for resolving the issue before me, I now turn to the dispute between the parties and how the expert resolved it.

Part 3: the dispute and how the expert resolved it

Clauses 20 and 21 of the Agreement

32. Clause 20 of the Agreement is titled "Usage fee for the Stadium and Other Payments". It comprises twenty sub-clauses of which only the following are relevant for present purposes. In the quotations from the Agreement which follow, I have replaced the words "Concessionaire" and "Grantor" with "WHH" and "E20" respectively.

> "20.10 [WHH] must notify [E20] of any Qualifying Transaction and, (except for an Excluded Transaction) on the request of [E20] provide all the Relevant Information and information required to accurately calculate… the Distributions.
>
> 20.11 Subject to Clauses 20.12 and 20.13…, if the Adjusted Consideration is equal to, or greater than, the Threshold Amount, [WHH] shall, in respect of payments of Adjusted Consideration payable on or about the date of the Qualifying Transaction, on, or before, the date falling 30 days after the date of the Qualifying Transaction, pay to [E20] an amount equal to the Stadium Premium Amount.
>
> 20.12 If any Adjusted Consideration is payable after the date of the Qualifying Transaction, the obligation to pay any further Stadium Premium Amounts in respect of a Qualifying Transaction will arise on the date falling 30 days after payment of the relevant Adjusted Consideration".
>
> 20.13 [of no application in this case]
>
> 20.14 The calculations set out in Clauses 20.10 to 20.13 shall be made in a manner that is consistent with the examples set out in paragraph two to three of Schedule 15 (Example calculations)".

33. Clause 1 of the Agreement contained 27 pages of defined terms used within the Agreement. The definitions in themselves often contained references to other defined terms. I now set out Clauses 20.10 to 20.12 again, with all the defined terms that are relevant to this judgment expanded to state the full definitions contained in Clause 1.

Clause number	Clause wording/ Definitions
20.10	[WHH] must notify [E20] of any **Qualifying Transaction** and, (except for an **Excluded Transaction**) on the request of [E20] provide all the **Relevant Information** and information required to accurately calculate the **Shareholder Loan Amounts** and the **Distributions**.
	Qualifying Transaction means any sale or transfer of any interest in the Club (directly or indirectly) by a Relevant Shareholder [as defined earlier in this judgment at para 3] (including any sale of any interest in shares, right to purchase shares, share purchase option or similar) or any transaction having the same or a substantially similar effect
	Excluded Transaction: not relevant
	Relevant Information means any information that is relevant to the value of the Adjusted Consideration provided in relation to the Qualifying Transaction
	Adjusted Consideration is more conveniently addressed in

Clause number	Clause wording/ Definitions
	connection with Clause 20.11: see below
	Shareholder Loan Amount means the principal amount of any subordinated loan or any similar debt instrument that has been provided to [WHH] by a shareholder as at the date that the Qualifying Transaction is signed
	Distributions means any dividend, payment, loan or any other payment by [WHH or its subsidiaries] to a Relevant Shareholder, for the period starting on the date of this Agreement and ending on the date of a Qualifying Transaction, excluding an amount of directors fees in an amount of up to £250,000 each per annum, that may be paid to no more than two Relevant Shareholders as remuneration for services provided as a director of [WHH] in the ordinary course of business
20.11	Subject to Clauses 20.12 and 20.13…, if the **Adjusted Consideration** is equal to, or greater than, the **Threshold Amount**, [WHH] shall, in respect of payments of Adjusted Consideration payable on or about the date of the Qualifying Transaction, on, or before, the date falling 30 days after the date of the Qualifying Transaction, pay to [E20] an amount equal to the **Stadium Premium Amount**.
	Adjusted Consideration means the **Consideration** plus the aggregate of: (a) Distributions; and (b) Excess Loan Amounts, for the Qualifying Transaction, in each case to be calculated as at the date of the most recent Qualifying Transaction
	Consideration means, for a Qualifying Transaction: (a) the amount paid or to be paid by a purchaser in that Qualifying Transaction for 100% of the share capital in the Club (to be calculated net of legal and advisory costs (but only to the extent that they are reasonable) incurred in relation to the Qualifying Transaction). (b) if 100% of the share capital in the Club is not sold in that Qualifying Transaction, an extrapolation of the value of 100% of the share capital in the Club on the basis of the consideration paid (or to be paid) for the percentage of the shares sold or to be sold; or (c) if any share purchase option (or similar) in the Club is being sold in that Qualifying Transaction, an extrapolation of the value of 100% of the share capital in the Club on the basis of the consideration paid (or to be paid) for the shares sold [or][1] the consideration to be paid for the share purchase option (or similar).

[1] In the Agreement, the word "of" appears here, but the parties were agreed that this was a typographical error for "or".

Clause number	Clause wording/ Definitions
	Threshold Amount means £125,000,000
	Stadium Premium Amount means the **Agreed Percentage Amount** multiplied by the ratio of A:B, where 'A' is the shares or rights to shares in the Club that are the subject of the Qualifying Transaction and 'B' is the total issued shareholding in the Club
	Agreed Percentage Amount means for a Qualifying Transaction, the aggregate of the following amounts, calculated by reference to the Adjusted Consideration: (a) 7.5% of the amount by which the Adjusted Consideration is greater than the Threshold Amount up to £150,000,000 (b) 10% of the amount by which the Adjusted Consideration is greater than £150,000,000 up to £200,000,000 (c) (i) 20%, if the Qualifying Transaction is signed on a date falling during the first five years of the **Qualifying Period**; or (ii) 12.5%, if the Qualifying Transaction is signed on a date falling between the 6th and 10th years (inclusive) of the Qualifying Period, of the amount by which the Adjusted Consideration is greater than £200,000,000 up to £300,000,000 and (d) (i) 30%, if the Qualifying Transaction is signed on a date falling during the first five years of the **Qualifying Period**; or (ii) 20%, if the Qualifying Transaction is signed on a date falling between the 6th and 10th years (inclusive) of the Qualifying Period, of the amount by which the Adjusted Consideration is greater than £300,000,000
	Qualifying Period means the period that starts on the date of this Agreement and ends on the date falling 10 years after the date of this Agreement.
20.12	If any Adjusted Consideration is payable after the date of the Qualifying Transaction, the obligation to pay any further Stadium Premium Amounts in respect of a Qualifying Transaction will arise on the date falling 30 days after payment of the relevant Adjusted Consideration.

34. By Clause 21 of the Agreement, all monetary amounts (save for the Threshold Amount) referred to in the Agreement were to be indexed by Retail Price Inflation after April 2012.

The transactions on 10 November 2021

35. On 10 November 2021, a series of transactions were entered involving 1890 Holdings as counterparty:

    i) WHH issued 688 new ordinary shares in itself to 1890 Holdings for £125,000,000;

    ii) Mr Sullivan and the trustees of The Sullivan Trust sold 84 ordinary shares in the Club to 1890 Holdings for £11,605,608, i.e., £138,162 per share;

    iii) Mr Gold sold 3 ordinary shares in the Club to 1890 Holdings for £414,486, i.e., £138,162 per share;

    iv) Gold Group International Limited sold 100 ordinary shares in the Club to 1890 Holdings for £13,816,200, i.e., again, £138,162 per share.

    v) Mr Sullivan entered the Option with 1890 Holdings, with a company called EP Investment SARL also party to the Option as guarantor of 1890 Holdings' obligations.

36. A copy of the Option was before the expert and was in the bundle for the trial before me. The key features of the Option for present purposes were as follows.

37. Mr Sullivan granted put and call options to 1890 Holdings in relation to all the shares in WHH owned by him and by The Sullivan Trust: 1,022 ordinary shares.

38. Clause 2 of the Option provided as follows:

> "2.1 In consideration of the mutual obligations and undertakings in this agreement:
>
> 2.1.1 and in consideration for payment, by 1890s holdings, of the sum of £18,000,000… in cash and in full to [Mr Sullivan] (which payment will be made simultaneously with 1890s holdings becoming (i) the legal and beneficial owner of 688 ordinary shares of £1.00 each in the capital of [WHH] by means of the increase of the registered capital of [WHH]; and (ii) the beneficial and, subject only to stamping, legal owner of 240 ordinary shares of £1.00 each in the capital of [WHH] by means of purchase of the shares from certain of the current shareholders of [WHH]) [Mr Sullivan] grants to 1890s holdings an option, exercisable by the [sic] 1890s holdings under this clause 2, to acquire all (not only some) of the Call Option Shares from [Mr Sullivan] on the terms of this agreement; and
>
> 2.1.2 1890s holdings grants to the Put Option Sellers [effectively, Mr Sullivan] an option, exercisable by the Put Option Sellers under this clause 2, to require 1890s holdings to buy all (not only some) of the Put Option Shares from the Put Option Sellers on the terms of this agreement"

39. Mr Sullivan was entitled to keep the £18,000,000 option fee whether or not the put or call option was exercised.

40. The call option had to be exercised by 1890 Holdings before the end of 25 March 2022. The consideration payable on exercise of the call option was simply stated at one number: £282,000,000. The £18,000,000 option fee formed no part of any consideration that might be payable under the call option.

41. The put option had to be exercised within the period of one year commencing with the date upon which (putting matters simply) 1890 Holdings acquired a controlling interest in WHH. The consideration payable on exercise of the put option by Mr Sullivan was to be calculated by a formula expressed in Schedule 1 to the Option. The formula contains a number of permutations founded on different factual assumptions: until and unless the put option is exercised, it will not be possible to know precisely what the consideration due will be. The £18,000,000 option fee forms no part of any consideration that might later be payable.

42. The call option was not exercised before the end of 25 March 2022 and thus lapsed after that date.

The dispute

43. The expert was sent, among other things, two documents which look like statements of case: E20 styled itself "claimant" and produced a "Statement of Claim" and WHH styled itself "defendant" and produced a "Defence".

44. From these quasi statements of case, it is clear the dispute was as follows:

    i) WHH accepted that a Stadium Premium Amount was payable in relation to the three share sales by Mr Sullivan and Mr Gold. It had provided the Relevant Information to E20 along with a spreadsheet which processed the numbers from the Relevant Information and identified a Stadium Premium Amount due in respect of the three share sales.

    ii) The three share sales were treated by WHH in the spreadsheet as being effectively one transaction.

    iii) E20 asserted that the three share sales formed part of a single Qualifying Transaction together with the Option.

    iv) WHH asserted that the Option constituted a different Qualifying Transaction to the share sales.

45. The practical effect of the two different approaches is best illustrated by reference to the calculations prepared by each party, which were before the expert and were before me.

46. It is convenient first to run through the calculation of the Stadium Premium Amount due on the three share sales. The parties prepared figures which aggregated these three transactions, but whether these are viewed as three separate Qualifying Transactions or one single Qualifying Transactions makes no difference, as will be seen below.

47. The calculation of the Stadium Premium Amount for the three share sales follows the following steps:

    i) 240 shares were sold to 1890 Holdings, but of those only 187 were sold by Relevant Shareholders: 84 by Mr Sullivan, 103 by Mr Gold (in two tranches of

3 and 100).

ii) All 187 shares were sold for the same price: £138,162 per share. Thus, the total price paid for the 187 shares was £25,836,294.

iii) The parties were agreed that the sale of these shares amounted to a disposal by the Relevant Shareholders of an indirect interest in the Club, because the Club was wholly owned by WHH.

iv) Assume all three sales fall to be treated as one transaction. The Consideration for the sales is that provided for in sub-clause (b) of the definition of Consideration: 'if 100% of the share capital in the Club is not sold in that Qualifying Transaction, an extrapolation of the value of 100% of the share capital in the Club on the basis of the consideration paid (or to be paid) for the percentage of the shares sold or to be sold'.

v) After the issue of the 688 new shares, the total number of shares in WHH was 3,438. There are various ways of extrapolating the Consideration, i.e., notional value of 100% of WHH, of which two seem most obvious:

a) 3,438 x £138,162 = £475,000,956

b) 3,438/187 x £25,836,294 = £475,000,956

vi) To this figure for Consideration must be added the Distributions and the Excess Loan Amounts. There were no Distributions, and the figure for Excess Loan Amounts was £71,515. Thus, the Adjusted Consideration was £475,072,471. For convenience, I refer to this figure as the "**Share Sale Adjusted Consideration**".

vii) Clearly, the Share Sale Adjusted Consideration was greater than the Threshold Amount of £125,000,000.

viii) Applying the rules in the Agreed Percentage Amount to the values in that defined term (adjusted for RPI):

a) 7.5% of the difference in the first layer (£187,577,511 less £125,000,000 = £62,577,511) gives £4,693,313.

b) 10% of the second layer (£250,103,348 less £187,577,511 = £62,525,837) gives £6,252,584.

c) The transaction(s) having taken place on a date falling between the 6th and 10th years of the Qualifying Period (i.e., between 2019 and 2023), 12.5% of the third layer (£375,155,023 less £250,103,348 = £125,051,674) gives £15,631,459;

d) The transaction(s) having taken place on a date falling between the 6th and 10th years of the Qualifying Period (i.e., between 2019 and 2023), 20% of the fourth layer (£475,072,471 less £375,155,023 = £99,917,448) gives £19,983,490.

e) The sum of the percentage amounts due for each layer – i.e., the Agreed Percentage Amount – is £46,560,846. I refer to this number as the "**Share Sale Agreed Percentage Amount**"

ix) The Stadium Premium Amount due is £46,560,846 multiplied by the ratio of A:B where A = the 187 sold shares and B = the 3,438 total number of shares: £46,560,846 *187/3,438 = £2,532,541.

48. As is clear from the foregoing, because the calculation of "Consideration" requires the identification of a notional valuation of the entire shareholding then, as long as the price paid per share is the same in each three transactions, the Consideration figure will always be the same; and hence the Share Sale Adjusted Consideration and the Share Sale Agreed Percentage Amounts will always be the same. When the Stadium Premium Amount is calculated, the number of "A" shares in the A:B ratio is of course different for each transaction; but the total of the three is the same:

i) For the 84 shares, the Stadium Premium Amount is: £46,560,846 *84/3,438 = £1,137,612.29

ii) For the 3 shares, the Stadium Premium Amount is: £46,560,846 *3/3,438 = £40,629

iii) For the 100 shares, the Stadium Premium Amount is: £46,560,846 *100/3,438 = £1,354,300.

iv) The sum of the three results is £2,532,541.

49. The question then arises, what, if any, Stadium Premium Amount is due in relation to the Option.

50. The number of shares in relation to which an interest was sold under the Option was 1,022; the option price was £18,000,000; the call option consideration was £282,000,000; and the put option consideration is not yet capable of being calculated.

51. The provisions of sub-clause (c) of the definition of Consideration give the parties choices about what figure is to stand as the Consideration if sub-clause (c) applies: "if any share purchase option (or similar) in the Club is being sold in that Qualifying Transaction, an extrapolation of the value of 100% of the share capital in the Club on the basis of the consideration paid (or to be paid) for the shares sold [or] the consideration to be paid for the share purchase option (or similar)". Given that at the time the parties were considering this question, the call option had lapsed and the put option had not been exercised, the only choice available was an extrapolation of the notional value of WHH on the basis of the consideration to be paid for the Option, i.e., £18,000,000.

52. The Stadium Premium Amount was thus to be derived from a calculation of the Consideration on the basis of the price paid for the Option, i.e., £18,000,000:

i) The number of shares in relation to which an interest was being sold was 1,022. The consideration payable for the option in relation to each share was thus £18,000,000/ 1,022 = £17,612.52

ii) The Consideration, i.e., notional value of 100% of WHH, would (using the same calculation performed by the parties) thus be 3,438/1022 x £18,000,000 = £60,551,859.

iii) The parties treated the Distributions and Excess Loan Amounts as having already been accounted for in relation to the shares sales. There was thus no need to add a figure for Distribution or Excess Loan Amounts; and so the Adjusted Consideration was unchanged from the Consideration: £60,551,859.

53. For convenience, I describe this figure of £60,551,859 as "**the Option Adjusted Consideration**".

54. £60,551,859 is clearly below the Threshold Amount. WHH accordingly maintained that no Stadium Premium Amount can be due in relation to the fee paid for the Option.

55. E20, by contrast, contended that since, on its case, there is only one Qualifying Transaction, so therefore the Option Adjusted Consideration figure should be simply added on to the Share Sale Adjusted Consideration from the sale of the shares. If that is done, then the there is an <u>additional</u> £60,551,859 which falls above the uppermost band (post indexation) of £375,155,023.

56. E20 then performed the following mathematical operations:

    i) On the basis that the Option Adjusted Consideration of £60,551,859 was being assessed for Agreed Percentage Amount as if it fell above the uppermost band, E20 calculated 20% of £60,551,859. That operation produced a figure of £12,110,372. I refer to this figure as the "**Option Agreed Percentage Amount**".

    ii) Then E20 performed the calculations required to arrive at the Stadium Premium Amount, which, it will be recalled, were to take the Option Agreed Percentage Amount and multiply it by the ratio of A:B, where B is "the total issued shareholding in the Club". E20 took as the value for A the 1,022 shares to which the Option agreement related; and for B it took the 3,438 total number of shares.

    iii) The input figure that E20 used for this calculation was £12,110,372. Thus, £12,110,372 *1,022/3,438 = £3,600,000.

57. It is convenient at this point to draw attention to the fact that what E20's calculation involved was arriving at one single figure for Stadium Premium Amount by performing two separate calculations:

    i) The set of calculations to arrive at the component of E20's blended figure which was derived from the Share Sale Adjusted Consideration was based on a sale price per share of £138,162 and on 187 shares being sold out of 3,438 shares in WHH;

    ii) The set of calculations to arrive at the component of E20's blended figure which was derived from the Option Adjusted Consideration was based on an option price per share of £17,612.52 and on the option being granted in relation to 1,022 shares out of 3,438 shares in WHH.

58. What E20 did not do was:

    i) Calculate the figure for the Share Sale Adjusted Consideration (£475,072,471);

    ii) Add to it the figure for the Option Adjusted Consideration (£60,551,859);

    iii) Calculate from the resulting number (£535,624,330) what the Agreed Percentage Amount would be (it would be £58,671,218);

    iv) Prorate that Agreed Percentage Amount to find the Stadium Premium Amount. E20 could not perform this final stage because there is no way of discerning a value for A to use in the formula provided for calculating the Stadium

Premium Amount: one cannot use 187 shares or 1,022 shares, and there is no other value that can be used for A.

The expert determination

59. As already stated, the expert was appointed to act as an expert, not an arbitrator. The parties agreed before me that whatever might have been submitted to the expert, his role remained to come to a determination that was free from manifest error. That being the case, I do not consider it necessary to rehearse the submissions made to the expert: what matters for present purposes is the result, not the process by which it was reached. Furthermore, the arguments made before the expert were substantially repeated before me in the context of WHH's case that the expert determination contains a manifest error, and I address them below when considering that question.

60. The expert's determination is dated 12 February 2023. Over paras 1 to 12, he reviewed the background of the share sales and calculation of the Stadium Premium Amount payable in relation to them and set out the salient facts regarding the Option. Between paras 13 to 24 he set out Clauses 20.10 to 20.14 of the Agreement and the defined terms used within those sub-clauses. Between paras 25 and 36 he set out the issue between the parties, the applicable principles of construction, and the arguments made by E20 and WHH respectively.

61. At paragraph 37 he gave his determination:

> "I determine that in the context of the Agreement and the purpose of any provision for the payment of the Stadium Premium Account, the expression 'any' in Qualifying Transaction is to be construed as 'one or more' and not 'one' as the intention of the parties was to bring a broad range of actions within the ambit of a Qualifying Transaction. Accordingly, the expression Transaction can embrace one or more of the factors described in the description of Qualifying Transaction. Further the sale of the 187 shares and the grant of the Option are to be regarded as being part of the same transaction and hence the same Qualifying Transaction. The fact that there were three Relevant Shareholders selling shares to 1890 [Holdings] and only one of the Relevant Shareholders was a party to the Option Agreement (with an additional party to the Option Agreement as a guarantor) does not prevent the sale of the 187 shares and the Option Agreement falling within the expression Qualifying Transaction as the sale of the 187 shares and the Option Agreement were part of the same deal or arrangement. Furthermore, the definition of Consideration in relation to a Qualifying Transaction requires the application of (a), (b) or (c) to each component of a Qualified [sic] Transaction if there are more than one and, in this case, requires the application of (b) and (c) so that the Additional Premium Amount must be aggregated with the Additional Premium Amount paid in respect of the 187 shares"

62. The outcome of the expert's determination was that WHH was found liable to pay £3,600,000 to E20, as well as E20's costs of the reference to the expert.

<u>Part 4: did the determination contain "manifest errors"?</u>

63. WHH's complaint in these Part 8 proceedings is that the determination set out above contains two manifest errors. The way WHH pleaded these errors was as follows:

i) "The Expert has accepted E20's calculation of the Stadium Premium Amount which was arrived at by applying the percentage scale (in the definition of Agreed Percentage Amount) to a figure for the Adjusted Consideration which

is contrary to the definition at clause 1.1 of the [Agreement], which requires an Adjusted Consideration to be calculation [sic] by reference to the Consideration for the option"

ii) "The Expert has found that the four agreements (ie three sale and one option) constituted a single 'transaction' notwithstanding that they were between different parties and there was no agreement to which all of the participants were parties. Where two agreements are between different parties they cannot as a matter of ordinary English be a single transaction. This finding was also contrary to the definition of Qualifying Transaction and Consideration which necessitated the sale and the option being treated as different Qualifying Transactions".

The First Complaint

64. The first complaint is expressed in the Part 8 Details of Claim at a relatively high level of abstraction and needs some unpacking. Mr Downes clarified in his written and oral submissions that the gravamen of the complaint was that E20's calculation applied the percentage scale to two extrapolated 100% valuations of WHH. By this, he was referring to the point identified above at paragraphs 57 and 58.

65. I have set out above the definition of Consideration in the Agreement, but will do so again in full here:

> "**Consideration** means, for a Qualifying Transaction:
>
> (a) the amount paid or to be paid by a purchaser in that Qualifying Transaction for 100% of the share capital in the Club (to be calculated net of legal and advisory costs (but only to the extent that they are reasonable) incurred in relation to the Qualifying Transaction);
>
> (b) if 100% of the share capital in the Club is not sold in that Qualifying Transaction, an extrapolation of the value of 100% of the share capital in the Club on the basis of the consideration paid (or to be paid) for the percentage of the shares sold or to be sold; or
>
> (c) if any share purchase option (or similar) in the Club is being sold in that Qualifying Transaction, an extrapolation of the value of 100% of the share capital in the Club on the basis of the consideration paid (or to be paid) for the shares sold [or] the consideration to be paid for the share purchase option (or similar)"

66. The definition self-evidently covers three alternative transaction types: (a), (b), (c). The use of the disjunctive "or" shows that Consideration may mean one of three things in relation to any given Qualifying Transaction. There is nothing in the wording of the definition that indicates that Consideration may mean any one or more of the three alternatives for any given Qualifying Transaction.

67. That being so, E20's approach to determining the Stadium Premium Amount by undertaking two separate calculations, each on a different basis, but then blending them into a hybrid calculation, can only be justified if there are words elsewhere in the Agreement that justify such an approach.

68. As Mr Plewman fairly accepted on behalf of E20, there are no express words that compel this approach. E20's case was that if a transaction may be a series of linked transactions, then it must follow in the circumstances here that the Consideration can comprise calculations performed under both sub-clause (b) and (c) of the definition. In this connection, Mr Plewman placed particular emphasis on the contention that Clauses 20.10 to 20.14 were anti-embarrassment provisions: his point was that it must be right that E20 could capture a fair portion of the entirety of the value realised by the Relevant Shareholders from the series of transactions which took place on 10 November 2021.

69. Mr Plewman also referred to the provisions of Schedule 15 to the Agreement, referred to in Clause 20.14. Schedule 15 contains sample calculations of Stadium Premium Amount, but none of the samples illustrates a situation where a Relevant Shareholder has in the course of one transaction sold some shares and granted an option in relation to other shares.

70. In my judgment, the fundamental difficulty with E20's approach is that it requires treating the calculation of the Share Sale Adjusted Consideration and the Option Adjusted Consideration as in some respects linked and in other respects separate.

    i) The Share Sale Adjusted Consideration (£475,072,471) is the product of a calculation based on the sale of 187 shares, i.e., 5.44% of the total number of shares in WHH.

    ii) The Option Adjusted Consideration (£60,551,859) is the product of a calculation based on the granting of option in relation to 1,022 shares, i.e., 29.72% of the total number of shares in WHH.

    iii) The bases of the two Adjusted Consideration figures are thus different: they give notional valuations for the 100% shareholding of two conceptually separate notions. The Share Sale Adjusted Consideration leads to a notional valuation of the entire shareholding of WHH on the assumption that every share had the same value as the 187 that were sold. The Option Adjusted Consideration leads to a notional valuation of the entire shareholding of WHH on the assumption that every share, were it subject to the Option, would have the same value as the 1,022 shares which were subject to the Option.

    iv) To add the Option Adjusted Consideration to the Share Sale Adjusted Consideration is to give an Adjusted Consideration for a transaction which never took place.

71. I cannot, accordingly, see any basis in the Agreement to arrive at the blended valuation for which E20 contended and which the expert accepted. In my judgment, the expert was in error in this respect. That is not, however, the end of the matter, because even if the expert was in error, WHH must still prove that the error was one that should be characterised as "manifest". I return to this below after considering WHH's second complaint.

The Second Complaint

72. WHH's complaint is simply stated:

    i) Where a series of transactions take place with different counterparties in each transaction, then that series of transactions cannot, as a matter of the ordinary usage of the English language, be termed a single transaction.

ii) As a matter of construction of the Agreement, the definitions of Qualifying Transaction and Consideration cannot be reconciled with the proposition that a series of transactions could be treated as a single Qualifying Transaction.

73. I have no hesitation in rejecting the first of these contentions. Whether a series of linked transactions may be termed a single transaction will depend on each case on the nature of the transactions. The sale by a holding company's shareholders of their entire interest to another company can often involve many transactions covering off the position of subsidiary companies; on one level, each such transaction is a single transaction, but the sum of the parts may, without doing any violence to language, be termed a single transaction: "the day we sold the company". Accordingly, I do not consider that the expert can be said to have fallen into error as alleged in this first part of the second complaint.

74. On the construction point, Mr Downes submitted as follows:

i) Clause 20.11 refers to "the" Adjusted Consideration and "the" Stadium Premium Amount".

ii) The definition of Consideration provides that Consideration means "for a Qualifying Transaction" (singular) one of the definitions in sub-clauses (a), (b) or (c);

iii) Within the sub-clauses of the definition of Consideration:

a) Sub-clause (a) provides that in the circumstances provided in that sub-clause, Consideration means "*the* amount paid or to be paid by a purchaser in *that* Qualifying Transaction"

b) Sub-clause (b) provides that in the circumstances provided in that sub-clause, Consideration means an extrapolation on the basis of "*the* consideration paid"…

c) Sub-clause (c) provides that in the circumstances provided in that sub-clause, Consideration means an extrapolation on the basis of "*the* consideration paid".

iv) The Adjusted Consideration is calculated by reference to a single figure (i.e., the Consideration);

v) The Agreed Percentage Amount is to be calculated by reference to one Adjusted Consideration figure; and

vi) Stadium Premium Amount is calculated by applying a single ratio to the Agreed Percentage Amount.

75. Mr Plewman resisted this on the basis that:

i) By Clause 1.4(a) of the Agreement, "(save where the context requires otherwise)… the singular number shall include the plural and vice versa";

ii) The word "transaction" is not a defined term. Thus, the definition of Qualifying Transaction is that it means "any sale or transfer of any interest in the Club (directly or indirectly)… or any transaction having the same or substantially similar effect"; and a series of linked agreements could constitute a "transaction having the" effect of being a sale or transfer of any interest in the Club.

76. The expert's reasoning for his determination on this question was as follows:

> "I consider that the function of (a) (b) and (c) of the definition of Consideration is to describe how the consideration is to be calculated according to the different forms a transaction might take (100 per cent, less than 100 per cent or the grant of an option which might lead to a sale if it is exercised or a combination of (a) (with an option to call on the seller to buy back shares) (b) or (c)) and does not assist the exercise of interpreting the expression Qualifying Transaction. The definition of Consideration does not lead to the conclusion that an option to purchase other shares in an agreement or arrangement to sell share [sic] must be treated as a separate Qualifying Transaction…
>
> WHHL also submitted that the extrapolation of the value of 100 per cent of the share capital in the Club in the case of a sale of less than 100 per cent of the shares combined with the sale of an option might result in a value being reached in excess of the value of 100 per cent of the shares in the Club. That might well appear to be the case when one aggregates the two values obtained in relation to the sale of the shares and the grant of the option in order to calculate the Consideration in accordance with the formula in the definition of Consideration but that is inherent in the formula and would, for example, apply where an option was granted for 95 per cent of the shares and exercised (an example where WHHL agrees that the consideration would include the option price and the strike price). If the option was granted at a substantial price and the strike price was the true market value of the shares the formula for the Agreed Percentage Amount might give rise to a price which might well exceed the value of 100 per cent of the value of the share capital of the Club and that it [sic] is because two events have occurred in relation to the 95 per cent of the shares, (i) the grant of an option over the shares and (2) [sic, sc. "(ii)"] a sale of the shares; i.e. two separate interests in the same shares have been disposed of. Furthermore, the reference to the value of 100 per cent of the shares in (b) and (c) is not a reference to their true market value but a value derived from 'the basis of the consideration paid (or to be paid) for the shares' which might bear no relation to the true value of the shares but is entirely dependent upon the subjective assessment of the parties to the sale or option as to what price they are prepared to pay."

77. I have already held above that the expert's acceptance of E20's calculation of the blended Stadium Premium Amount was erroneous; to the extent the expert's reasoning in relation to whether two or more transactions can be treated as one Qualifying Transaction relies on the analysis that underpinned E20's calculations, then in my judgment, his reasoning on that point too is undermined.

78. Furthermore, I consider that E20's own approach to calculating the Stadium Premium Amount in this case in fact recognises that the share sales and the Option are indeed separate transactions. As discussed above, E20's calculation involves pro-rating the Stadium Premium Amount due on the share sales on a different basis to the amount due on the Option. Even if one could say that the share sales and the Option should be categorised together as one Qualifying Transaction, it is not possible to proceed from there to the calculation of one Stadium Premium Amount using any mechanism contained within the Agreement.

79. Accordingly, in my judgment WHH has proved that the expert fell into error in his determination that the share sales and the Option fall to be characterised as one Qualifying Transaction with the result that the amount calculated by E20 falls due for payment by WHH.

Were the errors of the expert "manifest errors"?

80. Mr Plewman submitted on behalf of E20 that even if the expert had been wrong in his construction of the Agreement, his errors cannot be said to have been "manifest". A manifest error, Mr Plewman said, was "a howler", something that "hit you between the eyes", "so obvious a blunder that there really can be no dispute about it". There is support for Mr Plewman's submissions in dicta from the authorities: Simon Brown LJ in *Veba* referred to "oversights and blunders", and his remarks have been cited with approval by Lord Hamblen JSC in *Sara & Hossein Asset Holdings Ltd*; the suggested synonym of a "howler" came from submissions made to Mr Beltrami QC in *Flowgroup*, which Mr Beltrami did not disagree with. It is, however, relevant to recall that Lord Hamblen JSC also referred to the guidance given by Lewison J (as he then was) in *Van der Merwe* (followed by the Court of Appeal in that case and in *Amey Birmingham Highways*): "A 'manifest error' is one that is obvious or easily demonstrable without extensive investigation."

81. I am not persuaded that a party asserting that a reasoned expert determination which involves a point of contractual construction is obliged to prove that the expert has committed a "blunder", let alone that such a party must prove that an expert has committed a "howler" (whatever the correct definition of that is). I do not see how this terminology, with its pejorative overtones, can give a guide to the necessary qualities of an error in a reasoned determination. It may very well be that some errors can properly be characterised as blunders or even howlers; but ultimately, such errors would only be one subset of the whole range of errors that could be made.

82. Furthermore, for me to decide whether an error is to be labelled a "blunder" or "howler" would involve the application of almost purely subjective judgment. It would also inevitably involve casting aspersions on the expert's approach which are unfair (since he is not present) and probably do no party any good, especially where, as here, the expert has complete immunity from suit in relation to anything he has done.

83. Accordingly, rather than express myself in terms which I consider unhelpful in the context of a challenge to a reasoned determination involving a question of contractual interpretation, in my judgment it is safer to focus on the *Van der Merwe* guidance read together the *Veba* guidance: to be "manifest", errors must be so obvious and obviously capable of affecting the determination as to admit of no difference of opinion.

84. In my judgment, the errors which I have found proved by WHH are obvious, and are obviously capable of affecting the determination, because:

    i) The expert's error in adopting the blended calculation proffered by E20 was that he simply misread the word "or" in the definition of Consideration to mean "and". I asked Mr Plewman if reading the word "or" to mean "and" could amount to a manifest error. He fairly accepted that it could but insisted that in the instant case the position was "much more complex". He said that in order for E20 to capture some of the value of the £18,000,000 option fee, it must be the case that "or" in the definition of Consideration should effectively be read as "and". In my judgment, however, there is nothing complex here that requires the drastic step of mutating a disjunctive word into a conjunctive one. Mr Plewman's concession was right and is apt here because, putting matters simply, the error would have been avoided entirely if the expert had accepted that "or" meant what it said.

ii) The blending of the Share Sale Adjusted Consideration and the Option Adjusted Consideration, followed by the calculation of the Stadium Premium Amount by using two different values for "A" in the formula was, in my judgment, an impossible step having regard to the rules contained in the Agreement for the calculation of Stadium Premium Amount. In my judgment, in accepting E20's calculation as correct, the expert committed an error which was obvious: it can be seen from the Agreement that E20's calculation has no basis in the rules.

iii) If the errors I have found were not made, then the result of the expert determination would have been that E20's claim to £3,600,000 would have been rejected and WHH would not have been ordered to pay E20's costs. The errors went to the heart of the expert's determination.

85. As to whether these obvious errors, which obviously affect the outcome of the determination, are such as admit no difference of opinion:

i) There is before me clearly a difference of opinion in one sense, in that Mr Plewman's submissions are predicated on the contention that the expert's determination was correct. In my judgment, however, Mr Plewman's skilful advocacy cannot be said to represent his opinion, and I decline to treat it as such.

ii) In my judgment, the errors I have identified are such as are unlikely to admit any difference of opinion: the reasoning above involves applying the words of the Agreement and doing the mathematics, not exercising fine judgment in relation to a difficult argument regarding construction. In that respect, I reject a contention made in E20's written evidence for these proceedings that the Agreement was "poorly drafted and ambiguous" and that the expert had reached a reasonable construction; in my judgment, the provisions of the Agreement which I have had to consider are admirably clear.

Part 5: conclusion

86. For the reasons given above, in my judgment WHH has proved that the expert determination in this case contains two manifest errors. Accordingly, I shall grant the declaration sought by WHH that the determination is not final and binding on WHH.

87. I invite the parties to seek to agree a form of order reflecting the effect of my judgment and any other matters including costs. If agreement cannot be reached, I will direct that a short further hearing be listed to deal with consequential matters.