



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 73

P171/22

OPINION OF LORD LAKE

In the Petition of

DAVID MAGUIRE

Petitioner

for

Judicial review of a purported valuation by Stewart MacDonald, C.A., dated 14 February 2022

**Pursuer: M Upton, advocate; TC Young LLP**

**Defender: P Reid, advocate; CMS Cameron McKenna LLP, Narbarro LLP and Olswang LLP**

**Third interested party: R McIlvride KC; Harper Macleod LLP**

4 October 2022

[1] The petitioner and the first to third interested parties were shareholders in a private company (5 PM Limited). Following differences, there was an agreement that the petitioner's shares in the company would be cancelled and a payment would be made to him. This agreement is averred to have been contained in letters dated 8 and 27 November 2017. The sum to be paid to the petitioner was the value of his shares. That value was to be determined by an independent chartered accountant acting as expert. The parties would nominate such an accountant failing which the nomination would be made by the President of the Institute of Chartered Accountants of Scotland (ICAS).

[2] The parties could not agree who to nominate and ultimately the President of ICAS nominated Mr MacDonald, the respondent. Around 5 July 2018, Mr MacDonald drafted a Letter of Engagement in terms of which he would provide a valuation to the shareholders. At first the petitioner refused to sign the letter and the first to third interested parties raised a Commercial Action in the Court of Session seeking to have him ordained to do so. By interlocutor dated 10 July 2020, the Commercial Judge ordained the petitioner to sign the engagement letter. On 28 August 2020, after some further procedure, the petitioner delivered a copy of the letter which bore his signature and a date of 17 August 2020. Copies had already been signed by the respondents and the first to third interested parties. In terms of the Letter of Engagement, the parties agreed that the valuation provided by Mr MacDonald would be final and binding. I return to consider further the detail of the Letter of Engagement below.

[3] The respondent gave his decision on the value of the petitioner's shares on 14 February 2022. He concluded that the shares had no value. The petitioner wishes to challenge this conclusion. The petitioner contends that the respondent departed from his instructions in terms of the agreement in that he valued the shares without having sight of audited accounts of the company and in the absence of information he had requested from the third interested party on 28 September 2021. He seeks declarator of the fact that there was such a departure from instructions and reduction of the valuation.

[4] It is not disputed that the respondent did not have sight of either audited accounts or the material called for in his email of 28 September 2021 when he prepared the valuation. By email dated 3 December 2021 to the petitioner, the respondent said that he did not require to see audited accounts to carry out his work. The issue was therefore whether in proceeding without these materials the decision is invalidated.

[5] The matter came before me for a substantive hearing. The petitioner, the respondent and the third interested party were represented. The parties were content to address the issue as one of relevancy. An affidavit from the petitioner was available but it was not submitted by any party that there was anything in it relevant to determine the issues. An objection to the challenge to the decision proceeding by way of judicial review had initially been made by the respondent but had been departed from by the time of the hearing and I do not consider it further.

### **The law**

[6] There was little dispute between the parties as to the test to be applied to determine whether the decision fell to be reduced. For the petitioner, Mr Upton referred to *Veba Oil Supply and Trading GmbH v Petrotrade Inc ('The Robin')*, [2002] CLC 405, *Re Maximus Securities Ltd*, [2016] EWCA Civ 1057, and *Eastern Motor Co Ltd v Grassick*, 2022 SLT 139. For the respondent, Mr Reid also referred to *Eastern Motor Co* and also to *Jones v Sherwood Computer Services plc*, [1992] 1 WLR 277. He drew my attention to the examples of departure from instructions in *Jones* at pages 287A-C. Mr McIlvride appeared for the third interested party and adopted Mr Reid's submissions in this regard.

[7] The law applicable to this issue is focused in para [38] of the Opinion of the Inner House given by Lord Pentland in *Eastern Motor Co* as follows:

“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 issue for determination is accordingly whether the determination in the absence of the audited accounts and the information called to on 28 September 2021 was a departure from

the respondent's instructions. It is therefore necessary to determine the content of the instructions and that turns on the correct interpretation of the Letter of Engagement.

### *The Letter of Engagement*

[8] For the petitioner, Mr Upton placed reliance on the following passage in the Letter of Engagement:

"I will issue a request for further information in accordance with the timetable set out above. As a minimum I expect this to include the following:

- 1) Director's contracts of employment
- 2) Audited accounts for the year ended 31 December 2017
- 3) Latest management accounts for the current year to date.
- 4) In the accounts for the above periods:
  - Explanation for any material variances in income, salaries and overheads.
  - Details of exceptional/non-recurring income and expenditure.
  - Analysis of directors' remuneration and dividends paid.
  - Fixed asset registers (intangible and tangible fixed assets).
- 5) Budget for the two years to 31 December 2019.
- 6) Any other factors which you believe may impact the Company's valuation.
- 7) Copies of any recent valuations carried out.

For the avoidance of doubt, I shall be entitled to request further information and explanations as I consider to be relevant to my appointment, from the parties throughout the duration of my work. The parties shall be required to provide such information and/or explanation to me within a reasonable period and, in any event, by any deadline which I impose for the provision of such information and/or explanation."

Mr Upton submitted that in requesting this information it was implicit that the respondent would have regard to it otherwise there would have been no point in him having sought it and that the fact that respondent had sought the information meant that it was relevant to the issue to be determined. Mr Upton noted that the audited accounts were one of the items specified in the second list in the letter in the passage quoted and submitted that this meant that the parties were agreed that they should be provided to and considered by the respondent. The introductory words to that list referred to seeking additional information

and said, "I would expect this to include the following". It was submitted that in its context, the word "expect" was imperative in the sense that by means of the engagement letter the respondent was requiring the documents listed. He submitted that the respondent's instructions obliged him to have regard to the documents which he required the shareholders to provide. He referred to the decision of the Commercial Judge in the earlier case between the parties ([2020] CSOH 70) where the conclusion was reached that where information was requested from a party, that party would be obliged to provide it. He recognised that this passage was, however, obiter.

[9] In relation to the issue of an audit, Mr Upton relied on the factors that at the time the Letter of Engagement was entered into, there had been extra judicial correspondence about instructing an audit and in the earlier action the court had, in an interlocutor of 25 April 2019, required that audited accounts be lodged for the year ended 31 December 2018. Although it is accepted that there had never been audited accounts of the company, it was noted that, 10% of the shareholders or a company may require an audit (Companies Act 2006, section 476). Mr Upton noted by reference to productions that in July 2019 there had been efforts made to have accounts audited and auditors were appointed but in January 2020 the work had been put on hold. Because the Letter of Engagement was not signed until 17 August 2020, all the efforts to get audited accounts and the interlocutor of the Court were said to be part of the factual matrix against which the Letter of Engagement must be construed.

[10] For the respondent, Mr Reid submitted that the instruction was simply to value the petitioner's shares and that there had been no departure from that instruction. He explained that the material was requested on 28 September 2021 not because the respondent considered that he needed it but because the petitioner had asked him to request it. He said

that the request was not part of the respondent's instructions and was instead part of the process by which those instructions were carried out.

[11] In relation to the audited accounts, Mr Reid submitted that the use of the word "expect" in the context of the Letter of Engagement was a matter purely of anticipation. It was noted that at the time the letter was written, the respondent was unfamiliar with the detail of the exercise and that it would not be expected that he would make definitive statements of what he would require to see. He noted that at the time the letter was agreed, there had never been audited accounts of the company and observed that, as a shareholder, the petitioner was in a position to obtain audited accounts but had not done so.

[12] Mr Reid argued that issues of how the respondent went about the task of valuing the shares, the valuation methodology he used and the materials he required were ones in respects of which he was entitled to exercise his judgment. He noted that the Letter of Engagement states that the valuation method was yet to be determined and submitted on that basis that it cannot have been the intention that it was prescriptive as to the matters that were to be taken into account.

[13] Mr McIlvride, counsel for the third interested party, adopted the submissions made for the respondent. In addition, he submitted that an expert in the position of the respondent is entitled to make his own investigations and is not limited to material provided by the parties instructing him (*MacDonald Estates plc v National Car Parks Limited*, 2010 SC 250). On that basis, it was open to the respondent to make his own investigations and determine what material he considered he required to take into account. He noted that orders for the parties to produce documents would be issued by the respondent and, on the petitioner's interpretation of the Letter of Engagement, the respondent would be bound as to which orders he had to make. It was unlikely that the parties would intend this. He

submitted that the question raised by the declarator was whether the respondent was obliged to consider the documents in question as an indispensable part of his valuation exercise. Mr McIlvride had been present at the hearing which led to the interlocutor dated 25 April 2019 and he explained that the order for production of audited accounts was not part of the remedies that were sought in the action but was something that the Commercial Judge thought would facilitate resolution of the issues between the parties.

### *Decision*

[14] In considering the instructions to the respondent it is necessary to distinguish the obligation placed on him from the obligations he might impose on the parties in order to enable him to fulfil his duties. The passage quoted above which the petitioner relies on appears under a heading "Information Request" and is preceded by a narration that ICAS had provided the respondent with the Articles of Association of the Company and that the parties had already provided some other materials. Read together, this is a clear indication that the passage relied on by the petitioner is concerned with the process of carrying out the respondent's work and, in particular, what information he may seek, rather than a definition of what that work is to be. The provisions which provide that definition are to be found in other parts of the Letter of Engagement.

[15] After an introductory paragraph, the first section of the letter is headed "Scope of Work". Under that heading the first paragraph concludes with the statement,

"I am required to value Mr Maguire's shareholding in the Company utilising the valuation methodology set out in paragraph 1b of [Harper Macleod LLP's offer of 8 November 2016 to International & Domestic Law Practice ('IDLP')] ('Method 2')."

The offer of 8 November 2016 was not before me and no party made submissions as to its contents. On the second page of the letter, the respondent states that in forming his opinion

on the value of the petitioner's shares he will exercise his judgment to select the most appropriate valuation methodology. He then lists six commonly used approaches. The apparent conflict between the reference on the one hand to these six valuation methodologies and, on the other, the reference to the methodology contained in the letter of 8 November 2016 was not explored at all before me so I cannot comment on it. What is clear, however, that it is this part of the Letter of Engagement that specified what the respondent was to do; he was instructed to value the petitioner's shares and was not limited to what methodology he should use.

[16] What follows in the Letter of Engagement are stipulations as to the timetable to be followed, the form that the valuation report will take, the section titled "Information Request" noted above, consideration of the personnel who were involved and fees. All these matters are ancillary to the issue of what it was that the respondent was to do. It is not apparent that there was any intention that they were intended to limit what the respondent was to do, such that he could only provide a valuation after considering certain information.

[17] Mr Upton's submissions seek to elevate the provisions as to the information sought so that they form part of what the respondent was to do. I do not consider that they can bear the interpretation he seeks to place on them. It is apparent from the language used ("I will request") that the passage is addressing what is to happen in future in implementation by the respondent of his instructions rather than establishing the scope of those instructions. Viewed together with this prospective element, the word "expect" falls to be construed as indicating what is anticipated rather than what is imperative. More fundamentally, as the list of documents to be produced is clearly not concluded, it would be odd if the respondent was to be taken to be instructed not just to provide a valuation but to provide a valuation having regard to an unfinalised list of documents. There is no express stipulation to that



effect in the terms of the Letter, the inference of such a term is not necessary to give the Letter efficacy and it is at odds with the statement that the methodology for the valuation has yet to be determined. Although reliance was placed on the factual matrix, it cannot supply terms that are not present and it was not suggested to me that it had an effect on any of the wording that had been used in the Letter.

[18] In the earlier action, the issue of the scope of the respondent's instructions was not being determined. I do not find the decision to be of great assistance in resolving that issue. The decision of the Commercial Judge is, however, consistent with my view in that it proceeds on the basis that determination of what information is required and issuing of requests for it would take place after the date of the Letter of Engagement (para [53]). This is inconsistent with the contention for the petitioner that it was determined at that stage that documents such as audited accounts must be considered before the valuation is produced.

[19] In view of the above, it is apparent that the petitioner has not pleaded facts from which it could be concluded that the respondent departed from his instructions to prepare a valuation. In this situation, the arguments made for the petitioner that any departure from the instructions is sufficient to vitiate the determination do not arise.

[20] In view of the above, I consider that the petitioner's averments are irrelevant and therefore grant the motions made by the respondent and third interested party to sustain their preliminary pleas and dismiss the petition.