Supreme Court of Western Australia - Court of Appeal

Wmc Resources Limited v Leighton Contractors Pty Ltd [1999] WASCA 10 (7 May 1999)

Last Updated: 12 November 1999

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE FULL COURT (WA)

CITATION : WMC RESOURCES LIMITED -v- LEIGHTON CONTRACTORS PTY LTD [1999] WASCA 10

CORAM : KENNEDY J

IPP J

WHITE J

HEARD : 8 APRIL 1999

DELIVERED : 7 MAY 1999

FILE NO/S : FUL 149 of 1998

BETWEEN : WMC RESOURCES LTD

Appellant (Plaintiff)

AND

LEIGHTON CONTRACTORS PTY LTD

Respondent (Defendant)

Catchwords:

Contracts - Building and engineering contracts - Construction and interpretation - Valuation of variations to works - In absence of agreement proprietor entitled to determine value in its sole discretion - To what extent arbitrator could interfere with proprietor's valuation and substitute his own valuation

Legislation:

Result: Appeal allowed

Representation:

Counsel:

Appellant (Plaintiff) : Mr C L Zelestis QC & Mr G H Murphy

Respondent (Defendant) : Mr B W Walker QC & Mr A F Mizen

Solicitors:

Appellant (Plaintiff) : Clayton Utz

Respondent (Defendant) : Alan Mizen

Case(s) referred to in judgment(s):

Case(s) also cited:

Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) 16 NSWLR 582

Balfour Beatty Civil Engineering v Docklands Light Railway (1996) 78 BLR 42

Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd (1988)17 FCR 487

Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410

East Ham Corporation v Bernard Sunley & Sons Ltd [1966] AC 406

Greenberg v Meffert (1985) 18 DLR (4th) 548

Greenberg v Meffert (1987) 30 DLR (4th) 768

KBH Constructions v PSD Development Corporation Pty Ltd (1990) 21 NSWLR 348

Placer Development Ltd v The Commonwealth of Australia [1969] HCA 29; (1969) 121 CLR 353

Robins v Goddard [1905] 1 KB 294

1. **KENNEDY J**: I have had the benefit of reading in draft the reasons to be published by Ipp J. I am in agreement with those reasons and I would therefore uphold the appeal and substitute for the answers provided by the learned trial Judge the answers proposed by Ipp J.

2. **IPP J:** The issues: the significance of a discretionary valuation

3. This appeal concerns a valuation by the appellant of work executed by the respondent. The work constituted variations under a mining contract entered into between the parties. Essentially, there are two principal issues in the appeal. The first is: on what grounds can the arbitrator (appointed pursuant to cl 35.2 of the mining contract) interfere with the appellant's valuation (made in terms of cl 14.2(b)(iv) of the contract). The second is whether, and if so on what grounds, the arbitrator can substitute his own determination for that made by the appellant.

4. The learned Judge at first instance held, in effect, that merely upon the respondent disputing the appellant's valuation, the arbitrator had the power to set it aside and to determine the value of the variations himself. These findings are challenged on appeal.

5. Clause 14.2(b)(iv) of the contract empowers the appellant to determine the value "in its sole discretion". Much of the argument on appeal concerned the meaning and effect of this phrase, seen in the context of the contract as a whole. But, in my view, the critical feature of the valuation undertaken by the appellant is that it involved a discretionary judgment or had many of the characteristics of a discretionary judgment; for the reasons set out below, I think that the appeal, in essence, turns on this. The learned

Judge regarded the valuation in a different light; his Honour did not think that it involved a discretionary process in this sense. This difference substantially explains the different conclusions to which I have come in regard to the questions raised by this appeal.

The background circumstances and the formal questions

6. By the contract, the respondent undertook to carry out open cut mining for the appellant at its nickel mine at Mt Keith. Clause 14.2(b)(iv) provided that, subject to certain conditions, the value of variations to the contract works would be determined by the appellant "in its sole discretion". The conditions were fulfilled, and the appellant commenced to value the variations. The respondent disputed the appellant's valuation methods and the valuations it completed.

7. The contract contains an arbitration clause and, pursuant thereto, the respondent commenced arbitration proceedings. It contended that the appellant had "failed to exercise its discretion in a way which is authorised by the contract", and requested the arbitrator to determine the value of the variations himself. Issues thereupon arose as to the effect of the phrase "in its sole discretion" in cl 14.2(b)(iv). This led to a dispute as to the basis by which the value was to be determined, and as to whether the arbitrator could substitute his own decision for that of the appellant.

8. Formal questions as to these issues, together with a number of others, were put to the learned Judge at first instance by way of a reference pursuant to s39(1)(b) of the *Commercial Arbitration Act 1985*. The appellant challenges the answers given by his Honour to two of the questions. The formal questions are:

"2. Whether, and to what extent, the basis upon which the value may be determined is affected by the provision in cl 14.2 that the valuation by [the appellant] is to be made 'in its sole discretion'."

And:

"4. Whether, and to what extent, the arbitrator has the power to substitute his own valuation for the valuation made by [the appellant]."

9. The issues relating to these questions are difficult to separate as they bear on each other. For this reason the learned Judge gave a combined answer to them, namely:

"The power conferred on [the appellant] to determine the value of the variation in its sole discretion does not confer a power on [the appellant] to make a conclusive determination of [the respondent's] right to payment. In the event of a dispute the arbitrator may himself determine the value of the variations."

The appellant contends that this answer is incorrect.

The contract: the variation and the arbitration clauses

10. The learned Judge described the work to be done by the respondent under the contract as follows:

"The scope of work comprised open pit mining of ore and associated waste material from a large ore body ..., the separation of ore from waste material, the hauling and dumping of ore and waste to designated areas and the establishment and maintenance of necessary access roads, ramps, pads and dumps. The [respondent] was required to supply all labour, materials, supervision, transportation, off-loading facilities at site, consumables, plant, equipment, maintenance facilities and tools necessary to complete the works and was to perform the works under the general direction and supervision of the [appellant] which was to provide certain necessary engineering and technical services. In brief, the contract called for the performance by the [respondent] of large-scale mining of nickel ore by the open pit method, including the establishment of stock piles and waste dumps."

11. Payment for the works was based partly on a lump sum for establishment, mobilisation and demobilisation costs, and partly on a schedule of rates for the excavation, removal and ancillary works. The schedule of rates was very detailed. Some idea of the overall size of the contract is apparent from the cash flow forecast forming part of the contract. The estimate of the money that would be paid by the appellant to the respondent, overall, was almost $110 million.

12. The variations which gave rise to the dispute between the parties related to the volume of material mined. The variations first increased, and then reduced, the volume. The dispute, in money terms, involving the valuation of the variations, is substantial - amounting to several millions of dollars.

13. The issue before the arbitrator as to the quantum of the valuation, concerns the appellant's basic approach to the valuation. The respondent, contends, in effect, that the valuation should be made on the specific basis that all of its costs (including capital costs) are covered, and certain profits and overheads are taken into account, subject to any reduction on account of inefficiencies. The appellant's valuation does not pay specific regard to factors of this kind. It is based, rather, on a percentage increase in the scheduled rates, as adjusted by rise and fall formulae. In determining this value, the appellant informed the respondent that it believed that its valuation was based on rates which gave "reasonable compensation" to the respondent. The respondent's points of claim in the arbitration claimed, on the other hand:

"The *'value'* which the [appellant] must determine if it becomes entitled to make a determination is, upon the proper construction of *'value'* in cl 14.2(b)(iv), an amount which will fully compensate the [respondent] including an allowance for profit, for any additional expense or loss incurred or suffered by the [respondent] in complying with a variation direction.

The purported determinations by the [appellant] failed to *'value'* any of the variations in that manner, and to the extent to which the determinations are otherwise valid (which the [respondent] disputes), the amounts provided in the determinations result in the [respondent] carrying out the variations at a considerable financial loss, thus the [appellant] has failed to exercise its discretion in a way which is authorised by the contract."

The respondent went on to claim the amount which it contended was "the value of the variations".

14. At the kernel of the dispute between the parties are the variations and arbitration clauses. Relevantly, the variations clause provides:

"14.0 VARIATIONS

14.1 Variations Permitted

The Contractor shall not vary the Works except in accordance with a direction in writing from the Company.

The Company shall have full power to direct the Contractor by notice in writing to alter, amend, omit, add to or otherwise vary the Works and the Contractor shall carry out such variation as if such variation were part of the Works originally included hereunder.

No such variation shall invalidate this Agreement but the moneys otherwise payable to the Contractor under this Agreement shall be adjusted by the Company having regard to the value (if any) of the variation determined pursuant to Clause 14.2

14.2 Valuations of Variations

(a) Subject to Clause 14.2(b), the prices and rates shown in Schedule "A" shall be used as the basis for calculating the value of variations to the Works.

(b) Where:

(i) pursuant to a variation the total volumes of Ore, Low Grade Ore or Waste, inclusive, to be Mined, as shown in the Production Schedule at the Date of Award, is varied by the Company, whether by increase or decrease, by more than 20%; or

(ii) pursuant to a variation the total volume of Ore, Low Grade Ore or Waste, inclusive, to be Mined in any month, as shown in the Production Schedule at the Date of Award, is varied by the Company, whether by increase or decrease, by more than 20%;

(iii) the Company determines that the rates specified in the Schedule of Rates do not apply to a variation, or alternatively, are not appropriate to value the variation concerned;

then

(iv) the value of the variation shall be as determined by agreement between the Contractor and the Company, provided that if the Contractor and the Company fail to agree on such value then the Company shall either determine such value in its sole discretion or direct that the variation be carried out as Daywork under Clause 14.3.

14.3 Daywork

The Company may from time to time require work which is or is not included in the Works be carried out as Daywork. ...

... "

The arbitration clause relevantly provides by sub-cl 35.2:

"Either Party may in the event of a dispute between the Parties in respect of any aspect of this Agreement or its performance or non-performance appoint a single arbitrator agreed by the Parties ..."

Different categories of valuations

15. The duties and powers of a certifier under an engineering contract may be manifold. They may range from certifying whether the works have reached a particular stage, whether particular work or the entire works is complete, or is of the requisite quality, and may concern many other aspects of the contract. The certifier may be empowered to issue interim and final certificates relating to the various payments to which the contractor is entitled. Certificates of this kind are generally regarded as certificates as to value, and in arriving at the certified amount, the certifier performs a determination as to value.

16. Generally, the contract concerned will provide detailed fixed and objective criteria as to how the value of amounts to be certified under interim and final certificates is to be determined. These fixed and objective criteria are usually in the form of detailed schedules of rates or bills of quantities or specifications. The criteria so laid down enable the certifier, when assessing the value of the work and the amount of certificate concerned, merely to measure an item of work, assess its quality, and apply the rate provided by the contract for that item. In this sense, the valuer does not exercise a discretionary judgment in valuing the work. It is a mechanical exercise.

17. In these circumstances, if the certifier wrongly fails to issue an interim or final certificate in respect of the value of the work done, or issues an incorrect certificate of that kind (and there is no arbitrator under the contract), the court will set aside the certificate and order the correct amount to be paid. In so doing, the court will come to a judgment as to the correct amount owing, and make an order accordingly: ***Neale v Richardson*** (1938) 1 All ER 753, ***Brodie v Cardiff Corporation*** (1919) AC 337; cf ***Modern Engineering v Gilbert-Ash Ltd*** (1974) AC 689.

18. Ordinarily, in cases of this kind, where a certified valuation is to be made by reference to fixed, objective, criteria (such that there is no discretionary element in the valuation) there will only be one uniquely correct value. If the certifying valuer, in these circumstances, arrives at the incorrect value, the valuation will be in breach of the contract. It is for that reason that an incorrect certificate will also be set aside. The court will then have the jurisdiction to determine the correct amount owing in terms of the contract. Where there is an arbitration clause that gives the arbitrator jurisdiction to hear the merits of the claim, the arbitrator will have the same powers as the court: ***Prestige & Co Ltd v Brettell*** [1938] 4 All ER 346 at 350 and 354, ***Neale v Richardson***, ***Brodie v Cardiff Corporation***.

19. This may also be the case even when the schedules of rates or bills of quantities do not apply to variations, and the certifier is empowered to value them by some other, less well-defined but nevertheless readily available standard criteria. An example of this is ***Hawker Noyes Pty Ltd v New South Wales Egg Corporation***, unreported; SCt of NSW (Brownie J); 14077 of 1988; 11 November 1988. In this case the

Court was concerned with a variation clause, the fourth sentence of which provided, "A variation shall be valued in accordance with the rates included in the priced bill of quantities or schedule of rates if and in so far as those rates are applicable to the variation." The fifth sentence provided that should the superintendent determine that the rates included in the priced bill of quantities or schedule of rates did not apply, the rate was to be determined by agreement, and if the parties did not agree, "the superintendent shall determine the rate or price as he considers reasonable, ..." Brownie J said that the fourth sentence"

"Provides a mechanism for the valuation of the variations which does not really involve any exercise of discretion, properly so called. If that sentence does not provide a more or less mechanical mechanism for valuing or pricing the variations, then the fifth sentence requires the superintendent to determine a reasonable price, and cl 231 requires him to act in a reasonable and equitable manner. This seems to me to involve no more than that he decide, as a question of fact, what is a reasonable rate or price."

See also ***Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation*** (1992) 39 NSWLR 468, which concerned a clause in a construction contract that empowered the superintendent to determine whether any latent conditions existed and to order any consequent variation. Giles J, when commenting on the superintendent's function said (at 483):

"As in *Hawker Noyes Pty Ltd v New South Wales Egg Corporation*, what the superintendent had to do was determine questions of fact - what conditions had been encountered, were they physical conditions, did they differ materially from those ascertainable, and could they have reasonably been anticipated; what variation to the work was required as a result. Although no doubt opinions could differ, there was nothing discretionary in what was required of the superintendent, he had to make his determination reasonably and by regard to the facts (as would an arbitrator in hearing a dispute over the superintendent's determination), and once he concluded that a variation to the work was necessary he was obliged to order a variation."

20. If I may say so, the reference in both ***Hawker Noyes Pty Ltd v New South Wales Egg Corporation*** and ***Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation*** to the superintendent having to decide "questions of fact" is not particularly enlightening. It would be most unusual for valuations of work at a reasonable rate or price, or an assessment whether site conditions are latent, to involve anything other than questions of fact. The important point made in both of these cases, however, is that the decisions of the superintendents concerned did not involve any exercise of discretion. As Giles J put it, "there was nothing discretionary in what was required of the superintendent". The issues to be resolved by the superintendents were, in this sense, simple questions of fact. There was no discretionary element involved in ascertaining the reasonable rate or price, nor was there any discretionary element involved in deciding whether the conditions experienced on site were "latent".

21. Hawker Noyes Pty Ltd v New South Wales Egg Corporation and ***Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation*** have significance in this appeal because the learned Judge regarded the appellant's valuation as falling into the same category of decision as the decisions of the superintendents in question. Thus his Honour relied on these cases in concluding that the appellant's determination as to value could not be categorised as discretionary. It followed from this, in effect, that once the respondent disputed the determination, the arbitrator could without more substitute his own decision (in the same way as an arbitrator is often, by the contract concerned, empowered to substitute his own decision when an interim or final certificate is disputed).

22. It is to be emphasised, however, that, unlike the decisions of the superintendents in ***Hawker Noyes Pty Ltd v New South Wales Egg Corporation*** and ***Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation***, there may be decisions involving valuations of work which do require a valuer to exercise a very broad discretionary judgment indeed, and particular consequences flow, in law, where this is the case.

Valuations calling for discretionary judgment

23. Valuations may involve making decisions where no fixed or readily available standard criteria exist. There may be several possible methods of assessing value, each giving widely different results, but each being reasonable. Many subsidiary factors relevant to the valuation may be uncertain, many

contingencies may have to be taken into account, wide ranges of legitimate decisions may apply, and opinions may legitimately differ as to virtually all of the relevant issues.

24. This kind of valuation is exemplified by the task undertaken by the court in ***Turama Forest Industries Pty Ltd v Eng***, unreported; SCt of WA; Library No 960238; 7 May 1996. In this case a determination had to be made of the reasonable value of the undertaking of a logging contractor. Many facets of the business had to be valued, and the factors affecting the valuation were complex. They included the international market for timber and its future trends, the cost of logging particular forests (including variable transport and labour costs), contingencies including adverse weather conditions, and difficulties with the work force. An assessment had to be made of the effect of decisions made by the plaintiff which had caused losses to the business. The capital costs of establishing the infrastructure of the undertaking had to be taken into account. Difficult questions arose as to the methods by which particular heavy equipment was to be valued. As I will attempt to demonstrate, that valuation was, in principle, not dissimilar from the valuation of the variations in the present case. On appeal, in ***Turama Forest Industries Pty Ltd v Eng***, unreported; FCt SCt of WA; Library No 980190; 15 April 1998, Malcolm CJ (with whom Franklyn and Steytler JJ agreed) said that the character of such a valuation decision was "in the nature of a discretionary judgment".

25. The courts have consistently emphasised the discretionary nature of these kinds of valuations. In ***The Commonwealth v Reeve*** [1949] HCA 22; (1949) 78 CLR 410 Dixon J said (at 423) that the estimation of a value in monetary terms of land is very much "a result of judgment and sound discretion". In ***Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*** [1981] HCA 4; (1981) 146 CLR 336 Mason J said (at 381):

"As with the assessment of damages, especially in personal injury cases, the valuation of property by a court has many of the characteristics of a discretionary judgment. Valuation is a matter of estimation, not of precise mathematical calculation. It certainly involves the making of a value judgment in the metaphorical as well as the literal sense."

In ***Legal & General Life of Australia Ltd v A Hudson Pty Ltd*** (1985) 1 NSWLR 314, McHugh JA (at 336) described the task of a valuer of property as being a "discretionary judgment".

26. The reason why the valuation of property involves a discretionary judgment or contains discretionary elements, is explained by the remarks of Mason J, to which I have referred. The valuation of anything, be it property, the undertaking of a business, or engineering or mining work, that requires estimation and value judgments "in the metaphorical sense", is discretionary in the sense referred to by Mason J in ***Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*** and Malcolm CJ in ***Turama Forest Industries Pty Ltd v Eng***.

The valuation required by cl 14.2(b)(iv)

27. The work done by the respondent in executing the variations was extensive and complex. It included surveying the area for pits, stripping areas for top soil, cutting the top soil to a marked depth, moving the soil and mining waste (which involved excavating, loading and hauling to various locations), drilling, blasting, digging, ripping, loading, hauling, dumping (both ore and waste material), maintaining plant and labour, post-splitting, and a vast amount of miscellaneous other work.

28. The respondent's points of claim indicate that issues as to the correctness of the appellant's valuation include matters such as, how "profit" is to be determined, should allowances for profit be made (and if so, what allowances), what allowance should be made for changes in market conditions and trends (and there are several markets involved, such as the market for ore, the labour market, and the market for mining contracting) and many other intangible factors. The valuer would have to undertake an examination of the cost structure and pricing of the contract and decide how to apply his findings to the pricing of the variations.

29. Other factors that could well have a bearing on the valuation are whether the contract prices were profitable or under-estimated, whether the variations involved alterations in the price levels of labour or materials (and the extent thereof), whether discounts in respect of materials were gained or lost because of the variations (and the extent thereof), and the effect the variations would have on the contractor's time

and quantity related site overheads and fixed costs. Regard may also be had to external circumstances, such as weather, site conditions and changes to labour and material costs and availability.

30. Generally, the appellant may have to take into account that, as is pointed out in *Hudsons Building & Engineering Contracts* 11th Ed D Wallace Vol 1 at para 7-103:

"large increases in quantities notified in good time may often be extremely profitable to the contractor, thus logically justifying a reduction of the unit price involved, although in the last resort every argument for a change of price must depend ... on the internal assumptions and weightings made by the contractor when pricing his schedule or bills of quantities, in particular as between his construction and 'preliminaries' items. Other things being equal, however, substantial increases in quantities, if valued at the contract price rates or prices, should in principle benefit the contractor, since his fixed and other site overheads would have already been covered, while substantial omissions, on the contrary, may for the same reason, justify an increase in unit prices. As will be seen, however, this generalised approach is itself relatively unsophisticated, and no final answer can be given until the internal make-up of the contractor's prices, in particular in regard to their labour, plant, materials and sub-contract constituent elements, has been ascertained."

31. The pleadings in the arbitration reveal that there are many differences in principle between the parties as to the methods and criteria to be applied in arriving at the values of the various facets of the variations, and how the valuation as a whole is to be effected.

32. I think it is obvious from the aforegoing that the task of valuation undertaken by the appellant, pursuant to cl 14.2(b)(iv), cannot be described in any way as "mechanical", or as involving simple or straight forward factual questions based on fixed or standard criteria. There are a myriad of basic issues of principle and detail which are open to interpretation and reasonable differences of opinion. The ranges of opinion involved are manifold in number and broad in scope. Innumerable value judgments would have to be made. The valuation process carried out reasonably is likely to produce different results from different expert valuers, approaching the task in accordance with proper principles and making no errors of law.

33. The schedule of rates under the contract was described by Mr Walker QC, senior counsel for the respondent, as providing "excruciating detail" of the items of work and the rates therefor. These rates would ordinarily allow the appellant to value the variations in a mechanical and non-discretionary way under cl 14.2(a). But the very point of the machinery created by cl 14.2(b)(iv) is that it is triggered only when the schedule of rates does not apply to the variation or is inappropriate. That being so, once the variations are not to be valued by the exemplary detail of the schedule of rates, the task of the valuer becomes complex, difficult and, in my opinion, in the light of the circumstances I have described, essentially discretionary. In my opinion, it involves a series of discretionary judgments or, at least, a vast number of decisions having substantially discretionary elements. For the reasons that I shall proceed to explain, this finding is critical to the resolution of this appeal.

The judicial review of discretionary valuation decisions by third parties

34. Parties to a contract may agree to be bound by a decision, made by a third party, as to the value of a particular asset or work. In my opinion, subject possibly to one aspect, there is no difference between the principles which generally govern the review of discretionary valuations made in such circumstances and the principles applicable to the review of a discretionary valuation made by a party to the contract by agreement with the other party (as has occurred in this case). The only possible difference concerns the issue whether the valuer owes the other party a duty to act with care and skill and, if so, how this duty may affect the review of the valuation.

35. I think it would be helpful at this stage to summarise the principles applicable to the review of discretionary valuations by a third party. I shall then refer to the authorities from which they are derived.

36. Firstly, by the contract, the parties agree to be bound by a valuation made in terms thereof. Therefore, if the valuation complies with the contract, they are bound thereby. Because of the discretionary nature of the valuation, the contract will not require the valuation to be "correct". There will indeed be no uniquely correct valuation. The valuation will merely have to be within the terms of the contract.

37. Secondly, a court will not set aside a valuer's determination merely on the ground that it is "incorrect" or that it reveals errors. The determination will only be interfered with if it is not made in terms of the contract; a mere mistake in the valuation will ordinarily not be a departure from the terms of the contract.

38. In England, the leading authority on the issue is ***Campbell v Edwards*** [1976] 1 WLR 403. Lord Denning MR expressed the principles in stark terms (at 407):

"[I]t is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."

His Lordship (at 407) expressed some reservations if a valuer gave a "speaking" valuation and it appeared from the face of the valuer's reasons or calculations that they were wrong. In ***Jones v Sherwood's Computer Services Plc*** [1992] 1 WLR 277, however, Dillon and Balcombe LLJ held (at 284 and 289-290) that the principles expressed by Lord Denning in ***Campbell v Edwards*** apply, irrespective of whether the valuation is or is not a "speaking" valuation.

39. In Australia, a leading authority is ***Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd***, where Mason J observed (at 381):

"This court has consistently applied the rule that on a question of valuation an appellate tribunal is not justified in substituting its own opinion for that of the court below unless it is satisfied that the court below acted on a wrong principle of law or that its valuation was entirely erroneous."

These remarks echo decisions made by the High Court in cases such as ***Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co of South Australia Ltd*** [1947] HCA 10; (1947) 74 CLR 358 (at 367), ***The Commonwealth v Reeve*** [1949] HCA 22; (1949) 78 CLR 410 and ***Emerald Quarry Industries Pty Ltd v Commissioner of Highways*** (SA) [1979] HCA 17; (1979) 142 CLR 351 at 355 and 374.

40. In ***Legal and General Life of Australia Ltd v A Hudson Pty Ltd*** McHugh JA traced the historical development and expansion of the relevant principle and said (at 335 to 336):

"[A] valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: was the valuation made in accordance with the terms of the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. *The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.*" (My emphasis).

And later (at 336):

"There is nothing in the nature of the mistake which indicates a departure from the terms of the contract. The mistake was one made in the process of valuation. But it was not a departure from the terms of the contract."

41. The contract considered in ***Legal and General Life of Australia Ltd v A Hudson Pty Ltd*** provided that the decision of the valuer was "final and binding on the parties", but I do not understand this phrase to be relevant to the basic principles expressed by his Honour. While the phrase in question reinforced the intention of the parties that error or mistake would not warrant interference with the valuation, this was not the essential reason for the decision that the mistaken valuation did not depart from the terms of the contract. McHugh JA referred (at 335) to the fact that while it is easy to imply a term that a valuation must be made honestly and impartially, "[i]t will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable." His Honour had earlier referred to ***Karenlee Nominees Pty Ltd v Gollin*** [1983] VicRp 61;

[1983] 1 VR 657 and ***Email Ltd v Robert Bray (Langwarrin) Pty Ltd*** [1984] VicRp 2; [1984] VR 16, both decisions of the Full Court of the Supreme Court of Victoria. In ***Karenlee Nominees Pty Ltd v Gollin*** the contract did not provide for the valuation to be "final and binding". The Full Court held that the valuation could not be invalidated on the ground of mistake (save for mistake as to "the subject matter or terms or effect of the contract" - at 671). In ***Email Ltd v Robert Bray (Langwarrin) Pty Ltd***, another case where there was no "final and binding" provision, the Full Court followed ***Karenlee Nominees Pty Ltd v Gollin*** (and also held that a valuation could not be challenged on the ground that relevant matters had not been taken into account or irrelevant matters had). McHugh JA also referred to ***Campbell v Edwards*** where, similarly, there was no "final and binding" provision.

42. None of the cases to which I have referred concerned an engineering or construction (or mining) contract. But in my view that does not detract from the principles expressed therein. Contracts of that kind do not constitute a discrete and different branch of the law to which ordinary principles of the law of contract and the general law are not applicable.

43. In my opinion, the principles set out above in regard to the review of discretionary valuations apply to the appellant's valuation in this case.

The effect of the appointment of the appellant as valuer

44. Although the contract concerns mining work to be carried out by the respondent, it has, substantially, the features and form of an engineering contract for a very large project. By the contract, the functions performed in many engineering contracts by a third party certifier, such as an architect, or engineer or superintendent are to be performed by the appellant itself.

45. While an agreement of this kind is unusual, it is by no means unknown. In any event, it is nowadays relatively commonplace for the certifier under an engineering contract to be a "superintendent", who is usually an employee of the proprietor under the engineering contract concerned. The identification of the certifier with the proprietor is a feature long found in engineering contracts. Nearly 150 years ago it was recognised that such a contract may show that it was never intended that an engineer should be indifferent between the parties and that "when it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is in fact a stipulation that they shall be decided by the company": ***Ranger v Great Western Railway Company*** [1854] EngR 73; (1854) 5 HLC 72; 10 ER 824 at 88. Thus the contract may be such that an engineer or architect may be intended to function only as the *alter ego* of the proprietor: ***Minster Trust Ltd v Traps Tractors Ltd*** [1954] 1 WLR 963 at 973.

46. While the valuation is to be undertaken by the appellant itself, the respondent does not suggest that this renders cl 14.2(b)(iv) void for uncertainty. In any event, such a submission would be untenable. Any uncertainty would be cured by the implication of terms requiring the appellant to value by reference to objective criteria. The appellant accepts that those criteria are that it should act honestly, *bona fide*, and reasonably. The respondent does not dispute that terms to this effect should be implied in the contract. In my view, it is indeed implicit in the contract that, in carrying out a valuation in terms of cl 14.2(b)(iv), the appellant is obliged to act honestly, *bona fide*, and reasonably: see ***Sandhu v Ferizis***, unreported; SCt of NSW (Young J); 4630 of 1990; 11 March 1994, and cases such as ***Perini Corporation v Commonwealth*** [1969] 2 NSWR 530. It was not suggested by the respondent that the appellant should act with due care and skill in performing the valuation. Ordinarily, when a third party carries out such a valuation, the value determined cannot be challenged because of negligence on the part of the valuer: ***Legal and General Life of Australia Ltd v A Hudson Pty Ltd*** (at 335). That rule may not apply when the valuer is not a third party but a party to the contract itself. As there was no argument on the question, I express no concluded opinion as to it. I merely observe that the mere fact that a party to a contract is appointed as a valuer of a thing, which is to pass as consideration under the contract, does not mean that that party is at large to determine any value it wishes. Conditions will be implied in the contract which will govern the performance of the valuation function. For the purposes of this appeal, having regard to the way in which the matter was argued, I shall assume that those conditions are solely that the appellant is obliged to act honestly, *bona fide*, and reasonably.

47. The learned Judge, in concluding that "in the event of a dispute" the arbitrator could himself determine the value of the variations, said:

"If the [appellant] had an uncontrolled and unreviewable "discretion" to determine the amount to be paid to the [respondent] in respect of the variation, the [appellant] would have the [respondent] at its mercy from the [respondent's] standpoint, the position would be that from the outset the contract was seriously uncommercial in that at any moment the contract could be rendered worthless to the [respondent], indeed positively destructive.

I think, with great respect to his Honour, the views expressed do not take sufficient account of the appellant's obligations to act, at least, honestly, *bona fide*, and reasonably. These conditions act as a fetter on the appellant's right to determine the value. In my opinion, in such circumstances, the appellant's discretion would not be "uncontrolled and unreasonable". Whether the contract is "uncommercial" if the appellant's right to determine the value is qualified as I have mentioned, is debatable. But, in any event, that is not the true question, which is: what did the parties agree by the contract? Essentially, the valuation would have to be made in accordance with the contract to which each party agreed, and no one could ask for more than that.

The powers of the arbitrator

48. In ***National Coal Board v William Neill & Son (St Helens) Ltd*** [1985] 1 QB 300 at 309, Piers Ashworth QC, sitting as a deputy Judge of the High Court made the following observations which were approved by Lord Hope in ***Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*** [1998] UKHL 19; [1998] 2 WLR 860 (at 881):

"In general an arbitration clause does no more than provide an alternative method of resolving disputes. ... In building contracts an arbitrator is frequently given additional powers which would not otherwise be open to him and are not open to a Judge to exercise. For example, by cl 15 of this contract the contractor is required to proceed with the work in accordance with the instructions of the engineer. By sub-clause (b) he is entitled to dispute any such instruction and to refer to arbitration. Were it not for this sub-clause, clearly the contractor would have no right to dispute or litigate about any such instruction and, even within sub-clause (b), he cannot dispute such an instruction before a court. In this respect, it is right to say the arbitrator has additional powers to a court. But in general, as I have said, arbitration is simply an alternative way of resolving disputes ... [T]he contract must be construed as a whole and the wording in the arbitration clause may assist in the interpretation of other clauses. If, for example, the arbitration clause provides that the arbitrator shall have power to open up and review certificates, it raises a strong assumption that the certificates are not intended to be conclusive. Such a presumption may be rebutted by a specific provision in the contract."

49. In ***Beaufort Development (NI) Ltd v Gilbert-Ash (NI) Ltd*** Lord Hope (at 880) referred to "the additional powers which, in the typical building or engineering contract, are given to the architect or the engineer and, in the event of any dispute about their exercise, to the arbitrator". His Lordship then said:

"Their purpose [that is, of the 'additional powers'] is to enable the architect or engineer, and in the event of a dispute about their exercise the arbitrator, to do things in the course of the execution of the contract which the court could not do."

These remarks emphasise that unless the contract confers additional powers on the arbitrator, the arbitrator only has those powers that could be exercised by the court.

50. I have pointed out that where a certifier makes an erroneous decision as to value, which is mechanical in nature or otherwise involves simple or straight forward questions of fact, the court will set it aside and declare the correct amount. An arbitrator, having jurisdiction to resolve all disputes under the contract, would have the same power as the court to substitute his or her own decision for that erroneously given by the certifier. Where a certifier makes a determination as to a discretionary valuation, however, the court will only set it aside in the limited circumstances I have mentioned.

51. Hence the relevance of an express provision in a contract, of a power granted to an arbitrator to open up, review and revise decisions of an engineer, superintendent (or a party in the position of the appellant). Without a term to that effect, the arbitrator may only interfere with a discretionary valuation in accordance with the principles laid down in cases such as ***Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*** and ***Legal and General Life of Australia Ltd v A Hudson Pty Ltd***.

52. In this regard, insofar as the respondent's claim is based on the actual valuation under cl 14.2(b)(iv) (that is, relevantly to the two questions the subject of this appeal), the respondent does not claim, in the arbitration, that the appellant, as valuer, committed any breach of its obligations to act honestly, *bona fide*, and reasonably. Rather, in effect, it is said that, because the appellant failed to determine an amount which fully compensated the respondent for all its "costs" (as defined by the respondent) in complying with the variation directions, the appellant "failed to exercise its discretion in a way which is authorised by the contract." On the authorities to which I have referred, the particulars of this allegation do not justify a discretionary valuation being overturned in the absence of "additional powers" being conferred on the arbitrator in the sense that I have explained.

53. In argument before this court, Mr Walker went further. He said, "My primary argument is that the arbitrator can simply disagree with the determination". In other words, he submitted that the respondent is entitled under the contract to contend that the valuation for variations should be an amount other than that determined by the appellant. An arbitrable dispute then arises, and the arbitrator is empowered to determine the amount which he considers is the appropriate valuation. This argument, too, is fundamentally inconsistent with the rules applicable under the general law as to discretionary valuations.

54. In summary, the respondent does not contend in the arbitration that the valuation is subject to challenge in accordance with the criteria stated by Mason J in ***Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd***; nor does the respondent contend that the valuation was not in accordance with the contract in the sense explained by McHugh JA in ***Legal and General Life of Australia Ltd v A Hudson Pty Ltd***. Thus, unless power is given expressly or impliedly by the contract to the arbitrator to interfere with the award of the appellant on other grounds, he has no power to do so. This conclusion has been arrived at without reference to the phrase "in its sole discretion" as it is used in cl 14.2(b)(iv).

55. It will be necessary, therefore, to consider whether the arbitration clause, cl 35, gives the arbitrator additional powers to enable him to overturn the decision of the appellant on the grounds pleaded in the arbitration or argued by Mr Walker before this Court. Before doing so, I shall discuss various aspects of the contract which, it was submitted, assist in the exercise of construction that is required.

The presumption against the finality of the appellant's valuation

56. The learned Judge at first instance stated:

"In my opinion, ... the contract should not be construed in such a way as to confer on the [appellant] the exclusive power to make binding and conclusive determinations concerning the rates to be paid to the [respondent] in consequence of variation to the works, unless it is clear from the words of the contract that that is what was intended."

Lord Hoffmann, in ***Beaufort Developments Ltd v Gilbert-Ash Ltd*** (at 868), expressed views of a similar kind, namely:

"One would not readily assume that the contractor would submit himself to be bound by [the employer's] decisions subject only to a challenge on the grounds of bad faith or excess of power.

...

One should require very clear words before construing a contract as giving an architect such powers."

57. The respondent urged that this approach meant that cl 14.2(b)(iv) and cl 35 should be construed so as to give the arbitrator the widest powers to interfere with the appellant's valuation. I think that there are a number of points to be made in response.

58. Firstly, ***Beaufort Developments Ltd v Gilbert-Ash Ltd*** was not concerned with a discretionary valuation; it was a decision about a certificate based on fixed criteria. Further, as I have pointed out, the learned Judge did not approach the matter on the basis that the appellant's determination was a discretionary valuation. His Honour said:

"It is quite clear, in my opinion, that the task of determining the value of variations is not a discretionary

process in the sense that the company is at liberty to make a judgment that would create rights and duties, but is a fact finding process."

His Honour therefore treated the issues in accordance with the approach in ***Hawker Noyes Pty Ltd v New South Wales Egg Corporation*** and ***Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation***. It follows that his Honour did not have regard to the well-established principles applicable to a discretionary valuation. In my opinion, they provide an entirely different context in which the contract is to be construed.

59. Secondly, the contract in ***Beaufort Developments Ltd v Gilbert-Ash Ltd*** provided expressly that the arbitrator was empowered to "open up review and revise" the architect's certificates to be issued. Thus, there was ample material which could lead to the construction, in that case, that the architect's certificate was not final. This is to be contrasted with the present case where, on the one hand, there is an absence of such material and, on the other, the decision sought to be set aside is a discretionary valuation.

60. Thirdly, the essential nature of the valuation under cl 14.2(b)(iv) is such that it must have been obvious when the contract was entered into that the nomination of the valuer was a matter of significant commercial importance. It must have been obvious that the appellant, irrespective of its *bona fides* and its capacity and willingness to act honestly and reasonably, might tend - if only by subjective sub-conscious attitudes - to favour its own interests over those of the respondent when making the discretionary judgments necessary to carry out the valuation. The respondent agreed, nevertheless, that it would be the appellant who would undertake the valuation. On the face of the contract this was an important part of the consideration received by the appellant for entering into the contract. It is true that the very fact of the appellant's appointment would be likely to be prejudicial to the respondent's interests. But the respondent agreed expressly to this. And by the ordinary principles of the law of contract, by agreeing to the appointment of the appellant as a valuer, the respondent is, subject to whatever else the contract may provide, bound by the appellant's valuation as long as it is given in terms of the contract.

The proposition that the appellant's determination was a "provisional" decision

61. The learned Judge was of the opinion that the appellant's determination under cl 14.2(b)(iv) "would be valid and binding, although provisionally". That is, the determination would be valid and binding, provided it was not challenged by the respondent invoking the arbitration clause. In this sense, his Honour drew an analogy with an interim certificate for payment issued by an architect under a building contract. This was the concept adopted by Lord Hoffmann in ***Beaufort Developments v Gilbert-Ash (NI) Ltd*** (at 705-706). His Honour said:

"In my opinion, the power conferred on the [appellant] to determine the value of the variation 'in its sole discretion' should the [respondent] and the [appellant] fail to agree on the value, does not confer a power on the [appellant] to make a conclusive determination of the [respondent's] right to payment. It is simply intended to confer on the [appellant] a power to unilaterally stipulate a value in the event of a disagreement and to give what Lord Hoffmann described as 'provisional validity' to that stipulation of value. If not challenged, it would determine the [respondent's] entitlement to payment as the work continued."

62. In my view, however, there is, with respect, a substantial difference between interim certificates, which are generally regarded as provisional in the sense explained by Lord Hoffman, and a determination as to the valuation of the variations. Interim certificates relate to payments, as it were, of instalments by the employer under a building or engineering contract, to be made as the work is progressing. They are "interim" as they provide the contractor with interim remuneration pending the final completion of the works. They are also plainly provisional as they can be adjusted by subsequent payments. A valuation of the entire amount of variations, on the other hand, is not in any sense an interim decision, or intended to be provisional in nature. It is intended to value the variations once and for all. In my opinion, the views expressed by Lord Hoffman as to interim certificates have no application to the task of determination under cl 14.2(b)(iv).

The phrase "in its sole discretion" as it is used elsewhere in the contract

63. The phrases "in its sole discretion" and "in its absolute discretion" and "in its discretion" appear in

several places in the contract, all applying to the appellant. It is difficult to obtain any guidance from these as there does not appear to be a consistency in their use. At times, as Mr Walker pointed out, they are used where the appellant affords the respondent a liberty, or the appellant is given an election to exercise alternative contractual rights. That function is to be distinguished from the function of the phrase "in its sole discretion" in cl 14.2(b)(iv). I accept that in some instances the phrases add nothing to the appellant's rights, as the exercise of power, in these instances, in any event, is not arbitrable. I think, however, that generally these phrases are intended either to emphasise that the exercise of power, which each qualifies, is not arbitrable, or to remove any doubt in this respect.

64. Clause 7 of the contract is an example of such a use. This clause obliges the respondent to provide a performance security of $1.5 million to the appellant. The clause stipulates that the security may take the form of a banker's undertaking issued "by a bank acceptable to the [appellant], in its absolute discretion". Had the phrase "in its absolute discretion" not appeared in cl 7 it would have been open to argument, I think, that it was implicit in the clause that the appellant was obliged to act reasonably when determining whether an undertaking was acceptable to it. Were such an obligation to be implied, it would be open to the respondent (on the ground of unreasonableness) to challenge a refusal by the appellant to accept an undertaking proffered to it, and to submit the dispute concerned to arbitration under cl 35(2). The insertion of the phrase "in its absolute discretion", however, makes it plain that the discretion whether to accept or reject the undertaking is that of the appellant alone, and a decision on its part in this respect would not be arbitrable.

65. Clause 12.5 is another example. The clause provides:

"Before making any payment to the [respondent] under this Agreement the [appellant] may require from the [respondent] a statutory declaration that all of the [respondent's] employees and all sub-contractors of the [respondent] engaged in the Works have been paid in full all amounts due to them as wages and allowances required to be paid under any statute, industrial agreement or award of a competent court or tribunal to the latest date at which such wages and allowances are payable and in default of receipts of the same, the [appellant] may *at its sole discretion* cease making payments to the [respondent] hereunder or reduce the amount of such payments until the [appellant] is satisfied that such payments have been made."

Thus the clause entitles the appellant to withhold payments of monies owing to the respondent if the respondent fails to give the appellant a statutory declaration to the effect that all the respondent's employees and sub-contractors have been paid in full to the date stipulated in the clause. Mr Walker described this clause as "an election or liberty being granted or reserved to the [appellant]." He said:

"It is a choice between ceasing making payments or reducing the amounts of payments until the [appellant] is satisfied that such payments have been made or, on the other hand, doing nothing about it and allowing the third parties to look after themselves, so there is a choice or a liberty been given to the [appellant]."

Mr Walker submitted that, in these circumstances, a decision by the appellant to cease making payments to the respondent would not be arbitrable even if the phrase "at its sole discretion" had not been inserted in the clause. The basis of this argument was that, even without the phrase, there would be no contractual restriction on the part of the appellant in "ceasing" payments if the circumstances conditioning such a right, as expressly provided by the clause, obtained.

66. In my opinion, however, it is at least arguable that without the phrase "at its sole discretion" there would again be an implied obligation upon the appellant to act reasonably in ceasing to make payments to the respondent. Take for example a notional case where litigation has ensued between the respondent and a sub-contractor as to the amount to which the sub-contractor is entitled "as wages and allowances". It is conceivable that, in such circumstances, the respondent may be uncertain as to whether the particular sub-contractor has "been paid in full all amounts due to [it] as wages and allowances required to be paid under any statute, industrial agreement or award ...". For that reason, the respondent may be unable to provide the appellant with the statutory declaration contemplated by the clause. If, on this ground, the appellant refused to make any payment to the respondent under the agreement, one might well anticipate that in the absence of the phrase "at its sole discretion", the respondent might attempt to mount an

argument that the appellant's power to cease making payments could only be exercised reasonably. Accordingly, it seems to me, the object of the phrase "at its sole discretion" is to remove any possible doubt on the issue. The phrase ensures that a decision by the appellant, to cease making payments to the respondent or to reduce the amount of such payments, is not arbitrable.

The phrase "in its sole discretion" as it is used in cl 14.2(b)(iv)

67. Clause 14.2(b) operates as follows. When variations of the kind referred to cl 14.2(b)(i) and (ii) have been effected and the appellant determines that the rates specified in the schedule of rates do not apply to the variations or are not appropriate to value them, then cl 14.2(b)(iv) is triggered. Clause 14.2(b)(iv) requires the value of the variation to be determined by agreement between the appellant and the respondent. If the parties fail to agree "then the [appellant] shall either determine such value in its sole discretion or direct that the variation be carried out as Daywork under cl 14.3".

68. It is to be noted that cl 14.2(b) appears to be derived from like clauses of standard form. It is similar to the clause considered in ***Hawker Noyes Pty Ltd v New South Wales Egg Corporation*** and to cl 40.2 of the standard form of contract NPWC3. According to *Building and Construction Contracts in Australia*, 2nd Ed, Dorter and Sharkey at para 3.160:

"NPWC3 was published in 1981 ... the initial letters stand for National Public Works Conference and the major use of the form is to be found on projects administered by Australian Construction Services in the Commonwealth sphere and the State public works departments."

Clause 40.2 of NPWC3 provides:

"A variation shall be valued in accordance with the rates included in the Priced Bill of Quantities or Schedule of Rates ... if and insofar as the Superintendent determines that those rates are applicable to the variation. Where the Superintendent determines that the rates included in the Priced Bill of Quantities or Schedule of Rates ... do not apply to a variation, the rate or price payable for the variation shall be determined by agreement between the Contractor and the Superintendent, but if a Contractor and the Superintendent fail to agree on the rate or price the Superintendent shall determine such rate or price as he considers reasonable or he may direct that the variation shall be carried as Daywork."

In substance, the difference between cls 14.2(b)(iii) and (iv) on the one hand, and cl 40.2 of NPWC3 on the other, is that, in the former, the appellant has been substituted for the superintendent, and the words "in its sole discretion" have been inserted.

69. In considering the meaning to be attributed to the phrase "in its sole discretion" in cl 14.2(b)(iv) itself, it is relevant to notice those parts of cl 14.2(b) not governed by the phrase. Firstly, the phrase has not been inserted in cls 14(b)(i) and (ii). This is quite understandable as there is no element of discretion involved in the decision as to whether a variation has the effects contemplated by these two sub-clauses. Secondly, the phrase has not been inserted in cl 14.2(b)(iii). Thus, a determination by the appellant that the rates specified in the schedule of rates do not apply to a variation, or that the rates are not appropriate to value the variation, is arbitrable. That is again understandable as there would be no discretionary element involved in such a decision. The inference from the aforegoing is that the insertion of the phrase in cl 14.2(b)(iv) - where it applies to what is essentially a discretionary judgment - is commercially comprehensible and quite deliberate.

70. Mr Walker submitted that, in cl 14.2(b)(iv), the phrase means merely "[the appellant] alone". In other words, he argued that its purpose was to emphasise that it is the appellant alone who is empowered to determine the value. But, if that were to be the meaning, the phrase would be entirely irrelevant. Lord Hoffman in ***Beaufort Developments Ltd v Gilbert-Ash Ltd*** noted (at 866), in a different context, "that the argument from redundancy is seldom an entirely secure one". The use of the phrase in the clause in question, however, is particularly pointed (particularly having regard to its omission in cl 14.2(b)(iii), and its insertion elsewhere in the circumstances I have mentioned) and I think it has to be given some independent and additional meaning.

71. It seems to me that the appropriate meaning to be attributed to the words in question is their ordinary meaning. That is, the appellant is the sole person empowered to make the discretionary judgment

necessary to value the variations. If that is right, then by the contract, no other party can make such a judgment.

72. Accepting Lord Hoffman's warning in ***Beaufort Developments Ltd v Gilbert-Ash Ltd*** (at 868) that it should not readily be assumed that the contractor would agree to be bound by the proprietor's decisions subject only to a challenge on the grounds of bad faith or excess of power, the fact is that one has to give effect to the plain meaning of the contract. In my opinion, the plain meaning of the relevant part of cl 14.2(b)(iv), to paraphrase Lord Hope in ***Beaufort Developments Ltd v Gilbert-Ash Ltd*** (at 883), is that the sole means of establishing the value of variations, in the circumstances stipulated, is the determination by the appellant.

The meaning of the arbitration clause

73. Clause 35 relevantly provides, by sub-cl 35.2:

"Either Party may in the event of a dispute between the Parties in respect of any aspect of this Agreement or its performance or non-performance appoint a single arbitrator agreed by the Parties ..."

The clause goes on to provide for an arbitrator in default of agreement.

74. Under cl 35.2, the arbitrator is empowered only to resolve disputes "in respect of any aspect of this agreement or its performance or non-performance." A provision in these terms, it seems to me, confers no greater power on the arbitrator than a court would be able to exercise had there been no arbitration clause. In other words, the arbitrator is empowered only to make whatever orders would fall within the jurisdiction of a court. It is noteworthy that the clause does not expressly give the arbitrator the often seen power to "open up, review and revise" any opinion or certificates or decision of the appellant. In my view it does not impliedly do so, either. Thus, if a party asserts a claim based other than on its contractual rights or a breach of the other party's contractual obligations, the arbitrator has no power to resolve a dispute which may in consequence arise.

75. Accordingly, in my view, the arbitration clause (and the contract as a whole) does not give the arbitrator power to set aside the appellant's decision on the grounds pleaded in the arbitration or referred to in argument in this court.

The arbitrator's power to substitute his determination for that of the appellant

76. It is necessary to bear in mind that a distinction must be drawn between the criteria for reviewing the valuation, on the one hand, and substituting the decision of the reviewing tribunal for that of the valuer, on the other. The criteria for reviewing a non-discretionary valuation differ from those applicable to a discretionary valuation. Entirely different criteria apply to the question whether it is open to the court, once it has set aside the valuation, to substitute its own decision for that held to be nugatory.

77. I have expressed the opinion that the arbitrator is only entitled to set aside the valuation determined by the appellant on the grounds on which a court could do so, and such grounds are limited to the extent I have stated. Of course, unless the valuation can so be set aside, the arbitrator could not substitute his decision for that of the appellant.

78. But what happens if the decision is properly set aside on those grounds? Is the arbitrator empowered only to return the matter to the appellant for its decision again? Is this the effect of the phrase, "in its sole discretion", in cl 14.2(b)(iv)?

79. In my view, guidance to this question is to be obtained by asking what would the position be if the appellant wrongfully refused to make a determination at all under cl 14.2(b)(iv)? Were that to occur, it seems to me, the court would make a determination itself: see for example ***Brodie v Cardiff Corporation*** and ***Neale v Richardson***. The court would assume that, once the appellant had abnegated its duties by refusing to make an order, it would be the respondent's implied right under the contract to have the variations valued by the court.

80. Applying this reasoning to a case concerning a contract in the same terms as that presently under

consideration, but without an arbitration clause, and assuming the proprietor makes a valuation that does not conform with the contract - so that it is properly set aside, it seems to me that the contractor would be entitled to have the variations valued by the court.

81. I do not think that the words "in its sole discretion" would prevent this result. True it is that it would be the proprietor's right, in the first instance, to determine the value itself, alone. But should its valuation be in breach of the contract, it seems to me that the contractor could claim an order from the court, declaring the value of the variations in question. Having breached the clause by valuing otherwise than required by the contract, the proprietor would not be entitled to perform the valuation again. If in a similar case the contract concerned provided for disputes thereunder to be resolved by arbitration, the arbitrator would have the same powers as the court.

The answers to the questions posed

82. For the sake of convenience, I shall repeat the questions that have to be answered. They are:

"2. Whether, and to what extent, the basis upon which the value may be determined is affected by the provision in cl 14.2 that the valuation by [the appellant] is to be made 'in its sole discretion'."

And:

"4. Whether, and to what extent, the arbitrator has the power to substitute his own valuation for the valuation made by [the appellant]."

The two questions relate to each other and, as framed, are difficult to answer separately. Like the learned Judge, I shall give a combined answer to them. That answer is in four parts. It is as follows.

83. Firstly, even without the phrase, "in its sole discretion", the very nature of the valuation task undertaken by the appellant under cl 14.2(b)(iv) has the effect that the appellant's determination can only be challenged on grounds directed to the appellant's obligations to act honestly, *bona fide* and reasonably, or on any other ground on which it could be said that the valuation was not in accordance with the contract (in the sense explained by McHugh JA in ***Legal and General Life of Australia Ltd v A Hudson Pty Ltd***), or on a ground based on the remarks of Mason J in ***Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*** to which I have referred.

84. Secondly, the contract as a whole, and the arbitration clause in particular, does not confer any powers on the arbitrator additional to those which a court would enjoy. Thus, the other provisions of the contract do not alter the conclusion set out in the preceding paragraph.

85. Thirdly, the effect of the phrase "in its sole discretion" in cl 14.2(b)(iv) is to reinforce the previous two conclusions.

86. Fourthly, if the appellant's valuation is properly set aside, the arbitrator may substitute his valuation for that of the appellant.

87. Accordingly, I would uphold the appeal, set aside the answers previously given to the two questions, and substitute answers as indicated above.

88. **WHITE J**: I have read the reasons to be published by Ipp J. I agree with his Honour's reasons and have nothing to add.
