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Case No: CL-2020-000130

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2021

Before :

MR ADRIAN BELTRAMI QC
Sitting As A Judge Of The High Court

Between :

FLOWGROUP PLC (in liquidation) Claimant
- and -
CO-OPERATIVE ENERGY LIMITED Defendant

Jonathan Cohen QC (instructed by Memery Crystal LLP) for the Claimant
Alexander Polley (instructed by Gowling WLG (UK) LLP) for the Defendant

Hearing dates: 08 and 09 February 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR ADRIAN BELTRAMI QC SITTING AS A JUDGE OF THE HIGH COURT

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date for hand-down is deemed to be 19 February 2021”

ADRIAN BELTRAMI QC :

1. The is the trial of a claim under CPR Part 8 of a dispute arising in connection with an Acquisition Agreement dated 10 April 2018 (the **Agreement**), pursuant to which the Claimant (**Seller**) sold to the Defendant (**Buyer**) the entire allotted and issued share capital of Flow Energy Limited (**Target**). By clause 3 of the Agreement, the purchase price was subject to a working capital adjustment, to be determined in accordance with detailed provisions contained in Schedule 9. The parties were unable to agree on the amount of the working capital adjustment and the matter was referred to expert determination, pursuant to paragraph 4 of Part A of Schedule 9. That determination was delivered in the form of a report (the **Report**) dated 8 March 2019 by Ms. Maggie Stilwell, a partner in Ernst & Young LLP (the **Expert**). The Report was largely favourable to Buyer, and Seller now challenges the Expert's findings in 3 respects.
2. Paragraph 4.13 of Part A of Schedule 9, which I set out in full below, provides that the Expert's written decision on the matters referred to him (or, in this case, her) will be final and binding in the absence of manifest error. The issue before me is whether there was such manifest error in the Report.
3. The evidence for this purpose comprised: (a) a witness statement of David Harvey Rands dated 6 March 2020 (for Seller); and (b) a witness statement of Andrew Paul Smith dated 22 April 2020 (for Buyer). As Mr Rands observed at paragraph 6 of his statement, the claim gives rise to no factual dispute, save in respect of conclusions drawn by the Expert and which Seller contends are manifest errors. I am grateful to Counsel for their skeleton arguments and oral submissions.

A. BACKGROUND

4. Seller is now in voluntary liquidation, Mr Geoffrey Paul Rowley and Mr Philip Lewis Armstrong having been appointed liquidators on 8 October 2019. At all material times prior to 1 May 2018, Target was Seller's wholly owned subsidiary. Target was a supplier of gas and electricity. The Agreement specified an intended completion date of 30 April 2018. In the event, completion occurred on 1 May 2018.
5. Clause 3.1(a) of the Agreement described the purchase price in the following terms:
 - “3.1 **Amount**
 - (a) The aggregate purchase price for the Sale Shares is:
 - (i) £9,250,000 less the deductions referred to in paragraph 2.2 of Schedule 4; plus
 - (ii) the amount by which Completion Working Capital exceeds Target Working Capital; or minus
 - (iii) the amount by which Completion Working Capital is below Target Working Capital,subject to adjustment in accordance with clauses 3.2 and 3.5.”

6. Relevant definitions were contained in clause 1:

“**Accounts**” means the individual audited balance sheet and profit and loss account of [Target] as at and for the period ended on the Balance Sheet Date...

“**Balance Sheet Date**” means 31 December 2016...

“**Completion Date**” means 30 April 2018;

“**Completion Statement**” means the statement in respect of [Target] as at the Completion Date showing the Completion Working Capital, prepared in accordance with Schedule 9;

“**Completion Working Capital**” means the Working Capital as shown by the Final Completion Statement...

“**Final Completion Statement**” means the Completion Statement which becomes final and binding in accordance with Part A of Schedule 9...

“**Management Accounts**” means the unaudited management accounts of [Target] in respect of the period commencing on 1 January 2017 and ending on the Management Accounts Date, copies of which are included in the Data Room;

“**Management Accounts Date**” means 28 February 2018...

“**Target Working Capital**” means (minus) -£2,400,000...

“**Working Capital**” means for the period ended on the Completion Date:

(a) current assets (including trade debtors and prepayments but excluding cash, cash equivalents, deposits, credit facilities, the Cash Collateral and the Shell Cash Collateral and excluding, for the avoidance of doubt, capitalised customer acquisition costs in relation to switching site commissions and other third party direct sales channels), as recorded in the monthly management accounts of [Target] under the headings “Debtors” and “Current Assets”; less

(b) current liabilities (including trade creditors, accruals (accruals including trade, rent, salaries, monthly operating expenses, interest payable to trade creditors, and ROCS), but excluding debt and interest on financial instrument debt, as recorded in the monthly management accounts of [Target] under the heading “Current Liabilities” (which, for the avoidance of doubt, will include, but not be limited to, a payment of £208,333 due to SEEL in April 2018 (to the extent that such payment has not already been made by the

Completion Date) and which, for the avoidance of doubt, will include, but not be limited to, a payment of £208,333 due to SEEL in May 2018); and

(c) excluding all and any intercompany receivables, payables, intercompany debt or debt like instruments and any director or related party balances,

calculated on a basis consistent with and using the same accounting principles, policies, practices, evaluation rules and procedures, categorisations, methods and bases adopted by [Target] in the preparation of the Management Accounts including in relation to the exercise of accounting discretion and judgment. For the avoidance of doubt, a bad debt provision of 3 per cent on debtor balances will be applied, consistent with historical preparation of the Management Accounts and with the Accounts.”

7. The detailed terms for the applicable calculations were set out in Schedule 9, headed “Completion Statement and Completion Working Capital”. Part A set out general provisions. So far as material:

“1. **DEFINITIONS**

...

“**Consistent Basis**” means a basis consistent with and using the same accounting principles, policies, practices, evaluation rules and procedures, categorisations, methods and bases adopted by [Target] in the preparation of the Management Accounts including in relation to the exercise of accounting discretion and judgement (save for the calculation of the “Bad Debt” line item, which for the purposes of the Completion Statement shall be calculated at a rate of 3 per cent on debtor balances, consistent with historical preparation of the Management Accounts and with the Accounts)...

2.2 The Completion Statement will be drawn up in accordance with the bases that appear and in the order shown below:

(a) the specific accounting policies set out in part C (Specific Accounting Policies) of this schedule;

(b) to the extent not covered by paragraph 2.2(a), on a basis consistent with and using the same accounting principles, policies, practices, evaluation rules and procedures, categorisations, methods and bases adopted by [Target] in the preparation of the Accounts including in relation to the exercise of accounting discretion and judgement; and

(c) to the extent not covered by paragraphs 2.2(a) and/or 2.2(b), in accordance with UK GAAP.

3.1 The Buyer must prepare, or must procure the preparation of, a draft Completion Statement and must deliver it... to the Seller and the Seller's Accountants within 30 Business Days of the Completion Date.

3.2 The Seller will have 20 Business Days ... ("**Objection Period**") to agree or dispute the draft Completion Statement. If the Seller disputes the draft Completion Statement it must, within the Objection Period, serve a notice to that effect setting out, in reasonable detail, each area in dispute ("**Dispute Notice**")...

3.6 If the Seller serves a Dispute Notice, the Buyer and the Seller must use their reasonable endeavours... to reach agreement as to the matter or matters in dispute within 20 Business Days of the date of delivery of such Dispute Notice ("**Resolution Period**")...

4.2 In respect of any matters included in the Dispute Notice on which no agreement is reached within the Resolution Period, such matters will be referred, on the application of either the Buyer or the Seller to the Expert for determination...

4.13 The Expert will act as an expert and not as an arbitrator. The Expert will determine any dispute arising in connection [with] the provisions of paragraph 3, his jurisdiction to determine the matters and issues referred to him or his terms of reference. The Expert's written decision on the matters referred to him will be final and binding in the absence of manifest error (in which case the Expert's written decision will be returned to the Expert for correction) or fraud."

8. Part C was concerned with "Specific Accounting Policies":

"1.1 The Completion Statement shall comprise a balance sheet of [Target] immediately prior to 30 April 2018 (the "**Effective Time**")...

1.2 The Completion Statement shall be comprised of (for the period ended on the Completion Date):

(a) current assets (including trade debtors and prepayments but excluding cash, cash equivalents, deposits, credit facilities, the Cash Collateral and the Shell Cash Collateral and excluding, for the avoidance of doubt, capitalised customer acquisition costs in relation to switching site commissions and other third party direct sales channels), as recorded in the monthly management accounts of [Target]

(which, for the avoidance of doubt, shall be drawn up on a Consistent Basis) under the headings “Debtors” and “Current Assets”;

(b) current liabilities (including trade creditors, accruals (accruals including trade, rent, salaries, monthly operating expenses, interest payable to trade creditors, and ROCS), but excluding debt and interest on financial instrument debt, as recorded in the monthly management accounts of [Target] for the period ended on the Completion Date (which, for the avoidance of doubt, shall be drawn up on a Consistent Basis) under the heading “Current Liabilities” (which, for the avoidance of doubt, will include, but not be limited to, a payment of £208,333 due to SEEL in April 2018 (to the extent that such payment has not already been made by the Completion Date) and which, for the avoidance of doubt, will include, but not be limited to, a payment of £208,333 due to SEEL in May 2018); and

(c) excluding all and any intercompany receivables, payables, intercompany debt or debt like instruments and any director or related party balances.”

9. In accordance with the terms of Schedule 9, Buyer prepared a draft Completion Statement, which it served on Seller, dated 14 June 2018. This made certain adjustments from the final set of management accounts prepared to 30 April 2018 (referred to as **P4MA**, albeit that this document did not appear in evidence before the Court). Seller served a Dispute Notice dated 12 July 2018. The matters in dispute were not resolved and so were referred to the Expert, pursuant to a letter of engagement dated 7 November 2018. The Expert received written submissions from the parties dated 23 November 2018 and, in Reply, dated 14 December 2018. Responses to Expert’s Questions were provided on 15 February 2019. The Report was, as I have said, produced on 8 March 2019.

B. THE MATTERS IN DISPUTE

10. The Expert recorded at paragraph 1.8 of the Report the 7 matters in dispute which were referred to her for determination. As explained by Mr Rands in his statement, Seller’s case is that the Expert made manifest errors respect of 3 of those matters, namely:
- i) Item 1: Unbilled Identified Gas recognition (**UIG**). This refers to supplies which can be attributed to particular customers but which have yet to be billed.
 - ii) Item 2: Unidentified Unbilled Gas and Electricity (**UU**). These are supplies which have been shipped and sold but which are yet to be attributed to particular customers because of delays in obtaining meter readings.
 - iii) Item 4: Balances over 12 months’ old (**U12**). Such balances arise where energy has been used by customers more than 12 months before any meter reading could verify actual usage and a bill could be rendered.

11. At paragraph 2.1 of the Report, the Expert identified 3 “general factors” which divided the parties and which affected some or all of the matters then in dispute. The first two of those factors remain in dispute and relevant to the Seller’s case. They were described by the Expert in the following terms:
 - “(a) The interpretation of the accounting hierarchy or cascade included in Schedule 9, Part A, paragraph 2.2...
 - (b) The extent to which information arising after the Completion Date can or should be considered or whether a cut-off applies...”

C. LEGAL FRAMEWORK: MANIFEST ERROR

12. The parties were in dispute over the meaning or application of a “*manifest error*” exception in an expert determination clause such as the present. There were two aspects to this: (a) as to the meaning of the exception in general terms; and (b) as to its application where the expert’s determination itself involves a question of contractual interpretation.
13. Dealing first with the meaning of the exception, Seller contended that a “*manifest error*” is one which: (a) is obvious or easily demonstrable without extensive investigation; (b) does not, however, require the error to be demonstrated immediately and conclusively; and (c) may permit recourse to extrinsic evidence. Support for these propositions was said to derive from the Judgment of Jackson LJ in *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264, at paragraphs 83-87, and by reference also to the cases cited in those paragraphs. The particular focus of the argument was in respect of factor (a). There can be no dispute that this is a correct articulation of a relevant aspect of the test: the words used by Seller, found initially in the Judgment of Lewison J in *IIG Capital LLC v Van der Merwe* [2007] EWHC 2631 (Ch), are directly quoted by Jackson LJ in *Amey Birmingham* at paragraph 84. The question is as to exactly what they mean.
14. On behalf of Seller, Mr Cohen QC described these words as denoting a “*visibility*” test, in the sense that the error must be capable of being, as he put it, “*demonstrated from the face of the record*”. On this basis, it would not matter how complex or difficult the question was, an error would be manifest if it could be shown when set against the correct answer. Mr Cohen accepted that different considerations would apply when the decision of the expert was a matter of judgement because, “*The expert is given the ability to make judgments*”.
15. On behalf of Buyer, Mr Polley directed me to some obiter observations of Simon Brown LJ in *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832. At paragraph 33, and developing a description given by Morison J, Simon Brown LJ offered what he described as a “*definition*” of manifest errors as being “*oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion.*” Mr Polley submitted that a manifest error must be more than just a wrong answer; it must be what he described as a “*howler*”.

16. Mr Cohen's response to this was that I am bound by the analysis in *Amey Birmingham* and that I should not take into account the older and *obiter* views of Simon Brown LJ. That would be the correct approach if the later description of the test was inconsistent with its earlier expression in *Veba* but I do not consider that to be the case. It is not expressly so. Mr Cohen's submission, in reality, was that it was his interpretation of the test in *Amey Birmingham* which is inconsistent with the expression in *Veba* but that is a different matter.
17. I consider that the *Veba Oil* test identifies an important and necessary component of the "*manifest error*" exception. It has not been subsumed by the visibility test advanced by Mr Cohen. This is for the following reasons:
 18. First, I was shown no case in which the *Veba Oil* test has been disapproved.
 19. Second, I was shown two cases, both at first instance, in which the same or a similar approach was adopted (I record that Mr Cohen submitted that both were wrong):
 - i) *Invensys plc v Automotive Sealing Systems Ltd* [2002] 1 All ER (Comm) 222, a decision of Thomas J. In an *obiter* passage at paragraph 48, the Judge said, when considering the application of a manifest error clause, that "*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.*"
 - ii) *Walton Homes Ltd v Staffordshire County Council* [2013] EWHC 2554 (Ch), a decision of Peter Smith J. The Judge referred to and applied the *Veba Oil* test.
 20. Third, this is consistent also with the text books that I was shown:
 - i) Lindley & Banks on Partnership at paragraph 10-79, which cites a passage from Lord Lindley in the related context of the re-opening of partnership accounts that: "*All errors are manifest when discovered; but such clauses as those referred to here are intended to be confined to oversights and blunders so obvious as to admit of no difference of opinion.*"
 - ii) Lewison, *The Interpretation of Contracts* at paragraph 14.45: "A contract will sometimes say that a certificate is to be binding save in the case of "*manifest error*". The expression "*manifest error*" refers to "*oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*" [footnoted *Veba*] or "*one that is obvious or easily demonstrable without extensive investigation*". I note that this passage was cited with approval recently by Teare J in *Septo Trade Inc v Tintrade Ltd* [2020] EWHC 1795, at paragraph 54, who went on at paragraph 57 to consider whether there was an "*obvious blunder*".
 21. Fourth, and reverting to a more general point of principle, the Courts have emphasised that the circumstances in which an expert's determination can be challenged are tightly circumscribed: see *Walton Homes* at paragraph 7, and the cases there cited, and *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2012] Bus LR 542, at paragraph 29. The reason for this is that where parties have agreed to subject their dispute to an expert determination, that is what they are entitled to. A manifest

error exception allows recourse to the Court but in necessarily confined circumstances. A “*visibility*” test, along the lines suggested by Seller, might well restrict the potential for challenges to mere certificates but, at least where the subject matter is an expert determination which may be expected to carry reasons, would provide little content to the word “*manifest*” and in practice no real filter to the scope of any challenge, with the danger that the Courts would simply become an alternative forum for the party dissatisfied with the expert’s conclusions.

22. The second area of dispute, which is strictly speaking independent of the first, concerns the approach to be taken when the expert’s determination may be characterised as a decision on a matter of contractual interpretation. Seller’s case was that, since there is only one correct interpretation of a contract, where an expert misconstrues the contract and proceeds to make a determination which is founded upon such a mistake, there must by definition have been a manifest error. Mr Cohen submitted that such a situation is akin to that in which an expert has acted beyond his or her instructions, with the consequence that the determination cannot be final and binding. In such a case, in effect, the “*manifest*” qualification is as a matter of law either ignored or automatically satisfied.
23. Mr Cohen was not able to show me any authority which directly supported his proposition. The closest, perhaps, was a sentence in Lewison, at paragraph 14.46, that, “*A certificate may be invalid for manifest error if it is given on the basis of a disputed interpretation of the contract which turns out to be wrong.*” But this does not go so far as the proposition advanced and, indeed, by using the word “*may*” rather than “*must*”, undermines it.
24. Mr Cohen took me instead to a line of cases concerned, not with the application of a “*manifest error*” exception, but with questions relating to the scope of an expert’s mandate. The argument was that these cases were a *fortiori*, and that Seller’s proposition must necessarily be drawn from the Court’s approach. I do not agree. The cases deal with different questions and do not justify the proposition advanced by Seller.
25. The principal case relied upon was the decision of the Court of Appeal in *Barclays Bank plc v Nylon*. The claimant hedge fund investor gave notice to withdraw its investment, thereby triggering an obligation to allocate profits between investors. It sought a declaration that it was not obliged to pay the defendant manager profits on its initial capital investments. The defendant sought a stay of the proceedings on the grounds that the dispute over profit allocation was subject to an expert determination clause (clause 26) and it was said that the expert should, in the first instance, determine his own jurisdiction. The underlying issue was whether the expert determination clause was engaged on a dispute as to the making of the allocation or only on disputes once an allocation had been made. The Judge held that the dispute did not in fact fall within the scope of the expert determination clause and so refused to grant a stay. The Court of Appeal dismissed the appeal.
26. The Court of Appeal confirmed (and it appears from paragraph 21 of the Judgment of Thomas LJ that this was a matter of common ground) that it was ultimately for the Court to determine the jurisdiction of the expert. In such circumstances, what Thomas LJ described at paragraph 24 as the “*real issue*” was whether the expert should be free

to determine his own jurisdiction in the first instance. The Court of Appeal decided that, on the facts of that case, it was in the interests of justice and convenience for the Court to determine the issue.

27. So far, at least, this is some distance from Seller's proposition as to the application of a "manifest error" clause (there was no such clause in that case). However, I was directed to a discussion within Thomas LJ's Judgment of those situations in which (even absent a "manifest error" clause) the Court may intervene where the decision maker can be said to have gone outside the limits of his decision making authority. In particular, at paragraph 33, Thomas LJ referred to the dissenting Judgment of Hoffmann LJ in *Mercury Communications Ltd v Director General of Telecommunications* [1994] CLC 1125, at p 1140, but that does not support the proposition now advanced. Hoffmann LJ's analysis presupposes a close consideration of the actual scope of the decision making authority:

"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. The distinction is clearly made by Lord Mustill in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 at p. 32."

28. In the example which is posited by Hoffmann LJ, the scope of the instruction is narrow and does not include the determination of the meaning of the applicable principles. It is this feature which leads to the conclusion that, if the expert in fact acts by reference to an incorrect interpretation of those principles, he has exceeded his

decision making mandate. In that event, it is not a mandated determination which has been vitiated by manifest error; it is simply not a mandated determination at all. And in *Nylon* itself, the point did not in any event arise. At paragraph 35, Thomas LJ noted that clause 26.1 allowed issues of interpretation to be left to the expert, with the consequence that it was not necessary to decide whether, if an issue determined by the expert was solely one of law, it would fall outside the mandate.

29. Mr Cohen also relied upon *Great Dunmow Estates Ltd v Crest Nicholson Operations Ltd* [2019] EWCA Civ 1683 but I do not derive any further assistance from this case. This was a case in which the mandate for the expert (a surveyor) was narrow. The issue concerned the appropriate valuation date, as to which the expert took legal advice on the interpretation of the contract. The principal question before the Court was whether he ought to have applied a different valuation date which had been contained in a statement of agreed facts. The Judge concluded that, whilst the expert's interpretation of the contract was correct, the statement of agreed facts amounted to a contractual variation. As a result of the decision of the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119, it appears to have been accepted that this part of the decision was wrong and it was overturned on appeal.
30. The Court of Appeal then went on to deal, *obiter*, with a separate argument that the Judge had no jurisdiction to determine the valuation date at all because this fell within the exclusive jurisdiction of the expert. The Court held that the Judge was right to conclude that the expert did not have exclusive jurisdiction to decide the valuation date but this was a matter of interpretation of the relevant clause. At paragraph 35, Patten LJ noted that "*There is nothing in terms in clause 6.2 which gives the Valuer the jurisdiction to determine what is the correct of the two alternative dates or to exclude the rights of the parties to refer that question of construction and therefore jurisdiction to the court.*" So, again, the Court was not saying that, whenever an expert makes a determination on a point of interpretation, an error means that the determination falls outside the expert's mandate. It was saying that, in that case, and as in Hoffmann LJ's example, the mandate itself was narrow.
31. In contrast, Mr Polley relied upon two cases, both at first instance, which I consider to be closer to the point at issue. I have already referred to these cases above on the question of the meaning of the test itself, but for present purposes their significance is that both involved expert determinations on matters of contractual interpretation:
 - i) *Invensys* was concerned with a sale and purchase agreement with an expert determination clause subject to a manifest error exception. The subject matter of the determination was the amount of final consideration and one of the complaints was that the expert (accountant) had misconstrued the original contract. This was addressed in an *obiter* discussion at the end of the Judgment. At paragraph 48, and having noted that "*another interpretation of the agreement was permissible*", the Judge was not prepared to say that this meant that there was manifest error. As he said, "*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.*" Mr Cohen suggested that his Judgment in *Barclays Bank v Nylon*

demonstrated that the by then Thomas LJ had had “*somewhat of a Damascene conversion*” on this point but, for the reasons I have explained, I do not agree.

- ii) Indeed, it is relevant also to note also that Thomas J’s conclusion was reached following an assessment of the nature of the engagement itself. At paragraph 46, Thomas J observed that:

“... I have to bear in mind that this issue was submitted to a leading firm of accountants who would approach the interpretation of the agreement against their knowledge of accounting principles and of the commercial purpose of the various provisions of the agreement.”

In other words, a specialist interpretation of the agreement by an expert accountant was precisely what the parties had subscribed to. In such circumstances, and reverting to Seller’s proposition, a rule of law to the effect that any determination on a matter of contractual interpretation would, if wrong, fall outside the expert mandate itself, would be not only a surprising conclusion but one which undermined, on Thomas J’s analysis at least, the very reason why the parties had placed the determination in the hands of the expert.

- iii) In *Walton Homes*, an expert surveyor was engaged to provide a determination which would be final and binding on the parties in the absence of manifest error. It was accepted that the effect of the appointment clause in the agreement was that all questions of fact and law arising under it were to be determined by the expert. The dispute between the parties concerned the expert’s interpretation of how “*additional consideration*” was to be determined under the contract. The Judge was scrupulous not to substitute his own view on that interpretation question. He considered that the arguments put forward in the case were “*very strong*” on both sides and on this basis the expert’s conclusion was not manifestly erroneous.

32. For all of these reasons, I reject Seller’s proposition, at least insofar as it amounts to a rule of law. Instead, and as is apparent from the above discussion, I consider that the correct approach will necessarily turn on the scope of the expert engagement. If, pursuant to the contract, the expert is engaged, as in *Invensys* and *Walton Homes*, to make determinations on matters of contractual interpretation, I see no reason why a challenge should not have to circumvent the manifest error test as I have enunciated it. That is to be distinguished from the situation described by Hoffmann LJ, where the role of the expert is more circumscribed and where different considerations might therefore arise. I do not doubt that there may in some cases be a fine line to draw but that is itself a question of contractual interpretation.

33. Turning to the Agreement itself, it is to my mind clear that the engagement of the Expert was of a broad and expansive nature and that it included, where necessary, the mandate to determine issues of contractual interpretation, insofar as they were necessary to resolve the matters in dispute between the parties. The dispute was ultimately one of accounting, in the sense that the product of the Expert’s engagement was to be a determination for the purpose of a revised Completion Statement with the

correct figure for Completion Working Capital. Paragraph 4.1 of Part A of Schedule 9 provides that the Expert is a person appointed in accordance with that paragraph to resolve a dispute arising under paragraph 3, and paragraph 4.13 accords to the expert the mandate to determine “*any dispute arising in connection*” [with] the provisions of paragraph 3. A dispute under paragraph 3 is a dispute in respect of the draft Completion Statement. The basis on which the Completion Statement is to be drawn is set out in paragraph 2.2. In the event, at least part, and arguably a large part, of the difference between the parties was a dispute over the meaning of paragraph 2.2 and it is apparent from the written submissions that both parties did in fact seek the resolution by the Expert of central matters of interpretation in their favour. Nor is it a surprising conclusion that this is what the Agreement provides for. In this respect, at least, there are similarities to *Invensys*. As in that case, it is entirely understandable that the parties should wish for an expert accountant to resolve necessary issues of contractual interpretation in an accounting context.

34. All that said, the legal issues which I have considered only set the framework for the matters arising before me and do not determine them. Seller’s case was that there was manifest error in the Expert’s decisions, whatever the meaning or application of the test.

D. GENERAL FACTORS

35. As I have recorded, the Expert identified three “*general factors*” which divided the parties and the resolution of which affected some or all of the specific matters in dispute. The argument before me followed the same course and it is therefore appropriate that I give consideration to the two factors still outstanding, before turning to the disputed heads.

D1. The interpretation of Schedule 9, paragraph 2

36. This was addressed by the Expert at paragraphs 2.4 to 2.16 of the Report. It is the issue referred to by Mr Rands as “*Accounting Hierarchy*”. The issue arose because of the interaction between paragraphs 2.2 of Part A of Schedule 9 and paragraph 1.2 of Part C of Schedule 9. Paragraph 2.2 sets out a hierarchy of bases upon which the Completion Statement is to be drawn. They are on their terms mutually exclusive and, in short form, engage (a) the specific accounting policies in Part C; and if not (b) a basis consistent with the Accounts, as defined; and if not (c) in accordance with UK GAAP. Paragraph 1.2 of Part C, in turn sets out the categories to be included in the Completion Statement, in particular current assets and current liabilities “*as recorded in the monthly management accounts*” which must in turn be “*drawn up on a Consistent Basis*”. The definition of “*Consistent Basis*”, in turn, requires consistency with the principles, policies and so forth in the Management Accounts, as defined. It was common ground that, to the extent that paragraph 2.2(a) of Part A and therefore paragraph 1.2 of Part C were engaged, what was referred to as the “*Consistent Basis test*” needed to be satisfied.
37. In terms of the narrow question of the application of the hierarchy itself, the Expert was of the view (see paragraph 2.16 of the Report) that only paragraph 2.2(a) of Part A was engaged. It is not clear whether that was in dispute at the time but, if it was, it is no longer in dispute. Both parties accepted before me that paragraph 2.2(a) was

determinative. The real issue was and still is as to what it means in practice. Because paragraph 2.2(a) engages the accounting policies at Part C, it is necessary to consider the application of the Consistent Basis test.

38. The principal issue of interpretation considered by the Expert was whether, when applying the Consistent Basis test, this imported all, or indeed any, of the concepts and principles within UK GAAP. The conclusion which she reached, at paragraph 2.15 of the Report, is that it depended on whether such concepts and principles had been applied when exercising discretion and judgements in the preparation of the Management Accounts. If they had, then this would then carry forward as a component of the Consistent Basis test.
39. Seller contended that this interpretation was a manifest error in three respects. First, it was submitted that, on a proper interpretation of paragraph 2.2, any involvement of UK GAAP was excluded unless and until paragraph 2.2(c) was reached (which it never was). I reject this submission, which I consider to be plainly wrong. The hierarchy in paragraph 2.2 was indeed set in three stages with a final and residual reference to UK GAAP if neither of the first two stages applied. But that says nothing about the content of the earlier two stages. If the Management Accounts were produced by reference to UK GAAP concepts then this would necessarily flow into any application of the Consistent Basis test. In other words, the inclusion of UK GAAP at paragraph 2.2(c) does not operate silently to exclude the potential for UK GAAP at paragraph 2.2(a), or indeed 2.2(b), if such concepts would otherwise be applicable by reference to the accounting documents referred to.
40. Seller's second contention was more broadly based, though care must be taken with its articulation. Mr Cohen described it as follows in his skeleton argument:
- “...any assets and liabilities that could be identified in the management accounts for the period ending on 30 April 2018 were to be transposed into the CS [ie Completion Statement]. The CS was to be “comprised of” those assets and the Consistent Basis check was designed to do no more than ensure that those assets and liabilities had been quantified using the same discretion and judgment as they had been in the Management Accounts, so that there could be no change in approach at the time of sale of [Target].”
41. On one reading, and far from identifying a manifest error, this is broadly consistent with the Expert's conclusions on the issue of interpretation. Once paragraph 2.2(a) is engaged, it is necessary to give content to the Consistent Basis test at paragraph 1.2 of Part C when considering the various elements which, eventually, comprise the Completion Statement. On Mr Cohen's formulation, what that means is that the assets and liabilities have to have been quantified using “*the same discretion and judgment*” as they had been in the Management Accounts. Leaving aside the distinct point about UK GAAP to which I have already referred, it is difficult to discern any material departure from the Expert's own conclusion at paragraph 2.15 of the Report:

“...since the term Consistent Basis includes the words “in relation to the exercise of accounting discretion and

judgement”, then should such accounting discretion and judgement for any time have had reference to concepts and principles within UK GAAP, then I find that the same consideration should be applied again...”

42. The real criticism, however, was a rather more subtle one, and turns on what is meant by, in Mr Cohen’s words “*the same discretion and judgment*”. On the approach of the Expert, it is necessary to identify the concepts and principles by which discretions and judgements came to be exercised or made. I should make it clear that that appears to me to be clearly the right interpretation. The thrust of Mr Cohen’s submissions, in contrast, involved focusing on the product of the exercise rather than basis upon which the exercise came to be conducted. This led him to argue, as a logical consequence of the submission, that even a change in the facts would be irrelevant when it came to assessing whether the same discretion and judgements had been applied.
43. I can explain this by reference to a hypothetical example discussed during submissions. Assume, no doubt for a different company, there was a single large debtor on the balance sheet, which for each set of management accounts in months 1-9 had been valued at 100%. On Mr Cohen’s case, it would be expected that the same discretion and judgement would mean that the debtor would be valued at 100% in month 10. But suppose that debtor unexpectedly collapsed in month 10. On the Expert’s approach, it would be necessary to work out the basis on which the preceding judgements had been made and to apply the same basis to a judgement referable to the new circumstances. Mr Cohen’s response in argument was that an assessment at 100% in such circumstances would still involve “*using the same judgement*”. This was because, as he put it, “*A change in the evidence doesn’t matter one bit.*” In Reply, and perhaps recognising how odd that appeared, he submitted that the example was not apposite because Target did not have a single large debtor, though he otherwise accepted that the example was “*difficult*”. It seems to me that, however crudely, these exchanges do expose the underlying flaw in Mr Cohen’s argument. Accepting, as he did, that the same discretion and judgement must be applied, it is not possible or at least not appropriate to decouple the product of the exercise of discretion and judgement from the basis upon which that exercise is undertaken.
44. The third criticism was that the Expert’s interpretation of the Agreement involved the application of the Consistent Basis test to the wrong document. It is common ground that the test had to be applied against the Management Accounts, which was a defined term comprising the unaudited management accounts of Target from 1 January 2017 to 28 February 2018 and which were included in the Data Room. On Seller’s case before me, the proper interpretation of paragraph 1.2 of Part C is that it was P4MA which needed to be prepared on a Consistent Basis with the Management Accounts and that the Expert wrongly applied the test to the draft Completion Statement.
45. I accept Seller’s case that the Expert did apply the Consistent Basis test to the draft Completion Statement. There are many references in the Report which put this point beyond doubt. Mr Cohen submitted that there was therefore necessarily a fundamental error in the Expert’s approach because, in essence, she was looking at the wrong document. I do not accept this criticism, for the following reasons.

46. First, so far as I can discern, this is a point of recent origin. It is not mentioned anywhere in Mr Rands' statement, which does of course contain the evidential foundation of this claim. Indeed, not only is the point not mentioned, at least two paragraphs of this statement (namely paragraphs 20(a) and 32) appear to proceed on the express basis that the Consistent Basis test did apply to the draft Completion Statement. Whilst this is of course a trial without pleadings, I start by being cautious in how I treat a new allegation of manifest error which is not only not advanced on Seller's evidence but inconsistent with that evidence. I note also that the Claim Form records that Seller seeks to set aside the Expert's decision "*on the grounds set out in the Witness Statement of David Harvey Rands dated 6 March 2020.*"
47. Second, and more substantively, the manner in which the point was expressed by Mr Rands follows on from the presentation of the dispute before the Expert. Both sides proceeded before the Expert on the basis that the Consistent Basis test did apply to the draft Completion Statement, in the event that paragraph 2.2(a) was engaged. That no doubt also explains why the Expert did not address the specific point of interpretation which Seller has now raised: it was a point which, so far as I can see, she did not understand to be in issue.
48. I was taken to the Dispute Notice, which was the contractual document served by Seller pursuant to paragraph 3.2 of Part A of Schedule 9 and which therefore instituted the disagreement which ultimately came to be resolved by the Expert. At paragraph 3.2 of the Memorandum attached to that Notice, FRP Advisory LLP, on behalf of Seller, stated:
- "Part C, Clause 1.2 specifically asserts that the Completion Statement should be formulated on a consistent basis with the monthly management accounts."
- To similar effect, see paragraph 6.24 of Seller's Reply Submissions to the Expert:
- "The Completion Accounts should be prepared on a Consistent Basis with Management Accounts..."
49. In the light of this material alone, I must reject this further criticism belatedly made by Seller. It is to be remembered that this matter does not come to Court as a trial on a construction issue. It is for Seller instead to establish that the Expert made a manifest error in the Report. I cannot see any legitimate grounds for Seller to contend that the Expert made a manifest error on a matter which was not in dispute and where she proceeded on a basis consistent with that confirmed by or on behalf of Seller itself.
50. Third, I do not accept Seller's interpretation of the Agreement, or that this would matter in a material respect in any event. It is right that, pursuant to paragraph 1.2 of Part C of Schedule 9, it is the monthly management accounts which are to be drawn up on a Consistent Basis. Those accounts were, in the events which occurred, P4MA. But that does not mean that the draft Completion Statement was also not required to be drawn up on a Consistent Basis. Indeed, given that (a) by paragraph 2.2(a) of Part A, the Completion Statement must be drawn up in accordance with the specific accounting policies in Part C and (b) the Completion Statement is, by paragraph 1.2 of Part C, to be comprised of the assets and liabilities recorded in the monthly management accounts drawn up on a Consistent Basis, it follows that the Completion

Statement must itself be drawn up on a Consistent Basis, or else these requirements will not be met. This is consistent also with the definition of Working Capital (as a component of the Completion Statement), which must also satisfy the substance of the Consistent Basis test. Further, this is to my mind the obviously appropriate commercial interpretation of the Agreement as the context of the entirety of Schedule 9 is a resolution of the Completion Statement (as opposed to a resolution of P4MA), and it is in that context that the Consistent Basis test is of evident importance to the parties.

51. Even if this were wrong, I do not see how the point is likely to matter in at least most respects. Mr Cohen spoke frequently of the process of, as he put it, “*transposition*”. By that, he meant that the figures in P4MA should be carried over (without adjustment) into the Completion Statement. I do not disagree with that way of describing the process in principle, though it is subject to the caveat that P4MA must be prepared on a Consistent Basis. But even if, as per Seller’s interpretation, the Agreement specified only that P4MA should be prepared on a Consistent Basis, the effect of “*transposition*” would be that the Completion Statement had to reflect that Consistent Basis. Ultimately, and save possibly in respect of a timing issue, if that were material, I do not consider that it matters whether, by contractual obligation, the Consistent Basis test applies just to P4MA or also to the Completion Statement, because it involves looking at the same things.
52. In conclusion, I reject Seller’s case that the Expert made manifest errors on the issues of contractual interpretation which I have adumbrated. It is enough to say that she was not plainly wrong but I would go further because I am of the view that she was plainly right.

D2. Post balance sheet events (“PBSE”) period

53. This was considered at paragraphs 2.17 to 2.23 of the Report. The issue, in short, was whether there was any cut-off period (which the Expert referred to as the “*PBSE period*”) for the consideration of evidence when seeking to apply the Consistent Basis test. The Expert’s view was that, because the Completion Statement would not be finalised until after her determination, the PBSE period would in theory remain open beyond the date of the Report. However, she recognised that this would create commercial and practical issues and so, by paragraph 2.22, explained that she would examine each issue with the aim of reaching a decision based on information up to the date of the Dispute Notice, only looking beyond that date to check that there was no inconsistency or contradiction.
54. Seller contended that the Expert made a manifest error for three reasons. The first was that, as it was submitted, there is “*no applicable concept of PBSE*” at paragraph 2.2(a) of Part A of Schedule 9, because the exercise is simply the “*adoption*” of the asset and liability figures in P4MA. As put, this appears to be an issue of contractual interpretation but for reasons which will be apparent from the above, I am of the view that it is wrong. The exercise was not simply “*adoption*” (which I think is intended as a synonym for “*transposition*”) because that overlooks the Consistent Basis test. It is the Consistent Basis test which allows for at least the possibility of PBSE.

55. Seller's second submission was that, even if the Consistent Basis test did allow for PBSE, the relevant period would extend no further than the 8-14 days which the Expert described as the typical period within which management accounts came to be signed off. I could see the force of that submission if the relevant question which the Expert were addressing was whether P4MA satisfied the Consistent Basis test. However:
- i) This point links to Seller's anterior criticism of the Expert's application of the Consistent Basis test to the draft Completion Statement. I have rejected that criticism. If, as I have found, it was correct, or at least not a manifest error of which Seller can complain, for the Expert to proceed on that basis, this criticism necessarily falls away.
 - ii) There is also a particular point on Seller's case which I ought to mention for completeness. At paragraph 2.18 of the Report, the Expert recorded that Seller's position in its Response to Expert's Questions had been that no information after the date of the draft Completion Statement (14 June 2018) should be taken into account. Mr Cohen submitted that that was a mistake on the part of the Expert, as Seller's position had always been that there was no PBSE period at all.
 - iii) In its First Submissions to the Expert, at paragraph 5.4, Seller did certainly say that "*only the values and figures available at the time of preparation of [P4MA], and not items arriving later, or far less after the date of the Completion Accounts or Notice of Dispute may be included in the CWC [Completion Working Capital]*" and that further submissions were without prejudice to that contention. I do note, however, that this was in the context of a different issue (which is not an issue before me) as to whether amendments could be made by Buyer to the draft Completion Statement.
 - iv) Further, Mr Cohen very fairly also took me to the Responses to Expert's Questions. At paragraph 2.5.1(c), the Expert asked the parties to comment on the relevant post balance sheet period which might be implied in the absence of any specific direction in the Agreement. Seller's response, at paragraph 2.5.5, included the following sentence: "*The date 14 June is the cut-off date for new information which became available only after 30 April 2018 and only to change t[he] figures to be applied in the management accounts at 30 April 2018...*" Whilst accepting that this paragraph was not "*the most felicitously drafted*", Mr Cohen submitted that this, also, was intended to address the point about amendments to the draft Completion Statement.
 - v) Whilst I do not doubt Mr Cohen's explanation of what was intended by Seller, the question for me (if it matters) is whether the Expert was manifestly wrong to read this as an acceptance of a PBSE period up to 14 June 2018. Given that this was the very question that she was asking, I cannot conclude that she was wrong to read the answer in that way. Ultimately, this point does not make any difference, but it means that, at the very least, there can be no legitimate criticism of the Expert for running the PBSE period to at least 14 June 2018.

56. The third submission was that PBSE was wrongly introduced by the Expert because it is “a UK GAAP concept applicable to financial statements, not management accounts.” I do not accept this. I agree that, as a formal concept, there are rules about post balance sheet events and their impact on financial statements. But the Expert’s enquiry was at a less formal level, as to the evidence which ought properly to be taken into account when undertaking the judgements mandated by the Consistent Basis test. In the absence of any rule prohibiting the evaluation of evidence beyond a particular date, it was a matter for the accounting expertise of the Expert to set the cut-off date. I see no error, let alone manifest error, in the judgement which she exercised in this respect.

E. THE MATTERS IN DISPUTE

E1. Unbilled Identified Gas

57. The Expert considered UIG at paragraphs 2.33 to 2.75 of the Report. The point in issue may be shortly expressed. 100% of UIG was recognised as an asset in each of the Management Accounts in the period from January 2017 to September 2017. In the Management Accounts from October 2017 to February 2018, and in P4MA, this was reduced to 50%. The Expert determined that, for the purpose of the Completion Statement applying the Consistent Basis test, it was appropriate to make a further adjustment, to 0%.

58. Given my findings on the general factors, the balance of the Expert’s decision on UIG is properly characterised as the exercise of her own accounting judgment. As a matter of contractual interpretation, she was entitled to seek to discern the concepts and principles which underlay the judgements exercised in the Management Accounts. Those concepts and principles were, as she found, within UK GAAP. Applying UK GAAP, she judged that the balances should be written down to zero. Although the outcome therefore differed, the process by which the outcome was reached was, in the Expert’s view, an application of the Consistent Basis test. At paragraph 2.50 she said the following, with which I agree:

“I therefore conclude that the relevant practice for the Completion Statement was not associated with the % recognition per se but rather whatever would best give effect to the accounting principles and policies applied in the Management Accounts, based on the information available to management at the time.”

59. It is not the role of the Court to second-guess the exercise by the Expert of her accounting judgement, at least unless it is very clear that the judgement must be infected by a material mistake. That said, and as I suggested to Mr Polley in argument, I would have been cautious about a submission that the Expert could properly arrive at radically different outcomes if the underlying facts were exactly the same. That is not to say that this would necessarily have been a manifest error but it would be likely to require greater scrutiny. But that is not what happened. At paragraph 2.54, the Expert said in terms that “*the issue I have focussed on is the difference in information available...*” That information comprised, in particular, the introduction of Project Nexus in 2017. This was an industry initiative which replaced

previous gas market arrangements for UIG by the use of a daily algorithm. The consequence was volatility in the recovery of UIG and, indeed, was the cause of the reduction in value from 100% to 50% in the later sets of Management Accounts. As the Expert noted at paragraph 2.54, by the time of the draft Completion Statement in June 2018 (or even beyond) this volatility had existed for a considerably longer time. At paragraph 2.58, the Expert went on to consider the specific factors which were said by Seller to support the view, at the time, that 50% remained recoverable. She concluded that such factors did not justify that conclusion, by reference in part to the ongoing developments that she described (see for example paragraphs 2.65 and 2.66).

60. Ultimately, and assuming as I have found that the approach for the Expert was the contractually correct one, the conclusions which she came to were a matter for her accounting judgement. I can find no error, let alone manifest error, in such judgement.
61. Indeed, the criticisms made by Seller on this matter in dispute are in reality criticisms which applied to the general factors which I have already considered. It was said that the Expert ought to have applied the 50% UIG figure in P4MA, because that is what the Agreement required, having found that P4MA had been prepared on a Consistent Basis. But that goes back to the interpretation of the Agreement, on which I find no fault with the Expert's conclusions. Seller also said that PBSE should not have been taken into account but, again, I have already considered that point.
62. In the course of submissions, Mr Cohen identified a further criticism (which infected all of the matters in dispute) which is what he referred to as the "*burden of proof*". What he said was that the Expert proceeded as if it were incumbent on Seller to establish that the Consistent Basis test was satisfied (thus, for example, by producing evidence of continued recoverability) whereas it ought to have been for Buyer to establish that the Consistent Basis test was not satisfied. I fear that this was another new point, as it was not mentioned by Mr Rands but, in any event, I do not agree. The Agreement says nothing about burden of proof and I see no reason why there should be an implied burden on one party over another. As it seems to me, the burden of persuasion would fall on whichever party seeks to establish a particular proposition, whether it be that the Consistent Basis test has been complied with or that it has not been complied with. There is no starting presumption either way. And ultimately, it would be for the Expert to determine the answer to the matters in dispute, which is what she did.

E2. Unbilled over 12 months

63. At paragraphs 2.76 to 2.107 of the Report, the Expert considered the dispute in respect of U12. In the Management Accounts and in P4MA, this asset was valued at 100%. The Expert revalued it at 0%. The principal reason for this was the fact of an Ofgem letter dated 5 March 2018, setting out intended changes to the licensing requirements, effective 1 May 2018, and which, in substance, precluded the issue of bills for gas used more than 12 months prior to the date of the bill, unless there was evidence of unreasonable conduct (and, as the Expert found, such evidence was not being kept by Target).
64. Seller contended that this was a manifest error for the same reasons as in respect of UIG and I reject that contention for the same reasons. As a further gloss on this, Seller

also contended that there was material significance in the fact that the Ofgem policy did not come into effect until 1 May 2018, whereas the balance sheet date of P4MA and the Completion Statement was 30 April 2018. Hence, it was said, and if PBSE were relevant at all, this would be a “*non-adjusting event*” (cf FRS 102/32.2). This was said to be a matter of “*common sense*”.

65. I am not persuaded by Seller’s appeal to common sense. If that were the test, I would not immediately see the common sense in a conclusion that an asset representing unbilled balances should properly be assessed at 100% as at a certain date, when it is already known that such balances will never be recovered because a policy set to be introduced the following day means that they will be incapable of being billed. But, and perhaps fortunately, that is not the test. This is pre-eminently a matter of accounting judgement and I see no error, let alone manifest error, in the judgement exercised by the Expert.

E3. Unidentified Unbilled Gas & Electricity

66. This was addressed by the Expert at paragraphs 2.108 to 2.134 of the Report. Whilst there were a number of issues argued before the Expert, only one aspect was challenged by Seller. UU amounts totalling £3,329,744 were excluded from the draft Completion Statement. This was later revised to exclude £2,947,570. The Expert rejected the positions advanced by both Seller and Buyer but concluded that the figure for UU in the Completion Statement ought to be £544,527. This was intended to reflect the fact that the remaining balance of UU was over 12 months old and so would be the subject of the new Ofgem policy effective on 1 May 2018.
67. The principal criticism by Seller was accordingly the same as the criticism in respect of U12 and I reject it for the same reasons. But there was also an additional criticism, described by Mr Cohen as “*a simple and obvious failure of business mathematics.*” Having concluded that balances over 12 months should be written down to 0%, the Expert needed to work out how much of the overall UU balance fell into that category. At paragraph 2.134, she explained that she did this by deducting from the balance at 30 April 2018 the corresponding UU balance as at 30 April 2017, so producing a net figure.
68. Mr Cohen submitted that such a crude calculation must be wrong, or at least is likely to be wrong, because it does not take into account the day to day fluctuations on UU balances (if there were any) over the 12 month period to 30 April 2018. Strictly speaking, I agree. The Expert’s calculation would be accurate only if none of the UU balance at 30 April 2017 had been repaid by 30 April 2018, and so presented as an inevitable U12 balance at that date, but the Expert referred to no evidence to demonstrate that that was the case. Mr Polley submitted that these were in fact slow moving balances (although I have not seen any evidence of that either) and that, in any event, the Expert was doing the best she could on the available material.
69. Mr Cohen urged on me that, even if all other challenges failed, this point should be returned to the Expert. He also suggested that there would be other evidence which could be looked at in order to discern a more accurate figure. Again, however, I have to remind myself of the role of the Court. It is not to make its own findings or, necessarily, to ensure that all possible evidence is brought to bear on the matters in

dispute. The Court's jurisdiction is to determine whether there has been a manifest error. That involves, in this instance, a consideration of whether the Expert's approach to this issue was wrong, or indeed plainly wrong. It was not suggested to me that there was material before the Expert on which she should or even could have arrived at a more reliable figure. So her options were either to calculate a number on a fairly rough and ready basis, which had some logic attached to it but which did not have the granularity necessary to make it demonstrably accurate, or to open this matter up for further submissions and further evidence. This is, once more, as it seems to me, a matter of judgement. I do not find that the Expert's judgement was in error, or in manifest error.

F. DISPOSITION

70. For the reasons given above, I dismiss Seller's claim to set aside the Expert's decision on the matters in issue for manifest error.