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94 Paragraphs

GOLDSPAR AUSTRALIA PTY LTD v COUNCIL OF THE CITY OF SYDNEY - BC200104632

SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL
BEAZLEY, STEIN AND GILES JJA

CA 40632/00

26 June 2001, 2 August 2001

Goldspar Australia Pty Ltd v The Council of The City of Sydney [**2001] NSWCA 246**

CONTRACT FOR EXPERT DETERMINATION -- whether expert did not make determination in accordance with the contract -- submission that figure in determination could be seen from materials provided to expert to have left out significant part of what he had to determine -- counter submission that for a number of reasons a coincidence in figures did not so indicate -- question of fact -- departure from contract not made out

PRACTICE -- contract for expert determination -- determination in part relied on and in part challenged as above -- on appeal sought to argue that contract itself void on public policy grounds -- argument forshadowed prior to trial but abandonned -- whether should be permitted to raise it on appeal -- not expedient and in the interests of justice -- could not be raised

EVIDENCE -- discretion to exclude -- danger of undue waste of time -- slight probabtive value -- likely to lead to evidentiary blow out -- discretion not shown to have erred

Legislation cited:

Evidence Act 1995 (NSW) s55, s59, s60, s72, s135

Beazley JA

[1] I agree with Giles JA.

Stein JA

[2] I agree with Giles JA.

Giles JA

[3] The principal question in this appeal was whether an expert's determination was not made in accordance with the terms of the contract by which the expert was appointed to make the determination. There were two subsidiary questions. The first, which would give rise to a more fundamental question if answered favourably to the appellant, was whether the appellant should be permitted to argue that the contract by which the expert was appointed was void and unenforceable because ousting the jurisdiction of the court. The second was whether evidence said to be material to the decision of the principal question had been wrongly excluded.

The contract for expert determination

[4] In June 1997 the respondent invited tenders for the design, manufacture and supply or supply and installation of multi function street poles. The appellant submitted a conforming tender and a non-conforming tender.

[5] On 28 August 1997 the respondent informed the appellant that it had resolved to accept the non-conforming tender subject to satisfactory resolution of certain issues. On 18 September 1997 the appellant gave "notice of acceptance" of the letter of 28 August 1997 and recorded resolution of some of the issues. A form of conditions of contract was prepared and sent to the appellant, and on 29 May 1998 the conditions of contract were initialled on behalf of the appellant. This seems to have left the contractual position unclear.

[6] The appellant began to supply street poles. Disputes arose, which the appellant referred to arbitration in accordance with the conditions of contract.

[7] It was then agreed that the arbitration process should be suspended, that the appellant should submit to the respondent what was called a consolidated log of claims, and that the parties should endeavour to resolve the disputes by negotiation with a "back up mediation or expert determination process". On 3 November 1998 the appellant provided its consolidated log of claims to the respondent. Presumably because negotiation did not resolve the disputes, on 23 November 1998 the parties agreed by deed to submit their disputes to Mr John Morrisey for determination as expert.

[8] So far as presently material, by the deed the appellant and the respondent agreed that they would "refer to the Expert disputes between them arising out of or in connection with the Contract to be identified in the parties [sic] submissions to the Expert", and that "[t]he determination of the Expert will be conducted in accordance with the Guidelines for Expert Determination published by the Australian Commercial Disputes Centre" with certain amendments. The guidelines provided in cl4 for the signature of "an Expert Determination Appointment Agreement which sets out the terms of the Expert Determination" and that "the terms of the Expert Determination Appointment Agreement are consistent with these guidelines". They also provided in cl8(b), which the deed said "may not be amended for any reason" -

"(b) The determination of the Expert is final and binding . Unless otherwise agreed by the parties, the Expert shall not give reasons for the determination."

[9] On 24 November 1998 the appellant, the respondent and Mr Morrisey signed the Expert Determination Appointment Agreement, using a printed form with deletions and additions. So far as presently material, it provided (the deletions are indicated, the additions are italicised and the misspelling of Mr Morrisey's name is preserved) -

"A. That the parties here by request [*name*] ("*the consultant*") *John Morresey "Expert* "to determine the matters in dispute *arising out of or in connection with the contract to be identified in the parties submissions to the Expert, outlined in the notice of dispute dated [date] annexed to this agreement* by issuing a certificate stating his determination, and the consultant by signing his acceptance of this agreement agrees to comply with such request in accordance with the terms of this agreement.

B. The consultant in so determining and certifying -

(i) will act as an expert and not as an arbitrator,

(ii) will proceed in such manner as he thinks fit without being bound to observe the rules of natural justice or the rules of evidence;

(iii) will take into consideration all documents, information and other written and oral material that the parties place before him including documents, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute;

(iv) will not be expected or required to obtain or refer to any other documents information or material but may do so if he so desires,

(v) will without giving reasons issue a certificate in such form as he considers appropriate stating his determination of the matters in dispute;

(vi) will act with expedition with a view to such certificate being issued as soon as practicable.

C. ...

D. The parties agree to accept the determination in the said certificate as final and binding."

The Determination

[10] In the period from 30 November 1998 to 28 April 1999 much material was provided to Mr Morrisey (hereafter, "the expert"). He received a log of claims from the appellant and numerous substantive submissions from the appellant and from the respondent in reply; calculations in the form of spread sheets and otherwise; solicitors' letters; and much else. He heard evidence and took oral submissions over twelve days. It will be necessary to refer to some, but mercifully little, of the materials before the expert.

[11] On 15 January 1999 the expert made a consent determination that the contract relating to the street poles comprised seven documents identified in the determination.

[12] On 19 January 1999 the expert made a consent determination as to seven of the appellant's claims. As to six of the claims money was to be paid by the respondent to the appellant, and as to one of the six the appellant was to act in certain ways; as to the seventh claim, nothing was to be paid.

[13] On 9 February 1999 the expert made a consent determination as to the number and type of street poles which had been delivered as at 20 November 1998 (a total of 269), as to the amount which had been paid to or on behalf of the appellant ($2,455,292.35) and as to the number and type of street poles "currently being delivered by [the appellant] to fulfil the current order" (a total of 251). It was recorded that the overall number of street poles was 520 and that "the parties authorised Mr Morrisey to determine the dispute identified to date, by reference to all 520 poles".

[14] On 3 May 1999 the expert made his final determination. It read -

"WHEREAS

1. By agreement for binding expert determination dated 24 November 1998 made between the Council of the City of Sydney and Goldspar Australia Pty Ltd disputes have arisen between them as to certain matters arising out of or in connection with the contract which have been identified in the parties' submissions to the expert, a copy of the agreement being attached hereto and marked with the letter A (two pages).

2. The contract has been agreed and determined. A copy of the same, dated 15 January 1999, is attached hereto and marked with the letter B (one page)

3. By agreement of the parties, a determination was made on 19 January 1999 in relation to certain claims. A copy of

the same is attached hereto and marked with the letter C (five pages).

4. By agreement of the parties, a determination was made on 9 February 1999 in relation to certain matters. A copy of the same is attached hereto and marked with the letter D (three pages).

5. After taking into account the determinations referred to above, I hereby determine and certify as follows:

. Value of work	$4,362,588.00
. Less paid	$2,455,292.35
	$1,907,295.65
. Less retention	$ 120,456.95
. To be paid	$1,786,838.70"

The first subsidiary question

[15] In the proceedings below the appellant did not challenge the validity or enforceability of the contract for expert determination. By its summons it sought an order for payment of nearly $1.5 million "in accordance with the determinations made by [the expert] on 3 May 1999 and 19 January 1999"; declarations as to the scope of the determination of 3 May 1999; a declaration to the effect that some of the work under the contract was not within the contract for expert determination; and alternatively to the order and the preceding declarations a declaration that the determination of 3 May 1999 was not made in accordance with the contract for expert determination, did not validly determine the disputes referred to the expert for determination, and was not binding on it. The order rested upon the validity and enforceability of the contract for expert determination. The various declarations did not engage the validity or enforceability of the contract for expert determination, but rather engaged what had been determined and the way the contract for expert determination had been performed. Thus the appellant either relied on or accepted the validity and enforceability of the contract for expert determination.

[16] Payment in accordance with the determinations seems to have fallen away because payment had been or was made. The declaration that some of the work under the contract was not within the contract for expert determination fell away when the scope of the determination required of the expert became common ground in the course of the hearing. The determination purported to resolve all matters under the contract. The appellant maintained that the expert had erroneously left out of account claims to the value of $1,148,512.80, and there was left as the question for the trial judge whether the determination was not binding on the appellant because the expert had made that error, and thereby had not made the determination in accordance with the terms of the contract for expert determination. The trial judge held that it had not been shown that the expert departed from the terms of the contract for expert determination.

[17] The appellant's notice of appeal included the ground of appeal -

"4. His Honour should have found that the agreement between the parties that the Expert's Determination was final and binding, was void as contrary to public policy being an impermissible ouster of the jurisdiction of the Court."

[18] There had been no such question in the proceedings below, and the trial judge had not been asked so to find. Moreover, in a draft amended summons circulated some weeks before the hearing the appellant had sought a declaration that the contract for expert determination was void as against public policy, but it had withdrawn the proposed amendment after the respondent had indicated that, should leave be given to amend the summons, it would cross-claim to recover its costs of the expert determination process. It was accepted by the appellant in the appeal that it had

considered contending that the contract for expert determination was void and unenforceable, had foreshadowed doing so, but had decided not to do so.

[19] The respondent submitted that the appellant should not be permitted to rely on the ground of appeal. After hearing argument the Court ruled that the appellant could not rely on it, with the reasons for the ruling to be provided together with the reasons in the substantive appeal.

[20] In University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481 at 483 the High Court said -

"It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence he failed to put during the hearing when he had and [sic] opportunity to do so."

[21] As was noted by Mason P in Multicon Engineering Pty Ltd v Federal Airports Corp (2000) 47 NSWLR 631 at 645, this was not said in relation to an appeal, let alone an appeal by way of rehearing. It was said in relation to an application to vary an order made on appeal, in substance to reopen the appeal. But in Coulton v Holcombe (1986) 162 CLR 1 at 8 Gibbs CJ and Wilson, Brennan and Dawson JJ cited the passage for a principle operating in relation to an appeal by way of rehearing, and as a principle it has universal force.

[22] In Multicon Engineering Pty Ltd v Federal Airports Corp, in which his Honour's reasons had the agreement of Gleeson CJ and Priestley JA, Mason P referred at 645 to the principles relevant to an appeal by way of rehearing to be found in cases such as Suttor v Gundowda Pty Ltd (1950) 81 CLR 418 at 438 and Coulton v Holcombe at 7-9, whereby a party seeking to advance for the first time on appeal a new ground not taken at trial will be precluded from doing so if the new ground could possibly have been met by calling evidence at the hearing or if, had the ground been raised below, the respondent might have conducted the case differently at trial. His Honour continued at 645-646 -

"However there is another principle of more direct relevance. A party does not have a right to insist that a new point be decided on appeal simply because all of the facts have been established beyond controversy or the point is one of construction or of law, even constitutional law. This is because it remains a question of whether the appellate court "may find it expedient and in the interests of justice to entertain the point": Water Board v Moustakas (1988) 180 CLR 491 at 497; see also Jones v Minister for Immigration and Ethnic Affairs (1995) 63 FCR 32 at 47. The rule is not an absolute one, as evidenced by this Court's decision in Della Patrona v Director of Public Prosecutions (Cth) [No 1] (Court of Appeal, 1 September 1995, unreported). Unlike the present case, the respondent in Della Patrona failed to raise the "procedural point" until long after the appellant had been given leave to debate it. This was a very important factor in the Court's consideration. For later proceedings in the same case: see Della Patrona v Director of Public Prosecutions (Cth) [No 2] (1995) 38 NSWLR 257. However:

'... it is a sound general principle, leading not only to the maintenance of fair play, but also to the repression of unnecessary litigation, that parties must be bound by the course they deliberately adopted at the trial': Rowe v Australian United Steam Navigation Co Ltd (1909) 9 CLR 1 at 24, per Isaacs J; see also Browne v Dunn (1893) 6 R 67 at 75; Banque Commerciale SA (In Liq) v Akhil Holdings Ltd (1990) 169 CLR 279 at 284.

In Coulton (at 7), Gibbs CJ, Wilson J, Brennan J and Dawson J said that:

'It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

[23] In Multicon Engineering Pty Ltd v Federal Airports Corporation the appellant had obtained an order for reference pursuant to Pt72 of the Supreme Court Rules 1970. The reference had been lengthy and expensive. The referee's report was unfavourable to the appellant. The appellant wished to argue on appeal that, for constitutional reasons, the judge before whom the report came and who had adopted it should not have approached his role in accordance with the

principles expounded in Super Pty Ltd v SJP Formwork (Australia) Pty Ltd (1992) 29 NSWLR 549, but had been obliged to reconsider and determine afresh all issues which the appellant wished to have so determined. This had not been put to the judge. The appellant contended that it was not precluded from raising the constitutional points on appeal when the evidence on which the parties wished to rely was before the court.

[24] The submission was rejected on the wider principle explained by Mason P. His Honour said at 646 -

"In the present case it would not be "in the interests of justice" to permit Multicon Engineering to repudiate on appeal the stance it adopted at all stages in the trial. That would make it a classical case of a party having elected to fight on one basis, and lost, seeking a new trial to be allowed to fight it on another basis. To say nothing about a significant waste of judicial resources, payment of the costs thrown away (which Multicon Engineering offers) would not remedy the injustice that would flow if a party that invited the Court to exercise the powers conferred by r13 as expounded in Super (and which, in some of the remaining grounds of appeal, complains of failure to do so) now to adopt the position that there was no power to do this in the first place."

[25] After further discussion, in which he contemplated circumstances in which the appellant's ability to argue the constitutional points on appeal might not have been foreclosed, his Honour concluded at 647 -

"There are many circumstances where the law will afford a locus poenitentiae to a party who makes a procedural slip or takes a wrong turn in tortuous litigation. But there comes a time in any litigation where a party has gone so far in one direction that it would be unjust to allow that party to commence a second run at the same target. In the present case that time is past. Lord Atkin's aphorism that "finality is a good thing but justice is a better" (Ras Behari Lal v King-Emperor (1933) 50 TLR 1 at 2) raises a false dichotomy if finality is not seen as an aspect of justice."

[26] The wider principle was taken up and applied in this Court in Chilcotin Pty Ltd v Cenelage Pty Ltd (1999) NSWCA 11. With particular reference to the test of it being expedient and in the interests of justice to entertain the point, it was said at [18] -

"As always, the particular circumstances must be considered, with due recognition that mistakes occur, that second thoughts are sometimes good thoughts, and that the appellant is entitled to justice; but extending justice to an appellant who has failed to take a point at the trial may work an unacceptable injustice on the respondent."

[27] In the present case the appellant was a participant in the adoption of the expert determination process. The adoption of the process was consensual, and it must have considered that the process was in its interests. While it might have been entitled to do so at an earlier time, there is incongruity in the appellant now challenging the validity and enforceability of the process it adopted when the outcome is not to its liking.

[28] The appellant went further. It relied on the determination resulting from the process for the order sought in the proceedings, and even when alleging that the expert had not acted within the contract for expert determination it accepted the validity and enforceability of the contract. It deliberately did not include a challenge to the validity and enforceability of the contract for expert determination, and made known to the respondent that it had taken that decision. Only when the applicant failed in the proceedings below did it challenge the validity and enforceability of the contract for expert determination through the ground of appeal earlier set out.

[29] Much was done by the respondent, and much money must have been spent, in carrying out the expert determination process. It would be wrong to see this only as expenditure of money, because the respondent must have devoted considerable resources to the matter. Considerations closely analogous to those in Multicon Engineering Pty Ltd v Federal Airports Corp come into play. In my opinion regard to the finality of litigation, indeed of dispute resolution more generally, to the need for parties fully to present their cases at first instance, and to justice to the respondent required that the appellant not be permitted to rely on the ground of appeal.

The principal question

[30] Logically the second subsidiary question arises before the decision of the principal question, since it is concerned with proof of departure from the terms of the contract for expert determination. I have concluded that there was no material evidentiary error. The second subsidiary question will be better understood after discussion of the principal question, and I will therefore give my reasons for that conclusion after addressing the principal question.

[31] The parties were in agreement that the principal question was to be decided in accordance with the test as described in Legal and General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314 at 335-336 and Holt v Cox (1997) 23 ACSR 590 at 597. The respondent did not submit that, in answering the question, regard could not be had to evidence going beyond the determination itself in enquiring into what the expert had done (cf the discussion in Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd (2001) NSWSC 405).

[32] In the first of these cases, a valuation case, McHugh JA said at the identified pages -

"In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in Baber v Kenwood Manufacturing Co Ltd [(1978) 1 Ll R 175] (at 181). A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that three has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It 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. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is 'final and binding on the parties'. By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. It is now settled that an action for damages for negligence will lie against a valuer to whom the parties have referred the question of valuation if one of them suffers loss as the result of his negligence: Sutcliffe v Thackrah [1974] AC 727; Arenson v Arenson [1977] AC 405. But as between the parties to the main agreement the valuation can stand even though it was made negligently. While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But 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 a 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 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."

[33] In the second of the cases, also a valuation case, Mason P noted at 595 the common ground that a valuation was binding upon the parties unless it could be demonstrated that it was not made in accordance with the contract, referring to Legal and General Life of Australia Ltd v A Hudson Pty Ltd and a number of decisions which had followed the reasoning in that case. His Honour said at the pages earlier identified -

"A close reading of McHugh JA's judgment in Legal & General indicates that his Honour was not propounding the view that a valuation will stand regardless of error. Rather he was making the point that mistake is not itself a ground of vitiation: see also Wamo Pty Ltd v Jewel Food Stores Pty Ltd (1983) ANZ Conv R 50. a valuation may contain factual error or embody consideration of matters which should not have been taken into account, but it does not follow that the result is outside that which the contract contemplated would be within the realm of determination by the valuer. As McHugh JA makes plain, '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 he point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value' (emphasis added). The statement in the next sentence ('Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account') must be read in the

same context. His Honour is not saying that these matters are never relevant. Rather he is saying that they are not relevant if the valuation was in accordance with the terms of the contract.

I have already mentioned Sir Frederick Jordan's apophthegm about 'mistakes and mistakes'. It was uttered in a mandamus case. It seems to me that administrative law provides a useful analogy in the present context. There, the decision maker has an area within which he or she may make mistakes, even conferred, or exposing the decision to quashing. It is only those mistakes which involve a failure to address something which the statute requires to be taken into account that will expose the decision to judicial review on jurisdictional grounds: Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363 at 385 (Deane J); Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39; 66 ALR 299. The criteria of discrimination between 'mistakes and mistakes' are not determinable in advance: cf R v Australian Broadcasting Tribunal; Exparte 2HD Pty Ltd (1979) 144 CLR 45 at 49; 27 ALR 321."

[34] As I have indicated, the declaration that some of the work under the contract was not within the contract for expert determination fell away when the scope of the determination required of the expert became common ground in the course of the hearing. It is unnecessary to describe why or how this occurred. As recorded by the trial judge, the parties became agreed that the terms of the contract for expert determination required the expert to determine "the dispute between the parties identified by them in the Determination of February 1999 concerning the value of all work in relation to 520 poles including accessories and variations to them". That is, the expert was not to determine some only of the appellant's claims, or the appellant's claims by reference only to the street poles delivered as at 20 November 1998. He was to determine all claims as to all 520 street poles including those being delivered as at 9 February 1999.

[35] Once the expert had to address all claims as to all 520 street poles, and in his determination purported to resolve all matters under the contract, in order to pursue the claims to the value of $1,148,572.80 which it maintained he had left out of account the appellant had to contend that the determination was not binding on it. At the trial and on appeal it was common ground that, if the expert had left the claims to the value of $1,148,572.80 out of account, he had not made his determination in accordance with the terms of the contract for expert determination. It is unnecessary to consider whether this was a correct assessment of the application of the test as described in Legal and General Life of Australia Ltd v A Hudson Pty Ltd and Holt v Cox. The parties' assessment should be accepted for the purposes of the proceedings.

[36] The claims in question had a pedigree in the materials before the expert, but were last encapsulated with the value of $1,148,512.80 as some of the claims in a spreadsheet provided by the appellant to the expert on 28 April 1999. It seems that the spreadsheet was not provided to the respondent, as it should have been, but that was not a matter of which the respondent complained. It was the last of a number of spreadsheets provided in the same format, and on the evidence of Mr Anthony Barnes of the appellant was intended to summarise the appellant's claims.

[37] In the first two thirds of the spreadsheet there were set out claims for "Schedule Poles Supply and Installed", for each of type A poles, type B poles, type C poles, type D poles and type AB poles. There were for each type of pole a base cost per pole "at Tender Schedule of Prices" and items for variations and extra costs per pole of different kinds. These ingredients brought a sub-total per pole for each type of pole. There were then deductions for each type of pole for erection by the respondent. The number of poles was stated for each type of pole, and extensions for each type of pole were carried to a column "Value of Work to Date". The total value with respect to all types of poles, with a stated a total number of 520 poles, was $4,306,601.26.

[38] There followed in the remaining third of the spreadsheet two headings "Manufacture and Supply of Schedule of Rates Items" and "New Products Not Included in Tender", each with a number of items or products beneath it. Schedule rates for each of the schedule of rates items were set out, and in another column figures for "Goldspar Claim". Figures were set out in the same column for each product. The numbers of items or products were stated, and there were extensions for each item or product to the Value of Work to Date column. The total figure for all items and products under the two headings was $1,148,512.86.

[39] The next two lines in the Value of Work to Date column were -

"Total	$ 5,455,114.12
CPI	$ 55,796.69"

The "Total" was mathematically the addition of the $4,306,601.26 and $1,148,512.86. The CPI figure represented the appellant's escalation claim.

[40] The appellant's substantive argument for departure from the terms of the contract for expert determination, subject to the two supporting arguments to which I will come, was as follows.

[41] The expert determined "value of work" of $4,362,588.00. The figure of $4,306,601.26 in the spreadsheet plus the CPI figure of $55,796.69 came to a total of $4,362,397.95. However, the CPI figure of $55,796.69 was the same as the CPI figure for 519 poles shown on a previous spreadsheet. It was necessary to add a CPI figure for a further pole, and materials earlier provided to the expert by the appellant asserted a CPI figure for the last of the poles supplied or to be supplied of $190.93. Adding this to the $4,362,397.95 brought an amount of $4,362,588.88. If the 88 cents were ignored, this was the value of work as determined, namely, $4,362,588.

[42] It should be concluded, according to the argument, that the expert had arrived at the value of work of $4,362,588.00 in that way, that is, by taking from the spreadsheet the figures for Schedule Poles Supply and Installed and CPI and adjusting the CPI figure by an additional CPI amount appropriate to the 520th pole. In doing this, it was said, the expert left out of account the claims in the spreadsheet under the headings "Manufacture and Supply of Schedule of Rates Items" and "New Products Not Included in Tender" to the value of $1,148,512.86.

[43] In relation to the same argument the trial judge referred at one point to "an uncanny coincidence in the ability of the plaintiff to add together 1, 2, and 3 in the manner earlier referred", and the expression "uncanny coincidence" was repeated many times in the appellant's submissions in the appeal. I doubt that the emphasis on the expression, which clearly enough came into his Honour's vocabulary from the appellant's submissions, was of assistance. Coincidence requires two things that coincide. In the present context one is the amount of $4,362,588.88 at which the appellant arrived by adding together the three figures of $4,306,601.26, $55,796 and $190.93, and the other is the figure of $4,362,588.00 in the determination. To describe the similarity as a coincidence means no more than that the figures are similar. To describe it as an uncanny coincidence risks begging the question, by starting from the position that the similarity was because the expert had arrived at the value of work figure in the same manner the appellant arrived at its amount. The appellant's argument, of course, was that the coincidence called for the inference that the expert had done this. The word "uncanny" was part of its argument, but the trial judge was not satisfied that the coincidence went beyond hypothesis or conjecture and matured into an inference capable of forming the basis of a finding of fact.

[44] In a supporting argument not put to the trial judge the appellant referred also to the "less retention" figure of $120,456.95 in the determination. It argued that the expert's task had not included arriving at a retention amount, but he had done so; further, it could be seen that he had done so erroneously. The point of the argument was that, if the expert had taken on a task beyond that required of him, and then got it wrong, it should more readily be accepted that he had erred in departing from the contract for expert determination in determining the value of work figure. The appellant said that the fact that the expert had acted in this way was relevant within s55 of the Evidence Act 1995 (NSW) in that it could rationally affect the assessment of the probability of departure from the contract for expert determination in determining the value of work figure.

[45] The respondent accepted that the expert went beyond the task required of him in determining the retention amount. In my opinion, however, little significance should be attached to the fact that he did so.

[46] The contract for expert determination was imprecise: to repeat, it spoke of "the matters in dispute arising out of or in connection with the contract to be identified in the parties submissions to the expert". The respondent accepted that the submissions to the expert did not identify a dispute over retention. On one view, the contract for expert

determination called only for determination of discrete disputes over amounts claimed by the appellant to be payable but disputed by the respondent. But it was clear that the parties intended that, whether or not it was strictly required by the contract for expert determination, the expert should arrive at an overall value of work which would include undisputed amounts payable by the respondent to the appellant. Mr Barnes agreed in the evidence earlier referred to that he expected the expert, in arriving at his value of work figure, to take into account items which were in agreement and items which were not in agreement. Further, as is apparent from the determination of 19 January 1999 and more particularly the determination of 9 February 1999, what had been paid under the contract for the street poles was taken to be part of the expert's task even if not itself a matter of dispute, and without being confined to payment for items in dispute. The expert's task as conceived at the time was in fact wider than the terms of the contract for expert determination might have suggested.

[47] In the circumstances it is understandable that, although not in terms part of his task, after expressing his determination as a value of work figure less payments the expert should have gone on, either in order to avoid misinterpretation that the entire balance was immediately payable or simply following routine industry practice, to state a retention amount and express an amount which was immediately payable. To the extent he went beyond his task, it really says nothing as to the departure from the contract for expert determination necessary for the appellant's substantive argument.

[48] Before the trial judge neither party had been able to offer an explanation of the calculation of the retention amount. This perhaps was why the supporting argument was not put to the trial judge. The appellant proffered an explanation on appeal.

[49] The contract for the supply of the street poles provided for retention of 5 per cent of the contract sum. The contract sum was relevantly defined as the contract sum where the respondent accepted a lump sum or the sum ascertained by calculating the products of rates and quantities, in each case excluding any additions or deductions required to be made. The retention amount of $120,456.95 in the determination was mathematically 5 per cent of $2,409,139. The appellant's non-conforming tender had put forward $143,905 for set up, $955,117 for supply of 180 street poles with footings and installation by others, $1,310,117 for supply and installation of the same street poles with footings by others, and rates for the supply and installation of further street poles. The three lump sums totalled $2,409,139. The appellant submitted that it should be inferred that the expert had calculated the retention amount as 5 per cent of the total of these lump sums, and that he had erred in doing so: first, because the figures were for 180 street poles only, not the 520 poles the subject of the determination; and secondly because, although it was not plainly stated, the second and third figures were necessarily alternatives.

[50] The respondent accepted that the appellant had "demonstrated ... as a matter of probability" that the expert was not correct in his calculation of the retention amount. The error was potentially of more significance than arriving at a retention amount at all, in that it was an egregious error not understandable as a benevolent or routine addition to arriving at the value of work figure. But what might it signify?

[51] The respondent submitted that neither arriving at the retention amount nor getting it wrong assisted the appellant's argument for departure from the terms of the contract for expert determination in determining the value of work figure. That the expert addressed an irrelevant matter did not vitiate his determination of the relevant matter. The demonstrated error was not as to the value of work, and the fact that an error was made did not by itself or in conjunction with anything else support the error essential for an affirmative answer to the principal question. The respondent said that the supporting argument was no more than that the expert had a propensity to make mistakes, but that reasoning of that kind was impermissible and in any event a propensity had hardly been established.

[52] In my opinion the supporting argument in this respect provides but little support for the appellant. The appellant correctly did not put it as a propensity argument - if there is such a thing as a propensity to make mistakes, error in relation to the retention amount was not enough to establish propensity. What happened in relation to the retention amount is a beneficial reminder that experts can make mistakes, and an indication that the expert on a discrete subject

may not have had the mastery of the subject otherwise to be expected. I am content to have the reminder and the indication in mind when considering the possibility or probability that the expert's mastery of the materials before him in arriving at the value of work was wanting and he made the error for which the appellant contended.

[53] For a further supporting argument not put to the trial judge the appellant proffered a calculation which it said demonstrated that it had an indisputable entitlement to be paid $4,801,558.38. There were three components in the calculation. The first was said to be a calculation of rates and quantities in relation to undisputed items from the respondent's non-conforming tender. The second was a tabulation of amounts said to have been agreed between the appellant and the respondent in relation to disputed items in the course of the determination and in correspondence between them. The third was a tabulation of amounts said to have been offered by the respondent in relation to disputed items where agreement had not been reached. To this was added the CPI adjustment of $55,796.89. The appellant argued that, if it had the indisputable entitlement, there must have been error in the expert's determination of a lesser amount as the value of work.

[54] The respondent took issue with the calculation, and said also that if the argument had been raised before the trial judge it would have had the opportunity to meet it by evidence, rather than be required to challenge a calculation lately constructed from incomplete materials. In my opinion there was substance in both these responses to the argument. I am not satisfied that the appellant's calculation was soundly based, and it is sufficient that, without going through the figures, I consider that the respondent demonstrated that significant components of the calculation of rates and quantities in relation to allegedly undisputed items were in fact in dispute. It is otherwise sufficient to refer to the principles in Suttor v Gundowda Pty Ltd and Coulton v Holcombe to deny the argument to the appellant.

[55] To return to the appellant's substantive argument, it must be remembered that in this case the principal question is a question of fact. The appellant must establish on the balance of probabilities that the expert arrived at the value of work in the manner put forward in the argument, and thereby left out of account the claims to the value of $1,148,512.86.

[56] It could not lightly be found that the expert arrived at the value of work in the manner suggested. It is inherently improbable that he would have taken the figure for street poles supplied and installed from the first two-thirds of the spreadsheet page, passed over the two subsequent headings and the figure produced under them, ignored the "Total" figure which clearly showed that what was under the two headings was additional, and then taken the very next CPI figure. I bear well in mind the reminder and indication in the appellant's supporting argument. The improbable occurs. But the scale of improbability in relation to value of work to my mind is much greater than in relation to the retention amount. If the appellant's argument be correct, the expert did not just add something irrelevant to his prescribed task and in doing so misread a contract on a matter on which he had not received submissions. He inexplicably left out of account claims to a large sum of money clearly apparent from the spreadsheet and the subject of extensive submissions.

[57] The appellant said that arriving at the value of work in the manner suggested was really not inexplicable. The explanation, it suggested, was that a number of the claims in the spreadsheet under the headings "Manufacture and Supply of Schedule of Rates Items" and "New Products Not Included in Tender" had been agreed, and so the expert ignored the claims under those headings because they were not in dispute.

[58] There are at least two reasons why this is a highly unlikely explanation. First, as earlier noted the parties intended that the expert should arrive at an overall value of work which would include undisputed amounts payable by the respondent to the appellant. The intention was given effect through the spreadsheet including undisputed amounts as well as disputed amounts, and must have been shared by the expert. The expert should therefore not have ignored claims because they were not in dispute. Secondly, not all the claims in the spreadsheet under the two headings had been agreed. As the appellant acknowledged in the appeal, many of the claims in substantial amounts were disputed to the end. Even if he had been minded to ignore claims not in dispute, the expert should not have ignored the claims under the two headings entirely. The expert is unlikely to have acted as suggested given the extensive submissions, which could not have left him unaware of the disputed claims. The suggested explanation leaves inexplicable error.

[59] The appellant's argument depended on the coincidence between the figure of $4,362.588.00 in the determination and the derived figure of $4,362,588.88. The coincidence required that the 88 cents be ignored. Why should this be done, said the respondent, when all other figures in the determination had been expressed to the last cent? Why would the expert have rounded the figure off if he had derived it in the manner suggested, and if he had rounded it off why would he have rounded it down rather than up? The round figure suggested that the expert had arrived at it in some other way, in which there was an element of estimation or reasonable charge which made a value of work to the last cent inappropriate. In my opinion the respondent's points are well made, albeit not such as should govern the factual finding.

[60] There are other and weightier considerations against the finding sought by the appellant. They may be summarised as follows.

[61] First, if the expert acted in the manner required by the appellant's argument he must have accepted to the full the appellant's claims in relation to the supply and installation of street poles resulting in the figure of $4,306,601.26 for the 520 poles. The claims included items for variations and extras, of the same nature as many of the items under the two later headings giving rise to the $1,148,512.86. The trial judge recorded that the parties remained in dispute to the end about the value of work and how individual items were to be valued, and in addition that the respondent continued to submit that many of the appellant's recent submissions should be disregarded because of their contents and/or the lateness of their delivery. He recorded that on the evidence of Mr Barnes many of the claimed items making up to the $4,306,601.26 "remained in dispute right up until 03.05.99". Experience teaches that it is unlikely that the appellant's claims resulting in the figure of $4,306,601.26 were accepted in their entirety.

[62] Secondly, the trial judge also recorded that the appellant's categorisation of items was "without warrant in the contract or otherwise logical". This was not demonstrated to us in the appeal, but the appellant did not dissent from it. If the expert acted in the manner required by the appellant's argument, he must have accepted some items but passed over others either because of the unwarranted and illogical categorisation or in disregard of items of the same nature in different categories. Again, the improbable occurs. But that would be high on the scale of improbability, particularly when the submissions can not have left the expert unaware of the extent of the appellant's claims.

[63] Thirdly, if the appellant's argument be correct the expert must have appreciated that the CPI figure of $55,796.89 had been calculated by reference to 519 street poles rather than 520 street poles, and then sought out an appropriate adjustment. This would have required an appreciation of the calculation of the CPI figure. The calculation of the CPI figure included escalation with respect to a number of the items making up the amount of $1,148,512.86. An appreciation of the calculation of the CPI figure would be expected to have included that fact. It is unlikely that the expert wholly disregarded the items for which he allowed escalation, and it is scarcely conceivable that he paid regard to them for one purpose but not for another.

[64] Fourthly, the "less paid" amount of $2,455,292.35 in the determination included payments for items included in the $1,148,512.96. The figure came from the consent determination of 9 February 1999, and so may not have been the subject of detailed consideration by the expert. It is unlikely, however, that he did not appreciate that payments had been made with respect to some of the items. The same comment as above may be made.

[65] Some of the matters in dispute involved estimation or a reasonable amount. It was quite possible for the expert properly to reach a value of work in a round sum. As the parties' chosen expert, he was to take into consideration the materials provided to him and make his determination using his expertise, and there were a large number of possible combinations of his resolution of the disputes and of components in the value of work figure - it could not be said, and except by the second supporting argument the appellant did not attempt to say, that arriving at a value of work of $4,362.588.00 could not be one such combination.

[66] The figure of $4,362.588.00 has contractual standing, unless successfully challenged, as a final and binding determination. A successful challenge by a finding of fact requires more than conjecture. It requires "a satisfactory

inference, even though resting on a balance of probabilities": the words are those of Dixon CJ in Holloway v McFeeters (1956) 94 CLR 470 at 476-477. In Seltsam Pty Ltd v McGuinness (2000) 49 NSWLR 262 at 275 Spigelman CJ said that the common law test of the balance of probabilities is not satisfied by evidence which fails to do more than establish a possibility. His Honour referred to the distinction between permissible inference and conjecture, noting that it was often difficult to distinguish between them and that there is no bright line division. I will not repeat the cases cited by his Honour. In the present case I am not persuaded that there is more than possibility or conjecture, or that it should be found that the expert arrived at the figure in the manner required by the appellant's argument. There is coincidence, but not an uncanny coincidence in the sense of one calling for that inference.

The second subsidiary argument

[67] Through affidavits of Mr Anthony Barnes sworn 15 June 1999, Mr Simon Wilson sworn on 4 August 1999 and Mr Douglas Rawson-Harris sworn on 30 July 1999, the appellant sought before the trial judge to lead evidence of conversations with the expert said to provide evidence going to what the expert had done. The conversation of which Messrs Barnes and Wilson spoke was on 9 February 1999. The conversations of which Mr Rawson-Harris spoke were on 8 and 9 February 1999. Through an affidavit of Mr Rawson-Harris sworn on 23 June 2000 the appellant sought also to lead evidence of a conversation with the expert said to provide evidence of what the expert had done. The conversation was on 17 May 1999, that is, after the making of the determination. The trial judge rejected all the evidence.

[68] The appellant's grounds of appeal took issue with the exclusion of all this evidence, as did its written submissions. In oral submissions the appeal in this respect was expressly confined to the conversations of February 1999. The appellant said that it relied on the evidence as corroborative of its uncanny coincidence argument, as strengthening the inference for which it contended although not of itself sufficient to carry the day.

[69] Mr Rawson-Harris was present at a meeting on 8 February 1999 with the expert, attended also by Mr Bill Tsaklos, Ms Katie Williams and Mr Wayne Burns of the respondent, Mr John Lawrence the respondent's retained quantity surveyor, Ms Karen Mealey the respondent's solicitor, and Mr Barnes, Mr Lachlan Menzies and Mr Wilson of the appellant. Mr Rawson-Harris said in his affidavit that Mr Barnes explained a spreadsheet attached to appellant's submissions on variations dated 26 January 1999, and that he and Mr Lawrence went through their respective positions. According to Mr Rawson-Harris -

"I recall that the rate claimed by Goldspar for the vertical banner outreach and the Telco outreach were almost identical with the rate agreed by the Council for the vertical banner outreach.

Mr Morrisey said, 'Once variation rates had been agreed, that's it. There's nothing that I have to do since you have both agreed to it."

"Banner outreach" and "Telco outreach" were two of the eighteen items under the heading "New Products Not Included in Tender" in the spreadsheet. The claims for those items as at 28 April 1999 were $32,450.00 and $15,529.50.

[70] Messrs Barnes, Wilson and Rawson-Harris were present at a meeting with the expert on 9 February 1999, a meeting attended also by Mr Tsaklos, Ms Williams and Ms Mealey, being the occasion on which the consent determination of that date was made.

[71] Mr Barnes referred to the meeting in his affidavit and said that "at or about this time" there was a conversation -

"I said: 'When will we get around to valuing the accessories variations?'

The expert said: 'I am not interested in valuing those variations. I will only be giving a single lump sum figure for the 520 poles.'"

[72] According to Mr Wilson, there was a conversation at the meeting -

"I said: 'We want you to resolve all issues between the parties as this will avoid ongoing disputes between the Council and Goldspar. Despite the length of time so far taken, we haven't had the opportunity to explain to you any of our variations yet. We can't understand the Council's position, and we don't see how you can understand it either. We don't think you have enough information to carry out this task.'

Ms Mealey said: 'Mr Morrisey we want you to give one number with no explanations on the basis of today's determination.'

Mr Morrisey said: 'I will make a determination, as agreed by the parties, by giving a single lump sum figure for the value of the 520 poles only.'"

[73] According to Mr Rawson-Harris, there was a conversation at the meeting -

"Mr Barnes said: 'So far there has only been detailed discussion about the extra steel fabrication costs. We haven't talked about any of the other variations yet.'

Mr Morrisey said: 'You have had plenty of time to bring up these matters. I will make a determination as agreed by the parties by giving a lump sum figure for the value of the 520 poles. I won't determine the variations for the accessories as you have sorted most of them out and you can do the rest.'"

[74] Before the trial judge it appears that the respondent objected to this evidence on the ground that it was not relevant. The objections as notified prior to the hearing included "hearsay" in relation to the evidence of Mr Barnes, but it seems to have been accepted before the trial judge that the evidence was admissible if relevant subject to the exercise of the discretion under s135 of the Evidence Act. It was rejected in the exercise of that discretion.

[75] As to the evidence of Mr Barnes, the trial judge said that it was unclear whether the conversation was a private conversation and whether it truly took place on 9 February 1999. His Honour continued -

"Thirdly and, most importantly to my mind, the attempt to adduce evidence of what the expert subjectively may have had in mind at or about this date is unlikely to be of any real assistance to the court in deciding, as it must, objectively from the materials before the expert and from the terms of his determination what it was that he actually ultimately decided or determined.

In those circumstances, to my mind an excursion into conversations of this nature is likely to cause or result in an undue waste of time and or be misleading or confusing and or to be unfairly prejudicial to a party, those being the three sub-elements of s135 of the Evidence Act which provides that the court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party or be misleading or confusing or cause or result in undue waste of time.

To my mind, the probative value of this particular evidence is, indeed, substantially out weighed by the danger that the evidence might be so unfairly prejudicial to the defendant or be misleading or confusing or cause or result in undue waste of time.

It must be borne in mind that in central focus is the question of whether or not in the determination of 3 May, 1999, the expert did or did not determine or decide the matters which the parties are now agreed he was asked to determine or decide. That occasion is some time after, it would seem, this alleged conversation.

Finally, to my mind there is a very high question mark as to the relevance at all of this conversation to any issue before the Court in circumstances in which the issue which has now been posed is as above. For those reasons I reject para20 of this affidavit."

[76] As to the evidence of Mr Wilson, his Honour said -

"An objection previously pressed to para20 of the affidavit of Mr Barnes of 15 June 1999 has led to reasons being given and that paragraph being rejected. To my mind para10 of the affidavit of Mr Wilson of 4 August 1999 should also be rejected on the basis that the probative value of the evidence sought to there be admitted would be unfairly prejudicial to the defendants or be misleading or confusing or cause or result in undue waste of time. Here again one has the particular difficulty that the parties, the Court has been informed by both counsel, continued to make submissions and to exchange submissions and to deal with the expert up to the occasion or shortly before the occasion when the determination of 3 May 1999 was handed down. Here again the question of the expert having indicated from time to time during the ongoing hearings or informal hearings of the expert what he intended to do is calculated to lead to an undue waste of time because at the end of the day the question is not what he may have at a particular point in time said he intended to do but what he actually did in a final way when making a determination. Here again the statements by Mr Morrissey as to what he intended to do seem to me to be calculated to cause or result in an undue waste of time or be misleading or confusing and the probative value of the evidence is substantially outweighed by the danger that the evidence may be misleading or confusing or cause or result in an undue waste of time.

The parties, having determined that the expert could make his determination without giving reasons, are essentially it seems to me, Mr Morrissey [sic] not being a party to these proceedings so that his admissions cannot be taken into account, generally bound to litigate on the basis that it is the objective material alone which the Court may take into account. If Mr Morrissey, for example, had said one thing on one day, another thing on the next day and reverted back on the third day to the first of his apparently alleged statements as to what sort of determination he would make, the Court would generally be, if required to take into account what he was saying at this early stage as a matter of weight, totally unable to work through what weight to give his statements. It is his action seen in tandem with and in the context of all the submissions placed before him which is material.

If the plaintiffs were to put a case, but the Court does not understand this to be the case, that the parties actually said to Mr Morrissey and he accepted that he would make a determination on a particular basis, then certainly the Court would, in all likelihood, permit that evidence to be given. That would be because that evidence would go to what the parties were agreeing with the expert and one another was the contract, ie what they were agreeing he was to do. This particular form of evidence flies in the face of what both parties through the pleadings have now accepted was to be the contract. If admitted it would establish arguably and questionably as a matter of weight that, notwithstanding that the parties on some particular date agreed, so they both now say, with the expert that he would determine poles, et cetera, in the face of that statement yet still he indicated that he would make a determination contrary to that form of contract. This, it seems to me, throws into higher profile the significance of dating when it is that the agreement which the parties accept they had with the expert was entered into.

In the absence of suitable precision as to that matter and in the light of conflicting evidence generally on the issue, to my mind this paragraph should be rejected and I reject it."

[77] As to the evidence of Mr Rawson-Harris, in his ruling in relation to the conversation of 8 February 1999 his Honour said -

"A ruling in relation to a very similar situation was given when para20 of Mr Barnes' affidavit of 15 June 1999 was rejected. One difference between that situation and the position in Mr Harris's affidavit at para12 is that Mr Harris purports to depose to a conversation at which there were present or represented both the expert as well as both parties. Notwithstanding that difference, to my mind the same is the appropriate ruling and, to my mind, the same ruling is justified by, inter alia, s135 of the Evidence Act.

This is a situation in which, to my mind, the evidence should be refused because its probative value is substantially outweighed by the danger that the evidence may be unfairly prejudicial to the defendant, or be misleading or confusing, or cause or result in undue waste of time.

The general area of inquiry here seems to involve what was said on the day before a determination was signed by the parties, which signed document records what the parties were referring to the expert for determination. There are additional difficulties with the section of para12, which to my mind should be rejected in terms of the question of form.

Mr Barnes and Mr Lawrence are said to have briefly gone through their respective positions regarding the list of outstanding items. There is no specificity in that portion of the paragraph, which means that one would be admitting material without any clarity as to precisely what it was that is alleged to have been said.

The sentence which begins with the words 'I recall' also has difficulties in terms of the formal approach to the pleadings, although the recollection might, in some circumstances, since it does have some specificity, be allowed.

There is a further question as to the relevance of this material, it being the case that the dispute is about precisely what the expert did determine ultimately, and it is questionable, it seems to me, as to what he may have said at a time much earlier than that later determination about what he might or might not have intended to do or thought he had to do would be relevant to what he ultimately did some months later after a number of submissions and after changing positions appear to have been adopted by the parties.

I reject that section of para12 of Mr Harris's affidavit for those reasons."

[78] The evidence of Mr Rawson-Harris in relation to the conversation of 9 February 1999 was later rejected without further reasons. It was accepted in the appeal that it was taken that the earlier ruling applied to it.

[79] The focus in the appeal was on the trial judge's exercise of the discretion under s135 of the Evidence Act. There was, however, some discussion of the basis of admissibility of the evidence. It is desirable, if not necessary, to have that basis in mind when considering the exercise of discretion.

[80] On appeal the appellant primarily approached the evidence of the conversations it as evidence caught by the hearsay rule, that is, evidence of a previous representation made by a person adduced to prove the existence of a fact that the person intended to assert by the representation (see s59(i) of the Evidence Act). When this was questioned, the appellant's counsel said, "It records a fact, so it is evidence of a fact of what the arbitrator [sic] said in the presence of the other party. I think I said in opening they are all hearsay in the sense that they are reporting out of court statements."

[81] But counsel continued -

"The evidence upon which we rely is the combination of the non response, that is the silence or non contradiction of the other side plus us obviously seeking information about what was happening and being content with the answer. It is the combination of the silence by both parties present to those words of the arbitrator from we seek to infer that as it happened, later, the arbitrator gave effect to what can now with hindsight be understood as being his probable understanding at the time, that he was dealing only with the maters called unresolved or disputed and not matters which could come to be agreed, particularly as to rate. That means what he says is hearsay but there is more than that. We tender the evidence of the whole occasion and if we tender the evidence of the whole occasion, then in our submission it is not being tendered simply as hearsay standing alone for the truth of the assertions in it and therefore the whole gets in."

[82] There was some confusion in this. The evidence was evidence of previous representations in the sense of reporting out of court statements by the expert. But it was caught by the hearsay rule only if adduced to prove the existence of a fact that the expert intended to assert. If the evidence was adduced to found an admission by silence of what the expert was required to do, it was not adduced for that purpose and was not caught by the hearsay rule (although there would be relevance and other difficulties in the face of the contract for expert determination). If the evidence was adduced for the fact of what the expert understood he was to do, that is, his state of mind, the appellant treated it as adduced for that purpose and was caught by the hearsay rule.

[83] In the discussion which followed the appellant's position was, in summary -

(a) it wished to rely on the evidence as proof of the expert's understanding, corroborative of the uncanny coincidence argument because the expert was likely to have acted in accordance with his understanding;

(b) to overcome the hearsay rule -

(i) the evidence was also put forward as founding an admission by silence, so that the hearsay rule did not apply by force s60 of the Evidence Act;

(ii) in the alternative to (i), the evidence was evidence of a contemporaneous representation made by the expert about his intention or state of mind so that the hearsay rule did not apply by force of s72 of the Evidence Act.

(c) In the result, s135 of the Evidence Act was "the correct focus of the argument".

[84] The respondent's written submissions included that all the evidence with the exclusion of which the grounds of appeal took issue was inadmissible because of its subject matter, being evidence analogous to that of a judge in relation to how he arrived at his decision (See Zanatta v McCleary (1976) 1 NSWLR 230 at 234, 239). The submissions in this respect were primarily addressed to the conversation of 17 May 1999, after the making of the determination, and the respondent said in its oral submissions that it did not maintain this position in relation to the conversations of February 1999.

[85] The respondent's position as to the conversations of February 1999 was, in summary, that the evidence could only be relevant as evidence of a contemporaneous representation about the expert's intention or state of mind. It could not be relevant as going to what the expert required to do, because that was governed by the contract for expert determination and also because of the common ground as to the scope of the determination required of the expert. If the evidence fell within s72 of the Evidence Act and thus escaped the hearsay rule (which the respondent did not seem to dispute) any relevance was peripheral and the discretion under s135 of the Evidence Act was correctly exercised.

[86] I accept that the evidence could only be relevant as evidence of a contemporaneous representation about the expert's intention or state of mind, for the reasons given by the respondent and also because there was insufficient surrounding evidence to establish an admission by silence. Whether such evidence is truly hearsay at common law could be debated, but to no profit (see for example Cross on Evidence para37125). The Evidence Act assumes that it is caught by the hearsay rule, and equivalent debate is pointless in the present case in the light of s72 of the Act. Whether the evidence of the expert's intention or state of mind in February 1999 is admissible at all as relevant to what he did in May 1999 could also be debated (see ibid para37115-para37120). When the parties did not do so, it is not necessary to open the debate. The appellant treated such evidence as caught by the hearsay rule unless saved by, relevantly, s72 of the Evidence Act, and the respondent did not submit that it was wholly inadmissible. I proceed on that basis.

[87] The effect of the evidence was that as at 8-9 February 1999 the expert's intention or state of mind was that he would give a lump sum value for "the value of 520 poles". What this meant, and what he would not give a value for, was far from clear. On the evidence of Mr Barnes and Mr Rawson-Harris of the 9 February 1999 conversation, he would not give a value for variation for the accessories; on the evidence of Mr Wilson he would not give any other value at all; on the evidence of Mr Rawson-Harris of the 8 February 1999 conversation he would not deal with anything for which variation rates had been agreed, but that was said at a time when (it seems) only two items under the two headings had been agreed.

[88] With respect the trial judge's reasons are somewhat discursive. The essential reasoning material to the exercise of discretion, it seems to me, was as follows. The evidence was of slight relevance, because of the passage of time between early February 1999 and the beginning of May 1999. The expert's professed state of mind or intention in February did not provide a reliable guide to his state of mind or intention in May. The evidence lacked clarity as to what his professed state of mind or intention was. Whatever it was, it would have been affected by changing positions thereafter

and particularly by the parties' submissions. The determination in the light of the materials provided to the expert, especially the parties' submissions, were the true guide to the expert's state of mind or intention when he made the determination. There was dispute over what the expert had said in February 1999, and much time would be spent in cross-examination and the calling of further evidence directed to his professed state of mind or intention. The probative value of the evidence was so slight that, balanced against the risk of unfair prejudice, misleading or confusing evidence or undue waste of time, the evidence should be excluded.

[89] In this I have drawn upon the three statements of his Honour's reasons, as it seems to me that each can be taken into account to flesh out what was only touched on in another or the others. The dispute over what the expert had said in February 1999 should be amplified. The reasons in relation to the evidence of Mr Wilson included "in the light of conflicting evidence generally on the issue". The respondent had informed the trial judge that the evidence of what the expert had said was disputed, and that it proposed to call evidence from others at the relevant meetings. As has been seen, many others attended the meetings (Mr Tsaklos, Ms Williams, Mr Burns, Mr Lawrence, Ms Mealey, and Mr Menzies). Apart from additional evidence of what was said, it can readily be seen that it would be necessary to go further in order to place what was said (and the different recollections of what was said) in context and so attempt to ascribe the proper meaning to what was said. Hence the risk of undue waste of time, meaning devotion of much time to evidence of the expert's state of mind or intention in February 1999 when that was really peripheral to the issue for decision.

[90] The appellant's submissions did not address all these matters; indeed, they did not specifically advert to the well-known principles on which the exercise of a discretion may be overturned to be found in House v The King (1936) 55 CLR 499 at 504-505 -

"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[91] The appellant said that the conversations provided an explanation of what the expert did, in the appellant's words "that the dispute between the parties only existed with respect to 520 poles and no dispute existed because agreement had been reached in large part in relation to variations, accessories, miscellaneous and other add-on items". Because of the difficulty of otherwise proving what the expert had done, the conversations were important to the appellant's case, and their exclusion would be very prejudicial to it. The admission of the evidence would not have brought an undue waste of time, because cross-examination would have been limited and there was ample time available within the span set down for the hearing. It was therefore unreasonable to exclude the evidence on discretionary grounds, and the evidence should have been admitted subject to weight. The appellant appears to have been suggesting that the trial judge's exercise of discretion was unreasonable or plainly unjust, perhaps also that the facts were mistaken in relation to waste of time.

[92] I have some difficulty with the trial judge's references to unfair prejudice and misleading or confusing evidence. It is not sufficient to repeat the alternatives in s135 of the Evidence Act. Why would there have been unfair prejudice to the respondent? There is not unfair prejudice simply because evidence is against a party, or simply because it is of slight probative value. The evidence was hardly of the emotional appeal and thus potential for misuse contemplated by the Australian Law Reform Commission (see Evidence, Report No 26 (Interim) (1985) Vol 1 para644). It was quite open to

the respondent to call evidence from others at the relevant meetings, and to seek by evidence and submissions to place what was said in context. Perhaps his Honour had in mind unfair prejudice by way of something akin to "a lengthy exercise of rebutting complex evidence of peripheral relevance" (Zaknac Pty Ltd v Svelte Corp Pty Ltd (1995) 61 FLR 171 at 176 per Lehane J). What was the danger that the evidence would be misleading or confusing? Perhaps his Honour had in mind that what was meant was unclear, but in a trial before a judge alone this alternative will less readily arise. These difficulties do not matter, because I consider that the exercise of discretion was sound so far as ascribed to undue waste of time.

[93] The probative value of the evidence was indeed slight. The reasoning in that respect earlier expressed is verified by the facts that the appellant's spreadsheets continued to include its claims for "variations, accessories, miscellaneous and other add-on items" (the words are those from the appellant's submissions earlier set out) and that Mr Barnes expected the expert to taken into account items which were in agreement and items which were not in agreement. It was plainly not the case that, when the expert made his determination, there was no dispute over claims under the two headings in the lower one-third of the spreadsheet, and whatever the expert might have thought in February 1999 was or would be the case he realistically can not have retained his then state of mind or intention regardless of the materials provided to him and the parties' submissions. Given the dispute over what the expert had said, and the need to place what was said in context, the danger of the evidence causing or resulting in undue waste of time by an evidentiary blow-out was real, and the trial judge's assessment that the danger outweighed the probative value of the evidence was well open to him.

The result

[94] In my opinion the appeal should be dismissed with costs.

Order

The appeal is dismissed with costs.

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