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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 Appellants

\- and -

MAX COOPER & SONS PTY. LIMITED Respondents

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CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal as of right from a judgment of the Supreme Court of New South Wales (Sheppard, J.) given on 2nd June, 1978. pp.28-31

2. The proceedings before His Honour were instituted by a Summons dated 5th May, 1978 which sought, inter alia, an order that an award made by two arbitrators in an arbitration between the Appellants and the Respondents on 7th April, 1978 "be set aside". pp.25-26

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3. That Summons was dismissed and it is from that order which the Appellants appeal.

HISTORY

4. The Respondents entered into a contract dated 6th July, 1972 with the Appellants to carry out certain building works for the Appellants. p.27 1.1

5. The said contract contained an arbitration clause. p.27 1.7

6. After the completion of the works disputes arose between the Appellants and the Respondents as to the Respondents' entitlement to payment. p.27 1.10

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7. The said disputes were submitted to the arbitration of Messrs. Harry Oswald Hall and Geoffrey Lawrence Lumsdaine. p.27 11.13-16

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p.23 ll.23-26	8. The arbitration came on for hearing on 23rd and 24th February, 1976.
p.24 l.3	9. The arbitrators stated a case for the opinion of the Supreme Court of New South Wales.
pp. 1-22	10. The Court of Appeal Division of the Supreme Court of New South Wales delivered judgment dealing with the said stated case on 13th December, 1977.
p.23 l.5	11. The stated case was remitted to the arbitrators with an expression of opinion from the Court of Appeal. (10)
p.23 l.26	12. The arbitration resumed hearing on 13th March, 1978.
p.24 l.13-15	13. Upon the resumed hearing the arbitrators heard evidence and the addresses of Counsel.
pp.23-24	14. On 7th April, 1978 the arbitrators made an award which recited:-
p.23 ll.23-20	(a) "This arbitration coming on to be heard before us the undersigned Harry Oswald Hall and Geoffrey Lawrence Lumsdaine sitting as joint arbitrators on 23/2/76, 24/2/76 and 13/3/78 (20) WHEN Mr. V. Bruce of Counsel appeared for the builder and Mr. A.B. Shand of Queen's Counsel and with him Mr. D.I. Cassidy appeared for the proprietor.
p.23 ll.29-31	(b) AND UPON READING the points of claim of the builder and the points of defence of the proprietor as amended.
p.23 l.31- p.24 l.3	(c) AND questions of law having arisen as to the right of the builder upon a proper consideration of the provisions of the contract between the (30) parties in relation to facts that had happened in performance of the said contract to be reimbursed for loss or expense incurred by the builder in respect of otherwise unrecovered increased costs of such performance.
p.24 ll.3-5	(d) AND we having stated a case for the opinion of the Supreme Court upon the said questions of law.
	(e) AND the matter having been decided by the Court of Appeal upon appeal from the Supreme (40) Court wherein it was stated as 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 delay.

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(f) AND the Court remitted the stated case to us with that expression of opinion. — p.24 ll.11-12

(g) AND HAVING HEARD AND CONSIDERED the evidence adduced on behalf of the respective parties. — p.24 ll.13-14

(h) AND what was alleged by Counsel. — p.24 ll.14-15

(i) WE FIND that the builder is entitled to recover in respect of the provisions of contract the subject of the said stated case the sum of Twenty thousand five hundred and sixty-two dollars ($20,562.00)." — p.24 ll.15-19

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15. The said arbitrators then made an award in favour of the Respondents in the sum of Twenty thousand five hundred and sixty-two dollars ($20,562.00). — p.24 ll.20-24

16. The Appellants sought to set this award aside submitting that there was an error on the face of the award, namely, that the judgments of the Court of Appeal were by incorporation part of the award and were (or at least the majority were) in error.

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17. His Honour held that although he did not regard the matter as free from doubt he was of the opinion that there was an incorporation of the judgments of the majority of the Court of Appeal into the award. He then held that he was bound by the judgments of the Court of Appeal. — p.30 l.20 - p.31 l.2

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SUBMISSIONS

18. The Respondents submit :-

A. That the reasons of the Court of Appeal are not incorporated in the award of the Arbitrators.

B. That even if the said reasons are incorporated there is no error disclosed on the face of the award to justify the setting aside of the award.

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A. That the reasons of the Court of Appeal are not incorporated in the award of the Arbitrators.

19. The Respondents submit that the law relating to the incorporation of documents into the awards of arbitrators is clear. The principle

so far as is relevant is that documents are incorporated into an award if you can find in an award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous (Lord Dunedin in Champsey Braha & Co. v. Jivraj Balloo Spinning & Weaving Co. Limited (1923) A.C. 480 at 487).

20. The Respondents submit that the Court should be slow to read contracts or other documents into the award and should determine whether in the circumstances of the particular case it should be regarded as the intention of the tribunal which made the award to include the documents as part of the award. If any document is intended to form part of the award it should be appended or set out in full. It should be made clear that it is the intention of the award that the document should be incorporated in it. (Giacoma Costa Fu Andrea v. British Italian Trading Co. Ltd. (1963) 1 Q.B. 201 Sellers L.J. at page 219).

21. It is submitted that the appropriate course in the present case was for the Appellants to have sought an award in the form of a Stated Case pursuant to Section 9 of the Arbitration Act, 1902, so as to put before an appellate court all the relevant material.

22. It is submitted that the reference to the judgment of the Court of Appeal is no more than a recital and the judgments are no more incorporated in the award than are the pleadings, the evidence before the arbitrators or the addresses of Counsel. The recital of the fact of the opinion expressed does not indicate that the opinion was the basis of the award of the arbitrators. It is submitted that the present case is clearly distinguishable from cases such as Tuta Products Pty. Limited v. Hutcherson Bros. Pty. Limited (1971-1972) 127 C.L.R. 253, where the arbitrators expressed the fact that they had "regard" to the reasons and found "inconformity" with them (see page 260) and British Westinghouse Electric & Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited (1912) A.C. 673, where the arbitrator stated that he had adopted and acted upon the answer given by the Court and indeed annexed a copy of the special case and the answers so as to make them a part of the award.

23. It is submitted that there is nothing in the present case to satisfy the requirements laid down by Lord Dunedin at page 487 that it must be regarded

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as the intention of the Tribunal to include the document as part of the award and its reasoning.

B. <u>The reasons of the majority of the Court of Appeal do not disclose an error on the face of the award so as to justify the setting aside of the award.</u>

24. It is submitted that the majority of the Court of Appeal was correct in determining that Clause 24(i) and Special Condition 3 of the contract give separate and distinct rights to the parties. — p.14 l.25 - p.20 l.28 -

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25. Alternatively it is submitted that there is no material from which it can be determined that there was a material error on the face of the award.

26. Special Condition 3 provides, inter alia:- — p. 2 ll.24-27, ll.33-48

"The Contract Sum is subject to variation by the application of the provisions of this clause to take into account variations in the cost of labour."

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"(d) In the event of there being an award or other variation affecting the average hourly wage (including a variation resulting from alteration of ordinary working hours) the Contract Sum shall be adjusted by increase or decrease as the case may require by 60% of the amount that bears the same proportion to the uncompleted portion of the net Contract Sum as at the date when such variation shall have become effective as the increase or decrease in the average hourly wage consequent upon such variations shall bear to the average hourly wage as defined in sub-clause (c) hereof."

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27. Clause 24(i) provides :- — p.14 l.45- p.16 l.8

"The builder shall be entitled to reimbursement of loss or expense incurred by him as a result of a delay in the progress of the Works where all the following apply:

(i) Delay was caused by:

(A) one or more of the causes numbered (i), (ii), (iv), (ix), (x) and (xiii) in sub-clause (g) of this clause; or

(B) one or more of the causes numbered (iii), (vii), (viii) and (xiv) in sub-clause (g) of this clause where in the opinion of the Architect the Builder has so acted that he should be reimbursed for such expense; 10

(ii) An extension of the Date for Practical Completion has been made or should properly have been allowed pursuant to this clause;

(iii) The delay is not due to any default of the Builder or to any act of the Builder other than an act proper for the performance of this Contract;

(iv) The Builder has taken all practicable steps to avoid or reduce the delay and to keep expense resulting from the delay to a minimum; 20

(v) The loss or expense has not been and should not be included in the value of any variation;

(vi) The Builder in giving notice to the Architect pursuant to sub-clause (c) of this clause has stated his intention to make a claim under this sub-clause; 30

(vii) The Builder has given to the Architect details in writing of the nature of the claim as soon as practicable after commencement of the delay and at a time when details could be checked;

(viii) Within a reasonable time of the Date for Practical Completion being extended or being deemed to be extended the Builder has given to the Architect in writing details of the items of expense and the amounts therefor or a close estimate thereof; 40

and in any such circumstance, the loss or expense incurred shall be ascertained by the Architect and the Contract Sum shall be adjusted accordingly."

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p.19 ll.20-40

28. The Respondents suffered delays in respect of which they were granted extensions of time and following the date for practical completion the cost to the Respondents of work done increased by an amount which exceeded the amount recoverable by the Respondents under Special Condition 3.

29. It is submitted that upon the true construction of the contract the above clauses entitle the Respondents to reimbursement of loss or expense incurred by them as a result of delay in the progress of the works the subject of the contract.

30. In the event that there is an increase in the wages paid to employees of the Respondents which would not have been within the contract time for completion but for a delay in the progress of the works, it is not, it is submitted, open to the Appellants to claim that such an increase is not a loss or expense within the meaning of Clause 24(i) so as to prevent the Respondents from recovering under Clause 24(i).

31. It is submitted that loss or expense which is recoverable under Clause 24(i) is not limited to loss or expense incurred by the Respondents during the time of the actual delay but allows reimbursement for loss or expense sustained by the Respondents after the said period. This view was accepted by all members of the Court of Appeal.

32. There is nothing in the terms of Special Condition 3 or Clause 24(i) which could lead to the conclusion that Special Condition 3 precluded recovery of actual loss or expense sustained by the Respondents. It is not to the point to suggest that such a construction might be adopted because of any supposed difficulty in assessing the amount of loss or expense attributable to a delay.

33. The Respondents respectfully submit that the Order of the Supreme Court of New South Wales was correct and should not be disturbed for the following (amongst other)

R E A S O N S

(a) BECAUSE there is no error on the face of the award.

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(b) BECAUSE there are no documents incorporated into the award.

(c) BECAUSE there are no documents incorporated into the award so as to show an error on the face of the award.

V. BRUCE
Counsel for the Respondents

No. 35 of 1978

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ON APPEAL

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B E T W E E N :

THE UNIVERSITY OF NEW SOUTH WALES
Appellants

- and -

MAX COOPER & SONS PTY. LIMITED
Respondents

CASE FOR THE RESPONDENTS

FRESHFIELDS,
Grindall House,
25 Newgate Street,
London, EC1A 7LH.

Solicitors for the Respondents