

CHALLENGING AN EXPERT'S DETERMINATION

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It is well established law that the determination of an expert can only be successfully impeached as invalid:

- if it is shown to be tainted by fraud or collusion; or
- if it is shown not to have been made in accordance with the determination process specified.

If the determination has been made in accordance with the terms of the contract, a mistake by the valuer in the reasoning process in reaching his or her conclusion will not invalidate the determination. However, where a mistake is shown, it can result in a determination that does not comply with the contract, or it can occur in the process of carrying out the valuation which, even if done negligently, is nevertheless the process required by the contract. In the former case the determination is of no force and effect. In the latter case it is final and binding.

In Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd & Ors 2001 NSWSC 405 the judge enunciated these principles as being well settled and the parties did not take issue with them. The dispute was how those principles were to apply to the facts.

The plaintiff's contention was that the valuer's determination was of no effect because he failed to comply with the determination process provided for in the lease, and these errors resulted in a determination different in character from that for which the parties contracted.

In fact the court held that the determination was valid and binding, and that there was no negligence in the manner in which the valuer carried out his determination.

However, the major issue for the court before it reached that conclusion was whether it could or should have regard only to what appears on the face of the valuer's determination in considering whether any error was shown, or whether it could rely on extrinsic evidence such as, in this case, evidence given by experts to show that the valuer's determination did not conform with the requirements of the contract.

This is an issue on which judicial opinion has diverged in the United Kingdom and Australia. In *Mayne Nickless Limited v Solomon* 1980 QDR 171 the Queensland Full Court unanimously held that extrinsic evidence is inadmissible

After considering numerous authorities which, in the case of NSW judgments were conflicting, and in the case of decisions of the Queensland and Western Australian Full Court which were not binding, Palmer J came to the conclusion that he was in fact entitled to go behind the face of the determination and have regard to the extrinsic evidence presented, in order to decide whether the determination had been conducted in accordance with the requirements of the lease.

While the judgment is carefully considered it was, nevertheless, a judgment at first instance.

The judgment was appealed to the NSW Court of Appeal, but on appeal the parties did not dispute the trial judge's admission of extrinsic evidence. It is possible therefore that the issue could still be the subject of some dispute in the future.

The Court of Appeal found that the valuer had done all that he was

required to do by the terms of the contract and that he had not been negligent in making his valuation.

In doing so, the court emphasised that even if the valuation had been made negligently, or if the valuer had taken into account things that were not relevant, or not taken into account things that were relevant, this was not a mistake that would mean that the valuer had not made his valuation in accordance with the contract.

Giles JA said:

There is good reason for an expert valuation to operate in this way. There is not necessarily one correct valuation answer, and there is certainly likely to be room for dispute. That is what the parties to the contract seek to avoid, agreeing on the honest and impartial decision of the valuer, but also agreeing that they will be bound even if the valuer makes a mistake in doing what the contract says shall be done.

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