Expert Determination - The Role Of The Valuer Under C21

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Introduction

The NSW Department of Public Works and Services' new "C21 Construction Contract" provides for a "Valuer" to be engaged by the parties to value variations when requested by either party. This paper examines the role of the Valuer and seeks to anticipate problems which may arise.

This process of valuation is often called "expert determination". With minor changes in detail, it has existed in construction contracts for well over 150 years. There are countless reported cases on expert determination and from these cases it is possible to make predictions.

1. Background

Since time immemorial construction contracts have provided that when the parties cannot agree upon a price for a variation, the price will be determined by a third party. The third party has been given many different titles, e.g. superintendent, Principal's representative, engineer, architect, quantity surveyor, project manager and adjudicator. Under C21 the third party is called the "Valuer" and is defined in clause 94.69 as follows:

> *"Valuer means the independent quantity surveyor or engineer engaged jointly by the Principal and the Contractor."*

Sometimes in construction contracts the third party is appointed jointly by the parties. More often, to avoid the problems inherent in a joint appointment (discussed below), the third party is appointed by the Principal. The third party may be an employee of the Principal or a professional in private practice. In theory it makes no difference because, in performing a valuation or certification, employees and independent third persons are equally bound to act honestly, fairly and independently; see *Perini v Commonwealth* (1969) 2 NSWLR 530[1].

The decision of the third party has been accorded different degrees of finality in different contracts. In recent years, the trend has been to give the third party's decision binding effect on an interim basis and to permit an arbitrator to review and revise the decision[2]. However, that is not the case under C21. Clause 71.12 provides:

> *"The Valuer's determinations are final and binding and not open to review in any legal proceedings."*

Similarly the "*Agreement with Valuer*" (pp. 60-61 of C21) provides in clause 5:

> *"The parties agree to accept the determination in the Valuer's certificate as final and binding."*

The third party acts either as an arbitrator or as an expert. The process of valuation is either arbitration or expert determination. There is no third category. Until *Sutcliffe v Thackrah* [1970] AC 727 there was some doubt as to whether an expert had the same immunity from liability for negligence as an arbitrator. In that case it was held that the third party acting as an expert has no such immunity. Following that case, it became important to determine whether the third party is in fact acting as an arbitrator or expert. However, it is unnecessary to delve into those cases because it is clear from the "*Agreement with Valuer*" (pp.60-61 of C21) that the Valuer under C21 is not an arbitrator and the process of valuation is expert determination and not arbitration.

2. Functions Of The Valuer Under C21

Clause 71.4 of C21 provides:

"If the parties agree that a Variation applies, but cannot agree upon its value or on adjusting the Date for Completion, either party may request the Valuer to determine the value or the adjustment to the Date for Completion or both (whichever is not agreed), in accordance with the procedure set out in this clause 71.4, but not otherwise.

- *.1 The Valuer is to consult the Principal and the Contractor.*
- *.2 If the Variation involves decreased or omitted work, its value is that of the work included in the Contract Price (including a reasonable margin) as specified in the Contract, or otherwise as determined by the Valuer based*

on the rates and sums included in the Contract or otherwise applicable at the closing time of tender.

.3 If the Variation involves additional or increased work, its value is the sum of the following:

-1 the additional reasonable direct labour, material and plant costs of the Contractor;

-2 the additional reasonable costs of Subcontract work involved in the execution of the Variation;

-3 an additional 10% on the total, which allows for the Contractor's Margin."

Clause 71.9 provides:

"The Valuer is to take into account any matter raised by the Principal and the Contractor in making a determination."

Clause 71.10 provides:

"Only documents exchanged between the parties about the valuation of a Variation may be submitted to the Valuer or taken into account by the Valuer in making a determination."

The ambiguities in those provisions and the inconsistency between those provisions and other provisions of C21 are discussed below.

Clause 41 of C21 provides for a new rate to be added to the Schedule of Rates where there is no rate in the Schedule of Rates for an item of work. If the parties cannot agree upon a rate, clause 41.4 provides:

"41.4 If a new rate is to be added, it is to be:

...

.3 failing agreement, a reasonable rate for the specified item of work as determined by the Valuer.

41.5 The Date for Completion is to be adjusted by agreement, or otherwise by the Valuer, if extra or reduced time is required for work for which a new rate is selected under Clause 41.4."

It is of relevance that in respect of valuing a variation the jurisdiction of the Valuer is dependent upon agreement by the Principal and the Contractor that there is a variation but in respect of determining a new rate under clause 41, there is no need for agreement between the parties that a new rate is to be added. There may be disagreement between the parties as to whether the Valuer has jurisdiction to make a determination under clause 41. This is discussed later.

3. Appointment Of The Valuer

There are two steps to the appointment of a Valuer. The first is the selection of the Valuer. The Valuer may be named by the Principal in the Contract or be agreed by the parties or be selected by the President of the Australian Institute of Quantity Surveyors (see clause 9 of C21).

The next step is for the Principal and the Contractor to engage the Valuer. Clause 9.2 provides:

"The Valuer is to be engaged jointly by the Principal and the Contractor under the form of agreement in Schedule 5."

This is merely an agreement to agree and has no contractual effect. There is no way of compelling either party to enter the agreement with the Valuer. The consequence of there being no Valuer is discussed in Chapter 15.

Schedule 5 of C21 has a brief but inadequate form of agreement called "*Agreement with Valuer*". The most important omissions in the draft agreement are the absence of:

(1) a fee for the Valuer;
(2) terms of payment; and
(3) the duration of the agreement.

To make an effective agreement, these matters must be covered in the agreement.

Clause 3 of C21 provides that the singular includes the plural and there is nothing in C21 to say that the Valuer must be an individual as distinct from a partnership or corporation. However, if the Valuer is anyone other than a single individual all manner of complications arise. How would a corporation make a valuation? There is no power for the Valuer to delegate. If two or more persons are to carry out the same valuation, what happens if they don't agree?

On the other hand, the parties could appoint different Valuers for different valuations. Problems only arise if a corporation or two or more people are appointed to conduct the same valuation. Since some of the consultants who are likely to be appointed as Valuer carry on business in partnership or as an employee, care will have to be taken to ensure that the "*Agreement with Valuer*" is only made with an individual.

4. Remuneration Of The Valuer

The "*Agreement with Valuer*" could provide for payment to the Valuer of a lump sum or a rate or a combination of the two. The terms of payment could be payment on making the agreement, payment on completion or payment progressively. The most efficient method of payment would be a percentage of the Contract Price payable by monthly instalments when progress payments are made to the Contractor.

Alternatively, the Valuer's fee could be based upon the values determined by the Valuer or the hours worked by the Valuer. Either of these methods makes it impossible for the tenderer to price the potential fee payable to the Valuer. The hourly fee suffers from the further problem that either party may dispute the hours claimed by the Valuer. Moreover, the more inefficient the Valuer, the more

hours are likely to be worked.

If one party fails to pay the Valuer, the Valuer would have to sue that party to recover that party's share of the fee. From this point of view, the Valuer would prefer a system whereby the Valuer's fee is paid directly by the Principal to the Valuer when progress payments are made to the Contractor. If this system is not adopted, the Valuer may want the parties to be jointly and severally liable for the Valuer's fee.

It would be more efficient for the Principal to pay the Valuer on behalf of both parties and deduct the amounts paid from the Contract price.

5. Referring Matters To The Valuer

Clause 71 of C21 provides that either party may request the Valuer to determine the value of a variation. Such a request cannot validly be made until the Principal and the Contractor agree that "a Variation applies". There is an important distinction between agreeing "that a variation applies" and agreeing upon what the variation is.

> A Variation is defined in clause 94.70 as follows:
> *"Variation means any change to the Works, including additions, increases, omissions and reductions to or from the Works."*

The point is that the Principal and the Contractor may agree that there has been a change to the Works but they may disagree upon the extent of the change. Who decides what is the extent of the change, as distinct from its value? Who decides what is part of the Variation and what is not part? The answer to this issue will often depend upon legal interpretation of the contract or the Principal's Representative's direction to the Contractor. It seems that this issue is not one for the Valuer.

However, clause 1 of the "*Agreement with Valuer*" provides:

> *"The parties request the Valuer to determine Variations **and other matters** referred from time to time **under the Contract**."* (Emphasis added.)

It appears that even if the parties refer matters (e.g. whether work is a variation) other than matters which under clauses 41 and 71 are to be referred to the Valuer, the Valuer is not bound to make a determination under the "*Agreement with Valuer*" and could ask for an additional fee.

If the Valuer does accept a commission to determine something other than matters clearly covered by clause 1 of the "*Agreement with Valuer*", the Valuer must be very careful to ensure that the parties agree in writing that the determination will be made under the terms of the "*Agreement with Valuer*". This is necessary because the indemnity clause (clause 6 of the "*Agreement with Valuer*") only covers things "*done or omitted by the Valuer **under** this Agreement*". (emphasis added).

Clause 17 provides that the singular includes the plural and clause 71.4 provides that either party may request the Valuer to make a determination. What is the Valuer to do when one party asks the Valuer, when valuing a change (a variation), to include certain work and the other party says that the work is not part of the change?

The first thing that the Valuer should do is ask the parties whether they agree that the Valuer should decide that issue as part of the determination of the Valuer under the "*Agreement with Valuer*". If they say, "*Yes*", then the problem disappears. If either says, "*No*" then the Valuer has a problem. Without the consent of both parties, the Valuer has no authority to determine whether or not the particular work is part of the variation. The Valuer might decide that if the work is part of the variation, the variation has a certain value and that if it does not form part of the variation, the variation has a different value. If the Valuer makes that decision, the parties can submit to arbitration the question of whether the item of work in dispute is part of the variation.

Similarly, the Valuer could make two separate determinations with respect to the adjustment to the Date for Completion. It would then be for an arbitrator to decide which adjustment was the appropriate adjustment.

An example may serve to explain. Assume that the contract requires as part of the work that the Contractor excavates a hole of 10 cubic meters. Assume that the Principal varies the work by directing that the hole is to be 15 cubic metres. There are two ways of looking at the variation. It could be merely additional work, namely the same hole plus another 5 cubic metres or it could be regarded as two variations, namely omission of some work (a 10 cubic metre hole) and substitution of other work (a 15 cubic metre hole). In the first instance only the additional 5 cubic metres would need to be valued. In the latter instance the work omitted would need to be valued and the 15 cubic metre hole would need to be valued.

There is no dispute that there is a variation but there is a dispute as to what is the variation. That dispute is not within the jurisdiction of the Valuer. Each party may request the Valuer to value the variation on that party's interpretation of what the variation is. It seems that the Valuer should make a determination along the lines:

> *"If the variation is merely additional excavation of 5 cubic metres, it has a value of $a. If the variation is the substitution of a 15 cubic metre hole for a 10 cubic metre hole then the value of the work omitted (the 10 cubic metre hole) is $b and the value of the 15 cubic metre hole is $c."*

It is important that without the written request of both parties, the Valuer does not attempt to decide which is the correct interpretation of the variation. To do so would be to do something that the Valuer has not been engaged to do. It would probably void the valuation and it would probably take the Valuer outside the protection of the indemnity (clause 6 of the "*Agreement with Valuer*").

In the writer's experience, disputes over (1) the actual value of a variation are less common than disputes over (2) just what is to be valued. Having an arbitrator decide (2) and the Valuer decide (1) will present many problems. Sometimes an arbitrator will not be able to

finally determine a dispute because C21 has, by necessary inference, excluded valuing variations from the matters which can go to arbitration. Sometimes, after completion of the arbitration, matters of valuation will have to be sent back to the Valuer. Sometimes the parties may agree to waive the provisions of the Contract and cloak the Arbitrator with the powers of the Valuer. Sometimes the arbitrator may make a interim award and the final award when the Valuer has made his or her determination.

6. Procedure To Be Followed By The Valuer

It is unfortunate that the procedure to be followed by the Valuer is prescribed differently in different places. Once the Valuer has entered the "*Agreement with Valuer*" the procedure is:

1. The Principal or the Contractor refers a matter to the Valuer with a request that the Valuer make a "*determination*". This can be done orally or in writing or partly orally and partly in writing. The request can be made under clause 41 (new rate for Schedule of Rates) or clause 71 (variation). The request can be to determine a rate under clause 41 or a value under clause 71 or an adjustment to the Date for Completion under either clause. If other matters are referred, the Valuer must be careful to ensure that both parties agree to the Valuer making a decision on the additional matters and both parties agree that the Valuer will be deemed to be acting under the "*Agreement with Valuer*".
2. Within 28 days after receipt of the reference under (1), the Valuer must make a determination (see clause 2 of the "*Agreement with Valuer*" and clause 71.11 of C21). Failure to make a determination within that time is a breach of contract by the Valuer. It is not clear whether it goes to jurisdiction. In other words, it is not clear whether the Valuer can in fact make a valid determination if it is not made within 28 days. Such an important matter should have been covered in C21.
3. If the reference is under clause 71, the Valuer must meet with the Principal and the Contractor. If the reference is under clause 41, the Valuer may meet with the parties (clause 3 of the "*Agreement with Valuer*"). That is merely a meeting to discuss the matter referred.
4. If the reference concerns a variation then clause 71.10 of C21 provides that the Valuer can only take into account documents which have been exchanged by the parties and are submitted to the Valuer. This suggests that the Valuer cannot use the Valuer's own knowledge or Cordell's prices or any other information. However, clause 4 of the "*Agreement with Valuer*" provides that the Valuer will take into consideration all documents and oral information "*placed before the Valuer in accordance with the Contract*" and the Valuer "*will not be expected to or required to obtain or refer to any other documents, information or material but may do so if the Valuer wishes.*" This inconsistency is most embarrassing for the Valuer and is likely to lead to challenges to the validity of decisions of the Valuer.
5. The Valuer makes a decision by issuing a certificate (clause 4 of the "*Agreement with Valuer*"). See 7. below for a sample certificate without giving reasons. Giving reasons and giving an explanation of just what has been valued are two different matters. It is essential that the certificate is unambiguous in stating what value has been placed on what work or item.

7. Form of Valuer's Determination

The Valuer must make his or her determination by issuing a certificate "*in a form the Valuer considers appropriate, stating the Valuer's determination, but without giving reasons*" (clause 4 of the "*Agreement with Valuer*"). The form of certificate could be along the lines:

"I, Lee Wong,
(1) having been appointed Valuer by [... 'the Principal'] and [... 'the Contractor'] under an agreement dated ... between the Principal, the Contractor and myself;
(2) having been requested on ... [insert date] by [the Principal/the Contractor] to make a determination on the following issues:
(a) the value of variation no. ... under contract no. ...; and
(b) an appropriate adjustment to the Date for Completion of contract no. ... on account of that variation;

(3) having met with the Principal and the Contractor on ... [insert date];
(4) having considered the submissions of the Principal and the Contractor; and
(5) having considered the following documents submitted to me by the parties

Certify that:
(i) the value of variation no. ... is $...;
(ii) the adjustment to the Date for Completion of the Contract is an extension of the time for Completion of ... days.

Signed on [date] *Lee Wong*
Valuer"

It is important that the Valuer only states a number of days extension or reduction in time and does not purport to say what the Date for Completion is. The Valuer does not determine the Date for Completion. The Valuer merely determines the number of days adjustment, if any, to be made.

An important ambiguity is the question of whether the Valuer is bound to value in accordance with the limitations in clause 71 even though the Valuer considers that those limitations will result in a value different to the true value. For example, a variation may result in workers and plant on a portion of the site being idle for ten days while a redesign is effected. Assume that clause 66.1 of C21 precludes a right to an extension of time. Can the Valuer take that cost into account when clause 71.6 says that:

> *"Costs of delay or disruption caused by the variation must not be included in the valuation."*

Similarly, when determining an adjustment to the Date for Completion, is the Valuer constrained by clause 66.1 which provides that the Contractor is not entitled to an extension of time unless:

> *"... a clear majority of work in progress or planned to be started on Site during the period of the delay could not be proceeded with."*

In the instance where the Valuer believes that a variation has a certain value or a certain extension of time is reasonable, but it appears that the valuation or extension of time to which the Contractor is entitled has been constrained by the terms of C21, the determination which the Valuer might consider making is along the lines:

> *"Disregarding clause 71.6, a reasonable value for the variation is $a. Clause 71.6 of C21 appears to provide that costs of delay or disruption caused by a variation must not be included in the value. When I value the variation on that basis the value is $b.*
>
> *Disregarding clause 66.1 of C21, a reasonable extension of time for the variation is x days. However, clause 66.1 of C21 appears to provide that the Contractor is not entitled to an extension of time unless a clear majority of work in progress or planned to be started on Site during the period of the delay could not be proceeded with. When I determine an extension of time on that basis, I find that the Contractor is not entitled to any extension of time."*

In each case the Valuer should be careful to say what the particular clause of C21 appears to provide not what it actually provides. The Valuer is not the interpreter of the clause and should never purport to decide rights as distinct from values. An exception is where the parties specifically cloak the Valuer with additional jurisdiction. Of course, there is always the risk that in giving the Valuer additional jurisdiction the parties may unintentionally make the Valuer an arbitrator and the valuation process an arbitration.

It would be imprudent for a Valuer to assume that a particular clause has a particular meaning and thereby to certify a value or time which in the Valuer's opinion is not reasonable. In the situation postulated, it would be misleading for the Valuer to merely certify one value or one extension of time. The exclusion of liability clause of the "*Agreement with Valuer*" (clause 6) would not exclude liability for breach of clause 42 of the *Fair Trading Act* (engaging in misleading or deceptive conduct in trade or commerce. See 12. below).

The bar on the Valuer giving reasons (clause 4 of the "*Agreement with Valuer*") is not a bar on giving an explanation of what has actually been valued and what has not been valued. The Valuer should not say:

> *"I have not certified an extension of time because clause 66.1 of C21 precludes an extension of time."*
>
> It is another matter to say:
> *"Disregarding clause 66.1 an appropriate extension of time is ..."*

The Valuer should never use the word "*because*". It always precedes a reason and the Valuer must not give reasons.

In Chapter 5 there appears the following precedent for words to be used by the Valuer when there is a difference of opinion between the parties on just what is the extent of the variation.:

> *"If the variation is merely additional excavation of 5 cubic metres, it has a value of $a. If the variation is the substitution of a 15 cubic metre hole for a 10 cubic metre hole then the value of the work omitted (the 10 cubic metre hole) is $b and the value of the 15 cubic metre hole is $c."*
>
> This does not breach the ban on giving reasons.

8. Valuer's Power To Decide Valuer's Jurisdiction

The Valuer has no power to decide the Valuer's jurisdiction. Unlike an arbitrator, the Valuer has no statutory standing. For a Valuer there is no equivalent of the uniform *Commercial Arbitration Act*.

Normally a superintendent, architect, engineer or project manager (the certifier) valuing variations under a construction contract has a consultancy agreement with one party. The certifier has one client. However, the Valuer under C21 has two clients. Approval of both is required before the Valuer can lawfully depart from, or change the terms of, the Valuer's engagement.

The sort of problem which can arise is that the Contractor asks the Valuer to value certain work which the Contractor claims is a variation. Clause 2 of the "*Agreement with Valuer*" says that "*Within 28 days of a matter being referred by either party, the Valuer must determine the referred matter ...*". The Principal refers the Valuer to clause 71.4 of C21 which commences "*If the parties agree that a variation applies ... either party may request the Valuer to determine the value ...*". The Principal says to the Valuer, "*I have not agreed that there is a variation. Hence the parties have not agreed that there is a variation and therefore the Contractor has no right to request the Valuer to make a valuation*".

There is an ambiguity in C21. If the Valuer refuses

or fails to value, the Contractor may say that the Valuer has breached the "*Agreement with Valuer*". If the Valuer does make a determination, the Principal may say that the determination is not made under that Agreement and hence, with respect to that determination, the Valuer does not have any indemnity against liability under clause 6 of the Agreement. What is the Valuer to do? If the Valuer does value, but has no jurisdiction, the Valuer may not be able to recover a fee from the Principal. If the Valuer refuses to value, the Valuer may have a liability to the Contractor. Clause 6 (Liability of Valuer) does not purport to exempt the Valuer from liability for refusing to perform the agreement.

There is no answer except to redraft the pro forma "*Agreement with Valuer*" at pp.60-61 of C21.

9. Enforcing Valuer's Decision

Generally speaking an arbitrator's award can be registered as a judgment of a court and be enforced in the same way as judgments are enforced. A Valuer's decision under C21 cannot be enforced in the same way as an arbitrator's award. Sometimes the decision made by an expert in a formal expert determination creates a debt which can be readily enforced by suing for a liquidated amount. A Valuer's decision under C21 cannot be enforced in the same way. A Valuer's decision under C21 does not itself create a debt.

The Valuer decides the value of a variation, an adjustment to the Date for Completion or a new rate item for the Schedule of Rates. The right to payment of a value decided by the Valuer arises not from the valuation itself but from the Contract. Clause 71.5 provides:

> *"The Contract Price is to be adjusted to account for the value of a Variation."*

In clauses 81.2 and 81.3 this is repeated in slightly different words.

Clause 1.2.1 provides that the Principal is to pay the Contractor the *Contract Price* in accordance with the Contract. In clause 81.1 this is repeated in slightly different words.

The Contract provides in clause 62 for progress claims; in clause 64 for the Principal to assess the *Value of Work Activities Completed*; and in clause 64.5 for payment. In assessing the *Value of Work Activities Completed*, the Principal would not be entitled to ignore the valuation by the Valuer of a variation but the Principal, not the Valuer, decides how much of the value is to be included from time to time in progress payments. In practice the Principal's Representative will determine the progress value.

Clause 3.4 of C21 provides:

> *"The Principal's Representative acts only as agent of the Principal and not with the exercise of independent judgment or as an independent certifier, assessor or Valuer."*

This simply means that the Principal's Representative's valuation is the Principal's valuation. In other words, the obligation to act honestly and fairly when certifying is the Principal's obligation not an independent obligation of the Principal's Representative. Except in the case of fraud or breach of statute, the Contractor would have no action against the Principal's Representative personally for undervaluing. The action would be against the Principal. AS2124-1986 achieves the same result. In clause 23 it provides that the Principal shall ensure that the Superintendent acts honestly and fairly and arrives at a reasonable value.

For a case where, as in C21, the Principal takes on functions traditionally carried out by a Superintendent, see *Balfour Beatty v Docklands Light Railway* (Court of Appeal, England) 1996 CILL 1143-1145. In that case a contract based on the ICE conditions provided that the Principal's Representative took the place of the Superintendent and there was no arbitration clause. The Court held that failure of the Principal (through the Principal's Representative) to act honestly, fairly and reasonably could give rise to a claim against the Principal for breach of contract[3].

The Principal is not in breach of contract on account of the failure of the Valuer to value fairly but the Principal is in breach of contract if the Principal's Representative fails to value fairly.

C21 includes a novel provision that has no counterpart in AS2124-1986. It is clause 82.4 which provides:

> *"The Principal's assessments, determinations or instructions may be reviewed in any court proceedings which might follow this issue resolution procedure."*

It is established law that in proceedings challenging the validity of the Principal's assessments, determinations or instructions, courts can review the Principal's assessments, determinations and instructions to see whether they are valid. However, the courts will not go further and revise those assessments, determinations and instructions (see *Balfour Beatty v Docklands Light Railway* 1996 CILL 1143-1145 and *Atlantic Civil v Water Administration Ministerial Corporation* (1992) 39 NSWLR 468). The courts will award damages or even a quantum meruit, but will not revise the Principal's assessments, determinations or instructions.

The question must then be asked, "*Is clause 82.4 totally redundant or is it intended to give the Contractor some additional rights?*" The risk for the Principal is that a court or arbitrator will interpret clause 82.4 as entitling the Contractor to have an arbitrator revise the Principal's assessments, determinations and instructions. Such a vital issue should not be left ambiguous.

10. Finality Of The Valuer's Decision

Clause 71.12 of C21 provides:

> *"The Valuer's determinations are final and binding and not open to review in any legal proceedings."*

That clause deals with valuing variations and

extensions of time for variations. There is no similar statement in clause 41 where the Valuer has another function, namely to determine a new rate to be added to the Schedule of Rates and a consequent adjustment of the Date for Completion. This omission will be cured if the parties sign the standard form of "*Agreement with Valuer*" (pp.60-61 of C21) which in clause 5 provides:

> *"The parties agree to accept the determination in the Valuer's certificate as final and binding."*

When parties agree that the Valuer's determination will be final and binding, they obviously mean only to be bound by a valid determination. If the determination can be shown to be void, the parties are not bound by it. A determination is void or voidable, if it is obtained by fraud or not made honestly or independently[4]. A purported determination of the value of a certain variation is voidable, if it can be shown that the Valuer in fact valued the wrong variation or failed to value in accordance with the requirements of the "*Agreement with Valuer*"[5]. But the mere fact that the Valuer was negligent or arrived at a value which is erroneous is not grounds for challenging the validity of the variation.

The following passage from Lord Denning in *Campbell v Edwards* [1976] 1 Ll LR 522 at 524 is often cited with approval:

> *"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."*

Also often cited with approval is the following passage from Lawton LJ in *Baber v Kenwood* [1978] 1 Ll LR 175 at 181:

> *"Now experts can be wrong: they can be muddle-headed; and unfortunately, on occasions they give their opinions negligently. Anyone who agrees to accept the opinion of an expert accepts the risk of these sorts of misfortunes happening. What is not acceptable is the risk of the expert being dishonest or corrupt."*

On an appropriate application, a Court will rule on the validity of a determination. The Court will not enquire into whether the Valuer arrived at a reasonable value or adjustment of the Date for Completion - except in so far as that may be evidence that the valuation was obtained by fraud or is a valuation of the wrong variation or not made under the terms of the "*Agreement with Valuer*". The Court will not, indeed cannot, itself value the variation or adjust the Date for Completion (see *Balfour Beatty v Docklands Light Railway* 1996 CILL 1143-1145 and *Atlantic Civil v Water Administration Ministerial Corporation* (1992) 39 NSWLR 468).

From the point of view of making the Valuer's determination final and binding, it is unfortunate that C21 goes into so much detail on how the Valuer is to decide and what the Valuer can and cannot take into account. Worse still are the ambiguities (see 6. above). For example, clause 3 of the "*Agreement with Valuer*" provides that the Valuer "*may arrange to meet with the Parties*". Clause 71.3.1 says that the Valuer "*is to consult the Principal and the Contractor*". If the Valuer consults by telephone separately with each party, but does not meet with them, does that affect the validity of the process? What is sufficient consultation?

Clause 4 says that the Valuer "*will take into consideration all documents, information and other written and oral material that the parties place before the Valuer* ***in accordance with the Contract*****".** The emphasis has been added to show an important ambiguity. Clause 71.10 provides that "*only documents exchanged by the parties about the valuation of a variation may be submitted to the Valuer or taken into account by the Valuer in making a determination.*" What if the Valuer takes into account a document which has not been "*exchanged between the parties*"? Does that affect the validity of the Valuer's determination?

Clause 4 of the "*Agreement with Valuer*" provides that the Valuer may "*obtain or refer to other documents ... if the Valuer wishes*". This contradicts clause 71.10. Is the Valuer's determination still binding if the Valuer obtains or refers to a document which was not "*exchanged between the parties*"?

The doctrines of res judicata, issue estoppel and the so called "principle in *Henderson v Henderson"* have no application to the Valuer's determination[6].

11. Contractor's Challenge To The Valuer's Determination

If the Contractor wants to challenge the Valuer's determination, there are two obvious methods. One is to make a "*Claim*" against the Principal as defined in clause 94.A. "*Claim*" is defined to mean a "*claimed entitlement*" (see also clauses 81 and 82.1 of C21). The Contractor would claim an amount of money from the Principal or an extension of time. The justification for the claim may well be that there has not been a valid determination by the Valuer, i.e. that the valuation process has broken down[7].

The other obvious method is to give notice under clause 82.2 of an "*Issue (not being a Claim)*". An "*Issue*" is defined in clause 94 to mean "*any issue, dispute or difference raised by either party under clause 82*". The issue would be the validity of the Valuer's determination. The Contractor only has to say to the Principal, "*Do you agree that the Valuer's determination is void?*" If the Principal fails to agree, there is an "*Issue*".

A "*Claim*" (a claimed entitlement) and an "*Issue (not being a Claim)*" can exist at the same time. In fact, it is difficult to envisage a "*Claim*" without there also being an "*Issue*". But there can be an "*Issue*" without a "*Claim*". Hence the Contractor might try both avenues at once.

Either way, the Contractor can ultimately refer to arbitration under clause 84 of C21 the question of the validity of the Valuer's determination.

In short, the Valuer's determination is only final and binding, in the sense of not being open to challenge, if the parties accept it as final and binding or an arbitrator rules that it is final and binding.

It is one thing to be able to challenge the validity of a Valuer's determination. It is another thing to have the determination revised. Unless the parties cloak the arbitrator with some special additional powers, the arbitrator can only rule on the validity of the determination, i.e. whether it is a determination which under the terms of the "*Agreement with Valuer*" is final and binding. If the arbitrator decides that it is not final and binding there are two possibilities. One is for a party to request the Valuer to make a fresh determination. The other (which is only available if the Contractor has made a "*Claim*" as defined) is for the arbitrator to find that since the machinery for valuation has broken down and, therefore, the Contractor is entitled to a reasonable value[8]. The arbitrator would then proceed to determine a reasonable value.

12. Principal's Challenge To The Valuer's Determination

If the Principal wants to challenge the validity of the Valuer's determination, the Principal can't raise a "*Claim*". As defined, a "*Claim*" can only be raised by the Contractor. The Principal can assert that the determination is not valid and, therefore, not binding. The Principal can give notice under clause 82.2 of an "*Issue (not being a claim)*". However, the problem for the Principal is that the failure of the Valuer to make a valid determination is not a breach of contract by the Contractor. The Valuer's default cannot give the Principal any entitlement. The Principal nevertheless has to pay the Contractor a reasonable amount.

If the Principal has overpaid the Contractor then that is the Principal's fault because it was the Principal who decided what the Principal would pay (see clause 64). An overpayment made as a consequence of a void determination by the Valuer may possibly be recoverable in an action based upon the law of restitution but not in an action based upon breach of contract.

Overturning the Valuer's assessment of the value of a variation does not mean that the Principal is not liable to pay for the variation or that time for payment is postponed. It simply means that the Principal must pay a reasonable price for the variation.

Where the Principal seeks to reduce the Contract Price on account of a variation, the absence of a valid Valuer's determination means that the Contract Price is not reduced. There is no point in simply having the Valuer's determination set aside. To get a reduction, the Principal must have another Valuer make a determination of the value of the omitted work. It is important to remember that the Valuer is not empowered by C21 to determine whether or not work is omitted[9]. The Valuer's role is simply to value work which the parties agree or an arbitrator determines has been omitted.

If the determination of the Valuer which the Principal wants to prove is void is an adjustment to the Date for Completion, there are two possibilities. One is that the Valuer had no jurisdiction to make the determination - in that event the Date for Completion is unaffected by the determination. Alternatively, if the Valuer had jurisdiction but did not make a valid determination, the effect of having the determination declared void would almost certainly be that time for Completion is set at large. An exception would be where the adjustment was a purported reduction[10] in the Date for Completion. A void "*reduction*" would simply mean that the Date for Completion remained unaltered.

13. Valuer's Role In Arbitration

When in arbitration between the Principal and the Contractor the determination of the Valuer is challenged, what role does the Valuer have?

First and foremost, the Valuer must remain neutral. The Valuer should not support one party or the other. The Valuer should not seek to actively intervene. This will probably be hard. Usually people seek to justify their work and resent it being criticised. The Valuer may even think that he or she must argue for the validity of the determination because his or her liability may turn upon the outcome. This would be a very serious misjudgment.

Clause 6 of the "*Agreement with Valuer*" provides:

> *"The Valuer is not liable to either or both parties, or to any third party or stranger, for anything done or omitted by the Valuer under this Agreement ..."*

Once the Valuer makes a determination, the only thing which the Valuer can do under the Agreement is to correct a clerical mistake. Assisting a party in arbitration, giving evidence, making witness statements, etc are not done under the Agreement and do not fall within the protection of clause 6. There are certain protections attached to giving evidence in arbitration but that is another matter.

An example may serve to illustrate the risk. Assume that the Valuer is asked to value a variation and, in good faith but mistakenly, the Valuer arrives at a value of $10,000 when a reasonable value would be $20,000. Assume that in arbitration the Contractor argues that the Valuer's determination is not valid and not binding.

Assume that the Principal comes to the Valuer and says, "*I want you to give evidence in support of your valuation*". At that time the Valuer believes either:

1. the value of $10,000 is the correct value;
2. the value is another figure,

or the Valuer is not sure what the value is.

Any information which the Valuer gives either party at this stage is not subject to the protection of clause 6 of the "*Agreement with Valuer*". If at this stage the Valuer says that the value is $10,000, the Valuer runs a risk of liability. This is because, maybe unknown to the Valuer, a reasonable value is $20,000. In reliance on the Valuer's

"*unprotected*" opinion, the Principal may decide to defend a claim which the Principal would not have defended if the Valuer had said, "*I am not sure now whether my valuation was correct or not*".

Even that statement could be a misleading and deceptive statement if the Valuer actually believes that the Valuer's determination was incorrect. If, subsequent to making a determination, the Valuer believes that the Valuer's determination was mistaken, the Valuer should notify both parties as soon as possible.

Silence can be misleading and deceptive conduct. Making a mistake is one thing. Concealing it is another. The exclusion clause (cl.6) purports to exclude liability for making the original mistake but it does purport to exclude liability for covering up or concealing the mistake. Moreover, misleading and deceptive conduct can give rise to liability under statute[11] and the exclusion clause would not protect the Valuer against that liability.

Clause 2 of the "*Agreement with Valuer*" refers to correcting accidental slips. It does not authorise the Valuer to change his or her mind. However, the Valuer is not an arbitrator or judge. The Valuer's determination does not have any finality accorded to it by law. The only finality is that accorded by the parties to the "*Agreement with Valuer*".

Any professional who gives advice should inform the client if the professional has reason to believe that the advice was wrong. Failure to do so can give rise to liability even though the original advice itself could not give rise to liability. For example a doctor may prescribe some pills which are later proven to be harmful. The doctor should contact all patients for whom the doctor has prescribed the pills and tell them to cease using the pills.

The Valuer is in a similar position. If the Valuer subsequently realises that the Valuer's determination was mistaken, the Valuer should inform the parties before they incur loss or further loss in reliance upon the determination.

The Valuer can be subpoened to give evidence in the arbitration. The Valuer must answer honestly under oath. Despite clause 8 (Confidentiality) the Valuer cannot refuse to answer questions on the grounds of confidentiality or that the answer may tend to show that the Valuer breached the "*Agreement with Valuer*" or was negligent. Although clause 4 of the "*Agreement with Valuer*" provides that the Valuer is not to give reasons, in an arbitration the Valuer can be asked to give oral evidence of his or her reasons.

14. Liability of the Valuer

For Breach of Contract

The limitation of liability clause in the "*Agreement with Valuer*" reads:

"*6. Liability of Valuer*

The Valuer is not liable to either or both parties, or to any third party or stranger, for anything done or omitted by the Valuer under this Agreement; and the parties release and indemnify the Valuer from and against any claims for negligence, bias or other misconduct other than actual fraud."

To come within the scope of the clause, the Valuer must have done something "*under this Agreement*". Or the Valuer must have omitted to do something which the Valuer was required to do under the Agreement. This would appear to protect the Valuer if the Valuer failed to make a valuation within time or arrived at an incorrect value. It would appear to protect the Valuer if the Valuer failed to take into account some document or took into account a document which the Valuer should not have taken into account.

But it would not protect the Valuer if the Valuer stepped outside the "*Agreement with Valuer*" and purported to decide whether or not work was a variation or the Valuer valued work when the Valuer was not validly requested to do so. Note that the exclusion clause does not refer to things "*purportedly done*" under the Agreement. They must be things actually done under the Agreement.

Liability in Tort

That a valuer can have liability in tort for negligently valuing, is now settled law.

Clause 6 consists of three parts. The first is an exemption of liability clause. Strangely, it does not expressly refer to negligence or misconduct. If sued by either party the Valuer could plead in defence the agreed exemption but the exemption has the limitations mentioned and does not purport to exempt the Valuer from liability for negligence or misconduct.

The second part of clause 6 is a release. It says that the parties release the Valuer from claims for negligence, bias and misconduct other than actual fraud. It presupposes that the Valuer will be liable to the parties for negligence and misconduct. Had the exemption (the first part of cl.6) been in broader terms, the release would not be necessary. It is strange to have a release of a liability which has not yet arisen. If a liability arises, presumably the Valuer would have to call upon each party to formally release the Valuer and if either failed to do so, the Valuer would make a claim or crossclaim for breach of contract.

The third part of clause 6 is an indemnity. It is not clear whether the indemnity is given jointly or severally by the Principal and the Contractor. The way an indemnity works is this. Someone (even a party) makes a claim against the Valuer. The Valuer immediately calls upon the parties (or the other party) to indemnify the Valuer and take over the conduct of the defence of the Valuer. If the parties don't honour the indemnity, the Valuer defends himself or herself and sues the parties for breach of the indemnity.

An indemnity is only invoked if a claim is made against the Valuer. The parties have agreed not to make claims against the Valuer. The Valuer should try to ensure that no claim can legitimately be made by any third party. The Valuer should consider inserting a warning in all

determinations. Here is an example:

"Warning

This determination has been made for a particular purpose on particular information pursuant to a particular agreement between [the Principal] and [the Contractor] and it should not be used by anyone else whomsoever for any purpose whatsoever because it could contain errors or omissions or it could be misleading."

Liability Under Statute

Section 52 of the *Trade Practices Act* 1974 (Cth) and section 42 of the *Fair Trading Act* 1987 (NSW) provide that a person must not in trade or commerce engage in conduct that is misleading or deceptive or likely to mislead or deceive. Sections 82 and 68 of the respective Acts provide that a person who suffers loss or damage by conduct which breaches sections 52 and 42 respectively may recover damages. The *Trade Practices Act* is concerned primarily with the conduct of corporations so it is the *Fair Trading Act* which is most likely to apply to the Valuer.

The exemption clause, clause 6, would not protect the Valuer from liability for breach of these statutes. Publication by the Valuer of an incorrect determination could be misleading or deceptive conduct. Under the statutes, the fact that the Valuer did not intend to mislead or deceive is not a defence.

The liability is not limited to the actual parties. For example, a subcontractor or a client who is not a party to the C21 contract could nevertheless be relying upon the Valuer's determination when making decisions or claims. The above "*Warning*" could provide vital protection.

15. When There Is No Valuer

It may be that an "*Agreement with Valuer*" is never entered or the Valuer terminates the Agreement. Since the Agreement is not for any particular duration, any party can terminate it upon reasonable notice to the other parties.

The Contract will still work without a Valuer. A determination by the Valuer is not a condition precedent to payment. The determination is merely a mechanism for resolving an issue which will otherwise have to go to arbitration. For an extremely limited range of disputes, it is an alternative to arbitration.

Progress payments are not dependant upon a determination of the Valuer. A variation must still be paid for even if it is never valued by a Valuer. It is the Principal who should be most concerned to see that there is an "*Agreement with Valuer*" and that it works. In the absence of a Valuer, the Principal may not know just what the Contract Price is or what is the Date for Completion. It is for this reason that in most construction contracts the Principal appoints the equivalent of the Valuer. Then there is no risk that the process will fail for want of there being a Valuer.

Footnotes

1. There is an interesting anomaly in clause 3 of C21. Clause 3.1 provides that the Principal is to appoint a Principal's Representative to act for the Principal in all matters relating to the Contract. Some of those matters, e.g. assessing progress valuations and granting extensions of time, are instances where the Principal would be bound in law to act honestly, fairly and in good faith. However, clause 3.4 says, "*The Principal's Representative acts only as agent of the Principal and not with the exercise of independent judgment or as an independent certifier, assessor or valuer.*" Despite this provision, when the Principal's Representative is performing a function where the Principal must act honestly, fairly and in good faith, the Principal's Representative must do the same. To do otherwise would be a tort. The Principal cannot by contract legitimate tortious conduct. The Principal's Representative under C21 is no different to the traditional Superintendent. Despite clause 3.4 the Principal's Representative has the dual role identified in *Perini v Commonwealth* and *Sutcliffe v Thackrah* (above).
2. The *Housing Grants, Construction and Regeneration Act* 1996 (UK) even gives legislative backing to the 'adjudicator' role.
3. Clause 82.5 of C21 provides:

   "The Contractor acknowledges that the Principal is not liable in damages (whether in contract, negligence or otherwise) for making an incorrect assessment, determination or instruction."

   That is an extraordinary clause. Does it mean that the Principal will not be liable to the Contractor or is it merely a mutual misunderstanding of the law? In law, an incorrect assessment, determination or instruction by the Principal could be a breach of contract, tort or breach of statute. The clause does not say that, in that event, the Principal will not be liable to the Contractor for damages. If that was what was intended then surely the clause would say so. Of course, it may be impossible to contract out of liability under statute. Even if the clause was interpreted as an exclusion of liability clause, it does not purport to exclude liability for failing to exercise the power of assessment in good faith as distinct from arriving at the incorrect value.

   Also, the 'exclusion clause', if it is in fact an exclusion clause, purports only to exclude liability for damages. In the case of a progress valuation or an extension of time, the Contractor's entitlement is not to damages - it is an entitlement under the Contract. For example, if a progress valuation is not validly made, the Contractor can sue under the Contract for the amount which should have been paid (*Panamena Europa Navigacion v Leyland* (1947) AC 428).

There is further ambiguity in clause 82.4 of C21 which provides:

"The Principal's assessments, determinations or instructions may be reviewed in any court proceedings which might follow this issue resolution procedure."

4. *Perini v Commonwealth* [1969] 2 NSWLR 530
5. In *Baber v Kenwood* [1978] 1 Ll LR 175 at 181 Lord Cairns put it in these words:

"If the valuation has not been made in accordance with the express terms of the contract then it is clearly not binding. If it is made in accordance with the express terms, the next question is whether there were any implied terms that have not been complied with. Here there may arise a conflict between two principles, one that the Court will not imply a term unless it is one which reasonable men would obviously have agreed to if their minds had been directed to the point, the other that a contract should if possible be interpreted in such a way as to achieve fairness between the parties.

Plainly it must be implied that the valuation is to be made honestly and impartially. The only reason why that is not made an express term is that it is taken for granted.

Whether it can be implied that the valuation is not to stand if it can be shown that the valuer has made some mistake is a much more difficult problem."

In C21 the parties have agreed to accept the Valuer's determination as final and binding (cl.71.12 of C21 and cl.5 of the Agreement with Valuer) and they have agreed that the Valuer will not give reasons (cl.4 of the Agreement with Valuer). They have also expressly dealt with correction of clerical mistakes (cl.2 of the Agreement with Valuer). In the light of these express provisions, it would be very difficult to imply a term that the determination would not be binding, if the Valuer was negligent or arrived at an unreasonable valuation.

6. These doctrines and the principle in *Henderson v Henderson* are discussed in *Construction Claims*, Davenport, P, The Federation Press, Sydney 1995 at pp.170-175.
7. See *Panamena Europa Navigacion v Leyland* [1947] AC 428; *Sudbrook Trading v Eggleton* [1982] 3 WLR 315 and *Queensland E.G.B. v New Hope* [1989] 1 Ll LR 205.
8. For authorities to support this approach see footnote 7.
9. Clause 71.4.2 refers to "*decreased or omitted work*". It is not clear what the difference is. If the Contract required the Contractor to load 16 tonnes and the variation reduced the load to 10 tonnes, does the Valuer value the 10 tonnes - the decreased work, or the 6 tonnes - the omitted work? This ambiguity could be grounds for challenging in arbitration the Valuer's determination.
10. Clause 71.4.8 speaks of a "*reduction in the Date for Completion*". How do you reduce a date?
11. Section 42 of the *Fair Trading Act* 1987 (NSW).