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86 Paragraphs

DOWNER ENGINEERING POWER PTY LTD V P & H MINEPRO AUSTRALASIA PTY LTD - BC200709593

Supreme Court of New South Wales -- Court of Appeal
Giles, Basten JJA and Hoeben J

40200/2007

4 September, 9 November 2007

Downer Engineering Power Pty Ltd v P and H Minepro Australasia Pty Ltd [2007] NSWCA 318

CONTRACT -- sale of business -- adjustment of purchase price after completion -- construction of clause relating to work in progress -- provision for referral of disagreement to Valuer -- whether dispute as to construction and operation of clause was itself a matter to be referred to the Valuer -- effect of neither party referring disagreement to Valuer.

AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd [2006] VSCA 173; *Goldspar Australia Pty Ltd v The Council of the City of Sydney* [2001] NSWCA 246; *Holt v Cox* (1997) 23 ACSR 590 ; 15 ACLC 645; *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314; *M1 v L1* [2007] NSWSC 346; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462; *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587; *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187; *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583; *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors* (2004) 219 CLR 165 at 179, cited

Giles JA.

[1] I agree with Hoeben J.

Basten JA.

[2] The resolution of this appeal turns largely upon the construction of cl 5 of the sale of business agreement entered into between the parties on 11 October 2002. (Clause 5 is set out in full by Hoeben J at [24] below). As the submissions demonstrated there were a number of levels of particularity at which the dispute could be considered and there were a number of separate entry points through different provisions contained in cl 5 of the agreement. However, the first question should be whether any, and if so which, of these disputes are properly to be resolved by the Court.

[3] The parties provided in the agreement (cl 7) that the valuation of "work in progress" should take place after "Completion", which was to occur at 12 noon on 11 October 2002. The relevant adjustments following completion which did not constitute part of the agreement entered into, involved three figures. The first, which concerned "cash on

hand" was unlikely to involve any dispute. The second was identified as "deferred tax asset" which was defined as a percentage of employee entitlements. Those entitlements were also to be taken into account as an element of "accepted liabilities" which may have involved elements subject to disputation. The third item concerned "work in progress" which became the subject of the present dispute.

[4] The basis of calculation of figures to be included in the completion statement was identified in cl 5.3, as was the time by which the completion statement was to be delivered by the seller (the Appellant) to the buyer (the Respondent).

[5] Clause 5 allowed for disagreements between the parties as to the figures to be inserted in column 2 of the completion statement and made provision in cl 4.4 for their resolution. The clear effect of cl 5.4 was that the figures to be included in column 2 were to be "final and binding on the parties". That result was to occur by one of three methods. First, the parties were required to use all reasonable endeavours to reach agreement on the figures and, if they were agreed, the agreed figures would be final and binding: paras (a) and (b). If the parties did not agree, the figures contained in column 2 of the completion statement could nevertheless become final and binding as the result of the occurrence of one of two events, which were intended to cover the field of possibilities. Which event operated depended upon whether one of the parties referred the matters in dispute to a valuer for determination pursuant to cl 5.5, within a specified period. If the dispute were referred to a valuer within that period, the valuer's written determination was to be final and binding on the parties: cl 5.5(d). If the dispute were not referred to a valuer, by the end of the specified period, the values contained in the draft completion statement supplied by the seller were to be final and binding on the parties: cl 5.4(d).

[6] In the present case, there was no agreement and there was no referral to a valuer pursuant to cl 5.4(c), by either party. Accordingly, pursuant to cl 5.4(d), the figures contained in the draft statement provided by the Appellant were described as "final and binding on the parties".

[7] On this reasoning, the Appellant would have made out its contractual entitlement and would succeed on the appeal. The Respondent sought to avoid this conclusion by contending that the document provided to it by the Appellant on 8 November 2002 was not a "completion statement" for the purposes of cl 5.3 and accordingly the provisions of cl 5.4 were not engaged.

[8] The statement was said not to comply with the requirements of cl 5.3 because it failed to include in column 2 the figure for work in progress identified in the inventory of work agreed upon at the conclusion of the stocktake, pursuant to cl 5.2(b). The Appellant replied that it was entitled to include amounts additional to the valuation which had been included in the inventory of work because the inventory was based upon a physical verification of the work done and did not take account of items which could properly be included by application of the factors set out in cl 5.3(b).

[9] It may thus be seen that the dispute was one concerning the proper construction of cl 5 of the agreement. The relevant question was thus reduced to whether a dispute as to the construction and operation of cl 5 itself constituted a matter which the agreement contemplated would be referred to the valuer. If referral of a dispute involving such an issue were covered by the agreement, the Respondent could not escape the operation of cl 5.4(d). The answer to that question turned upon the construction of cl 5.4(c) which it is convenient to set out:

> If either party does not agree, within the period referred to in clause 5.4(a), that the column 2 of Completion Statement has been prepared on the basis provided for in this agreement, the Buyer or Seller (as the case may be) may, at any time within 10 Business Days after the end of that period, refer the matters in dispute to the Valuer for determination in accordance with clause 5.5.

[10] Leaving to one side for present purposes the reference to cl 5.5, it is clear that matters in dispute which may be referred must involve the question whether column 2 "has been prepared on the basis provided for in this agreement". It is clear that the phrase "Completion Statement" is the document prepared by the seller under cl 5.3: it is defined in these

terms in cl 1. (In cl 5.4(d), it is referred to as "the draft Completion Statement", but nothing turns on this variation in terminology.) No doubt there are various reasons why the completion statement prepared by the seller may not have been prepared "on the basis provided for in this Agreement" but in the absence of some clear indication to the contrary, it is impossible to read this language as excluding a requirement that the valuer form a view as to the construction of relevant elements in the agreement, in order to determine the dispute as to its operation. The present dispute falls precisely within the objective meaning of that phrase: it is a dispute as to whether the agreement required the seller to insert the figure agreed upon as part of the inventory of work in progress under cl 5.2(b) or whether it was entitled to include additional amounts in its calculations. That dispute, which occupied a number of hours in this Court, could have been described with complete accuracy as a dispute as to whether column 2 of the completion statement had been prepared on the basis provided for in the agreement.

[11] The only potential source of contrary indication was the requirement that the valuer determine the matters in dispute "in accordance with cl 5.5". The relevant part of cl 5.5 is to be found in para (a), which provided:

> The party referring a matter to the Valuer for determination under clause 5.2 or clause 5.4 must instruct the Valuer to make the determination in accordance with the requirements set out in clause 5.3(b) and to complete the determination as soon as practicable.

[12] Clause 5.3(b), excluding an irrelevant qualification, provided:

> The parties agree that ... column 2 of the Completion Statement must be completed on a basis consistent with (in order or [of?] priority):
>
> (1) the 30 June 2002 figures (and accompanying notes) in column 1 of the Completion Statement ... ;
> (2) the accounting polices described in schedule 9; and
> (3) the Accounting Standards.

[13] Two inferences were sought to be derived from this provision by the Respondent. The first, being the more general, was that the exercise to be undertaken by the valuer was to be an accounting exercise. The second and more specific inference was that the same accounting exercise was expected to apply to the preparation of the inventory of work in progress to be agreed for the purposes of cl 5.2(b), which might itself be the matter of referral to the valuer, in a case of dispute, pursuant to cl 5.2(c) and cl 5.5.

[14] It is convenient to deal with the latter (particular) argument first. That argument, whether right or wrong, involves the construction of the agreement and is another way of stating the question whether column 2 of the completion statement provided by the Appellant was in fact prepared on the basis provided for in the agreement. For present purposes it is therefore the first (general) argument which is relevant.

[15] The Respondent's contention must be that the final words of cl 5.4(c) demonstrate that the parties only envisaged a dispute as to the matters of accounting arising from the application of cl 5.3(b). However, if that were the intention, the broad language contained in cl 5.4(c) as to whether column 2 had been prepared on the basis provided for in the agreement, could readily have been recast as a dispute as to whether column 2 had been prepared in accordance with cl 5.3(b) of the agreement. An alternative construction is that the final words of that paragraph, picking up para (a) from cl 5.5, were intended to ensure that the valuer was bound to apply cl 5.3(b), as were the parties to the agreement, in undertaking a relevant accounting exercise. It would not, on that approach, necessarily follow that no other disputes were expected to arise or, if they did arise, to be capable of referral to the valuer.

[16] One reason for supposing that matters for referral were not restricted to accounting exercises arises from the right of the buyer who disagreed with "any part of the inventory of work in progress" to refer the matter to the valuer. The primary purpose of the stocktake (which resulted in the inventory of work in progress) was to undertake a physical verification of work in progress: there is no reason to suppose that the buyer could not dispute some element of the physical verification and refer such a matter to the valuer for determination. The language of cl 5.4 would appear to mirror the language of cl 5.2 to the extent that each appears to envisage that any sort of dispute as to the steps to be taken in preparation of the completion statement might be referred to the valuer.

[17] It is well-established that the effect of a determination by a valuer depends upon the construction of the contract pursuant to which the referral takes place: see *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (Mahoney, Priestley and McHugh JJA) followed in *Holt v Cox* (1997) 23 ACSR 590 ; 15 ACLC 645; *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583 (Giles J), *Goldspar Australia Pty Ltd v The Council of the City of Sydney* [2001] NSWCA 246 (Giles JA, Beazley and Stein JJA agreeing) and by the Victorian Court of Appeal in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 (Nettle JA, Maxwell P and Bongiorno AJA agreeing) at [43]-[44] and [51]-[54]. (Nettle JA in the last case, at [52], sought to draw an analogy between a challenge to the determination of an expert appointed under a contract and judicial review of an administrative decision based on the concept of jurisdictional error. The analogy is evocative, but may need to be treated with caution: administrative action is not necessarily reviewable only for jurisdictional error; further, there may be limits as to the extent to which an administrative officer can be vested with power to determine questions of law. Different principles apply in relation to the construction of a contract between private parties.)

[18] The operation of these principles may be tested in the present case by asking whether, if the particular disputes now under consideration had been referred to a valuer, his or her determination would have been binding. The indications in the contract relied upon by the Respondent do not demonstrate that it would not have been. Accordingly, a dispute of the kind now in issue was within the contemplation of the parties as one which could properly be referred to the valuer. In the absence of such a referral, the Respondent is bound by the figures contained in column 2 of the completion statement, as provided by the Appellant.

Other matters

[19] If this conclusion be correct, it is neither necessary nor appropriate to determine other issues relating to the proper construction of the contract. However, against the possibility that the foregoing analysis is incorrect, I would indicate agreement with the reasoning of Hoeben J in relation to the construction of cl 5 generally, subject to one qualification. The qualification is that I would be content to accept the approach of the parties which treated the reference to "quantum and value" in cl 5.2(a) as, if not interchangeable concepts, an hendiadys expressing a single concept: cf [50] below. The preferable understanding of cl 5.2(a) is that it imposed an obligation on the parties to undertake "a physical verification of work in progress" for the purpose of determining the "quantum and value of these items". Value and quantum may be different words to identify a form of description by quantification.

[20] Further, there is nothing in cl 5.2 which requires that the value so determined must be inserted in column 2 without variation. Were that the case, the buyer would suffer the severe disadvantage of having to determine within three business days whether or not to challenge the value so determined or, in default, be taken to have accepted it: cl 5.2(c). As it seems that assessment of the work in progress was anticipated to be the most complex item to be included in the completion statement, the result that the buyer would be bound by a figure arguably unduly high, after only three days consideration, would deprive of commercial sense the provision in cl 5.4 for a further 20 business days for the parties to confer in relation to the completion statement prepared by the seller and then a further 10 days to determine whether to refer that document to a valuer.

Orders

[21] I agree with the orders proposed by Hoeben J.

Hoeben J.

[22]

Nature of proceedings

The appellant was the plaintiff in proceedings in the District Court which were heard before Gibb DCJ between 7 and 9 February 2007. Her Honour gave judgment on 13 May 2007. The claim concerned the sale of a business, with the appellant as seller and the respondent as purchaser. Although there were some factual issues, the outcome depended upon the construction of certain clauses in the Sale of Business Agreement (the agreement). The construction of those clauses would determine the issue of the appellant's contractual entitlement to claim, in respect of work in progress, additional amounts payable after completion which the appellant alleged remained unpaid. Her Honour found against the appellant on that issue and the appellant has appealed.

Factual background

[23] The appellant is a company incorporated in New South Wales, which in 2002 was the owner of various rotating machine repair and maintenance businesses identified in the agreement as George Gilbert, EMR-Gilberts and Downer RML Motor Solutions (the business). The business operated from three premises, two located in Queensland and one in New South Wales. The respondent is a company incorporated in Queensland.

[24] The relevant clauses in the agreement are as follows:

4 Purchase Price

4.1 Purchase Price.

The Purchase Price is $2,954,000 being the net amount in column 1 of Schedule 8, adjusted in accordance with clause 5.7.

4.2 Apportionment of Purchase Price

For the purpose of determining the Purchase Price in clause 4.1:

(a) The Business Assets are valued as follows:

(1) Business Intellectual Property -- $NIL.
(2) Business Records -- $NIL;
(3) Contracts -- $NIL;
(4) Environmental Authorities -- $NIL;
(5) Goodwill -- $1;
(6) Plant and Equipment -- as valued in the Completion Statement.
(7) Freehold Property -- $1,615,000;
(8) Property Leases -- $NIL;
(9) Stock (other than work in progress) -- $42,000; and
(10) Work in Progress -- as valued in the Completion Statement; and

(b) The Employee Liabilities are valued as set out in the Completion Statement.

4.3 Payments at Completion

(a) At Completion, the Buyer must pay $2,960,000 on account of the Purchase Price and Settlement Adjustments to the Seller in Immediately Available Funds.

(b) At or as soon as practicable after Completion, the parties shall agree upon the amounts to be paid or which are payable to Governmental Agencies or other third parties (including any security deposits, taxes, rates, water rates, rental arrears, legal costs and the like) in respect of

transactions affecting the Property which occurred at Completion (Settlement Adjustments) on the basis that amounts pertaining to the period prior to Completion shall be to the account of the Seller and amounts pertaining to the period after Completion shall be to the account of the Buyer. The Settlement Adjustments shall be added or subtracted (as appropriate) to the Completion Adjustment Amount.

5. Completion adjustment

5.1 Fixed Assets and Stock as at Completion

The Seller and the Buyer acknowledge that they have agreed that the value of:

(a) Fixed assets as at Completion is $2,885,770; and

(b) Stock (excluding work in progress) as at Completion is $42,000.

5.2 Valuation of Work in Progress.

(a) Immediately after the Effective Time, the Seller and the Buyer (and their respective representatives) will jointly undertake a physical verification of work in progress as at the Completion Date to determine the quantum and value of these items (Stocktake).

(b) On conclusion of the Stocktake, representatives of the Buyer and Seller must agree and initial the inventory of work in progress which must then be used in preparing Column 2 of the Completion Statement.

(c) If the Buyer disagrees with any part of the inventory of work in progress the Buyer may, no later than three Business Days after receipt of the Stock list, refer the matter to the Valuer for determination under clause 5.5. If the Buyer does not refer the matter to the Valuer within that period, the Buyer is to be taken to have accepted the inventory of work in progress.

5.3 Completion Statement

(a) Not later than 20 Business Days after the Effective Time, the Seller must complete column 2 of the Completion Statement and deliver the Completion Statement to the Buyer.

(b) The parties agree that subject to clause 12.4, column 2 of the Completion Statement must be completed on a basis consistent with (in order or priority):

(1) The 30 June 2002 figures (and accompanying notes) in column 1 of the Completion Statement (except for fixed assets and Stock (other than work in progress) which will be the amount set out in Clause 5.1);

(2) The accounting policies described in schedule 9; and

(3) The Accounting Standards.

(c) The Completion Statement must be in the form contained in Schedule 8.

5.4 Completion Statement Review

(a) The Buyer and Seller must confer and use all reasonable endeavours to agree on Column 2 of the Completion Statement within 20 Business Days after it is provided to the Buyer by the Seller.

(b) If the contents of column 2 of the Completion Statement are agreed between the Buyer and the Seller, the Completion Statement will be final and binding on the parties.

(c) If either party does not agree, within the period referred to in clause 5.4(a), that the column 2 of Completion Statement has been prepared on the basis provided for in this Agreement, the Buyer or Seller (as the case may be) may, at any time within 10 Business Days after the end of that period, refer the matters in dispute to the Valuer for determination in accordance with clause 5.5.

(d) If the Buyer and Seller do not agree on column 2 of the Completion Statement within the period referred to in clause 5.4(a), and no election to make a referral is made under clause 5.4(c) within the period referred to in clause 5.4(a), the values contained in the draft Completion Statement will be final and binding on the parties.

5.5 Valuer

(a) The party referring a matter to the Valuer for determination under clause 5.2 or clause 5.4 must instruct the Valuer to make the determination in accordance with the requirements set out in clause 5.3(b) and to complete the determination as soon as practicable.

(b) The Buyer and the Seller must give the Valuer full access to their respective books, records and working papers and any information the Valuer requires to complete a determination under clause 5.2 or clause 5.4.

(c) Each party may make submissions to the Valuer in respect of a determination.

(d) The Valuer's written determination is final and binding on the parties.
(e) In making a determination the Valuer acts as an expert and not as an arbitrator.
(f) The Valuer's costs must be borne equally by the Buyer and the Seller.

5.6 Access.

Subject to the Buyer's privacy obligations, the Buyer must give the Seller, the Valuer and their respective representatives all reasonable and necessary access to the Business Records and the Transferring Employees as related to the Business prior to Completion for the purposes of this clause 5.

5.7 Adjustment of Purchase Price

(a) After the Completion Statement has been agreed between the parties or when all matters in dispute have been finally resolved by the Valuer the Purchase Price will be subject to an adjustment for any movement in the Net Amount between 30 June 2002 and the Completion Date. The amount by which the Purchase Price is to be adjusted is to be determined by subtracting the Net Amount as at 30 June 2002 from the Net Amount as at the Completion Date (the Completion Adjustment Amount).
(b) If the Completion Adjustment Amount is a positive number, the Purchase Price is to be increased by the Completion Adjustment Amount. In this case, the Buyer must pay the Seller that amount within 10 Business Days of the Adjustment Date.
(c) If the Completion Adjustment Amount is a negative number, the Purchase Price is to be reduced by the Completion Adjustment Amount. In this case, the Seller must pay the Buyer the absolute value of that amount within 10 Business Days of the Adjustment Date.

[25] Between May and October 2002 due diligence assessments were carried out by the respondent. Contracts were exchanged and the transaction completed in the late afternoon of Friday 11 October 2002. The first payment of $2,960,000 was made. The business was transferred. It was then necessary to adjust the purchase price in accordance with cl 5. This was described as the completion adjustment.

[26] The agreement provided a means of quantifying the completion adjustment in two stages. The first involved a stocktake as provided in cl 5.2. The physical verification of work in progress in accordance with that clause in fact occurred before the contractual date, being complete at the time of execution. In that regard the respondent's signatory (Mr Truman) checked with each of his company's representatives before execution to satisfy himself that there were no material surprises.

[27] The stocktake produced a figure of $757,734 as the value of the work in progress. That amount was agreed between the appellant and the respondent as the figure for the "quantum and value" of the stocktake for the purposes of cl 5.2(b).

[28] The second stage involved the preparation of and agreement to a Completion Statement in a form specified in Sch 8 of the agreement. On 8 November 2002 the appellant sent to the respondent what it said was the Completion Statement. Accompanying that document was supporting documentation to explain it. The document served as the Completion Statement in its structural elements was in accordance with schedule 8 of the agreement. Against the line "work in progress" in column 2 the amount of $1,124,000 was inserted rather than the cl 5.2(b) amount of $757,734.

[29] The reason for the difference was that the appellant had used $757,734 as its starting figure but had then added further amounts. It added a sum for work in progress costs identified after the stocktake which had not been identified at the time (primarily reflective of labour costs). A sum was added for profit margin and for work in progress which had not been included in the stocktake. These amounts had not been taken into account at the time of the "physical verification" of the stocktake for the purposes of cl 5.2.

[30] By 6 December 2002 (being the day referred to in cl 5.4(a)), the appellant and the respondent had not agreed on the contents of column 2 of the Completion Statement. The point of disagreement was the amount inserted for "work in

progress". By 20 December 2002 neither the appellant nor the respondent had referred the dispute in respect of the contents of column 2 to the "Valuer" as provided in cl 5.4(c). At no time after 20 December 2002 did either the appellant or the respondent refer any dispute as to the contents of column 2 of the Completion Statement to the Valuer.

[31] There was no issue in the proceedings that the document relied upon by the appellant as the Completion Statement was served on the respondent within the time specified by the agreement. There was no dispute that the respondent did not avail itself of the contractual dispute resolution mechanism by way of reference to the Valuer appointed under the agreement.

[32] On 7 January 2003 the appellant's solicitors wrote to the respondent's solicitors requesting that the respondent pay the completion adjustment amount of $842,000 by 10 January 2003. This was the amount calculated by reference to the figure for work in progress in column 2 of the Completion Statement. The respondent's solicitors disputed that the completion adjustment amount was $842,000 but advised that it would pay $395,000 by 10 January 2003. This was the amount calculated by the respondent as the completion adjustment amount if the stocktake figure of $757,734 had been inserted for work in progress in column 2. That payment of $395,000 was made on 9 January 2003.

[33] Thereafter letters passed between the parties putting forward their respective positions as to the correct completion adjustment amount. In an attempt to resolve the dispute, the respondent on 2 October 2003 forwarded a further $80,000 to the appellant by way of full and final settlement of the disputed matters. The appellant accepted that amount but did so by treating it as part payment of the outstanding larger amount.

Proceedings in the District Court

[34] Although there was considerable oral evidence called in the proceedings, the area of factual dispute between the parties was limited and is irrelevant to this appeal. Her Honour found that the parties to the agreement acted honestly, honourably and bona fide at all times and that each of the witnesses who testified was frank and straightforward. She concluded that each side, particularly the respective principals, was firmly and honestly of the view that the construction given by their company to the agreement was correct.

[35] The first area of dispute concerned the interpretation of cl 5.2(b) of the agreement. The respondent submitted that by reference to the words "quantum and value" in cl 5.2(a) the word "used" in cl 5.2(b) meant that the stocktake figure $757,734 should have been inserted into column 2 of the Completion Statement as the value of the work in progress.

[36] The appellant submitted that the stocktake figure $757,734 reflected the starting point for the calculation of the amount to be inserted into column 2 of the Completion Statement as work in progress. In that context the word "use" had the meaning of "make use of" as distinct from "insert to the exclusion of any other figure".

[37] In support of that submission the appellant referred to extrinsic circumstances such as the nature of the business, the knowledge of the parties and the effect of the competing interpretations. These matters, it said, were important in determining what a reasonable person in the position of the parties would have understood the terms of the agreement to mean. In that regard not only the text of the agreement but the surrounding circumstances known to the parties and the purpose of the transaction were relevant (*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors* (2004) 219 CLR 165 at 179 [40]).

[38] The appellant submitted that the context did not support a narrow interpretation of the word "used". It was known by both sides that the appellant's records were not up to date in all respects and that the appellant normally added a margin for overheads and a degree of profit to its quantification of the value of work in progress.

[39] Her Honour rejected the appellant's submission primarily on the basis that the words used in cl 5.2(b) were plain and lacking in ambiguity. The cl 5.2(a) stocktake was to determine the "quantum and value" of the inventory, it was not to identify a category or list of work in progress. Her Honour was of the opinion that a determination of "quantum and value" meant the determination of a monetary figure. Her Honour was attracted to the simplicity of the respondent's

approach whereas the interpretation sought by the appellant involved adding a significant gloss to the word "used", ie that it meant something like "used as a starting point".

[40] Her Honour held that to apply the plain words of cl 5.2(b) to construe the requirement that the figure to be inserted in the Completion Statement was the stocktake figure, did not produce a commercial absurdity nor was it commercially inconvenient or unrealistic. On this question her Honour's conclusion was:

> I find that on its proper construction, clause 5.2(b) required that the agreed stocktake figure be "used" in column 2 of the Completion Statement, which on the facts before me meant that the figure to be entered in the relevant line item was the agreed sum of $757,734. It was not." (Red Appeal Book 68N)

[41] Her Honour also concluded that the figure inserted by the appellant for work in progress in column 2 of the Completion Statement did not comply with cl 5.3(b). That clause required that column 2 of the Completion Statement must be completed on a basis consistent with the 30 June 2002 figures in column 1.

[42] Her Honour noted that the quantification of the value of work in progress as at 30 June 2002 included a margin which reflected overheads and profit calculated on a job-by-job basis. The quantification of the margin on the work in progress figure in the document served by the appellant as a Completion Statement was arrived at on the basis of historical margins. As a result her Honour found that the methodology applied in the quantification of that figure failed to meet the requirements of cl 5.3(b) in that the figure had not been completed on a basis consistent with the 30 June 2002 figures.

[43] The appellant submitted that it had complied with the temporal provisions of cll 5.3(a) and cl 5.4(a). But in any event, because there had been no agreement on column 2 of the Completion Statement within the time provided, the respondent had 10 days in which to refer the matters in dispute to the Valuer for determination in accordance with cl 5.5. Because this had not been done the effect of cl 5.4(d) was that the draft Completion Statement had become final and binding on the parties. The appellant submitted that this was the outcome even if the figure for work in progress in column 2 was arrived at contrary to the agreement.

[44] The respondent submitted that those clauses did not apply because what had been served on the respondent in purported compliance with cl 5.3(a) was not a Completion Statement as envisaged by the agreement. It was not a Completion Statement because the stocktake figure of $757,734 had not been "used" in preparing column 2 of the Completion Statement as required by cl 5.2(b).

[45] Her Honour rejected the appellant's submission. She was of the opinion that the inclusion of a figure in the relevant line item which failed to accord with the contractual obligation either rendered that which was served something other than the Completion Statement or vitiated its effect such that it was void ab initio or voidable upon challenge.

[46] Her Honour expressed her conclusions on this issue as follows:

> I do not accept the plaintiff's construction. I do not find that, absent a referral to the Valuer, the document described as the Completion Statement is final and binding. I find that, on its proper construction, the document upon which the plaintiff relies fails to accord to the contractual requirements for the Completion Statement.
>
> If the figure to be entered ("used") in the relevant work in progress line in column 2 of the Completion Statement is, as I construe the contractual requirement, the agreed stocktake sum quantified under clause 5.2, the parties do not relevantly "not agree on column 2 of the Completion Statement". On the contrary, that figure was agreed at the completion of the stocktake, and was expressly agreed for the purposes of these proceedings, in the sum of $757,734. There is thus no role for the Valuer.

> The agreed stocktake figure of $757,734 "must then be used in preparing column 2 of the Completion Statement". It was not. To that extent the document served failed to conform with the contractual requirement for completion of the Completion Statement. The plaintiff's claim thus fails." (Red Appeal Book 70J-N)

Appeal

[47] The same submissions, albeit significantly expanded, were made on the appeal. The appellant and respondent identified the following issues:

(a) Was the Completion Statement prepared as required by the agreement?
(b) If the Completion Statement was not (or arguably was not) prepared as required by the agreement, did the failure by the respondent to refer any dispute about the Completion Statement to the Valuer appointed under the agreement for determination mean that the values contained in the draft Completion Statement became final and binding on the respondent?

[48] Fundamental to the first question was her Honour's construction and application of cl 5.2(b). Her Honour held that cl 5.2(b) required the appellant to insert the stocktake figure of $757,734 as the amount for work in progress in column 2 of the Completion Statement served on the respondent without any scope for adjustment.

[49] That approach involved an incorrect reading of cl 5.2. Clause 5.2(a) required firstly a physical verification of work in progress as at the completion date. The purpose of that physical verification was to determine "the quantum and value" of these items. Her Honour read the phrase "quantum and value" as involving interchangeable concepts. A similar approach was adopted before this Court by both the appellant and the respondent.

[50] It seems to me, however, that the phrase "quantum and value" refers to two quite separate matters, ie the quantity or extent of the work in progress and the value to be ascribed to it. Both concepts are important. Her Honour, however, approached cl 5.2(a) as if the task there prescribed related only to the determination of the value to be ascribed to the work in progress.

[51] Consistent with what I consider is the correct approach, cl 5.2(b) refers to agreement and initialling of "the inventory of work in progress". What is to be agreed is the inventory setting out, or otherwise identifying, the work in progress. There is no specific reference to "value" although consistent with cl 5.2(a) there was a value attributed to the work in progress on the inventory, ie $757,734. It is therefore not without significance that it is the "inventory of work in progress" which is to be "used in preparing" column 2 of the Completion Statement not the value attributed to it.

[52] I am also of the opinion that the phrase "used in preparing" carries the meaning that further steps need to be taken in respect of column 2 than simply inserting the agreed stocktake amount for work in progress. It is an odd combination of words if all that was intended was the insertion of an agreed monetary figure in column 2. In that latter circumstance one would have expected the word "preparing" to have been left out since its presence would be otiose.

[53] Consistent with that interpretation is the wording of cl 5.2(c). As with the earlier clauses, the focus is upon the inventory of work in progress with no particular emphasis on the value attributed to that work. In saying that I accept that the monetary figure attributed to that work would form part of the inventory. Nevertheless the emphasis throughout cl 5.2 is on the inventory of the work in progress.

[54] It seems to me that the emphasis given to the value attributed to the inventory of the work in progress of $757,734 in the way in which this litigation was fought, has obscured the broader focus of cl 5.2. That focus was upon the physical verification of the work in progress enabling an inventory to be created and a value to be ascribed to the contents of the inventory. This is despite the use of the word "valuation" in the heading to cl 5.2.

[55] Such an interpretation of cl 5.2 is strongly suggestive that the way in which her Honour applied cl 5.2(b) was

incorrect.

[56] Clause 5.3 also operates as a significant obstacle to her Honour's interpretation of the words "used in preparing" in cl 5.2(b). It is difficult to see why 20 business days would be allowed for the completion of column 2 of the Completion Statement if all that was involved was the insertion of an already agreed figure for work in progress. While there were other figures besides work in progress to be inserted in column 2, those figures were peripheral and there is no suggestion that they would have significantly affected the bottom line in column 2. The crucial figure to be added to column 2 was that for work in progress.

[57] Clause 5.3(b)(1) supports that interpretation. There is a specific reference to work in progress. There is a mandatory requirement for consistency between column 1 and column 2 in the methodology used. This clearly contemplates some adjustment to the monetary value of the work in progress derived from the exercise required to be carried out by cl 5.2.

[58] If the 30 June 2002 figure for work in progress in column 1 included an element for margin and labour costs then a similar allowance had to be taken into account in respect of the figure to be inserted in column 2. It seems to have been common ground that the figure of $757,734 did not include an allowance for margin and labour costs.

[59] It is reasonable that minds might differ as to the extent of the adjustments to be made to the $757,734 figure so that the end result was calculated on a basis consistent with the 30 June 2002 work in progress figure in column 1. That is the sort of dispute which was contemplated in cl 5.4 for referral to the Valuer appointed under the agreement.

[60] It seems to me that the combined effect of cll 5.2 and 5.3 is tolerably clear. Clause 5.2 involved a physical inspection of each of the workshop locations to assess what jobs were in train, and what was their state of completion. The result of that process was the production of an inventory which was then agreed and signed. As part of the process a value was ascribed to the work recorded on the inventory. While these clauses contemplate no change being made to the work recorded on the inventory they do envisage and allow for an adjustment to the value attributed to the work on the inventory. Such an approach provides certainty as to the quantity or extent of work in progress recorded on the inventory but gives effect to the words "used in preparing" in cl 5.2(b) and allows for adjustment of the value to be attributed to that work as envisaged by cl 5.3.

[61] Further support for that interpretation is provided by cl 5.4(a). As with cl 5.3(a) it is difficult to see why 20 business days would be required for agreement as to column 2 if there was no scope for adjusting the most significant figure in column 2, ie the work in progress figure. The same argument can be made in relation to the whole of cl 5.4. If there was no scope for adjusting the figure for work in progress in column 2 once that figure had been calculated pursuant to cl 5.2(b), there would be no reason to have the detailed review mechanism for column 2 set out in cl 5.4. The Valuer would in reality have no work to do in respect of column 2.

[62] Because in my opinion the meaning of cll 5.2-5.4 is reasonably clear, I do not see a need to reach any conclusion concerning the contextual submissions made on behalf of the appellant based as they were on the presumed intent of the parties in the light of their knowledge prior to the contract.

[63] I should say something about her Honour's approach to cl 5.3(b). Her Honour found that the figure for work in progress inserted by the appellant in column 2 of the Completion Statement was not calculated on a basis consistent with the 30 June 2002 figure for work in progress in column 1. Her Honour reached that conclusion because the margin in the appellant's column 2 figure for work in progress had been calculated by reference to historical margins whereas the 30 June 2002 figure in column 1 included a margin which had been calculated on a job by job basis.

[64] It is not clear what use her Honour made of that finding. By inference it would seem that her Honour used it as another reason for why she found that the Completion Statement served by the appellant was not in accordance with the agreement and was therefore not a Completion Statement.

[65] In reaching that conclusion it seems to me that her Honour focused on the wrong issue. The real significance of the

30 June 2002 figure for work in progress in column 1 and that relied upon by the appellant in column 2 of its document, was that they both contained an allowance for margin which had been added to the actual value of the work in progress. Disputes as to how the margin was calculated were the very sorts of matters which could have been referred to the Valuer in accordance with cl 5.4.

[66] The real issue raised by cl 5.3(b) which her Honour did not address was that the 30 June 2002 figure for work in progress in column 1 contained an allowance for margin whereas on her Honour's interpretation the proper figure to be inserted in column 2 for work in progress, ie the $757,734 stocktake figure, did not. On her Honour's interpretation it would be difficult to see how the column 2 figure for work in progress could be said to be completed on a basis consistent with the 30 June 2002 column 1 figure.

[67] In my opinion the insertion of the stocktake figure $757,734 in column 2 without an adjustment for margin would involve a failure to comply with cl 5.3(b). On the other hand a difference between the figures for work in progress in columns 1 and 2 where that difference involved the way in which the margin had been calculated would not. This is because there would be a consistency in the approach as to how the figures were derived but a difference in the method of calculation. Such a difference comes within the broad ambit of the phrase "on a basis consistent with" as used in cl 5.3(b) and is the sort of dispute which could have been referred to the Valuer under cl 5.4.

[68] It follows from the above analysis that I am of the opinion that her Honour erred in finding that the Completion Statement served by the appellant did not comply with the agreement because it did not have included in column 2 for work in progress the stocktake figure $757,734. As indicated above it seems to me that the agreement envisaged that figure being adjusted to have regard to such matters as labour costs, profit margin and also invoices paid before 11 October 2002.

[69] There was, however, one respect in which the appellant's Completion Statement did not comply with the agreement. This was referred to by her Honour but not developed. It emerges from the evidence of Mr Bigg, an employee of the appellant, at Black Appeal Book 103:

> Q. Yes. What I'm suggesting to you is that the final figure for WIP, prepared by you for the completion statement, included figures for jobs which were not on the stocktake sheets at the time of the stocktake on 11 October and were not identified to Harnischfeger representatives on that day as being jobs?
> A. What I'm referring to in that comment is on the work in progress spreadsheets which accompanied the completion statement was that there were job cards which were issued which were valid to the date of stocktake which were not included in the stocktake sheets.
> Q. Does that mean that they weren't part of the jobs which were signed off at the stocktake?
> A. They would have been valid jobs as at the date of the stocktake.
> Q. But they were not jobs which were signed off at the stocktake. Is that right?
> A. That would have been correct.
> Q. But nonetheless you included those jobs in your calculations of the final figure for WIP, correct?
> A. That's correct.

[70] That evidence makes it clear that included in the work in progress figure in column 2 of the appellant's Completion Statement was an amount for work in progress which was not on the agreed inventory. I do not read cll 5.2 and 5.3 as permitting that kind of adjustment. If that were permitted there would be no point in carrying out a physical verification of the work in progress. There would be no certainty achieved as a result of the agreement and initialling of the inventory. In effect the exercise prescribed by cl 5.2 would be largely meaningless.

[71] The evidence did not disclose the quantity or extent of the work in progress which was outside the agreed inventory. One can perhaps infer that it was not particularly great if it was not picked up by the physical verification

process.

[72] In relation to the second question there was no issue, and her Honour found, that the appellant's Completion Statement "in its structural elements" reflected that which was required by Sch 8 of the agreement and that it was served in accordance with the time limits therein prescribed. There was no doubt that the document purported to be a Completion Statement and was so described and treated by the appellant.

[73] Her Honour found that because the figure for work in progress in Sch 2 of the appellant's Completion Statement did not accord with cl 5.2(b), the document was not a Completion Statement. If the document was not a Completion Statement, this itself involved a failure by the appellant to comply with cl 5.3(a) and the review provisions in cl 5.4 were inoperative.

[74] There is something of an internal inconsistency in that reasoning process. Implicit in it is that a review under cl 5.4 is only available in the case of a properly calculated and accurate Completion Statement where there still might be some insignificant area of dispute between the parties. By so confining the concept of "Completion Statement" very little if anything is left for the Valuer to review. I can see no basis in the agreement for so confining the application of cl 5.4.

[75] It seems to me that the obvious and natural meaning of cll 5.3 and 5.4 is that when a document which purports to be a Completion Statement and which is in the form required for a Completion Statement, is served by the appellant, cl 5.3(a) is complied with. If agreement cannot be reached between the parties as to column 2 of the document, the review provisions in cl 5.4 can be utilised by the parties. If they are not utilised cl 5.4(d) sets out the result.

[76] I can see no reason in the text of the agreement for reading down or confining the nature of the dispute which can be reviewed by the Valuer pursuant to cl 5.4 except that the dispute must relate to column 2 of the Completion Statement. This gives effect to the natural and in the context of this agreement, obvious meaning of the words in cl 5.4

[77] It seems to me that the error which I identified in the appellant's Completion Statement, ie the inclusion in the value of work in progress, work which was not included on the agreed inventory, is the very type of dispute which cl 5.4 contemplates for review. So also is the question of whether the margin on work in progress has been correctly calculated, ie on an historical basis or on a job by job basis.

[78] It follows that if the respondent contended that column 2 in the appellant's Completion Statement did not comply with cll 5.2(b) or 5.3(b), the respondent was obliged to raise the issue with the appellant and seek to resolve it and in default of agreement, either party could refer the matter to the Valuer whose decision would be binding. The very issues which were litigated before her Honour were the issues which under the agreement, the respondent should have referred to the Valuer for review if the respondent wanted the matter resolved.

[79] There seems to be ample authority for questions such as this, ie questions of mixed fact and law, to be referred to third party experts albeit that most of those decisions are at first instance (*Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587; *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [30] and *M1 v L1* [2007] NSWSC 346 at [24]). In *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187 Wheeler JA, whilst not in terms dealing with questions of law being referred to experts, implicitly approved such a practice. I see nothing inappropriate in the matters which were in issue in this case being referred to the Valuer under cl 5.4.

[80] It follows that the respondent having failed to avail itself of the review provisions in cl 5.4, is now bound by the values contained in the Completion Statement in accordance with cl 5.4(d).

[81] For completeness I should deal with some specific submissions by the respondent. It was submitted that if the stocktake figure was not to be inserted in column 2 of the Completion Statement, the agreement offers no guidance as to how the work in progress figure in column 2 is to be derived. I do not agree. There is certainty as to the quantity of work in progress as recorded on the agreed inventory. That is fixed and there is no authorisation in the agreement for

changing it. A value is attributed to that work in progress as part of the inventory but the agreement envisages some adjustment being made to that value. That adjustment is not at large but must be in accordance with cl 5.3(b)(1). In the sense contemplated by the agreement the inventory of work in progress is thus "used in preparing" the column 2 figure.

[82] The real difficulty with the respondent's interpretation of cl 5.2(b) is that it gives so much weight to the word "used" and to the value attributed to the agreed inventory, that it effectively deprives cll 5.3 and 5.4 of any real utility. On the respondent's interpretation once the stocktake value is derived in accordance with cl 5.2, there is little more needed to complete column 2 of the Completion Statement. This in my opinion removes any balance from the agreement. Its only real benefit is that of simplicity.

[83] It was submitted by the respondent that there is no inconsistency between the stocktake figure in cl 5.2(b) and cl 5.3(b)(1). This, it was submitted, was because the cl 5.3(b) considerations were taken into account when deriving the stocktake figure so that any disputes in that regard would have been resolved pursuant to cl 5.2(c).

[84] Such an approach involves a significant distortion of the relationship between cll 5.2 and 5.3. The events identified in cl 5.2 are clearly expected to precede those in cl 5.3. It is for that reason that cl 5.3(a) specifies 20 business days during which the steps identified in the clause are to be carried out.

Conclusion

[85] It follows from the above analysis that the appeal should succeed. The parties agreed that should the appeal be successful, the orders proposed by the appellant in its Amended Notice of Appeal should be made by the Court.

[86] Accordingly, I propose the following orders:

(1) That the appeal be allowed and that the orders of the District Court of 13 March 2007 be set aside.
(2) In lieu thereof:
    (a) Judgment for the plaintiff in the amount of $615,062.77, such judgment to take effect from 13 March 2007.
    (b) Judgment for the cross-defendant on the defendant's cross-claim.
    (c) Order the defendant to pay the plaintiff's costs of the proceedings on the ordinary basis to 3 August 2006 and thereafter on an indemnity basis.

(3) Order that the respondent repay the appellant the sum of $104,736.44 together with interest at the rate or rates prescribed pursuant to s 101 of the Civil Procedure Act 2005 (NSW) from 5 April 2007.
(4) Order that the respondent pay the appellant's costs of the appeal.

Order

That the appeal be allowed and that the orders of the District Court of 13 March 2007 be set aside

In lieu thereof

Judgment for the plaintiff in the amount of $615,062.77, such judgment to take effect from 13 March 2007

Judgment for the cross-defendant on the defendant's cross-claim

Order the defendant to pay the plaintiff's costs of the proceedings on the ordinary basis to 3 August 2006 and thereafter on an indemnity basis.

Order that the respondent repay the appellant the sum of $104,736.44 together with interest at the rate or rates prescribed pursuant to s 101 of the Civil Procedure Act 2005 (NSW) from 5 April 2007

Order that the respondent pay the appellant's costs of the appeal.

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---- End of Request ----
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