IMPUGNING EXPERT DETERMINATIONS IN AUSTRALIA

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Both in England and in Australia the vexed question concerning judicial review of expert determinations (valuations) has been dealt with in various manners by the courts over a long period of time. This article traces the Australian and English case histories, analyses the various conflicting decisions and in conclusion lists questions which appear to be still open for judicial determination.

The courts have always held that fraud or dishonesty and partiality will vitiate an expert determination. There is however considerable controversy as to whether or not error on the part of the expert is a sufficient basis for impugning the expert's determination, and if so, what the nature and extent of the error must be to qualify.

Australian case history

Over a long period of time, the courts both in England and Australia have attempted to formulate legal principles for impugning expert determinations. As will be seen from an analysis of the cases below, the decisions have not been consistent.

In *Mayne Nickless Ltd v Solomon*,[1] a rent review clause provided that the rent payable was to be fixed by reference to a mathematical calculation based upon the market value to be determined by a valuer. The valuer prepared a speaking valuation which, on its face, indicated that the method employed was that of replacement costs less depreciation.

In an action by the lessor company for arrears of rent, the lessee attacked the valuation alleging that the method employed by the valuer was not acceptable and that the valuer should have based his valuation upon comparable sales and, furthermore, should have taken into account a "Use Restriction". The Court held that if the speaking valuation could be impeached for mistake, then such mistake "must appear from a reading of the valuation and not from cross-examination of the valuer".[2]

The Court's obiter comments[3] suggest that both speaking and non-speaking classes of valuations should not be subject to attack for error or mistake where the valuer is chosen by the parties. The proper remedy of an aggrieved party would be to sue the valuer for damages for having acted negligently in making the valuation. *Collier v Mason*[4] and *Dean v Prince*[5] gave way, in this judgment, to *Campbell v Edwards*.[6] In *Zucchiatti v Ferrara*,[7] Needham J found it unnecessary to decide whether he should follow *Collier* and *Dean* on the one hand or *Campbell* on the other.

In *Karenlee Nominees Pty Ltd v Gollin & Co Ltd*,[8] detailed reasons were provided in a speaking valuation. The Court held that it was proper to decline to act on such a valuation if a "mistake in a relevant sense, or lack of good faith, or fraud" emerges.[9] In considering the nature of a mistake cognisable by a court in this context, it was held:

> "The mere attribution of too much or too little weight by one of the two valuers to matters which bear upon the ultimate valuation arrived at cannot be considered a mistake vitiating a valuation."[10]

In *Wamo Pty Ltd v Jewel Foods Pty Ltd*,[11] Clarke J stated:

> "The only cases in which a valuation has been set aside for mistake precede *Sutcliffe* and *Arenson*. These authorities, as Lord Denning pointed out, require a reconsideration of the old cases ... My conclusion ... is that valuations, whether speaking or non-speaking, are not open to impeachment on the ground of mistake."[12]

The seminal decision in New South Wales on impugning an expert's determination is *A Hudson Pty Ltd v Legal & General Life of Australia Ltd*.[13] It was accepted by Waddell J at first instance in an application by a lessee to set aside a speaking valuation (that is, one setting out reasons for its conclusions), that a mistake which led to a valuation not in conformity with the contract should be set aside. His Honour drew a distinction between a misapplication of a value principle or a mistake in calculation on the one hand, both of which would be unassailable, and on the other hand, the type of error with which his Honour was concerned, namely, a mistake which results in the valuation not being in conformity with the contract.[14]

On the facts found by his Honour, the valuer took into account, in arriving at his valuation of market rental, a mezzanine floor area which had been removed by the lessee with the lessor's consent at the commencement of the lease. His Honour held that the error committed by the valuer related to the fact that the non-existent mezzanine area was taken into account.

Hudson at first instance was overruled on appeal: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*[15] per Mahoney, Priestley and McHugh JJA; although as appears below, there is no consistent ratio in the three separate judgments. Mahoney JA held that there was no error and accordingly it was not necessary to express any concluded view as to whether the valuation would have been rendered ineffective if the error found by Waddell J existed.[16]

Priestley JA would have been disposed to have granted the same declarations made by Waddell J, if he had thought that the valuation document was based upon the market rental value of the premises in their physical state at the commencement of the lease.[17] His Honour held that on the facts, the applicant who bore the onus had not shown on a balance of probabilities that the new rental was not binding on it.[18] He stressed that if the applicant had not sought the declaration, but had merely refused to pay the higher rental, the incidence of onus would be reversed.[19]

Although McHugh JA found that the valuer was not guilty of the error found by Waddell J,[20] he nevertheless embarked upon a comprehensive survey of most of the relevant authorities and in a seminal judgment held:

- A mistake involving a departure from a question referred to a valuer would invalidate the valuation, for example, a mistake as to the identity of the thing to be valued, but the valuation would not be invalidated by an error such as taking into account rents which are not comparable. In the former case, the valuer does not answer the question referred to him as his assessment is not based "on the terms, covenants and conditions of this lease".[21]
- A valuation obtained by fraud or collusion can be disregarded both in law and in equity, as "the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract".[22]
- There is no implied term that a valuation must not be mistaken or unreasonable. In the case in question, the decision of the valuer was to be "final and binding on the parties".[23]
- A distinction is to be drawn between a case where a party seeks the assistance of an equitable remedy to enforce an agreement to abide by a third party's valuation, in which case a defence based upon mistake, fraud or collusion may avail, and an action based upon a common law remedy. In the latter event, defences of fraud, collusion or mistake may be available because the express or implied terms of the contract permit them.[24] His Honour stated that to hold otherwise "is to be a victim of 'the fusion fallacy' ".

The Full Court gave leave to appeal to the Privy Council.[25] The appeal was dismissed. Their Lordships held that they were

> "not persuaded that the valuers made any mistake in fact or in law ... There being no discernible mistake in the valuation their

> Lordships are not concerned to consider the kinds of mistake which might justify interference by the court with the valuation of an expert".[26]

In *Email Ltd v Robert Bray (Langwarrin) Pty Ltd*,[27] the Full Court of Victoria held that a valuation could not be upset on the ground that irrelevant matters were taken into account, or relevant matters disregarded. The Court was of the opinion that a valuation bound the parties "unless the assessment is vitiated by fraud, collusion or mistake".[28] No distinction was drawn between relief in equity or in law. The report does not make it clear whether or not there was a clause in the agreement that the valuer's valuation was to be final and binding.

Yeldham J comprehensively reviewed the authorities in *Joint Coal Board v Noone Pty Ltd*.[29]

In *Capel Services Ltd v Legal & General Assurance Society Ltd*,[30] Beach J held that evidence of pressure by one of the parties having been brought to bear upon a valuer may result in the valuer's findings being set aside.

In "Arbitration, Valuation and Certainty of Terms",[31] the Hon Mr Justice B H McPherson explained the reluctance to set aside a valuation by referring to the fact that a court has no power to order the nominated valuer or another valuer to make a fresh valuation.

However, in *Horwitz Grahame Books Pty Ltd v Mid-City Centre Pty Ltd*,[32] Bryson J adopted the approach taken by McHugh JA in *Hudson* on appeal to the Full Court, where the valuer was appointed as an expert, and not as an arbitrator, and the clause appointing him read: "and the decision of such qualified valuer (including any decision as to the costs of such determination) shall accordingly be final and binding on the parties to the lease".

Bryson J accepted McHugh JA's formulation that the question whether a valuation could be set aside for error depended, in the first instance, on the express or implied terms of the contract appointing the valuer. Where the contract provided for the valuation to be "final and binding on the parties", it could not be set aside for error, save where it was not in accordance with the contract. McHugh JA's judgment in *Hudson* has been followed in New South Wales and elsewhere.[33]

In *James McEwan & Co Pty Ltd v Dilettante Pty Ltd*,[34] Duggan J held that an agreement that valuations be "conclusive and binding" meant that the parties agreed to accept it. However, parties may set the parameters of a valuer's discretion by stipulating certain matters to be considered or disregarded. A failure by a valuer to observe these parameters was open to court review.

In *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd*,[35] Giles J held:

> "But even when the valuer's determination is binding provided his valuation was made in accordance with the terms of the contract, as I consider is the position in the present case, that is only the beginning of the inquiry. What does the contract — here, the sale agreement — require of the valuer?"[36]

In applying the dictum of McHugh JA in *Hudson*, Giles J held:

> "it will be difficult and usually impossible to imply a term that a valuation can be set aside on the ground of the valuer's mistake. The parties have committed themselves to the valuer's honest and impartial, albeit mistaken, exercise of his skills."[37]

Giles J's judgment in *Strang Patrick* was referred to by Olsson J in *Bank of South Australia v SA Health Commission*.[38] It was not necessary for Olsson J to determine whether the approach of Giles J was correct.

In *Holt v Cox*[39] the auditor of a company was required to determine a fair price for shares following their compulsory acquisition on the termination of an employee's employment. Santow J followed *Strang Patrick* on the finality of the expert's determination:

> "Where a valuation is made as an expert, the issue of whether it is binding on the parties, depends on the terms of the contract. If the contract expressly or impliedly, provides that the decision of the valuer is 'final and binding on the parties', a valuation made in accordance with the terms of the contract will be binding as between the parties, even if made negligently, or in mistaken application of the principles of valuation including failing to consider relevant matters or mis-valuing the asset.
>
> The question is not whether there is an

error in the discretionary judgment of the valuer, but whether the valuation was made in accordance with the terms of the contract: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335-336 per McHugh JA, *Woolworths Ltd v Merost Pty Ltd* (1988) 14 NSWLR 300 at 303, *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657 at 670."[40]

Significantly, Santow J went on to hold[41] that where there is a simple direction to determine the value of an asset, it is inferred that the expert valuer is entitled to adopt his or her own methodology and "any mistakes of methodology are mistakes in the course of doing what the contract required".[42]

> "This is analogous to the use of expert determination of fair value in the context of company take overs. Once it is decided that the question of the fair value of the shares should be referred to a neutral expert, it then becomes a matter for the expert to determine the value in the manner in which he or she, as a matter of expert opinion, believes to be appropriate: *BTR Plc v Westinghouse Brake & Signal Co (Aust) Ltd* (1992) 106 ALR 35; 7 ACSR 122 at 137 and 153."

His Honour continued:

> "Thus the critical distinction is between a mistake in the process of valuation where in the absence of dishonesty or partiality, the courts do not interfere, in contrast to a valuation which actually departs from the contract, where the courts will intervene: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* . . . ."[43]

But he nevertheless set aside the valuation of shares because of the failure by the auditor to take into account the full bundle of the rights which the shares accorded, and because the price determined was not fair, which his Honour held was contrary to the contract itself, and not a mere error in the valuation process. The holding that the valuation could be avoided on the ground that the valuation was not a fair one, although based on the principle that the expert failed to carry out the task which he had undertaken, that is, to determine a fair valuation, comes very close to avoiding a determination on the ground of error. The dividing line is a narrow one indeed.

In *Holt v Cox*[44] on appeal to the Court of Appeal, it was submitted that the expert determination although valid at law may yet be vitiated by such error that a court would decline to enforce it by decree of specific performance. The Court of Appeal noted that the distinction between the respective roles of equity and common law was discussed by McHugh JA in *Legal & General*.[45] The point was however left open. The Court of Appeal said:

> "At least as a matter of common law, a valuation will stand if it satisfies the description given in the contract between the parties. The readiness in the courts to provide greater latitude for experts to choose between different valuation methods and, within limits, to make errors in assessing facts or taking matters into consideration or declining to take matters into consideration, is influenced by the recognition in *Arenson v Arenson* [1977] AC 405 and *Sutcliffe v Thackrah* [1974] AC 727 that experts who negligently determine a valuation will be held liable in damages to a party suffering loss in consequence of the expert's negligence."[46]

It will be noted that the Court of Appeal did not entirely exclude impugning expert determinations where the expert chose an incorrect valuation method, or made errors in assessing facts, or taking matters into consideration, or declining so to do. The Court of Appeal recognised[47] that there were limits to the types of errors which will be overlooked in the courts, and cited Sir Frederick Jordan in *Ex parte Heppurn Ltd; Re Kearsley Shire Council*: "There are mistakes and mistakes."[48]

It was held that "where, as here, the valuer exposes his or her reasoning processes", then the ultimate issue for judicial determination remains that of deciding whether the valuation was in accordance with the parties' contract.[49]

The Court of Appeal significantly held:

> "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 Jewell Food Stores Pty Ltd (1983) ANZ Conv R 50."[50]

The Court of Appeal noted that McHugh JA was not of the view that mistakes are never relevant.[51] Rather that they are not relevant if the valuation was in accordance with the terms of the contract.

In *Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co*[52] the clause in the contract between the parties provided for disputes or differences to be determined by the joint decision of two firms of auditors "whose decision shall be final and accepted by the parties as such". Rolfe J, after having referred to McHugh JA's judgment in *Hudson*, noted that in McHugh JA's view,

> "even though error leads to a result, which does not accord with that for which the parties contracted ie a valuation on a different basis, the fact that it occurred in attempting to perform the task they contractually submitted to an expert means that it does not invalidate the conclusion to which he came".[53]

Rolfe J continued:

> "However, if it is said that by committing that error the expert arrived at a value that was not the current annual open market rental value, I have difficulty, if I may say so with respect, in concluding that such a mistake was one performed in carrying out the contractual requirement. If on the other hand it is said that the decision was one in the exercise of discretion on which minds could legitimately differ as to the methodology to be applied, provided one reached the contractually stipulated for result, I do not have that difficulty."

And:

> "In *Holt* the issue was whether an expert valued shares at a 'fair price' as he was required to do by the Articles of Association of a company. In carrying out that task the auditor was acting as an expert rather than as an arbitrator. In a detailed judgment Santow J said at 333:
>
> '2. Where a valuation is made as an expert, the issue of whether it is binding on the parties, depends on the terms of the contract. If the contract expressly or impliedly, provides that the decision of the valuer is "final and binding on the parties", a valuation made in accordance with the terms of the contract will be binding as between the parties, even if made negligently, or in mistaken application of the principles of valuation including failing to consider relevant matters or mis-valuing the asset.'
>
> If I may say so with respect this method of stating the matter causes me some difficulty in the sense that it may pre-suppose that notwithstanding that a valuation was made negligently, or in mistaken application of principles of valuation, it will none-the-less be made in accordance with the terms of the contract. I have sought to explain why, in my view, that will not necessarily be the case if the valuation is made contrary to principles of valuation it may not produce that which is contractually demanded, viz a 'fair value'."[54]

Rolfe J's observation appears to be based on the principle that an expert cannot be said to have carried out the contract, by making a negligent determination which does not in fact determine the value of the subject matter of the contract in accordance with the standard set in it.

In *Holt*, as discussed above, the valuation failed because the valuer's errors resulted in the price not being fair. The question may be asked as to what the difference is between that set of circumstances and where because of the errors of the expert in adopting the wrong valuation methodology or taking into account the relevant factors or ignoring relevant factors results in "value" not being determined.

In *WMC Resources Ltd v Leighton Contractors Pty Ltd*,[55] the proprietor had power to determine the value of variations under a building contract in its sole discretion. Anderson J held[56] that on the authority of *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*[57] and *Atlantic Civil Pty Ltd v Water Administerial Corporation*,[58] generally speaking, a court or an arbitrator called upon to determine contractual rights and obligations was required to enforce the contract including any provision in it for the final and binding determination by a named person. His Honour was of the view that the named person must at least act honestly and within power.[59] He

pointed out that a number of cases hold that that person must also act reasonably. His Honour summed the matter up thus:

> "These implied terms that the designated person authorised to conclusively determine contractual rights is bound to act honestly, reasonably and within power are, of course, terms that will be enforced by the tribunal before which rulings by the designated person are challenged, so that if he is found to have been dishonest or to have acted beyond power, his certificate or determination or opinion will not be enforced. This is simply because it will not be a certificate or determination or opinion which is in accordance with the contract: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 per McHugh JA at 335-336. Now, there is a question as to what is the remedy for the aggrieved party if it should be found that the named person authorised by the contract to make a conclusive and binding determination, has not acted properly."[60]

Anderson J's observation that it is implied that the expert should act reasonably is to be contrasted with the holding of McHugh JA in *Legal & General*[61] that there is no such implied term.

The Full Court of the Supreme Court of Western Australia distinguished between valuations which may involve the making of decisions where there are no readily available standard criteria and which may involve "several possible methods of assessing value, each giving widely different results but each being reasonable",[62] on the one hand and valuations where there are fixed or readily available standard criteria.

After referring to *Turama Forest Industries Pty Ltd v Eng*[63] and the same case on appeal,[64] and *Commissioner of Taxation (Cth) v St Helen's Farm (ACT) Pty Ltd*[65] and *Legal & General*,[66] the Full Court noted that the first type of valuation where there were no fixed criteria required the valuer to exercise a "discretionary judgment".

The Court went on to determine whether or not a discretional valuation decision by a third party could be the subject of judicial review[67] and held that such discretionary determinations could not be invalidated on the ground of mistake save for a mistake concerning the subject matter or terms of the contact.[68]

The Court further held that a discretionary valuation was also not subject to challenge on the ground that relevant matters had either not been taken into account or irrelevant matters had.[69] Ipp J held that in the very nature of the valuation task undertaken by the valuer, the valuer's

> "determination can be challenged on the grounds directed to the [valuer's] obligations to act honestly, bona fide and reasonably, or on any other ground on which it could be said that the valuation was not in accordance with the contract, in the sense explained by McHugh JA in *Legal & General Life of Australia v A Hudson Pty Ltd* or on a ground based on the remarks of Mason J in *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* to which I have referred".[70]

The question that arises is how reasonably a valuer acts if this regards relevant matters and/or takes into account irrelevant matters. It appears as if the inquiry goes around in a circle.

English case history

As both Waddell J and McHugh JA did in *Hudson*, in order to attempt an answer to some of these questions, it is necessary to analyse and trace the history of decisions on the impugning of expert determinations, through the English and Australian cases. In doing so, reference will be made to the decisions referred to by their Honours and certain decisions which neither of their Honours cited.

A convenient starting point is *Belchier v Reynolds*,[71] where the Court of Chancery held that the parties to an agreement of valuation are bound by the resultant valuation unless the valuer "had been guilty of some gross fraud or partiality".

In *Emery v Wase*,[72] it was held that the plaintiff's remedy for an incorrect valuation was an action for damages against the valuer. The judgment on appeal[73] upheld the decision at first instance.

However, in *Parken v Whitby*,[74] Sir Thomas Plumer MR restated the right of a court of equity to refuse specific performance where the price fixed by a valuer was infected by error.

Lord Romilly LJ's dictum in *Collier*[75] has been much quoted:

> "I cannot satisfy myself that I should be correct in saying that this is a contract which cannot be specifically performed. It is not proved that Mr Englehart did not exercise his judgment and discretion in the best way he could. It may have been improvident as between these parties to enter into a contract to buy and sell property at a price to be fixed by another person, but that cannot avoid the contract. Here the referee has fixed the price, which is said to be evidence of miscarriage, but this Court, upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract; or even, in the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the court would refuse to act on the valuation."

It will be seen that, in his Lordship's view, there were broad grounds on which a valuation could be set aside. Of significance is the reference to the price being so excessive or small to warrant an inference that there is a basis cognisable in law for the determination to be impugned.

Lord Romilly MR in *Weekes v Gallard*[76] held that the only defence to a claim for specific performance to an agreement to be bound by the valuation of other persons was fraud or collusion. As pointed out by McHugh JA in *Hudson* on appeal there was no mention of mistake as a defence to such an action.[77]

Nevertheless the *Collier* line of authority was followed in *Dean*,[78] where it was held that when the determination of the value of an item by a valuer, whether speaking or non-speaking, is manifestly unjust and made in error, the valuation can be set aside provided that the extravagance or inadequacy is gross. Denning LJ put on one side the impact that the personal liability of a valuer for error might have on this issue. His Lordship said:

> "if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely: or interpreted the agreement wrongly: or proceeded on some erroneous principle. In all these cases the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate. These cases about valuers bear some analogy with cases on domestic tribunals, except of course that there need not be a hearing. On matters of opinion, the courts will not interfere; but for mistake of jurisdiction or of principle, and for mistake of law, including interpretation of documents, and for miscarriage of justice, the courts will interfere: see *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329."[79]

As the case law developed in England, the principles stated above appear to have been eroded. McHugh JA in *Hudson* on appeal stated in regard to *Collier*:

> "Nothing in the previous case law, however, had decided that a court could set aside a valuation on the ground of mistake. In some cases the Court of Chancery had refused to decree specific performance of the agreement. But in each of them the plaintiff was left to his remedy at law."[80]

Roskill J (as he then was) in *Frank H Wright (Constructions) Ltd v Frodoor Ltd*,[81] by obiter, accepted as correct the *Collier* and *Dean* principle applied to speaking valuations.

In *M Jones v R R Jones*[82] Ungoed-Thomas followed *Collier* and *Dean* and held "even apart from authority, [he] would have no difficulty whatever in so concluding".[83] A valuation of a company's factory and shop premises on a break-up basis was set aside where the contract called for the valuation to be undertaken on a going concern basis. His Lordship held that this was a sufficient mistake to disregard the valuation.

In *Hudson*, McHugh JA noted that the correct

ground of this decision was that the valuation was not in accordance with the contract.[84]

In *Arenson v Arenson*[85] Denning LJ reconsidered his judgment in *Dean* by taking an approach which was very simple. He excluded all considerations of error and based his decision on parties being bound by their agreement. He stated:

> "At common law — as distinct from equity — the parties are undoubtedly bound by the figure fixed by the valuer. Just as the parties to a building contract are bound by the architect's certificate, so the parties are bound by the valuer's valuation. Even if he makes a mistake in his calculations, or makes the valuation on what one or other considers to be a wrong basis, still they are bound by their agreement to accept it."[86]

On 11 November 1975 the House of Lords decided *Arenson* on appeal[87] and upheld the minority view of Denning LJ in *Arenson* in the Court of Appeal that a valuer was liable for damages on the ground of negligence at the instance of the parties for whom the valuation was made.

The next case to which reference must be made is that of *Campbell*,[88] in which the judgment in *Dean* was doubted, primarily in regard to a non-speaking valuation. Denning MR suggested that where a valuation was excessive, the aggrieved party's remedy was to sue the valuer for damages in negligence.[89] Lord Denning MR appeared to exclude error altogether excepting in the case of a speaking valuation. His Lordship said:

> "It is simply the law of contract if two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."[90]

Campbell was followed in *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co.*[91] Sir David Cairns pointed out that the initial inquiry as to whether a valuation was binding upon the parties turned upon the express or implied terms of the agreement.[92] He took an approach which was very simple. He excluded all considerations of error and based his decision on parties being bound by their agreement.

The trend reversing *Collier* (through *Arenson* at first instance, *Campbell* and *Baber*), appears to have been halted by Nourse J, who in *Burgess v Purchase & Sons (Farms) Ltd*[93] (applying *Johnston v Chestergate Hat Manufacturing Co Ltd*,[94] *Dean*, and *M Jones v R R Jones*[95]), in a persuasive judgment in which a sharp distinction was drawn between speaking and non-speaking valuations, held:

> "The question whether a valuation made by an expert on a fundamentally erroneous basis can be impugned or not depends on the terms expressed or, to be implied in the contract pursuant to which it is made. A non-speaking valuation made of the right property by the right man and in good faith cannot be impugned, although it may still be possible, in the case of an uncompleted transaction, for equitable relief — as opposed to damages — to be refused to the party who wishes to sustain the valuation. On the other hand, there are at least three decisions at first instance to the effect that a speaking valuation which demonstrates that it has been made on a fundamentally erroneous basis can be impugned. In such a case the completion of the transaction does not necessarily defeat the party who wishes to impugn the valuation."

Walton J in *Re Imperial Foods Ltd Pension Scheme*,[96] cited with approval *Collier* and *Dean*, and accepted that a valuation can be impugned on the grounds stated by Romilly MR in *Collier*, namely, where:

(i) there is mistake;
(ii) there is improper motive, not necessarily a fraudulent one;
(iii) the valuer values something not included;
(iv) a wholly erroneous principle is employed;
(v) the valuation is so excessive or so small as only to be explained by reference to some such cause.

Walton J's decision in *Imperial Foods* is evidence

that the *Collier* and *Dean* principle is still alive and well in England.

In *Jones v Sherwood Computer Services Plc*[97] a disputed valuation in the sale of a business was submitted to a firm of chartered accountants to determine, in accordance with the customary formula, "as experts and not as arbitrators". It was provided that the decision would be final and binding. The vendors declined to accept the decision.

It was held that if the valuers departed from their instructions in a material respect, either party could claim that a report was not binding in that the valuers would not have done what they were appointed to do. Both Dillon and Balcombe LJJ disapproved of the distinction made by Nourse J between a speaking and a non-speaking valuation in *Burgess*. Their Lordships considered that a contract can provide that both valuations be conclusive or non-reviewable.

Where expert misconstrues a contractual provision

In *Nikko Hotels (UK) Ltd v MEPC Pic*,[98] an expert adopted a QC's ruling on the construction of a lease. The Court rejected an attempt to impugn a valuation on the basis that the valuer had misdirected himself on a point of law, holding that whichever way a point of law is resolved by the expert, the determination will stand unless the expert has asked the wrong question. However this trend in England seems to have been halted in *Mercury Communications Ltd v Director-General of Telecommunications*.[99] Lord Slynn of Hadley said:

> "Reference was made to *Jones v Sherwood Computer Services Pk* ([1992] 1 WLR 277) where the Court of Appeal held that in a case where parties had agreed to be bound by the report of an expert the report could not be challenged in the courts unless it could be shown that the expert had departed from the instructions given to him in a material respect. In that case the experts had done exactly what they were asked to do.
>
> What has to be done in the present case under condition 13, as incorporated in clause 29 of the agreement, depends upon the proper interpretation of the words 'fully allocated costs' which the defendants agree raises a question of construction and therefore of law, and 'relevant overheads' which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the facts may in the absence of fraud be beyond challenge."[100]

It follows that, at least in England, a misinterpretation of the phrases employed in the valuation clause may constitute an error resulting in the valuation being impugned.

Where expert not third party and expert function to be carried out by a party to the contract

In *WMC Resources Ltd v Leighton Contractors Pty Ltd*,[101] the Full Court of Western Australia held that the rule that a valuation cannot be impugned because of negligence on the part of the valuer may not apply where the valuer is not a third party but a party to the contract itself.[102] No concluded opinion was expressed on this point. Ipp J went on to state:

> "I merely observe that the mere fact that a party to a contract is appointed as a Valuer of a thing, which is to pass as consideration under the contract, does not mean that that party is at large to determine any value it wishes. Conditions will be implied in the contract which will govern the performance of the valuation function."[103]

Ousting the jurisdiction of the court

In "Ousting the Jurisdiction",[104] A Berg observes:

> "Neither the judgment nor the arguments in *Jones v Sherwood Computer Services* made reference to the Court of Appeal's decisions in *Czarnikow v Roth, Schmidt & Co* ([1922] 2 KB 478) and *Lee v Showmen's Guild of Great Britain* ([1952] 2 QB 329) which established, or applied, the principle that, although the parties to a contract can make a domestic tribunal the final arbiter on questions of fact,

they cannot make it the final arbiter on questions of law, including questions as to the construction or meaning of a document."[105]

Berg concludes:

"It is suggested that *Jones v Sherwood Computer Services* is based on a fallacy that can be traced to a statement which Dillon LJ quoted from Lord Denning MR's judgment in *Campbell v Edwards* above described by Dillon LJ as 'the starting point for the modern statement of the law'.

However, *Johnson v Moreton* ([1980] AC 37) demonstrates that whether a party is bound by a particular clause is not 'simply the law of contract'. Lord Hailsham of St Marylebone, Lord Simon of Glaisdale and Lord Edmund-Davies made it clear that, if a clause operates to exclude a party's right as regards a matter in which the public also have an interest, the public interest overrides the law of contract and invalidates the clause. Since there is a public interest in the courts retaining the power (except where excluded by statute) to determine questions of law, *Johnson v Moreton* suggests that the courts' jurisdiction is not excluded by a contract providing that an expert's certificate shall be conclusive."[106]

See however, *Nikko*, above.

Evidence that valuation/determination not made in accordance with contract

In *Strang Patrick*,[107] Giles J held that evidence was admissible to show the valuer failed to make his determination in accordance with the contract between the parties, whether or not the valuation was a speaking valuation.

In *Holt v Cox*,[108] Santow J held that the question whether or not a valuation was made in accordance with a contract is open to evidence unless there has been an express agreement by the parties that what the expert did may not be investigated.

Disclosure of documents

Parties usually wish to provide the expert with documents in support of their submissions. Unless the agreement referring the matter to an expert specifically requires disclosure of documents, it is to be doubted whether or not the expert has authority to require either party to disclose to the other any documents submitted to the expert in support of either party's contention.

Procedural unfairness

In the absence of a term to the contrary, an expert is not obliged to comply with the requirements of procedural fairness or natural justice.[109] However, Rolfe J, without referring to any English authority on this point in *Fletcher Construction Australia Pty Ltd v MPN Group Pty Ltd*[110] held that "in devising procedures the expert is no doubt obliged to ensure that he or she affords natural justice to both parties but, subject to that, he or she is to enter upon the determinative task as an expert and not as an Arbitrator."

Determination made by person who lacks requisite qualification

In *Zucchiatti*,[111] Needham J cited the following passage from *Jones v Jones*[112] with approval:

"In *Jones v Jones* ... Ungoed-Thomas J said:
'And it seems to me that when a valuation of certain specified assets included in a valuation is directed to be by an expert valuer of such assets then a valuation of such assets by a person who is not such an expert valuer is simply not such a valuation as has been directed. If A and B agree to abide by a valuation by C, it is a negation of that agreement to require either of them to abide by a valuation by Z.'"[113]

Conclusions

The questions which call for an answer are:

- Is *Hudson* at first instance correctly decided?
- Should *Hudson* be extended to include the type of errors which Waddell J excluded?
- Should *Hudson* apply to a speaking valuation?
- Is the above distinction in regard to the enforcement of equitable or legal remedies drawn by McHugh JA in *Hudson* correct?

- Does the agreement that a determination is final and binding, authorise the expert to make a negligent determination, binding on the parties?

The following points arise for consideration:

- In regard to *Mayne Nickless*[114] there can be no justification in law for denying an aggrieved party the right to attack a valuation in cross-examination. Additionally, the distinction between a valuer chosen by the parties and one appointed by an alternative method rests on a somewhat tenuous premise.
- In regard to *Wamo*[115] this decision is against the latest trend of persuasive authority in England. It is of cold comfort to an aggrieved lessee, who is locked into a long lease at an excessive rental based upon an erroneous valuation, negligently made by a valuer, a person of straw, to be able to attempt to recover damages in protracted litigation and at the same time suffer severe liquidity problems because of the necessity to pay the excessive rent.
- In regard to Justice McPherson's observations in his article,[116] it is respectfully submitted that as noted in *Sudbrook Trading Estate Ltd v Eggleton*[117] and the other authorities cited below, there is a judicial attempt to break away from that line of reasoning. It can no longer be said that a court in all circumstances is powerless to order a fresh valuation or undertake the task itself.
- In regard to McHugh JA's judgment in *Hudson* on appeal, it is pointed out that this judgment is predicated upon the absence of an implied term that should the valuer act unreasonably, unskilfully or negligently, the valuation will nevertheless be binding.[118] A possible implied term which satisfies the criteria delineated by Greig and Davis in *The Law of Contract*[119] is that parties are not bound by a perverse valuation. It is respectfully submitted that the answer might lie in considerations of fact and degree.
- Further, in regard to McHugh JA's judgment in *Hudson* on appeal, it does appear to be inappropriate in this day and age for the result of a case to depend on the consideration as to who the plaintiff is, that is, whether the plaintiff is the landlord seeking to enforce the agreement, or the tenant seeking to set the valuation aside. In either case, depending only on considerations of onus, the result should be the same.
- For the reasons advanced in cases such as *Collier, Johnston, Dean, Jones, Burgess, Imperial Foods, Karenlee* and *Hudson*, at the very least an equitable claim for the enforcement of an agreement to abide by a valuation of a third party can be resisted on the ground that the valuation was erroneously made and not in conformity with the contract. It is further respectfully submitted that this approach, supported by both recent and ancient authority[120] may confidently be followed.
- Upon analysis, the *Collier* and *Dean* principle is based upon sound commercial sense, for the reason advanced above, that is, there is no valid commercial reason for substituting the right to set aside an erroneous valuation which may have disastrous economic consequences for a perhaps tenuous right to claim damages. Furthermore, Lord Denning's approach in *Campbell*,[121] that is, that parties are simply bound by their contract to accept an erroneous valuation, with great respect, does not take into account the commercial reality of the situation referred to above nor the possibility of a court finding an implied term that parties should not be bound by a perverse valuation. Another approach is that any valuation beyond those parameters will constitute an excess of jurisdiction.
- There is much to be said for the reservations of Rolfe J in *Fermentation*.[122]

Consequently, it will be seen that although the weight of authority in Australia appears to hold that in regard to both speaking and non-speaking valuations, an agreement that an expert determination will be final and binding, precludes any attempt to impugn it on the ground of mere error, there are still many questions that remain undecided. For example, can it be said that an expert has acted so as to carry out the agreement if his or her decision is unreasonable or unfair? Has an unreasonable or unfair determination fulfilled the purpose of the agreement? What precisely is the role to be played in any defence in an action to enforce the expert's determination? Must the expert accord both parties natural justice? These and

other questions remain to be determined at appellate level in future cases.

Endnotes

[1] [1980] Qd R 171.
[2] Ibid at 178.
[3] Ibid at 179.
[4] (1858) 25 Beav 200; 53 ER 613.
[5] [1954] Ch 409.
[6] [1976] 1 WLR 403.
[7] (1976) 1 BPR 9199 at 9204.
[8] [1983] 1 VR 657.
[9] Ibid at 669.
[10] Ibid at 671.
[11] [1983] ANZ Conv R 50.
[12] Ibid at 53-54.
[13] [1984] 1 NSWLR 1.
[14] Ibid at 10.
[15] (1985) 1 NSWLR 314.
[16] Ibid at 322.
[17] Ibid at 323.
[18] Ibid at 324.
[19] Ibid.
[20] Ibid at 330.
[21] Ibid at 331.
[22] Ibid at 335.
[23] Ibid.
[24] Ibid at 336.
[25] (1986) 61 ALJR 280.
[26] Ibid at 281.
[27] [1984] VR 16.
[28] Ibid at 21.
[29] (1985) 28 *The Valuer* 547.
[30] [1985] ANZ Conv R 37 at 42-43.
[31] (1986) 60 ALJ 8 at 11.
[32] [1990] NSW Conv R 55-514.
[33] See *Woolworths Ltd v Merost Pty Ltd* (1988) 14 NSWLR 300; *Best Wood Pine Mart (Victoria Avenue) Pty Ltd v Coles Myer Ltd* [1990] NSW Conv R 55-520; *Crusader Resources NL v Santos Ltd* (1991) 58 SASR 74; *Ricciardello v Caltex Oil (Aust) Pty Ltd* (unreported, Supreme Court, WA, 23 April 1991); *J L Atkinson v Ebonstone* (unreported, Supreme Court, Qld, 3 March 1992); *Burdon Pty Ltd v Gillford Pty Ltd* (unreported, Federal Court (FC), 21 December 1995).
[34] (1992) 163 LSJS 162.
[35] (1993) 32 NSWLR 583.
[36] Ibid at 588.
[37] Ibid at 592.
[38] (1996) 65 SASR 409.
[39] (1994) 15 ACSR 313.
[40] Ibid at 333.
[41] Ibid.
[42] See *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583 at 592.
[43] *Holt v Cox* (1994) 15 ACSR 313 at 333.
[44] (1997) 23 ACSR 590.
[45] (1985) 1 NSWLR 314 at 336.
[46] (1997) 23 ACSR 590 at 596.
[47] Ibid at 596-597.
[48] (1947) 47 SR (NSW) 416 at 420.
[49] (1997) 23 ACSR 590 at 597.
[50] Ibid.
[51] Ibid.
[52] Unreported, Supreme Court, NSW, 12 February 1998.
[53] Ibid, p 20.
[54] Ibid, p 23.
[55] (1998) 15 BCL 49.
[56] Ibid at 57.
[57] [1998] 2 All ER (HL) 778 at 783 per Lord Hoffmann.
[58] (1992) 39 NSWLR 468 especially at 476.
[59] *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1998) 15 BCL 49 at 57.
[60] Ibid.
[61] *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335.
[62] *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489 at 496.
[63] Unreported, Supreme Court, WA, 1996.
[64] *Turama Forest Industries Pty Ltd v Eng* [1998] WASCA 93 (15 April 1998).
[65] (1981) 146 CLR 361 at 381 per Mason J.
[66] *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 366 per McHugh J.
[67] *WMC Resources Ltd v Leighton Contractors Pty Ltd* (1999) 20 WAR 489 at 499-500.
[68] Ibid at 500.
[69] Ibid.
[70] Ibid at 510.
[71] (1754) 3 Keny 87 at 91; 96 ER 1318 at 1319.
[72] (1801) 5 Ves Jun 846 at 848; 31 ER 889 at 891.
[73] (1803) 8 Ves Jun 505 at 517; 32 ER 451 at 455.
[74] (1823) Turn & R 366; 37 ER 1142.
[75] (1858) 25 Beav 200 at 203-204; 53 ER 613 at 614.
[76] (1869) 21 LT 655.
[77] *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 332.
[78] *Dean v Prince* [1954] Ch 409 at 426-427.
[79] Ibid at 427.
[80] *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 333.
[81] [1967] 1 WLR 506.
[82] [1971] 1 WLR 840.
[83] Ibid at 854.
[84] *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 334.
[85] [1973] Ch 346.
[86] Ibid at 363.
[87] [1977] AC 405.
[88] *Campbell v Edwards* [1976] 1 WLR 403 at 407.

[89] Ibid at 408.
[90] Ibid at 407.
[91] [1978] 1 Lloyd's Rep 175 at 179-180.
[92] Ibid at 181.
[93] [1983] Ch 216 at 225B-D.
[94] [1915] 2 Ch 338.
[95] [1971] 1 WLR 840.
[96] [1986] 1 WLR 717 at 726.
[97] [1992] 1 WLR 277.
[98] [1991] 28 EG 86.
[99] [1996] 1 WLR 48 [HL].
[100] Ibid at 58.
[101] (1999) 20 WAR 489 at 501.
[102] Ibid.
[103] Ibid.
[104] (1993) 109 LQR 35.
[105] Ibid at 36-37.
[106] Ibid at 38.
[107] *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583 at 587 (his Honour cites further authorities).
[108] (1994) 15 ACSR 313 at 333.
[109] Compare *Capricorn Inc Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8.
[110] Unreported, Supreme Court, NSW, 14 July 1997, p 20.
[111] *Zucchiatti v Ferrara* (1976) 1 BPR 9199.
[112] [1971] 1 WLR 840 at 854.
[113] *Zucchiatti v Ferrara* (1976) 1 BPR 9199 at 9203.
[114] *Mayne Nickless Ltd v Solomon* [1980] Qd R 171.
[115] *Wamo Pty Ltd v Jewel Foods Pty Ltd* [1983] ANZ Conv R 50.
[116] Op cit, n 31.
[117] [1983] 1 AC 444.
[118] *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336.
[119] Law Book Co, Sydney, 1987, p 547.
[120] See, eg *Chichester v M'Intire* (1830) 4 Bli NS 78; 5 ER 28.
[121] *Campbell v Edwards* [1976] 1 WLR 403.
[122] See text at n 60, above.