FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 67
CA31/20

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Reclaiming Motion

in the cause

EASTERN MOTOR COMPANY LIMITED

Pursuers and Respondents

against

(1) COLIN DONALD GRASSICK, (2) DAVID DOUGLAS GRASSICK and (3) JANE HARTREE HAIG

Defenders and Reclaimers

Pursuers and Respondents: Dean of Faculty (Dunlop, QC); Addleshaw Goddard
Defenders and Reclaimers: Simpson, QC, R Mitchell, sol adv; Brodies LLP

17 December 2021

Introduction

[1] This reclaiming motion (appeal) raises two questions. The first concerns the circumstances in which the Court of Session is entitled to interfere with the decision of an expert appointed under a contractual dispute resolution procedure, where parties have agreed to be bound by the expert's determination. The second relates to the competency of challenging the decision of such an expert *ope exceptionis* (literally "by force of exception") in

the defences to enforce the expert's decision. The pursuers, who seek to enforce the expert's decision, contend that the defenders' challenges to the expert's determination could competently have been brought only by an application for judicial review.

The core facts

The parties' contract

[2] On 1 August 2017 the parties entered into a Share Purchase Agreement for the sale by the defenders to the pursuers of the entire issued share capital of Grassick's Garage Limited. Grassick's principal business was owning and operating a BMW and Mini car franchise dealership in Perth.

[3] The agreed sale price was to be the Ordinary Share Consideration, which was defined in the agreement as being the aggregate of four elements. The relevant element for the purposes of this case is the "Actual Net Asset Value". The Actual Net Asset Value was to be ascertained by means of the preparation of Completion Accounts; these were defined as meaning the balance sheet of the company as at close of business on 30 June 2017. That date was referred to in the agreement as the "Locked Box Date". The sum of £250,000 was paid by the pursuers into a retention account with the Royal Bank of Scotland pending agreement or expert determination of the Completion Accounts.

The relevant contractual provisions

[4] Paragraph 6.1 of Part 7 of the Schedule to the Share Purchase Agreement provided as follows:

> "The Completion Accounts will be prepared in accordance with, and in the order shown below:
>
> (a) the specific accounting policies set out in Section D of this Part 7 of the Schedule;

(b) to the extent not inconsistent with paragraph 6.1(a), using the same accounting principles, policies, practices, evaluation rules and procedures, methods and bases, (including in respect of the exercise of management judgment) adopted by the Accounts (**Accounting Policies**), applied on a consistent basis (but only to the extent that the Accounting Policies are in accordance with UK generally accepted accounting practices as at the Locked Box Date); and

(c) to the extent not inconsistent with paragraphs 6.1(a) and/or 6.1(b), in accordance with UK generally accepted accounting practice as at the Locked Box Date."

[5] The "specific accounting policies" set out in Section D of Part 7 included the following in paragraph 15:

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

[6] CAP Valuation Anywhere is a subscription website widely consulted in the motor trade. It provides valuations (revised monthly) for a wide range of cars of different registration dates.

[7] The agreement provided that the draft Completion Accounts were to be prepared by the pursuers and delivered to the defenders, who had 30 days to notify any proposed adjustments, failing which the draft accounts would be final and binding.

[8] Paragraph 10 of Part 7 of the Schedule stated that any matters in dispute relating to the Completion Accounts were to be referred to a firm of independent chartered accountants, or a chartered accountant within a firm that had expertise in preparing completion accounts and/or advising on disputes in relation to the preparation and agreement/determination of completion accounts for companies in the motor trade industry.

Failing agreement on the accountant, nomination was to be made by the President of the Institute of Chartered Accountants in Scotland or by a person appointed by him.

[9] Paragraph 10.4 provided *inter alia* as follows:

> "Save as otherwise agreed between the Buyer and the Sellers, the following provisions will apply to the role of Price Adjustment Experts under this paragraph 10:
> …
> (b) the Price Adjustment Experts will act as experts and not as arbitrators;
> …
> (e) the Price Adjustment Experts:
> (i) will apply the accounting policies and other matters referred to in paragraph 6 above;
> (ii) will only determine:
> (A) what, if any, alteration should be made to the draft Completion Accounts; and
> (B) whether or not any of the arguments put to it for modification of the draft Completion Accounts are correct, in whole or in part;
> …
> (iii) may not determine the scope of their own jurisdiction;
> (f) the Price Adjustment Experts' decision as to any matter referred to them for determination will be final and binding on the Buyer and the Sellers, save in the case of manifest error or fraud, in which case the relevant part of their determination will not be effective and will be referred back to the Price Adjustment Experts for correction; …"

The dispute and the expert's determination of it

[10] As required under the agreement, the pursuers produced the Completion Accounts in draft. After that the Accounts were adjusted between the parties. They were ultimately unable to agree on certain aspects of the Accounts. They therefore activated the dispute resolution procedure by referring the matters in dispute to an expert for determination. The President of ICAS nominated and appointed Mr Greig Rowand of Henderson Loggie to act as the Price Adjustment Expert. In his letter of engagement Mr Rowand set out the two matters that now remain in dispute as follows:

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

[11] Qualifying vehicles are those on which VAT at the full rate is exigible on sale of the vehicle by the motor trader. The other category of vehicles is known as "margin vehicles". These are second-hand vehicles on which VAT was not charged when the trader bought the vehicle because the seller was not registered for VAT, for example a private individual. A motor trader can take advantage of the Margin Scheme when it comes to sell such a vehicle by charging VAT at the rate of one-sixth of the profit made (the margin).

[12] On the first of the disputed points, Mr Rowand stated his opinion as follows:

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

[13] On the proper interpretation of the word "prevailing" Mr Rowand concluded:

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

[14] The defenders were not willing to accept Mr Rowand's determination insofar as it related to the VAT question and to the issue of the prevailing date for the purposes of the CAP values. They believed that he should have decided that the company's stock of qualifying vehicles was to be valued by taking simply the values stated in CAP Valuation Anywhere; there ought not to have been any deduction from those valuations for VAT. The defenders also considered that Mr Rowand should have decided that the stock of all the second-hand vehicles fell to be valued on the basis of the figures which applied in June 2017 according to CAP Valuation Anywhere rather than the values which applied in July (although stated on 28 June). The defenders therefore refused to settle the sale on the basis of Mr Rowand's determination.

[15] The pursuers thereafter raised the present proceedings seeking: (i) declarator that the expert determination is binding on the parties; and (ii) an order requiring the defenders to instruct the Royal Bank of Scotland to release to the pursuers £158,068 and accrued interest from the retention account and to pay the balance of £91,932 with interest to the defenders. The action was defended on the basis that the expert's determination was unenforceable

because he had failed to comply with his instructions and had made manifest errors. In their pleas-in-law the defenders asked that the determination should be reduced *ope exceptionis* for these reasons.

The decision of the commercial judge

[16] Following proof the commercial judge granted decree in favour of the pursuers. He rejected the pursuers' challenge to the competency of the defence based on reduction *ope exceptionis*.

Competency

[17] The courts had rejected the argument that decisions of arbiters and adjudicators could only be challenged by seeking reduction of the decision in a petition for judicial review (*Vaughan Engineering Ltd* v *Hinkins & Frewin Ltd* 2003 SLT 428; *Carillion Utility Services Ltd* v *SP Power Systems Ltd* 2012 SLT 119; *SGL Carbon Fibres Ltd* v *RBG Ltd* 2011 SLT 417). The principle was a general one; it applied with equal force to the decisions of contractually appointed dispute resolution experts. There was, however, a distinction between resisting *ope exceptionis* the enforcement of a decision by setting it aside, on the one hand, and reducing it, on the other. Reduction was not necessary in a case such as the present one; it was sufficient for the court to refuse to enforce the decision. There was no need for the expert to be afforded the opportunity to enter the proceedings to defend the determination, as no allegation of misconduct or impropriety on his part was being made. Leaving the decision standing, unreduced, had little practical consequence in this case. The position was different in cases where the challenge was to an *ex facie* valid certificate (*Kelly* v *Kelly* 1986 SLT 101; *Cavendish Pharmacies Ltd* v *Stephensons Ltd* 1998 SLT (Sh Ct) 66). There proceedings seeking reduction would have to be brought.

Merits

[18] The basic principle was that where parties had contracted to remit issues arising under their contract to an expert for resolution, they were taken to be bound by the expert's determination of the issues (*Campbell* v *Edwards* [1976] 1 WLR 403, Lord Denning MR at 407; *Jones* v *Sherwood Computer Services plc* [1992] 1 WLR 277, Dillon LJ at 287; *Veba Oil Supply and Trading GmbH* v *Petrotrade Inc ("The Robin")* [2002] CLC 405, Simon Brown LJ (as he then was) at paragraph 26). As an expert in such cases was a creature of contract, one had to look to the contract to find the requirements and extent of the expert's jurisdiction (*Redding Park Development Co Ltd* v *Falkirk Council* [2011] CSOH 202). Where the expert made a mistake in carrying out his instructions, the parties were nonetheless bound by his decision because that was what they had agreed. A mistake in this context might be a mistake as to fact or law (*Walton Homes Ltd* v *Staffordshire CC* [2014] 1 P&CR 10, Peter Smith J at paragraph 7). If, however, the expert departed from his instructions, the position was different; in those circumstances the parties could not be said to have agreed to be bound by the expert's decision.

[19] The defenders' contention that the expert departed from his instructions because he failed to apply the terms of the Share Purchase Agreement as correctly construed in law was misconceived. The questions referred to the expert concerned to some extent the proper construction of paragraphs 6.1 and 15. The expert had been asked to determine questions of mixed fact (industry practice) and law (interpretation of the contract). The defenders' argument blurred the distinction between a departure from instructions and making a mistake in the carrying out of instructions. It was not open to one of the parties to contend that the expert departed from his instructions simply because they did not agree with the expert's conclusion.

[20] It was clear that Mr Rowand had addressed and answered the questions that had been referred to him: (i) the correctness or otherwise of the treatment of qualifying cars in the Completion Accounts, and (ii) the correctness of applying "July" data from the CAP Valuation Anywhere website.

[21] The Share Purchase Agreement provided that the expert's determination would be binding except in the case of manifest error or fraud. There was no suggestion of fraud in the present case. "Manifest error" meant "an error which has clearly been made" (*Lion Apparel Systems Limited* v *Firebuy Limited* [2007] EWHC 2179 (Ch), Morgan J at paragraph 38).

[22] Applying this to the parties' dispute, neither of the alleged errors relied upon by the defenders could be considered manifest. The expert's valuation of the qualifying vehicles was based on normal accounting practice. Further, there was consensus amongst the skilled witnesses who gave evidence that if no adjustment was made, either to used vehicle stock value or the VAT account, the Completion Accounts would not balance. The defenders' argument that the used vehicle stock ought to have been valued gross of VAT was based on nothing more than the opinion of their skilled witness that the Share Purchase Agreement ought to have been construed differently. That was far from sufficient to establish that an error had been made.

[23] The second issue turned on the expert's interpretation of the phrase "prevailing CAP clean values". The expert used the CAP Anywhere figures referable to July 2017, because those figures applied from 28 June 2017. The defenders simply disagreed that the "prevailing" figures as at 30 June 2017 were those dated July 2017 as opposed to those dated June 2017.

[24] Neither of the defenders' arguments was sufficient to establish that there had been a manifest error.

The issues in the reclaiming motion

The defenders' arguments

[25] In support of the appeal, the defenders advanced a number of challenges to the judgment of the commercial judge. These may be summarised as follows. First, the defenders submitted that the price adjustment expert's agreed role was merely to apply the accounting policies and not to interpret them. Therefore retailable used vehicle stock had to be valued in accordance with "prevailing CAP clean values on CAP Valuation Anywhere." The second sentence of paragraph 15 was of critical importance. It was outside the expert's jurisdiction and not in accordance with his instructions for him to determine what he considered to be the proper interpretation of the relevant accounting policy. This analysis was supported by the right conferred on the expert to obtain legal advice. The expert had exceeded the scope of his jurisdiction and materially departed from his instructions by proceeding on the basis of an incorrect interpretation of paragraph 15. He should not have reduced the clean CAP values by one-sixth to take account of VAT that would be charged on future sales of qualifying vehicles; there was no warrant for this approach in paragraph 15. The paragraph did not provide for this to be done in respect of a sub-category of the used vehicle stock (i.e. qualifying vehicles). In other parts of the Share Purchase Agreement the parties had expressly provided for VAT to be deducted (e.g. in respect of manufacturer franchise parts and non-manufacturer parts), but paragraph 15 by contrast said nothing about VAT. The parties could have provided for the deduction of VAT on the used car stock, but had chosen not to do so.

[26] Second, the defenders argued that the expert had misinterpreted the Share Purchase Agreement by taking the prevailing values for the used vehicle stock as those published on

28 June 2017 instead of those published on 29 May 2017. It was the latter valuations which "prevailed" throughout June 2017 and in particular on 30 June, the date on which the balance sheet of the company was to be drawn. This misreading of the Share Purchase Agreement was an error of law; in providing his determination based on such an error the expert had acted outside his jurisdiction and contrary to his instructions.

[27] Third, the defenders submitted that the commercial judge had erred in holding that support for the expert's approach to the VAT issue could be found in the evidence of the pursuers' expert witness, Mr Michael Jones. There was no evidence that the practice of adjusting the CAP values for VAT was known to both parties at the time of the contract.

[28] Fourth, the defenders contended that, in any event, the price adjustment expert's approach to the VAT issue and the meaning of the word "prevailing" amounted to manifest errors; to the extent that his determination was based on these errors it was not binding. Reference was made to *Amey Birmingham Highways Ltd* v *Birmingham City Council* [2018] EWCA Civ 264, Jackson LJ at paragraphs 80 – 91.

[29] Fifth, the defenders submitted that the commercial judge had misunderstood the expert evidence given by Mr Jones and by Mr Stuart Preston, who was called for the defenders, on the question of whether the used car stock should be valued net of output VAT. The correct position was that no account of output VAT should have been taken because it was a liability that had not yet accrued at the time of preparing the company's balance sheet.

[30] On the competency issue the defenders adopted the reasoning of the commercial judge.

The pursuers' arguments

[31] The pursuers submitted that all the alleged errors relied on by the defenders were

errors of mixed fact and law. As such, they could not provide a basis for challenging the price adjustment expert's determination. Paragraph 15 required the expert to reach a view on "current motor trade valuation". That was exactly what he had done. There had been no departure from instructions. The defenders merely disagreed with his conclusions; that was not sufficient for a valid challenge to his determination.

[32] Including an asset on which VAT was exigible in the balance sheet at its gross value would not provide a true account of the value of the company's assets. As explained in evidence by Mr Jones, the asset had to be valued net of VAT or if that was not done a provision had to be made elsewhere in the accounts for the VAT liability. Otherwise the accounts would simply not balance.

[33] "Prevailing" was synonymous with "current". The CAP website contained a column entitled "current". The expert had used the figures given in that column. It could not be a departure from instructions for the expert to use the "current" values to assess the "prevailing" values.

[34] Mr Jones had given admissible evidence, based on his extensive experience, of standard industry practice, whereby the CAP values were adjusted for VAT in respect of qualifying cars. The commercial judge had not erred in treating this evidence as providing support for the approach taken by the price adjustment expert.

[35] The alleged errors relied on by the pursuers could not be regarded as manifest errors. They fell well short of the necessary level of obvious blunders which admitted of no difference of opinion.

[36] The commercial judge had not misunderstood the expert evidence. He had been entitled to reject the evidence of the defenders' experts on the basis that they had nothing relevant and admissible to contribute. Mr Jones' testimony was consistent with the findings

made by the commercial judge as to the company's own accounting policies and generally accepted accounting practice in the UK.

[37] On the competency question, the defenders renewed their submission that the challenge to the expert's determination could only be brought by way of judicial review. The court had no power in the present action to remit to the expert for reconsideration of his determination. The expert should be allowed the opportunity to defend his determination and his professional reputation. Decree of absolvitor would leave the determination intact as the court could not reduce it in the present action. The expert would be entitled to ignore the court's decision, which could only bind the parties to the proceedings and would not be *res judicata* vis-à-vis the expert.

Analysis and decision

Merits

[38] The starting point (and in the circumstances of the case the end point) is that the parties entered into a contract whereby they agreed that the price adjustment expert's decision as to any matter referred to him would be final and binding unless he was guilty of fraud or manifest error. As the authorities cited by the commercial judge clearly show, a clause in such terms leaves little scope for a court challenge to the expert's ruling. This is simply because the parties agreed to accept the expert's decision on any matter referred to him except where the decision was vitiated by fraud or was manifestly wrong. The law attaches a strong degree of respect to the parties' agreement as to the finality of their chosen dispute resolution procedure. As Lord Denning explained in *Campbell* v *Edwards* [1976] 1 WLR 403, at 407, even if the expert has made a mistake the parties are still bound by his decision unless there has been fraud or a manifest error. Of course, if it can be shown that

the expert departed from his instructions in some material way he has not done what the parties agreed that he was appointed to do; then his decision is open to challenge (*Jones* v *Sherwood Computer Services plc* [1992] 1 WLR 277, Dillon LJ at 287). The principles in this area were authoritatively analysed by Hoffmann LJ (as he then was) in his dissenting judgment (with which the House of Lords subsequently agreed, at least to the extent of allowing the appeal) in *Mercury Communications Ltd* v *Director General of Telecommunications* [1994] CLC 1125, CA; [1996] 1 WLR 48, HL(E). His Lordship said this:

> "So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.
>
> One must be careful about what is meant by 'the decision-making authority'. By 'decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion."

[39] As Thomas LJ pointed out in *Barclays Bank* v *Nylon Capital LLP* [2012] Bus LR 542 at paragraph 35, where a pure issue of law arises in the course of an expert's determination and the expert mistakenly decides that issue the result may be that it can be concluded that the expert has not acted in line with his mandate. Lord Neuberger went somewhat further in his judgment in *Barclays Bank* in expressing the *obiter* view that where there was an issue of law which divided the parties and needed to be resolved by the expert, it did not follow

that his resolution of the legal question was immune from court challenge (see especially paragraph 69).

[40] While there may, therefore, be some scope for debate at the outer margins of the principle of finality of an expert's decision, no issue of erroneous interpretation of the remit arises in the present case. Nor is there anything in the nature of a pure issue of law. There is no question of the price adjustment expert having gone outside the limits of his authority in the sense that he misunderstood his remit or, putting it more colloquially, addressed himself to questions which were different from those that the parties asked him to address. On the contrary, it is clear that Mr Rowand understood perfectly well what he had been instructed to decide: whether VAT should be deducted from the values of the qualifying cars and what the word "prevailing" meant in the context of the parties' contract. Moreover, the questions referred to the expert were plainly ones of mixed fact and law, involving consideration of practice in the motor trade. In these circumstances, the court has no jurisdiction to interfere with the expert's conclusions on either of the issues referred to him for determination.

[41] On the question of what constitutes a manifest error in the present context, we consider that this requires there to be a glaring mistake that jumps off the page. We respectfully agree with Simon Brown LJ (as he then was) in *Veba Oil and Trading GmbH* v *Petrotrade Inc ("The Robin")* [2002] CLC 405 at paragraph 33 that for a manifest error the defenders must be able to show "oversights and blunders so obvious *and obviously capable of affecting the determination* as to admit of no difference of opinion". A mere difference of opinion cannot be described as a "blunder".

[42] Turning to examine more closely the defenders' grounds of challenge, we are satisfied that none of them has any merit. We reject the argument that the expert merely had to apply mechanistically the accounting policy set out in paragraph 15. The defenders'

approach focuses too narrowly on the second sentence of paragraph 15, but this is only part of the picture. The first sentence is just as important. It states that the stock is to be valued in line with current motor trade valuation. The expert was correct to hold that the first two sentences had to be read together. When that was done it inevitably required the expert to give consideration to the factual question of what the practice in the motor trade in regard to valuation of qualifying used vehicles actually was. The expert held, as he was entitled to do, that this required them to be valued net of VAT. He held that "there is a clear industry and HMRC practice for applying VAT to used cars." In making this finding the expert was properly fulfilling his remit. There was no departure from his instructions and no manifest error in regard to his findings on the VAT issue. All the defenders' challenges to this aspect of the expert's conclusions fail.

[43] Insofar as the defenders referred in their submissions to the treatment of VAT on margin scheme cars (as distinct from qualifying cars), we do not consider this to be of any relevance. The issue referred to the expert concerned qualifying cars only.

[44] The second part of the expert's findings concerned the question whether at the date of the Completion Accounts, namely 30 June 2017, the second hand cars were to be valued using the values stated in CAP Valuation Anywhere at the end of May or the end of June. The expert held that the latest values available from CAP at the Locked Box Date "would be those dated 28 June 2017 regardless of the July label attached to them." He went on to conclude that the values at 28 June 2017 "are widely available to the trade and any transactions would take this value into account". Again, we have no difficulty in holding that in reaching these findings the expert did not depart from his instructions to any extent. Moreover, it cannot be said that they constituted manifest errors.

[45] To the extent that the defenders submitted that the commercial judge misconstrued the expert evidence, we reject the criticisms advanced of his approach. Understandably, the commercial judge found the expert evidence to be of limited assistance in the circumstances of the case. He was entitled to accept the evidence of Mr Jones that in the context of a sale of shares in a motor dealership where a valuation guide was used to value the used vehicle stock, it was consistent with standard industry practice to adjust the CAP value for qualifying cars to take account of VAT. This was appropriate as a matter of proper accounting practice. The commercial judge found support in the evidence given by Mr Jones on these issues for the price adjustment expert's conclusions on the same question. The defenders' argument that there was no evidence that this practice was known to both parties at the time of the agreement is nothing to the point. The question for the commercial judge was whether to accept the expert evidence of Mr Jones on the issue of standard industry practice; the case of *Arnold* v *Britton* [2015] AC 1619, relied on by the defenders, concerned matters of contractual interpretation and is not relevant in the present context. Mr Jones was undoubtedly qualified to give such evidence and the commercial judge was entitled to accept his evidence in this connection.

[46] On the argument that the commercial judge was not entitled to hold that Mr Preston's distinction between input and output VAT was of no moment in the context of valuing the used cars at the Locked Box Date, we can detect no error on the part of the commercial judge. The commercial judge was entitled to accept the evidence given by Mr Jones that the concept of net realisable value required selling costs to be taken into account in the preparation of the Completion Accounts. In the case of qualifying cars the selling costs would include VAT which, from the perspective of the seller, would be an output tax for which he would be liable to account to HMRC. As Mr Jones explained, in

evidence which the commercial judge was entitled to accept, the point was that where stock with an inbuilt VAT liability falls to be included in a balance sheet, the liability must be reflected as a realisation cost.

[47] For these reasons we consider that all the defenders' challenges to the expert's determination must fail. That is sufficient for disposal of the reclaiming motion in the pursuers' favour. In deference, however, to the views of the commercial judge on the competency point and to the submissions which were made to us on that issue, we propose to say something about one particular aspect of the matter.

Competency

[48] The commercial judge applied the reasoning of Lord Clarke in the Outer House in *Vaughan Engineering Ltd* v *Hinkins & Frewin Ltd* 2003 SLT 428 in holding that the principle that the validity of persons appointed to resolve disputes can competently be challenged by defenders in enforcement proceedings was a general one that extended to arbitrators, adjudicators and dispute resolution experts. The commercial judge took the view that a distinction had to be drawn between, on the one hand, resisting *ope exceptionis* the enforcement of a decision whose validity is challenged and, on the other, reducing that decision. In the former case the decision would be "set aside"; in the latter it would be struck down by decree of reduction. In a case such as the present there was no need for reduction, it was enough for the court merely to refuse to enforce the decision. Therefore the challenge did not have to be brought by judicial review.

[49] In our opinion one particular aspect of this approach misunderstands the nature and effect of a successful challenge to the validity of a document brought by way of a defence *ope exceptionis*. There is no reason why the court should not give effect to a successful challenge of this type by granting decree reducing the decision; such an outcome is not the exclusive

preserve of proceedings where a conclusion or crave for reduction is made, such as an action of reduction or a petition for judicial review in which the remedy of reduction is specifically sought by the petitioner. In this connection it is important to note that in *Vaughan Engineering Ltd* both parties accepted that the result of seeking to resist the effect of a deed or other writing *ope exceptionis* was not to reduce the deed (see Lord Clarke at paragraph [25]). Lord Clarke's views on this point accordingly proceeded on the basis of a concession and cannot be regarded as authoritative. In any event, they are not binding on us.

[50] We consider that there is force in the views expressed by Lord Glennie in *SGL Carbon Fibres Ltd* v *RBG Ltd* 2011 SLT 417 at paragraph [48] that the concept of a decision which is binding but unenforceable, having been "set aside" but not reduced, is conceptually nonsensical.

[51] To understand the nature of exception *ope exceptionis* it is important to go back to the terms of the Act of Sederunt of 20 March 1907 which introduced the remedy into Court of Session procedure in the context of challenges to deeds or writings. By section 6 it enacted as follows:

> "Where in any action a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof, unless the Court or Lord Ordinary shall consider that the matter would be more conveniently tried in a separate action of reduction."

[52] From this it can be clearly seen that wide powers were conferred on the court. The power was to be available in "any action". It extended to "all objections" to a deed or writing founded on by either party to the action. There was no restriction on the type of deed or writing to which the power related. The aim was to avoid the necessity of "bringing a reduction". Importantly, the court was vested with a wide discretion to decline to exercise the power where it considered that "the matter would be more conveniently tried in a

separate action of reduction". From these provisions it is plain that the aim of the Act of Sederunt was to promote procedural efficiency by avoiding unnecessary duplication of proceedings and to allow the court to act flexibly according to the particular circumstances of the case. On a straightforward construction of the language used in the Act of Sederunt we consider that it contemplated that the court would be empowered to grant reduction of a document when upholding a challenge to the document brought *ope exceptionis*.

[51] The terms of the current Court of Session rule are very similar to those of the Act of Sederunt (RCS 53.8 which is contained in the chapter dealing with actions of reduction):

> "Where, in an action, a deed or other writing is founded on by a party, any objection to it may be stated by way of exception, unless the court considers that the objection would be more conveniently disposed of in a separate action of reduction."

[53] So too are the current rules in ordinary causes in the Sheriff Court (rule 21.3):

> "(1) Where a deed or writing is founded on by a party, any objection to it by any other party may be stated and maintained by exception without its being reduced.
> (2) Where an objection is stated under paragraph (1) and an action of reduction would otherwise have been competent, the sheriff may order the party stating the objection to find caution or give such other security as the sheriff thinks fit.
> (3) An objection may not be stated by exception if the sheriff considers that the objection would be more conveniently disposed of in a separate action of reduction."

[54] It is instructive to note that just 3 years after the Act of Sederunt was introduced, the First Division had occasion to consider its purpose and reach in the case of *Oswald* v *Fairs* 1911 SC 257. The Lord President (Dunedin) referred at page 264 to the "recent Act of Sederunt" which "makes it no longer necessary to raise actions of reduction". Lord Dunedin went on to describe the new procedure as:

> "… a very valuable one in the way of dispensing with useless process – that is to say, instead of having to sist an action in order that an action of reduction may be raised as a separate process, it is now possible to make good a defence which depends upon reduction at once …"

[55] There was no suggestion that where the court considered it appropriate to exercise the power in the Act of Sederunt the remedy was to be a novel intermediate one short of reduction in the form of "setting aside" a deed or writing or refusing to enforce it.

[56] The matter was considered by the Second Division the following year in *Donald* v *Donald* 1913 SC 274, an appeal from the Sheriff Court. The case concerned a challenge *ope exceptionis* to a will relied on by an objector to a petition brought by the heir-at-law of a deceased person for completion of title under section 10 of the Conveyancing (Scotland) Act 1874 on the ground that the will had been impetrated by fraud and circumvention. It is clear from the opinions delivered by the Lord Justice Clerk (Macdonald) and Lord Salvesen that they were much influenced in their approach to the case by the fact that at that time an action of reduction could not competently be raised in the Sheriff Court. That, of course, is no longer the position except in relation to court decrees (section 38 of the Courts Reform (Scotland) Act 2014).

[56] The court in *Donald* held that notwithstanding the terms of Rule 50 of the First Schedule to the Sheriff Courts (Scotland) Act 1907 (which was in similar terms to the Act of Sederunt) the will could not be set aside by way of exception in the Sheriff Court action. The Lord Justice Clerk (Macdonald) at page 278 referred to the purpose of the rule as being "intended to simplify procedure and prevent delays". He based his judgment on the view that the will was more than a mere piece of evidence; it was "the very foundation" of the defence set up by the objector to the petitioner's being declared infeft. The petitioner's contention "would practically set aside the law by which reduction is not competent in the Sheriff Court". It would allow every debtor when sued by an executor to have a trial for setting aside the executor's title with the potential for a succession of inquiries in different Sheriffdoms. This could lead to "complication, trouble, and expense rather than to the

facilitating of procedure." His Lordship's views appear, therefore, to have turned to a substantial degree on questions of practicality and convenience.

[57] Lord Salvesen expressed the view (at page 280) that it was implicit in Rule 50 that the objection which could be stated and maintained by way of exception was one which the Sheriff could finally dispose of, and that his judgment would supersede the necessity of bringing a reduction of the deed challenged. Clearly his Lordship saw it as pivotal that an action of reduction was not at that time competent in the Sheriff Court.

[58] The question as to what form of order the court should pronounce when it was satisfied that it was appropriate to give effect to a defence based on exception *ope exceptionis* was not specifically addressed in *Donald*.

[59] The same can be said of the other authorities drawn to our attention, in particular *Kelly* v *Kelly* 1986 SLT 101 and *Cavendish Pharmacies Ltd v Stephensons Ltd* 1998 SLT 66.

[60] In *Carillion Utility Services* v *SP Power Systems Ltd* 2012 SLT 119 Lord Hodge in the Outer House held at paragraph [42] that challenging the validity of the decision of an adjudicator without seeking reduction of the decision was competent. He followed Lord Clarke's decision on the point in *Vaughan Engineering Ltd*. As we have explained, however, Lord Clarke's view was based on a concession.

[61] We agree with the commercial judge that there was no need for the challenge to the validity of the determination to be brought by way of separate proceedings for judicial review. Whether to exercise the power to reduce *ope exceptionis* remains ultimately a matter for judicial discretion. This was not a case where the decision-maker had to be allowed the opportunity to become a party to the proceedings. No allegation of misconduct or impropriety had been made against him.

[62] We differ, however, from the commercial judge on the technical and procedural question of whether it is competent for the court to give effect to a defence brought *ope exceptionis* by granting decree of reduction. We are satisfied that where the court proposes to uphold a challenge to the validity of a document *ope exceptionis* the correct way to achieve that outcome is to grant decree reducing the document. There is no remedy known to our law of setting aside or refusing to enforce a document. Accordingly, contrary to the view of the commercial judge, it would have been open to him, in the event that he was persuaded that grounds for reduction of the price adjustment expert's decision had been established (which he was not) and that it was appropriate in the whole circumstances of the case so to do, to have granted decree reducing the expert's determination. We are reinforced in this view by a further consideration. Had the determination been reduced this would have opened the way for the issues to be referred back to the price adjustment expert for reconsideration as specifically envisaged in the parties' contract.

Disposal

[63] For the reasons we have given, the reclaiming motion must fail.

[64] In his interlocutor of 26 January 2021 granting decree in favour of the pursuers the commercial judge *inter alia* sustained the pursuers' second plea-in-law; this was to the effect that the defenders' challenge *ope exceptionis* to the expert's determination was incompetent. In fact the commercial judge held in his opinion that the challenge was competent. We shall accordingly recall the interlocutor, sustain the pursuers' first, third and fourth pleas-in-law, repel their second plea and the defenders' pleas, and grant decree of declarator and

implement in the same terms as the commercial judge. We shall reserve all questions as to expenses.