Neutral Citation Number: [2019] EWCA Civ 1683

Case No: A3/2018/1888

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST CHANCERY DIVISION
HH Judge Kramer
Claim Number HC-2017-001934

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 October 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE MOYLAN
and
LORD JUSTICE SINGH

- -

Between :

GREAT DUNMOW ESTATES LIMITED	**Claimant/ First Respondent**
- and -	
(1) CREST NICHOLSON OPERATIONS LIMITED **(2) CREST NICHOLSON PLC**	**Defendants/ Appellants**
(3) STEPHEN DOWNHAM	**Defendant/ Second Respondent**

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Jonathan Seitler QC and **Tom Roscoe** (instructed by **Gateley PLC**) for the **Appellants**
Guy Fetherstonhaugh QC and **Toby Boncey** (instructed by **Mills & Reeve LLP**) for the **First Respondent**

Hearing date : 24 July 2019

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Approved Judgment

Lord Justice Patten :

1. This is an appeal by Crest Nicholson Operations Limited and Crest Nicholson Plc (together "Crest Nicholson") against certain declarations made by HH Judge Kramer (sitting as a deputy judge of the Chancery Division) following a hearing on 11 June 2018.

2. Crest Nicholson and the first respondent, Great Dunmow Estates Limited ("GDEL"), are parties to a contract for the sale of land at Smith's Farm, Great Dunmow, Essex which is owned by GDEL. The contract with Crest Nicholson was entered into on 22 December 2011 and was made conditional on four matters (set out in clause 5.1), namely:

   (i) the grant of a satisfactory planning permission;

   (ii) the occurrence of what is defined as the Challenge Expiry Date in relation to that planning permission which in this case means a date 3 months and 5 days after the grant of the planning permission;

   (iii) the removal of certain registered restrictions from the title; and

   (iv) the agreement or determination of the price calculated in accordance with clause 6 of the contract.

3. It is common ground that the first three conditions have been fulfilled. A satisfactory planning permission was granted on 4 November 2014 making the Challenge Expiry Date 11 February 2015. Under the terms of the permission development had to be commenced before the expiration of two years from the date of the agreement.

4. The dispute between the parties is about the purchase price and how it should be ascertained. Clause 6.1 of the contract contains detailed provisions which require the parties to use reasonable endeavours to agree various matters relevant to the valuation of the property to be sold. For reasons which I will come to, the detail does not matter but they include the Base Revenue Per Square Foot (as defined) for each house to be constructed (clause 6.1.6) and the Main Infrastructure Costs (clause 6.1.7). The contract contains provision for the determination of any of these clause 6.1 matters which cannot be resolved by agreement.

5. Clause 6.2 provides as follows:

> "6.2 Following the Challenge Expiry Date and the agreement or determination of the items referred to in clause 6.1 the Parties shall appoint a Valuer to ascertain the Assumed Value of the Property and in so doing the Valuer shall comply with the valuation standards published in the Red Book and shall act as an independent external valuer and the valuation shall be:
>
> 6.2.1 on the basis of Market Value (as defined in Practice Statement 3.2 of the Red Book) and using the residual method and any other methods that are appropriate

> 6.2.2 with the valuation date being the Challenge Expiry Date or (if later) the date of valuation
>
> 6.2.3 on the basis that
>
> 6.2.3.1 the Property is serviced …
>
> 6.2.3.2 the Property has the benefit and burden of the Satisfactory Planning Permissions … ".

6. Under clause 6.4 the price payable for the property is to be the higher of the Assumed Value as determined by the valuer in accordance with clause 6.2 and a Minimum Price of £1m per net developable residential acre less "Total Costs".

7. The parties were unable to agree the Base Revenue Per Square Foot (clause 6.1.6) or the Main Infrastructure Costs (clause 6.1.7) and so on 10 May 2016 the second respondent, Mr Stephen Downham, who is a chartered surveyor, was appointed in accordance with clause 26 of the contract to determine these matters and also the Assumed Value of the property under clause 6.2. The parties had by then instructed their own valuers but agreed that Mr Downham should be able to obtain his own advice from an expert on the issue about the Main Infrastructure Costs.

8. On 19 August 2016 Mr Downham issued directions to the parties including that their valuers should produce a statement of agreed facts by 22 August 2016 in respect of the development site. The valuers were to agree as many facts as possible including the comparables that the parties wished to rely on. They were also to set out any matters that they had been unable to agree. They were to deliver their representations by 14 September 2016.

9. The parties' valuers produced a document entitled "Statement of Agreed Facts" on 23 August 2016. It recites that it "has been prepared to assist Mr Stephen Downham in arriving at his determination" and that it has been prepared and agreed by the parties' two valuers. In accordance with Mr Downham's directions, it contains a summary in conventional form of the matters on which the two valuers were agreed and identifies the principal areas of disagreement between them. On the front page of the document the parties have included the words "Without Prejudice".

10. Although clause 6.2 of the contract (as quoted above) sets out the basis on which Mr Downham is to calculate the Assumed Value of the property, it does not in terms specify a valuation date. But the parties' own experts did address this issue in the Statement of Agreed Facts. They said:

> "Under clause 6.2 of the 22 December 2011 Agreement ("The Agreement"), the Assumed Value of the Property is to be arrived at on the basis of (Red Book) Market Value (as defined at Clause 6.2.1 of the Agreement) but subject to a number of special assumptions at clause 6.2.3.
>
> There is no fixed Valuation Date hence, in the event that the Assumed Value of the Property falls to be determined by an

> Expert, the Valuation Date then becomes the date that the Expert issues the determination."

11. Accordingly the two valuers produced their own reports in September 2016 setting out their valuations of the property as at the date of their reports. The valuations which they produced were very different in amount. Mr John Turner (for Crest Nicholson) considered that the Assumed Value was just under £29.5m. Mr Michael Shaw (for GDEL) said that it was over £43m. In a further report of 14 October 2016 Mr Turner revised his valuation to £20.59m on the basis that the planning permission was about to expire.

12. One of the issues affecting valuation was the assumption which the valuers had to make in relation to the planning permission and whether the valuers had simply to assume that a satisfactory planning permission remained in force or could have regard to the reality which was that (as at the date of the valuation) it was about to expire. Advice on this and other related issues was tendered to the parties by Mr Fetherstonhaugh QC and Mr Seitler QC and this led Mr Downham to seek his own legal advice. Both parties were agreeable to this on the basis that they would have the opportunity through their own counsel of making submissions to the legal assessor instructed by Mr Downham.

13. Although this process was intended to provide a means of resolving the legal differences between the parties about the valuation assumptions, it has in fact led to the litigation with which we are concerned on this appeal. Mr Timothy Morshead QC was instructed in December 2016. By then the planning permission had in fact been implemented so that the issue as to whether the valuer could take into account its imminent expiry had disappeared. But Mr Downham considered that other issues about the terms of the hypothetical sale remained and that he would be assisted by advice from Mr Morshead on these issues. Mr Morshead was therefore instructed on the basis that the planning permission issue had been resolved and that it was agreed that the valuation date should be the date of Mr Downham's actual determination of the Assumed Value.

14. Mr Morshead produced his opinion on 20 January 2017. Despite the terms of his instructions, he explained in his opinion why he considered that the correct valuation date was not the date of Mr Downham's valuation but rather the Challenge Expiry Date. Having seen his advice, Crest Nicholson then moved from their position set out in the Statement of Agreed Facts and said that they agreed with Mr Morshead. GDEL maintained that the date of valuation had been agreed and that Crest Nicholson were bound by it.

15. Faced with this dispute Mr Downham invited the parties to make submissions as to the status and effect of the Statement of Agreed Facts and whether their then agreed position could be overridden as a result of Mr Morshead's opinion. The end result (after further correspondence with their solicitors) was that on 15 May 2017 Mr Downham sent an e-mail to the parties stating that after taking further advice from Mr Morshead he had concluded that on the true construction of the contract the correct valuation date was the Challenge Expiry Date; that the Statement of Agreed Facts was merely a record of the views of the parties' own valuers about the valuation date; and that it did not operate contractually so as to bind the parties to a different valuation

date. He would therefore proceed to determine the Assumed Value of the property as at the Challenge Expiry Date.

16. On 5 July 2017 GDEL issued their Part 8 claim form seeking the setting aside of Mr Downham's determination of the correct valuation date and a declaration either that on the true construction of the contract the correct valuation date is the date of the actual determination of Assumed Value by the expert or that for the purposes of the expert determination that date had been agreed by the parties to be the correct date in accordance with clause 6.2 of the contract.

17. At the hearing Judge Kramer was asked by Mr Fetherstonhaugh to consider and make the following determinations:

    (1) that Mr Downham had no exclusive or any jurisdiction to determine the contractual valuation date himself given that this was a question of law and therefore a matter for the Court;

    (2) that the agreement between the valuers about the correct valuation date (contained in the Statement of Agreed Facts) was contractual and again was not an issue which Mr Downham had any jurisdiction to determine; and

    (3) that if the parties are not bound contractually by what is contained in the Statement of Agreed Facts then clause 6.2 of the contract should be construed or given effect on the basis that the valuation date is the date of Mr Downham's final determination of the Assumed Value.

18. On 24 August 2017 Crest Nicholson filed their own application notice seeking an order that the Court did not have any jurisdiction to set aside Mr Downham's determination of 15 May 2017 unless that decision lay outside the scope of his decision-making authority or involved a manifest error or omission.

19. The judge rejected GDEL's argument that on the true construction of the contract the valuation date was the date of Mr Downham's final determination of the Assumed Value. He held that Mr Downham had been right to accept Mr Morshead's view that the contractual valuation date was the Challenge Expiry Date. His reasons are set out in [57]-[65] of his judgment (see [2018] EWHC 2133 (Ch)). There is no appeal by GDEL against the judge's conclusions on this issue and, in those circumstances, I do not propose to summarise the judge's reasons here.

20. But the judge dismissed Crest Nicholson's application of 24 August and held that the effect of the agreement contained in the Statement of Agreed Facts about the correct valuation date was contractual and was therefore binding on Mr Downham for the purposes of his expert determination. The judge dismissed an argument by Crest Nicholson that it would be premature to grant declaratory relief and his final order contains declarations: (1) that on the true construction of the contract the valuation date for the purposes of clause 6.2 is the Challenge Expiry Date but (2) that, notwithstanding this, the valuation date is the date on which Mr Downham issues his determination of the Assumed Value.

21. The judge's decision on these issues was of course premised on the Court having retained jurisdiction to determine both the question of construction and the effect of

the agreement contained in the Statement of Agreed Facts. Much of the judgment contains a detailed analysis of the relevant cases on the jurisdiction of an expert and whether the agreement under which he is appointed ousts the jurisdiction of the Court. The judge decided that the jurisdiction of the Court to decide the issues of construction and the effect of the Statement of Agreed Facts was not excluded by the contract and that Mr Downham had in fact no jurisdiction to issue a binding decision on the construction of clause 6.2.2. I will consider later in this judgment whether it is necessary for us to determine these matters as part of this appeal.

22. For completeness I should mention that Crest Nicholson filed a further application notice on 18 June 2018 after the judge had handed down judgment in which they sought directions in respect of the setting aside of the Statement of Agreed Facts on the basis that it was vitiated by mistake. The judge dismissed this application on 20 July 2018. Permission to appeal was sought by Crest Nicholson on a number of grounds but was granted by Lewison LJ on limited grounds. In summary, the judge's order is said to be wrong for the following reasons:

    (1) that he erred in assuming jurisdiction over the valuation date at all. Either under the contract or as a result of subsequent events this was a matter within the expert's sole and exclusive jurisdiction;

    (2) that he was wrong to have construed the Statement of Agreed Facts as amounting to a contractual agreement as to the valuation date; and

    (3) that even if the Statement of Agreed Facts had contractual effect in relation to the valuation date the judge should have followed the decision of Lightman J in *Techno Ltd v Allied Dunbar Assurance plc* [1993] 1 EGLR 29 and implied into the agreement a power for the expert to release the parties from it.

23. As originally formulated the challenge to the judge's finding that the agreement between the valuers about the valuation date contained in the Statement of Agreed Facts is contractual was based largely on the terms of the Statement and the context in which it was produced. This, it is said, points strongly against the contents of the document being contractual. Its purpose was to inform the expert about what remained in issue between the parties' own valuers but it did not prevent the parties from changing their position about that. Still less can it have been intended to commit them to what amounts to a variation of the contract in terms of the valuation date.

24. Although these arguments have not been abandoned by Crest Nicholson, they have largely been superseded by the consequences of a recent decision of the Supreme Court. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24 ("*MWB*") (decided after the trial in the present case but shortly before Judge Kramer gave judgment) the Supreme Court held that there was no reason in principle why the parties to a contract could not bind themselves to a specified method for making any subsequent variation to the contract. The parties are to be taken to have agreed that purported variations which do not comply with the relevant conditions are to be invalid.

25. Clause 30 of the contract in this case provides:

> "This Agreement constitutes the entire contract between the Parties and may only be varied or modified in writing by letter or memorandum signed by both the Parties or their solicitors specifically referring to this clause 30 and stating that this Agreement is varied in the manner specified and such variation may be prepared in duplicate or in original and counterpart and reference to such variation shall be endorsed on this Agreement."

26. Mr Fetherstonhaugh realistically accepts that these provisions were not complied with in the present case either in relation to the Statement of Agreed Facts or in relation to any other dealings between the parties that might be relied upon to support the efficacy of what the parties' valuers originally agreed. It is clear therefore that the judge's decision about the effect of the Statement of Agreed Facts and the declaration which he made to give effect to it cannot stand and must be set aside. But the Supreme Court did leave open the possibility of a non-compliant variation being given effect by way of estoppel and GDEL wish to consider whether a case can be advanced on that basis. At the hearing before Judge Kramer, Mr Fetherstonhaugh disclaimed any reliance on estoppel as part of his case and it would need to be pleaded. If my Lords agree that we should allow the appeal on this ground and set aside the second of the declarations made by the judge then the case should in my view be remitted back to a judge of the Chancery Division for further directions. It will then be for GDEL to consider whether it wishes to make an application for permission to amend and the judge will need to decide how (if at all) the action should proceed or be disposed of.

27. That leaves the issue about jurisdiction. On one view it is unnecessary for us to say or decide anything about whether the judge had jurisdiction to decide the questions about the correct valuation date. His decision about the effect of the Statement of Agreed Facts must be set aside following the decision in *MWB* and the judge's construction of clause 6.2 is no longer challenged and has always been shared by Mr Downham. But because we have heard full argument on the point I propose to set out relatively shortly why I consider that the judge was right to conclude that the expert did not have exclusive jurisdiction to decide the valuation date issues.

28. There is and cannot be any real dispute that the scope and nature of an expert's jurisdiction is determined by the contract between the parties. They determine what the expert is to decide and have it within their power to agree that his decision on those matters should be final without recourse to the courts. The expert has no other source of authority and is unregulated in terms of his powers by statute. The scope of his remit and the finality of his decisions on matters within his authority are therefore dependent on the proper construction and terms of the contract which the parties have made. This includes the question whether that very issue of jurisdiction is itself a matter for the expert or one for the court to adjudicate upon.

29. The correct valuation date depends upon the construction of clause 6.2 (in particular clause 6.2.2) read in the context of and consistently with the other relevant provisions of the contract. This is clearly a question of law and not a straightforward one as the history of the litigation demonstrates. Mr Downham was appointed as the "valuer" in accordance with clause 6.2. This is a defined term in the contract (see clause 1). The valuer must be a chartered surveyor with experience of the valuation of new build

residential developments in the region of the property and as a term of his appointment he is required, *inter alia*:

> "to allow and consider and copy to the other Party written representations and counter representations and written evidence on the same terms as referred to in clauses 26.6.3 to 26.6.6 (inclusive) of this Agreement."

30. Clause 26 of the contract contains dispute resolution provisions under which an "Expert" is appointed. He must consider representations from the parties on the matters in issue and has power to seek legal advice or other expert assistance. Importantly clause 26.9 provides that clause 26 has no application "to disputes in relation to matters of law which will be subject to the jurisdiction of the courts".

31. The parties could not therefore have appointed Mr Downham under clause 26 even had they wished to do so and Mr Seitler submits that the provisions of clause 26 have no application or relevance to the appointment of the Valuer under clause 6.2. Mr Fetherstonhaugh's position before the judge was that the task of the valuer and the cross-reference to clause 26 in the definition of his rôle quoted above brought in either directly or by analogy the provisions of clause 26.9.

32. The judge rejected this argument and was, I think, right to do so. There is a clear distinction in the contract between the Valuer appointed under clause 6.2 and the Expert appointed under clause 26. The fact that certain specific procedural powers given to the Expert under clause 26 are conferred on the Valuer points if anything away from a general adoption of the clause 26 code. Had the draftsman wished to introduce clause 26.9 as a term of a clause 6.2 appointment he could and I think would have said so.

33. But the absence of such a provision is not, I think, to be read as an indication that the Valuer would have exclusive jurisdiction to decide any questions of law arising in relation to the valuation. For that one needs to look at the provisions of clause 6.2.

34. The task of the Valuer set by the opening words of clause 6.2 is to ascertain the Assumed Value of the Property as defined. The clause goes on to set out the basis of valuation "with the valuation date being the Challenge Expiry Date or (if later) the date of valuation": see clause 6.2.2. The authority of the Valuer is to determine the Assumed Value at the correct date specified in clause 6.2.2; nothing else. And if the Valuer produces a valuation as at some other date he will not have carried out the terms of his appointment and his valuation will not be binding upon the parties.

35. There is nothing in terms in clause 6.2 which gives the Valuer the jurisdiction to determine what is the correct of the two alternative dates or to exclude the rights of the parties to refer that question of construction and therefore jurisdiction to the court. What Mr Seitler primarily relied on is the decision of this Court in *Norwich Union Life Insurance Society v P&O Property Holdings Ltd* [1993] 1 EGLR 164. In that case an issue arose as to whether a development had been "completed" within the meaning of a funding agreement. The developers contended that this meant the same as practical completion under the building contract. The funders said that it stipulated a higher standard of completion. The agreement provided for disputes to be referred to a commercial arbiter. The question for the court was whether the arbiter had exclusive jurisdiction to decide what "completed" meant. Sir Donald Nicholls V-C held that the

dispute resolution clause gave the arbiter exclusive jurisdiction to decide that issue as part of deciding about whether the works had in fact been completed to the requisite standard. He said (at page 166J):

> "Far from this being unlikely, it seems to me that identifying what are the design drawings in accordance with which the development was to be completed was typical of the questions the nominated arbiter would be expected to answer if a dispute arose on whether a particular document was or was not a design document. Answering this question may give rise to issues of fact or mixed fact and law, but architects and surveyors not infrequently are faced with such issues in the course of references of this nature. Likewise as to the meaning of the word "completed". What the parties are to be taken to have intended by that word in clause 6(9) and in the definition of "the completion date" is, as a question of construction, a question of law as distinct from a question of fact. But questions of interpretation of documents frequently arise in the course of resolution of rent review disputes by surveyors or building contract disputes by architects. I am therefore not persuaded that the parties to the funding agreement should be taken to have excluded these questions from the scope of the matters to be decided by the nominated arbiter if, as has happened, answering such questions becomes necessary in the course of determining what was the completion date."

36. His decision was affirmed in the Court of Appeal. Dillon LJ (at p. 168H) said:

> "In the present case, whether the development has been completed must essentially depend on the facts and not on any clear-cut issue of law. The nominated arbiter will have to consider in what respects it is said that the development has not been completed and how significant they are and so forth. They are all matters which are rolled into the question that he has to consider, whether at the stage in which he is considering it the development has been completed. Those are pre-eminently, in my judgment, matters for the decision of the nominated arbiter and not for the court to consider in anticipation of the arbiter reaching his decision. It is to the arbiter and not to the court that the issue has been remitted."

37. The decision in *Norwich Union* was cited to the Court of Appeal in the subsequent case of *Mercury Communications Ltd v Director General of Telecommunications* [1994] CLC 1125. The Secretary of State had granted to British Telecom a licence which by condition 13 required it to give other operators access to the network on reasonable terms. Those had to be embodied into an agreement based on certain considerations and the parties could apply to the Director General to fix the terms in the absence of agreement. A dispute arose in relation to the charges contained in the agreement with Mercury which sought declarations from the Court that the Director General had erred in law in his construction of certain paragraphs of BT's licence. The Court of Appeal by a majority struck out the proceedings. Dillon LJ, relying on

Norwich Union, held that the issues arising in relation to the fixing of the charges were all issues for the Director. But Hoffmann LJ dissented. He said:

> "So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.
>
> One must be careful about what is meant by the decision-making authority. By decision-making authority I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to decide what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion. The distinction is clearly made by Lord Mustill in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 All ER 289, [1993] 1 WLR 23 at p 32 of the latter report."

38. In the House of Lords (see [1996] 1 WLR 48) the views of Hoffmann LJ prevailed. Lord Slynn of Hadley said (at page 58G):

> "What has to be done in the present case under condition 13, as incorporated in clause 29 of the agreement, depends upon the proper interpretation of the words "fully allocated costs" which the defendants agree raises a question of construction and therefore of law, and "relevant overheads" which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the facts may in the absence of fraud be beyond challenge. In my view when the parties agreed in clause 29.5 that the Director's determination should be limited to such matters as the Director would have power to determine under

> condition 13 of the B.T. licence and that the principles to be applied by him should be "those set out in those conditions" they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought should bear. His interpretation could therefore be reviewed by the court. There is no provision expressly or impliedly that these matters were remitted exclusively to the Director, even though in order to carry out his task he must be obliged to interpret them in the first place for himself. Nor is there any provision excluding altogether the intervention of the court. On the contrary clause 29.5 contemplates that the determination shall be implemented "not being the subject of any appeal or proceedings." In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the court's jurisdiction by the agreement of the parties."

39. The decisions in *Norwich Union* and *Mercury Communications* were considered by the Court of Appeal in *National Grid Co plc v M25 Corp Ltd* [1999] 1 EGLR 164, which concerned a rent review clause. The tenant issued an originating summons by which he asked the court to determine a number of issues including the meaning of the demised premises, the identification of improvement works and the extent of the fixtures and fittings to be included in the hypothetical letting. Pumfrey J struck out the proceedings on the basis that these were all matters within the exclusive jurisdiction of the expert valuer appointed to determine the rent. The Court of Appeal reversed his decision holding that the lease did not confer on the valuer the exclusive power to construe the lease. In his judgment Mummery LJ referred to the provisions of clause 1(4) of the rent review clause which, as in the present case, set out the basis on which the valuer should determine the new rent. Mummery LJ (at page 67) said:

> "The valuer must ascertain the rent in accordance with these contractual criteria. He can only lawfully do what he was appointed to do under the lease. If he does something that he was not appointed to do, he is acting outside his terms of reference. He does not have a completely free hand in deciding the question of what increase ought to be made in the rent payable. Whether he is acting within the perimeter of his contractual power depends on ascertaining the correct limits of the power conferred on him by the lease. Those limits are ascertained by a process of construction of the lease. The terms of the lease do not confer on the valuer, either expressly or by implication, the sole and exclusive power to construe the lease."

40. In relation to the earlier cases on exclusive jurisdiction, he distinguished *Norwich Union*:

> "In my judgment, that case is readily distinguishable from the present by reason of the presence in this lease of clause 1(4), which sets limits on the expert's power to determine an increase

> in rent. No such limits were set on the power of the expert in the *Norwich Union* case."

41. The approach of Hoffmann LJ to the rôle of the expert and the question of the exclusive jurisdiction which is set out in his dissenting judgment in *Mercury Communications* has been expressly approved by this Court in *National Grid*; in *Thorne v Courtier* [2011] EWCA Civ 460 at [15]; and in *Premier Telecom Communications Group Ltd v Webb* [2014] EWCA Civ 994. In *Barclays Bank PLC v Nylon Capital LLP* [2011] EWCA Civ 826 the Court of Appeal had to consider a provision for expert determination which expressly assigned to the expert disputes about the interpretation of the contract and made his decision final and binding. But the Court decided that even this should not be interpreted as excluding the right of the parties to challenge the correctness of his decision on a question of law which went to the expert's own jurisdiction. Thomas LJ said at [34]-[35]:

> "34. I accept the broad proposition which Mr Tozzi QC has advanced on the basis of these cases. The court will not generally intervene in a matter which is within the jurisdiction of the expert save in the narrow circumstances circumscribed as a matter of contractual interpretation of such clauses. However, it is important to make clear that in none of these cases was there, on the analysis undertaken by the court in each case, an issue which was solely one of law relating to the scope of the expert's mandate (including the principles on which he determines the dispute) as derived from the contract which governed his determination. Although the way in which an expert may approach the issues referred to him for determination is one where there is no statutory code, an expert must nonetheless determine the issue referred to him in accordance with the mandate conferred upon him by the agreement; the scope of that mandate (including the principles as derived from the contract upon which that determination must be made) is a question of law.
>
> 35. The decisions in *Nikko*, *Sherwood* and *Norwich Union* all involved mixed issues of fact and law. In the present case it is not necessary to decide whether, if an issue of the kind described is determined by the expert and is solely one of law, a wrong determination of law may have the consequence that the expert is not determining the issue in accordance with the mandate given to him. That is because Clause 26.1 is a wide clause that allows issues of interpretation to be left to the expert and, more importantly and, as I shall explain, there is no issue yet within the jurisdiction of the expert. However I consider that the cases to which reference has been made do not decide that, where a pure issue of law of the type I have described arises in the course of a determination by an expert acting under the usual form of clause, a wrong determination by the expert of that issue cannot be challenged in the courts in circumstances where the interpretation adopted by the expert

> has the consequence that he is not determining the matter in accordance with the mandate given to him. That remains to be decided applying the approach set out in *Jones* as elucidated by Hoffmann LJ in *Mercury Communications*. Since preparing the draft, I have had the advantage of reading the observations of the Master of the Rolls at paragraphs 63 to 72. I see force in his observations but the issue needs detailed examination when it arises. I would prefer to express no concluded view."

42. Lord Neuberger MR at [67]-[68] said that the correct position about exclusive jurisdiction was that set out by Hoffmann LJ in *Mercury Communications* and treated *Norwich Union* as a case which did not involve consideration of what he described as a bare point of law.

43. It seems to me that clause 6.2 clearly falls within the category of dispute resolution provisions which do not give the expert exclusive jurisdiction over the scope of his own authority and jurisdiction and which set out the approach and conditions which he must follow and comply with in order to produce a valuation binding on the parties. This is not a case like *Norwich Union* where the issue for the expert was at best a mixed one of law and fact. Rather the valuer here must correctly determine and apply the valuation date prescribed by clause 6.2.2 and there is nothing in clause 6.2 which can be read or implied as making him the sole arbiter of that question. The balance of authority is in my judgment now firmly in favour of preserving access to the courts to determine this legal issue going to jurisdiction. The only decision of the Valuer which is final and binding on the parties under clause 6.2 is one which is based on a correct application of clause 6.2.2. I would therefore reject Mr Seitler's ground of appeal which challenges the judge's jurisdiction to have decided this issue of construction. But, for the reasons given earlier in this judgment, I would allow the appeal against the second of the declarations which he made.

Lord Justice Moylan :

44. I agree.

Lord Justice Singh :

45. I also agree.