Judgment 8, 1972

(8)

No. 38 of 1970

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

F.J. BLOEMEN PTY. LIMITED formerly
CANTERBURY PIPELINES (AUST.) PTY. LIMITED
(Plaintiff) Appellant

AND

THE COUNCIL OF THE CITY OF GOLD COAST
(Defendant) Respondent

RECORD OF PROCEEDINGS

PARK NELSON, DENNES,
REDFERN & CO.,
11 Essex Street,
Strand,
London, W.C.2.

Solicitors for the
Appellant

LIGHT & FULTON,
24, John Street,
Bedford Row,
London,
W.C. IN 2DA

Solicitors for the
Respondent

IN THE PRIVY COUNCIL No. 38 of 1970

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

F.J. BLOEMEN PTY. LIMITED formerly
CANTERBURY PIPELINES (AUST.) PTY. LIMITED
(Plaintiff) Appellant

AND

THE COUNCIL OF THE CITY OF GOLD COAST
(Defendant) Respondent

INDEX OF REFERENCE

E X H I B I T S

LIST OF DOCUMENTS ON THE FILE OMITTED FROM RECORD

IN THE PRIVY COUNCIL No. 38 of 1970

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

BETWEEN:

F.J. BLOEMEN PTY. LIMITED formerly CANTERBURY PIPELINES (AUST.) PTY. LIMITED (Plaintiff) Appellant

and

THE COUNCIL OF THE CITY OF GOLD COAST (Defendant) Respondent

RECORD OF PROCEEDINGS

In the Supreme Court of Queensland

No. 1

Writ of Summons

13th May 1969

No. 1

WRIT OF SUMMONS

(endorsement of Claim only)

Dated 13 May 1969

IN THE SUPREME COURT OF QUEENSLAND No. 421 of 1969

BETWEEN: F.J. BLOEMEN PTY. LIMITED formerly CANTERBURY PIPELINES (AUST.)PTY. LIMITED Plaintiff

AND THE COUNCIL OF THE CITY OF GOLD COAST Defendant

(Endorsement of claim on Writ of Summons)

The plaintiff's claim is for $49,386.90 being moneys owed by the defendant to the plaintiff under and pursuant to the provisions

In the Supreme Court of Queensland

No. 1

Writ of Summons

13th May 1969

(continued)

of an agreement in writing bearing date the Fifth day of March, 1965 between the plaintiff and the defendant plus interest thereon at the rate of seven per cent (7%) from the date hereof until the date of payment or Judgment.

No. 2

Statement of Claim

15th May 1969

No. 2

STATEMENT OF CLAIM

(Delivered the fifteenth day of May 1969)

1. The plaintiff (hereinafter referred to as "the contractor") is a company duly incorporated in the State of New South Wales and registered in the State of Queensland and having its registered office in the said State at C/- R.H. Mainwaring, English & Peldaw, Chartered Accountants, Perry House, 131 Elizabeth Street, Brisbane.

2. The defendant (hereinafter called "the principal") is a local authority constituted under and in accordance with the provisions of "The Local Government Acts 1936 as amended".

3. By an agreement in writing bearing date the Fifth day of March 1965 the contractor covenanted faithfully to execute and complete several works and provisions in accordance therewith and the principal covenanted to pay to the contractor such sums as might become payable pursuant thereto at such times and in such manner as therein provided. The contractor craves leave to incorporate the said agreement in writing herein and will refer thereto at the trial of this action for its full terms true meaning and effect.

4. Clause 35(c) and Clause 41 of the general conditions of the said agreement in writing

bearing date the Fifth day of March 1965 respectively provide as follows:-

"35(c) - Contractor entitled to interest. The Contractor shall be entitled to interest on all moneys payable to him, but unpaid, from the date on which payments become due, and such interest shall be calculated at twice the maximum ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts. This rate of interest shall be applicable to the whole of the moneys due to the contractor."

"41(a) - Submissions to arbitration. If any question, difference or dispute whatsoever shall arise between the principal and the contractor or the Engineer and the Contractor upon or in relation to or in connection with the contract which cannot be resolved by the contracting parties to their mutual satisfaction, either party may as soon as reasonably practicable by notice in writing to the other party clearly specify the nature of such question, difference or dispute and call for the point or points at issue to be submitted by settlement by arbitration.

(b) - Arbitration and arbitrators. Arbitration shall be effected -

(i) by an arbitrator agreed upon between the parties, or failing agreement upon such an arbitrator,

(ii) by an arbitrator appointed by the President for the time being of the Institution of Engineers, Australia, or failing such appointment,

(iii) by an arbitrator appointed in accordance with the provisions

In the Supreme Court of Queensland

No. 2

Statement of Claim

15th May 1969

(continued)

of the arbitration act of the state whose laws govern the contract.

(c) - Arbitration deemed to be under Arbitration Act. Submission to Arbitration shall be deemed to be submission to arbitration within the meaning of the Arbitration Act of the State whose laws govern the contract.

(d) - Costs. Upon every and any submission to arbitration the costs of and incidental to the submission and award shall be at the discretion of the arbitrator, who may determine the amount thereof or may direct that the costs be taxed by a proper officer of the Court. The arbitrator shall direct by whom, in what proportion and in what manner costs shall be paid.

(e) - Continuation of work and payments during arbitration. If it be reasonably possible, work under the contract or any variation thereto shall continue during arbitration proceedings, and no payment due or payable by the Principal shall be withheld on account of the arbitration proceedings unless so authorised by the Contractor."

5. Each of the parties served upon the other a notice of dispute in relation to certain differences between the parties arising out of the said agreement in writing.

6. On the Sixth day of January 1966 the parties executed a document entitled "Terms of Arbitration" whereby they appointed one F.W. Laws the Arbitrator pursuant to the said Clause 41 of the said agreement in writing, on the terms therein set out and referred to the said Arbitrator all matters and difference between them. The contractor craves leave to incorporate the said "Terms of Arbitration" herein and will refer thereto at the trial of

this action for its full terms, true meaning and effect.

7. By a document in writing bearing date the Eighth day of November 1966 the said F.W. Laws made an award of and concerning the matters so referred to him in the following terms:-

"1. I award and direct that the said Council of the City Gold Coast shall pay the said Canterbury Pipelines (Aust.) Pty. Ltd. the sum of FOUR HUNDRED AND SEVENTY-EIGHT THOUSAND FOUR HUNDRED AND SEVENTY-EIGHT DOLLARS ($478,478.00).

2. I award that the said sum of FOUR HUNDRED AND SEVENTY-EIGHT THOUSAND FOUR HUNDRED AND SEVENTY-EIGHT DOLLARS ($478,478.00) be paid and accepted in full satisfaction of all claims by each of the said parties against the other and of all matters and differences between them.

3. As to costs I award and direct that the said Council of the City of Gold Coast shall pay to the said Canterbury Pipelines (Aust.) Pty. Ltd. its costs of and attending to the said arbitration and shall also pay the costs of this my award."

8. By the following letters that is to say -

letter from Plaintiff's Sydney Solicitors to Solicitors for the Defendant dated 4th August 1966;

letter from Plaintiff's Sydney Solicitors to the Defendant's Solicitors dated 14th March 1968; and

letter from Defendant's Solicitors to Plaintiff's Sydney Solicitors dated 16th April 1968,

the parties agreed upon the sum of $13,808.02 as the Contractor's costs of and attending the said arbitration and the costs of the said award.

In the Supreme Court of Queensland

No. 2

Statement of Claim

15th May 1969

(continued)

9. The principal has made the following payments to the contractor in satisfaction of the said award:

22nd February 1968	$403,478.00
28th March 1968	$ 75,000.00
17th April 1968	$ 13,808.02

10. The maximum ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts has been three and one-half per cent (3.1/2%) per annum until 31st July 1968, and thereafter three and three-quarter per cent (3.3/4%).

11. The principal is presently indebted to the contractor in the sum of $49,688.02 which amount is calculated as follows:-

Arbiter's award dated November 8th, 1966	$478,478.00	
Cost of Arbitration (as agreed)	13,808.02	
Amount due at November 8th, 1966 as per clause 35C of General Conditions of Contract	492,286.02	
Add interest for 1 year to 7th November 1967 (inclusive) at 7% per annum due 8th November, 1967	34,460.02	
	526,746.04	
Less Payment by Council received 22nd February 1968	403,478.00	
	123,268.04	
" Payment by Council received 28th March, 1968	75,000.00	
	48,268.04	
" Payment by Council received 17th April, 1968	13,808.02	

Award plus costs x 1 year interest less payments made		34,460.02
Add Interest		
8th November 1967 to 22nd February 1968 107 days at 7% on $526,746.04 = $10,809.16		
23.2.68 to 28.3.68 35 days at 7% on $123,268.04 =	827.42	
29.3.68 to 17.4.68 20 days at 7% on $48,268.04 =	185.14	
18.4.68 to 31.7.68 105 days at 7% on $34,460.02 =	693.92	
1.8.68 to 8.5.69 281 days at 7.1/2% on $46,975.66 =	2,712.36	15,228.00
TOTAL AMOUNT DUE AT 8th MAY 1969		$49,688.02

12. The principal has failed or neglected or refused to pay the said amount or any part thereof to the contractor.

AND the contractor claims $49,688.02 being moneys owed by the principal to the contractor and/or moneys payable by the principal to the contractor under and pursuant to the provisions of an agreement in writing bearing date the Fifth day of March, 1965 between the contractor and the principal plus interest thereon at the rate of seven and one half per cent (7.1/2%) from the date hereof until the date of payment or Judgment.

This pleading was settled by Mr. Fitzgerald

In the Supreme Court of Queensland

No. 2

Statement of Claim

15th May 1969

(continued)

of Counsel.

Morris Fletcher & Cross

Solicitors for the Plaintiff

The defendant is required to plead to the within Statement of Claim within twenty-eight days from the time limited for appearance or from the delivery of the Statement of Claim whichever is the later, otherwise the plaintiff may obtain judgment against it.

No. 3

Demurrer

4th June 1969

No. 3

DEMURRER

Dated 4 June 1969

DEMURRER

(Delivered the fourth day of June 1969)

1. The Defendant says that the award referred to in paragraph 7 of the Statement of Claim contained as part of it certain reasons (which were delivered at the time of the award and formed part of it) paragraph 12 of which reads as follows:-

"Decision on payment.

I have decided that

(a) The work done by the Contractor was inadequately recompensed by the schedule rates forming part of the Contract.

(b) The Contractor was justified in stopping work.

(c) The Principal was not justified in refusing approval for the Contractor to start work in Southport.

(d) The Principal was not justified in cancelling the Contract.

There remains to be settled now the question of payment.

In this respect the Contractor's Counsel has set out four alternative methods of payment. This is about the only information I have. The Principal has not assisted very much in helping me to assess any new values assuming a change. Under such circumstances I must be guided solely by the terms of the Contract.

I am loath to accept the Contractor's new rates.

The alternative (says Clause 22F of the General Conditions of Contract) is day labour or else the Arbitrator fixes new rates. The Arbitrator has insufficient information to fix new rates. Therefore recourse must be had to the day labour principle.

I therefore accept as proved

(a) The Contractor's claim as set out in exhibit YY in the sum of £100,121.7.3. ($200242.72).

(b) The Contractor's claim as follows

(i)	For loss of profit on balance of Surfers Paradise	£10,653
(ii)	For loss of profit on Southport	£65,762
(iii)	Loss of use of plant at Surfers Paradise	£28,233
(iv)	Loss of use of plant at Southport	£26,880
	Total	£131,528
	or	$263,056

In the Supreme Court of Queensland

No.3

Demurrer

4th June 1969

(continued)

(c) I agree to a deduction from the Contract Price in the sum of $1,000 - (see par. 6)

Total of (a) and (b) is	$463,298
Less (c)	1,000
Net total	$462,298

It is not proposed to allow any additional payment for overhead.

Clause 35C of the General Conditions of Contract says that the Contractor is entitled to interest on moneys owing to him and the rate is set out at 7%.

Interest is therefore to be paid at this rate on the net total shown in (c) for a period of six (6) months that is an amount of

$$\frac{462298 \times 7}{100 \times 2} = \$16180$$

The grand total of the award is therefore

	$462298
	16180
	$478478

The formal Award follows immediately hereafter. "

2. The Defendant demurrs to the Plaintiff's Statement of Claim and says that the same is bad in law on the following grounds:-

(a) The said award was in substitution for, and superceded the rights of the parties under the Contract;

(b) The said award contains no provision relating to interest subsequent to the making of the award;

(c) On the proper construction of

Clause 35 (c) of the General Conditions interest is not payable thereunder on the said award; and

(d) The Plaintiff's claim is for interest on an award, which itself contains provision for interest, which provision was bad in law.

And on other grounds sufficient in law.

Thynne & Macartney

Thynne & Macartney,
Town Agents for -
Messrs. Primrose & Couper,
Solicitors for the Defendant

This pleading was settled by Mr. P.D. Connolly Q.C. and Mr. P.V. Loewenthal of Counsel.

The Plaintiff is required to set this Demurrer down for argument within ten days, otherwise judgment will be given against him on the matters demurred to.

No. 4

ORDER OF THE FULL COURT

Dated 28 October 1969

FULL COURT: BEFORE THEIR HONOURS MR. JUSTICE HANGER, MR. JUSTICE LUCAS AND MR. JUSTICE HOARE

THE TWENTY-EIGHTH DAY OF OCTOBER, 1969

The Defendant having on the Fourth day of June, 1969 demurred to the whole of the Plaintiff's Statement of Claim delivered on the Fifteenth day of May, 1969 and the said demurrer

In the Supreme Court of Queensland

No. 4

Order of the Full Court

28th October 1969

(continued)

having been allowed by the Court, it is this day adjudged that the Defendant do recover against the Plaintiff its costs of the said demurrer to be taxed AND IT IS FURTHER ORDERED that this matter be adjourned to a date to be fixed for further consideration.

By the Court

(L.S.) J. Munro

Acting Registrar

No. 5

Reasons for Judgment of Hanger A.S.P.J.

No. 5

REASONS FOR JUDGMENT OF HANGER, A.S.P.J.

(as he then was)

JUDGMENT - HANGER, Act.S.P.J.

Demurrer by the defendant to the Statement of Claim.

Paragraphs 1 and 2 identified the plaintiff and the defendant and referred to the plaintiff as the contractor and the defendant as the principal. Paragraph 3 provided: "By an agreement in writing bearing date the fifth day of March, 1965, the contractor covenanted faithfully to execute and complete several works and provisions in accordance therewith and the principal covenanted to pay to the contractor such sums as might become payable pursuant thereto at such times and in such manner as therein provided. The contractor craves leave to incorporate the said agreement in writing herein and will refer thereto at the trial of this action for its full terms, true meaning and effect".

Paragraph 4 set out Clause 35(c) and Clause 41 of the general conditions of the agreement. Clause 35(c) provided for the payment of interest on all money payable to the

contractor. I set it out in full later in this judgment. Clause 41 provided:

"(a) - Submissions to arbitration. If any question, difference or dispute whatsoever shall arise between the principal and the contractor or the Engineer and the Contractor upon or in relation to or in connection with the contract which cannot be resolved by the contracting parties to their mutual satisfaction, either party may as soon as reasonably practicable by notice in writing to the other party clearly specify the nature of such question, difference or dispute and call for the point or points at issue to be submitted by settlement by arbitration.

(b) - Arbitration and arbitrators. Arbitration shall be effected -

(i) by an arbitrator agreed upon between the parties, or failing agreement upon such an arbitrator.

(ii) by an arbitrator appointed by the President for the time being of the Institution of Engineers, Australia, or failing such appointment,

(iii) by an arbitrator appointed in accordance with the provisions of the arbitration act of the state whose laws govern the contract.

(c) - Arbitration deemed to be under Arbitration Act. Submission to Arbitration shall be deemed to be submission to arbitration within

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J.

(continued)

the meaning of the Arbitration Act of the State whose laws govern the contract.

(d) - Costs. Upon every and any submission to arbitration the costs of and incidental to the submission and award shall be at the discretion of the arbitrator, who may determine the amount thereof or may direct that the costs be taxed by a proper officer of the court. The arbitrator shall direct by whom, in what proportion and in what manner costs shall be paid.

(e) - Continuation of work and payments during arbitration. If it be reasonably possible, work under the contract or any variation thereto shall continue during arbitration proceedings, and no payment due or payable by the Principal shall be withheld on account of the arbitration proceedings unless so authorised by the contractor."

As to this clause of the contract, it may be noted that the clause does not require matters to be submitted to arbitration; it purports to do no more than to enable a party to call for arbitration.

Further, the clause contemplates the existence of disputes which the parties cannot settle and the giving of a notice which is to "clearly specify the nature of the question, difference or dispute and call for the point or points of issue to be submitted by settlement by arbitration."

Paragraph 5 provided: "Each of the parties served upon the other a notice of dispute in relation to certain differences between the parties arising out of the said agreement in writing".

I find it quite impossible to regard this

as an allegation that these notices were given pursuant to Clause 41(a) or fulfilled its requirements.

Paragraph 6 provided: "On the Sixth day of January 1966 the parties executed a document entitled 'Terms of Arbitration' whereby they appointed one F.W. Laws the Arbitrator pursuant to the said Clause 41 of the said agreement in writing, on the terms therein set out and referred to the said Arbitrator all matters and differences between them. The contractor craves leave to incorporate the said 'Terms of Arbitration' herein and will refer thereto at the trial of this action for its full terms, true meaning and effect."

I assume the words "on the terms therein set out" refer to the terms set out in the document "Terms of Arbitration".

The prima facie meaning of the paragraph is that the parties, by the "Terms of Arbitration", referred to the arbitrator "all matters and differences between them". Reference to the document, however, shows that it is concerned with the appointment of an arbitrator, the delivery of pleadings, the conduct of the arbitration and certain other matters. Nothing in the document specifically refers anything to the arbitrator. It was, perhaps, the intention of the parties that the arbitrator should determine any matter in dispute which appeared to arise on the pleadings provided it was in relation to or in connection with the contract, whether or not it had been included in any notice given under clause 41(a) (if any such notice was given). But the Statement of Claim in this action makes no reference to the contents of the pleadings delivered in the arbitration and we have no knowledge of their contents. I do not think that by the "Terms of Arbitration" the parties referred anything to the arbitrator.

I note that it may be possible to read the paragraph as if the words "and referred to the said Arbitrator all matters and differences

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J. (continued)

between them" constituted the predicate of a co-ordinate principal clause of which the subject is "the parties" and not part of a co-ordinate adjectival clause. But this would suggest that the reference of matters and differences was done by some other document or in some other way.

Clause 19 of the "Terms of Arbitration" seems to call for mention. The clause provides: "The Law of Queensland shall apply to the Arbitration and this reference is and is to be considered to be a submission to Arbitration within the meaning of 'The Interdict Act of 1867' and the award shall be made a Rule of the Supreme Court of Queensland". The words "this reference" must refer to what is contained in the "Terms of Arbitration". The reference "is and is to be considered to be a submission to Arbitration" within The Interdict Act.

Paragraph 7 stated that by a document in writing bearing date the 8th November, 1966, F.W. Laws made an award of and concerning the matters so referred to him in the following terms:

> "1. I award and direct that the said Council of the City of Gold Coast shall pay to the said Canterbury Pipelines (Aust.) Pty. Limited the sum of four hundred and seventy-eight thousand four hundred and seventy-eight dollars ($478,478.00).
>
> 2. I award that the said sum of four hundred and seventy-eight thousand four hundred and seventy-eight dollars ($478,478.00) be paid and accepted in full satisfaction of all claims by each of the said parties against the other and of all matters and differences between them.
>
> 3. As to costs, I award and direct that the said Council of the City of Gold Coast shall pay to the said Canterbury Pipelines (Aust.) Pty. Limited its costs of and attending to the said arbitration

and shall also pay the costs of this my award."

Paragraph 8 sets out that the costs were agreed on at $13,808.02.

The words "so referred", I understand to mean referred to alleged in paragraph 6, that is, referred by the "Terms of Arbitration". In favour of the plaintiff, I take paragraph 7 to to (sic) an allegation that the arbitrator's award was within the scope of the matters referred to him.

Paragraph 9 stated that the principal had made the following payments to the contractor in satisfaction of the award:

22nd February, 1968	403,478.00
28th March, 1968	75,000.00
17th April, 1968	13,808.02

Paragraph 10 set out the ruling rates of interest of the Commonwealth Savings Bank of Australia during certain periods.

Paragraph 11 stated that the principal was presently indebted to the contractor in the sum of $49,688.02 and showed how this amount was calculated. It began with the amount of the award and costs which totalled $492,286.02 and then proceeded to add interest and to give credit for payments made; and then showed a balance due at 8th May, 1969 of $49,688.02. (The Statement of Claim was delivered on 15th May, 1969).

Paragraph 12 alleged that the plaintiff had not paid this amount or any part thereof.

The document concluded with a claim:

"And the contractor claims $49,688.02 being moneys owed by the principal to the contractor and/or moneys payable by the principal to the contractor under and pursuant to the provisions of an agreement in writing bearing date the fifth day of March 1965 between the contractor and the

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J.

(continued)

principal plus interest thereon at the rate of Seven and one half per cent (7½%) from the date hereof until the date of payment of judgment."

The defendant demurred to the Statement of Claim. The document set out material contained in the award referred to in the Statement of Claim. This material is set out later in this judgment.

The claim of the plaintiff, as appears clearly from the allegations in the body of the Statement of Claim and also from the claim at the end, is for money owed or payable by the Council to the contractor under and pursuant to the agreement of 5th March, 1965 plus interest at the rate of 7½% from the date of the Statement of Claim until payment or judgment.

It is clear also that the plaintiff's claim for money payable is for interest, which is said to be payable pursuant to the agreement; for the whole of the amount awarded by the arbitrator and the costs have been paid (see paragraph 9 of the Statement of Claim). The claim to add interest rests upon clause 35(c) of the contract which was set out in the Statement of Claim (paragraph 4). The Clause is as follows:

> Contractor entitled to interest. The Contractor shall be entitled to interest on all moneys payable to him, but unpaid, from the date on which payments become due, and such interest shall be calculated at twice the maximum ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts. This rate of interest shall be applicable to the whole of the moneys due to the contractor.

The portion of the award - of which the plaintiff has set out part in paragraph 7 of the Statement of Claim - which the defendant set out in its Demurrer, was as follows:

"Decision on payment.

I have decided that

(a) The work done by the Contractor was inadequately recompensed by the schedule rates forming part of the Contract.

(b) The Contractor was justified in stopping work.

(c) The Principal was not justified in refusing approval for the Contractor to start work in Southport.

(d) The Principal was not justified in cancelling the Contract.

There remains to be settled now the question of payment.

In this respect the Contractor's Counsel has set out four alternative methods of payment. This is about the only information I have. The Principal has not assisted very much in helping me to access any new values assuming a change. Under such circumstances I must be guided solely by the terms of the Contract.

I am loath to accept the Contractor's new rates. The alternative (says Clause 22f of the General Conditions of Contract) is day labour or else the Arbitrator fixes new rates. The Arbitrator has insufficient information to fix new rates. Therefore recourse must be had to the day labour principle.

I therefore accept as proved

(a) The Contractor's claim as set out in exhibit YY in the sum of £100,121.7.3. ($200,242.72).

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J. (continued)

(b) The Contractor's claim as follows

(i)	For loss of profit on balance of Surfers Paradise	£10,653
(ii)	For loss of profit on Southport	£65,762
(iii)	Loss of use of plant at Surfers Paradise	£28,233
(iv)	Loss of use of plant at Southport	£26,880
	Total	£131,528
	or	$263,056

(c) I agree to a deduction from the Contract Price in the sum of $1,000 - (see par. 6)

Total of (a) & (b) is	$463,298
Less (c)	1,000
Net total	$462,298

It is not proposed to allow any additional payment for overhead.

Clause 35C of the General Conditions of Contract says that the Contractor is entitled to interest on moneys owing to him and the rate is set out at 7%.

Interest is therefore to be paid at this rate on the net total shown in (c) for a period of six (6) months that is an amount of

$$\frac{462298 \times 7}{100 \times 2} = \$16,180$$

The grand total of the award is therefore $462,298

The formal Award follows immediately hereafter."

From this portion of the award, it appears that the arbitrator was awarding considerable sums for damages e.g., loss of profit on the balance of work at Surfers Paradise, loss of profit on work at Southport, damages for loss of use of plant at Surfers Paradise and Southport; and that the arbitrator included in his award interest on these damages at 3½%.

After the award was made, an application was made by the defendant to the Supreme Court of Queensland to set aside the award on the ground that a number of errors of law appeared on its face and on other grounds. The Supreme Court declined to set the award aside and the defendant appealed to the High Court which dismissed the appeal. However, in the reasons of that Court, a clear opinion was expressed that the arbitrator had no authority whatever for allowing interest on damages for loss of profit and loss of use of plant.

The result of the failure to set aside the award is not to make the award any more valid than it was before. It merely puts an end to one means of attacking the award which the defendant had. It does not make the arbitrator's award of interest on damages a valid exercise of his power; and it does not make the total amount awarded by the arbitrator a valid award.

The plaintiff must allege in his pleading facts which show that the interest which is claimed, is claimed on money payable under the contract. The defendant has paid the full amount of the arbitrator's award and no question arises as to that payment.

The question for consideration now appears to me to be whether the money awarded by the arbitrator or any of it is money payable under the contract within Clause 35(c). The money payable falls into three parts:

1. A sum of $200,242.72 described in the award as the contractor's claim as set out in exhibit YY;

2. damages for loss of profit; and loss

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J. (continued)

of use of plant;

3. interest on both these sums.

Do the allegations of the plaintiff show that this money or any of it is payable under the contract?

A link in the chain of proof of the plaintiff's claim is the award and the award stems from a submission to arbitration. I think that the plaintiff must allege a valid award. In Norske Atlas Insurance Co. v. London General Insurance Co. 43 T.L.R. 541 MacKinnon J. said, "in order to sue on an award, it is, I think, necessary for the plaintiffs to prove, first, that there was a submission; secondly, that the arbitration was conducted in pursuance of the submission, and, thirdly, that the award is a valid award made, pursuant to the provisions of the submission, and valid according to the lex feri of the place where the arbitration was carried out and where the award was made". The learned Judge was speaking of what had to be proved but I think it is a fair statement of what must be alleged in a pleading where the award is the basis of the claim which the plaintiff makes. In such a case, the validity of the award so far as it relates to the power of the arbitrator to make any determination which he has made, may, within the limits of established principles, be challenged.

The effect of the award in this case does not depend upon the terms of any Statute; it depends entirely upon the common law as applied to the events which happened. I refer to a passage from the judgment of the High Court in Dobbs v. National Bank of Australasia Ltd. (1935) 53 C.L.R. 643 at p. 653: "By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action. His award will do so if it negatives the existence of liability. It will do so if it operates, not merely to ascertain the existence and

measure of the original liability, but to impose a new obligation as a substitute, whether the obligation results from the tenor of the award or from an antecedent undertaking of the parties to give effect to the determination it embodies". I cite also the sentence which immediately followed that passage: "The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the causes of action awarded upon;" and a sentence from p.654: "Any issue might be submitted to arbitration, and upon that issue the award would be as conclusive upon the parties as an award upon the whole cause of action if that had been submitted".

The passages serve to illustrate two points. The first is that the award derives its authority from the agreement of the parties and this agreement is that the arbitrator shall determine the matters agreed to be submitted. Outside of these matters agreed on, the arbitrator has no authority to go. If he determines a matter which the parties have not agreed that he shall determine, the award is made without any "prior accord" and the basis of its authority never comes into existence. The arbitrator never had any authority to make such a determination.

The second point is merely a particular aspect of the first. One issue alone might be submitted to an arbitrator. His decision on that issue concludes the matter in respect of that issue. But an arbitration may extinguish a whole cause of action. Two cases are instanced in the passage quoted. The award negatives the existence of liability; or, it not merely ascertains the existence and measure of an original liability, but it imposes a new obligation as a substitute. I understand from this that if the award merely ascertains the existence and measure of an original liability it does not extinguish the original cause of action. Two of the authorities cited by the High Court as authority for the first of the passages I have cited are Allen v. Milner (1831) 2 Cr & J. 47 (149 E.R. 20) and Commings v. Heard

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J.

(continued)

(1869) L.R. 4 Q.B. 669.

Allen v. Milner was an action in indebitatus assumpsit for £50 for turnpike tolls. The defendant pleaded an agreement to refer the matter to arbitration and an award by the arbitrator of £13 and said that this was an answer to the plaintiff's claim. The Court held that it was not, the £13 not having been paid. "The question, therefore, is", said Lord Lyndhurst for the Court, "whether this award is, of itself, without payment or satisfaction, any bar; and considering the nature of the plaintiff's demand and the nature of the award, we are of opinion that it is not. The plaintiff's demand is for a debt, and the award is not for the performance of any collateral act, but for the payment of money. The matter, therefore, for the consideration of the arbitrator was, whether there were any, and what debt; the award only ascertains that there is a debt, specifies the amount, and directs the payment; but the money, till paid, is due in respect of the original debt, i.e. for tolls; its character remains the same, nothing is done to vary its nature or destroy its original quality. Had the demand been of a different description, as for the delivery of goods, and the award had directed a payment of money in satisfaction of the demand, it might then have been said that the award had changed the nature of the original demand, that the right to have the goods was gone, and the only right remaining was the substituted right, i.e., the right to have the money; or had the demand been for a debt, and the award had directed not payment in money, but payment in a collateral way, as by delivery of goods, performance of work, etc., it might, perhaps, have been said that the right to have payment in money was gone; but here the £13 is to be paid for the original demand, i.e. for the tolls, and it is to be paid as that demand was to have been paid i.e. in money ..... Upon the ground, therefore, that the present action is for a debt, that the award only ascertains the amount of that debt, and that the money payable under the award is nothing but the original debt so

ascertained the amount, we are of opinion that this plea is bade, and that the plaintiff is entitled to judgment". i.e. judgment on the demurrer.

The importance of the passage cited is, for present purposes, the principle that while, in some cases, the award of the arbitrator does not change the nature of the liability, in other cases, it does; that where the plaintiff's demand is for a debt and the award of the arbitrator has been only a determination of the amount of the debt, the award does not change the character of the original debt; but that where the demand is of a different description, e.g. the delivery of goods, and the award directs a payment of money, the award has changed the nature of the original demand; the right to have the goods is gone and the only right remaining is the substituted right, the right to have the money.

In Commings v. Heard the claim was for £400 for work done and material provided. The defence pleaded was that there had been a dispute between plaintiff and defendant and, by agreement, the question how much was due from the defendant to the plaintiff was submitted to an arbitrator who awarded £145. 3. 1. and that therefore except as to the sum of £145. 3. 1. this was a good defence. The Court held this to be a good plea. Lush J. and Hayes J. each referred to Allen v. Milner and distinguished it as not applicable to the case before them. But the reasoning on which Allen v. Milner was based was the very reasoning which led them to their conclusions in the case before them. Lush J. said, in reference to Allen v. Milner at pp. 673-4: "The plea was held bad, and for this reason, that an award upon a money claim does not alter the nature of the original debt; it leaves it remaining due. The amount which the arbitrator found to be due was for the original consideration. The award did not change the nature of the debt, consequently, a plea which professed to answer the whole of the debt, and admitted a part of it was due, was a bad plea. That is the ground of that decision."

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J.

(continued)

Lush J. continued:

"On the other hand, it is settled, where the claim is one for unliquidated damages, an award, which settles the amount, may be pleaded in bar to the entire action, although the plea, on the face of it, shows that the money is not paid. In the case of Gascoigne v. Edwards (1 Y & J 19), there was a general plea pleaded to the whole declaration, by which it was alleged that the parties had agreed to refer the amount of the damages to arbitration, and an award had been made, by which it was awarded that the defendant should pay to the plaintiff £5 to put the premises in repair. The plea, although it did not aver that the £5 was paid, was held to be a good plea because an award, fixing the amount and creating a debt between the parties, extinguished the original demand for unliquidated damages". Hayes J. said at pp 675-6: "In the case of Allen v. Milner the plea was held bad because it was pleaded to the whole cause of action. It admitted that the amount found by the arbitrator was due, but did not show that the plaintiff's claim in respect of it was answered. There is this difference between the cases: In the present case the plea is pleaded to the excess of what the arbitrator found to be due. We do not know what has taken place as to the £145. 3. 1.; all we know is, that the excess to which the plea is directed has been found by the arbitrator not to be due, and both parties are bound by the finding."

I take it to be the law then, that as the agreement of the parties fixes what is the authority of the arbitrator, if he is merely to determine the amount of the liability, the amount remains due as an original liability; but that an award, pursuant to an agreement between the parties, may affix an amount and create a debt between the parties, extinguishing the original demand e.g. delivery of goods (See Allen v. Milner (supra)). In the first case, the liability continues under the agreement; in the second,

it stems from the submission to arbitration and, pursuant thereto, from the award.

It is apparent from what I have said that the agreement to submit matters to arbitration is not contained in the construction agreement. There is no sufficient allegation that the parties implemented the provisions of clause 41 of that agreement and there is an allegation that it was by the Terms of Arbitration that matters in dispute were referred to arbitration. The Terms of Arbitration (incorporated by the plaintiff in the Statement of Claim) purported to be a submission to arbitration.

It is also apparent that there is no specific information in the Statement of Claim as to what was agreed to be submitted to the arbitrator and there is therefore no information as to what claims or disputes the items dealt with by the arbitrator had reference.

I turn now to the plaintiff's claim which is for interest said to be due on the items in the award.

As to interest on the interest on the damages, because the award of the interest on the damages was beyond the power of the arbitrator, I do not see how the interest can be said to be payable under the agreement within Clause 35(C) of the contract. It can not therefore itself carry interest.

As to the damages awarded, it was argued that as they were payable by virtue of the award and the award was made pursuant to terms of the construction agreement, ipso facto, they became payable under the construction agreement. As I hold that the award was not made pursuant to this agreement, the argument fails.

But I have pointed out that as appears from Allen v. Milner (supra) and Commings v. Heard (supra), money awarded by an arbitrator could in some cases, be payable under the original agreement out of which the disputes submitted to arbitration arose. This, however,

In the Supreme Court of Queensland

No. 5

Reasons for Judgment of Hanger A.S.P.J. (continued)

is not the case where the damages are awarded for breach of contract. The plaintiff cannot therefore succeed on this basis in claiming that the damages awarded are payable under the construction agreement.

As to the sum of $200,242.72, I think the position is this: It is not payable as money due on an award which was made pursuant to Clause 41 of the construction agreement. It is in the same position as the award of damages. We do not know in respect of what matter of claim, dispute or difference it was awarded. If information in the pleading had shown this, then it would be possible to say whether the amount, though contained in the award of an arbitrator, continued to be money due under the construction agreement. But, in the absence of this information, the question cannot be determined. As it is for the plaintiff to show facts making its claim sustainable, I am of opinion that the claim for interest on this sum also fails.

The demurrer should be allowed. The plaintiff should pay the costs of the defendant. The plaintiff should have leave to amend its Statement of Claim as it may be advised etc.

No. 6

Reasons for Judgment of Lucas J.

No. 6

REASONS FOR JUDGMENT OF LUCAS J.

JUDGMENT - LUCAS J.

The nature of the action and the effect of the Statement of Claim are set out in the judgment of Hanger J., which I have had the advantage of reading, and it is not necessary for me to repeat them.

The grounds upon which the Demurrer is based are expressed as follows:-

(a) The said award was in substitution for, and superceded (sic) the rights

of the parties under the contract;

(b) The said award contains no provision relating to interest subsequent to the making of the award;

(c) On the proper construction of Clause 35 (c) of the General Conditions interest is not payable thereunder on the said award; and

(d) The plaintiff's claim is for interest on an award, which itself contains provision for interest, which provision was bad in law.

As I read these grounds (b) is dependent upon (a); that is, it is asserted in ground (a) that the award has superseded "the rights of the parties". I take this to mean that any rights which the parties now have against each other must be based upon something that is in the award, and may no longer depend upon anything that is in the contract. This being so, the plaintiff, so runs the argument, has no right against the defendant, to interest, since there was no provision in the award for the payment of interest in respect of any period after it was made (ground (b)).

I understand ground (c) to be intended to advance an additional reason why interest is not payable; that is, that clause 35(c) of the contract, properly construed, does not make interest payable "on the said award", that is, on this award; we are not concerned with any other award which might have been made in different circumstances. Thus, ground (c) does not seem to me to raise a pure question of law relating to the construction of Clause 35(c); it raises the question of its construction against the background of the facts pleaded in the Statement of Claim, which must of course for this purpose be assumed to be true. So considered, I am not sure that ground (c) adds anything to grounds (a) and (b), but in any event it was not separately argued.

It is evident that the first question which

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Lucas J.

(continued)

requires consideration is the validity of the proposition advanced in ground (a), that is, whether the award "was in substitution for, and superseded the rights of the parties". The proposition in this form is of course widely expressed, but no doubt it must be read as applying only to the rights of the parties in relation to the relief claimed in the action. The relief claimed in the action was for the recovery of interest pursuant to Clause 35(c) of the contract, that is, interest upon "moneys payable to the (plaintiff) but not paid, from the date on which payments become due .....". This clause is of course only capable of referring to moneys payable by virtue of the contract, so that the question is whether the amount of the award constitutes moneys so payable. If it does the plaintiff is entitled to interest; if not, the plaintiff must fail.

In support of the demurrer reference was made to Dobbs v. National Bank of Australasia Ltd. (1935) 53 C.L.R. 643. It was said that the case supported the proposition that in principle the award of an arbitrator puts an end to the contractual rights upon which it is based. This is a proposition with which, I should think nobody would wish to quarrel. But it is necessary to be precise. In the joint judgment of Rich, Dixon, Evatt and McTiernan JJ. the following passage occurs (at p. 653):

> "..... if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined."

The important words seem to me to be "the claims which the award determined". The effect of an award cannot be to preclude the parties from asserting in the Courts any claims other than these. It is clear that the plaintiff could not now litigate the matters which were referred to the Arbitrator for his decision, but it does not appear from the Statement of Claim that among those matters were the question of the plaintiff's right to interest

under clause 35 (c) upon the amount of the award, with reference to any period after that amount became payable.

Paragraph 5 of the Statement of Claim asserts that each party served a notice of dispute upon the other "in relation to certain differences between the parties arising out of the said agreement".

It is true that it is not in terms pleaded that this was done pursuant to Clause 41, but this, I think, is not an unreasonable way to read the paragraph, which follows immediately after the paragraph in which the arbitration clause is set out in full. No argument for the defendant was based upon the fact that the Statement of Claim did not specifically allege that the notice of dispute referred to in paragraph 5 was a notice given in pursuance of the arbitration clause set out in paragraph 4.

Paragraph 6 asserts that the parties referred to the arbitrator "all matters and differences between them". But the nature of those matters and differences does not appear, except in so far as they may be gathered from paragraph 12 of the arbitrator's "reasons", which is set out in the demurrer, and the award when made did not purport to deal with interest which might accrue afterwards. In these circumstances it seems to me that the award, considered by itself, does not constitute a bar to an action brought in respect of a matter which was not shown to have been among the matters referred to the arbitrator for his determination.

Counsel for the defendant argued that it was possible to gather from the material set out in the demurrer that the arbitration was what he described as "the final wash-up of the contract". Assuming that I have understood this phrase correctly, I find it quite impossible to draw such an inference. It may be gathered that the plaintiff had stopped work, and that the arbitrator had found that he was justified in doing so; that he had wanted to start work

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Lucas J.

(continued)

(presumably on another part of the contract) and that the defendant had, unjustifiably, purported to cancel the contract. But it is not possible to infer that the arbitration was intended, or was effective, to determine all matters which might be in dispute under the contract until its performance was complete, and in my opinion it is only if such an inference can be drawn that the award will have the effect which the defendant seeks to attribute to it.

But what I have written does not conclude the matter. I have given my reasons for thinking that the award does not of itself preclude the plaintiff from suing for the interest claimed in the writ. The plaintiff must, however, go further and show that the interest so claimed constituted "moneys payable" within the meaning of clause 35(c). In Dobbs v. National Bank of Australasia Ltd. (supra) in the joint judgment already referred to, the following appears (at p.653):

> "(an award will extinguish an original cause of action) ..... if it operates, not merely to ascertain the existence and measure of the original liability, but to impose a new obligation as a substitute, whether the obligation results from the tenor of the award or from an antecedent undertaking of the parties to give effect to the determination it embodies ..... The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the causes of action awarded upon."

As I have already said, the making of the award in this case would have precluded the plaintiff from suing upon the matters referred to the arbitrator. If the amount awarded had not been paid, the only proceedings open to the plaintiff would have been proceedings to enforce the award. But what was it that imposed the obligation upon the defendant to pay the amount of the award? Obviously it was not the award considered by itself, for that would have

been of no effect whatever without the provision for arbitration in the agreement or without some other agreement to refer matters in dispute to an arbitrator. I am not overlooking the fact that, as appears from paragraph 6 of the Statement of Claim, there was a specific reference of the matters in dispute to the arbitrament of Mr. Laws, but I think that this may be dismissed from consideration, since it was the original provision which required resort to the process of arbitration if either of the parties wished it. Copies of the "Terms of Arbitration", which is incorporated in the Statement of Claim, have been supplied to us. That document, however, does not specify the matters which were referred to the decision of the arbitrator. It makes detailed provision for the conduct of the arbitration, and confers certain powers upon the arbitrator, but I cannot gather from its terms that the parties agreed to forego any rights which the contract gave them in relation to any matter not referred to the arbitrator for his determination. This being so, it seems to me that the defendant's obligation to pay the amount awarded arose from the original agreement and from the award made in pursuance of the original agreement. In my opinion this leads to the conclusion that the amount awarded constituted "moneys payable" within the meaning of Clause 35(c).

As will be seen, I do not regard cases such as Dobbs v. National Bank of Australasia Ltd. (supra) and Doleman v. Ossett Corporation (1912) 3 K.B. 257, as authorities applying to this question. These cases decide that an award may substitute a different obligation for the original contractual obligation; the question here is what gives rise to the compulsion to perform the obligation so substituted. The original obligation assumed by the parties was to perform the contract according to its terms. The contract contained an arbitration clause, pursuant to the provisions of which either party was enabled to refer to an arbitrator the determination of matters in dispute between them. This had been done and the arbitrator has made his determination. It is quite clear to me that the

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Lucas J.

(continued)

original obligation, that is the obligation to perform the contract according to its terms, has in the circumstances of this case been replaced, in relation to carry out the terms of the arbitrator's award. But, as I have tried to show, it is not the award considered in vacuo which binds the parties to perform the substituted obligation. What else can it be which so binds them except the contract which contained the provision for the reference of disputes to arbitration? And if this is so, it necessarily follows, in my opinion, that the amount of the arbitrator's award is money payable under the provisions of that contract and so money which is within the scope of Clause 35(c).

I should add that I do not consider that Allen v. Milner (1831) 2 Cr. & J. 47: 149 E.R. 20 supplies the answer to the present question. With respect, I would regard that as a very doubtful authority; the actual decision seems to have proceeded on a narrow point of pleading. It was an action for £50 for turnpike tolls; the defendant pleaded that there had been an agreement to submit matters in dispute between the parties to arbitration, and that an award had been made whereby an amount of £13 had been found to be payable by the defendant. But the defendant did not plead that the £13 had been paid, and, as clearly appears from the report, the demurrer by the plaintiff was based only upon the absence of such an averment. The point, therefore, was not that the £13 had not been paid, but that there was no plea that it had been, and the only matter decided by the court was that the defence amounted to a plea of accord without satisfaction. It is not possible to gather from the report whether the £13 had in fact been paid or not.

Allen v. Milner was explained and distinguished in Commings v. Heard (1869) L.R. 4 Q.B. 669 and referred to in Ayscough v. Sheed Thomson & Co. (1923) 92 L.J. K.B. 878. It was cited in argument in La Purisma Concepcion (1849) 13 Jur. 585, and it is one

of the cases cited in Dobbs v. National Bank of Australasia Ltd. (supra) in support of the passage which I have quoted earlier in this judgment: the support comes from a dictum of Lord Lyndhurst based on earlier cases, not the decision itself. Otherwise it does not appear to have received judicial consideration.

This case is not by any means free from difficulty; it is not as clear a case as Albeck v. A.B. Y-Cecil Manufacturing Co.Pty.Ltd. (1965) V.R. 342, in which a majority of the Full Court of Victoria held that it was the original agreement which bound the parties to performance of an obligation ascertained by an arbitrator's award; there was an appeal to the High Court, reported at 38 A.L.J.R. 437, but the point mentioned did not arise for consideration.

It only remains to deal with ground (d) of the demurrer. The arbitrator wrongly included interest upon an amount of damages as part of the sum which he awarded, and he conceived that it was clause 35(c) which authorised him to do so. The High Court pointed out that he was wrong, but allowed the award to stand for the reasons which are given in the report at 41 A.L.J.R. 307. But in my opinion this is quite irrelevant to the present question. An examination of the items of which the award was composed is impossible in these proceedings, and is unnecessary; what matters if whether the amount awarded constitutes moneys payable within the meaning of clause 35(c), and I have given my reasons for thinking that it does. This ground of the demurrer seems to me to raise an appeal to be determined by the length of the Chancellor's foot; if parties agree to refer matters in dispute, which may involve the resolution of difficult questions of law, to the arbitrament of an engineer, they must abide by the consequences if a mistaken view of the law is taken. For that matter, I do not suppose that a lawyer's estimate of the strength of structural steel required in a building would be particularly helpful.

For the reasons I have given, the demurrer should in my opinion be overruled. The defendant

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Lucas J.

(continued)

has not delivered a defence, and the time for doing so has expired; leave to plead within 14 days of the date of this judgment should in my opinion be given.

No. 7

Reasons for Judgment of Hoare J.

No. 7

REASONS FOR JUDGMENT OF HOARE J.

JUDGMENT - HOARE J.

I have had the benefit of reading the reasons for judgment of each of my brothers.

It is clear that an award made following a submission by the parties will in some cases extinguish the original cause of action while in other cases the original cause of action will remain. An award will have the effect of extinguishing the original cause of action if it imposes "a new obligation as a substitute, whether the obligation results from the tenor of the award or from an antecedent undertaking of the parties to give effect to the determination it embodies". (Dobbs v. National Bank of Australasia (1935) 53 C.L.R. 643 at p. 653).

On the other hand if the award merely ascertains the existence and measure of the original liability it does not extinguish the original cause of action. (Allen v. Milner (1831) 2 Cr. & J. 47 149 E.R. 20). This distinction was recognised and applied in Commings v. Heard (1869) L.R. 4 Q.B. 669. As

was observed by Lush J. in Commings v. Heard (supra) at pp. 673, 674 when applying Allen v. Milner (supra)" ..... an award upon a money claim does not alter the nature of the original debt; it leaves it remaining due .....

On the other hand, it is settled where the claim is one for unliquidated damages, an award, which settles the amount, may be pleaded in bar to the entire action although the plea on the face of it, shows that the money is not paid."

Thus if pursuant to an agreement of the parties an arbitrator makes an award, and he merely determines the amount of the liability, then the amount of the liability can be said to be payable under the earlier agreement. On the other hand where an award made pursuant to the agreement of the parties, goes beyond this situation and creates a debt where there was previously a mere unliquidated demand, then the award creates a new liability. It is no longer a liability existing and continuing under the earlier agreement. The distinction was also adverted to by Bankes L.J. in Aygcough v. Sheed Thomson & Co. (1923) 92 L.J.K.B. 878 at p. 880.

> "I think it is quite clearly established that where a person has a claim for damages, and, after the accrual of the cause of action, submits all disputes to arbitration, an award made in such a submission is a bar to the action for damages, also if the claim had been a claim for debt, and the award was merely that the debt was due and payable, it might not be a bar."

As has been so often said, proceedings by demurrer are frequently unsatisfactory and in the instant case it seems to me that it would have been preferable if the point had been raised in another way. However it would appear that this Court is entitled to refer to the award, some of which was set out in paragraph seven of the Statement of Claim and the relevant part was referred to and set out in paragraph one of the

In the Supreme Court of Queensland

No. 7

Reasons for Judgment of Hoare J.

(continued)

demurrer. It appears that as to the sum of $462,298.00 which was ordered by the arbitrator to be paid together with interest, the arbitrator was making what amounted to an award of damages. Pursuant to the general conditions of the contract, the contractor had a claim for loss of profits and damages for loss of use of plant. It seems to me that when the arbitrator made an award of these items he converted what was previously an unliquidated demand into a liquidated debt which became duly payable by the Council. As to this liquidated debt it was payable under the award and no longer represented an item payable under the earlier obligation (the building contract). Thus it cannot be said that it was an earlier obligation which was merely quantified by the award. Accordingly I am satisfied that there can be no claim for interest on this part of the award based on clause 35 (c) of the general conditions of the building agreement.

As to the item of $200,242.72 I am less confident that it cannot be said to be money due and owing pursuant to clause 41 of the general conditions. However I am prepared to accept the reasoning of my brother Hanger J. that the pleadings do not sufficiently establish that it was moneys payable under the original agreement.

Accordingly, I agree with Hanger J. that the demurrer should be allowed and I agree with the Order which he proposes.

No. 8

Order of the Full Court

14th November 1969

No. 8

ORDER OF FULL COURT

Dated 14 November 1969

FULL COURT BEFORE: THEIR HONOURS MR. JUSTICE HANGER, MR. JUSTICE LUCAS and MR. JUSTICE HOARE

THE FOURTEENTH DAY OF NOVEMBER, 1969

The Defendant having on the Fourth day of

June, 1969 demurred to the Plaintiff's Statement of Claim delivered on the Fifteenth day of May, 1969 and the said demurrer having been allowed by the Full Court on the twenty-eighth day of October, 1969 and this matter having come on for further consideration on this day and UPON HEARING Mr. Brennan of Queen's Counsel with him Mr. Fitzgerald for the Plaintiff and Mr. P.D. Connolly of Queen's Counsel with him Mr. Leewenthal for the Defendant and Counsel for the Plaintiff having referred to the judgment of the Full Court on the twenty-eighth day of October, 1969 and having sought leave of this Honourable Court to amend the Plaintiff's Statement of Claim in accordance with Exhibit "A" and the said Application having been refused by the Court, it is this day adjudged that judgment be entered for the Defendant in the action and that the Defendant do recover against the Plaintiff its costs of the action to be taxed and that the Plaintiff do pay to the Defendant its costs of this day's proceedings.

In the Supreme Court of Queensland

No. 8

Order of the Full Court

14th November 1969

(continued)

By the Court

W.C. Brooks

(L.S.) Registrar

(L.S.)

No. 9

AFFIDAVIT OF ANTHONY NOEL LEE ATKINSON

Dated 17 November 1969

No. 9

Affidavit of Anthony Noel Lee Atkinson

17th November 1969

I, ANTHONY NOEL LEE ATKINSON of 58 Eldernell Avenue, Hamilton, Brisbane in the State of Queensland, Solicitor, being duly sworn make oath and say as follows:-

1. I am a member of the firm of Morris Fletcher & Cross, Solicitors, the Solicitors for F.J. BLOEMEN PTY. LIMITED.

In the Supreme Court of Queensland

No. 9

Affidavit of Anthony Noel Lee Atkinson

17th November 1969

(continued)

2. By a writ of summons number 421 of 1969 F.J. BLOEMEN PTY. LIMITED (hereinafter referred to as "the plaintiff") commenced an action in the Supreme Court of Queensland against THE COUNCIL OF THE CITY OF GOLD COAST (hereinafter referred to as "the defendant").

3. A Statement of Claim was delivered by the plaintiff to the defendant on the 15th day of May 1969.

4. A Demurrer was delivered by the defendant to the plaintiff on the 4th day of June 1969.

5. The said Demurrer was entered for argument and was argued before The Full Court of this Honourable Court which was constituted by His Honour the Acting Senior Puisne Judge Mr. Justice Hanger, His Honour Mr. Justice Lucas, and His Honour Mr. Justice Hoare, on the 10th day of July, 1969. At the conclusion of such argument the Full Court reserved its decision.

6. On the 28th day of October 1969 the Full Court by a majority, His Honour Mr. Justice Lucas dissenting, allowed the Demurrer of the defendant, and ordered that the defendant do recover against the plaintiff its costs of the said Demurrer to be taxed and further ordered that the matter be adjourned to a date to be fixed for further consideration. His Honour Mr. Justice Hanger delivered reasons for his judgment with which His Honour Mr. Justice Hoare concurred. His Honour Mr. Justice Lucas delivered reasons for his judgment.

7. On the 14th day of November 1969 the Full Court constituted as aforesaid reconvened for further consideration and Counsel for the plaintiff after referring to the judgment of the Full Court on the 28th day of October 1969, stated that while the plaintiff was not to be taken as approbating the judgment of the Full Court or the reasons of the majority delivered as aforesaid (it being the intention of the plaintiff to challenge the judgment and the reasons of the majority) the plaintiff desired to apply for leave to amend the Statement of Claim.

Counsel for the plaintiff tendered a document entitled "Amended Statement of Claim" which was marked "A" by the Full Court and made application for leave to amend the Statement of Claim in terms of that document. Counsel for the Plaintiff then drew the attention of the Full Court to the proposition that, in view of the reasons for judgment of the majority of the Full Court it appeared to the plaintiff that the majority of the Full Court would consider the proposed amended statement of claim demurrable. In reply to a question from His Honour the Presiding Judge Counsel for the plaintiff while not consenting to refusal of the plaintiff's application for leave to amend, conceded that if the opinion of the majority of the Full Court were correct, judgment could not be obtained by the plaintiff on the proposed amended statement of claim, and that the allowing of the proposed amendment would be futile. Counsel appearing for the defendant stated that the defendant regarded the question of whether or not the Full Court should allow the proposed amendment as being a matter entirely for the Full Court and the Full Court then refused leave to amend. Counsel for the defendant declined to move for judgment but the Full Court gave judgment in this action for the defendant and ordered that the plaintiff pay to the defendant the defendant's costs of the proceedings before the Full Court that day.

8. I crave leave to refer to the Writ, Statement of Claim, Demurrer, and other documents before the Full Court, the Judgments and Orders of the Full Court above referred to and the Reasons for Judgment above referred to.

9. The plaintiff desires to appeal to Her Majesty in Council against the judgment and orders of the Full Court above referred to and respectfully requests the leave of this Honourable Court to do so

SWORN by the above-named Deponent at Brisbane in the State of Queensland this 17th day of November, 1969, before me) A.N.Lee Atkinson

E. Greene J.P.
A Justice of the Peace

In the Supreme Court of Queensland

No. 10

Order of Full Court

19th December 1969

No. 10

ORDER OF FULL COURT

(incorrectly dated 26th November 1969)

Date 19 December 1969

FULL COURT BEFORE THEIR HONOURS MR. JUSTICE HANGER MR. JUSTICE STABLE AND MR. JUSTICE KNEIPP

THE TWENTY SIXTH DAY OF NOVEMBER, 1969 (L.S.)

UPON MOTION this day made unto the Court by Mr. Brennan of Queens Counsel with him Mr. Fitzgerald of Counsel for F.J. BLOEMEN PTY. LIMITED (hereinafter referred to as "the applicant") and UPON HEARING Mr. Connolly of Queens Counsel with him Mr. Loewenthal of Counsel of THE COUNCIL OF THE CITY OF GOLD COAST (hereinafter referred to as "the respondent")

AND UPON READING the Affidavit of ANTHONY NOEL LEE ATKINSON filed herein on the 17th day of November 1969 and the Writ, Statement of Claim, Demurrer and other documents before the Full Court of Queensland in action number 421 of 1969 in this Honourable Court between the applicant as Plaintiff and the respondent as Defendant and the Judgements and the Orders and the Reasons for Judgment of the Full Court of Queensland in the said action

THIS COURT DOTH ORDER that the applicant be and is hereby granted leave to appeal to Her Majesty in Council from the several Judgments and Orders of the Full Court of Queensland made in the said action number 421 of 1969 in this Honourable Court on the 28th day of October, 1969 whereby the Demurrer delivered on the 4th day of June 1969 by the respondent to the Statement of Claim delivered on the 15th day of May 1969 by the applicant was allowed and it was adjudged that the respondent recover against the applicant its costs of the said Demurrer to be taxed and on

the 14th day of November 1969 whereby the applicant was refused leave to amend its Statement of Claim in accordance with Exhibit "A" tendered on that day before the Full Court of Queensland and judgment was ordered to be entered in such action in favour of the respondent and the applicant was ordered to pay the costs of that day's proceedings in the Full Court of Queensland

AND THIS COURT DOTH FURTHER ORDER that the appeals to Her Majesty in Council from the several Judgments and Orders of the Full Court of Queensland in the said action number 421 of 1969 made on the 28th day of October 1969 and the 14th day of November 1969 be and are hereby consolidated

AND THIS COURT DOTH FURTHER ORDER that the leave to appeal hereby granted to the applicant be and the same is conditional upon the applicant not later than the 25th day of February 1970 entering into a security in the sum of One thousand dollars ($1000) for the prosecution of the said consolidated appeal and the payment of all such costs as may become payable to the respondent in the event of the applicant not obtaining an Order granting it final leave to appeal or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the applicant to pay the costs of the respondent of the Appeal by paying the said sum of One thousand dollars ($1000) into this Honourable Court or by delivering to the Registrar of this Honourable Court a bond to the respondent executed by the applicant as obligor and any Bank, Insurance Company or Finance Company carrying on business in Queensland as surety

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of and incidental to this motion abide the event unless Her Majesty in Council should otherwise order

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said costs be paid by the applicant in the event of the applicant not obtaining an Order granting it final leave to

In the Supreme Court of Queensland

No. 10

Order of Full Court

19th December 1969

(continued)

appeal or of the appeal not being proceeded with or being dismissed for non-prosecution.

BY THE COURT

W.C. Brooks

(L.S.) REGISTRAR.

No. 11

Transcript of Judgment by Full Court

19th December 1969

No. 11

TRANSCRIPT OF JUDGMENT BY FULL COURT

Dated 19 December, 1969

IN THE FULL COURT OF QUEENSLAND

BEFORE: No. 421 of 1969

Mr. Justice Hanger
Mr. Justice Hart
Mr. Justice Kneipp

BRISBANE, 19 DECEMBER 1969

JUDGMENT

MR. JUSTICE HANGER: In my opinion, the judgment of the Full Court dismissing the plaintiff's action was a final judgment within the meaning of the Rules regarding appeals from Queensland to the Privy Council. As to the other orders of the Full Court, I think leave to appeal should be given but only for the reason that I do not wish there to be any legal obstacle to the Judicial Committee dealing with the whole of the matter in controversy between the parties. Otherwise, I would certainly have refused leave in respect of these orders. In my opinion, the order should be in terms of the draft which was handed up to the court in the course of the hearing of the application.

MR. JUSTICE HART: I agree that the order should be in the form proposed by the appellant at the hearing. I publish my reasons.

MR. JUSTICE HANGER: I am authorised by my brother Kneipp to say that he agrees that the order for leave to appeal should be granted as asked for and that the order should be in terms of the draft which was handed up in the course of the hearing of the application.

The order will be in terms of the draft which was handed up by the parties in the course of the hearing.

In the Supreme Court of Queensland

No. 11

Transcript of Judgment by Full Court

19th December 1969

(continued)

No. 12.

REASONS FOR JUDGMENT OF HART J.

No. 12

Reasons for Judgment of Hart J.

JUDGMENT - HART J

This is a notice of Motion seeking leave to appeal to Her Majesty in Council from:-

A. A judgment of this Court pronounced on the 14th November, 1969, in Action No. 421 of 1969 where judgment was ordered to be entered for the respondent defendant with costs of that day's proceedings to be taxed.

B. An order of this Court refusing leave to the applicant plaintiff to amend its pleadings in the said action.

C. The judgment of this Court pronounced on the 28th October, 1969, in the said action whereby the demurrer of the respondent to the Statement of Claim was allowed with costs to be taxed

In the Supreme Court of Queensland

No. 12

Reasons for Judgment of Hart J.

(continued)

R.2 of the Rules Regulation Appeals from Queensland of the 18th October 1909 is:

"2. Subject to the provisions of these Rules, an Appeal shall lie:-

(a) As of right from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of 500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of 500 sterling or upwards; and

(b) at the discretion of the Court, from any other judgment of the Court, whether final interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision."

By the Judicial Committee Rules of 1925 as amended by the Order-in-Council of August the 8th, 1932, all appeals to the Privy Council shall be brought either in pursuance of leave obtained from the Court appealed from or, in the absence of such leave, in pursuance of special leave to appeal from the Privy Council.

By an agreement in writing, the 5th March, 1965, (the contract) the Applicant contracted with the Respondent to perform certain work. Disputes arose as to the amounts which became owing to the Applicant and the matter was referred to arbitration. The arbitrator found:

(a) The work done by the contractor was inadequately recompensed by the schedule rates forming part of the contract.

(b) The contractor was justified in stopping work.

(c) The principal was not justified in refusing approval for the contractor to start work in Southport.

(d) The principal was not justified in cancelling the contract.

The arbitrator "accepted as proved the contractor's claim as set out in exhibit YY" in the sum of $200,242.72 which appears to have been in respect of wages under the contract and the sum of $263,056, which appears to have been for damages for breach of contract. He deducted the sum of $1000, allowed $16,180 for interest for six months or $462,298 at 7%, and awarded the sum of $478,478. This has been paid, but, owing to appeals to the Full Court and the High Court, it was not paid upon the date when it became due and the Applicant sued the Respondent for $49,688.02 for interest. I shall call the interest claimed in respect of the $200,242.72 amount A and the interest claimed in respect of the $263,056 and the $16,180 amount B, ignoring the $1000 on the de minimis principle. The Respondent demurred to this statement of claim. Paragraph 2 of the demurrer was:-

"2. The Defendant demurrs to the Plaintiff's Statement of Claim and says that the same is bad in law on the following grounds:-

(a) The said award was in substitution for, and superceded (sic) the rights of the parties under the Contract;

(b) The said award contains no provision relating to interest subsequent to the making of the award;

(c) On the proper construction of Clause 35(c) of the General Conditions

In the Supreme Court of Queensland

No. 12

Reasons for Judgment of Hart J.

(continued)

interest is not payable thereunder on the said award; and

(d) The Plaintiff's claim is for interest on an award, which itself contains provision for interest, which provision was bad in law.

And on other grounds sufficient in law. "

On the 28th October, 1969, this Court upheld the demurrer by a majority Hanger and Hoare J.J., Lucas J. dissented.

Clause 35(c) and Clause 41(a) of the contract provide:

"35(c) Contractor entitled to interest. The contractor shall be entitled to interest on all moneys payable to him, but unpaid, from the date on which payments become due, and such interest shall be calculated at twice the maximum ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts. This rate of interest shall be applicable to the whole of the moneys due to the contractor.

41(a) Submissions to arbitration. If any question, difference or dispute whatsoever shall arise between the principal and the contractor or the Engineer and the Contractor upon or in relation to or in connection with the contract which cannot be resolved by the contracting parties to their mutual satisfaction, either party may as soon as reasonably practicable by notice in writing to the other party clearly specify the nature of such question, difference or dispute and call for the point or points at issue to be submitted by settlement by arbitration."

With respect to amount B the majority held

that it was not payable as clause 35(c) did not apply to damages for breach of contract or to the interest upon interest. They further held with respect to both amounts A and B that the pleadings did not sufficiently establish that they were moneys payable under the contract. I think this is implicit in the reasoning of Hoare J. though he only expressly said so with respect to amount A. In Gold Coast City Council v. Canterbury Pipelines 41 A.L.J.R. 307 a majority of the High Court expressed the view that the Arbitrator had no power to allow interest on this sum of $263,056, which he had in fact done. Part of the $16,180 was interest on this sum and part on the $200,242.72. But as the point had not been taken in this Court, the High Court refused to entertain it.

Paragraph 6 of the affidavit of Mr. Atkinson a member of the firm of Morris, Fletcher and Cross the applicants' solicitors which was filed in support of the Notice of Motion referred to the allowing of the demurrer on the 28th October, 1969. Paragraph 7 of that affidavit is:-

> "7. On the 14th day of November 1969 the Full Court constituted as aforesaid reconvened for further consideration and Counsel for the plaintiff after referring to the judgment of the Full Court on the 28th day of October 1969, stated that while the plaintiff was not to be taken as approbating the judgment of the Full Court or the reasons of the majority delivered as aforesaid (it being the intention of the plaintiff to challenge the judgment and the reasons of the majority) the plaintiff desired to apply for leave to amend the Statement of Claim. Counsel for the plaintiff tendered a document entitled "Amended Statement of Claim" which was marked "A" by the Full Court and made application for leave to amend the Statement of Claim in terms of that document. Counsel for the Plaintiff then drew the attention of the Full Court to the proposition that,

In the Supreme Court of Queensland

No. 12

Reasons for Judgment of Hart J.

(continued)

in view of the reasons for judgment of the majority of the Full Court it appeared to the plaintiff that the majority of the Full Court would consider the proposed amended statement of claim demurrable. In reply to a question from His Honour the Presiding Judge Counsel for the plaintiff while not consenting to refusal of the plaintiff's application for leave to amend, conceded that if the opinion of the majority of the Full Court were correct, judgment could not be obtained by the plaintiff on the proposed amended statement of claim, and that the allowing of the proposed amendment would be futile. Counsel appearing for the defendant stated that the defendant regarded the question of whether or not the Full Court should allow the proposed amendment as being a matter entirely for the Full Court and the Full Court then refused leave to amend. Counsel for the defendant declined to move for judgment but the Full Court gave judgment in this action for the defendant and ordered that the plaintiff pay to the defendant the defendant's costs of the proceedings before the Full Court that day."

The Court entered judgment pursuant to O. 29 r. 10 of the Supreme Court rules which is:

"10. Effect of Decision on Demurrer going to Whole Action. Subject to the power of amendment, when a demurrer to the whole of any pleading, so far as it relates to a separate cause of action, is allowed or overruled, the Court shall give such judgment as to that cause of action as upon the pleadings the successful party appears to be entitled to, and, if the judgment is for the defendant with respect to the whole action, the plaintiff shall pay to the defendant the costs of the action, unless the Court otherwise orders."

Demurrers were abolished in England in 1883. There was no similar provision to O. 29 r. 10 in the schedule to the Judicature Act of

1873. By O. 28 r. 10, the effect apart from costs of allowing a demurrer was that the matter demurred to was struck out of the pleadings. (The Law Reports Statute 1875 p. 804).

The decisions on what amounts to a final judgment are difficult and conflicting. The matter has recently been before the High Court in Hall v. The Nominal Defendant (1966) 117 C.L.R. 423, where it was held by a majority that an order refusing an application for an extension of time within which to institute proceedings against the Nominal Defendant was not a final order within the meaning of S. 35 (1)(a) of the Judiciary Act. Taylor J. at pp. 439-440 approved as a broad test that laid down by Lord Alberstone C.J. in Bozson v. Altrincham Urban District Council (1903) 1 K.B. 547 at pp. 548-9 which is:-

> "Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

Taylor J. pointed out that it has in the main, been the practice of the courts to confine themselves to a consideration of the character of the particular order in question in each case. In Re: Page (1910) 1 Ch. 489 the Court of Appeal held, not for the first time, that an order dismissing an action for want of prosecution is for the purposes of appeal an interlocutory order. Buckley L.J., as he then was, felt some difficulty in agreeing with the other members of the Court at p. 494 he said:-

> "This, however, is an order in favour of the defendants and it brings this action altogether to an end. To my mind it would be reasonable to say that this is a final order. But I do not think I am entitled to found myself on that, because there have been many decisions in which orders apparently final have been treated as interlocutory. The Master of

In the Supreme Court of Queensland

No. 12

Reasons for Judgment of Hart J.

(continued)

the Rolls has referred to one or two of them."

In Smith v. Cowell (1880) 6 Q.B.D. 75 an order made after final judgment was held to be interlocutory. But there S. 25 (8) of the Judicature Act could be treated as defining the word interlocutory.

The High Court has dealt with demurrers for the purpose of S. 35 of the Judicature Act in Hope v. R.C.A. Photophone 59 C.L.R. 348. Evatt J. said at p. 352. "The true position is that a judgment on demurrer may be final or interlocutory; the court has to see the whole issue between the parties, including those portions of the issue contained in the demurrer, together and see whether the judgment or demurrer finally disposes of the issue between the parties." In that case the plaintiff sued the defendant for money payable for the hire of certain equipment under an agreement. The defendant in a replication pleaded that under the agreement the plaintiff was bound to supply new equipment and that it had in fact supplied old equipment. The plaintiff demurred and the demurrer was allowed by the Supreme Court of New South Wales on the ground that the agreement on its proper construction did not require that the equipment should be new and that parol evidence was not admissable to establish that the parties intended new equipment. This was held to be a final judgment at p. 352 Dixon J., as he then was, said:-

> "The plea by way of cross-action sets up an independent cause of action upon which there may be an independent recover, and, in my opinion, the judgment in demurrer was a final conclusion which of itself determined the rights of the parties and concluded the cross-action. The fact that the defendant might have amended does not affect the matter, because no amendment was made and none of any use could have been made. No doubt, when liberty to amend is given and exercised, it might prevent such a judgment operating in its prima-

facie conclusive form."

In my opinion when this Court gave judgment on the 28th October its judgment was final as to amount B, as it had been held that interest was not payable on the damages or interest awarded. No amendment could have made any difference. But with respect to amount A I do not think it was final as the matter had been determined purely on a point of pleading. I consider the amounts may be considered separately for the purpose of appeal.

On this basis I do not think the concession of Counsel as set out above in paragraph 7 of Mr. Atkinson's affidavit that any proposed amendment on the reasons of the majority would be futile was correct. It would have been futile with respect to amount B, but not with respect to amount A.

After this concession the Court entered judgment against the applicant pursuant to O. 29 r. 10.

In my opinion once that order was made the applicant could no longer set up the causes of action contained in the Statement of Claim. They had merged in the judgment. See Thoday v. Thoday (1964) p. 181 at 197. In Blair v. Curran 62 C.L.R. 464 Dixon J., as he then was, said at pp. 531, 532:

> "A Judicial determination directly involving an issue of fact or of law disposes once for all of the issue so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue-estoppel is that in the first the

In the Supreme Court of Queensland

No. 12

Reasons for Judgment of Hart J.

(continued)

very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of act or law is alleged or denied the existence of which is matter necessarily decided by the prior judgment, decree or order."

The passage has been subject to much judicial approval. As by the judgment the applicant is precluded from again setting up the causes of action in the Statement of Claim, I consider that it is final. The fact that the applicant was manoeuvring for a final order does not affect the question. The Court was fully aware of the relevant matters. The result is we have no discretion to refuse leave to appeal, and this is so even if, contrary to the opinion I have expressed amounts A and B must be considered together for the purpose of appeal.

But if this conclusion as to res judicata is wrong, on the basis that A and B may be considered separately for the purpose of appeal I think we should still give leave to appeal as to both amounts A and B. The order with respect to amount B was as I have said final on the 28th October, 1969 and we have no discretion as to the giving of leave. Thus the matter will go to the Privy Council as to that amount. It is in my opinion more convenient to the parties that the whole matter should go rather than that they should by amendments be compelled to litigate half the case in Brisbane and half in London. There are also important questions of law involved. I think we should also give leave to appeal as to the amendments so that the whole matter may come before their Lordships. The order should be in the form proposed by the appellant at the hearing and handed to the Court.

No. 13

REASONS FOR JUDGMENT OF KNEIPP J.

In the Supreme Court of Queensland

No. 13

Reasons for Judgment of Kneipp J.

JUDGMENT - KNEIPP J.

I think that the judgment which was entered in favour of the defendant, dismissing the action, was a final judgment within the meaning of Rule 2 (1) of the Rules regulating appeals from Queensland to the Privy Council: Coroneo v. Kurri Kurri and South Maitland Amusement Co. Ltd. (51 C.L.R. 328, at p.334): Hope v. R.C.A. Photophone of Australia Pty. Ltd. (59 C.L.R. 348); Hall v. Nominal Defendant (117 C.L.R. 423). The judgment plainly disposed of and determined the issues which had been joined between the parties, and I do not see that it could be described as anything but final as that expression is used in this context.

I therefore think the Court should hold that there is a right of appeal from this judgment (Lady Davis v. Lord Shaghanessy (1932) A.C. 106) and grant leave to appeal under Rule 2 of the Judicial Committee Rules, 1925, subject to the usual conditions as to costs.

The other two appeals are in a sense bound up with the first, and if leave to prosecute them is not given then it is at least possible that there could be obstacles in the way of a full adjudication by the Judicial Committee on the arguments which the parties might wish to canvass on the appeal. I therefore think that in the case of these two appeals leave should also be given.

In the Supreme Court of Queensland

No. 14

Order of Full Court

17th March 1970

No. 14

ORDER OF FULL COURT

Dated 17 March, 1970

FULL COURT BEFORE: THEIR HONOURS MR. JUSTICE HANGER, MR. JUSTICE HART AND MR. JUSTICE W.B. CAMPBELL

THE SEVENTEENTH DAY OF MARCH, 1970

UPON MOTION this day made unto the Court by Mr. Fitzgerald of Counsel for F.J. Bloemen Pty. Limited, (hereinafter referred to as "the applicant") AND UPON HEARING Mr. Aboud of Counsel for the Council of the City of Gold Coast (hereinafter referred to as "the respondent") AND UPON READING the Affidavit of Anthony Noel Lee Atkinson filed herein on the Seventeenth day of November 1969 and the writ, statement of claim, demurrer and other documents before the Full Court of Queensland in action No. 421 of 1969 in this Honourable Court between the applicant as plaintiff and the respondent as defendant and the judgments and orders and the reasons for judgment of the Full Court of Queensland in the said action and the further affidavit of the said Anthony Noel Lee Atkinson filed herein on the Twelfth day of March 1970

THIS COURT DOTH ORDER that the consolidated appeals to Her Majesty in Council from the several judgments and orders of the Full Court of Queensland made in the said action No. 421 of 1969 in this Honourable Court on the Twenty-eighth day of October 1969 whereby the demurrer delivered on the Fourth day of June 1969 by the respondent to the statement of claim delivered on the Fifteenth day of May 1969 by the applicant was allowed and it was adjudged that the respondent recover against the applicant its costs of the said demurrer to be taxed and on the Fourteenth day of November 1969 whereby the

applicant was refused leave to amend the statement of claim in accordance with exhibit "A" tendered on that day before the Full Court of Queensland and judgment was ordered to be entered in such action in favour of the respondent and the applicant was ordered to pay the costs of that days proceedings in the Full Court of Queensland be allowed to be made

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of and incidental to this motion abide the event unless Her Majesty in Council should otherwise order

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said costs be paid by the applicant in the event of the said consolidated appeals not being proceeded with or being dismissed for non prosecution.

BY THE COURT

W.C. Brooks

(L.S.) REGISTRAR

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969

EXHIBITS

EXHIBIT "A"

PROPOSED AMENDED STATEMENT OF CLAIM

AMENDED STATEMENT OF CLAIM

Amended the day of 1969
pursuant to Order dated the
day of 1969.
(Delivered the day of 1969)

1. The plaintiff (hereinafter referred to as "the contractor") is a company duly incorporated in the State of New South Wales and registered in the State of Queensland and having its registered office in the said State at C/- R.H. Mainwaring, English & Peldaw, Chartered Accountants, Perry House, 131 Elizabeth Street, Brisbane.

2. The defendant (hereinafter called "the principal") is a local authority constituted under and in accordance with the provisions of "The Local Government Acts 1936 as amended."

3. By an agreement in writing bearing date the Fifth day of March 1965 the contractor covenanted faithfully to execute and complete several works and provisions in accordance therewith and the principal covenanted to pay to the contractor such sums as might become payable pursuant thereto at such times and in such manner as therein provided. ~~The contractor craves leave to incorporate the said agreement in writing herein and will refer thereto at the trial of this action for its full terms true meaning and effect.~~

4. Clause 35(c) and Clause 41 of the general conditions of the said agreement in writing bearing date the Fifth day of March 1965 respectively provide as follows:-

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969

(continued)

"35(c) - Contractor entitled to interest. The Contractor shall be entitled to interest on all moneys payable to him, but unpaid, from the date on which payments become due, and such interest shall be calculated at twice the maximum ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts. This rate of interest shall be applicable to the whole of the moneys due to the contractor."

"41(a) - Submissions to arbitration. If any question, difference of dispute whatsoever shall arise between the principal and the contractor or the Engineer and the Contractor upon or in relation to or in connection with the contract which cannot be resolved by the contracting parties to their mutual satisfaction, either party may as soon as reasonably practicable by notice in writing to the other party clearly specify the nature of such question, difference or dispute and call for the point or points at issue to be submitted by settlement by arbitration.

(b) - Arbitration and arbitrators. Arbitration shall be effected -

(i) by an arbitrator agreed upon between the parties, or failing agreement upon such an arbitrator,

(ii) by an arbitrator appointed by the President for the time being of the Institution of Engineers, Australia, or failing such appointment,

(iii) by an arbitrator appointed

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969

(continued)

in accordance with the provisions of the arbitration act of the State whose laws govern the contract.

(c) - Arbitration deemed to be under Arbitration Act. Submission to Arbitration shall be deemed to be submission to arbitration within the meaning of the Arbitration Act of the State whose laws govern the contract.

(d) - Costs. Upon every and any submission to arbitration the costs of and incidental to the submission and award shall be at the discretion of the arbitrator, who may determine the amount thereof or may direct that the costs be taxed by a proper officer of the Court. The arbitrator shall direct by whom, in what proportion and in what manner costs shall be paid.

(e) - Continuation of work and payments during arbitration. If it be reasonably possible, work under the contract or any variation thereto shall continue during arbitration proceedings, and no payment due or payable by the principal shall be withheld on account of the arbitration proceedings unless so authorised by the Contractor. "

~~5. Each of the parties served upon the other a notice of dispute in relation to certain differences between the parties arising out of the said agreement in writing.~~

5. Pursuant to and in accordance with the said clause 41 certain questions differences and disputes of the nature referred to in such clause were submitted by the principal and the contractor to the arbitration of one F.W. Laws of Strathfield in the State of New South Wales.

~~6. On the Sixth day of January 1966 the~~

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969 (continued)

parties executed a document entitled "Terms of Arbitration" whereby they appointed one F.W. Laws the Arbitrator pursuant to the said Clause 41 of the said agreement in writing, on the terms therein set out and referred to the said Arbitrator all matters and differences between them. The contractor craves leave to incorporate the said "Terms of Arbitration" herein and will refer thereto at the trial of this action for its full terms, true meaning and effect.

6. No question dispute or difference relating to the entitlement of the contractor to interest on any moneys in respect of any period subsequent to the date of the award of the said arbitrator was submitted to arbitration by the parties.

7. By a document in writing bearing date the Eighth day of November 1966 the said F.W. Laws made an award of and concerning the matters so referred to him in the following terms:-

"1. I award and direct that the said Council of the City Gold Coast shall pay the said Canterbury Pipelines (Aust.) Pty. Ltd. the sum of FOUR HUNDRED AND SEVENTY-EIGHT THOUSAND FOUR HUNDRED AND SEVENTY-EIGHT DOLLARS ($478,478.00).

2. I award that the said sum of FOUR HUNDRED AND SEVENTY-EIGHT THOUSAND FOUR HUNDRED AND SEVENTY-EIGHT DOLLARS ($478,478.00) be paid and accepted in full satisfaction of all claims by each of the said parties against the other and of all matters and differences between them.

3. As to costs I award and direct that the said Council of the City of Gold Coast shall pay to the said Canterbury Pipelines (Aust.) Pty. Ltd. its costs of and attending to the said arbitration and shall also pay the costs of this my award."

7. Between the 28th day of June 1966 and the 5th day of September 1966 an arbitration of the

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969 (continued)

questions differences and disputes submitted as aforesaid was duly conducted.

8. ~~By the following letters that is to say:~~

~~letter from Plaintiff's Sydney Solicitors to Solicitors for the Defendant dated 4th August 1966;~~

~~letter from Plaintiff's Sydney Solicitors to the Defendant's Solicitors dated 14th March 1968, and~~

~~letter from Defendant's Solicitors to Plaintiff's Sydney Solicitors dated 16th April 1968,~~

~~the parties agreed upon the sum of $13,808.02 as the Contractor's costs of and attending the said arbitration and the costs of the said award.~~

8. By a document in writing bearing date the 8th day of November 1966 the said arbitrator made an award of and concerning the questions differences and disputes submitted as aforesaid whereby he awarded and directed the principal to pay to the contractor the sum of $478,478.00 and its costs of and attending to the said arbitration and further directed the principal to pay the costs of the award.

9. ~~The principal has made the following payments to the contractor in satisfaction of the said award:~~

~~22nd February 1968 ------ $403,478.00~~
~~28th March 1968 ------ $ 75,000.00~~
~~17th April 1968 ------ $ 13,808.02~~

9. The parties agreed upon the sum of $13,808.02 as the contractor's costs of and attending the said arbitration and the costs of the said award.

10. ~~The maximum ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts has been three and one half per cent (3.1/2%) per annum until 31st July 1968,~~

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969

(continued)

and thereafter three and three-quarter per cent (3.3/4%):-

10. The principal paid to the contractor as moneys payable in respect of the said agreement in writing bearing date the fifth day of March 1965 pursuant to the said award the sums following:-

22nd February 1968	$403,478.00
28th March 1968	$ 75,000.00
17th April 1968	$ 13,808.02

11. The maximum ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts was three and one-half per cent (3.1/2%) per annum from the date of the said award until 31st July 1968, and thereafter has been three and three-quarter per cent (3.3/4%).

11. 12. The principal is presently indebted to the contractor in the sum of $49,688.02 which amount is calculated as follows:-

Arbitrator's award dated November 8th, 1966	$478,478.00
Cost of Arbitration (as agreed)	13,808.02
Amount due at November 8th, 1966 ~~as per clause 35C of General Conditions of Contract~~	$492,286.02
Add interest for 1 year to 7th November 1967 (inclusive) at 7% per annum due 8th November 1967	34,460.02
	$526,746.04
Less Payment by Council received 22nd February 1968	403,478.00
	123,268.04

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969 (continued)

	b/f	$123,268.04
Less Payment by Council received 28th March, 1968		75,000.00
		$ 48,268.04
" Payment by Council received 17th April, 1968		13,808.02
Award plus costs x 1 year interest less payments made		34,460.02
Add Interest		
8th November 1967 to 22nd February 1968 107 days at 7% on $526,746.04 =	$10,809.16	
23.2.68 to 28.3.68 35 days at 7% on $123,268.04 =	827.42	
29.3.68 to 17.4.68 20 days at 7% on $48,268.04 =	185.14	
18.4.68 to 31.7.68 105 days at 7% on $34,460.02 =	693.92	
1.8.68 to 8.5.69 281 days at 7.1/2% on $46,975.66 =	2,712.36	15,228.00
TOTAL AMOUNT DUE AT 8th May 1969.		$49,688.02

12.13. The principal has failed or neglected or refused to pay the said amount or any part thereof to the contractor.

AND the contractor claims $49,688.02 being monies owed by the principal to the contractor and/or monies payable by the principal to the contractor under and pursuant to the provisions of an agreement in writing bearing date the Fifth day of March, 1965 between the contractor and the principal plus interest thereon at the rate of seven and one-half per cent (7.1/2%) from the date of

the Writ of Summons herein until the date of payment or Judgment.

This pleading was settled by Mr. Brennan of Queen's Counsel and Mr. Fitzgerald of Counsel.

Solicitors for the Plaintiff

The defendant is required to plead to the within Statement of Claim within twenty-eight days from the time limited for appearance or from the delivery of the Statement of Claim whichever is the later, otherwise the plaintiff may obtain judgment against it.

10

Exhibits

Exhibit "A"

Proposed Amended Statement of Claim referred to in Order 14th November 1969

(continued)

No. 38 of 1970

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

F.J. BLOEMEN PTY. LIMITED formerly
CANTERBURY PIPELINES (AUST.) PTY. LIMITED
(Plaintiff) Appellant

AND

THE COUNCIL OF THE CITY OF GOLD COAST
(Defendant) Respondent

RECORD OF PROCEEDINGS

PARK NELSON, DENNES,
REDFERN & CO.,
11 Essex Street,
Strand,
London, W.C.2.

Solicitors for the
Appellant

LIGHT & FULTON,
24, John Street,
Bedford Row,
London,
W.C. IN 2DA

Solicitors for the
Respondent