JUDGMENT : Mr. N. Strauss Q. C (sitting as a deputy judge of the Chancery Division). 30th March 2007

Introduction and background

1. This Part 8 claim arises out of a 999 year lease dated 10th September 1996 of 107 acres of land known as Knockdown Quarry at Knockdown, near Tetbury, Gloucestershire, which was entered into between the claimant as lessor and Hughes Waste Management Limited as lessee. The lease was assigned to the defendant (then called A. and J. Bull Limited) in 1999. The defendant also carries on a waste management business.

2. The issue is whether the base rent of £100, 000 per annum, referred to as "Certain Rent", ceased to be payable in December 2005 on the service of a Minerals Exhaustion Certificate under clause 3. 5. 4 of the lease. This case raises again the much litigated question as to the circumstances in which the certificate of an independent third party can be set aside for mistake.

3. The lease was preceded by an agreement for lease dated 22nd May 1996, by clause 7 of which the lessee undertook (inter alia) to obtain planning consent(s) for the extension of the minerals extraction and waste activities on the land to (i) at least 10 metres below the maximum winter water table, (ii) the entire area of the land, (iii) the in filling of all excavated areas with commercial waste and (iv) the processing of waste materials brought on to the land for recycling. By clause 19, the terms and conditions of the agreement for lease continued in full force and effect notwithstanding completion of the lease.

4. Thus the basic purposes of the lease were to carry out quarrying activities and the landfill activities made possible by the quarrying activities, subject to further planning permissions to be obtained, which would no doubt contain conditions relating to these activities and to the subsequent restoration of the site.

5. At some time before 1996, some quarrying had occurred, and there were silent quarry workings in the northern part of the land. Planning permission had been granted on 27th November 1990 for quarrying activities on the southern part of the land, amounting to some 64 acres, but not below 114 metres AOD or 2 metres above the agreed winter water table level, whichever was the greater, unless a detailed scheme for working below these levels had been approved by the Mineral Planning Authority. The accompanying section 106 agreement limited extraction to not more than 100, 000 tonnes of material per annum. The surface levels on the land ranged from 128 metres AOD in the north to 113 metres AOD in the south.

The terms of the lease

6. The lessor's rights under the lease were defined in the First Schedule, and included rights to quarry and excavate all Minerals in on or under the land and to dispose of them (§1), to open sink and make mines and quarries (§2), to tip waste materials from its operations on the land (§4), to bring on to the land extraneous waste (§5) and to do all that was necessary to extract store or otherwise develop the Minerals (§7). The Minerals are defined as *"all minerals including limestone and clay deposits within the Land excluding.. the Reserved Minerals"*.

7. The lessor's Reserved Rights are defined in the Second Schedule and (in so far as is relevant) they are in essence rights to excavate and exploit the Reserved Minerals, which are defined as *"Up to 12, 000 tonnes in each year of this lease of limestone suitable for use as building walling and/or rockery stone and/or stone tiles and roofing slate"*.

8. In a report prepared by Mr. Terence Smith, FRICS, FIQ, the claimant's mineral consultant, dated 16th March 2006, the minerals on the site are described as jurassic limestone suitable for the quarrying of building stone, with four layers as follows: -

   (1) The top layer is finely bedded and suitable for making excellent roofing slates.

   (2) The next bed is thicker and makes excellent walling stone.

   (3) The third layer is a thicker bedded stone which can be split or sawn to produce a building stone.

   (4) In the base of the quarry there are thicker beds suitable for cutting to produce ashlar or other masonary products, or to be sold in the market as block stone.

9. This description of the Minerals is not disputed, and accordingly it appears that the Reserved Minerals were 12, 000 tonnes per annum of the first three layers.

10. Clause 3 defined the Certain Rent and Royalties. In effect, the lessee was to pay monthly a Minerals Royalty once Minerals had been extracted from the land, a Wayleave Royalty once materials for recycling were put on to the land and a Waste Royalty once waste was received for infilling activities, but was in any event liable for the Certain Rent of £100, 000 p. a. payable monthly if this exceeded the Royalties. There was provision in clause 3. 5. 2 for recouping payments of Certain Rent in excess of the Royalties, if in later months Royalties exceeded Certain Rent.

11. Clause 3. 5. 4 provided as follows: -

   3.5.4 The Lessee's liability to pay the Certain Rent shall cease upon the exhaustion of all the reserves of Minerals in on or under the Land or upon those Minerals becoming economically irrecoverable and there being no reasonable prospect

   3.5.4 The Lessee's liability to pay the Certain Rent shall cease upon the exhaustion of all the reserves of Minerals in on or under the Land or upon those Minerals becoming economically irrecoverable and there being no reasonable prospect of them becoming economically recoverable within the next ten years PROVIDED THAT:

   3.5.4. 1 not less than twelve (12) months prior to the date on which the liability to pay the Certain Rent ceases the Lessee has served on the Lessor a notice in writing of its intention to cease payment of the Certain Rent which notice shall append a Surveyor's Minerals Exhaustion Certificate; and

3.5.4. 2 if at any time after the Lessor's liability to pay the Certain Rent has ceased and during the subsistence of this Lease any Minerals are extracted at the Property the Lessor's liability to pay the Certain Rent shall resume upon the terms hereinbefore contained. "

12. The Surveyor was to be an independent chartered surveyor to be appointed by the parties, or in default of agreement by the President of the R. I. C. S. The 'Surveyor's Mineral Exhaustion Certificate" was defined as follows: - *"A certificate signed by the Surveyor which unequivocally confirms that all Minerals in on or under the Land are exhausted or are not economically recoverable and there is no reasonable prospect of them becoming economically recoverable within the next ten years. "*

13. Clause 7 of the lease contained provisions governing the respective activities of the lessor and the lessee on the land, as follows: -

"Extraction of reserved minerals

In relation to the extraction of the Reserved Minerals the Lessee and the lessor covenant and agree and undertake with the other (as appropriate) and so that these covenants shall run with the Land and bind the parties hereto and their successors in title that at all times during the Term.

(1) The Lessor shall be entitled to extract and remove entirely for its own benefit the Reserved Minerals and exercise the rights granted in the Second Schedule without hindrance or interference from the Lessee provided that the lessor shall exercise the Reserved Rights in accordance with the relevant planning permission(s) licence(s) and statutory authorisations notified by the Lessee to the Lessor including (without prejudice to the foregoing) the Working Plan and the Lessor will observe the site rules made by the Lessee's site manager acting properly and reasonably in the course of his duties.

(2) The Lessor and the Lessee will work in compliance with the Working Plan and any reasonable directions of the Lessee's site manager and without prejudice to the Lessor's own working practices and programme of works the Lessor will upon request by the Lessee use all reasonable endeavours to extract within a reasonable period any Reserved Minerals from any part of the Land identified by the Lessee so as to enable the Lessee to comply with the Working Plan.

(3) The Lessor shall not permanently remove any Reserved Minerals from the Land without having first weighed and recorded them on the Lessee's weighbridge maintained under clause 5. 8.

(4) The Lessor shall keep proper records of all Reserved Minerals removed from the land and shall permit the lessee to inspect the same on reasonable notice to the lessor and to take copies.

(5) The Lessee shall not agree with any relevant authority or body any draft working Plan containing provisions affecting the exercise of the Lessor's rights in respect of the extraction of Reserved Minerals without first obtaining the Lessor's prior written approval to those provisions which approval shall not be unreasonably withheld or delayed.

(6) The Lessor shall indemnify the Lessee against any outgoings charges or expenses in relation to the extraction of the Reserved Minerals.

(7) The Lessor and the Lessee each covenant with the other to use all reasonable endeavours not to interfere with or interrupt the other in its extraction of minerals from the Land and the parties shall wherever possible give the other reasonable notice of their intention to excavate minerals from a particular part of the Land having regard to the operations of the other.

(8) The Lessor and the Lessee each covenant with the other to use all reasonable endeavours not to cause any damage to any minerals being excavated having been excavated or capable of being excavated by the other.

(9) The Lessee shall exercise reasonable endeavours not to use the Land or deal with the Minerals so as to prejudice the commercial operation of that part of the Lessor's business which is based on the exercise of the Reserved Rights.

(10) If a dispute shall arise between the parties over a conflict between the exercise of the rights of the Lessee under this lease and the rights of the Lessor under this clause the matter may be referred by either party for resolution to an independent Chartered Surveyor pursuant to clause 14 hereof but if such Surveyor shall determine that the Lessor's rights cannot be exercised without materially adversely affecting the Lessee's rights hereunder the Lessee's rights shall prevail. "

14. *The Working Plan, which is referred to in clause 7. 1* and clause 7. 2 is defined as: *"The plan for mineral extraction and subsequent waste in filling agreed from time to time with the relevant authorities".*

15. It is also relevant to refer to clauses 10 to 12, which entitle the lessee to terminate the lease, and gives it an option to acquire the freehold for £1, in circumstances in which the minerals are exhausted or not economically recoverable. This also depends (inter alia) on a Minerals Exhaustion Certificate.

16. Finally, clause 14 is an arbitration clause: - *"If at any time after the date of this lease any dispute doubt or question shall arise between the Lessor and the Lessee touching the construction meaning or effect of this lease or any clause or thing contained in it or their respective rights and liabilities under this lease or in case any valuation shall require to be made or amount determined under the provisions contained above then every such dispute doubt question valuation or amount shall be referred to the decision in accordance with the Arbitration Acts 1950 to 1979 of an independent chartered surveyor experienced in mineral matters to be appointed by agreement between the parties or failing agreement to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors or if*

more appropriate by the President for the time being of The Law Society and whose fees shall be borne equally between the parties to this case. "

Mr. Hill's certificate

17. It appears that little or no quarrying was in fact carried out apart from the lessor's limited operations, and both a planning application made by the original lessee and a planning application made by the defendant were abandoned in 2002 because of strong indications that they would be refused: there was considerable local opposition to them. In April 2004, the claimant approved the defendant's appointment of Mr. John Hill at Bowman Planton Limited to act as the surveyor for the purposes of clause 3. 5. 4, and he was duly appointed on 11th May 2004.

18. Mr. Hill's certificate dated 16th December 2004 followed a lengthy report in which he considered, amongst other things, the existing planning permission for the site, relevant development guidance for the site, the Minerals Land Plan, the terms of the lease, the available quantities of Minerals and the economic situation. The wording of the certificate is as follows: -

"THIS CERTIFICATE DATED 16 December 2004 is issued in compliance with the requirements of Clause 3. 5 of the Lease dated 10 September 2006 with regard to: -

- *Minerals Exhaustion and*
- *Economic Viability*

of the mineral operation of Knockdown Quarry, near Tetbury, Wiltshire.

10.3.1 Mineral Exhaustion

> *There are proven recoverable permitted mineral reserves of limestone remaining to be exploited at Knockdown Quarry and hence it is not appropriate to consider such certification on mineral reserve grounds.*

10.3.2 Economic Viability

> *The current evidence in respect of costs, selling price, competitor activity and planning policies/guidance does not support the economic viability of the Knockdown operation but the opposite.... This Surveyor's Minerals Exhaustion Certificate therefore unequivocally confirms that the Minerals as defined in the Lease dated 10th September 1996 are not economically recoverable and there is no reasonable prospect of them becoming recoverable within the next ten years. ".*

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19. The validity of this certificate is in issue, on grounds which will be explained later in this judgment, but it is convenient first to consider the issue of construction which underlies the dispute between the parties.

The issue of construction

20. This issue relates to the definitions of Minerals and Reserved Minerals, and in particular the effect of excluding from the Minerals "up to 12, 000 tonnes in each year" of the Reserved Minerals. The defendant submits that it is not entitled to any of the limestone which is suitable for use as building walling, rockery stone or stone tiles and roofing slates (that is the limestone in the first 3 layers) without leaving sufficient to enable the claimant to recover 12, 000 tonnes in each year of the lease i. e. some 12 million tonnes in all of such material. The claimant submits

that it is entitled to recover up to 12, 000 tonnes in each year for so long as that amount remains on the land, but that subject to this the defendant is entitled to take what it wants.

21. I have no hesitation in preferring the claimant's construction. It is entirely consistent with the basic purposes for which the lease was entered into as set out above and with the lessee's rights as set out in the First Schedule. It permits the defendant to exploit the whole site, if the planning permission which it is obliged to seek is obtained, for the benefit of both parties, by excavating all the limestone over and above 12, 000 tonnes per annum and by carrying on its waste disposal business to the full extent allowed by the provisions of the lease, subject to the terms of the planning permission.

22. On the defendant's construction, the defendant would in practice never, or at least not in the foreseeable future, be able to take any of the limestone of the kind specified in the definition of Reserved Minerals, since it would not know whether this left 12 million tonnes. The defendant would therefore be unable to get at the other Minerals, which are in the lowest layer. This would be wholly inconsistent with the rights granted to the defendant in the First Schedule. Further, the defendant's construction is inconsistent with one of the main purposes of the lease, namely the use of the land for waste disposal purposes. This is because the claimant has no obligation to take away any of the Reserved Minerals and indeed, even if it were to exercise its rights to the full, the limit of 12, 000 tonnes per annum would mean that the land would not be sufficiently excavated to provide for the tipping of waste except in the quarried area for very many years.

23. Further, on the defendant's construction, there would be no point in obtaining planning consent "for the extension of the minerals extraction and waste activities on the Land... to the entire area of the Land" as required by clause 7. 1. 2 of the agreement to lease, as there would be severe limitations on the extraction of minerals and little or no prospect of carrying on the waste business. As Mr. Wonnacott submitted, the reason for limiting the claimant to 12, 000 tonnes per annum, strictly weighed, must have been to give the defendant mineral exploitation rights which were capable of being exploited immediately, and to enable the defendant, if planning permission was obtained for the entire area, to get on with excavating it, subject to the terms of the permission. This would involve the defendant removing the upper layers, subject to the claimant's 12, 000 tonnes per annum.

24. Mr. Hutchings relied on the terms of clause 7 of the lease, and especially clauses 7. 8 and 7. 9 which, he submitted, precluded the exploitation by the defendant of any limestone of the quality specified in the definition of Reserved Minerals, since this would involve damage to limestone which was "capable of being excavated" by the claimant, and would prejudice the claimant's commercial operation. However, as Mr. Wonnacott submitted, this takes no account of clause 7. 10, which sets out the machinery for resolving any conflict between the exercise by lessor and lessee of their respective rights, with the lessee's rights to prevail if there was an unavoidable conflict.

25. In my opinion, therefore, what was for consideration by the surveyor in providing the Surveyor's Minerals Exhaustion Certificate was whether all the Minerals were exhausted or whether all the Minerals (other than a quantity of 12, 000 tonnes per annum of the limestone suitable for building, walling etc.), were "economically recoverable" either at present or within the next 10 years.

The correspondence between the parties

26. Put shortly, the claimant's case is that Mr. Hill did not carry out his instructions, because he excluded from his valuation all limestone which was suitable for building, walling and for the other uses specified in the definition of Reserved Minerals. The claimant accepts that this is not apparent from the certificate, which complies with clause 3. 5. 4, but relies on the terms of Mr. Hill's report and on subsequent correspondence between the parties. This, Mr. Wonnacott submits, establishes that Mr. Hill did not carry out his instructions; instead of considering all the Minerals, he considered only part of them. Therefore, it is submitted, the certificate is a nullity.

27. After some correspondence to which it is unnecessary to refer, the claimant's solicitors wrote to Mr. Hill, on 18th August 2005, setting out its "very real" concerns that, in arriving at his determination, he had failed to follow his instructions, and inviting Mr. Hill to respond. The material part of the letter is as follows: -

"6. The definition of Minerals contained in the Lease is:

"All minerals including limestone and clay deposits within the Land excluding for the avoidance of doubt the Reserved Minerals. "

7. Reserved Minerals are defined as:

"Up to 12, 000 tonnes in each year of this lease of limestone suitable for use as building walling and/or rockery stone and/or stone tiles or roofing slates. "

8. The meaning of these two definitions, taken together, is that in any year the Lessee is entitled to remove from the land limestone suitable for use as building walling and/or rockery stone and/or stone tiles, except for 12, 000 tonnes of such limestone in that year, which is reserved for the Lessor. The clauses do not mean that: -

8. 1 In any given year, the Lessee must not remove any such limestone until, in that year of the Lease, the Lessor has removed 12, 000 tonnes - the definition of Reserved Minerals does not reserve "the first 12, 000 tonnes" to the Lessor. Plainly, therefore, if there are reserves of such limestone in excess of 12, 000 tonnes (as is the case), the Lessee can remove the excess without falling foul of the Reserved Minerals provision; or that

8. 2 The Lessee is prevented from removing such limestone at all, whereas the Lessor can diminish the reserves of such limestone by 12, 000 tonnes per year of the Lease. This interpretation of the clauses has the effect that all such limestone is "reserved" and renders meaningless the words "up to 12, 000 tonnes in each year"

Failure to comply with instructions

14. We and our client believe that, in issuing your Certificate you have failed to comply with your instructions and that, accordingly, the Certificate is not binding on the parties. In particular, you failed to comply with your instructions. It is clear from the following paragraphs of the Report that in coming to your assessment of the economic recoverability of Minerals, you have considered only the economic recoverability of crushed rock, and not of the other Minerals available on or under the Land, in particular the types of limestone included in the definition of Reserved Minerals. For example: -

14.1 In paragraph 3. 8 you say that "The upper layer of the limestone is worked by an independent third party for the provision of walling stone, paving and roofing slates via the operatives work at Halfway Bush Farm". As you know, or should know, this upper layer is worked [by the Lessor] for the Reserved Minerals (i. e. up to 12, 000 tonnes per year, but in reality significantly less than that tonnage) and is capable of being worked by the Lessee.

14.2 However, when you assess the quality of the Minerals in section 5. 4 of your Report, you say nothing of the quality of the upper layer for walling stone, paving and roofing slates. You refer only to the qualify of the limestone "for construction purposes".

14.3 Similarly, in the section of your Report dealing with development guidance and policies, the focus is very much on the constraints and opportunities for crushed rock in Wiltshire, and not walling stone, paving and roofing slates (see paragraphs 6. 1. 11-14; 6. 2. 1-6. 2. 3; 6. 4. 7-12).

14.4 You do not refer anywhere in your Report to the fact that the Lessor and/or its sub-contractors make a significant profit from its workings of the upper layer of limestone. Plainly the profitability or otherwise of the existing workings of the Land (whether by the Lessee or the Lessor) are highly relevant to the assessment of economic recoverability.

14.5 We understand from our client that you did ask Homepace for information concerning its operations for the removal of limestone. However, you chose to issue your Report and Certificate before our client had responded. "

28. Mr. Hill responded on 25th August 2005 as follows: -

"It is my view that the terms of my appointment required me only to consider whether the Minerals as defined within the Lease dated 10 September 1996 were exhausted or had become economically irrecoverable in accordance with Clause 3. 5. 4 of the Lease.

Having considered the Lease my view was, and remains, that I should only take account of the Minerals as defined in the Lease which specifically excludes the Reserved Minerals. My interpretation was based upon the clear definitions contained in the Lease, the Rights Granted and Reserved Rights as contained in the First and Second Schedules of the Lease and particularly Clause 7 of the Lease which deals specifically with the extraction of the Reserved Minerals. Uppermost in my mind was Clause 7. 9 which required the Lessee to use reasonable endeavours not to use the Land or to deal with the Minerals so as to prejudice the commercial operation of that part of the Lessor's business which is based upon the exercise of the Reserved Rights. In considering this matter, I took specific note of the letter of instruction dated 11 May 2004, a copy of which was sent to your office and which makes it clear that my instruction is to consider whether it would be appropriate to issue a Surveyor's Minerals Exhaustion Certificate in respect of the Minerals. The letter of appointment makes no reference to Reserved Minerals and it seems pertinent to point out, that as this letter was copied to yourselves, then if I was required to take account of the Reserved Minerals the letter of appointment could have been commented on by yourselves and if agreed by the Lessee I could have been specifically directed to take account of the Reserved Minerals in preparing my report.

In the circumstances, I do not propose to comment in detail on your letter, as the issue being raised by you seems to be clear and limited to one fundamental point, that is whether on considering a Surveyor's Minerals Exhaustion Certificate as a matter of interpretation of the 1996 Lease the Reserved Minerals should be taken into account. My view as the Surveyor, appointed by the Parties under the terms of the Lease and letter of instruction, is that these should not. It appears to me that this leaves the Parties with three alternatives; a) accept the 16 December 2004 Report, or b) the Parties agree that Reserved Minerals should be taken into account in which case I would, (subject to the Lessor providing the relevant initial information regarding past and projected outputs, market place by end product, selling prices, production costs and volumes of Reserved Minerals remaining with and without the benefit of planning permission) be prepared to reconsider my report with my additional fees being met by the Lessor or c) the Parties can simply refer the matter to Arbitration in accordance with the lease to determine whether Reserved Minerals should be taken into account. "

29. On 1st September, the claimant's solicitors wrote further to Mr. Hill, as follows: -

"Your explanation does not take account of paragraph 8 and 9 of our letter of 18 August, in which we made clear that your assessment of the available reserves of Minerals and their economic recoverability required you to consider all minerals in on or under the site, including that limestone suitable for use as building walling and/or rockery stone and/or stone tiles and roofing slates which is not reserved to our client.

In your letter, you admit that you did not consider at all the availability and economic recoverability of limestone suitable for use as building walling and/or rockery stone and/or stone tiles and roofing slates which is not reserved to our client, since your interpretation of the definitions contained in the Lease led you to conclude that all such minerals were excluded. In fact, this interpretation is not correct, as set out in our letter of 18 August. We therefore conclude that you have failed to follow your instructions. It follows that the Certificate is not binding on the parties. "

30. Mr. Hill replied on 6th September in the following terms: - *"With respect, my explanation does take account of paragraphs 8 and 9 of your letter of 18 August. However my conclusion based upon my interpretation of the Lease was, and remains, that the Lessee is not entitled to remove from the Land limestone available for use as building, walling and/or rockery stone and/or stone tiles. Accordingly in determining whether to issue a Surveyor's Minerals Exhaustion Certificate the Surveyor cannot consider the available reserves of such material. I gave the reasons for my reaching that opinion in my letter of 24 August 2005 and with all due respect, I disagree with your own interpretation of the Lease. "*

Jones v. Sherwood Computer Services Plc

31. The law relating to the certificates of independent third parties was clarified by the decision of the Court of Appeal in ***Jones v. Sherwood Computer Services Plc*** [1992] 1 W. L. R. 277. In that case, the purchase price for shares in a company was to be calculated on the basis of the amount of products sold by its subsidiaries in a stated period, to be determined in the event of disagreement by independent accountants acting as experts and not arbitrators, such determination to be as conclusive and final and binding for all purposes. The parties disagreed on a question as to whether certain transactions should be taken into account relevant sales. The determination of the independent accountants was challenged, on the basis that their decision not to take into account the disputed transactions as sales was mistaken. The Court of Appeal held that the determination could not be challenged on the ground that the independent accountants had mistakenly failed to take into account the transactions in issue because that was an issue which the parties had asked them to decide.

32. In the course of his judgment at 284G, Dillon L. J. referred to the distinction between speaking and non-speaking valuations or certificates, which he said was an irrelevant distinction: - *"Even speaking valuations may say much or little; they may be voluble or taciturn if not wholly dumb. The real question is whether it is possible to say from all the evidence and not only from the valuation or certificate itself, what the valuer or certifier has done and why he has done it. The less evidence there is available, the more difficult it will be for a party to challenge to the certificate... "*

33. Dillon L. J. reviewed the old authorities, referred in particular to ***Dean v. Prince*** [1954] Ch. 409, in which Denning L. J. said (at 427) that if the court was satisfied that the valuation was made under a mistake, it would not be binding on the parties; this would be so, for example, if the expert had interpreted the agreement wrongly. However, in later cases, ***Campbell v. Edwards*** [1976] 1 W. L. R. 103 and ***Baber v. Kenwood Manufacturing Co. Ltd*** [1978 1 Lloyd's Reports 175, the Court of Appeal had decided, in the light of the new principle that the expert or valuer could be sued for negligence, to look again at the question of setting aside certificates of independent third parties.

34. Dillon L. J. continued at 287A: -

*"On principle, the first step must be to see what the parties have agreed to remit to the experts, this being, as Lord Denning M. R. said in **Campbell v. Edwards** [1976] 1 W. L. R. 403, 4079 a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect - e. g. if he valued the wrong number of shares, or valued shares in the wrong company or if, as in **Jones N v. Jones (R. R.)** [1971] 1 W. L. R. 840, the expert had valued machinery himself where as his instructions were to employ an expert valuer of his choice to do that - either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.*

The present case is quite different, however, as Coopers did precisely what they were asked to do. They were asked to consider only the points on which Peats and Deloittes were not in agreement, to decide whether the two classes of disputed transactions were or were not to be included in the total of "sales".. and to determine the amount of sales accordingly; that is what they have done...

Accordingly, in my judgment, because Coopers did precisely what they were instructed to do, the plaintiffs cannot challenge their determination of the amount of the sales. "

35. Both Dillon L. J. (at 284C) and Balcombe L. J. (at 289H) relied on a passage from the judgment of Lord Denning M. R. in ***Campbell v. Edwards*** at 407: *"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, he gives that valuation honestly 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... "*

36. A striking example of the application of this principle is to be found in the later decision of the Court of Appeal in ***Veba Oil Supply & Trading GmbH v. Petrotrade Inc.*** [2002] 1 All E. R. 703, in which the contract provided for determination by the independent inspector of the quantity and quality of gas oil by a specified method. The inspector used a different method and his determination was held to be invalid and not binding even though the method used was more modern and more accurate and would inevitably have led to the same result The principle is stated by Simon Brown L. J. at para. 26: - *"Strongly and skilfully though the argument was advanced, for my part I cannot accept it. Rather I see the position as follows, (i) A mistake is one thing; a departure from instructions quite another. A mistake is made when an expert goes wrong in the course of carrying out his instructions. The difference between that and an expert not carrying out his instructions is obvious, (ii) Under the old law a mistake would vitiate the expert's determination if it could be shown that it affected the result. That was the concept of material mistake established in **Dean v. Price** and the **Frank H Wright case**. Not so, however with regard to a departure from instructions - see Ungoed-Thomas J's judgment in Jones v. Jones cited at [21] above. (iii) Under the modern law the position is the same as it was with regard to a departure from instructions, different with regard to mistakes. As Lord Denning MR explained in Campbell v. Edwards, if an expert makes a mistake whilst carrying out his instructions, the*

parties are nevertheless bound by it for the very good reason that they have agreed to be bound by it. Where, however, the expert departs from this instructions, the position is very different: in those circumstances the parties have not agreed to be bound. (iv) The test of materiality devised for identifying vitiating mistake does not carry across to the quite separate field of departures from instructions. This seems to me so both as a matter of principle and of authority. The position is stated in Jones v. Jones and in Dillon LJ's judgment in ***Jones v. Sherwood Computer Services*** *[1992] 2 All ER 170 at 179, [1992] 1 WLR 277 at 287 (quoted at [23] above) where he illustrates the principle by reference to* ***Jones v. Jones, (v) Dean v. Prince*** *and the* ***Frank H Wright case*** *- although on any view rightly decided - should no longer be regarded as authoritative with regard to experts' mistakes. That for the most part was made clear in Jones v. Sherwood Computer Services. The contrary is not to be inferred from the dictum in Dillon LJ's judgment ([1992] 2 All ER 170 at 170, [1992] 1 WLR 277 at 288) (the other line of reasoning on which he did not found his judgment) referring back to the Frank H Wright case. It is time that Dean v. Prince and the Frank H Wright case received their quietus. (vi) Once a material departure from instructions is established, the court is not concerned with its effect on the result. The position is accurately stated in para 98 of Lloyd J's judgment in the* ***Shell UK case*** *([1999] 2 All ER (Comm) 87 at 108-109): the determination in those circumstances is simply not binding on the parties. Given that a material departure vitiates the determination whether or not it affects the result, it could hardly be the effect on the result which determines the materiality of the departure to be material unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party. "*

The issues relating to the certificate

37. The issues between the parties as to the certificate are as follows: -

(1) Is the claimant entitled to rely on the subsequent correspondence to establish the invalidity of a certificate which on its face complies with clause 3. 5. 4?

(2) If so, is the certificate invalid on the ground that Mr. Hill departed from his instructions?

(3) If the certificate is valid, is it conclusive as to the matters to which it relates, or is the claimant entitled to refer them to Arbitration?

The evidential question: is the claimant entitled to rely on the subsequent correspondence to establish the invalidity of a certificate which on its face complies with clause 3. 5. 4?

38. Mr. Hutchings submits that, since Mr. Hill has provided a certificate which on its face complies with the terms of the lease, that is the end of the matter. It is not open to the claimant to rely on evidence which goes behind the certificate in order to establish any form of mistake.

39. In support of that submission, Mr. Hutchings relied first on the decision of Thomas J. in ***Invensys Plc, v. Automotive Sealing Systems Limited*** [2002] 1 All E. R. (Comm.) 222. In that case, the contract provided that the determination by the expert was to be "final and binding except in the case of manifest error" and was to be set out in a written report giving reasons for the decision. Thomas J. held that, in determining whether there was a manifest error in an expert's determination it was appropriate to examine material which explained or clarified the original reasons, and any additional materials which formed an essential part of those reasons. He said at para. 22: - *"Thus, construing this particular agreement for an expert determination where the parties have provided for a reasoned determination, which is to be final and binding save for manifest error, it is in my judgment permissible to examine the additional materials that form an essential part of those reasons. However, it is important, as was said in* ***Toepfer v. Continental Grain Co Ltd*** *[1974] 1 Lloyd's Rep 11, to stress that finality is an important factor; that it is not enough that the expert has made a mistake; there must be a manifest or plain and obvious error. The effect of the word 'manifest' must not be diluted; the finality of the determination must not be subject to attack because another view could, in the light of further argument, properly be taken of the matters dealt with during the determination. It must be proved by the party disputing the determination that there was a manifest error in the determination. "*

40. Mr. Hutchings submitted that where (as in the present case) there is no provision for setting aside the certificate for manifest error, it is not permissible to look at either the reasons in the accompanying report, or at any other materials (such as in the present case) the correspondence on which the claimant relies.

41. I do not think that the decision of Thomas J. in this case provides any support for this argument. The position in ***Invensys*** was that the contract provided that the independent certificate could be set aside for mistake, even if the expert was carrying out his instructions, if the mistake was "*manifest. "* What Thomas J. was considering was the ambit of the evidence which might enable the court to say that a mistake was "*manifest",* or plain and obvious. He was not considering what evidence might be looked at in a case in which the issue was whether the expert, in providing his certificate, had not been following his instructions at all.

42. Mr. Hutchings also relied on the decision of H. H. Judge Bowsher Q. C. in ***Dixons Group plc v. Murrav-Oblynski*** [1997] All E. R. (D) 34. That case concerned the sale of a company, and independent certification by chartered accountants as to the value of assets in the completion accounts where there was a dispute. The decision was to be final and binding save in the case of manifest error, and the defendants challenged the decision both on the basis of manifest error and on the basis that the chartered accountants had departed from their instructions.

43. On the issue as to the expert's departure from his instructions, the judge held that the difficulty in the defendants' case was that they could neither identify the instructions alleged to have been breached, nor demonstrate the breach. He said: - *"There is in fact no evidence of the basis which was in: fact applied by the expert. Even if it were permissible to join the expert as a party for the purpose of discovery or to administer interrogatories to him (and in*

my view it would not be permissible) that has not been done. Any application to call the expert to give oral evidence on such a matter could only be on a speculative basis to fish out an impleaded case and there is no justification in law for such a course: see ***Healds Foods v. Hyde Dairies*** *cited above. Counsel for the defendants accepts that any manifest error must be manifest without evidence from the expert, and the same must apply to any alleged failure to comply with instructions. Since the basis determined and applied by the expert is unknown it cannot be shown that there was any breach of instructions. "*

44. I do not think that Judge Bowsher Q. C. was expressing the view that it was impermissible to rely on evidence to establish a failure to comply with instructions: he simply held that there was no such evidence in the case before him, and no justification for a speculative application to interrogate the expert. If I am wrong, his view was based on a concession which I think was incorrect; in any event in the present case there is evidence from Mr. Hill.

45. In my judgment, the defendant's case on this point is inconsistent with the basic principle that, unless the parties have provided otherwise in their contract, they are free to establish their case on the basis of the available admissible evidence, in the usual way. The contract in this case does not provide for the certificate to be questioned for mistake, whether manifest or otherwise. As for a departure from instructions, the contract does not limit this to a case in which the departure is "manifest", or in any other way limit the evidence which may be adduced to establish such a departure. There is no provision in the contract which limits the evidence which a party may rely on to establish that the certifier did not carry out his instructions.

46. H. H. Judge Bowsher Q. C. referred in the course of his judgment to the passage from the judgment of Dillon L. J. in ***Jones*** which I have set out at §32 above. The question is "*whether it is possible to say from all the evidence properly before the court* (my emphasis), *not only from the valuation or certificate itself, what the valuer or certifier has done and why he has done it"*. This passage in the judgment of Dillon L. J. is inconsistent with the defendant's argument, as is the passage set out at §34 above "*... what the nature of the mistake is, if there is evidence to show that"*. (my emphasis).

47. Therefore, I do not accept Mr. Hutchings' argument on this point.

Is the certificate invalid on the ground that Mr. Hill departed from his instructions?

48. It is apparent from the extracts from Mr. Hill's report, and from the correspondence, that he reached the conclusion that, in assessing what was economically recoverable, he should disregard all the good quality limestone, and take account only of the crushed rock. Whether he did so because in his view the definitions of Minerals and Reserved Minerals excluded all other qualities of limestone for practical purposes, the 12 million tonnes to which the claimant was entitled had to be left in the ground, or because in his view clause 7. 9 prevented the defendant from exploiting its rights, is not entirely clear. His letter of 25th August suggests the latter reason, whilst his letter of 6th September suggests the former. It may be that both played a part.

49. As is clear from what I have said in §25 above, in my opinion Mr. Hill's conclusion was wrong, whatever his reasons. It follows that the issue is what was the nature of the mistake: did Mr. Hill make a mistake in carrying out his instructions, or did he not carry them out at all. The starting point, as Dillon L. J. indicates, is to identify what his instructions were and, as is often the case, what is important is whether the question of construction which may have been (and in this case, in my opinion, was) mistakenly decided by the independent certifier was within his remit. In ***Jones,*** the Court of Appeal came to the conclusion that it was precisely the question which had been referred to the certifier and for that reason held that the decision of the independent expert was binding, whether it was right or wrong.

50. In ***Nikko Hotels (UK) Limited v. NEPC plc*** [1991] 2 E. G. L. R. 103, rent review provisions depended on a formula based upon changes in the "room rate" of a London hotel, and the issue between the parties was whether such increases were to be calculated by reference to room rates actually charged or published rates for rooms. Having considered the then unreported decision in ***Jones,*** Knox J. said at l08A-C: - *"The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity. "*

51. Knox J. then went on to consider the terms of the lease, and concluded that the issue as to the appropriate room rate was one for the expert chartered accountants to decide, and that their decision was therefore (as in Jones) binding whether they were right or wrong.

52. It is common ground between the parties that the effect of these decisions, and of the decisions of Sir Donald Nicholls V-C and of the Court of Appeal in ***Norwich Union Life Assurance Society v. P&O Property Buildings Ltd*** [1993] 1 E. G. L. R. 164 is that which issues of construction have been left to the expert, and not to the court, depends on the proper construction of the contract.

53. In ***National Grid plc v. M25 Group Ltd*** [1999] 1 E. G. L. R. 65 the Court of Appeal made it clear that the House of Lords in ***Mercury Construction Ltd v. D-G of Telecommunications*** [1996] 1 W. L. R. 48 had not held that questions of construction had to be decided by the courts, but merely that, on the proper construction of the contract in that case, the questions had not been left to the expert, and were for the court. A similar conclusion was reached in

National Grid. I was referred to the following summary of the effect of the authorities in Kendall on Expert Determination 3rd ed. at 12. 6. 6., which I regard as correct: -

"No general principle that court can decide questions of interpretation

12.6.6 It might have appeared from the Nikko Hotels and Norwich Union cases, decided in 1991 and 1993, that the court would usually not intervene where an expert had to decide questions as to the meaning of the words of the contract. On the other hand, it is possible to interpret the House of Lords' decision in Mercury as laying down a principle that the court always has jurisdiction to decide these questions, and as implicitly over-ruling the decision of the Court of Appeal in Norwich Union, However in Mercury Lord Slynn referred to Norwich Union without any disapproval, and Hoffmann L. J. in the Court of Appeal contrasted the facts in Mercury with those in Norwich Union. Both Pumfrey J. at first instance and the Court of Appeal in National Grid confirmed that in Mercury the House of Lords did not overrule Norwich Union.

What National Grid made clear is that there is no general principle either that the expert always has exclusive jurisdiction to decide the meaning of the terms of the contract, or that the expert never has exclusive jurisdiction to do so. In each case it is necessary to examine the contract itself in order to decide what the parties intended should be a matter for the exclusive decision of the expert, and little assistance can be gained from previous cases involving different contract wording. Each of the cases referred to above involved different contract wording and arose in a different context, and in each case the court reached the decision it considered to be most appropriate on the facts of the case it was dealing with. In the absence of both parties' consent the court generally has no discretion to decide interpretation issues which the expert has jurisdiction to decide.[1]

The Mercury and National Grid cases do however demonstrate that in cases where the contract gives no clear indication either way (and other judges have reached a different conclusion on the scope of the issues to be decided by the expert), the courts may be prepared to infer from the other terms of the contract and from the circumstances that the parties did not intend to refer questions of interpretation to the expert. "

54. Unless there is an indication to the contrary, it is in my view usually right to infer that the parties intended to leave to the expert any issue of construction which he would necessarily have to consider on the way to reaching his decision. As Sir Donald Nicholls V-C said (at 163E): - *"[The parties] are not readily to be taken to have intended that any necessary prerequisite to [the expert's] determination, which raises a question of law, is to be outside the matter so remitted. On the contrary, they are unlikely to have intended that fine and nice distinctions were to be drawn between factual matters which fall within the expert's remit and questions of law or questions of mixed law and fact which do not. "*

55. However, it is much less likely that the parties will have intended to leave to an expert a question of construction which is not an obvious part of the subject-matter of the certificate, especially if the issue is latent in the wording, and becomes obvious only later.

56. In the present case, there were possible issues of construction, for example what was meant by "exhausted" or "economically recoverable" which obviously had to be considered by the surveyor in order to carry out his instructions. It would be clear to the parties at the time of the lease, if they thought about it, that any surveyor carrying out the task would have to reach conclusion as to what those concepts meant. However, I do not think that the same could be said of the questions of the construction referred to at §47 above, the resolution of at least one of which, and possibly both, must have been fundamental to Mr. Hill's conclusion. The existence of these issues cannot have been known to the parties at the time. As regards the definitions of Minerals and Reserved Minerals, if the ambiguity had been apparent to the parties, they would have clarified the position in the lease. As regards clause 7, I do not think that there is any ambiguity, or any real issue of construction. Mr. Hill unfortunately missed clause 7(10). Neither of these questions was an obviously necessary part of resolving the issue as to Certain Rent, and in my opinion the parties cannot be taken as having intended to refer them to Mr. Hill, who is not a lawyer. Questions of construction such as these fell within clause 14, the Arbitration clause.

57. Therefore, I consider that, as a result of Mr. Hill's mistaken construction, and whatever was the precise chain of reasoning which led to it, he considered the wrong subject matter. He assessed the economic recoverability only of the crushed rock and not of all the Minerals after allowing for the claimant's 12, 000 tonnes per annum so long as that quantity remained in the land. Mr. Hill departed from his instructions, which were to consider the economic recoverability of the Minerals, by considering only the economic recoverability of a part of them. What he did was similar to Dillon L. J. 's example of valuing the wrong number of shares. It follows that, the certificate is, as the claimant submits, a nullity.

If the certificate is valid, is it conclusive as to the matters to which it relates. or is the claimant entitled to refer them to arbitration?

58. Because I have held that the certificate is invalid, this issue does not arise, but I will nevertheless consider it briefly.

59. Mr. Wonnacott's fall back position was that, even if the certificate was valid, it was not, either expressly or impliedly, final and conclusive. In order to satisfy clause 3. 5. 4 (and also clause 10.), the defendant was obliged first to provide the surveyor's certificate and then (if it was challenged) establish exhaustion of the reserves, or economic irrecoverability, as a matter of fact in an arbitration in accordance with clause 14.

[1] ***Norwich Union Life Assurance Society v. P&O Property Holdings Ltd*** [1993] 1 E. G. L. R. 164 at 167E-F and 169F (disapproving ***Royal Trust International Ltd v. Nordbanken***, unreported, October 13, 1989, Hoffmann J., ***British Shipbuilders v. VSEL Consortium plc*** [1997] 1 Lloyd's Rep. 106.

60. It is true that, purely as a matter of language, it can be argued that there are two separate requirements both in clause 3. 5. 4 and in clause 10, for the fact of exhaustion etc. and for the certificate. It is also true that there is no express provision that the certificate is final and binding But it is impossible to find any sensible rationale for the elaborate provisions for the appointment of the surveyor, and for the certification process, other than he should, in unequivocally confirming either exhaustion or economic irrecoverability, be the final arbiter of those questions. Therefore, in my view, it is to be implied, in order to give business efficacy to these provisions, that the certificate is (except in the case of failure to carry out instructions) final and binding.

61. This conclusion is supported by a passage in Lewison on Interpretation of Contracts 3rd ed. at §13. 07: - *"Where the contract provides either expressly or by necessary implication that the certificate is to be final, the certificate cannot be set aside on the ground that the certifier made a mistake. But even if it is not so provided, it is submitted that such will have been the intention of the parties that the certificate should be final (sic). Although there is no direct authority on the finality of certificates where the contract is silent as to finality, the court has repeatedly held that where the price of a commodity is to be fixed by a valuation, the valuation is final and binding on the parties even if the valuer made a mistake. "*

62. Mr. Wonnacott submitted that this was inconsistent with the decision of the Court of Appeal in ***Universities Superannuation Scheme Ltd v. Marks and Spencer plc*** [1999] 1 E. G. L. R. 13. If it was, it would be surprising, since Mr. Lewison (as he then was) referred to this decision in both the 6th and the 7th editions of his book on Business Leases. There is in my view no inconsistency. The certificate in that case was the landlord's own certificate, which was held not to be binding on either party on the proper construction of the terms of the lease. There was no independent certification process such as there is in the present case. Therefore, if the certificate had been valid, I would have held that it was final and binding.

63. If the parties are able to agree on the form of the order, or are willing to deal with any contentious issues by written submissions which reach me not later than 4 p. m. on the day before I give judgment, there is no need for anyone to attend.

Mr. Mark Wonnacott, instructed by Messrs. Bevan Brittan, appeared for the claimant.
Mr. Martin Hutchings, instructed by Clarks Legal, appeared for the defendant.