tions to be done by a particular method - which the arbitrator has found to be unreasonable - constitutes any breach of contract by the Corporation; nor, indeed do they put their case in this way."

Whilst the term "reasonably" was used in AS2124-1978 (see footnote 9) in relation to the functions of the Superintendent, it was not used in AS2124-1986 (see Clause 23) nor in NPWC3 in relation to the functions of the Superintendent.

- Philip Davenport

34. Variations - NPWC3

State Rail Authority of NSW v Baulderstone Hornibrook Pty Ltd & Another, Supreme Court of New South Wales, Cole J. 16/12/88.

The contractor had entered into a lump sum contract with SRA to construct certain roadworks. The general conditions of contract were NPWC3-1981. The contractor succeeded in arbitration in claiming that the importation of fill material for embankments was a variation under the contract. The SRA's Superintendent had contended that the importation of fill material was within the scope of works and did not amount to a variation and accordingly declined to instruct a variation pursuant to the variations clause (clause 10) under the contract.

The SRA argued before the arbitrator that, because no order was made by the Superintendent, there was no variation under clause 40, but if the importation of fill was a variation, the contractor should properly have claimed damages for breach of contract. The reason for adopting this approach was because, if the claim was in breach of contract, the damages would be those flowing from such breach. This measure of damage was said to be less than the amount which the arbitrator determined as the reasonable value of the importation of the fill as a variation pursuant to the variations clause. (But now consider *Hungerfords & Others v Walker & Others* (1989) 63 ALJR 210). The SRA sought leave to appeal on the grounds that the arbitrator wrongly considered the issue as a variation, rather than a claim for breach of contract.

The court rejected this argument and applied *Brodie v Corporation of Cardiff* (1919) AC 337. In this instance, the court found that, in effect, the superintendent had issued a variation order.

The court left open the question as to whether a contractor is obliged to sue for breach of contract or alternatively claim a variation in circumstances where the Superintendent wrongly fails to issue a variation order.

- Frank Cahill, Partner, Baker & McKenzie, Solicitors, Sydney.

35. Variations

Bethlehem Singapore Private Limited v Barrier Reef Holdings Ltd, Supreme Court of New South Wales, Bryson J. 27/10/1987.

Most construction contracts include a variations clause empowering the principal or its architect, engineer or superintendent to vary the works. This case considered the power of the principal to order omissions from the works under a variations clause included in the contract for the supply of a vessel known as a "Floating Hotel". In monetary terms, the value of the omitted work was a small proportion of the total value of the vessel.

The principal's position was that it was open to it to omit the work and add this work (if it so desired) after the vessel was delivered and that, if the principal elected to accept the vessel without those works having been installed and treat that as delivery of the complete vessel, that was its right.

The court took the view that the omitted work must eventually be done by the principal or a contractor on its behalf. The court applied *Carr v JA Berriman* (1953) 89 CLR 327 and held that such a variation order, namely the omission of work for the purposes of giving it to another contractor was invalid. Although there was a wide power to omit work in the variation clause, the court held that it was not a proper exercise of the power or an exercise within the ambit of the power to take any work out of the contract as a step in the process of giving it to somebody else.

The court considered that such an order was outside the concept of a variation. The defendant principal contended that in *Carr v Berriman* the principle was that variations must not be such as to fundamentally alter the nature or character of the contract or of its subject matter or that the owner cannot get the omitted work done by someone else whilst the prime contract remains on foot, but that does not preclude the principal from taking delivery and treating the work as being completed, excepting omissions, providing the omissions are not such as fundamentally to alter the nature or character of the subject matter of the contract.

The court rejected this proposition, finding that there was no such qualification to be found in *Carr v Berriman*. The limitation on the validity of a variation was not a matter of degree. There was no support in that case for the idea that the principle which the High Court stated was subject to any limitations of degree so that it does not operate where a variation can be said to be less than a fundamental change in the nature or character of the subject matter.

- Frank Cahill, Partner, Baker & McKenzie, Solicitors, Sydney. □