SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2012 0078

DURA (AUSTRALIA) CONSTRUCTIONS PTY LTD — Appellant
v
HUE BOUTIQUE LIVING PTY LTD — First Respondent

and
LANCE HO CHUEN CHU — Second Respondent
and
CHENG HAN TAN — Third Respondent

S APCI 2012 0092

DURA (AUSTRALIA) CONSTRUCTIONS PTY LTD — Appellant
v
HUE BOUTIQUE LIVING PTY LTD — Respondent

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| JUDGES | MAXWELL P, ASHLEY and REDLICH JJA |
| WHERE HELD | MELBOURNE |
| DATES OF HEARING | 3–4 June 2013 |
| DATE OF JUDGMENT | 26 July 2013 |
| MEDIUM NEUTRAL CITATION | [2013] VSCA 179 |
| JUDGMENT APPEALED FROM | *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (Formerly SC Land Richmond Pty Ltd) (No 3)* [2012] VSC 99 (Dixon J) |

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CONTRACT – Building contract – Provision for proprietor to take works over and complete – Provision for Supervisor to 'ascertain' cost to complete and certify amount payable – Whether Supervisor's certificate complied with contract – Whether open to appellant builder to challenge certificate – Whether contractual dispute resolution procedures required to be followed – Election – Waiver – Appeal dismissed.

INTERPRETATION – Contract – Presumption – Word used with consistent meaning throughout contract.

WORDS AND PHRASES – 'Ascertain'.

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Appellant | Mr T J Margetts SC with Mr R Andrew | Noble Lawyers |
| For the Respondents | Mr D S Levin QC with Ms K L Stynes | Herbert Smith Freehills |

MAXWELL P:

***Summary***

1 In December 2004, the respondent ('HBL') engaged the appellant ('Dura') under a standard form building contract (the 'Agreement') to carry out certain building works. Disputes arose over what HBL contended were defects in the work done by Dura and, in September 2006, HBL exercised its rights under the Agreement to take the whole of the remaining work out of the hands of Dura. HBL engaged another builder to complete the works (including necessary rectification works) and also to undertake additional work not within the original scope as specified under the Agreement.

2 The various disputes between the parties were subsequently litigated in the Trial Division of the Supreme Court, over some 31 days. The trial judge dismissed Dura's claims, which were based on alleged breaches of the Agreement, and gave judgment in favour of HBL on its counterclaim. Dura was ordered to pay HBL the sum of $6,173,155.80, comprising $4,457,308 on the counterclaim and $1,715,847.83 for interest.

3 This appeal[1] concerns only the judgment on the counterclaim. There is no appeal against the dismissal of Dura's claims. HBL having taken the works out of Dura's hands, the Agreement specified that it was for the Superintendent to ascertain the cost to complete the works, and to certify the difference between that cost and the amount which would have been payable to Dura had it completed the works. The Superintendent certified that the difference was $4,457,308, payable by Dura to HBL. That is the amount which Dura was ordered to pay.

4 The following questions were addressed on the appeal:

(a) was it open to Dura in these proceedings to dispute the correctness of

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1 As will appear, there are in fact two appeals, which were heard together. For convenience I will refer to them as a single appeal.

the Superintendent's certificate and, if so, on what basis?

(b) did the Superintendent comply with the Agreement in 'ascertaining' the cost to complete and in certifying the difference?

(c) if the Superintendent did not comply, was Dura nevertheless precluded from challenging the certificate in this proceeding, since it had not complied with the dispute resolution provisions of the Agreement?

5 For reasons which follow, I have concluded that:

(a) on ordinary principles, Dura was entitled to assert that the certificate did not comply with the Agreement;

(b) the Superintendent did ascertain the cost to complete the works, as required, and hence the certificate did comply with the Agreement; and

(c) if, contrary to my view, the work of the Superintendent had not been in compliance with the Agreement, there was no bar to Dura challenging the certificate in this proceeding. By its conduct, HBL waived the right to insist on Dura complying with the dispute resolution provisions of the Agreement.

6 The appeal must therefore be dismissed.

***Taking over the works***

7 The relevant provisions of the Agreement are as follows:

**44.2 Default by the Contractor**

If the Contractor commits a substantial breach of contract the Principal may give the Contractor a written notice to show cause.

Substantial breaches include but are not limited to–

(a) suspension of work, in breach of Clause 33.1;

(b) failing to proceed with due expedition and without delay, in breach of Clause 33.1;

(c) failing to lodge security in breach of Clause 5;

(d) failing to use the standard of materials or provide the standards of workmanship required by the Contract, in breach of Clause 30.1;

(e) failing to comply with a direction of the Superintendent under Clause 30.3, in breach of Clause 23;

(f) failing to provide evidence of insurance, in breach of Clause 21.1; and/or

(g) in respect of Clause 43, knowingly providing a statutory declaration or documentary evidence which contains a statement that is untrue.

**44.3 Requirements of a Notice by the Principal to Show Cause**

A notice under Clause 44.2 shall–

(a) state that it is a notice under Clause 44 of the General Conditions of Contract;

(b) specify the alleged substantial breach;

(c) require the Contractor to show cause in writing why the Principal should not exercise a right referred to in Clause 44.4;

(d) specify the time and date by which the Contractor must show cause (which time shall not be less than 7 clear days after the notice is given to the Contractor); and

(e) specify the place at which cause must be shown.

**44.4 Rights of the Principal**

If by the time specified in a notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 44.4, the Principal may by notice in writing to the Contractor–

(a) take out of the hands of the Contractor the whole or part of the work remaining to be completed; or

(b) terminate the Contract.

Upon giving a notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of–

(i) the date upon which the Contractor shows reasonable cause;

(ii) the date upon which the Principal takes action under Clause 44.4(a) or (b); or

(iii) the date which is 7 days after the last day for showing cause in the notice under Clause 44.2.

If the Principal exercises the right under Clause 44.4(a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 44.6.

**44.5 Procedure when the Principal Takes Over Work**

If the Principal takes work out of the hands of the Contractor under Clause 44.4(a) the Principal shall complete that work and the Principal may without payment of compensation take possession of such of the Constructional Plant and other things on or in the vicinity of the Site as are owned by the Contractor and are reasonably required by the Principal to facilitate completion of the work.

The Contractor must, if required by the Principal, assign to the Principal, without payment, the benefit of any agreement for the manufacture or supply or goods and equipment for the performance of any work for the purposes of the Contract. For the purposes of effecting such assignment, the Contractor irrevocably appoints the Principal to be the true and lawful attorney of the Contractor with full power and authority to execute such assignment on behalf of Contractor and to bind the Contractor accordingly. The assignment will be on terms under which the relevant manufacturer, supplier or subcontractor will be entitled to make any reasonable objection to any further assignment by the Principal.

The Principal may pay any manufacturer, supplier or subcontractor for any goods and equipment delivered or work performed (including design work) for the purposes of the Contract (whether before or after the date the Principal takes over the work) if the price has not already been paid by the Contractor. Payments made under this Clause 44.5 may be deducted from any sum due or to become due to the Contractor. The Principal's rights under this Clause 44.5 are in addition to its rights to pay suppliers, manufacturers or sub-contractors as provide elsewhere in the Contract.

The Contractor will, when required in writing by the Superintendent (and not before), remove from the Site any Constructional Plant, Temporary Works and goods. If, within a reasonable time after receipt of such request, the Contractor does not comply, then the Principal may remove or sell any such property of the Contractor.

The Contractor will execute all documents required by the Principal to enable the Principal to obtain the benefit of any approval, consent or permit issued by any relevant authority. For the purposes of obtaining such benefit, the Contractor irrevocably appoints the Principal to be the true and lawful attorney of the Contractor with full power and authority to execute such documents on behalf of the Contractor and to bind the Contractor accordingly.

If the Principal takes possession of Constructional Plant or other things, the Principal shall maintain the Constructional Plant and, subject to Clause 44.6, on completion of the work the Principal shall return to the Contractor the

Constructional Plant and any things taken under this Clause which are surplus.

**44.6 Adjustment on Completion of the Work Taken Out of Hands of Contractor**

When work taken out of the hands of the Contractor under Clause 44.4(a) is completed the Superintendent shall ascertain the cost incurred by the Principal in completing the work and shall issue a certificate to the Principal and the Contractor certifying:

(a) the amount of that cost and setting out the calculations employed to arrive at that cost;

(b) the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor;

(c) the difference between (a) and (b).

If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Principal.

If the Contractor is indebted to the Principal, the Principal may retain Constructional Plant or other things taken under Clause 44.5 until the debt is satisfied. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the Constructional Plant or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor.

8 On 13 May 2008, the Superintendent (Mr Luciano Pozzebon) provided a certificate to Dura in the following terms:

> The original agreed Contract value is $8,450,000 against which $6,400,981 was assessed as the value of works to date (refer Payment Schedule No. 23) and variations totalling $633,438 resulting in a total valuation of work as of 23rd October 2006 as $7,034,419.
>
> Pursuant to Clause 44.6 b), the Contractor would have been entitled to receive the balance of the original Contract amount equating to $2,049,019 less any reduction in Contract scope. I have reviewed Payment Schedule No. 23 and note a scope deduction of a further $166,226 for Variation 87A. I therefore reasonably assess uncompleted Contract works as $1,882,793.
>
> Pursuant to Clause 44.6 c), the difference between 44.6 a) and b) is $4,052,097 excluding GST.
>
> I have fairly and reasonably taken into account the relevant contractual provisions and independently certify that there is an amount payable of

$4,457,308 including GST by Dura (Australia) Constructions Pty Ltd to SC Land Richmond Pty Ltd.

9 It was common ground that the certificate was based on the work of a quantity surveyor, Mr Peter Clack of PAC Construction Consultants. Mr Clack's calculation of the cost to complete was set out in a report dated 5 May 2008, headed 'Cost to Complete'. That report identified the cost to complete for each of the distinct elements and areas of the construction work. Subsequently, Mr Clack prepared a marked up version of his report, in which (by the use of colour coding) he allocated the costs into three categories, as follows:

(a) cost of works to rectify defects in work undertaken by Dura;

(b) cost to complete the works as specified in the original Agreement; and

(c) cost of 'enhancements', that is, works outside the scope of the works as originally specified.

10 In evidence, Mr Clack explained how he had gone about this task:

> The way this was presented was to basically give a breakdown of the costs between the three categories. The way the subcontracts were let, we had prices received from the subcontractors to do works on a continuous basis. Their quotes did not break down between the various items. They were brought on board to complete all the carpentry works. Part of those works were enhancements, part of those works were rectification works, so I made a determination when I was asked to do the split of what I believe the percentage to be for enhancements and what I believe the percentage to be for rectification or for costs to complete works. So I agree that those – something like the general carpentry works, it was my assessment of what I believed to be the value of the enhancement works in regard to carpentry.
>
> HIS HONOUR: How did you make that percentage assessment? Tell me what the process was that you went through?---The process was that the amount they had to do for either rectification, because I was obviously monitoring on site, something like enhancements I think I worked it out at probably 30 per cent of the costs.
>
> As I said, basically it was an arbitrary split. So yes, there may be plus or minus on that but there are certain costs that to be allocated to enhancements because part of the subcontract was for enhancement works.

11 The trial judge characterised Mr Clack's methodology as having involved the exercise of 'a judgment based on his examination of documents and on his inquiries

of the owner and the architect when he allocated costs to different categories'.[2]

His Honour said:

> Mr Clack's judgment, when allocating costs — for example, from an invoice for the work of a trade to elemental categories separated into rectification, completion and enhancement — involved his professional skills. The proper allocation was a discretionary judgment, made in a reasoned way, and based on disclosed methods considering the source information, found in the project documents, and instructions from the project architect and owner.[3]

12 On the appeal, Dura relied on this characterisation in support of its contention that what had occurred did not comply with the contract. Dura's argument, in short, was that the word 'ascertain' in cl 44.6 allowed no room for judgment, or estimation, or subjective opinion. Instead, it was contended, 'A proper application of the contractual mechanism could only result in one uniquely correct value, being the amount in fact incurred by the Principal'. According to the submission, the costs incurred in completing the works were a matter of fact, which was known, or capable of being known, with precision. Clause 44.6 did not contemplate, and did not permit, 'an estimate to be arrived at using experience, judgment or discretionary decision making'.

13 The trial judge rejected a similar argument. His Honour's reasons were as follows:

> ***The Superintendent's task under cl 44***
>
> The language of cl 44.6 identifies the correct approach to certification of the debt due. The clause does not direct a judicial assessment of damages. It does not require an audit. It does not preclude a global approach. The superintendent's primary obligation is to 'ascertain' identified categories of costs to certify the costs incurred by the principal in completing the works. The consequences for the contractor or the principal then follow the certificate.
>
> To 'ascertain' is to determine, or more specifically, to find out by trial, examination, or experiment, what the costs are. Cost accounting in the construction industry is not an exact science. Mr Clack's qualifications and experience equip him to make a judgment about the appropriate

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2 *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (Formerly SC Land Richmond Pty Ltd) (No 3)* [2012] VSC 99, [618] ('Reasons').

3 Ibid [630].

methodology in the circumstances of this project. His education, training, and substantial experience are in quantity surveying, cost management, and project management. The practice of quantity surveying is the estimation and measurement of the quantities of materials and labour, and its cost, for the construction of a building. Quantity surveyors are recognised and accepted by courts[4] as having a skills set that relate to contracts and costs, particularly costs estimation and control, on construction projects. Professional quantity surveyors, also known as construction economists or costs managers, employ skills across a range of activities that may include cost planning, value engineering, value management, feasibility studies, cost benefit analysis, life-cycle costing, tendering, valuation, change control, dispute resolution, claims management, project management cost estimation and costs monitoring. Quantity surveyors are recognised as possessing skills in interpretation of contract documents, particularly measuring quantities from drawings, sketches and specifications prepared by architects and engineers, in order to prepare tenders or contract documents, works valuation, project costs management, viability assessment and project management. Mr Clack was a member of the Royal Institute of Chartered Surveyors for 19 years until 2004 and is a Fellow of the Australian Institute of Quantity Surveyors. These organisations are professional standards bodies that supervise or regulate standards of professional excellence.

There is nothing in the evidence or in the words of the clause that require [HBL] to adopt a process of costs management that suits Dura or that results in the assessment of rectification costs on an individual basis, such as may occur in disputes concerning domestic renovation and the like. Mr Clack's methodology is appropriate in the circumstances of this project and is consistent with the practices of quantity surveyors. The process of determination of the costs to complete the works involves judgments, allocations of expenses to categories. This is unexceptional as an accounting practice, particularly where the practice is based on industry experience or processes. It is pertinent to note that while [Dura's expert] commented that he had not the opportunity to examine the documents on which Mr Clack compiled his report, he did not take issue with the methodology that was plainly evident from the report.

For these reasons, I reject Dura's criticism that Mr Clack's assessments were an 'arbitrary split'. I am satisfied that Mr Clack exercised a judgment based on his examination of documents and on his inquiries of the owner and the architect when he allocated costs to different categories. Further, I accept that a process of allocation of costs, on a different basis to that chosen by the supplier, to suit the purposes of the payer is a judgment commonly made in cost management and one which Mr Clack was qualified by his specialised knowledge to make. [5]

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4 See, eg, *Stockland (Constructors) Pty Limited v Darryl I Coombs* [2004] NSWSC 323.

5 Reasons, [615]–[618] (citation in original).

***Challenging a determination made under a contract***

14 It is a commonplace in commercial contracts for provision to be made for the determination — whether by an independent expert or by one of the parties — of a particular cost, value or quantity. As a consequence, intermediate appellate courts have frequently had to consider whether, and to what extent, a determination of this kind can be reviewed by a court (or, where the contract so provides, by an arbitrator). As will appear, the applicable principles have been clearly enunciated, and consistently applied, by the appellate courts of several States.

15 The question, first and last, is one of contract. What did the parties bargain for? If the determination given does not satisfy the terms of the contract, then it is of no effect and, at the option of the parties, must be done again.[6] If, on the other hand, the determination complies with the contract, the parties are bound by it.

16 The starting point is the judgment of Lord Denning MR in *Campbell v Edwards*,[7] where 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.[8]

17 The recent Australian jurisprudence starts with the judgment of McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*, as follows:

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

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6 *A G L Victoria Pty Ltd v S P I Networks (Gas) Pty Ltd* (2006) Aust Contract Reports 90–241, [77] ('*A G L*').

7 [1976] 1 WLR 403.

8 Ibid 407. See also *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657, 670 ('*Karenlee*').

*valuer. It is whether the valuation complies with the terms of the contract.*[9]

18 The most comprehensive analysis of the applicable principles is to be found in the judgment of the Full Court of the Supreme Court of Western Australia in *W M C Resources Ltd v Leighton Contractors Pty Ltd*.[10] Ipp J (with whom Kennedy and White JJ agreed) enunciated the principles as follows:

1. By the contract, the parties agree to be bound by a determination made in accordance with the terms of the contract. If the valuation complies, the parties are bound.[11]

2. A court (or an arbitrator) will not set aside a determination merely on the ground that it is incorrect or that it reveals errors. The determination will only be interfered with if it is not made in terms of the contract.[12]

3. There will ordinarily be implied terms of the contract that the process of making the determination will be conducted honestly, bona fide and reasonably.[13]

4. Given that the parties have bound themselves to accept a determination which complies with the contract, a statement in the contract that the determination is 'final and binding' adds little.[14]

5. No different approach is required where, in accordance with the contract, the determination is made by one of the parties to the contract

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9 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, 335–6 (emphasis added).

10 (1999) 20 WAR 489 ('*W M C*').

11 Ibid 499 [36]. See also *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16, 21 ('*Email*'); *Yarraman Pine Pty Ltd v Forestry Plantations Queensland* [2009] QCA 102, [44] ('*Yarraman*'); *Khayat Investments Pty Ltd v Winston Holdings Pty Ltd (No 2)* [2011] WASCA 196, [10]–[11]; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 315–16 [26]–[27] ('*Shoalhaven*').

12 *W M C* (1999) 20 WAR 489, 499 [37]. See also *Shoalhaven* (2011) 244 CLR 305, 315–16 [26]–[27].

13 *W M C* (1999) 20 WAR 489, 501 [46].

14 Ibid 500 [41]. See also *Holt v Cox* (1997) 23 ACSR 590, 605.

or its representative.[15]

19 The WA Full Court also elucidated the distinction between a determination which involves a 'mechanical' computation and one which requires the exercise of 'discretionary' judgment.[16] The former is characterised by the application of 'detailed fixed and objective criteria as to how the value of amounts to be certified … is to be determined'.[17] Application of the applicable criteria does not involve any exercise of judgment. 'It is a mechanical exercise'.[18] Ipp J said:

> Ordinarily, in cases of this kind … there will only be one uniquely correct value. If the certifying valuer, in these circumstances, arrives at the incorrect value, the valuation will be in breach of the contract. It is for that reason that an incorrect certificate will also be set aside. The court will then have the jurisdiction to determine the correct amount owing in terms of the contract.[19]

20 A 'discretionary' judgment, on the other hand, will typically be required (or authorised):

> where no fixed or readily available standard criteria exist. There may be several possible methods of assessing value, each giving widely different results, but each being reasonable. Many subsidiary factors relevant to the valuation may be uncertain, many contingencies may have to be taken into account, wide ranges of legitimate decisions may apply, and opinions may legitimately differ as to virtually all of the relevant issues.[20]

In such a case, there will be no 'uniquely correct' determination. The determination will 'merely have to be within the terms of the contract'.[21]

21 It is, of course, possible that the parties may contract for a determination which requires both mechanical calculation and the exercise of judgment. *A G L* was such a case. Nettle JA (with whom Maxwell P and Bongiorno AJA agreed) said:

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15 *W M C* (1999) 20 WAR 489, 504 [60], 508 [72]: see [35]–[36] below.

16 There is a recognised distinction between judgment and discretion, but in this field of discourse the terms are used interchangeably (cf F Bennion, 'Distinguishing judgment and discretion' [2000] *Public Law* 368).

17 *W M C* (1999) 20 WAR 489, 494 [16].

18 Ibid 494 [16].

19 Ibid 495 [18].

20 Ibid 496 [23].

21 Ibid 499 [36]. See also *Yarraman* [2009] QCA 102, [44].

> Therein lies the distinction drawn in some of the authorities, and observed by the judge in this case, between an error in the exercise of a judgment, opinion or discretion entrusted to an expert, and an error which involves objective facts or a mere mechanical or arithmetical exercise. Subject to the contract in question, it is easier to suppose that parties to a contract contemplate that an error of the former kind be beyond the realm of review than it is to think that they intend to be fixed with errors of objective fact or in processes of mechanical calculation.
>
> As this case demonstrates, however, matters are likely to be more complex where error occurs in the course of an exercise which is partly comprised of discretion, judgment or opinion and partly constituted of objective fact or mechanical calculation. In some such cases, the overriding discretionary or judgmental character of the exercise may so inform each step in the determination as to put even those steps which are matters of objective fact or mere mechanical calculation beyond the scope of permissible review. In other instances it may appear that, despite the overall character of the exercise, the various steps in the determination are severable, according to whether they are essentially discretionary or judgmental or simply matters of objective fact or mechanical calculation, and that those steps which are of the latter kind are within the scope of permissible review. *The question in each case is what the parties should be presumed to have intended, and that is to be determined objectively from the terms of the contract, bearing in mind the context in which it was created*.[22]

22 Accordingly, the question for determination in the present case is whether what the Superintendent did complied with the contract. If it did, then in accordance with their agreement, the parties are bound by the Superintendent's conclusion.

***The meaning of 'ascertain' in this contract***

23 Axiomatically, what the parties intended by their agreement is to be discerned from the words they used. The meaning of those words is to be determined by examining the Agreement as a whole.

24 The appointment of the Superintendent was made under cl 23(a), which provided:

> (a) The Principal shall ensure that at all times there is a Superintendent who it is acknowledged by the parties is appointed as an agent of the Principal and not as an independent assessor, valuer or certifier with any quasi-judicial or quasi-arbitral role and that in the exercise of the functions of the Superintendent under the Contract, the

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22 *A G L* (2006) Aust Contract Reports 90–241, [53]–[54] (emphasis added, citations omitted).

Superintendent –

(i) acts honestly and fairly;

(ii) use its reasonable endeavours to act within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and

(iii) use its reasonable endeavours to arrive at a reasonable measure or value of work, quantities or time.

25 This case concerns 'the exercise of [one of] the functions of the Superintendent under the Contract', that of ascertaining the cost to complete in accordance with cl 44.6. It is significant that the parties were in agreement that, in carrying out that and other like functions, the Superintendent should arrive at 'a reasonable measure or value of work, quantities or time'.

26 The word 'ascertain' appears in several places in the Agreement. As senior counsel for Dura properly conceded, it is a principle of contractual interpretation — as it is of statutory interpretation — that, where parties to a carefully drafted agreement have used the same word more than once in the document, they intended that it have the same meaning each time.[23] This is, of course, a rebuttable presumption. The particular context in which a word is used may disclose a contrary intention.

27 Of particular significance for present purposes is cl 40.5 of the Agreement, which provides as follows:

**40.5 Valuation**

Where the Contract provides that a valuation shall be made under Clause 40.5, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount *ascertained* by the Superintendent as follows –

(a) if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;

(b) if Clause 40.5(a) does not apply, the rates or prices in a Priced Bill of Quantities or Schedule of Rates shall be used *to the extent that it is reasonable to use them*;

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23 *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 WLR 89, 97; *Interactive Investor Trading Ltd v City Index Ltd* [2011] EWCA Civ 837, [29].

(c) to the extent that neither Clause 40.5(a) or 40.5(b) apply, *reasonable rates or prices shall be used* in any valuation made by the Superintendent;

(d) in determining the deduction to be made for work which is taken out of the Contract, the percentage specified in Annexure Part A for additions shall be added to the value of the work deducted, such amount being the agreed margin for non-time related preliminaries, profit, overheads and contract administration;

(e) if the valuation is of an increase or decrease in a fee or charge or is a new fee or charge under Clause 14.3, the value shall be the actual increase or decrease or the actual amount of the new fee or charge without regard to overheads or profit;

(f) if the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a *reasonable amount for overheads* but shall not include profit or loss of profit;

(g) in determining the increase in the Contract Sum to be made for work added to the Contract, the percentage specified in Annexure Part A for additions shall be added to the value of the work, such amount being the agreed margin for non-time related preliminaries, profit, overheads and contract administration; and

(h) daywork shall be valued in accordance with Clause 41.[24]

28 It is clear from the language of this clause that the parties intended by their use of the word 'ascertain' to authorise a process of computation which would, where necessary, involve judgment, estimation and approximation. The determination of what might be 'reasonable' is, quintessentially, an exercise involving judgment and experience.[25] Moreover, the language of this clause is entirely consistent with the notion of 'a reasonable measure or value', which the parties used in cl 23(a) (above) to define how the Superintendent should carry out functions of this kind.

29 It is to be presumed that the parties intended the word 'ascertain' to have the same meaning in cl 44.6. There is nothing in the language or context of cl 44.6 to suggest otherwise. It follows that they intended to authorise the Superintendent, when carrying out the task of 'ascertainment' under cl 44.6, to exercise judgment

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24 Emphasis added.

25 *Karenlee* [1983] 1 VR 657, 669–70; *Email* [1984] VR 16, 20–1.

where necessary. What the Superintendent did (in reliance on the work of Mr Clack) was therefore within the scope of the 'ascertainment' function conferred on him by cl 44.6. The parties are therefore bound by the Superintendent's certificate. That conclusion is sufficient to dispose of this ground of appeal.

30 For completeness, however, reference should be made to the authorities on which Dura relied. The first of these was the decision of Stephen J in *R v City of Doncaster & Templestowe*.[26] That case concerned the meaning to be given to the word 'ascertain' in the following statutory provision:

> Where any street in the municipal district of a municipality has been constructed, and the municipal clerk is unable to ascertain from the municipal records the circumstances in which the street was constructed, the street shall be deemed to have been constructed under this division, and the municipal clerk shall certify accordingly.[27]

Stephen J said:

> The word 'ascertain' is, I think, concerned less with the objective correctness of the conclusion arrived at than with the state of mind of the person undertaking the inquiry; it is neutral so far as concerns objective accuracy. The *Shorter Oxford Dictionary* gives as its meaning, in the intransitive, the act of making oneself certain or finding out or learning for a certainty or, in its modern usage, of making sure of or getting to know. I think that in its context it here involves the municipal clerk in getting to know with what he regards as certainty a given state of facts as to the history of street construction. The fact that the section contemplates that the municipal clerk is to grant a 'certificate' which, when given, will constitute conclusive evidence of facts stated in it, stresses the need for the municipal clerk to be satisfied of the correctness of the conclusion he has come to before he issues his certificate and this supports the meaning I have given to 'ascertain'.[28]

31 Far from supporting Dura's contention, however, this passage would seem to support what the Superintendent did in the present case. On the view of Stephen J, 'ascertainment' is not concerned with objective correctness — with 'one uniquely correct' answer[29] — but with the subjective state of mind of the person undertaking the enquiry. It is for that person to find out the facts 'with what he regards as

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26 [1971] VR 466 ('*City of Doncaster*').

27 Ibid 467.

28 Ibid 468.

29 See [19] above.

certainty'.[30]

32 Reliance was also placed on the decision in *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd*,[31] a decision of Judge Lloyd sitting as an official referee in the Queen's Bench Division. In that case, the relevant clause of the construction contract stated as follows:

> If the Contractor makes written application to the Architect stating that he has incurred or is likely to incur direct loss and/or expense in the execution of this Contract … the Architect from time to time thereafter shall ascertain, or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense which has been or is being incurred by the Contractor ...[32]

His Honour said:

> 'to ascertain' means 'to find out for certain' and it does not therefore connote as much use of judgment or the formation of an opinion [as would have been the case] had 'assess' or 'evaluate' been used. It thus appears to preclude making general assessments as have at times to be done in quantifying damages recoverable for breach of contract.[33]

33 As counsel for HBL pointed out, however, what was said by Judge Lloyd was recently considered by the Queen's Bench Division in *Walter Lilly & Company Ltd v Mackay*.[34] That case concerned the same term of the standard form construction contract. Akenhead J held as follows:

> Clause 26.1 talks of the exercise of ascertainment of loss and expense incurred or to be incurred. The word 'ascertain' means to determine or discover definitely or, more archaically, with certainty. It is argued by DMW's Counsel that the Architect or the Quantity Surveyor can not ascertain unless a massive amount of detail and supporting documentation is provided. This is almost akin to saying that the Contractor must produce all conceivable material evidence such as is necessary to prove its claim beyond reasonable doubt. *In my judgement, it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world. The Architect or the Quantity Surveyor must be put in the position in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred. They do not have to be 'certain'.* One has to bear in mind that the ultimate dispute resolution tribunal will decide any litigation or arbitration

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30 *City of Doncaster* [1971] VR 466, 468. See also *Tapgnuk v Northern Land Council & Ors* (1996) 5 NTLR 109, 113.

31 (1995) 76 BLR 59.

32 Ibid 65.

33 Ibid 88 (citation omitted).

34 [2012] EWHC 1773.

> on a balance of probabilities and at that stage that tribunal will (only) have to be satisfied that the Contractor probably incurred loss or expense as a result of one or more of the events listed in Clause 26.2. Bearing in mind that one of the exercises which the Architect or Quantity Surveyor may do is allow loss and expense, which has not yet been incurred but which is merely 'likely to be incurred'; in the absence of crystal ball gazing, they cannot be certain precisely what will happen in the future but they need only to be satisfied that the loss or expense will probably be incurred.[35]

34 Inevitably, only the most limited assistance can be derived from decisions concerning the meaning to be given to a particular word when used in a quite different contractual context. Suffice it to say that nothing in those decisions affects my conclusion about what the present parties intended by cl 44.6.

35 There is one final point, concerning the status of the Superintendent as an agent of HBL. It was contended for Dura that, given the Superintendent's lack of independence, it was unlikely that the parties had intended to make the certificate final and binding. Reliance was placed on a statement by Lord Hoffman in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd*.[36] That case concerned a building contract which provided for the issue by the architect of certificates as to his opinion on various matters. Only the final certificate, stating the balance due from employer to contractor, was said by the contract to afford conclusive evidence of the matters certified. As to whether other certificates issued by the architect were intended to be binding upon the parties, Lord Hoffman said:

> Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can be at least provisionally determined with some precision. This machinery is provided by architect's certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge.
>
> On the other hand, to make the certificate conclusive could easily cause injustice. It may have been given when the knowledge of the architect about the state of the work or the effect of external causes was incomplete. *Furthermore, the architect is the agent of the employer. He is a professional man but*

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35 Ibid [468] (emphasis added).

36 [1999] 1 AC 266 ('*Beaufort Developments*').

> *can hardly be called independent. One would not readily assume that the contractor would submit himself to be bound by his decisions, subject only to a challenge on the grounds of bad faith or excess of power.* It must be said that there are instances in the 19th century and the early part of this one in which contracts were construed as doing precisely this. There are also contracts which provided that in case of dispute, the architect was to be arbitrator. But the notion of what amounted to a conflict of interest was not then as well understood as it is now. And of course the inclusion of such clauses is a matter for negotiation between the parties or, in a standard form, the two sides of the industry, so that what is acceptable will to some extent depend upon the bargaining strength of one side or the other. *At all events, I think that today one should require very clear words before construing a contract as giving an architect such powers.*[37]

36 A similar argument, based on the same passage from *Beaufort Developments*, was advanced in *W M C* and rejected, for reasons I would respectfully adopt. In *W M C*, the task — the valuation of certain mining works — was to be performed by one of the parties to the contract, the proprietor. The task involved the making of discretionary judgments. Ipp J said:

> the essential nature of the valuation under cl 14.2(b)(iv) is such that it must have been obvious when the contract was entered into that the nomination of the valuer was a matter of significant commercial importance. It must have been obvious that the [proprietor], irrespective of its bona fides and its capacity and willingness to act honestly and reasonably, might tend — if only by subjective sub-conscious attitudes — to favour its own interests over those of the [contractor] when making the discretionary judgments necessary to carry out the valuation. The [contractor] agreed, nevertheless, that it would be the [proprietor] who would undertake the valuation. On the face of the contract this was an important part of the consideration received by the [proprietor] for entering into the contract. It is true that the very fact of the [proprietor's] appointment would be likely to be prejudicial to the [contractor's] interests. But the [contractor] agreed expressly to this. And by the ordinary principles of the law of contract, by agreeing to the appointment of the [proprietor] as a valuer, the [contractor] is, subject to whatever else the contract may provide, bound by the [proprietor's] valuation as long as it is given in terms of the contract.[38]

Exactly the same may be said of the present case.

37 Dura's challenge to the certificate therefore fails. The trial judge was correct so to conclude. The relevant part of his Honour's reasons was in these terms:

> Mr Clack's judgment, when allocating costs - for example, from an invoice for the work of a trade to elemental categories separated into rectification,

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37 Ibid 276 (emphasis added).

38 *W M C* (1999) 20 WAR 489, 504–5 [60].

> completion and enhancement - involved his professional skills. The proper allocation was a discretionary judgment, made in a reasoned way, and based on disclosed methods considering the source information, found in the project documents, and instructions from the project architect and owner.
>
> I am satisfied that the resultant certificate, involving discretionary judgment by the superintendent who, adopting Mr Clack's work, ascertained the costs as required by cl 44.6, followed the process contemplated by the contract and that process is not open to review for error. It is final and binding.[39]

38 His Honour went on to hold that no error in the certificate had in any event been demonstrated:

> I would add, in case it becomes necessary to consider the issue, that Dura has not demonstrated any error by Mr Clack in the process by which he ascertained the costs that make up the certificate. Dura's prime objection was that the certificate erroneously incorporated enhancement costs in the costs to complete its work, but its submission focussed on the global approach adopted to assessing rectification costs. Dura invited me to analyse this issue by reference to a particular item, bathtubs, contending that the cost of installing new bathtubs, plainly an enhancement, were included in the costs of rectification or completion. If I accepted that fact, Dura contended that the global basis of the claim precluded identification of the appropriate allowance to vary the certificate. The bathtubs are not a good example for Dura. I have noted above that the conclave of Messrs Holman and Barber accepted the bathtubs as defectively installed. I have also accepted the evidence of Messrs Chu and Pozzebon. I consider the cost of installing new bathtubs was rectification, not enhancement. The rectification costs were part of the costs incurred by [HBL] in completing the works. It is not to the point, on a contention that the certificate erroneously incorporated enhancement costs, that the rectification costs were calculated globally as the remaining costs after deducting the other components of the total costs incurred by [HBL] in completing the works. There was no error by Mr Clack in ascertaining the enhancement costs for two reasons. First, I have set out above why I accept Mr Clack's methodology in determining and costing enhancements as appropriate. Second, I have rejected as inadmissible, alternatively, unreliable [Dura's expert's] evidence about enhancement costs. Appropriately, the enhancement costs ascertained by Mr Clack were properly excluded from the amount certified as owing by Dura.
>
> It follows that [HBL] is entitled to rely on the superintendent's cl 44.6 certificate to claim the sum certified, $4,457,306.70 as a debt due to it.[40]

39 Dura did not raise on the appeal any specific complaint about misallocation of costs as between completion and enhancement. As I have said, the argument was directed at showing that the contractual task of 'ascertainment' had not been

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39 Reasons, [630]–[631].

40 Ibid [632]–[633].

performed. (In a reply submission, Dura drew attention to the allocation of costs with respect to one particular item, but this was said to be for the purpose only of illustrating that the Superintendent's approach to the task of ascertainment did not comply with the Agreement.)

***Funds held in trust***

40 When giving judgment in the proceeding, the trial judge reserved for further argument a question about the orders to be made with respect to funds (in excess of $1 million), held in a designated trust account following adjudications under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the '*Security of Payment Act*'). As his Honour explained in separate reasons,[41] the amount in the trust fund comprised three amounts paid in by HBL with respect to claims by Dura for progress payments. In each case, the amount paid in represented the difference between the amount certified by the Superintendent as payable on the claim, and the amount determined by an adjudicator under the provisions of the *Security of Payment Act*.

41 Having made the payments into the trust account, HBL commenced proceedings in the Victorian Civil and Administrative Tribunal, in accordance with the Act. Those proceedings were subsequently consolidated with the Supreme Court proceeding but, as his Honour noted, he was not invited to determine, and did not determine, any matter in dispute between Dura and HBL in connection with any of the adjudicated progress claims.

42 His Honour held that the trust moneys should be released to HBL. His reasons were as follows:

> Money paid into a designated trust account is held upon the trusts stated in s 26(2) of the Act, as it stood prior to amendment. The money is first to be applied in satisfaction of the claimant's entitlements to the progress claim and the claimant's entitlements in respect of earlier progress claims are to be satisfied before its entitlements in respect of a later progress claim. To the

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41 *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 4)* [2012] VSC 155.

extent to which any of the money remains in the account after the claimant's entitlements have been fully satisfied, the money is to be paid to the respondent. The phrase 'claimant's entitlements' is defined in these terms:

> Claimant's entitlements in relation to money held in a designated trust account, means the amount (if any) to which the claimant becomes entitled after any matters in dispute between the claimant and the respondent in connection with the progress payment to which the money relates have been finally determined.

> All of the disputes between Dura and [HBL] in connection with the construction contract have now been finally determined. Although the parties did not bring forward any specific or particular dispute concerning the three adjudicated progress payments, *completion of a final accounting renders otiose any residual dispute about a payment on account. Further, the final certification is of a debt due from Dura to [HBL]. There can be no entitlements now arising in favour of Dura to the moneys held in the designated trust account.*

> This conclusion is inescapable for three reasons. First, Dura did not establish any entitlement generally to a payment in its favour. Second, there was no issue raised in the proceeding concerning Dura's entitlement to the funds in the designated trust account. Third, Dura did not challenge the cl 44.6 certificate as reviewable for error on this ground and cannot now mount a collateral challenge against the certificate on that basis. It ought be borne in mind that the structure of progress claims is to deduct from the valuation of the work at the relevant date of the claim the amount that has been paid by the principal to that time. The cl 44.6 certificate derived, in part, from Dura's earlier claims carried through in this manner. Thus, the amount paid by the principal, and the manner in which it was accounted for in the cl 44.6 certificate, could have been, but was not, challenged in the proceeding.[42]

43 By a separate appeal, Dura sought to challenge his Honour's conclusion that the trust moneys should be released to HBL. Counsel for Dura acknowledged, however, that if the primary appeal (against the Superintendent's certificate) failed, the second appeal must necessarily fail. That concession was properly made.

44 There is, however, a more fundamental difficulty. As his Honour's reasons make clear, there is not — indeed, there cannot be — any remaining question about whether a particular progress claim was justified. His Honour's judgment determined all of the disputes between Dura and HBL with respect to the construction contract. The only issue for determination, accordingly, was what amount was payable — and by which party — on the final accounting.

45 Even if, contrary to my view, the certificate were invalid, such that it was necessary for the Superintendent to ascertain afresh the difference between the cost

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42 Ibid [14]–[16] (emphasis added).

to complete and the cost which would have been payable to Dura, no question would have arisen about particular progress payments. Put another way, the trusts on which the disputed moneys were held could no longer be performed. There was neither necessity nor warrant for entitlements to progress payments to be determined, and hence no circumstance in which a payment would fall to be made to Dura out of the trust fund.

***Dispute resolution procedures under the Agreement***

46 In view of my conclusion that Dura's challenge to the certificate was rightly dismissed, it is strictly unnecessary to consider HBL's further contention that the validity of the certificate was not justiciable at the suit of Dura. The point was, however, fully argued and it is appropriate that I record my view that the contention is unsound. Had I reached a different conclusion about the validity of the certificate, I would have held that there was no obstacle to Dura's mounting that challenge in this proceeding. My reasons are as follows.

47 Under the heading 'Dispute Resolution', the Agreement provided as follows:

> **47.1 Notice of Dispute**
>
> If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.
>
> Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract, and subject to Clause 44, the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.
>
> A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in any proceeding.
>
> **47.2 Further Steps Required before Proceedings**
>
> *Alternative 1*
>
> Within 14 days after service of a notice of dispute, the parties shall confer at least once, and at the option of either party and provided the Superintendent so agrees, in the presence of the Superintendent, to attempt to resolve the

dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

*In the event that the dispute cannot be so resolved or if at any time either party considers that the other part is not making reasonable efforts to resolve the dispute, either party may by notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation.*[43]

…

**47.4 Summary or Urgent Relief**

Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under Clause 42 or to seek urgent injunctive or declaratory relief in respect of a dispute under Clause 47 or any matter arising under the Contract.

48 By notice of contention filed in this appeal, HBL argued that Dura had no entitlement to challenge the certificate in court proceedings:

in circumstances where it has failed refused or neglected:

a. to follow the obligations imposed upon it under the contract by clause 47.1 by delivering a Notice of Dispute in relation thereto; and

b. to confer to attempt to resolve the dispute under clause 47.2; and

c. to explore and if possible agree on methods of resolving the dispute by other means under clause 47.2; and

d. to refer the challenge to the Cost to Complete Certificate to litigation by notice in writing to the Principal (the respondent) under clause 47.2.

49 On ordinary principles, a dispute resolution provision expressed in mandatory terms — as cl 47.1 is — obliges the parties to the contract to follow the prescribed procedure in respect of any dispute which falls within its scope.[44] Moreover, it was common ground on the appeal that the dispute between the parties concerning the Superintendent's certificate was a 'dispute' within the meaning of cl 47.1. That was so because the definition of 'direction' in the Agreement includes a

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43 Emphasis added.

44 *A B B Power Plants Ltd v Electricity Commission of New South Wales (t/as Pacific Power)* (1995) 35 NSWLR 596, 599, 611-12; *P M T Partners Pty Ltd (in Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 311–12, 322–3 ('*P M T Partners*'); *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Ltd* [1999] WASCA 144, [41]–[44].

certificate.

50 It was also common ground that Dura had not given a notice of dispute under cl 47.1 with respect to the certificate. Dura's challenge to the certificate — as not complying with the Agreement — only emerged at a late stage in the present proceeding, in the form of an amendment to its defence to HBL's counterclaim. As noted earlier, the counterclaim sought an order that Dura pay HBL the amount specified in the certificate.

51 The certificate was dated 13 May 2008. Dura's amended defence to counterclaim was dated 19 September 2011, a matter of weeks before the trial was due to commence. In response, HBL filed (on 21 September 2011) a reply which advanced the contention that Dura was precluded from challenging the certificate by reason of its failure to follow the cl 47.1 procedures. HBL's pleaded contention — repeated in the notice of contention — was that compliance with cl 47.1 was a condition precedent to litigation concerning the matter in dispute.

52 In my opinion, HBL would have been entitled — even at that stage of proceedings — to insist on Dura complying with cl 47.1. I do not accept Dura's argument that cl 47.1 must be read as subject to an implied exclusion, to the effect that the specified procedures have no application to disputes which are crystallised in the course of litigation between the parties to the contract. At the same time, it needs to be emphasised that cl 47.1 was not a complete bar to litigation.[45] It provided, instead, a procedural condition precedent to litigation about the subject-matter of the dispute.

53 At the time the trial commenced, therefore, HBL faced a choice between two alternative — and inconsistent — courses of action.[46] The first was to seek to enforce cl 47.1, by objecting to the court receiving any evidence, or hearing any argument,

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45 Cf *P M T Partners* (1995) 184 CLR 301, 322–3.

46 See *Immer (No 145) Pty Ltd v The Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 41.

bearing upon the validity of the certificate unless and until Dura had taken the steps prescribed by the clause. The alternative was to allow the question of the validity of the certificate to be litigated *without* insisting on Dura first complying with cl 47.1.

54 HBL chose the second course. Rather than seek a ruling from the judge on the objection raised in its pleading, HBL instead joined issue with Dura on the merits of its challenge to the certificate, leading its own evidence and making submissions. As noted earlier, his Honour delivered detailed reasons rejecting Dura's challenge. There is no suggestion in the reasons that any preliminary point was raised by HBL, about Dura's failure to comply with cl 47.1 or the implications of that failure for Dura's entitlement to make the challenge in the first place. On the appeal, counsel for HBL acknowledged that the cl 47.1 objection had been only a 'fallback defence'.

55 In short, HBL elected not to raise what would have been a jurisdictional objection to the Court's entertaining that part of Dura's defence to counterclaim. Had it done so, the judge would have first had to decide whether the challenge to the certificate was justiciable in the proceeding. Instead, HBL was content to have the question of the validity of the certificate litigated on its merits.

56 In my opinion, that election was irrevocable. Having elected to allow the dispute about the certificate to be litigated to judgment, it would not have been open to HBL — if the judgment had been unfavourable — to object that the dispute was not justiciable in the first place because of Dura's failure to comply with cl 47.1.[47] Put another way, HBL by its conduct in the litigation waived its right to insist on compliance by Dura with that condition precedent.[48] That right having been waived, it cannot be revived on appeal.

57 It was pointed out in argument that cl 48 of the Agreement deals with waiver, in these terms:

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47 See *Sargent v A S L Developments Ltd* (1974) 131 CLR 634, 642, 655–6.

48 As to the overlap between election and waiver, see *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587 [51].

**48 WAIVER OF CONDITIONS**

Except as provided at law or in equity or elsewhere in the Contract, none of the terms of the Contract shall be varied, waived, discharged or released, except with the prior consent in writing of the Principal in each instance.

58 Nothing in cl 48 alters the conclusion I have reached about HBL's waiver of its right to insist on Dura's compliance with cl 47.1. HBL's waiver — by conduct — had effect by operation of law and, hence, falls within the scope of the exception in cl 48.

ASHLEY JA:

59 I respectfully agree with Maxwell P that, for the reasons explained by his Honour, the Superintendent's certificate complied with clause 44.6 of the contract, for which reason both appeals must be dismissed. I definitely incline to the view that his Honour's thorough analysis respecting Hue's notice of contention is also correct, but it is unnecessary to express a final opinion about that matter.

REDLICH JA:

60 I have had the advantage of reading in draft the reasons of Maxwell P and I agree that the Superintendent, in compliance with the contract, did ascertain the cost to complete the works. The appeal must therefore be dismissed.

61 The respondent in its notice of contention maintained its reply to the appellant's defence to the counterclaim, submitting that the appellant was precluded from challenging the certificate by reason if its failure to follow the procedure set out in cl 47.1 of the contract. The President has concluded that the respondent's failure to raise a jurisdictional objection to that aspect of the appellant's defence to counterclaim at the commencement of the trial constituted an election or waiver at law of its right to rely upon compliance with cl 47.1 as a pre-condition to litigation. As the question of election or waiver was not fully explored on the appeal I prefer to express no conclusion as to the respondent's notice of contention.

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MAXWELL P
ASHLEY JA
REDLICH JA