Supreme Court of Victoria - Court of Appeal

AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd & Anor [2006] VSCA 173 (31 August 2006)

Last Updated: 1 September 2006

SUPREME COURT OF VICTORIA

COURT OF APPEAL

No. 2056 of 2003

AGL VICTORIA PTY LTD	Appellant
v.	
SPI NETWORKS (GAS) PTY LTD (formerly TXU Networks (Gas) Pty Ltd)	First Respondent
and	
VICTORIAN ENERGY NETWORKS CORPORATION	Second Respondent

JUDGES:	MAXWELL, P., NETTLE, J.A. and BONGIORNO, A.J.A.
WHERE HELD:	MELBOURNE
DATE OF HEARING:	21 June 2006
DATE OF JUDGMENT:	31 August 2006
MEDIUM NEUTRAL CITATION:	[2006] VSCA 173

CONTRACT – Construction and interpretation – Expert determination – Mistake – Gas distribution tariff agreement – Expert determination of unaccounted for gas reconciliation amount – Mistake of fact as to volume of gas withdrawn from transmission system for distribution – Whether determination reviewable for mistake of fact.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr S.J. Gageler, S.C. and Ms R.C.A. Higgins	Gilbert & Tobin/ Brand Partners

For the First Respondent	Mr D.G. Collins, S.C. and Ms G.H. Thomas	Johnson Winter & Slattery
For the Second Respondent	Mr J.B. Davies	Phillips Fox

MAXWELL, P.:

1 I have had the considerable advantage of reading in draft the reasons for judgment of Nettle, J.A. For the reasons which his Honour gives, I too would allow the appeal.

NETTLE, J.A.:

2 This is an appeal from a judgment given in the Commercial and Equity Division on 2 July 2004. It concerns the finality of calculations made by the second respondent ("VENCorp") of the Reconciliation Amounts for Unaccounted for Gas ("UAFG") for the TXU distribution system for the 1999 and 2000 calendar years. The judge held that VENCorp's calculations were valid and binding even though they were based on erroneous data and, therefore, that they could not be reopened and revised in order to correct the error. The appellant contends that the judge was wrong in law so to hold.

The regulatory framework

3 The sale and distribution of natural gas in Victoria is governed by a complex regulatory framework which includes Market and System Operation Rules ("MSO Rules"), the *Gas Distribution System Code*, and contractual access arrangements.

4 The MSO Rules were promulgated on 21 November 1997 under s.48N of the *Gas Industry Act* 1994 and continue in force under s.41 of the *Gas Industry Act* 2001. Their stated purpose is to regulate the operation of the market for gas in Victoria, the activities of market participants in the market for gas and the operation of the gas transmission system, so as to provide for a competitive, reliable and efficient market for gas. They provide among other things for the registration of gas Producers, gas Distributors and gas Retailers and govern the rights and obligations of Producers, Distributors and Retailers in relation to the market and *inter se*.

5 VENCorp is a body corporate established under Division 2A of the *Gas Industry Act* 1994. Its function is to control the operation of the gas transmission system in accordance with the MSO Rules, through the collection of information about the system, the operation and administration of the market, the facilitation of trading arrangements and the provision of information and service, to facilitate decisions for economically efficient investment and use of resources in the gas industry.

6 In the way in which the system operates, Gas Producers (and some others) inject gas into the transmission system at system injection points; gas Distributors, like the first respondent ("SPI"), withdraw gas from the transmission system at points of interconnection with their distribution systems, and distribute it through their distribution systems to gas Retailers, like the appellant ("AGL"); and the gas Retailers withdraw gas from withdrawal points in the parts of the distribution systems of which they are the host retailer and sell it to their customers.

7 The MSO Rules provide for the measurement of and payment for gas at each of the various stages of transmission from producer to sale by retailer to final customer. Each system injection point and each system withdrawal point is required to be fitted with a metering installation capable of recording the volume and quantity of gas, expressed in joules, passing that point in each interval of 24 hours and of transmitting that metering data to VENCorp.

8 VENCorp is responsible for the validation of the metering data and, in the event of inaccuracy or loss of metering data, for its replacement with substitute data.

9 VENCorp is also required to administer a system of market settlements by determining the "Trade Imbalance" for each Participant (constituted of the difference between aggregate injections at gas injection points and aggregate withdrawals of gas at gas withdrawal points for that Participant), and by application of the market price to the Trade Imbalance in order to determine the "Settlement Amount" payable by or to the Participant.

10 Rule 3.6.15 of the MSO Rules provides that:

> "(a) No later than 18 *business days* after the end of each *billing period*, *VENCorp* must give to each *Market Participant* a *final statement* stating the amounts payable by the *Participant* to *VENCorp* or payable by *VENCorp* to the *Market Participant* ... in respect of the relevant *billing period*."

11 Rule 3.6.18 of the MSO Rules contain detailed provisions for Participants to dispute such calculations and, in the event of a failure to agree, for the dispute to be resolved by dispute resolution procedures outlined in Rule 7.2.
12 Rule 3.6.19 provides for the correction of errors in Final Statements, as follow:

> "(b) if *VENCorp* becomes aware of an error in an amount stated in a *final statement* issued under clause 3.6.15 and in *VENCorp's* reasonable opinion a *Participant* would be materially affected if a revision to the *final statement* was not made to correct the error, then *VENCorp* must issue *revised statements* for the relevant *billing period* in accordance with clause 3.6.19(a)."

13 The *Gas Distribution System Code* was established under s.48U of the *Gas Industry Act* 1994 and continues in force under the *Gas Industry Act* 2001. The stated purpose of the *Gas Distribution System Code* is to set out:

> "(a) the minimum standards for the operation and use of the *distribution system* including requirements for:
>
> (1) installation and maintenance of *connections* and *metering installations;*
> (2) disconnections and reconnections;
> (3) the provision of *metering data*; and
>
> (b) the minimum terms and conditions, other than tariffs prescribed under the *Tariff Order,* on which the *Distributor* will provide the *distribution services* as part of its *Access Arrangement*."

14 The nature of gas reticulation is such that it is impossible to avoid the loss of some gas from the distribution system and hence the possibility of there being some gas which cannot be accounted for. But in order to promote efficiency in the operation of Gas Distribution systems, Access Arrangements are required to set a "benchmark quantity" of UAFG and provide that Distributors shall supply gas to Retailers on terms that, where the UAFG is below the benchmark quantity, the Retailer must pay an amount to the Distributor equal to the cost of the shortfall and, where the UAFG exceeds the benchmark quantity, the Distributor must pay an amount to the Retailer equal to the cost of the excess.
15 In this case those requirements were given effect by a Distribution Tariff Agreement ("DTA") made 14 August 1998 between Westar Pty Ltd (now the respondent SPI) and Ikon Energy Pty Ltd (to the rights of which the appellant (AGL) has since succeeded).
16 The DTA provides among other things for the calculation each year of the amount by which UAFG exceeds or falls short of the benchmark quantity ("the Reconciliation Amount") and for VENCorp to make that calculation in accordance with a formula which is set out in Schedule 8 to the DTA.
17 Clause 8.4 of the DTA provides that:

> "(a) The parties agree that the Reconciliation Amount for Unaccounted for Gas for Class B Supply Points in the Distribution System will be calculated by VENCorp under the VENCorp Connection Deed in accordance with Schedule 8.
> (b) The party Liable to pay the Reconciliation Amount for Unaccounted for Gas for Class B Supply Points (as determined by VENCorp in accordance with Schedule 8) must pay the Reconciliation Amount within 30 days of the parties receiving written notification of the Reconciliation Amount from VENCorp.
> (c) Distributor is not liable to Shipper [Retailer] for Unaccounted for Gas other than as provided for in this clause 8.4."

18 Clause 8.5 provides that:

"(a) Distributor must give VENCorp written notice by 31 March in each year of the volume of Gas withdrawn by Distributor for Shipper at all Class A Supply Points and Class B Supply Points for the previous calendar year provided that in respect of the period 1 July 1998 to 31 December 1998:

(1) the volumes notified by Distributor on 31 March 1999 will be only for that period; and
(2) no Reconciliation Amount will be payable in respect of that period.

(b) The calculation by VENCorp of the Reconciliation Amount shall be final and binding on Distributor and Shipper."

19 In contradistinction, however, to Rules 3.16.8 and 3.16.9 of the MSO Rules (which allow for the Participants to dispute Final Statements of Trade Imbalance and for the correction of errors), neither the DTA nor the Connection Deed provides expressly for Participants to dispute the calculation of Reconciliation Amounts or for the correction of errors discovered in those calculations.
20 VENCorp is not a party to the DTA and so is not bound directly to carry out the calculations of Reconciliation Amount. But there is a "Connection Deed" between VENCorp and Westar which in effect binds VENCorp to the task.
21 Clause 16 of the Connection Deed provides that:

"(a) Westar must give VENCorp written notice by 31 March in each year of the volume of gas withdrawn by Westar for each Retailer at all Class A Supply Points and Class B Supply Points for the previous calendar year.
(b) VENCorp must calculate the Reconciliation Amount in accordance with Schedule 5[1] within 14 days after it has received from Westar the information specified in clause 16.1(a).
(c) VENCorp must provide written notice to Westar and the Retailer of the Reconciliation Amount."

The facts
22 Schedule 8 to the DTA and Schedule 5 to the Connection Deed provide for the calculation of the Reconciliation Amount according to the formula:

"The Reconciliation Amount = (X+Y) x (B-A)
Where:
X = the quantity weighted annual price of Gas, using spot and contract prices and quantities, as determined by VENCorp for the previous calendar year expressed in $ per gigajoule, calculated under the VENCorp connection Agreement.
Y = the average transmission tariff for the previous calendar year expressed in $ per gigajoule determined under Part A 3.4 of Schedule 5 of the Tariff Order.
A = D - (E/(1-G))
Where D = the quantity of Gas withdrawn from the Transmission System by Distributor for Shipper under this Agreement at the Connection Points for the previous calendar year; and
E = the quantity of Gas withdrawn by Distributor for Shipper under this Agreement at all Class A Supply Points for the previous calendar year.
B = H/(1-F)
H = the quantity of Gas withdrawn by Distributor for Shipper under this Agreement at all Class B Supply Points for the previous calendar year.
F = the benchmark flow rate for Gas for Class B Supply Points being 2.6% until 31 December 2002 and thereafter to be reviewed and determined by the ORG.
G = the benchmark flow rate of Gas for Class A Supply Points, being 0.1% until 31 December 2002 and thereafter to be reviewed and determined by the ORG."

23 In or around June 2000 GasNet provided VENCorp with access to data which purported to represent the quantity of natural gas withdrawn from the Victorian Transmission System for distribution by Ikon 2 and injected into the TXU Distribution Area for the 1999 calendar year.

24 From that and other information VENCorp determined, pursuant to the MSO Rules and the Connection Deed, the quantity of natural gas injected from the Victorian Transmission System into the TXU Distribution Area for withdrawal from the TXU Distribution Area for supply to Ikon 2 retail customers (but excluding gas injected into the TXU Distribution Area to be withdrawn for retail customers other than customers of Ikon 2) at Class A and Class B Supply Points for the 1999 calendar year. The numerical value of that quantity was 32, 757, 793 gigajoules of natural gas.

25 VENCorp used that figure as the value represented by Factor D in its calculation of the Reconciliation Amount for calendar year 1999, and by letter dated 26 June 2000 VENCorp notified Ikon 2 of the calculation of the 1999 Reconciliation Amount so calculated.

26 Between 26 June 2000 and 6 November 2000 various errors were identified in the processes leading up to the calculation of the 1999 Reconciliation Amount and, after an exchange of correspondence on the subject, on or about 6 November 2000 Ikon 2, AGL,[2] TXU and TXU Retailing executed a market deed to resolve errors which had been so identified.

27 In or around December 2000, GasNet made available to VENCorp revised data which purported to represent the quantity of natural gas withdrawn from the Victorian Transmission System for distribution by Ikon 2 and injected into the TXU Distribution Area. From that and other information VENCorp redetermined the quantity of natural gas injected from the Victorian Transmission System into the TXU Distribution Area for withdrawal from the TXU Distribution Area for supply to Ikon 2 retail customers (but excluding gas injected into the TXU Distribution Area to be withdrawn for retail customers other than customers of Ikon 2) at Class A and Class B Supply Points for the 1999 calendar year (the Revised 1999 Injection Data).

28 On or about 15 December 2000, VENCorp issued two statements, one for the period 1 January 1999 to 30 June 1999 and another for the period 1 July to 31 December 1999, which together purported to constitute a revised 1999 Reconciliation Amount.

29 The values ascribed to the factors specified in Schedule 8 to the DTA (and thus in Schedule 5 to the Connection Deed) for the period 1 January 1999 – 30 June 1999 were as follows:

Variable	Item	Value
X	Average volume weighted spot price	$2.3044546/gigajoule
Y	Average transmission tariff	$0.2980642/gigajoule
H	Class B for retailer	10,293,086.0 gigajoules
E	Class A for retailer	6,936,738.0 gigajoules
D	CTM injections into distribution business for retail business	16,408,424.8 gigajoules
F	Class B benchmark rate	2.6%
G	Class A benchmark rate	0.1%.

30 The values ascribed to the factors specified in Schedule 8 to the DTA (and thus in Schedule 5 to the Connection Deed) for the period 1 July 1999 – 31 December 1999 were:

Variable	Item	Value
X	Average volume weighted spot price	$2.3044546/gigajoule
Y	Average transmission tariff	$0.2980642/gigajoule
H	Class B for retailer	10,293,086.0 gigajoules
E	Class A for retailer	6,808,511.0 gigajoules
D	CTM injections into distribution business for retail business	17, 271,851.7 gigajoules
F	Class B benchmark rate	2.8%
G	Class A benchmark rate	0.3%.

31 The revised Reconciliation Amounts were:

January - June 1999: $2,870,856.73

July - December 1999: $ 381,895.97

$3,252,752.70

32 In or around November 2001, GasNet made available to VENCorp data which purported to represent the volume of natural gas withdrawn from the Victorian Transmission System for distribution by Ikon 2 and injected into the TXU Distribution Area for the 2000 calendar year. From that and other information VENCorp determined the quantity of natural gas injected from the Victorian Transmission System into the TXU Distribution Area for withdrawal from the TXU Distribution Area for supply to Ikon 2 retail customers (but excluding gas injected into the TXU Distribution Area to be withdrawn for retail customers other than customers of Ikon 2) at Class A and Class B Supply Points for the 2000 calendar year (the 2000 Injection Data).

33 On or about 27 November 2001, VENCorp issued a statement which purported to be the 2000 Reconciliation Amount for the period 1 January 2000 – 31 December 2000. VENCorp provided that statement to AGL[3] by letter dated 27 November 2001.

34 The values ascribed to the factors specified in Schedule 8 to the DTA (and thus in Schedule 5 to the Connection Deed) for the period 1 July 1999 – 31 December 1999 were:

Variable Item Value

X Average volume weighted spot price $2.4150010/gigajoule

Y Average transmission tariff $0.3111460/gigajoule

H Class B for retailer 21,120,311.6 gigajoules

E Class A for retailer 7,074,819.7 gigajoules

D CTM injections into distribution business

for retail business 27,731,895.4 gigajoules

F Class B benchmark rate 2.8%

G Class A benchmark rate 0.3%

35 The 2000 Reconciliation Amount was stated to be $2,979,482,91.

36 In May 2002 it was discovered that gas was flowing through an unmetered valve on a pipe connecting the transmission system and the portion of the TXU distribution area for which AGL was the host retailer. The unmetered valve was immediately closed.

37 Subsequent investigations showed that gas had been flowing through the unmetered valve since at least March 1999 and hence that a much greater quantity of gas than previously thought had flowed into the TXU distribution system. As best could be estimated, the unmetered flow totalled about 4 petajoules over the two calendar years 1999 and 2000, which is about 6.5 percent of the total gas previously thought to have flowed into the distribution system. This meant that the amount of UAFG for those two years was very significantly greater than had been stated in the VENCorp calculations of Reconciliation Amounts for those years.

38 By letter dated 7 March 2003, AGL requested VENCorp to perform a re-calculation of the Reconciliation Amounts, taking into account the discovery of the unmetered in-flows, and to issue a fresh statement of the Reconciliation Amounts for the 1999 and 2000 years.

39 TXU objected that VENCorp's calculation of the 1999 and 2000 Reconciliation Amounts were final and binding according to clause 8.5(b) of the DTA and therefore that a recalculation was neither appropriate nor legally possible.

40 VENCorp accepted the position that it did not have authority to recalculate the 1999 and 2000 Reconciliation Amounts, but nonetheless performed a recalculation for the information of the parties.

41 By letter dated 3 April 2003 to AGL, VENCorp stated that if materially accurate figures were substituted for those which had previously been used for Factor D, the difference in result for the 1999 year was $5,734,734.07: which is to say that, whereas the shipper had been required to pay the distributor $3,252,752.70, if materially accurate figures had been used the Distributor would have been required to pay the Shipper $2,418,981.36; and the difference for the 2000 year was $4,967,491.88; which is to say that, whereas previously the Shipper had been required to pay $2,979,482.91 to the Distributor, if materially accurate figures had been used, the Distributor would have been required to pay the Shipper $1,988,008.97.

The judge's reasons

42 The question for the judge was whether upon its proper construction the DTA prohibited review of VENCorp's 1999 and 2000 determinations on the ground of mistake.
43 After referring to the several tests identified in the authorities for determining the extent to which a court may review expert valuations and determinations, his Honour adopted the test propounded by McHugh, J.A. in *Legal & General Life of Aust Ltd v A Hudson Pty Ltd*: [4] that where parties to a contract have agreed that an expert determination shall be final and binding, it is ordinarily not open to a court to review the determination on the grounds of mistake unless the mistake is such as to show that the determination has not been carried out in accordance with the contract or, to put it another way, that the expert has not performed the task entrusted to the expert by the contract.[5]
44 As is apparent, that test is more in the nature of a statement of conclusion than one which identifies relevant criteria of distinction. But the trial judge also noted with approval, and therefore appears to have adopted as providing relevant criteria of distinction, a submission made by AGL (and accepted on behalf of TXU) that, although a final and binding determination is not ordinarily reviewable for error in the exercise of a judgment, opinion or discretion entrusted to the expert,[6] a final and binding determination which involves a mere mechanical or arithmetical exercise may be reviewable for gross mathematical error or mistake. As his Honour put it:

> "On behalf of TXU, it was accepted that a final and binding clause would not save a determination which was not performed in accordance with the contractual mandate. Where, however, the determination was arrived at in accordance with the contract, the parties would be bound notwithstanding error in a matter of judgment entrusted to the valuer. Where, however, in arriving at such a determination, there was error in a merely mechanical or arithmetic process, then, it could be impugned unless the parties had agreed that it was final and binding."

45 Reasoning from that point the judge concluded that the determination of the Reconciliation Amount was more than a mere mechanical exercise, because it involved the carrying out of adjustments and conversion into units of energy in order to determine appropriate values for each of the factors, including Factor D, and hence that, inasmuch as the parties had agreed to abide VENCorp's determination of those values, the calculation of the Reconciliation Amount could not be challenged for error.
46 As his Honour put it:

> "...The matter falls to be determined by an examination of the task to be performed by VENCorp in arriving at the determination which the parties agreed to accept. This task was to calculate the Reconciliation Amount in accordance with Schedule 8 of the Distribution Tariff Agreement.
> There are a number of factors which, like factor D, must be used in calculating this Reconciliation Amount. Factor X, which is the quantity weighted annual price of gas, is to be determined by VENCorp using spot and contract prices and quantities. In Schedule 8 there is a requirement that this be calculated under the VENCorp Connection Agreement. It would seem that the determination of the value of this factor is more than a mere mechanical task. In any event, its determination is part of the task of VENCorp in producing the Reconciliation Amount. The same may be said for factor Y, which is to be determined under Part A 3.4 of Schedule 5 of the Tariff Order. This calculation under the Tariff Order appears to be a complicated one.
> The determination of the quantities of gas to be inserted as factors A, B, D, E and H require VENCorp to carry out adjustments and conversion into units of energy. It follows, for example, that the figures for factors E and H involve VENCorp in doing more than merely taking up the figures provided to it by TXU under cl.16(a) of the Connection Deed, which may, in turn, have been provided to TXU by AGL pursuant to cl.10.1 of the Distribution Tariff Agreement. I have already referred to the steps which are to be undertaken by

> VENCorp in arriving at the values for these factors. The same may be said of the value for factor D.
> I conclude from all of this that part of the task of VENCorp under cl.16 of the Connection Deed and in arriving at a Reconciliation Amount in accordance with Schedule 8 of the Distribution Tariff Agreement, is the determination of the appropriate values for each of these factors, including factor D. The parties have in cl.8.5 agreed to abide its determination of these values in the same way as they have agreed to abide its performance of the relatively simple calculation which the formula in those schedules requires to be undertaken upon those values.
> ...
> It follows that the calculation by VENCorp of the Reconciliation Amount cannot be challenged by AGL or TXU or their predecessors for error of the kind presently disclosed."

47 The judge stated that he found support for that conclusion in the fact that the actual amount of unmetered gas may never be known and may be incapable of precise determination. He considered that, unless the parties were to be taken as having accepted that VENCorp's determination of the amount of unmetered gas was determinative, VENCorp could never issue an effective statement of Reconciliation Amount.
48 His Honour added that his conclusion also derived support from the contrast between the express provisions of the MSO Rules for the amendment of Settlement Amounts in the case of error, and the absence from the DTA of provision for the revision of a statement of Reconciliation Amount in the case of error, and from what his Honour perceived to be the absence from the DTA of any provision for resolution of a dispute concerning the calculation of a Reconciliation Amount.

The appellant's argument

49 AGL accepts that the *Legal & General* test was the correct test but argues that his Honour erred in its application. AGL says that, as the test applies to the facts of this case, it is whether a calculation of Reconciliation Amount based upon an erroneous measurement of Factor D answers the contractual description of the Reconciliation Amount to be calculated and notified by VENCorp in accordance with the DTA and Connection Deed. In AGL's submission, the characteristics essential to answer that contractual description are not met in circumstances where VENCorp uses a figure for Factor D which does not reflect the actual volume of gas withdrawn by the Distributor for the Retailer under the DTA for the previous year. AGL contends that, since the figure for Factor D does not correspond to the contractual description of Factor D in either Schedule 8 to the DTA or Schedule 5 to the Connection Deed, it must follow that a calculation of Reconciliation Amount based on that figure does not accord with Schedule 8 to the DTA or Schedule 5 to the Connection Deed, and it is therefore not calculated by VENCorp "under" the Connection Deed.

The respondent's argument

50 SPI contends that the judge was correct both in principle and in the application of principle. It submits that the question of whether the erroneous calculation of Reconciliation Amount answers the contractual description of the "Reconciliation amount" fell to be determined according to whether the task of calculating the Reconciliation Amount was one which was entrusted to VENCorp. It says that it was and therefore that the determination was not reviewable for error, even error in fact or of mere mechanical calculation. According to SPI, AGL's argument amounts to saying that the determination of Factor D in the formula in Schedule 8 to the DTA and Schedule 5 to the Connection Deed was not part of the task entrusted by contract to VENCorp; and, as SPI would have it, such a proposition is plainly untenable, given that by clause 8.5 "the parties have agreed to abide VENCorp's determination of Factor D in the same way as they have agreed to abide its performance of the relatively simple calculation which the formula in the Schedules requires to be undertaken."

The relevant principles

51 I agree with the judge that the question of whether it is open to review an expert determination on the ground of error is in the first place to be decided according to whether the determination answers the contractual description of what the expert was required to

determine. I also agree with the judge that the question of whether an error in determination deprives the determination of compliance with the contractual description of what the expert was required to determine is in the first place to be answered according to whether the error occurred in respect of a task which the contract entrusted to the expert. As Mason, P. explained in *Holt v. Cox,*[7] although mistake is not itself a ground for vitiation of a final and binding expert determination, a mistake may still be of such a nature that the resultant determination is beyond the realm of contractual contemplation – beyond anything which the parties may be supposed to have intended to be final and binding – and therefore susceptible to review.

52 The situation is analogous to that which faces a court in a cases of judicial review of administrative error. Just as an administrative decision maker has an area within which he or she may make mistakes without relevant consequence, so too an expert appointed under contract has an area within which the contract contemplates that he or she may make mistakes without relevant consequence. Similarly, just as there are some administrative mistakes which amount to jurisdictional error, and so expose a decision to judicial review, those appointed under contracts to make determinations may make errors which are beyond the area of tolerance which it is to be supposed the contract had in view.

53 Therein lies the distinction drawn in some of the authorities,[8] and observed by the judge in this case,[9] between an error in the exercise of a judgment, opinion or discretion entrusted to an expert,[10] and an error which involves objective facts or a mere mechanical or arithmetical exercise. Subject to the contract in question, it is easier to suppose that parties to a contract contemplate that an error of the former kind be beyond the realm of review than it is to think that they intend to be fixed with errors of objective fact or in processes of mechanical calculation.

54 As this case demonstrates, however, matters are likely to be more complex where error occurs in the course of an exercise which is partly comprised of discretion, judgment or opinion and partly constituted of objective fact or mechanical calculation. In some such cases, the overriding discretionary or judgmental character of the exercise may so inform each step in the determination as to put even those steps which are matters of objective fact or mere mechanical calculation beyond the scope of permissible review. In other instances it may appear that, despite the overall character of the exercise, the various steps in the determination are severable, according to whether they are essentially discretionary or judgmental or simply matters of objective fact or mechanical calculation, and that those steps which are of the latter kind are within the scope of permissible review. The question in each case is what the parties should be presumed to have intended, and that is to be determined objectively from the terms of the contract, bearing in mind the context in which it was created.

The judge's reasoning

55 In this case the judge's conclusion appears to me to be informed by two processes of reasoning. The first is apparent in his Honour's consideration of the processes involved in the determination of Factors X and Y and A, B, E and H and his conclusion that the determination of Factor D was in principle no different. The essence of it seems to be that, because the determination of some or all of those other factors involved a degree of judgment and opinion which put them beyond the scope of permissible review, the determination of Factor D should also be regarded as beyond the scope of permissible review.

56 The second line of reasoning is implicit in the judge's observation that the determination of Factor D was part of the task entrusted VENCorp under clause 16 of the Connection Deed. That suggests that his Honour regarded the overall judgmental character of the determination of the Reconciliation Amount as characterising each step of the determination as an exercise in judgment and so placing the ascertainment of Factor D beyond the scope of permissible review.

57 With respect, I take a different view. I do not agree that the determination of Factor D is to be equated with the determination of Factors X and Y, or even Factor A, B, E or H, and I do not agree that such judgmental character as may inhere in the overall determination of the Reconciliation Amount is sufficient to characterise the ascertainment of Factor D as judgmental.

The nature of the determination of Factor D

58 To begin with the nature of the exercise involved in the determination of Factor D, the thrust of the judge's reasoning is that the determination of Factor D is more than a merely mechanical task because it requires adjustments and conversion of units of volume into units of energy. But, as has been seen, Factor D is defined in Schedule 8 as being the volume of Gas withdrawn from the Transmission System by Distributor for Retailer under the Distribution Tariff Agreement at the Connection points for the previous calendar year. Other things being equal, the volume of gas withdrawn from the Transmission System by Distributor for Retailer under the Distribution Tariff Agreement will be capable of objective measurement and will be objectively measured by meters installed and maintained in accordance with Rule 4 of the MSO Rules.

59 Clause 8.5 of the DTA provides that the Distributor must give VENCorp notice of the volume of gas. It is implicit in that requirement that the volume of which the Distributor is to give notice is the volume measured in accordance with the metering rules prescribed in Rule 4.4 of the MSO Rules. That rule sets out comprehensive metering requirements for connection points on the transmission system and distribution delivery points at which gas is withdrawn by market customers. The key principle adopted in the rule is that there must be a metering installation at each connection point on the transmission system and each delivery point at which gas is withdrawn by a market participant and required to be measured for settlement purposes. Rule 4.4.26 provides that metering data must by used by VENCorp as the primary source of data for settlement purposes under the MSO Rules. The close interconnection between the MSO Rules, the DTA and the Connection Deed implies that metering data must also be used in the calculation of the Reconciliation Amount pursuant to the DTA.

60 Admittedly, it is possible that a meter may malfunction and hence that VENCorp may be required by Rule 4.24 to adopt substitute readings for a period not exceeding six months leading up to the date of discovery of the malfunction. The possibility of some such substitution suggests a degree of judgment, opinion or discretion entrusted to VENCorp. But I am unable to attribute to that possibility the significance which the judge considered it to have. It is not a judgment, opinion or discretion which falls to be exercised in the usual run of case and it did not fall to be exercised in this case. Here there was no meter malfunction. There was simply a failure to recognise the existence of an unmetered flow of gas out of the Transmission System by Distributor Retailer for AGL and, once it was recognised, the objective ascertainment of the volumes which had gone unmetered. I do not see why the parties should be taken to have intended to exclude error-based review in a case of that kind.

61 With respect, I also consider that the judge credited with undue importance the fact that the data made available to VENCorp from the meters is the quantity of gas passing through the meter, measured by volume in cubic metres or mass in kilograms, and that the quantity needs then to be standardised by corrections for pressure, temperature, and natural gas composition and multiplied by a heating value in order to produce the quantity of energy of the gas which is expressed in joules. While such post-meter computations may be seen to involve a degree of judgment, opinion or discretion, and for that reason, perhaps, to be within the area in which VENCorp is permitted to err, it remains that, ordinarily, the volume of gas withdrawn from the Transmission System by Distributor for Retailer is an objectively discernible quantity, in respect of the measurement of which there is no need or room for discretion, judgment or opinion, and hence I see no reason why that should be thought of as intended to lie beyond the scope of error-based review.

62 It will be recalled that a further part of the judge's reasoning about the nature of the ascertainment of Factor D rests upon acceptance of TXU's proposition that it is always possible that the actual amount of unmetered gas may never be known and may be incapable of precise determination. His Honour thought it followed from that possibility that, if the determination of the amount were susceptible to review for error, "it could never be said that VENCorp could ever issue an effective Reconciliation Amount". In turn he regarded that as providing "a demonstration of the reason for the parties agreeing to accept the determination of VENCorp as to the Reconciliation Amount".

63 But with respect, to say that the actual amount of unmetered gas may never be known and may be incapable of precise determination is to say no more than that it is possible that a volume of gas at one time thought to have been accurately measured will later be found to

have been inaccurately measured. It does not follow that it is impossible for VENCorp to issue an effective determination of the Reconciliation Amount unless the volume of gas upon which it bases the ascertainment of Factor D is not reviewable for error. As with most things to be ascertained by measurement, what is accurate is never more accurate than what is for the time being believed to be accurate. Yet what is issued on the basis of it will be taken as accurate, and so therefore as effective and enforceable, unless and until some inaccuracy in measurement be shown.

64 Finally, on this aspect of the matter, it will be recalled that the judge treated as significant that disputes as to the calculation of the Reconciliation Amount were not included in Schedule 4 of the Connection Deed as one of the matters to be resolved in accordance with the dispute resolution procedures provided for in the deed. His Honour reasoned that :

> "This must be because that task has been entrusted to VENCorp as an expert and because its calculation is to be final and binding, as indeed is the determination of the expert him or herself under Schedule 4."

65 But with respect, that is not so. Clause 8.1 of the Connection Deed provides generally for the resolution of any dispute which may arise between the parties to the deed. Clause 8.3 directs that the details of the dispute shall be set out in reasonable detail and that thereafter the parties shall, as soon as possible and to the extent and on as many occasions as may be necessary, confer in an endeavour to resolve the dispute. Clause 8.5 further directs that, if the dispute is not so resolved within 14 days after first conferring, either party who has not refused to confer and who is not otherwise in breach of clause 8 may refer the dispute to both parties' chief executive officers for resolution. Clause 8.6 provides that, if the dispute is of a kind listed in clause 3, 4 or 5, it may be referred to the dispute resolution mechanism provided for in Schedule 4 to the deed and, if it is of any other kind, that either party may commence legal proceedings in respect of the dispute. I see nothing in any of that which implies or suggests that the calculation of the Reconciliation Amount is in all respects to be beyond the scope of review for error or mistake.

Overall character of the determination of Reconciliation Amount

66 Turning then to the judge's reasoning about the overriding nature of the determination of the Reconciliation Amount, I have already observed that it does not necessarily follow from the fact that a determination is of an overall discretionary or judgmental nature that those of its elements which are matters of objective fact or mere mechanical calculation are to be treated as being of a discretionary or judgmental nature. In each case the question is one of what the parties intended. Logic suggests, and the course of authority tends to confirm, that parties more often than not intend that the discernment of objective facts and mechanical calculations on which a determination is to be based should be subject to review. Hence the conclusion reached in *Holt v. Cox* that the failure of a valuer to have regard to one of the facts upon which his opinion should have been based meant that his valuation was not in accordance with the contract.

67 In the result, rather than working from the top down – from the overall character of the determination to the question of whether it stamps each step in the determination with that character – it is in my view preferable to proceed by first identifying the steps in the determination which involve no more than the ascertainment of objective facts or processes of mechanical calculation and then to decide whether the parties should be taken to have intended that those steps not be subject to error-based review even though they involve no more than the ascertainment of objective facts or mechanical calculations.

68 For the reasons already given, I consider that the ascertainment of the volume of Gas withdrawn from the Transmission System by Distributor for Retailer was a step in the determination of the Reconciliation Amount which involved no more than the ascertainment of objective facts or processes of mechanical calculation. In truth, it was simply a matter of reading meters and adding up the sums. In those circumstances, I see no reason to suppose that the parties to the DTA and Connection Deed intended a mistake in the ascertainment of the volume of Gas to be beyond the scope of error-based review.

69 To the contrary, by Schedule 8 to the DTA and Schedule 5 to the Connection Deed, the parties declared that they required the determination of the Reconciliation Amount to be based on the volume of Gas withdrawn from the Transmission System by Distributor for

Retailer under the Distribution Tariff Agreement at the Connection Points for the previous calendar year. To my way of thinking that declaration implies that the parties did intend that an error in the ascertainment of the volume of Gas withdrawn should be subject to review. The requirement was that the determination be based on "*the* volume of Gas withdrawn from the Transmission System by Distributor for Retailer" - not VENCorp's estimate or any other estimate of that volume of Gas - and as a matter of the plain and ordinary meaning of the DTA, a determination of Reconciliation Amount based upon an erroneous measurement of the volume of Gas withdrawn from the Transmission System by Distributor for Retailer is not a determination of Reconciliation Amount based on the volume of Gas withdrawn from the Transmission System by Distributor for Retailer.

70 In point of principle the requirement in clause 8.5 of the DTA that VENCorp determine the Reconciliation Amount according to a formula based upon the volume of Gas withdrawn in the last year is no different to a contractual requirement that an estate agent determine the value of real property on the basis of, say, the last three sales in the street. If the valuer makes a mistake as to one or more of those prices, the resulting valuation is not in accordance with the contract and so will be subject to review.[11] In the same way, as it seems to me, since VENCorp was required to determine the Reconciliation Amount on the basis of the volume of Gas withdrawn from the Transmission System by Distributor for Retailer for the previous calendar year, the mistake which was made about the volume means that the determination of the Reconciliation Amount does not accord with the DTA or Connection Deed and so it is subject to review.[12]

71 Counsel for the respondent argued to the contrary. He submitted that the decision of the English Court of Appeal in *Jones v. Sherwood*[13] makes plain that it would not be open to challenge the estate agent's valuation in the circumstances just mentioned, and equally that it is not open to review VENCorp's determination of the Reconciliation Amount for error in the ascertainment of the volume of Gas withdrawn. Counsel referred in particular to the observations of Dillon, L.J. in *Jones v. Sherwood,*[14] that:

> "That approach, however, of treating the [determination] as mere machinery for calculation which can automatically be overridden by the court if it appears to be wrong, cannot be enough where the expert...is to [determine] the fair value of property for which there is not absolute objective criterion, or where, as in the present case, the parties have expressly declared that the determination...is to be conclusive, final and binding for all purposes, and where they have further shown that, as would be inherently likely where an issue of further shares is in question, they want a speedy determination without the delays and complexities of arbitration, let alone court proceedings: see in particular the requirement in paragraph 4 of appendix 1 that the expert is to provide his report 'within the shortest practicable time'."

In counsel's submission, it is evident that the parties to the DTA wanted a speedy determination without the delay and complication of disputes and, by parity of reasoning with *Jones v. Sherwood,* should be taken to have agreed in effect that errors of fact and mechanical calculation not be subject to review.

72 I do not accept that submission. In *Jones v. Sherwood* it was held that parties who had agreed to be bound by the report of chartered accountants as to the value of shares in a company could not contend that the report was vitiated by the accountants' failure to take account of transactions of which it was said that they ought to have taken account. But, so far from the case supporting the conclusion that it would not be open to attack an expert's valuation on the basis of mistake as to one or more of the facts on which it was required to be based, the case appears to me to stand as authority that such a valuation would be subject to attack on just that basis. The relevant principles are expressed in Dillon, L.J.'s judgment, as follows:

> "On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning, M.R. said in *Campbell v. Edwards* [1976] 1 W.L.R. 403, 407G, a matter of contract. The next step must be to see

> what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect – e.g., if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in Jones *(M) v. Jones (R. R.)* [1971] 1 W.L.R. 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do."[15]

73 In my view there is no relevant difference between an accountant who is required to value an identified number of shares in a company and who by mistake values the wrong number of shares or shares in the wrong company, and an estate agent who is required to value property by reference to the prices at which three identified properties have been sold, and who by mistake as to one or more of those prices values the property the subject of valuation on the basis of something other than the three identified prices. The consequence of the mistake in each case is that what is done is not what the contract required to be done.
74 So too in the case of VENCorp. The DTA and the Connection Deed required VENCorp to determine the Reconciliation Amount on the basis of the volume of Gas withdrawn from the Transmission System by Distributor for Retailer. Because of a mistake as to the amount of that volume, what VENCorp did was not what the DTA required be done.
75 Counsel for the respondent emphasised the contrast between Rule 3.6.19(b) of the MSO Rules and the absence from the DTA and Connection Deed of an express provision for the issue of a revised determination of Reconciliation Amount in the event of an error being discovered. He submitted that the contrast was a further strong indication that the parties to the DTA and Connection Deed intended that determinations of Reconciliation Amount should not be amended even for material error, and hence that clause 8.5 of the Connection Deed was intended to operate, as its terms provide, by making a determination of Reconciliation Amount once made final and binding for all purposes.
76 I do not accept that submission either. The contrast between Rule 3.16.9 of the MSO Rules and the absence of a comparable provision from the Connection Deed highlights that VENCorp is not obligated to issue an amended determination of Reconciliation Amount to correct a material error. To my way of thinking, however, it says very little if anything about whether a determination of Reconciliation Amount infected by material error is binding on the parties. Certainly clause 8.5(b) of the DTA states that a determination of Reconciliation Amount is final and binding. But the authorities are clear (and indeed counsel for the respondent properly accepted) that clauses like clause 8.5 make little difference to the question of whether a final and binding determination is reviewable for error.
77 In the end, as has been seen, the question is to be decided according to whether the determination complies with the contract. And if it does not, the parties are entitled to say that what purports to be the determination of the Reconciliation Amount for the purposes of the contract is without effect. In that event, VENCorp would be bound to prepare a determination which did comply with the contract - not an amended determination, but *the* determination which VENCorp was from the outset bound to prepare – and thereafter the parties would be bound by the contract to comply with it on that basis. Other things being equal, amounts previously paid under the invalid determination would be recoverable as moneys had and received.
78 It was further contended for the respondent that to allow that an error in the ascertainment of the volume of Gas is sufficient to open the determination of the Reconciliation Amount to review would have the effect of depriving clause 8.5(b) of any efficacy.
79 I reject that contention too. Clauses like clause 8.5 of the DTA emphasise that it is the intention of the parties that an error or mistake in the making of a determination is not to be reviewed unless the result of the error is that the determination does not accord with the contract.[16] Clause 8.5 of the DTA thus emphasises that the elements of a determination of the Reconciliation Amount which involve discretion, opinion and judgment are beyond the scope of review.[17] It does not deprive clause 8.5 of that function to hold that an error in the ascertainment of a fact on which the determination is required to be based may result in a determination which is not in accordance with the contract and which, therefore, is subject to

review.

80 Finally, I should say that I am strengthened in the view that error in the ascertainment of the volume of Gas is subject to review by the recognition that the DTA and the Connection Deed are pre-eminently commercial agreements. Their terms must therefore be construed against the matrix of facts which underpins those arrangements and as the court would suppose that honest businessmen would understand the words they have actually used with reference to their subject-matter and the surrounding circumstances.[18]

81 Views may differ about the premium which the Participants are likely to have put on certainty and the consequent extent to which they may have been prepared to forgo rights of review in order to achieve certainty. I would allow that the terms of the DTA show that the parties wanted a prompt determination of the Reconciliation Amount without delays, complexities and the expense of disputes and court proceedings. That explains why the parties agreed to exclude from review so much of the determination as may involve discretion, judgment or opinion. But I am unable to accept that honest businessmen would mean to bind the parties to the DTA by a determination of Reconciliation Amount based upon an error as to volume of Gas extracted from the system, with consequences amounting possibly to millions of dollars, in circumstances which they had agreed should lead to the correction of Trade Imbalances as a matter of course. In my view honest businessmen would surely say that such a determination was not in accordance with their agreement.

Conclusion

82 I would allow the appeal.

BONGIORNO, A.J.A.:

83 I agree with the reasons for judgment of Nettle, J.A.

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[1] The contents of which are the same as Schedule 8 to the DTA.

[2] Then known as Pulse.

[3] Still then known as Pulse.

[4] *Legal & General Life of Australia Ltd v. A. Hudson Pty Ltd* (1985) 1 N.S.W.L.R. 314.

[5] *Holt v. Cox* (1994) 15 A.C.S.R. 590 at 597.

[6] Unless the determination is attended by fraud, collusion, dishonesty or impartiality.

[7] (1994) 15 A.C.S.R. 590 at 597.

[8] See in particular the analysis of Ipp, J. in *WMC Resources Ltd v. Leighton Contractors Pty Ltd* (1999) 20 W.A.R. 489 at 494-9.

[9] Which is referred to in the passage of the reasons for judgement that I have set out above at paragraph [44].

[10] Unless determination is attended by fraud, collusion, dishonesty or impartiality.

[11] I add that it would make no difference to that conclusion that the mistake might not have been discoverable at the time at which it was made.

[12] Cf. *Karanlee Nominees Pty Ltd v. Gollin & Co. Ltd* [1983] VicRp 61; [1983] 1 V.R. 657 at 668-9; *Email Ltd v. Robert Bray (Langwarrin) Pty Ltd* [1984] VicRp 2; [1984] V.R. 16 at 21.

[13] [1992] 1 W.L.R. 277.

[14] [1992] 1 W.L.R. at 285.

[15] Ibid at 287. Emphasis added.

[16] Cf. *WMC Resources Ltd v. Leighton Contractors Pty Ltd* at [41] per Ipp, J.A.

[17] Except in cases of fraud, caprice or lack of impartiality and the like.

[18] *Cohen & Co. v. Ockerby & Co. Ltd* [1917] HCA 58; (1917) 24 C.L.R. 288 at 300; *Di Dio Nominees Pty Ltd v. Brian Mark Real Estate Pty Ltd* [1992] VicRp 99; [1992] 2 V.R. 732 at 742.
