OUTER HOUSE, COURT OF SESSION

[2022] CSOH 26

CA104/21

OPINION OF LORD BRAID

in the cause

MAYFLY GWR OFFSHORE CONTAINERS INDUSTRIA E COMERCIO LTDA

Pursuer

against

SWIRE OILFIELD SERVICES DO BRASIL LTDA

Defender

Pursuer: Lindsay QC, Whyte; Lindsays LLP
Defender: MacColl QC, Tyre; Brodies LLP

15 March 2022

Introduction

Background

[1] Mayfly Containers Ltd (Mayfly) manufactures containers and baskets for use in the offshore oil industry. For many years, it supplied its products to the Swire Group from its factories in the UK, for onward lease or sale. In about 2009, Swire asked Mayfly if it could supply containers for use in Swire's incipient business in Brazil, which Mayfly agreed to do. While the precise reasons are not common ground, it is not in dispute that Mayfly, having incorporated the pursuer as a Brazilian subsidiary company, built a factory in Brazil, from which to manufacture products intended to be sold or leased by the Swire Group in Brazil

(and other countries in Latin America). The cost of building the factory was partially funded by a loan from Swire of £600,000 (which has since been repaid). Swire for its part also incorporated the defender as a Brazilian subsidiary, to undertake its business there.

[2] Against that background of financial commitment by both parties, or their parent companies, the parties entered into a Distribution Agreement dated 13 April 2011, whereby the pursuer appointed the defender as sole distributor of its products in Latin America. The agreement contained a provision obliging the defender to purchase a minimum of 750 products per year for a minimum period of five years. It has not done so. The pursuer seeks damages for breach of that obligation. Clause 25.1 of the agreement provided that the agreement, and any dispute arising out of it, were to be governed by and construed in accordance with Scots law, and conferred jurisdiction on the Scottish courts.

[3] On 13 June 2013, a Master Service Agreement (MSA) was entered into between the pursuer and Monument Containers Ltd (Monument), another subsidiary of the Swire Group. The reasons for entering into it are not a matter of agreement. The MSA contained no minimum purchase obligation, nor did it confer any exclusive distribution rights on the defender. To put it in neutral terms at this stage, it did cover some of the same ground as the Distribution Agreement. Clause 12.12 of the MSA provided that "the Contract" and any dispute arising out of it were to be governed by and construed in accordance with Brazilian law. (As discussed more fully below, "Contract" was a defined term, and parties differed as to what precisely it covered. However, they were in agreement that whatever the correct meaning of "Contract" the MSA itself was governed by Brazilian law.)

[4] The defender asserts that since 13 June 2013, the business relationship between the parties has been governed not by the Distribution Agreement, but solely by the MSA. If

correct that would be a complete defence to the action. I fixed a preliminary proof to resolve that matter.

The issues as originally expressed

[5] The interlocutor fixing the proof identified the issues as follows:

(i) Whether Brazilian law applies?

(ii) Which contract governs the relationship between the parties?

(iii) If it is the MSA, does it supersede the Distribution Agreement?

[6] With the benefit of hindsight, these might have been more accurately and succinctly expressed, in that (iii) might be seen as unnecessary once (ii) has been answered; and (i) is ambiguous: is the question directed at whether Brazilian law applies in resolving (ii) and (iii), or at which law will govern the parties' relationship after (ii) and (iii) have been answered? Reduced to its essentials, the question to be answered at this stage is simply: did the sole distributor and minimum purchase obligations in the Distribution Agreement survive the making of the MSA? If those obligations (which may be seen as counterparts of each other) still exist, it is immaterial whether the MSA also regulates the relationship between the parties in other respects. If the obligations no longer exist, the action must fail.

[7] Although senior counsel for the pursuer came to submit that only Scots law should be applied even in interpreting the MSA, the parties had, before the proof, lodged a joint statement of agreed legal principles in which they agreed, among other things, that the interpretation of the Distribution Agreement was a matter of the law of Scotland and that the interpretation of the MSA was governed by Brazilian law, which required to be proved. Those principles appear uncontroversial. The proof was conducted on that footing with evidence of Brazilian law being led by both parties, without objection to its relevancy.

Reformulation of the issues

[8] Before discussing the evidence, it is helpful to be clear at the outset about what questions have to be asked and answered, and which law is to be applied in answering them. Senior counsel for the pursuer approached the dispute primarily as one involving a conflict of laws, and argued, in support of his submission that Scots law should be applied across the whole dispute, that the starting point was Rome I. However, having regard to the agreement reached about the applicable legal principles I do not consider that there is a live dispute of that nature, or that the court requires to embark upon an examination of Rome I or its applicability here. It is sufficient to recollect that the parties are agreed as to which law governs which contract, and that in consequence, Scots law governs the question of whether the Distribution Agreement has been terminated, and that the MSA must be interpreted in accordance with Brazilian law. The pursuer also accepts that, whatever the Distribution Agreement says about duration or termination, it would be open to the parties to that agreement to replace it by another agreement. Once all of that is understood, the structure of the analysis to be undertaken can be distilled into the following questions:

(i) Was it the intention of the parties that the MSA should replace the Distribution Agreement? This involves interpretation of the MSA, which requires the application of Brazilian law. This question can be further broken down into two questions:

a. Did the obligations and rights created by the MSA extend to the defender (the privity of contract issue)?

b. What is the meaning of the MSA (the interpretation issue)?

(ii) Did the MSA, as properly interpreted under Brazilian law, replace the Distribution Agreement (the termination issue)? This involves the application of Scots law.

Consideration of these questions does not necessitate resolution of a conflict of laws. Brazilian law is applied to interpret the MSA, following which Scots law will determine what effect, if any, that contract had on the Distribution Agreement. The only conflict which might exist would be were Brazilian law to hold that the MSA amounted to a termination or novation of the Distribution Agreement, and Scots law were to hold otherwise. As will be seen, that conflict does not arise after (i)(a) and (b) have been answered.

The proof

The witnesses

[9] Evidence of Brazilian law was given by Professor Claudio Michelon (for the pursuer) and Professor Lauro Gama (for the defender). Both are eminent academic and practising Brazilian lawyers, who spoke to their respective written Opinions and supplementary Opinions. While it might be fair to describe Professor Michelon as an academic lawyer who also practises law, and Professor Gama as a practising lawyer who also teaches law, I am satisfied that both possess the necessary experience, qualifications and skill to qualify them to give expert evidence about Brazilian law, which each did in a thoughtful, measured and analytical way.

[10] As regards evidence of the background to the agreements, the pursuer led evidence from Graeme Shepherd, who was Swire's Fleet Procurement Manager at the material time; and the defender from Richard Sell, who was Chief Operating Officer of Swire Oilfield

Services from August 2012 to 2016, and from Sergio Moraes, the defender's operations manager.

The respective agreements

[11] To put the disagreement into context, it is helpful to give an overview of the respective agreements, before setting out certain clauses in more detail.

The Distribution Agreement – an overview

[12] Clause 3.1 of the Distribution Agreement appointed the defender as the exclusive distributor of the pursuer's products within Latin America. Products were defined in clause 1 as: offshore containers, baskets, tanks, modular units, skips and similar goods and any accessories to be supplied by the pursuer to the defender. Clause 4.6 obliged the defender to purchase a minimum of 750 products in each 12 month period from commencement. In clause 5, the pursuer undertook to supply only to the defender. Clause 10 provided that the defender's conditions of purchase in force from time to time were to apply to all purchases under the agreement; the conditions of sale at the commencement date were set out in schedule 3. Clause 11 regulated intellectual property rights. Clause 12 dealt with product liability and insurance. Clause 13 provided that the agreement was to continue for an initial term of 5 years and indefinitely thereafter until terminated by either party giving at least 6 months written notice to the other. Clause 15 bound both parties to duties of confidentiality. Clause 18 provided that (subject to clause 4.5, which is of no significance for present purposes), no amendment or variation was to be effective unless in writing and signed by the parties (or their authorised representatives). Schedule 3 contained the defender's Conditions of Purchase. These were the conditions which applied to each

individual sale entered into by virtue of the Distribution Agreement. The conditions regulated such matters as prices and payment; time of delivery; passing of risk; packing and loading; warranties as to quality; confidentiality; inspections; certificates.

The MSA – an overview

[13] The MSA is headed "Standard Terms and Conditions for Provision of Goods and Services to The Swire Group of Companies (Master Agreement for Call-offs under Purchase Orders". It contains numerous references to the defender (which it refers to throughout as Swire). The following defined terms in clause 1.1 are relevant:

- Contract: the contract between Swire (or the Affiliate issuing the Order) and [the pursuer] for the supply of Services in accordance with a) these Conditions… b) the Order and c) the Prior Agreement.
- Affiliates: any subsidiary or parent or holding company or any other subsidiary of such parent or holding company.
- Order: the purchase order issued by Swire or any of its Affiliates relative to the supply of the Services.
- Services: the services of toll manufacturing of Units and/or the order for Units.
- Prior Agreement: the terms of the latest version of the Manufacturers Handbook produced by Swire, provided the same has been issued to the [pursuer] {at any time in the past} prior to the date of an Order being issued.
- Units: the offshore containers, baskets, tanks, modular units, skips and similar goods and any other goods accessories agreed to be supplied to the Contractor [the pursuer] by Swire [the reference to the parties appears to have been

> transposed in the last part of the definition but nothing turns on that. It will be noted that the Units in the MSA are the same as the Products in the Distribution Agreement].

Clause 2.1 provided that the Contract was binding on the parties from and after either the date specified in the Order or the date agreed in writing between the parties. Clause 2.3 to 2.5 dealt with delivery, late delivery and deemed delivery. Clause 3 set out conditions governing the supply of services by the pursuer, including matters such as performance targets, quality standards and regulatory compliance. Clause 5 provided for Swire to make materials available to the pursuer from time to time. Clause 7, broadly similar to clause 11 of the Distribution Agreement, dealt with intellectual property rights. Clause 8 dealt with indemnity and insurance. Clause 9 imposed an obligation of confidentiality on the pursuer (but not on the defender, in contrast to the Distribution Agreement).

Clause 10.1 of the Distribution Agreement

[14] Three clauses, one in the Distribution Agreement and two in the MSA, bear setting out in full. Clause 10.1 of the Distribution Agreement provides:

> "The [defender's] conditions of purchase in force from time to time shall apply to all purchases by the [defender] to (*sic*) the [pursuer] under this agreement. The conditions of sale that apply at the Commencement Date are set out in Schedule 3 and the [defender] shall notify the [pursuer] in writing of any changes to the [defender's] conditions of purchase at least 14 days prior to any changes being implemented and will provide a copy of the revised conditions of sale to the [pursuer] within 7 days of implementation. If there is any inconsistency between those conditions of purchase and the terms of this agreement, the latter shall prevail."

Clauses 2.2 and 12.8 of the MSA

[15] Clause 2.2 of the MSA, insofar as material, provides:

> "These Conditions apply to the Contract to the exclusion of any other terms that the [pursuer] seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing."

[16] Clause 12.8 provides:

> "Third parties: The Contract in whole or in part may be performed by Swire or any of its Affiliates. The rights in whole or in part under the Contract are in favour of Swire and any of its Affiliates and the burdens and obligations in whole or in part under the Contract shall be borne by Swire or any of its Affiliates. Swire shall solely determine which refers to it or any of its Affiliates. Otherwise a person who is not a party to the Contract shall not have any rights under or in connection with it. An Order may be issued by Swire or any of its Affiliates and the Contract will then be between the party named in the Order and the [pursuer] (subject always to the other provisions of this clause). Where Swire is referred to in these presents it will be deemed substituted by the Affiliate which issues the Order."

The expert evidence

Introduction

[17] Professor Michelon and Professor Gama each gave evidence about how the MSA would be treated under Brazilian law, including the extent, if any, to which it conferred rights and imposed obligations on the defender; how it fell to be construed; and whether it had superseded the Distribution Agreement in whole or in part. In addition to their written Opinions they helpfully agreed what was in effect a Joint Minute, setting out their areas of agreement and disagreement. Each expanded upon their evidence in oral testimony.

Areas of agreement

[18] There was a large measure of agreement. The experts agreed that articles 112 and 113 of the Brazilian Civil Code (Federal Law n.10,406/2002) regulated the interpretation of the MSA under Brazilian law. Insofar as relevant to the issues in dispute, they also agreed that the following interpretative criteria applied to the present case:

(i) Literal interpretation of the wording of the contract is the first step in ascertaining the parties' intention, which is the primary aim of contractual interpretation.

(ii) Among different possible interpretations of a contract, the one that best conforms with good faith standards should be preferred.

(iii) The interpretation should be reasonable taking into account other contractual provisions and the underlying economic rationale of the contract.

[19] The experts also agreed that in Brazilian law there was a difference between distribution agreements and supply agreements. Finally, they agreed that the doctrine of privity of contract ("efeitos relativos") was an established principle of Brazilian law, subject to certain exceptions. However, while each respectfully acknowledged that the view held by the other was a tenable view to take of Brazilian law, they agreed on little else.

Areas of disagreement

[20] There were two main areas of disagreement. The first was whether this case fell within one of the exceptions to privity of contract. The second was how the agreed interpretative principles should be applied to the MSA (and whether the Distribution Agreement and MSA could (and did) co-exist). They also disagreed on the form which a "distrato" (voluntary termination of a contract) must take in Brazilian law, albeit Professor Michelon acknowledged that he was less sure about his view on this than on the other issues in dispute, from which I took him to mean that the law was simply less clear.

This court's approach to the expert evidence

[21] The approach the court must take where there is evidence of foreign law was explained in *Ted Jacob Engineering Group* v *Morrison* 2019 SC 487, paragraphs [12] to [17]. As paragraph [12] makes clear, the function of the experts is not to decide the foreign law; rather it is to assist this court in the exercise of its function in deciding the case before it. So, this court must ascertain, on the expert evidence, what the relevant principles of the foreign law are, and then apply them to the facts of the case. It must determine how a foreign court would be likely to decide the issues of law that are relevant to the particular facts. Applying that to the present case, insofar as the experts disagree, my task is to examine their competing opinions and decide for myself what Brazilian law is, as it would be applied by a Brazilian court. Primarily, that task should be undertaken by testing their views against any authorities cited, and the views of the other, and by applying my own analytical reasoning. I do not accept the submission of senior counsel for the defender that Professor Gama's views carry more weight simply because he might have more practical litigation experience over the last ten years. With these observations in mind, I now turn to consider the competing evidence given in relation to each of the areas of disagreement.

The privity of contract issue

Professor Michelon

[22] Professor Michelon's view was that the case did not give rise to an exception to the privity of contract principle. Because the parties to the agreements were not the same, the MSA could not vary, let alone supersede, the Distribution Agreement. It was possible under Brazilian law for a contract to confer rights on a third party, but there had to be exceptional circumstances for obligations imposed in the contract to extend to a third party, or for a

third party's rights to be waived. Such circumstances included significant inequality of bargaining power or third party complicity in non-performance, neither of which was present here. As regards the group of companies doctrine relied upon by Professor Gama, it was not enough for companies simply to form part of the same group for that doctrine to apply. It made no difference that the defender ("Swire") was mentioned numerous times in the MSA. Even if the parties to the MSA intended the defender to be bound, the missing feature was that the defender itself had not signified its intention to be bound, since it was not a party to the agreement and had not executed it. It was irrelevant that the individual who signed on behalf of Monument may also have had authority to bind the defender; he had not signed on behalf of the defender. Before leaving Professor Michelon's evidence, it should be acknowledged that in his written Opinion, he stated that Swire was not mentioned at all in the MSA. In his evidence-in-chief, he volunteered that this was an error and that what he had intended to say was that Swire was not mentioned on the execution page. He had not thought it necessary to specifically mention the references to Swire in the body of the MSA, which were obvious, since they did not affect his underlying reasoning.

Professor Gama

[23] In Professor Gama's view, the social function of the contract and the good faith principle could mitigate the extent to which privity of contract applied, and they did so here. He drew attention to a number of situations – bankruptcy and arbitration – where the Brazilian courts had lifted the corporate veil, by applying the group of companies doctrine. It was significant that there were numerous references to the defender in the MSA. Having regard to that, and to the fact that the defender and Monument were both wholly owned subsidiaries of the same UK holding company, he noted that the core rights and obligations

of the MSA were expressly associated with the defender, and concluded that the rights and obligations of the MSA could be satisfied only with the defender's active engagement. The defender was therefore bound by the MSA and entitled to any benefits conferred by it. In his oral evidence Professor Gama accepted that under Brazilian law a party could be deprived of contractual rights only if that party agreed to the deprivation.

Other evidence

[24] Other evidence was led about the background to the MSA, primarily in relation to the interpretation issue, but as that evidence may also be relevant to the privity of contract issue, I deal with it here. Mr Shepherd reluctantly came to accept that he was acting for the defender in his dealings with the pursuer, but was adamant that he was acting for Monument when he executed the MSA: Monument was the company within the Swire Group which owned the fleet of products. He also said that it was always the intention of the parties that the MSA should complement rather than replace the Distribution Agreement. The main purpose of the MSA was to introduce key performance indicators. Similar agreements had been entered into world-wide with other suppliers. It was based on a style in use in the UK. He confirmed that the minutes referred to by Professor Gama were accurate. Mr Sell for his part was not directly involved in the signing of the MSA but said that in the defender's view it was to replace the Distribution Agreement, and to introduce a degree of professionalism. The Distribution Agreement (which had been entered into before he joined Swire) was only to get matters off the ground and was unsustainable in the longer term. Mr Moraes did not give any evidence of any significance to the issues in dispute. He was unclear as to what the terms of the relationship between the parties were.

[25] Although Mr Shepherd's evidence about how his witness statement came to be prepared was contradictory and to an extent unsatisfactory, I nonetheless did accept his evidence that when he signed the MSA he did so on behalf of Monument. That is consistent with his (unchallenged) evidence that it was Monument which owned the fleet; with the signing page itself, which stated that signature was for and on behalf of Monument; and with the evidence that it was generally Monument which entered into similar agreements with other suppliers.

[26] Otherwise, I did not ultimately find this chapter of evidence to be of assistance, either in deciding the privity of contract issue, or in interpreting the MSA. I attach no weight to either Mr Shepherd's view that the MSA was to complement the Distribution agreement, or to Mr Sell's that it was to replace it. What they thought subjectively was irrelevant in Brazilian law (Professor Gama's report, paragraph 63), just as it would be in Scots law. Even if Mr Sells' evidence was to be preferred, as urged upon me by senior counsel for the defender, and it was the defender's intention, or wish, that the MSA should be the sole agreement which regulated the relationship between the parties, there was no evidence that that was an intention or wish shared by the pursuer. It is not inconsistent with a desire to improve professionalism, or to introduce key performance indicators, that there should also be in existence a minimum purchase obligation or a right of exclusive distribution. I attach no weight to Mr Sell's evidence that the Distribution Agreement was only to get matters off the ground, the implication being that it was always the parties' intention to replace it within a short period by another agreement: that is inconsistent with the minimum term of five years. On one view, it would be mildly surprising, to put it no higher, if a relatively standard agreement in similar terms to those agreed with other suppliers, was intended to replace a bespoke distribution agreement which still had three years or so to run, without

any discussion whatsoever of the fact it was to do so, or without any express reference to that in the MSA or in the minutes of meetings leading up to its execution.

Submissions

[27] In substance, senior counsel for each party urged me to prefer that party's expert. For the pursuer, it was submitted that there was no evidence that the defender had consented to losing its rights under the Distribution Agreement before the contract was entered into. On Professor Michelon's evidence, the defender had failed to discharge the onus of proving that one of the exceptions to privity of contact applied. Senior counsel for the defender submitted that the pursuer being party to both contracts had freely agreed to be bound by the MSA and the defender had accepted that it was bound by it. That was sufficient to overcome privity of contract, if Professor Gama's evidence was accepted.

Decision on the privity of contract issue

[28] It is important not to lose sight of the core question, which is not whether the defender was content to be bound by the MSA or to give up its exclusive distributorship rights (if, properly construed, the MSA had that effect) but whether, as a matter of Brazilian contract law, the MSA achieved the aim of binding the defender to the contract, when it was not a party to it. The repeated references to the defender make clear, as indeed does clause 12.8, that the parties to the MSA intended that it should apply to the defender, and I accept Professor Gama's evidence that a Brazilian court would be likely so to find. Nonetheless, that begs the question as to whether their common intention had the desired effect. Reliance on clause 12.8 is circular, in that if privity of contract has the effect that the

contract cannot bind the defender, then clause 12.8 itself can have no effect in imposing obligations or conferring rights on the defender.

[29] This brings us back to Professor Michelon's objection, which is that the defender was not a party to the contract, and that none of the recognised exceptions to privity of contract apply. According to Professor Michelon, even if the parties to the MSA had expressly stated that Swire was to be bound by the MSA – which is essentially what clause 12.8 states, and is the position arrived at by Professor Gama – privity of contract would mean that the defender could not be held bound. To paraphrase the example Professor Michelon gave in his evidence, if B agrees with A that C will do something, only B is liable to A if C fails to perform. None of the examples given by Professor Gama at paragraphs 140 and 141 of his report contradict that principle. The closest example is the second in paragraph 140 – promises of performance by third parties, such as a contract in which one of the parties promises to hire a third party to perform artistic services – but this must be read in light of the relative footnote, which states: "*The one who has promised* (emphasis added) that a third party will perform a certain act will be liable for losses and damages if the third party fails to perform it". That does not support Professor Gama's view that the third party may be held liable; rather, it reinforces the point made by Professor Michelon in his evidence that in the given example only B, not C, is liable for a breach.

[30] In fairness to Professor Gama, the primary basis for his opinion that an exception to privity of contract exists in the present case, lies not in paragraphs 140 and 141, but in paragraph 142 of his report, where he states that the "contract effects may be extended to third parties who have actively participated in the negotiations or drafting of the contract terms and conditions, as sometimes is the case of entities belonging to a group of companies." That statement is not supported by reference to authority, from which I infer

that there is none. Professor Gama then goes on to consider the doctrine of group of companies under Brazilian corporate law. He sets out a number of situations in which companies controlled by the same shareholder are deemed to be part of the same group. However, none of the examples he gives are comparable to the present situation. At paragraph 146, Professor Gama gives the example of a controlling company being held to be bankrupt, in addition to its subsidiary, where the companies shared unified labour and management, as well as the same bank account. That is far removed from the facts here. At paragraph 147, he states in very general terms that "other" Brazilian case law has recognised legal effects to situations that do not necessarily arise from legal transactions or illicit acts – such as partnerships in fact and apparent representation, but that statement is too vague to be applied to the present case, where no question of agency, implied or apparent, is relied upon. The closest analogy given by Professor Gama is his example in paragraph 149 of the group of companies doctrine being applied to arbitrations, where one company, part of a group, can be held bound by an arbitration agreement, even though it is not a signatory to that agreement. That appears to be a special rule which applies only to arbitration agreements, rather than a rule of general application.

[31] As already stated, Professor Michelon agreed that there is a doctrine of group of companies in Brazilian law, but in his view that was a necessary, but not sufficient, reason for the corporate veil to be lifted. He was aware of no Brazilian judicial decision (and Professor Gama did not cite any) where the doctrine of group of companies had been used to justify an exception to the doctrine of privity of contract so as to allow a member of a group of companies to avoid contractual liability.

[32] For all these reasons, I find Professor Michelon's opinion to be more persuasive than Professor Gama's. Professor Michelon's view is consistent with principle, whereas Professor

Gama has not been able to cite any authority which supports his view that an exception to privity of contract falls to be made on the facts. I find that a Brazilian court would be more likely to accept the former, than the latter, as representing the law of Brazil.

[33] I also reject the defender's argument that it was significant that the defender was, through Mr Shepherd, involved in the negotiations leading up to the MSA and that he was the person who signed the MSA. Given my finding that the MSA was signed by Mr Shepherd on behalf of Monument, it is immaterial whether he had previously negotiated on behalf of the defender. Even on Professor Gama's evidence, Mr Shepherd's involvement on behalf of both companies would be insufficient to lift the corporate veil, since he was not the principal shareholder, or controlling mind, of either company. His involvement was simply a consequence of the fact that the companies were part of the same group, and not such as to give rise to a reason not to apply the privity of contract principle.

[34] I also reject the defender's related argument that the defender is bound by the MSA because Mr Shepherd, who executed it, also had authority to bind the defender. That may be so, but as Professor Michelon pointed out, and as I have found in fact, he signed the agreement on behalf of Monument, and so whether he might also have had authority to bind the defender is neither here nor there, as Professor Michelon said. In any event the defender's pleaded case is not that it entered into the MSA (the logical consequence of the MSA having been executed on its behalf) but that the MSA entered into by Monument conferred rights on the defender.

[35] In summary, I hold, accepting Professor Michelon's evidence, that Brazilian law does not admit of an exception to privity of contract in the circumstances of the present case. It follows that the MSA was not effective to confer rights or impose obligations on, or remove rights from, the defender.

[36] For completeness, I should revert to Professor Michelon's admitted error about references to Swire in the MSA, which senior counsel for the defender urged me to take into account in assessing the weight to be attached to the respective opinions of the two professors. While the text of Professor Michelon's Opinion does not sit entirely happily with his explanation, nonetheless, as he said in his oral testimony, it is inconceivable that he could have read the MSA and not noticed that it contained numerous references to "Swire". I accept his explanation that these references to the defender made no difference to his reasoning, and that the mistake in his Opinion is not such as to undermine his evidence.

[37] In conclusion, since the defender was not a party to the MSA, and is not bound by it, the only agreement which can regulate the parties' current relationship continues to be the Distribution Agreement. However, lest I am wrong in reaching that view, it is also necessary to consider how the MSA falls to be interpreted.

The interpretation issue

Professor Michelon

[38] Professor Michelon's view was that on a proper construction of the MSA, and on the assumption that privity of contract was overcome, it was not intended to replace the Distribution Agreement. In part, he reached this view having regard to the differing natures of a distribution agreement on the one hand and a supply agreement on the other. A distribution agreement was wider. He agreed with Professor Gama that the essential features of a distribution agreement (although there were others) were (i) several purchase and sale transactions, (ii) the distributor's economic profit, being the price difference between purchase and resale of the goods and (iii) transfer of ownership from the supplier to the distributor and ultimately to the third party purchaser. In addition, other common

features, present in the Distribution Agreement, were (i) an undertaking by the distributor to distribute the goods in the territory, (ii) delimitation of the territory, (iii) a provision clarifying whether the distribution was exclusive, (iv) duties to advertise and promote the products and (v) a prohibition on the products being sold on more favourable terms to third parties. The Distribution Agreement was a typical distribution agreement under Brazilian law. It could not be reduced to a mere supply agreement. Even though it contained conditions for the supply of goods to the defender, these were inserted into a wider normative framework. The MSA was simply a framework agreement, which (apart from several ancillary clauses, such as confidentiality) only had any application upon individual sales contracts being entered into. It could not wholly replace the Distribution Agreement.

[39] Professor Michelon also based his view on his interpretation of the MSA. The definition of "Contract" in clause 1.1, restricted as it was to a contract for the supply of services, did not cover all contractual relationships between the parties. What could amount to a contract as defined was further qualified by the reference to "Prior Agreement", itself a defined term. The Distribution Agreement could not fall within the definition of "contract", as so qualified. Clause 2.2 could not be interpreted as meaning that the Distribution Agreement was to be superseded in its entirety by the MSA. This literal interpretation was reinforced by a contextual one. There was no plausible explanation as to why it would make economic sense for the pursuer to waive the economically valuable rights it enjoyed under the Distribution Agreement, while gaining nothing in return.

[40] In his oral evidence, Professor Michelon derived further support for his view from the words "seeks to impose or incorporate", in clause 2.2. The pursuer could not be said to be seeking to impose or incorporate terms which existed by virtue of a bilateral agreement.

[41] If privity of contract was overcome, Professor Michelon's view was that while there would then be an overlap between the two agreements, the Distribution Agreement dealt with matters which the MSA did not. At best, the MSA would merely replace schedule 3 of the Distribution Agreement, which dealt with the same sort of issues. In so far as the MSA contained terms which mirrored those in the body of the Distribution Agreement, such as those relating to intellectual property and confidentiality, the Distribution Agreement would take priority, by virtue of the last sentence in clause 10.1.

Professor Gama

[42] In Professor Gama's opinion, a proper construction of clause 2.2 led to the conclusion that the MSA replaced the Distribution Agreement in its entirety. In his Report, he adopted a more structured approach to interpretation than Professor Michelon, stating that the courts would assess the meaning: *grammatically* (that is, literally); *logically* (so as to achieve internal consistency); *systematically* (reading the term contextually); and *teleologically* (in our language, adopting a purposive interpretation). While he sought to justify his proposed construction by reference to all of these, this is effectively superseded by the joint agreement reached as to the interpretative principles applicable here. On a literal approach, Professor Gama considered that the exclusion of "any other terms that the [pursuer] seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing" was wide enough to cover terms emanating from the Distribution Agreement. The wording of clause 2.2 was such that the only documents that governed the relationship between the parties after 13 June 2013 were the MSA itself, the Appendix, the Order and the Prior Agreement. He further considered that the socio-economic rationale of the MSA was sufficiently clear to warrant his preferred interpretation, as the MSA provided a new and

comprehensive contractual framework between the parties for the supply of Units (which had the same definition as Products in the Distribution Agreement). While accepting that a supply agreement was different from a distribution agreement, he did not accept that the latter was necessarily wider than the former, as Professor Michelon had suggested. The MSA was not truly a supply contract. It was an innominate one. Professor Gama considered that the language adopted in both contracts, and the obligations undertaken by the pursuer in relation to the same goods, were close enough to warrant the claim that the MSA replaced the Distribution Agreement. He adhered to this view in his oral evidence. Although he accepted that there were also differences, the link between the two contracts was close enough that the parties essentially intended to replace the previous contractual scheme with a new one, contemplating the same goods, which could now also be toll-manufactured.

[43] As regards the words "seeks to impose or incorporate", Professor Gama pointed out that the Portuguese language version of clause 2.2 used the word "invocar" which he said translated as "invoke" rather than impose. Adopting that word, the clause more obviously prevented the pursuer from relying upon, the terms of the Distribution Agreement.

[44] Professor Gama derived support for his interpretation from the minutes of two meetings: the first, a meeting on 5 April 2013 at which the parties agreed that invoices could be approved for payment under the terms of the MSA; and the second, a meeting on 16 April 2013 when it was agreed that the MSA would be signed, an indication that the pursuer intended to be bound by it.

[45] Finally, for Professor Gama, it "stood to reason" that the MSA and the Distribution Agreement could not co-exist, as each regulated the supply of the same goods, or categories of goods.

Submissions for the pursuer on interpretation of the MSA

[46] Senior counsel for the pursuer submitted that Professor Michelon's approach should be preferred. The exclusive distribution rights and obligations in the Distribution Agreement were sufficiently, and conceptually, distinct from toll manufacturing and ordering of Units, so as to fall outwith the scope of the MSA. In particular, they fell outwith the scope of clause 2.2. It was a classic "battle of the forms" clause, as the phrase "seek to impose" confirmed. The English version should be construed in preference to the Portuguese, as the negotiations had been conducted in English and it appeared first in the contract.

Submissions by the defender on interpretation of the MSA

[47] Senior counsel for the defender submitted that, applying the reasoning of Professor Gama, the proper construction of the MSA was that it was intended to replace the Distribution Agreement. It was significant that both agreements regulated the supply of the same products. There was no evidence that the parties did not intend that the MSA would not govern their relationship. Clause 10.1 could not be relied upon. "Latter" in that clause must mean the later in time. If not, the clause would have no application, since the Distribution Agreement would always prevail over the MSA, meaning that the terms of supply could never be varied. As for "impose" versus "invoke", it was wrong to say that the English language version must prevail. The court could have regard to both versions in deciding what parties intended.

Decision on the interpretation issue

[48] The agreed first step under Brazilian law is to ascertain the literal meaning of the words used, and on the authority of *Ted Jacob Engineering Group*, above, it is for me to carry out that task for myself rather than necessarily to accept the views of one or other expert. As a starting point, I note that the MSA is a framework or master agreement (as both experts said), the terms and conditions of which are to apply to future contracts for the supply of services by the pursuer to the defender, rather than a free-standing agreement covering all aspects of the relationship between the parties. That assertion is reinforced by the definition of "Contract", which is restricted to contracts between the pursuer and the defender (or an affiliate) for the supply of services. Necessarily, the definition comprehends only future contracts. It cannot be read as a reference to contracts previously entered into by the parties, and so it cannot be read as including a reference to the Distribution Agreement, at least insofar as it created rights and obligations governing the longer-term relationship between the parties. Insofar as clause 2.2 excludes the application of other terms, it does so only in relation to contracts, as defined; it cannot fairly be read as meaning that no previously agreed contractual provision is to have effect for any purpose. The distinction I am seeking to draw can be illustrated as follows. If the defender made not a single purchase from the pursuer after the MSA came into force, then there would be no contracts to which the MSA conditions could ever apply. It follows that, whatever other arguments might be open to it, the defender could not meet a claim that it was in breach of the minimum purchase requirement of the Distribution Agreement by founding upon clause 2.2, because the trigger for its operation –the existence of a contract – would be absent. Not only is this the literal interpretation of clause 2.2, it is both a logical and a reasonable construction of the MSA that it should regulate only future contracts, and, in relation to such contracts, to apply to the

exclusion of any other terms. Construed in this way, the precise meaning of "impose", and whether it means "invoke", and whether on either interpretation it is capable of referring to the Distribution Agreement, becomes irrelevant, or at least of less moment. Although Professor Gama arrives at a different interpretation by a number of routes, the cornerstone of all of them is the *exclusion* of *any other terms* (his emphasis), which he maintains is broad enough to include an exclusion of the Distribution Agreement. With respect to Professor Gama, I consider the flaw in that approach to be that it ignores that the exclusion of other terms is in relation only to a "Contract" as defined. Professor Gama essentially inverts the interpretative task by asking first, what is excluded – which he answers as "everything" – from which he concludes that the Distribution Agreement has been superseded; whereas the correct approach is first to ask, to which contracts does the exclusion apply, and only then to ask what is excluded from those contracts. Professor Gama consequently falls into error at paragraph 97 d of his Report, where he states that the wording of the first sentence of clause 2.2 denotes that the MSA (together with the Appendix, the Order and the Prior Agreement) are the only legal documents governing the relationship of the parties as of 19 June 2013. That is not what clause 2.2 says.

[49] That the foregoing literal interpretation is the correct one is reinforced by a contextual interpretation, and the differing nature of the Distribution Agreement on the one hand and the MSA on the other. It is nothing to the point that the agreements applied to the same products. The Distribution Agreement contained obligations about the parties' longer term relationship which the MSA did not. The nature of the rights and obligations conferred by the two agreements is more significant than the fact that they refer to the same products.

[50] There are a number of subsidiary points to deal with. I do not find that anything turns on the application of good faith. There is no evidence that the pursuer has acted in

bad faith, since there was no evidence that it intended the MSA to apply to all dealings. As for economic justification, ultimately this is a neutral factor. The pursuer would have given up an economic advantage, had it agreed that the MSA would supersede the Distribution Agreement, but it would have gained the ability to sell to other players in the market. There was no evidence as to the respective values of what would have been lost and gained.

[51] I also find that (putting privity of contract to one side) there is nothing to prevent the Distribution Agreement and the MSA from co-existing. It does not stand to reason, as Professor Gama put it, that they cannot, given that the nature of the rights and obligations created is not the same. If the contracts did co-exist, the MSA, which deals mainly with the conditions of purchase, would replace only schedule 3 of the Distribution Agreement. Cause 10.1 of the Distribution Agreement envisages that the conditions of sale as set out in schedule 3 may change from time to time during the lifetime of the Distribution Agreement. There is no reason why they should not change by virtue of an agreement between the parties. The last sentence of clause 10.1 is not without difficulty, since read literally it could be taken as having the effect that in the event of any inconsistency between the old and new conditions, the terms of schedule 3 would always prevail, from which it would follow that no change could ever take effect. Clearly that would be a nonsensical result. Senior counsel for the defender submitted that this difficulty was avoided by reading "latter" as later in time, but that is not the normal meaning of that word, which is the second or last of two or more things mentioned in a list, as here. I prefer the pursuer's approach which is to read the reference to "the terms of this agreement" as not including a reference to the terms of schedule 3. The clause itself draws a distinction between conditions of sale, and the terms of the agreement. There is no lack of logic in the two agreements co-existing.

[52] It follows that the minutes of meetings referred to by Professor Gama, where it was agreed that future orders would be placed in accordance with the MSA, are of little assistance. That agreement is equally consistent with the MSA replacing only schedule 3, as with replacing the entire Distribution Agreement.

[53] Finally, I should deal briefly with the assertion made both by Professor Gama and in submissions for the defender, to the effect that there is no evidence that the parties' intention was not to have the MSA as the sole agreement governing their relationship. That takes the defender nowhere. Equally, there is no evidence that it was, but more to the point, the parties' intention must be ascertained by construing the MSA.

[54] In conclusion, even if I am wrong in relation to privity of contract, and the defender is to be taken as party to the MSA, it did not have the effect contended for by the defender of replacing the exclusive distribution, and minimum purchase obligations, of the Distribution Agreement.

The termination issue

[55] Given the conclusions I have already reached, the issue of voluntary termination – or, in Brazilian law, distrato – does not arise, whether under Scots law or Brazilian law. The MSA properly construed does not display an intention to terminate the Distribution Agreement but, at best for the defender, sits alongside it. However, I will deal with this issue briefly in case I am wrong in reaching both conclusions, and the correct interpretation of the MSA was, after all, that the MSA should govern all future relations between the parties. As a matter of Brazilian law, Professor Gama's view was that it was open to parties to terminate a contract in any manner they chose (even orally), subject only to any limitations imposed by statute. Professor Michelon, somewhat diffidently on this point,

differed from that view and was of the view that in addition to statutory limitations, it was open to the parties to impose further limitations in the contract itself. However, as he pointed out in his supplementary Opinion, correctly, it was then a matter for Scots law as to whether any such limitations existed.

[56] Since senior counsel for the pursuer accepted that the parties to the Distribution Agreement could, under Scots law, enter into a subsequent agreement to bring it to an end, the only question then becomes, did they do so? I do not accept the submission for the pursuer that the subsequent agreement must clearly express such an intention: if that intention can be ascertained on a proper construction of the second contract, the first contract will have been terminated by agreement. If follows that if, contrary to the views I have reached, the defender was party to the MSA, and the intention of the parties in that contract was to replace the Distribution Agreement in its entirety, the Distribution Agreement would have been terminated (or novated) by the second agreement. That can be tested by supposing that the MSA had contained a different minimum purchase obligation – say, a smaller number of units for a shorter term: the pursuer could hardly argue in those circumstances that the Distribution Agreement had not been superseded by the MSA.

[57] Accordingly, if I had accepted the defender's arguments on privity of contract, and interpretation, I would have found that the Distribution Agreement had been terminated, on the application of Scots law.

Disposal

[58] I will sustain the pursuer's fourth plea in law to the extent of deleting the averments identified in the pursuer's written submissions in Answers 1 and 2; thereafter, I will put the case out By Order to discuss further procedure.