JUDGMENT : Mr Justice Thomas: Commercial Court. 8th November 2001

Introduction

1. There is before the court an application by the claimants (the vendors) for summary judgment under CPR Part 24 for sums they say are due under an agreement made for an expert determination of a dispute under a sale and purchase agreement. The agreement for the expert determination provided that the decision would be "final and binding except in the case of manifest error". The Expert determined the dispute in favour of the vendors; the contention of the defendants (the purchasers) is that there was a manifest error by the Expert and that they are therefore not liable for the amounts payable as a result of the determination.

2. The principal questions before the court are (1) whether it is only permissible to look at the determination itself to decide whether there is manifest error and (2) whether, on the materials the court is permitted to examine, there was a manifest error. On the first of these questions, little authority has been found, despite the extensive researches of counsel. Before turning to consider those two questions, it is necessary for me to set out the factual background in a little more detail.

Factual background

3. By an agreement dated 28 January 2000 the vendors agreed to sell to the purchasers for "a debt free, cash free" price a number of companies that were involved in the production of automotive sealing systems. Under the terms of clause 4 of the agreement an initial consideration was payable on completion; the final consideration payable was to be calculated thereafter to reflect the debt free, cash free basis for the price and the working capital of the companies. Two of the sums that were part of the final calculation were "the Final External Debt/Cash Balance" (clause 13 of the agreement) and the "Aggregate Working Capital Adjustment" (clause 15 of the agreement).

4. On 31 March 2000, the initial consideration was paid upon completion of the agreement. After that the vendors and the purchasers set about calculating the final consideration so it could be agreed and paid. By 22 September 2000, the parties had agreed the Final External Debt/Cash Balances and Aggregate Working Capital Adjustment, save for sums in respect of factored debts of $12.1m of one of the companies which had been sold, Saiag Sealing Systems SPA, an Italian company (Saiag Italy). By an exchange of correspondence dated 22 and 27 September 2000, the vendors and purchasers agreed to the figure payable for the final consideration with the exception of the way in which the factored debts of Saiag Italy were to be treated in the Final External Debt/Cash Balance and Aggregate Working Capital. They agreed to refer this dispute to expert determination; the purchasers paid the amount that was otherwise agreed in respect of the final consideration.

5. By an agreement in writing dated 1 December 2000, the parties appointed Deloitte & Touche as an Expert to determine the following: *"The treatment of the $12.1m Saiag Italy cash, received in respect of factored debts, for the purposes of the calculation of (a) the Final External Debt/Cash Balance; and (b) the Aggregate Working Capital."*

6. The signed agreement made it clear that the Expert was to act as an expert and not an arbitrator. As I set out in paragraph 1, the determination was to be final and binding except in the case of manifest error. The parties also provided that the Expert's determination would be set out in a written report. In giving its decision the Expert would give a summary of the reasoning in arriving at its decision. It was also agreed that the Expert would reach its decision on the basis of the evidence and arguments submitted by the parties. A further term of the agreement provided that the Expert was not to be liable save for fraud, wilful default or negligence and, save in the case of fraud or wilful default, its liability was to be limited to £25m.

7. Submissions were then made by the parties to the Expert. On 16 February 2001 the Expert made its report. Its determination was set out in the three final paragraphs of the report:

   "5. <u>OUR DETERMINATION</u>

   5.1 The final External Debt/Cash Balance should exclude the $12.1 million Saiag Italy cash received in respect of factored debts and accordingly should be reduced by $12.37 million from $62.9 million to $50.5 million.

   5.2 Aggregate Working Capital should exclude the factored debts in respect of which the $12.1 million Saiag Italy cash was received and accordingly should remain unchanged at $145.7 million.

   5.3 Neither a determination of the Aggregate Working Capital Adjustment nor a determination of target working capital is within our Terms of Reference."

8. As required by the terms of reference the report in which the determination was included set out in greater detail the nature of the dispute, the outline of the parties' positions and a summary, contained in three pages, of the Expert's reasoning.

9. As a result of that determination, there became payable to the vendors a further sum of just over $12m.

10. On 28 February 2001 the solicitors for the purchasers wrote to the Expert stating that, although they did not accept the conclusion of the Expert in respect of Aggregate Working Capital was correct, they understood the means by which that decision had been reached. However the letter went on to state that they did not understand the reasons for the determination in respect of the Final External Debt/Cash Balance and contended that the part of the determination relating to that issue was manifestly in error. They set out the reasons for their contention.

11. On 15 March 2001 the Expert replied. It pointed out that although it was not obliged to enter into any correspondence after its determination had been made, it would make further comment "by way of clarification

of our reasoning in respect of matters which you do not appear to have understood". In a few short paragraphs, the Expert elucidated its reasoning on further points. That further reasoning did not satisfy the purchasers; a further letter followed on 29 March 2001. That was responded to by the Expert in a letter containing one substantive paragraph on 30 April 2001.

12. The purchasers did not accept the explanation and did not pay the sum due as a result of the determination. On 6 April 2001, the vendors began these proceedings and issued on 22 June 2001 an application for summary judgment.

13. In response to that application, the purchasers put forward various counterclaims and crossclaims; furthermore they contended that not only was the determination of the Expert not final and binding by reason of manifest error, but they also contended that no agreement to pay the amount determined by the Expert had been properly pleaded.

14. During the course of the hearing before me the issues narrowed; the vendors amended their pleadings to set out their case on whether there had been an agreement to pay the amount determined by the Expert. After the purchasers had had time to consider the amendment, they no longer maintained their contention that no agreement had been made. The sole issue for decision by the court was whether there was a manifest error in the Expert's determination. I therefore turn to the two questions that arise.

(1) What material can be examined to decide if there was a manifest error?

15. The first question which must be considered is the material which can be examined for the purpose of deciding whether there is a manifest error in the determination. It was the vendors' contention that I should only consider the Expert's determination itself. The purchasers contended I should look at the further correspondence between the purchasers and the Expert and the documents referred to in that further correspondence and in the determination.

16. There is virtually no authority on this point. In another Part 24 application, ***Galaxy Energy International Limited v Eurobunker SpA*** (NLR, 2 August 2001), I had to consider an agreement which provided that a certificate of inspection under an oil sale contract was to be final and binding save in the case of fraud or manifest error. Paragraph 16 of the judgment set out some principles which were not seriously in dispute:

"*(i) It is important for the operation of commerce that commercial men and bankers can rely upon the finality of a certificate: in* ***Toepfer v. Continental Grain Co****. [1974] 1 Lloyds Rep. 11. Lord Denning put the position in the following terms: "Apart altogether from authority, I am clearly of the opinion that a mistake by the certifier, even when afterwards admitted by him to be a mistake, does not invalidate the certificate. It remains binding as between seller and buyer all down the chain… it must be remembered that numerous persons act on the faith of the certificate, such as buyer, sub-buyers, bankers lending money and so forth. Good sense requires that the finality of the clause should be upheld by arbitrators and the Courts in full."*

(ii) Even if the certifier admits that he has made a mistake, the Court should uphold the finality of the certificate (see the passage quoted above).

(iii) The exception of manifest error should be construed in this commercial context.

(iv) "Manifest" meant in ordinary language "plain and obvious".

(v) The manifest error must relate to the certificate or the procedure that led to the making of the certificate; for example it would be a manifest error if a plain and obvious mistake of transcription had been made or a plain and obvious error had been made in testing or in sampling or in mixing the samples.

(vi) In deciding whether there was a manifest error the Court should take into account the technical knowledge that parties would have about the testing procedure."

17. In construing the present terms of reference to the Expert in this case, although it is clear that the parties desired finality, they provided for the exception of "manifest error" in a determination which was to contain reasons. Therefore, although very substantial weight must be given to the parties desire to obtain finality, they must have contemplated an examination of the reasoning of the determination to see if it disclosed any manifest error.

18. The purchasers contend that there were two manifest errors:
    (1) The Expert had misunderstood the parties' submissions and wrongly concluded that the purchasers had accepted a certain treatment of the transactions; it was on the basis of this clear and obvious misunderstanding that the Expert had decided in favour of the vendors.
    (2) The Expert had clearly misconstrued the original contract of 28 January 2000; it was obvious that the Expert should have determined the Final External Debt/Cash Balance issue in a different way on the proper construction of the agreement of 28 January 2000.

19. As to the first of the manifest errors contended for by the purchasers, the Expert's determination contained a simple statement of reference to the submissions. However, in the further reasons given by the Expert in its letter of 15 March 2001 reference is made to specific paragraphs of the purchasers' first and second submissions. Should the court consider the further reasons? It seems to me the court should. If an Expert considers it necessary to amplify or (as in this case) clarify the reasons given, when the terms of reference require reasons, it would not be right to ignore those further reasons in examining the question of manifest error. The documents setting out the further reasons, together with the original reasons, represent the totality of the reasoning and it is that totality that should be examined.

20. The further question then arises as to whether the court should also examine the specific documents referred to in the further reasons. It obviously is impossible to examine whether there is in fact a manifest error in the determination without reference to those specific paragraphs of the submissions. The same question as to whether it is possible to examine documents expressly referred to arises in relation to the second of the purchasers' contentions of manifest error. The reasoning of the determination contains references to the agreement of 28 January 2000.

21. It seems to me that in deciding whether there was a manifest error, then it is permissible to refer to documents expressly referred to in the determination and forming an essential part of the determination. As the Expert's conclusion concerns the interpretation of that agreement, it is difficult to see how the reasoning can be examined without reference to the whole of that agreement; it is common place in an appeal on a question of law under the Arbitration Act 1996 which revolves on the interpretation of a contract to look at the whole of the contract, even if only a clause or two is expressly referred to in the Award; that is because in interpreting a clause of an agreement, the clause has to be interpreted in the context of the agreement as a whole. It therefore seems to me permissible, in considering whether there is a manifest error in the determination, to have regard to the terms of the original agreement. For similar reasons it seems to me that it is also permissible to examine the submissions expressly referred to; an essential part of the determination was based upon the Expert's understanding of the submissions and in the further reasons the Expert has expressly referred to certain paragraphs. As it is not possible to determine whether there was a manifest error without examining those further paragraphs to which the Expert has made specific reference, I consider that it is permissible to examine them.

22. Thus, construing this particular agreement for an expert determination where the parties have provided for a reasoned determination which is to be final and binding save for manifest error, it is in my judgment permissible to examine the additional materials that form an essential part of those reasons. However it is important, as was said in ***Toepfer v Continental Grain***, to stress that finality is an important factor; that it is not enough that the Expert has made a mistake; there must be a manifest or plain and obvious error. The effect of the word "*manifest*" must not be diluted; the finality of the determination must not be subject to attack because another view could, in the light of further argument, properly be taken of the matters dealt with during the determination. It must be proved by the party disputing the determination that there was a manifest error in the determination.

23. There was discussion in the argument about an arithmetical error being made and the extent to which extraneous evidence might be admissible to show that this had occurred. It is not necessary to determine that issue, as this particular dispute can be resolved by reference to materials expressly referred to in the reasoning and essential to that reasoning and not by extraneous materials put forward only to show there was a manifest error.

24. I asked counsel to consider the line of authorities (of which there were many) in relation to error on the face of an arbitration award under the law that existed prior to this form of judicial interference with arbitration awards being swept away by the Arbitration Act 1979; the authorities are conveniently set out in *Russell on the Law of Arbitration* 19th edition, 1979. Having done so, no submissions were made that any assistance could be derived from that line of authorities. I consider that counsel were entirely correct in the view taken.

25. I therefore accept the defendant's contentions as to the ambit of the material I should consider and turn to examine the question of whether there was a manifest error by reference to the determination, the further reasons and the specific documents to which I have referred.

(2) Was there a manifest error?

26. The sum of $12.1m, the subject of the reference to the Expert concerned the treatment by Saiag Italy of factored debts in its accounts; the original amount was in Italian lire and there was a complication relating to exchange rates to which it is not necessary to refer. It is clear from the Expert's determination that factoring can take two forms – one "*without recourse*" and one "*with recourse*". As these terms suggest, in the former case the factoring company provides to the trading company which has a receivable from a trade debtor in its accounts a sum of money discounted (a) for prompt payment and (b) to take account of the risks of the factoring company failing to collect that from the trade debtor; in such a case, if the factoring company fails to collect the full amount from the trade debtor, it has no recourse against the trading company. However if the factoring arrangements are "*with recourse*", the trading company remains liable to the factoring company in the event that the trade debtor does not pay the factoring company in full. Normally the determination of whether the factored debts of a trading company are with or without recourse must depend upon an analysis of the contractual arrangements between the trading company and the factoring company.

27. The accounting treatment of the factored debts for the purpose of the sale and purchase agreement and the Expert determination (at least insofar as they concerned Aggregate Working Capital) depended upon two sets of internal accounts – the operating reports of Saiag for the 12 months ended 31 December 1999 and the operating reports at the completion date under the agreement of 28 January 2000.

28. Saiag, in common with the other companies sold, had internal accounts known as operating reports (ORs). In the ORs for the 12 months ended 31 December 1999, it was common ground (as the Expert determination records) that the factored debts of Saiag Italy were eliminated from working capital; no liability to the factoring company was recognised in the ORs at that date in respect of the proceeds of the factoring arrangements.

29. ORs at the completion date were required by the agreement of 28 January 2000 and were essential to the calculation of the Aggregate Working Capital under clause 15 of the agreement of 28 January 2000. That

clause provided that an adjustment was to be made in the event of the Aggregate Working Capital of the companies transferred being greater or less than US$137m; the figure of $137m was referred to as the "target working capital". For the purpose of making the calculations, the management of the companies had to prepare normal ORs for the period ending at the close of business on the completion date (the completion ORs). The completion ORs were to be prepared in accordance with Schedule 6 to the agreement. The vendors and the purchasers were to endeavour to agree in good faith the amount of the Aggregate Working Capital shown in or derived from the completion ORs; if they were unable to reach an agreement, then any items in dispute were to be referred to Expert determination. It was on the basis of the agreement by the parties of the Aggregate Working Capital or, in the event of dispute, by determination by the Expert, that the adjustment between the amount of Aggregate Working Capital and the target working capital of $137m was to take place.

30. Schedule 6 to the agreement set out a specific definition of working capital and the principles upon which the completion ORs were to be computed. Working capital included inventories, trade accounts receivables, trade accounts payable, trade deposits and other items; it did not include cash. The completion ORs were to be prepared in accordance with the following principles set out in descending order of priority:
   (1) General Principles: these principles included preparation on the basis that the company was trading in the ordinary course under the claimant's continuing ownership, on the basis of the same practices, policies, basis and methodologies and the same types of management judgments, estimates forecasts and opinions that were used for the purpose of and reflected in the ORs for the 12 months ended 31 December 1999 and on which the target working capital had been based; there were other general principles which also included preparation: *"on the basis that no amount will be included in the Aggregate Working Capital to the extent that it is part of the Final External Debt/Cash Balance, the Final Inter Company Payables or the Final Inter Company Receivables*
   (2) Subject to 1 above *"in accordance with the same principles, practices, policies, basis, methodologies and assumptions applied in the preparation of the ORs for the 12 months ended 31 December 1999.*
   (3) …
   (4) …
   (5) Subject to 1, 2, 3 and 4 above *"under generally accepted accounting principles in the United Kingdom in issue and applicable at the close of business on the Completion Date."*

31. Although these detailed provisions were made expressly in respect of the Aggregate Working Capital, the agreement of 28 January 2000 contained no express reference as to the principles on which the Final External Debt/Cash Balance was to be calculated.

32. It was the contention of the purchasers (as appeared from the determination of the Expert) that the factored debts of Saiag were incorrectly accounted for in both the completion ORs and the ORs for the 12 months ended 31 December 1999. They contended that, on a true analysis of the transactions and in accordance with the United Kingdom Financial Reported Standard 5 (FRS5), the liabilities in respect of the factored debts ought not to have been derecognised in the ORs at both dates, as they were "*with recourse*" within the meaning of FRS 5; thus applying generally accepted accounting principles in the UK (UK GAAP) and the principle of consistency, the factored debts should therefore be treated in this way for the purpose of both the Aggregate Working Capital and the Final External Debt/Cash balance. The vendors contended that because (as set out at paragraph 28 above) the factored debts had been excluded from the ORs at 31 December 1999, the principle of consistency was, under the express provisions of Schedule 6, to be applied in preference to other principles, including UK GAAP; it followed therefore that the factored debts should be excluded from the completion ORs and therefore from the computation of the Aggregate Working Capital. The factored debts should also be treated in the same way for the purpose of the Final External Debt/Cash balance and so should be excluded there.

33. In its determination, the Expert decided:
   i) that the complaint (in so far as it was made by the purchasers) about the way in which the target working capital of $137m had been calculated was not within its terms of reference;
   ii) that the dispute over the Aggregate Working Capital should be resolved in favour of the vendors' argument that consistency should take precedence over the principles of UK GAAP; that the Aggregate Working Capital should exclude the factored debts in respect of which cash of $12.1m had been received by Saiag Italy.
   iii) as both parties were, in the Expert's view, agreed that the factored debts should be treated on the same basis for the purposes of the Final External Debt/Cash balance and the Aggreagte Working Capital, the factored debts should be excluded for the purpose of the Final External Debt/Cash balance.

34. In their correspondence with the Expert after the determination and in the argument before me, the purchasers did not challenge the first and second parts of the Expert's decision as summarised by me in paragraph 33 - the conclusion that the consideration of the Target Working Capital was outside the terms of reference and that the factored debts should be excluded for the purposes of calculating the Aggregate Working Capital.

35. Their challenge was confined to the third issue before the Expert – the calculation of the Final External Debt/Cash Balance which, as set out in the Expert's determination, determined that the Final External Debt/Cash Balance should also exclude $12.1m Saiag Italy cash. They say that this decision was manifestly in error because (1) the Expert had based the decision upon a concession or agreement in the submissions which the purchasers had never

made and (2) the agreement plainly provided the calculation of the figure for Final External Debt/Cash Balance in a way which the Expert had not followed.

36. At the heart of the Expert's determination on the third issue was its view that, if the sum of $12.1m in respect of factoring arrangements should be excluded from the Working Capital, it should also be excluded from the figure for Final External Debt/Cash Balance. The Expert considered that the parties were agreed on this. It is necessary to set out the Expert's reasoning which can be seen from the following passages from the determination and the correspondence after the determination:

"3.6 The arguments in the submissions as to whether the Purchaser is contending for a "one-sided adjustment" seem to arise from the basis on which the figures have been agreed subject to the determination – that is, the Final External Debt/Cash Balance is provisionally agreed in an amount which includes a liability in respect of the factoring, but the Aggregate Working Capital is provisionally agreed in an amount which excludes the factored debts. In fact it is clear from their respective submissions that both parties agree that the factoring transactions should be either reflected in or eliminated from both sides of the balance sheet.

……

Consideration of the Purchaser's position re Completion ORs

4.9. …..

4.10 At paragraph 4.6 of its first submission the Purchaser concludes that there was no real distinction between the two types of factoring for the purposes of deciding how to account for them in Working Capital and Final External Debt/Cash.

4.11 On that basis, therefore, the primary requirement for consistency of accounting treatment in the preparation of the Completion ORs would require the same accounting treatment to be adopted as in the ORs or for the 12 months ended 31 December 1999, namely that the amounts factored be deducted from Working Capital and from Final External Debt/Cash.

Consideration of the Vendor's position re Completion ORs

4.12 The Vendor contends that the factoring at 31 March 2000 was without recourse, but does not explicitly state whether it concludes that the factoring in the ORs for the 12 months ended 31 December 1999 was with recourse or without recourse. If it was also without recourse at 31 December 1999, then on the basis of the Vendor's contention, the accounting treatment at 31 March 2000 should be consistent with that at 31 December 1999.

4.13 If, however, the factoring was with recourse at 31 December 1999, then on the basis of the Vendor's contention at 31 March 2000, the requirement for consistency of accounting treatment would not apply, because the circumstances to which the accounting treatments would apply at the two dates would be different. The appropriate accounting treatment at 31 March 2000 would then be determined by UK GAAP, which on the basis of the Vendor's contention would be that the amounts factored would be deducted from Working Capital and from Final External Debt/Cash.

4.14 It therefore follows that on the basis of the Vendor's contention that the factoring at 31 March 2000 was without recourse, the appropriate accounting treatment in the Completion ORs is also that the amounts factored be deducted from Working Capital and from Final External Debt/Cash, whatever the nature of factoring at 31 December 1999.

4.15 Therefore, both the Vendor's contention that the factoring at 31 March 2000 was without recourse, and the Purchaser's contention that there was no real distinction between the types of factoring at 31 March 2000 and at 31 December 1999, lead to the same conclusion, namely that the amounts factored should be deducted from Working Capital and from Final External Debt/Cash."

In the correspondence after the issue of the determination the Expert elucidated the reasons:

"Whilst the Agreement defined Final External Debt/Cash by reference, inter alia, to borrowings, it did not define borrowings. The Purchaser argued in its two submissions that the treatment of the $12.1 million Saiag cash for the purposes of the calculation of the Final External Debt/Cash Balance, and in particular whether the receipt of such cash constituted borrowings for that purpose, was to be determined by the treatment in the Saiag Completion OR of the other side of the entry to the cash receipt. The Vendor made the same argument.

*In paragraph 3.6 of our determination, we acknowledged this line of argument when we said (in respect of the Completion ORs): **"… it is clear from their respective submissions that both parties agree that the factoring transactions should be either reflected in or eliminated from both sides of the balance sheet."***

The subsequent reasoning in our determination concerned the preparation of the Completion ORs, which was governed by Schedule 6 of the Agreement."

And in a further letter the Expert stated: "*We did consider whether the $12.1 million Saiag Italy cash, received in respect of factored debts, should be included in Final External Debt/Cash under the definition in the Agreement. We accepted, and agreed with, the argument put forward by both parties that this question was to be determined by the treatment in the Saiag Completion OR of the other side of the entry to the cash receipt. Our determination of the accounting treatment in the Saiag Completion OR determined both (a) and (b) of the Disputed Matter."*

37. I therefore turn to consider the two questions.

(a) Did the Expert make a manifest error in its understanding of the submissions?

38. It was the contention of the purchasers before me that their submissions to the Expert, properly read, were to the effect that the Expert should apply both the principle of consistency with prior years and the principles in UK GAAP to the question of whether the $12.1m should be included within both the Aggregate Working Capital and the Final External Debt/Cash Balance; that if that submission was not accepted, it was their alternative submission that the principles of UK GAAP should be applied to the calculation of the External Debt/Cash Balance as the provisions of Schedule 6 did not apply to the calculation of that balance.

39. I have carefully read the submissions made to the Expert by the purchasers to see if the Expert made a manifest error in its understanding of those submissions. Though I can see, in the light of the argument before me, the interpretation that the purchasers place upon those submissions, I consider that there was no error by the Expert in its reading of the submissions. For example, paragraphs 5.2, 5.3 and 5.14 of the submissions of the purchasers to the Expert dated 4 January 2001 plainly treat the factoring transactions as requiring corresponding adjustments to both the Aggregate Working Capital and the External Debt/Cash Balance; no reservation to this was made. The same, in my view, is true of the paragraphs in the submission of 26 January 2000 upon which the Expert relied in its further reasons. Reading the submissions as a whole, there was ample justification for the Expert reaching the conclusion it did; thus to the extent that the purchasers did not make the position they now contend for clear, that flows from the submissions themselves and not any error on the part of the Expert, let alone a manifest error.

40. It is important in considering the contention made by the purchasers before me to bear in mind that the submissions were made by the purchasers directly to the Expert; they were addressed to and to be considered by the Expert as one of the leading firms of chartered accountants and not by a lawyer. Reading the submissions through, I can easily understand how the Expert reached the view that it did; it was one that was in my view clearly open to the Expert. The fact that I might in the light of the oral submissions in front of me so clearly made by Mr Todd QC have reached a different conclusion on the way in which they should be read is not relevant. The purchasers have to show that as understood in the context of the determination there was a manifest error in the understanding reached by the Expert. I am quite satisfied that there was no manifest error and the conclusion reached by the Expert was one open to him on an ordinary reading of the submissions; the Expert made no error, let alone a manifest error.

41. In my view therefore the Expert was entitled to come to the view that the parties had agreed the approach to the treating of the External Debt/Cash Balance in the same way as the Aggregate Working Capital and, as they were agreed upon that, he could base his decision upon that agreement.

42. It follows therefore that this challenge to the determination must fail. It also follows that it is not strictly necessary to consider the second ground. Because as the Expert was entitled to proceed to his determination upon a common approach of the parties, the question of the proper interpretation of the agreement does not strictly arise. However, as this was argued before me, I will set out my views briefly.

(b) Was there a manifest error in the interpretation of the agreement?

43. Although the Expert seems in the determination to have relied solely upon the common approach of the parties that the Final External Debt/Cash Balance was to be treated in the same way as the figure of the Aggregate Working Capital, in the letter of 30 April 2001 the Expert stated (in the passage set out at paragraph 36 above) that it agreed that under the agreement of 28 January 2000 that the treatment of the factored debt should be the same for the purposes of the Aggregate Working Capital as for the Final External Debt/Cash balance.

44. This conclusion was challenged by the purchasers as manifestly erroneous. The essence of the argument cogently advanced by Mr Todd QC can be summarised:
    (1) Clause 13 (A) of the agreement of 28 January 2000 provided that the vendors and the purchasers should endeavour to agree the Final External Debt/Cash Balance in respect of each company within 21 business days of completion.
    (2) The term (Final External Debt/Cash Balance) was defined in the agreement to include (in summary) the aggregate of all the borrowings and indebtedness of a company for borrowed money, less intergroup indebtedness, less adjusted cash (a term specifically defined).
    (3) Neither clause 13 nor the definition referred in any way to the provisions of schedule 6 to the agreement which provided for consistency between years being applied in preference to generally accepted accounting standards. Nor did the agreement define borrowings.
    (4) Thus, whether the Saiag factoring transactions as at 31 March 2000 (the completion date) constituted borrowings could only be determined by a proper analysis of those transactions in accordance with ordinary accounting principles.
    (5) It was clear from the determination of the Expert that no analysis of the transactions as at the completion date had been carried out; on the conclusion reached by the Expert as to the position of the parties, it had been considered unnecessary.
    (6) It did not matter whether the accounting principles to be applied were UK GAAP or some other general standard of accounting principles, because the manifest error in the determination was the failure of the Expert to carry out any analysis at all.

45. It seems to me clear that, if there was no interrelationship between the provisions of the agreement dealing with the Aggregate Working Capital and those dealing with the Final External Debt/Cash Balance, the argument would be correct. An analysis of the factoring transactions would be required to determine whether they amounted to an external borrowing, whatever definition of borrowing was taken or whatever accounting principles were applied. Thus the key issue was whether there was an interrelationship between the calculation of the Final External Debt/Cash Balance and the Aggregate Working Capital and whether the conclusion of the Expert that there had to be parity of treatment was correct.

46. Although I can see considerable force in the argument made by Mr Todd QC on behalf of the purchasers that on a reading of the agreement the calculation under clause 13 is independent of the calculation in respect of Aggregate Working Capital, the question for the court is whether there was a manifest error in the determination by the Expert that there was such an interrelationship. In approaching this question, 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.

47. In the argument before me, neither the vendors nor the purchasers were able to advance any or any compelling commercial reasoning which explained the commercial purpose of their respective contentions. In those circumstances, it would not be apposite for me to put forward my own view. It is clear that clauses 13 and 15 of the agreement, dealing respectively with the External Debt/Cash Balance and the Aggregate Working Capital were both designed to provide for an adjustment to the price to take into account the final movements in the companies figures to reflect the final debt free cash free price payable. In those circumstances, it would strike one as odd if the factoring arrangements were to be treated in one way for the purpose of the calculation of the Aggregate Working Capital and in another way for the Final External Debt/Cash Balance. Moreover paragraph 9 part B of schedule 6 provides that the Completion ORs and the Aggregate Completion OR will be: *"prepared on the basis that no amount will be included in the Aggregate Working Capital to the extent that it is part of the Final External Debt/Cash Balance, the Final Inter-Company Payables or the Final Inter-Company Receivables;"*

This provision confirms the view that there was an interrelationship.

48. Thus although I see considerable force in the argument eloquently made by Mr Todd QC on behalf of the purchasers before me, I can see that another interpretation of the agreement was permissible. I cannot say that that other interpretation arrived at by the Expert should be characterised as giving rise to "a manifest error". 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. I do not consider that they have shown this.

Conclusion

49. In the result therefore, I hold that the challenge to the determination fails as there was no manifest error. Although at one stage it was contended that in these circumstances I should consider whether the purchasers were entitled to set off the amount of their counterclaim, I understand that argument is not to be pursued. It follows therefore that the vendors are entitled to judgment on their claim computed as a result of the Expert determination, though the matters the subject of counterclaim must proceed to trial and I will make the necessary further directions.

Bernard Eder QC and Steven Berry (instructed by Jones, Day, Reavis and Pogue) for the Vendors
Michael Todd QC and Jonathan Peddie of Clifford Chance LLP (instructed by Clifford Chance LLP) for the Purchasers