OUTER HOUSE, COURT OF SESSION

[2022] CSOH 49

CA2/22

OPINION OF LORD BRAID

In the cause

SUPASEAL GLASS LIMITED

Pursuer

against

INVERCLYDE WINDOWS MANUFACTURING LIMITED

Defender

Pursuer: Thomson, QC; MacRoberts LLP
Defender: Manson; DAC Beachcroft Scotland LLP

20 July 2022

Introduction

[1] The pursuer, Supaseal Glass Ltd, manufactures and supplies sealed double glazing window units. The defender, Inverclyde Windows Manufacturing Ltd, supplies and installs replacement windows, glazed doors and conservatories. For many years, it was a long-standing customer of the pursuer, from whom it purchased glass and sealing units.

[2] The pursuer contends that in December 2015 a binding contract was concluded whereby the defender agreed to purchase all of its glass from the pursuer from then until 31 December 2020, at prices agreed on an annotated price list signed by the parties, and that the defender has been in breach of that contract since November 2017 by purchasing glass

products elsewhere. The defender's position is that no such binding contract was concluded because, at most, the parties reached an agreement in principle which was never committed to writing as intended.

[3] The action called before me for a preliminary proof on the following issues: (i) whether a choate, binding and enforceable contract was concluded between the parties at a meeting which took place between their respective controlling minds, Alexander Gray, the pursuer's managing director, and his counterpart at the defender, Mark Gorman, on 8 December 2015; and (ii) if so, what were the terms of that contract.

[4] Evidence for the pursuer was given by Mr Gray; Linda Murdoch, who was employed by the defender as an accounts administrator (and has, since 2018, been employed by another of Mr Gray's companies); and Brian Cannie, a funeral director who has known both Mr Gray and Mr Gorman for many years. Mr Gorman gave evidence for the defender, as did Lynn Rayner, solicitor, who has in the past acted for both Mr Gray and Mr Gorman but who, in this matter, was acting for the defender (and, latterly, also for Mr Gorman). Evidence in chief was in the form of witness statements (two from Mr Gorman and one from each of the other witnesses), augmented by oral evidence, mainly in cross examination and re-examination. Some formal evidence was agreed in a joint minute.

[5] Much of the evidence was the subject of Notes of Objection lodged by each party. As agreed, I heard all of that evidence under reservation of its competency and relevancy.

The pleadings

[6] It is worth setting out, in brief, the parties' respective positions in their pleadings. After making detailed averments in article 5 of condescendence about the meeting of 8 December 2015, the pursuer avers in article 6:

> "… at the said meeting on 8 December 2015 an agreement was reached to the following effect: (i) Mr Gray would transfer his shares in the defender to Mr Gorman; (ii) Mr Gorman would pay Mr Gray the sum of £57,000; and (iii) the defender would buy all glass required by it from the pursuer, at the rates stipulated in the annotated and initialled price list, until 31 December 2020."

[7] The defender denies that there was any such agreement as averred by the pursuer, and adopts the position that no formal, binding, choate agreements were reached at the meeting but that (Answer 6(ii)):

> "[t]he 8 December 15 emails from Messrs Gray and Gorman represent that there was a willingness on the part of Mr Gorman to take forward a series of formal contracts (some between the private individuals concerned and others between the corporate persons) addressing (i) the share transfer; (ii) a form of exclusivity arrangement in connection with the purchase of glass; and (iii) a renunciation of certain claims. The emails' express terms make clear that formal written agreements were going to be required in order to give the generally contemplated arrangements contractual effect."

The defences elsewhere refer to the parties merely having reached agreements in principle.

The law

[8] It is convenient to set out the governing legal principles at this stage. First, neither a contract for the sale of shares, nor one for the exclusive purchase of goods, is one which the law requires to be in writing: Requirements of Writing (Scotland) Act 1995, section 1(1). Second, whether a binding agreement is reached by two parties must be assessed on an objective basis: McBryde, *The Law of Contract in Scotland (3rd Edition)* paragraph 5-04. Third, what is important is what is said and done, rather than what the parties thought privately. "The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other": Gloag on Contract, (2nd ed) p7, approved by Lord Reid in *McCutcheon* v *David MacBrayne Ltd* 1964 SC (HL) 28 at 35. Fourth, if two parties to an agreement intend that they should not be bound until a

written agreement has been entered into, they will not be bound until that written agreement has been executed: *Gordon's Executors* v *Gordon* 1918 1 SLT 407. However, fifth, even if parties to an apparent contract provide that either may withdraw until the terms of their agreement have been reduced to a formal contract, the bare fact that they have stipulated that it shall be embodied in a formal contract does not necessarily mean that they are still at the stage of negotiation: *Stobo Limited* v *Morrison (Gowns) Limited* 1949 SC 184. Finally, agreement must be reached on the essentials of a contract. A concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. What the essentials are may vary according to the particular contract under consideration: *May & Butcher Ltd* v *R* [1934] 2KB 17, Viscount Dunedin at 21.

The evidence

Undisputed facts

[9] (In the narrative which follows I will refer to the parties as Supaseal and Inverclyde, for ease of reading.) The following facts are not in dispute. Mr Gorman held a majority shareholding of 86% in Inverclyde, and Mr Gray a minority shareholding of 14%. Though not a director of Inverclyde, Mr Gray provided strategic advice to it. For some years Inverclyde had purchased glass products from Supaseal at "mates' rates". By November 2015, for whatever reason, relations between Mr Gray and Mr Gorman had broken down such that it was in their mutual interests that one buy out the other's interest in Inverclyde. In the days leading up to the key meeting of 8 December 2015, discussions had taken place between the parties, including discussions between Mr Gray and Lynne Rayner, as the company's solicitor, but no agreement had been reached.

[10] The meeting on 8 December 2015 took place at Inverclyde's premises and was attended only by Mr Gray and Mr Gorman. A discussion took place about the price which Mr Gorman would be willing to pay Mr Gray for his shares, and after a certain amount of haggling a figure of £57,000 was agreed. A discussion also took place about the terms on which Inverclyde would, in the future, buy glass products from Supaseal. During the meeting, Mr Gray phoned Irene Henderson, who worked in the Supaseal office, and asked her to email a price list of the glass products supplied to Inverclyde, which she did. Mr Gray and Mr Gorman then discussed prices. New prices were agreed for the three products most commonly purchased by Inverclyde from Supaseal. Those new prices were written on the price list in manuscript, which both men signed (the pleadings state "initialled" but it is clear from a comparison of the price list with the witness statements lodged in process that both men in fact added their signatures).

[11] Mr Gray then emailed Lynn Rayner from his iPhone, at 1545 on 8 December 2015, in these terms:

> "Afternoon Lynn
> Mark and I have agreed the following:
> Payment of £57000.00 & sign up to buy all glass from Supaseal Glass Ltd until 31 December 2020 at the rates we have agreed. Mark will send you a signed attachment in his e-mail. We also agree to sign a document relinquishing any further claims against each other apart from trading invoices."

[12] That was followed by this email from Mr Gorman to Ms Rayner at 1658:

> "Hi Lynn
> Alex and I have agreed the following:
> Payment of £57000.00 & sign up to buy all glass from Supaseal Glass Ltd until 31 December 2020 at the rates we have agreed. We also agree to sign a document relinquishing any further claims against each other apart from trading invoices."

As the absence of any reference to a signed attachment in his email suggests, Mr Gorman did not in fact send the annotated price list to Ms Rayner, as Mr Gray had said he would do.

[13] Ms Rayner did not reply to those emails until 14 December 2015, when she emailed Mr Gray (copying in Mr Gorman) in the following terms, so far as material:

> "Thank you for your email of 8th December, 2015 in which you advised that you have agreed to sell your 14 ordinary shares in [Inverclyde] to ….Mark Gorman for the sum of £57,000…
> Can you please send a suitable letter to me as agent for the company along with your Share Certificate? I will then arrange for the appropriate Stock Transfer Form to be prepared and an appropriate Minute signed by the Company.
> I note that you and Mark have also agreed to the Company buying all glass from [Supaseal] until 31st December 2020 at the rates agreed. If you have a document signed by yourself and Mark agreeing this then I suggest that you send a copy to me and I will store it with the paperwork for the Company.
> I will speak to Mark about framing a suitable document in which you relinquish any further claims against each other apart from trading invoices."

[14] Ms Rayner also emailed Mr Gorman on the same day:

> "Thanks for your email. Can you confirm when you will be in a position to make the payment so I can prepare the necessary paperwork? If you have something in writing between yourself & Alex about the glass then please let me have a copy.
> I note that you are each relinquishing any claims against each other apart from trading invoices. Can you give me a call about this?"

[15] Mr Gray replied to Ms Rayner's email on 15 December, stating, insofar as material for present purposes:

> "I have attached the price list which both Mark and I have signed, is this along with our respective e-mails of last week not sufficient? If not, will you be drafting something more appropriate?"

That elicited no response.

[16] A Share Purchase Agreement was subsequently drawn up by Ms Rayner. It included some terms which had not previously been discussed between Mr Gray and Mr Gorman, in particular a non-solicitation clause, but no issues arose out of that and the Agreement was duly signed by both men. Ms Rayner made it clear to Mr Gray that she could not tender legal advice to him. Notwithstanding the prior reference to a discharge of claims, no such

document was ever drawn up, nor was any further documentation ever prepared in relation to the purchase of glass by Inverclyde from Supaseal.

[17] Finally, it is noteworthy that before the Share Purchase Agreement was signed, Mr Gorman began making payment for the shares. He paid £15,000 in December 2015 and £22,000 on 11 January 2016, with the balance of £20,000 being paid upon execution of the Agreement.

Mr Gray

[18] Turning to the areas where the evidence diverged, Mr Gray said that at the meeting an oral agreement was reached between him and Mr Gorman that Inverclyde would buy all its glass exclusively from Supaseal for a period of five years, until the end of December 2020. In his witness statement he gave a verbatim account of how the conversation between him and Mr Gorman had unfolded. He had admittedly gone into the meeting with a view to reaching such a deal as part of the overall package which he hoped to agree with Mr Gorman to bring his involvement in Inverclyde to an end, and the five year exclusivity deal was agreed by Mr Gorman. On Mr Gray's evidence, that was why he had asked for the price list to be emailed to the meeting, and why there was a discussion about prices in relation to the three most commonly purchased products. He anticipated that those prices would increase over the coming five years, and did not wish to be tied into prices which were too low. He increased the rates on those three products. Mr Gorman had accepted at the meeting that he could no longer expect to get "mates rates". Mr Gray did not trust Mr Gorman – whether that lack of trust was merited or not is neither here nor there for present purposes – and that was why he insisted that both of them email Lynn Rayner in the terms they did. Having done that, and secured Mr Gorman's signature on the price list, so

far as he was concerned the exclusivity deal was in place from that moment on. It was put to him that he had pre-prepared the emails to Lynn Rayner, which he denied, and he pointed out, with some justification, that they could not have been entirely pre-prepared since he could not have anticipated the terms on which agreement would be reached. So far as the reference to relinquishing claims was concerned, he said that this wording had come from Lynn Rayner, who had mentioned that possibility in one of the conversations he had with her in the days before 8 December 2015.

[19] In cross-examination, Mr Gray's evidence was robustly challenged, but he largely adhered to his statement. He insisted that he could remember the detail of the conversation between him and Mr Gorman at the meeting. He agreed that before the share purchase agreement was signed, certain revisals were made to it by Ms Rayner which he accepted. He had not prepared the text of the emails in advance of the meeting. He did see the overall agreement reached as a package.

Mr Gorman

[20] Mr Gorman's position in evidence was more elusive. In his first witness statement, he said that he and Mr Gray were both aware that he was being advised by Lynn Rayner and that she would be asked to prepare the legal document they needed. He emailed Ms Rayner in the terms he did because he was asked to do so by Mr Gray to show that he was willing to take forward a formal agreement in these terms. Mr Gray had already prepared the emails on his phone. As far as Mr Gorman was concerned, sending an email to the lawyer did not mean that he was tied in to anything. He had no intention of being legally bound simply by sending an email. He "knew" that a contract would be needed to put it all into effect. He was happy to indicate that contracts could be prepared along the

lines of what was said in the emails. At the same time, he thought that if Ms Rayner did not put something formal in place, then there was nothing to lock him in. He deliberately did not respond to Ms Rayner's email of 14 December 2015, because he did not want to take that forward unless he absolutely had to. He had not agreed an exclusivity deal. By using the words "sign up" it was intended that a written agreement would be needed.

[21] In his rebuttal statement, Mr Gorman responded in detail to Mr Gray's witness statement, commenting in particular on what Mr Gray claimed was said at the meeting. He also said that Inverclyde could not have purchased all of its products from Supaseal, because it required some products which Supaseal did not supply, and he named two other companies from which Inverclyde purchased glass products (in passing, I would observe that this arguably should have been included in the first statement; it is not as if Mr Gorman did not know that the pursuer's position in its pleadings was that an exclusivity deal had been entered into, but no issue was made of this by the pursuer and I will let it pass).

[22] In cross-examination Mr Gorman said for the first time that he had felt intimidated by Mr Gray. Interestingly, he accepted that he had agreed to a price increase for the three products in question because he accepted that Inverclyde could no longer purchase at the same rates as before, the companies no longer being part of the same group, which was consistent with Mr Gray's evidence of what he had said at the meeting in that regard. He also accepted that he had not told Mr Gray that his belief was that there would be no binding agreement until a formal contract had been signed, nor had he told him that his mind-set was that he privately did not agree to the exclusivity deal. An apparent inconsistency between his witness statement and the defences prepared on his instructions was also put to Mr Gorman. Whereas in the former he said that he had signed the price list to show the lawyer what he was prepared to commit to in a formal contract, the defences

stated that the reason he did not attach the price list was because he did not wish to give the indication that he had agreed that Inverclyde was to be formally bound by a signature having been added to the price list. It was put to him that if his evidence was correct, it was surprising that he had not forwarded the annotated price list to Ms Rayner. Mr Gorman did not give a satisfactory explanation for the apparent contradiction and appeared uncomfortable when asked to explain it, at one stage stating that he did not know if the price list was attached or not, then denying that he had deliberately not attached the price list in an attempt to get out of the deal, then stating that it probably did enter his mind that he did not want to agree but never said that to Mr Gray.

[23] Mr Gorman was then asked about an averment in the defences (but about which he had not given evidence in either witness statement), namely, that immediately Mr Gray left, he telephoned Ms Rayner to say that he was dissatisfied with the exclusivity deal and that he did not agree with it. He said he had done that. He accepted that Mr Gray would not have known this. He was unable to explain why Ms Rayner had made no mention of that telephone call, or why her emails of 14 December 2015 appeared inconsistent with there having been such a conversation.

Linda Murdoch

[24] Ms Murdoch's evidence was mostly about background facts, to which I attach little weight. She also spoke to a conversation with Mr Gorman, at some point after 2015, when he told her that an exclusivity deal had been agreed, that he had to buy glass from Supaseal and that there was a signed contract in place. She stood by that evidence even when it was put to her that there was no signed contract in existence. (Mr Gorman denied that any such conversation had taken place.) Ms Gray's evidence was inconsistent as to whether she was

uncertain whether the agreement was for 2 or 5 years (paragraph 13 of her witness statement) or that she knew it was for 5 years (her evidence in cross-examination). She also said that she "knew" they had to sign a contract.

Brian Cannie

[25] Mr Cannie spoke to an occasion in 2019 when he was phoned early one morning by Mr Gorman, who was upset because sheriff officers had visited him at the instance of Supaseal. Mr Cannie had tried to act as a go-between, and had phoned Mr Gray to find out what was going on. Mr Cannie said that Mr Gorman told him that his company had a contract with Supaseal. (Mr Gorman denied that any such conversation had taken place.)

Lynn Rayner

[26] Ms Rayner spoke to the emails she had received and sent, and to her role in drawing up the Share Purchase Agreement. Significantly, she did not speak to any telephone call between herself and Mr Gorman on 8 December 2015, nor was a file note of any such call produced. Although she said that she had made it clear to Mr Gray that she was not acting for him, and had acted for Mr Gorman in drawing up the Share Purchase Agreement, she was constrained to accept that her letter of engagement and email of 26 November 2015 stated that she was at that stage acting only for Inverclyde.

The notes of objection

The defender's note

[27] The defender objected to elements of the evidence of all three of the pursuer's witnesses. Insofar as Mr Gray gave evidence about Mr Gorman fraudulently diverting

Inverclyde money to himself, it was complained that fair notice had not been given, and that the evidence was irrelevant to the issues. Insofar as he gave evidence about performance and breach, that was said to relate to issues which did not fall within the scope of the preliminary proof. Ms Murdoch's evidence was objected to in its entirety, partly because it dealt with allegations of fraud; partly because no fair notice had been given of her alleged conversation with Mr Gorman; and partly because she gave evidence of her opinion of Mr Gorman's character, which was inadmissible. Mr Cannie's evidence was also objected to in its entirety, as irrelevant to the matters in dispute, and because of a lack of fair notice.

[28] Disposing of those objections in turn, I repel the objection to Mr Gray's evidence about fraudulent activity, which was foreshadowed in the pursuer's averments and which gives context to the meeting of 8 December. That said, I attach little weight to that evidence, other than that it confirms that (for whatever reason) Mr Gray did not trust Mr Gorman, and that the relationship between the two men had deteriorated to the point where it could not continue. I sustain the objection to evidence about performance and breach, which fell outwith the scope of the preliminary proof and which I have disregarded. Since I propose to reject Ms Murdoch's evidence as unreliable, there is no real need to consider the objection to her evidence, but for completeness I sustain the objection to her opinion evidence about Mr Gorman's character. Finally, while Mr Cannie's evidence was mostly of doubtful value, I repel the objection insofar as it relates to Mr Gorman's statement that he had an agreement with the pursuer, which is relevant and available as an adminicle of evidence.

The pursuer's note

[29] I sustain the pursuer's objection to Mr Gorman's evidence insofar as it contradicted an admission in the defences about the number of shares held by Mr Gray in Inverclyde.

Beyond that, the objection was in the main either that there was no record for passages of the evidence, or that Mr Gorman sought to give evidence about what his subjective intentions were. Insofar as the first of these is concerned, Mr Gorman was entitled to give evidence about the background, as Mr Gray did. As regards evidence of subjective intention, while that is strictly irrelevant in ascertaining what the parties intended, which must be assessed objectively, it is instructive in the present case as a guide to Mr Gorman's credibility and reliability and it would be artificial not to have regard to his evidence about what was in his mind at a time when he was ostensibly reaching agreement with Mr Gray. Accordingly I repel the remainder of the pursuer's objection to Mr Gorman's evidence.

[30] The pursuer also objected to Ms Rayner's evidence. While much of it is of limited assistance, it is relevant to the global picture, and I will repel that objection also.

Credibility and reliability

[31] I do not accept Linda Mitchell's evidence as reliable. There were inconsistencies in it, to which I have drawn attention. It is a matter of established fact that there never was a written agreement for the purchase of glass, so Mr Gorman is unlikely to have told her that there was, particularly in light of his evidence that, privately, he never intended to enter such an agreement. I therefore discount her evidence in its entirety (including her assertion that the parties "had to" sign a contract).

[32] Insofar as they gave relevant evidence, I find Ms Rayner and Mr Cannie to be credible and reliable witnesses. They have no axe to grind. Mr Cannie spoke to Mr Gorman having told him that he had a deal with Supaseal. He would have no reason to make that up, or even to be mistaken about it, if it had not been said. I prefer his evidence on this matter to that of Mr Gorman.

[33] That leads to a wider consideration of Mr Gorman's evidence. There are two major obstacles to my accepting his evidence as credible and reliable. The first is why, if his account of what was said at the meeting is correct, did he send an email to Ms Rayner on the day of the meeting stating in terms that he had agreed to sign up to purchase all glass until the end of 2020? The second is that if he had telephoned Ms Rayner immediately after sending the email to say that he had not after all agreed what was in the email, that would have been something so unusual that she would surely have remembered it. For that matter, one might have expected to see it in his witness statement rather than having it teased out of him in cross-examination. Equally tellingly, Ms Rayner's emails of 14 December 2015 are entirely at odds with her having been told that there was no agreement. I therefore repel as unreliable and incredible Mr Gorman's evidence that he made such a telephone call, and that he did not tell Mr Gray that he agreed to the exclusivity deal proposed.

[34] There are further cogent reasons for not accepting Mr Gorman's evidence insofar as it is inconsistent with Mr Gray's. First and foremost, his own account of what he did – say one thing to Mr Gray, while privately thinking another – is effectively an admission of dishonesty. Second, I have already referred to the inconsistency in his position as to why he did not attach the price list to his email to Ms Rayner, for which he gave differing reasons, which he was unable to explain. There were other inconsistencies in his evidence, for example his statement that he was happy to indicate that a contract could be prepared along the lines of what was in the emails was patently never his true position. Finally, he appeared uncomfortable when put on the spot during his evidence and did not give his evidence in a convincing manner.

[35] Mr Gray, on the other hand, while he was not slow to use any opportunity he could to denigrate Mr Gorman, and was often more anxious to make his point than to answer the question put to him, sometimes in a bombastic manner, nonetheless gave a clear and consistent account of what happened at the meeting, which in many material respects was supported either by the contemporaneous documentation or indeed by aspects of Mr Gorman's evidence where the two were not inconsistent. One example of this I have already mentioned, namely, where Mr Gorman accepted that he had said at the meeting that he did not expect to continue to receive "mates' rates". While it is entirely possible that Mr Gray did enter the meeting with the emails which were subsequently sent, partly prepared – as already pointed out, they could not on any view have been completely prepared in advance of agreement being reached – I do not find that to be a reason to reject his evidence. It would be entirely understandable if he had gone into the meeting with a firm idea of what he wanted to achieve. Nor do I accept Mr Gorman's evidence that he was intimidated by Mr Gray, at least to the extent that his free will was overcome (for which the defender has no pleadings in any event). Mr Gray is undoubtedly a stronger and more forceful personality than Mr Gorman but that is far from amounting to intimidation.

[36] For completeness, there are aspects of Mr Gray's evidence which I do not accept: for example his assertion that it was Mr Gorman who brought up exclusivity is unlikely to be correct, when Mr Gray had exclusivity in mind as one of the things to discuss when he entered the meeting. However I find the substance of his evidence on the material issues to be credible and reliable.

[37] Counsel for the defender submitted that I should find Mr Gray's evidence incredible because in his witness statement he sought, through his use of italics and quotation marks, to give evidence about the precise words used by himself and Mr Gorman at various

junctures of their meeting on 8 December 2015, on the basis that it took place nearly 7 years ago. I do not find that so inherently improbable as to be incredible. Mr Gray's account of how the discussion proceeded hangs together. In context, his description of what each said to the other is entirely plausible, such as Mr Gray asking for £100,000 and Mr Gorman replying "no, I can't afford that, I don't have it" particularly as Mr Gorman's position in evidence was that he could not in fact afford to pay £100,000. I do not accept the defender's suggestion that Mr Gray was indulging in "post-factual rationalisation". The verbatim remarks attributed to himself and Mr Gorman at the meeting may not be accurate to the last word. Nonetheless, I do find the substance of Mr Gray's evidence about what was said at the meeting to be correct.

[38] In his rebuttal statement, Mr Gorman subjected Mr Gray's account of the words used by each of them to a detailed analysis, commenting that in some instances, the words suggested might have been used; in other instances, that he couldn't remember; and in still others, that he definitely would not have used the words suggested. Counsel for the defender submitted under reference to *Browne* v *Dunn* (1893) 6R 67 and *Chen* v *Ng* [2017] UKPC 27 at [48] to [61] that, because Mr Gorman had not been asked in cross-examination whether he said the things attributed to him by Mr Gray, Mr Gorman's account of the meeting must therefore be preferred. I consider that to be wrong, in two respects. First, *Browne* v *Dunn* did not lay down an absolute rule that a witness must be cross-examined on every point with which the cross-examiner wishes to take issue. As Lord Herschell made clear at 71, it is simply a matter of dealing fairly with witnesses. He went on to say at the end of the passage in question:

> "… it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation *by reason of there having been no*

> *suggestion whatever in the course of the case* that his story is not accepted (emphasis added)".

So, if there is a rule, it is simply that a witness whose credibility is to be challenged must be given a fair opportunity to provide an explanation, which may require cross-examination if there has been no prior suggestion to the witness that his credibility is in issue. The present case is a commercial action in which witness statements were not only exchanged, but Mr Gorman has in fact commented at length on Mr Gray's account of the meeting. It was abundantly clear to Mr Gorman, who is to all intents and purposes a party to the action, that his account of the meeting, and therefore his credibility and reliability, was to be challenged by the pursuer. Fairness did not require anything further by way of cross-examination. The facts are very different from those in *Browne* v *Dunn*, where the witnesses were not parties, and were not given any opportunity to comment on a suggestion that a document to which they spoke was a sham, which had not previously been suggested. Second, even if the rule was as contended for by counsel for the defender, fairness in the present case would simply require that I discounted Mr Gray's evidence on the facts which were not put, rather than that I must accept Mr Gorman's. For the reasons which I have already given, I do not find Mr Gorman to be a credible and reliable witness, and his evidence could not get in by the back door, so to speak, simply because certain questions were not put in cross-examination.

[39] However, to a large extent this discussion is beside the point, given the battle lines which were engaged prior to the commencement of the proof, and the large measure of agreement about what took place at the meeting, to which I have already referred. On any view, whatever precise words were used, the parties did arrive at a price for the shares; and did discuss an exclusivity deal whereby Inverclyde would purchase glass from Supaseal for

a period of five years, at the prices recorded in the annotated price list; that they did so is confirmed by the contemporaneous emails which both men sent to Lynn Rayner.

Decision

[40] Having already recorded the undisputed evidence above, and given my reasons for preferring Mr Gray's evidence to that of Mr Gorman, I will now deal with the various discrete issues which emerged during the course of the proof.

One agreement, or more than one agreement?

[41] Counsel for the defender made much of the fact that the pursuer had averred that *an* (ie a single) agreement had been reached for the sale of Mr Gray's shares to Mr Gorman and that the defender would purchase all of its glass from the pursuer until 31 December 2020. He submitted that (as Mr Gray had accepted in his evidence) this was a single package, and that either the whole agreement was immediately enforceable, or none of it was. That is indeed what is pled, but Mr Gorman accepted that he and Mr Gray were the respective controlling minds of Inverclyde and Supaseal, and that when they were discussing the glass they were doing so on behalf of those companies. On no view could there have been only one agreement, given that Mr Gray and Mr Gorman were negotiating as individuals in relation to the shares, and on behalf of their companies in relation to the glass (and that is so whether concluded agreements were reached, or merely agreements in principle). It must follow that there were two agreements: one between Mr Gray and Mr Gorman as individuals, for the sale of Mr Gray's shares at a price of £57,000 (and that they would each grant a discharge of all claims against the other); and the other between Inverclyde and Supaseal, that Inverclyde would "sign up" (using the term in the emails for the moment) to

purchase all of its glass from Supaseal for 5 years on the prices agreed. On the basis of Mr Gray's evidence, I am however willing to proceed on the basis that the agreements were interlinked, so that either both were immediately enforceable, or neither was.

Prior to the meeting of 8 December 2015, was it the parties' intention that any agreement(s) reached would be reduced to writing?

[42] There is no objective evidence supporting Mr Gorman's statement that both he and Mr Gray were aware that he was being advised by Lynn Rayner and that she would be asked to prepare the legal document they needed. The contemporaneous evidence points the other way. First, Ms Rayner was at that time acting only for Inverclyde, not for Mr Gray or Mr Gorman, which suggests that neither of them thought they needed a solicitor, let alone that Ms Rayner would be acting for Mr Gorman. Second, if Mr Gorman did not know that an exclusivity deal was to be discussed, he could not have been aware that any agreement reached in that regard would need to be committed to writing. Third, he accepted that he said nothing to Mr Gray to the effect that a written agreement would be required.

Did the parties agree at the meeting of 8 December 2015 that their agreements must be reduced to writing?

[43] Neither party said at the meeting that there would require to be written agreements before they would be bound. Mr Gorman may have thought that the oral agreement he had reached would not be binding unless and until a written agreement was entered into and that he never intended to enter such an agreement, but he did not communicate that belief to Mr Gray. His belief is irrelevant in ascertaining what was agreed. Insofar as the share purchase and the exclusivity agreement were concerned, there was simply no mention of a

written agreement at all. The clearest indication that Mr Gray and Mr Gorman regarded themselves as immediately bound by the agreements reached is that Mr Gorman began making payments before the share purchase agreement had been signed. For what it is worth, Ms Rayner, in her email of 14 December 2015, clearly did not anticipate that a written agreement would be required in relation to either the shares, or the exclusivity agreement. As regards the shares, she said only that she would arrange for the appropriate Stock Transfer Form to be prepared and an appropriate Minute signed by Inverclyde. By asking for a copy of any agreement about the glass, she signified that she did not think either that a written agreement was necessary or that the agreement reached was in principle only; and neither Mr Gray nor Mr Gorman challenged her on that. Nor had Ms Rayner been instructed, by that stage, to prepare a share purchase agreement. There was no reason why she should have been, in her capacity as solicitor for Inverclyde, and not as the solicitor for Mr Gorman.

[44] There are three principal factors which the defender relies on as showing that the parties did not regard themselves as immediately bound. The first is the reference in the emails to the defender "sign[ing] up" to buy all glass from the pursuer. However, in the context of emails written by businessmen, the term simply indicated that the parties had reached an agreement, rather than that they literally had to sign a written agreement before they considered themselves to be bound: in everyday language, "signing up" to something signifies a willingness to be bound without any necessary connotation that a written agreement will be required. The second factor is that Ms Rayner did prepare a Share Purchase Agreement, which underwent some revisals (at her instance) before it was signed; and Mr Gray was prepared to accept in evidence that he could have walked away at any time before it was signed. There are a number of answers to that. It remains unclear on

what basis, or on whose instructions, Ms Rayner prepared the Share Purchase Agreement, when she had previously stated that only a Stock Transfer Form would be required and that she was acting only for Inverclyde. Further, whether or not Mr Gray would have been entitled to walk away was (as senior counsel for the pursuer submitted) a question of law, not one of fact. His evidence about that is strictly inadmissible. As a matter of fact he was prepared to, and did, agree to the revisals to the Share Purchase Agreement and he did execute it but it by no means follows that there was no binding agreement until he did so. The third factor is that the parties also referred in their respective emails of 8 December 2015 to signing a document relinquishing claims against each other. The defender argues that this showed that all agreements were to be reduced to writing; since no discharge was ever drawn up and signed, there was no binding discharge and the same reasoning applied to the exclusivity agreement. The first difficulty with this argument is that any agreement about a discharge of claims must have been between the men as individuals (there was no suggestion that there were potential claims between Supaseal and Inverclyde, which were to continue to have a trading relationship) and the absence of a written discharge did not prove to be an obstacle to concluding an agreement in relation to the shares. Anyway, it is an open question as to whether, if either man now attempted to sue the other, a defence would be available based upon the agreement to discharge claims. Further, the reference to signing (as opposed to signing up to) a discharge rather leads to an inference that no other agreement did require to be signed.

[45] The defender also founds upon Mr Gray's email to Ms Rayner of 15 December 2015 as showing that he did not consider that a binding agreement had been reached. If anything I read that the other way – the question "Is this not sufficient" implies that the questioner

thinks that it is sufficient – and in any event, whether it was sufficient or not was a question of law.

[46] For these reasons, the factors in paragraph [44] outweigh those relied on by the defender. What was in Mr Gorman's mind (or for that matter, Mr Gray's) was irrelevant. On the basis of what Mr Gray and Mr Gorman said and did, I find on the balance of probabilities that the parties did reach a binding exclusivity agreement on 8 December 2015, just as they reached a binding agreement for the sale of Mr Gray's shares, and that they did not intend that either agreement would require to be formalised in a written agreement before it became enforceable. That intention is unaffected by the fact that a Share Purchase Agreement was subsequently entered into: it did not have to be.

[47] That is sufficient to dispose of the defender's argument, founded as it was on *Gordon's Executors*, above. I accept the proposition advanced by the defender that the court will not make the parties' bargain for them in circumstances where the agreement to do something depends on negotiations yet to take place, or where there is otherwise no consensus on one or more essential of the contract: *East Anglia Electronics Ltd* v *OIS plc* 1996 SLT 808 at 812 E-F; *Scottish Coal Company Ltd* v *Danish Forestry Company* 2010 SC 729 at [17]. However, on the evidence, the agreement in this case cannot be described in those terms. It may be that (as happened with the sale of the shares) further negotiations might have resulted in the exclusivity agreement already reached being innovated upon before being reduced to writing, but that is a different issue. If, for example, Mr Gorman had second thoughts about the wisdom of having agreed that Inverclyde would purchase "all" its glass from Supaseal, (if it truly is the case that certain glass products were purchased from different suppliers) and if Supaseal does not sell the products in question, then any written agreement may well have reflected that by qualifying what was meant by "all" glass. But

that is nothing to the point, and brings us back to the law, which is that whether a contract has been concluded or not, and if so, on what terms, must be assessed objectively having regard to what was said and done, rather than what either party thought privately. The nub of the matter is that since I have found that Mr Gorman did say that Inverclyde would purchase all glass from Supaseal for 5 years, at the prices agreed, and since the parties did not negotiate with a view to embodying the result of their negotiations in a further written agreement or agreements, there is no presumption that until such further agreements were executed, no enforceable agreement had been achieved.

What were the terms of the contract or was it void for uncertainty

[48] The two parts of the question to be answered are essentially counterparts of each other. If the court is able to conclude what the terms of the contract were, and if they include the essentials of the contract, the contract is unlikely to be void for uncertainty.

[49] The test as to whether a contract is sufficiently certain to be enforced is generally said to be whether or not decree for specific implement could safely be pronounced: *Macarthur* v *Lawson* 1877 4R 1134; Gloag on Contract, (3rd Edition), page 11. In the latter passage, the author stated that "It is a question of degree whether a particular obligation, taking the words used and the legal implications, is too vague for enforcement".

[50] The submission for the defender is that the parties merely reached a general measure of agreement on the heads of terms of a proposed contract which they both intended to be sent to a lawyer for the purpose of initiating the process of preparing a binding and enforceable agreement by way of a written deed. I have already held that the evidence showed no such thing. The terms of the oral agreement reached between the parties was that Inverclyde would purchase all of its glass from Supaseal for a period of 5 years, at the

prices agreed between Mr Gray and Mr Gorman. Those comprise the essentials to the agreement. Who were the parties? Supaseal and Inverclyde. What was to be purchased by Inverclyde? All its glass. From whom? Supaseal. For how long? Until December 2020. For how much? At the prices shown on the price list, subject to the changes which were initialled. In the words of Viscount Dunedin in *May & Butcher,* quoted above, everything had been settled that it was necessary to settle and nothing remained to be settled. I accept the pursuer's submission that the agreement was sufficiently specific that its terms could be enforced by decree of specific implement. This is not a case where the court is required to make the parties' agreement for it, nor did the parties merely reach an agreement to agree. The defender founds on arguments (a) that the emails should be construed as if they are a contractual document and (b) that the use of the words "sign up" signified that further contractual elements fell to be agreed. Neither of those is sound. The parties concluded an oral agreement before the emails were sent, and the emails should not be construed as if they constitute a contractual document. I have already rejected the argument that "sign up" meant that the parties literally had to sign a written agreement. Doubtless, if Ms Rayner or another solicitor had drawn up an agreement it would have had "bells and whistles" attached, but that does not affect the basic proposition that all of the essentials had already been agreed in sufficiently precise terms.

Disposal

[51] For all of these reasons, the pursuer has proved that a choate, binding and enforceable contract was concluded between the parties, and has proved what the terms of that contract were. I will repel the defender's first to fourth pleas in law, and put the case out by order to discuss further procedure.