

IN THE PRIVY COUNCIL

No. 35 of 1978

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION IN CAUSE NO. 12093 OF
1978

B E T W E E N :

THE UNIVERSITY OF NEW SOUTH WALES Appellant
(Plaintiff)

- and -

10 MAX COOPER & SONS PTY. LIMITED Respondent
(Defendant)

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the Judgment of the Supreme Court of New South Wales, Common Law Division (Sheppard J.) dismissing a Summons on behalf of the Plaintiff to set aside an award of Arbitrators on the ground that the award disclosed an error of law upon its face. The learned Judge held that he was bound by the decision of the majority of the Court of Appeal Division of the Supreme Court of New South Wales (Hutley and Glass J.J.A., Hope J.A. dissenting) when the point at issue between the parties had been decided by the said Court upon a Case Stated. It is the submission of the Appellant that the said majority decision of the Court of Appeal and therefore the decision of the learned Judge following the same were both wrong and that since the said majority decision of the Court of Appeal was wrong and since it was expressly followed by the Arbitrators in making their said award and incorporated therein the award discloses an error of law upon its face.

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The order appealed from

2. The Petitioner and the Respondent were the parties to a building agreement as proprietor and builder respectively.

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lines G-T

That Contract contained an arbitration clause (Condition 32).

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Certain differences arose between the parties and there was an arbitration, in the course of which the Respondent asked the Arbitrators to state a case for the opinion of the Supreme Court.

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Pages 23 Line R
to Page 25 Line C
and Page 32
Line M to Page 34
Line P

That case concerned the proper construction of, and inter relationship between Condition 24 and Special Condition 3 of the Contract.

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3. The case was dealt with at first instance by Collins J., who answered the question asked in favour of the Petitioner.

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The Respondent appealed to the Court of Appeal Division of the Supreme Court and by majority (Hutley & Glass J.J.A., Hope J.A. dissenting) the appeal was allowed and the question asked in the case answered in favour of the Respondent.

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4. The appellant, whilst dissatisfied with the decision of the Court of Appeal and intending to ultimately challenge the correctness of that decision, felt unable to appeal directly from that decision, because it was an advisory opinion only. In re Knight and Tabernackle Permanent Building Society (1892) 2 Q.B. 613, Minister for Works for the Government of Western Australia v. Civil & Civic Pty. Limited 116 C.L.R. 273. The hearing of the arbitration therefore resumed, and thereafter the arbitrators published their award.

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5. The award stated, in effect on its face that the arbitrators had applied the reasoning of the majority of the Court of Appeal Division of the Supreme Court as to the construction of the Contract.

6. The appellant sought an order setting aside that award, for error of law on its face (namely the adoption by the arbitrators of the judgment and reasons for judgment of the majority of the Court of Appeal and the incorporation into their award of those reasons). That summons was dismissed by Sheppard J. who held that he was bound by the majority of the Court of Appeal. He did not examine their reasons.

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7. The appellant humbly submits that the majority of the Court of Appeal were in error, and that upon the proper construction of the Contract, the question asked in the Stated Case should have been answered in favour of the Appellant; that is,

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that upon the proper construction of the Contract the builder was not entitled to be paid the moneys claimed by it.

The Construction of the Contract:

8. The contract provided for the construction by the Respondent builder of a building for the lump sum of \$2,072,938.00 called in the contract "the contract sum" (Clause 2).

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10 The form of the contract was printed and it was a form copyrighted by The Royal Australian Institute of Architects and The Master Builders' Federation of Australia Inc. The printed form was modified in certain respects by typed matter, including the addition of a Special Condition 3 entitled "Variation of Contract Sum by Application of a Rise & Fall Provision", which provided for the adjustment of the contract sum from time to time, in respect of the then uncompleted portion of the building work, by reference to a formula set out in the Special Condition. In substance that formula provided that the builder should recover 60% of the cost of any upwards variation in the cost of labour.

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to Page 34
Line P

20 9. In the printed part of the contract, Condition 25 provided that the builder was to give Practical Completion of the works by a nominated date, 18th July, 1973, and Condition 27 provided for the payment of liquidated damages should it not do so.

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D to Q

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to Page 26
Line E

40 Condition 24 provided that the builder might in certain circumstances obtain an extension of time for the completion of the works, and also (in Clause (i)) that the builder should be entitled to reimbursement for loss or expense incurred by it as a result of delay in the progress of the works, provided that the conditions then set forth were satisfied.

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50 10. The arbitrators found that during the performance of the contract, the progress of the works was delayed, that in respect of certain delays the builder had claimed an extension of time for the completion of the works, and an entitlement to reimbursement for loss and expense incurred by it in respect of those delays. They found also that during the performance of the contract the contract sum

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had been varied on a number of occasions, pursuant to Special Condition 3, that following the date for practical completion of the works stipulated in the contract, 18th July 1973, the cost of performance of the works was increased by variations in the cost of labour within the meaning of Special Condition 3, and that the cost to the builder exceeded the amount recovered by the builder pursuant to Special Condition 3.

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Page 8 Line R

11. The builder claimed that it was entitled to be reimbursed under the provisions of Clause 24 for the whole of the loss or expense incurred by it in respect of those increases in the cost of labour, and not just the 60% thereof paid to it pursuant to the provisions of Special Condition 3.

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12. For the appellant, it is submitted that Condition 24 and Special Condition 3 both relate to matters which the parties contemplated might arise during the performance of the contract and in respect of which they made provision. The payment by the builder of increased wages as a result of variations in the cost of labour was one such possibility and it was provided for in Special Condition 3. That Special Condition operated whenever those increased costs were incurred. Condition 24 provided for the reimbursement of the builder in respect of expense incurred by it as a result of delay in the progress of the works, but when construing that condition, regard must be had to the fact that the parties made separate provision for the cost of increased labour costs. To construe Special Condition 24 as the builder seeks to construe it is to ignore Special Condition 3.

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13. An examination of Condition 24(i) as a whole, and in its context, indicates that where, as here, lengthy delays may be encountered, in a time of inflation, Condition 24 is inappropriate as a means of reimbursing the builder for increased costs of labour, where that increased cost may be encountered, not immediately at the time of the delay, but later and perhaps years later. Thus, for example, the fact that there is a week's delay early in the performance of the contract because of a strike may mean that the performance of the contract will be extended by a week, and towards the end of the performance of the contract, perhaps a year later, the level of wages will be higher. In such circumstances the builder cannot at the time of the delay or close thereto comply effectively with the provisions of Condition 24(i) (vii) and (viii), and as soon as possible after the commencement of the delay give

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details of the nature of its claim, and details of the items of expense likely to be incurred later on and the amounts thereof or a close estimate thereof.

10 14. The submission of the appellant as to how the contract should be construed is reinforced by a consideration of other portions of the contract and in particular Special Condition 3(g) and (h), Special Condition 4 and Special Condition 19. It is submitted that Special Condition 3(g) and (h) assumes that Special Condition 3 regulates the entitlement of the builder to reimbursement for extra work (or "variations") so far as there have been increases in the cost of labour, by reference to the balance of Special Condition 3 and to the exclusion of Special Condition 24.

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Page 19 Line J-V

20 15. Condition 24 only operates in relation to loss or expense incurred during the period of delay "in the progress of the works", or at least in respect of loss or expense directly related to matters occurring during that period of delay. It does not operate in respect of loss or expense incurred by reason of delay in the completion of the works. It does not extend to a claim such as is made here, for loss or expense incurred at a later point in time, because work which would have been done at one time, was by reason of the delay done at a later time, when wages were higher; or
30 alternatively where because one item of work could not be done at a certain time because of a delay, the whole performance of the contract was delayed and other work was done at a later time when the cost of labour was higher.

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to Page 25
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Error on the Face of the Award:

40 16. The award recited that a question of law had arisen, and identified that question, recited the stating of the case, and the opinion of the Court of Appeal "that the builder was entitled to recover from the proprietor for loss or expense by reason of increased wages resulting from the delay", and the remission of the case back to the arbitrators, and then went on to find that the builder was entitled to a sum of money.

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Page 23-24

50 17. It is submitted that this portion of the award necessarily indicates that the arbitrators intended to publish and were in fact publishing an award in compliance with the opinion of the Court of Appeal, and to make it

RECORD

clear that their award was published in conformity with that opinion, so as to incorporate that opinion into the award. The Council of the City of Gold Coast v. Canterbury Pipe Line (Aust.) Pty. Limited 118 C.L.R. 58, Tuta Products Pty. Limited v. Hutcherson Bros. Pty. Limited 127 C.L.R. 253, Giacomo Costa Fu Andrea v. British Italian Trading Co. Limited (1963) 1 Q.B. 201.

The State of the Record:

18. The Appellant in arguing the appeal, seeks to rely upon the Appeal Book in appeal to the Court of Appeal referred to in paragraph 2 hereof, which document is not contained in the record, but is exhibited to an Affidavit of Kenneth Bately Ramsay sworn 20th March, 1979 supporting a Petition for leave to include such document in the Record. The said Appeal Book incorporates the stated case herein referred to, which annexes a copy of the Contract the subject of the dispute between the parties. 10

19. When the Summons of the Appellant, seeking an order that the Award be set aside came on for hearing, the Affidavit relied on by the Appellant in support of the Summons referred to the Appeal Book, but did not expressly incorporate it. It was not formally tendered, but was referred to by Counsel and Sheppard J. in his Reasons for Judgment. It was not tendered due to inadvertence. An Affidavit of Derek Ian Cassidy, Counsel for the Appellant on the hearing before Sheppard J. sworn 19th March, 1979 is filed with the Petition. 20

20. The appellant humbly submits that in these circumstances, and since any review of the correctness of the decision of the Court of Appeal necessarily involves an examination of the Stated Case, and the Contract a copy of which was annexed to that Stated Case, and since the matter was openly referred to in the proceedings before Sheppard J., who could not have reached his decision without reference at least to a copy of the Contract between the parties, no injustice will be done to the respondent by examining those documents, and that they should be examined. 40

21. The appellant therefore submits that the appeal should be allowed, and an Order made setting aside the said award, and that the Respondent pay the costs of the Summons and of this appeal for the following among other

R E A S O N S

(1) BECAUSE upon its true construction Condition 50

24 of the contract does not entitle the Respondent to recover its increased costs of labour as awarded, the only entitlement thereto being as provided by special condition 3.

- (2) BECAUSE the Court of Appeal of New South Wales, in so holding, were wrong; and therefore the award of Arbitrators which incorporates the said decision discloses an error of law upon its face.

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A.B. SHAND

N.W. LYELL

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B E T W E E N :

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Appellant

- and -

MAX COOPER & SONS PTY. LIMITED

Respondent

CASE FOR THE APPELLANT

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