Neutral Citation Number: [2021] EWHC 45 (Ch)

Case No: BL-2020-001131

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS LIST

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 13/01/2021

Before :

MR JUSTICE MILES

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Between :

GENERAL ELECTRIC COMPANY	**Claimant**
- and -	
(1) AI ALPINE US BIDCO INC **(2) AI ALPINE AT BIDCO GMBH** **(3) AI ALPINE NL BIDCO BV**	**Defendants**

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Sharif Shivji QC and Karl Anderson (instructed by **Clifford Chance**) for the **Claimant**
Philip Edey QC, Andrew Fulton and Sarah Tresman (instructed by **Quinn Emanuel Urquhart & Sullivan UK**) for the **Defendants**

Hearing dates: 14 December 2020

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JUDGMENT

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 and time for hand-down is deemed to be 10:30 on 13 January 2021.

Mr Justice Miles :

Introduction

1. The Defendants apply for a stay of proceedings brought by the Claimant under Part 8 of the CPR. The claim concerns a Share Purchase Agreement ("the SPA") dated 25 June 2018 (as twice amended) by which the Claimant (as Seller) sold its distributed power business to the Defendants (as Buyer). The SPA uses defined terms, and I shall adopt some of them here.

2. In the SPA the parties agreed a Base Purchase Price of $3.258 billion. The Base Purchase Price was to be adjusted by various items including Working Capital, Cash and Debt. These various adjusting items were to be set out in an Estimated Closing Statement to be provided by the Seller shortly before Closing. The Buyer was then to make the Closing Payment which was the Base Purchase Price as adjusted for the amounts set out in the Estimated Closing Statement. The Closing Payment was (in the event) about £3 billion.

3. The parties also agreed a process for determining a Final Closing Statement, which was to contain (among other things) the Purchase Price (i.e. the final price payable for the business).

4. The process was set out in Schedule 2 to the SPA. The first stage was the provision by the Buyer of a Proposed Final Closing Statement within 75 days of Closing. There was then a Review Period of 60 days for the Seller to review the Proposed Final Closing Statement.

5. If the Seller disputed any item set forth in the Proposed Final Closing Statement it was required (during the Review Period of 60 days) to deliver a written notice (a Dispute Notice) to the Buyer setting out in reasonable detail the basis for such dispute and the Seller's proposed modifications to the Proposed Final Closing Statement. The parties were then required to negotiate in good faith for 30 days (the Resolution Period) to seek to reach agreement.

6. If the parties failed to reach agreement during the Resolution Period any matters identified in the Dispute Notice that remained in dispute were to be finally and conclusively determined by an accountancy firm to be appointed under Sch. 2, para 1.1(h), known as the Independent Accountancy Firm (which I shall call "the IAF").

7. By Sch. 2, para 1.1(i) the parties were required jointly to appoint the IAF and instruct it promptly to make a determination, based on written presentations, of the matters in dispute, and provide a written report (the Final Closing Statement) setting out its determination. The IAF was to act as an expert, not as an arbitrator.

8. The expert determination was to be a rapid process, in the first instance within 40 days from appointment, but extendable by the IAF after consultation with the parties, with an ultimate limit of 120 days.

9. Sch. 2 provided that the IAF would be bound by the provisions in the SPA and could not assign a value to any item greater that the greatest claimed by the parties, or smaller than the smallest value claimed by the parties.

10. Sch. 2, para 1.3 required the Final Closing Statement to be (a) in a format substantially similar to the Form of Closing Statement set out in Sch. 2, Part C, and (b) prepared in accordance with the Closing Statement Principles. These were set out in Part B of Sch. 2. and provided that the entries in the Final Closing Statement for Net Working Capital, Cash and Debt were to be

prepared in accordance with the following hierarchy: first, the Specific Policies (which were listed); second (to the extent not inconsistent with the Specific Policies) the Consistent Policies; and third (to the extent not addressed in the Specific or General Policies) US GAAP as of 31 March 2018 as adopted by the Seller. It is not necessary for present purposes to go into the details of the Closing Statement Principles.

11. One of the entries to be contained in the Final Closing Statement was the Purchase Price. Sch. 2, para 1.2 provided for payment (in one direction or the other) of the difference between the Closing Payment and the Purchase Price (as stated in the Final Closing Statement), to be made within three days of the Final Closing Statement becoming conclusive and binding (for present purposes, the date of the IAF's determination). The amount payable would then attract interest from such payment date in accordance with clause 14.13 of the SPA at 5% over Barclays Bank's base rate.

12. It is common ground on the facts that any payments which may eventually fall due once the Final Closing Statement has been issued will be payable by the Claimant to the Defendants.

13. The SPA separately contained warranties including in respect of the accuracy of certain specified historical accounts relating to the business. Such claims were required to be brought by November 2020. By Schedule 8 to the SPA there were limitations on the Seller's liability under the warranty claims. By Sch. 8, para 9 no matter was to be the subject of a warranty claim to the extent that allowance, provision or reserve in respect of such matter shall have been made in the Final Closing Statement or reflected therein.

14. In accordance with the provisions of Sch. 2 to the SPA, the Defendants served a Proposed Final Closing Statement within 75 days of Closing. In March 2019 the Claimant served a Dispute Notice which identified the various items disputed by the Claimant and identified the amount of each disputed item.

15. In the Dispute Notice the Claimant contended that a number of the disputes enumerated by the Defendants in the Proposed Final Closing Statement could not properly be raised as part of the Closing Statement process. The Claimant's position was, in summary, that the Sch. 2 process did not permit the Defendants to revisit the accounting decisions or judgments adopted or applied by the Claimant when compiling the Estimated Closing Statement or related documents. The Claimant argued that, in the Proposed Final Closing Statement the Defendants had improperly and inadmissibly sought to substitute their own accounting decisions or judgments for the Claimant's. The Claimant said that any complaints concerning historical accounting decisions or judgments were exclusively to be addressed under the accounting warranties, and that the Closing Statement process was designed only to "true-up" the position as between 25 October 2018 (when the Estimated Closing Statement was provided by the Seller) and Closing, 31 October 2018. As will be explained further below these contentions are the basis for the declarations now sought in the Part 8 claim. In the alternative, and without prejudice to that general position, the Claimant took issue in the Dispute Notice with the Defendants' contentions about the Claimant's historical accounting treatments or decisions and explained why those treatments and decisions were valid as a matter of accounting.

16. On 3 December 2019 the parties jointly appointed BDO as the IAF to make a determination in accordance with Sch. 2 to the SPA.

17. The IAF has carried out a substantial part of its task. It has received and considered various written representations from the parties, has issued requests for information, and has received responses from the parties.

18. As already explained, even before the appointment of the IAF the parties had taken differing views about the nature of the Closing Statement process and, in particular, the extent to which the Defendants are entitled to revisit the accounting treatments and decisions made by the Claimant about historical transactions. The parties nonetheless served submissions and responded to the IAF's requests for information. In these documents the Claimant continued to object to the Defendants approach but, in the alternative, explained why its own historical accounting treatment was valid.

19. In their joint instructions to the IAF the parties agreed that the IAF should be allowed to seek advice from leading counsel if it thought fit. The IAF indicated to the parties that it intended to seek the advice of leading counsel about certain legal questions. The parties gave their views about the questions to be asked. The IAF did not think it was necessary to ask leading counsel for his views about the Defendants' approach to the Claimant's historical accounting treatments. The IAF stated that it had reached a clear view about the meaning of Sch. 2 to the SPA and had concluded that it did not require legal advice to interpret it in reaching a determination.

20. However, at the insistence of the Claimant, the IAF ultimately agreed to include the following passage in the instructions to leading counsel:

> "… during the course of seeking to agree these instructions with the Parties, the Seller has submitted that legal advice on the "Threshold Legal Issues" should be provided as follows:
>
> a) Do the terms of the SPA permit the Buyer to substitute or revisit the Seller's historical accounting treatments, accounting judgments, and business judgments and decisions which were used to prepare the Form of Cash and Debt Statement, Form of Working Capital Statement and Form of Closing Statement in Schedule 2 to the SPA ("the Forms") and the Estimated Closing Statement?
>
> b) Is the Closing Statement Process intended to act as a "true-up" of the financials which were agreed by the Parties upon executing the SPA and which were prepared on a consistent basis? Or is it intended to provide for full review and calculations for the computation of the final Purchase Price untethered to the Seller's historical basis of preparation?
>
> c) Are the Forms intended to act as "worked examples", in the sense that all iterations of the Cash and Debt Statement, Working Capital Statement and Closing Statement must be prepared on a consistent basis with the corresponding Form (i.e. applying the same accounting treatment, accounting judgments and business judgments)? Or are the Forms only intended to prescribe the format of and entries on the different parts of the Closing Statement and to reflect the mapping of the certain accounting entries that the Parties jointly undertook before signing the SPA?
>
> d) To the extent that the Buyer is able to demonstrate any materially incorrect historical accounting treatment (i.e. outside the range of reasonable accounting treatments), is the appropriate remedy for the Buyer to introduce changes to the

historical accounting in the Closing Statement Process? Or is the appropriate remedy to bring a claim against the Seller for breach of the Seller's warranty contained in Clause 7 of Schedule 4 of the SPA?

e) Is the Buyer permitted to reclassify the SLB Transaction as a "capital lease" on a proper construction of the terms of the SPA?

f) Is the Welfare Plan to be included in the definition of "Debt" on a proper construction of the terms of the SPA?"

21. The instructions to leading counsel (including this passage) were sent by the IAF on 23 June 2020. It was accepted by the IAF and the parties that leading counsel's views would not be binding on the IAF.

22. Mr Thanki QC and Mr Atrill of counsel released an opinion on 10 August 2020 (a draft having been provided on 3 August 2020). They concluded (in broad terms) that the Defendants, in contending that items contained in the Estimated Closing Statement did not comply with the Closing Statement Principles, were not prohibited from raising issues about the appropriateness of the Claimant's historical accounting treatment.

23. On the 10 August 2020 Claimant issued a claim form seeking declarations, including that:

> "The Legal Framework does not permit the Defendants to retrospectively substitute the Buyer's own proposed post-Closing:
>
> (i) decisions and judgments for the decisions and judgments made by the Seller in relation to business matters: or
>
> (ii) Accounting Treatment for the Seller's past Accounting Treatment,
>
> in the calculation of the final Purchase Price as part of the Closing Statement Process."

24. The term "Legal Framework" is used in the claim form to mean the relevant clauses governing the process for determining the Closing Statement and the expert determination process. The term "Accounting Treatment" is not used in the SPA but is defined in the claim form as "a shorthand used by the Seller for the matters which on the Seller's case under the terms of Schedule 2 … the Buyer is not permitted to retrospectively substitute for its own proposed post-Closing Accounting Treatments".

25. The claim form also sought declarations in relation to two specific items: first that "the SLB Transaction" cannot be categorised as anything other than an operating lease and, second, that "the Welfare Plan" is not to be included in the Final Closing Statement. It is unnecessary to go more deeply into these issues for the purposes of the present application as the parties' submissions were focused on the declaration set out in [23] above.

26. After the issue of the claim form, the parties corresponded with the IAF. The Claimant's solicitors contended that the IAF should not complete the determination until the Court had ruled on the Part 8 claim. The Defendants disagreed and invited the IAF to continue. The Claimant opposed this and said that the IAF's fees would be at risk if it continued with the determination. When the Defendants offered to meet those fees the Claimant argued that this would jeopardise the IAF's independence. Ultimately, on 4 September 2020, the IAF said that it would not issue a final determination pending the court's direction. The IAF continued

however to request information from the parties about some remaining issues. The Defendants submitted at the hearing (and the Claimant did not disagree) that if the Part 8 claim were stayed the IAF would be in a position to produce a determination reasonably promptly.

27. On 10 September 2020 the Defendants served the first witness statement of Mr Bunting, their solicitor, in answer to the Part 8 claim. He said that the claim was premature and reserved the Defendants' right to apply to the Court. He nonetheless responded on the merits of the claim and answered the points made by the Claimant's solicitor, Mr Acratopulo, in his witness statement in support of the claim. At that stage it appeared that a trial might be possible in early to mid-2021.

28. On 13 October 2020 the Defendants changed track and issued the stay application, seeking an order that the Part 8 claim be stayed pending the completion of the IAF's determination of the Final Closing Statement.

29. In November 2020 the Defendants served separate proceedings claiming under the contractual warranties for alleged inaccuracies in the historical accounts. The Defendants invited the Claimant to agree a stay of the warranty proceedings pending the determination of the Final Closing Statement. The Claimant refused to agree this course. The Claimant has served its defence to the warranty claims in January 2021.

30. There are eighteen outstanding disputed items concerning the Closing Statement. The total amount in dispute is some $190 million. Some of the underlying matters giving rise to those disputes are also raised in the warranty claims. There is a substantial overlap in the underlying matters in respect of five of the eighteen disputed items and those five items account for almost $110 million of the $190 million at stake in the Closing Statement dispute.

Legal principles

31. I was referred to a number of authorities concerning the Court's approach to the supervision and control of expert determinations. These were: *Mercury Communications Ltd v Director General of Telecommunications* [1994] CLC 1125 ("*Mercury CA*"); *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48 *(*"*Mercury HL*"); *Thorne v Courtier* [2011] EWCA Civ 460; *Barclay's Bank v Nylon Capital LLP* [2011] EWCA Civ 826; and *MP Kemp v Bullen* [2014] EWHC 2009 (Ch). I draw the following guidance from these cases:

    (a) The parties to a contract may agree that an independent expert shall have the power to decide a question in dispute. The extent and limits (or scope) of an expert's decision-making authority depends on the interpretation of the contract and this is a matter for the court.

    (b) Where the expert acts within its decision-making authority, the court will not intervene concerning these, before or after the expert's decision, even if the court considers that it would have reached a different decision itself.

    (c) The parties may however agree the principles on which an expert is to act. If it can be shown that the expert has acted outside its decision-making authority the court will set aside its decision; the expert has not performed the exercise which the parties have agreed it should undertake (*Mercury CA)*.

(d) But even where there is a dispute about the expert's decision-making authority the court will not normally declare in advance what the limits of his authority are. This is because in advance of his decision the question is usually hypothetical. It only becomes a live issue when one of the parties contends that the expert has reached the wrong decision (*Mercury CA* and *HL*).

(e) Where a party seeks an advance declaration of the court concerning the scope of the expert's decision-making authority the court has to determine, first, whether it is faced with a dispute which is real and not hypothetical and then, if it is real, whether it is in the interests of justice to determine the disputed matter itself rather than allowing the expert to do so first (*Nylon* at [42]).

(f) There may also be a question whether an expert determination agreement covers the relevant dispute at all. This is sometimes described as a dispute about the expert's "jurisdiction". Whether the dispute is covered by the agreement is a matter of contractual construction (*Nylon* at [21] and [28]).

(g) Where there is a jurisdiction dispute of this kind, the same test as set out in (e) above applies, but the considerations arising under the second stage of the test may be different (*Nylon* at [42]).

(h) Where the court, having applied that test, concludes that the expert should be allowed to determine the matter first it may stay any proceedings in which one of the parties seeks an advance declaration about the expert determination process (*Mercury CA*, *Kemp*).

32. The Claimant submits that where a stay is sought the principles in cases such as *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 apply, so that a stay will only be granted in exceptional and compelling circumstances. I disagree. The authorities cited in [31] above govern the specific context of proceedings about expert determinations, where there are special considerations arising from the parties' agreement and the need to show that the dispute is a real one. There is no suggestion in these cases that the *Reichhold* approach applies in this special context, and I see no reason why it should.

33. The Claimant also submits that the Defendants have submitted to the jurisdiction of the court by acknowledging service and by serving the witness statement of Mr Bunting, and that they are therefore prevented from seeking a stay. I reject this submission. As the Defendants accept, the court has jurisdiction to rule on the scope of the IAF's decision-making authority and jurisdiction. However, as the authorities show, cases concerning expert determinations give rise to a distinct timing question: should the court rule in advance of the determination or (conversely) should it allow the expert to give its determination first? Where the court decides that the expert should be allowed to go first, one remedy is to stay the proceedings. The decision whether to grant a stay pending an expert determination is a case management decision (though, as just explained, it engages special and distinct considerations). The Defendants are not precluded from seeking such a stay by reason of any steps they may have taken or failed to take earlier in the proceedings. Having said that, the steps taken by the Defendants may be relevant to the exercise of the court's discretion (a point to which I shall return below).

Application of the principles

34. I turn to the application of the principles identified in [31] above.

35. It is helpful to start by characterising the main issue between the parties. Is the dispute about (i) the IAF's jurisdiction or (ii) the IAF's decision-making authority?

36. The Defendants say it is about the IAF's decision-making authority. They accept that the issue whether the IAF may scrutinise the Claimant's historical accounting treatments is subject to the Court's supervision. They do not suggest that the parties have left these issues to the IAF to decide. But they say that the disagreement between the parties is about the scope and limits of the expert determination process.

37. The Claimant says that there is a prior jurisdictional question. It argues that, on the true interpretation of Sch. 2, the expert determination provisions do not permit the Defendants to revisit the Claimant's historical accounting treatments and decisions. It says that the expert determination clause is concerned with a much narrower range of issues. Its position is well captured by the questions it framed in the instructions to counsel set out at [20] above.

38. The Claimant relies on *Westmoreland Coal Company v. Entech, Inc.* 100 N.Y.2d 352 (2003), where the Court of Appeals of New York decided that allegations about the historical accounting decisions and treatments by a seller under a business sale agreement were exclusively to be made (if at all) in warranty claims and could not be raised in determining a final closing certificate, on which the purchase price depended. The Court of Appeals held that such allegations were therefore outside the scope of an expert determination clause in the agreement. The Claimant submits that this was in effect a ruling about the jurisdiction of the expert and that the same reasoning applies here.

39. I have concluded that the differences between the parties about the nature of the expert exercise concern the scope and limits of the IAF's mandate rather than its jurisdiction. My reasons are these:

    (a) Under Schedule 2 to the SPA, as already explained, there is an agreed process for finalising the Closing Statement. Its target is a statement which sets out the final adjustments needed to determine the Purchase Price. The process requires the Claimant to serve a Dispute Notice in which it identifies the items it disputes as set out in the Proposed Final Closing Statement served by the Buyer.

    (b) The Dispute Notice in fact served by the Claimant identified a number of disputed items and explained the Claimant's position about them, including the numbers the Claimant says should be included in the Proposed Final Closing Statement in respect of each of them.

    (c) Sch. 2, para (i) provides for the IAF to determine the matters identified in the Dispute Notice which remain unresolved at the time of its appointment. The IAF's task is therefore to determine, for the remaining disputed items, which of the adjustments (if any) set out by the Defendants in the Proposed Final Closing Statement and disputed by the Claimant in the Dispute Notice should be made. The result of the determination will be the Final Closing Statement which will contain (inter alia) a figure for the amount of the Purchase Price. This is the dispute that has been remitted to the IAF under the joint instructions and in my judgment it falls squarely within the scope of the expert determination clause.

    (d) The debate about whether the Defendants were permitted (in the Proposed Final Closing Statement) to revisit or query the historical accounting judgments or treatments adopted

by the Claimant is to my mind a disagreement about the matters the expert may properly take into account in reaching its determination; it is an issue about the scope and limits of the expert's decision-making authority (rather than one about its jurisdiction).

40. As to the *Westmoreland* case, while decisions of the New York Court of Appeals are to be treated with respect, I have to apply English law. I have set out the relevant principles at [31] above, and my conclusion about the proper characterisation applies those principles. In any event the *Westmoreland* decision turned on the interpretation of the specific contract in issue. The terms of the contract were different from those found in the SPA. The accounts covered by the warranties in the present case are different both in nature and accounting date from the various accounting entries at issue in the Closing Statement process. A court cannot reach a decision about the meaning of one contract from another court's view about a differently worded one (see the vivid warning in *Aspden v Seddon* (1874–75) LR 10 Ch App 394 n.1).

41. I therefore consider that the issue between the parties is properly to be characterised as one about the scope and limits of the expert's mandate rather than about its jurisdiction. But in any event, as I have already explained the test is the same in either case (albeit the considerations to be taken into account may be different): see [31(g)] above.

42. I now turn to the application of that test to the present facts.

43. The first question is whether the issue is hypothetical or real. This does not mean that the issue is an important one or that the resolution of it one way or the other may, in due course, materially affect the positions of the parties. Rather the question is whether, until the expert has decided, you can know that one or other party will be aggrieved by the decision (see *Mercury CA*).

44. I have concluded that the issues identified in the Part 8 claim form are hypothetical in this sense:

    (a) The parties do not yet know the IAF's approach to the "threshold legal issues" raised by the Claimant in the instructions to counsel (see [20] above). The IAF has said that it has reached a clear view but has not said what this is. Although leading counsel has advised on the threshold legal issues, the parties accept that this opinion is non-binding and that the IAF might reach a different view.

    (b) But even supposing the IAF favours the Defendants position on the threshold legal issues, this may make no practical difference as the IAF may agree with the Claimant that its historical accounting treatments and decisions were proper and appropriate. The Claimant may be content with the IAF's decision.

    (c) Hence a proleptic ruling on the threshold legal issues may make no practical difference to the outcome for the parties.

45. In case I am wrong in characterising the dispute as one concerning the scope of the mandate of the IAF rather than a jurisdictional one, I should also address the Claimant's submission that jurisdictional challenges are by definition real and not hypothetical. I reject this argument. In the present case even if the challenge is regarded as jurisdictional, the issue is hypothetical and not real. As just explained, the IAF may decide against the Defendants on the threshold legal points or it may decide in favour of the Claimant on its historical accounting decisions and treatments even if it favours the Defendants on the threshold legal issues. The Claimant may have no wish to challenge the determination.

46. The conclusion that the questions raised by the claim form are hypothetical rather than real is itself a powerful reason for a stay. Indeed *Nylon* suggests that this conclusion will generally be decisive. But I should also consider more generally whether it is in the interests of justice for the court to determine the disputed matter itself rather than allowing the expert to do so first.

47. There are five factors which, taken together, weigh in favour of a stay.

48. First, I consider that in deciding the issues about the scope of the IAF's authority the court would be assisted by understanding how the IAF has reached an actual determination. The court would be able to test the rival interpretations against a concrete set of facts rather than operating in a vacuum.

49. In this regard, I consider there is some force in the Defendants' submission that the declarations set out in the claim form do not accurately or completely capture the differences between them and that this further suggests that the court would be better equipped to grapple with the issues if it had the benefit of the IAF's determination. The claim form is not entirely easy to follow. The coinage "Accounting Treatment" suggests that the Defendants have impermissibly substituted their own post-Closing accounting decisions and judgments. But elsewhere (such as para 8(b) of the claim form) "Accounting Treatment" seems to be used in a more neutral way to describe the Seller's actual accounting treatments and decisions. The Claimant's formulation also appears to be contentious as the Defendants do not necessarily seek to substitute their own post-Closing decisions and judgments. They seek to contend that, on a proper application of the Closing Statement Principles, certain transactions or events ought to have been treated differently in the Estimated Closing Statement. I accept that the formulation of the declarations could no doubt be refined if the proceedings were allowed to progress. But the lack of clarity in the proposed declarations is a further reason for thinking that the court's interpretative task would be assisted by understanding how the IAF had actually reached a concrete determination in light of the parties' rival contentions.

50. Second, the expert determination process under Sch. 2 to the SPA is already well advanced. The IAF was appointed in December 2019. It has received the parties' submissions and their responses to its requests for information. It has done a good deal of the necessary work. Most of the costs of the process (and most of the work to be carried out by the parties) have already been incurred. This is not therefore one of those cases where an advance ruling from the court might lead to a substantial saving of the parties' resources by saving the expert from going down a dead-end.

51. Third, there is the prospect of delay. The parties agreed a quick process for determining the final price. The IAF was close to finalising its determination and probably would have served its report by now. The proceedings will continue well into 2021 (even if expedited): the Claimant has sought directions for pleadings, with the possibility of witness evidence and there is a trial estimate of three days. Moreover, if the IAF were allowed to produce its report now there is a realistic prospect that there will be no challenge by the parties (and therefore no delay in reaching an answer).

52. Fourth, there may be a waste of the parties' own resources if the proceedings are allowed to continue. For the reasons already given, the Claimant may be happy with the IAF's determination: the proceedings would in that event turn out to have been pointless. The court has to consider too the possible waste of its own resources and the position of other court users. This is a material factor given that the parties seek directions for a three day trial.

53. Fifth, there is potential uncompensated financial detriment to the Defendants if the IAF process is further delayed. As already explained, under the SPA interest runs from three days after the IAF's determination. The contractual interest rate is 5% over base rate. The Defendants will be potentially deprived of this interest for any period by which the determination is delayed. If there is a determination in favour of the Defendants which is successfully challenged by the Claimant, the Claimant will not be prejudiced. But there is no such protection for the Defendants to compensate them in respect of the delay in reaching the determination and the Claimant has not proposed any means of compensating the Defendants against this loss.

54. The Claimant emphasises features of the case pointing the other way. It says, first, that the Defendants' position has changed. On 10 September 2020 the Defendants served a witness statement opposing the claim on the merits. They were willing at that stage to allow the claim to proceed and must have thought there was some merit to this course. They then changed their mind and, on 13 October 2020, issued their application for a stay. I consider that, to an extent, the Defendants have blown hot and cold, and did not make this application as soon as they might. But little turns on their change of stance. The Claimant does not suggest that it was led to incur significant additional costs or acted on the basis that the claim would continue to trial. Moreover the witness statement of Mr Bunting served on 10 September 2020 reserved the Defendants' rights to say that the claim was not appropriate. I do not consider that this point had much weight.

55. The Claimant submits, second, that there is an overlap between the matters being addressed by the IAF and the subject matter of the warranty claims. The Claimant says that this is unfair and wasteful: it will be required to undertake the work and show its hand in the IAF process. It says that, if the Part 8 claim were resolved in its favour the overlapping issues would fall to be determined only in the warranty proceedings and that there would then be an orderly determination of those issues with disclosure and the production of evidence. To my mind this submission is theoretical rather than real. The great bulk of the submissions and information about the overlapping issues has already been addressed in the written submissions and responses served in the expert determination process. All that remains is the IAF's requests for limited further information and the parties' responses. Hence the Claimant has already undertaken the great bulk of the work and has set out its detailed case on the underlying accounting issues. For these reasons I do not consider that the argument based on overlap or duplication has any significant weight.

56. Viewing things in the round I conclude that the declarations sought in the Part 8 claim are hypothetical rather than real and that the other relevant features of the case also firmly favour a stay.

Conclusion

57. I shall therefore stay the Part 8 claim pending the IAF's determination of the Final Closing Statement.