6,1980

IN THE PRIVY COUNCIL No. 33 of 1979

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL
IN PROCEEDINGS NO. C.A. 191 OF 1978

BETWEEN: MAX COOPER & SONS PTY. LIMITED
Appellant and Cross-Respondent
(Plaintiff)

AND: THE COUNCIL OF THE CITY OF SYDNEY
Respondent and Cross-Appellant
(Defendant)

CASE FOR THE APPELLANT

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- and -

THE COUNCIL OF THE CITY OF SYDNEY

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CASE FOR THE APPELLANT

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1. This is an appeal and cross-appeal by leave of the Supreme Court of New South Wales, Court of Appeal, finally granted under the Order In Council of 1909 on 20th August 1979 from a decision dated 17th May 1979 of that Court (Moffitt P., Glass and Mahoney JJ.A.) allowing by majority (Mahoney J.A. dissenting) an appeal from a decision given by Yeldham J. on 27th April 1978.

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2. The questions raised by the appeal and cross-appeal relate to the proper construction of a "rise and fall" clause contained in a building contract made between the parties and providing for the construction of a substantial office building within the City of Sydney.

FACTS

3. The Council of the City of Sydney (hereinafter called "the Council") called for tenders for the building of a substantial office building within the City of Sydney. Tenders closed on 12th November 1974 and the contract was awarded to Max Cooper & Sons Pty. Limited (hereinafter called "the builder").

p. 4 l.13

4. A building contract was signed by the Council and the builder. The contract provided for the Council to pay to the builder a lump sum of Eight million eight hundred and ninety two thousand nine hundred and eighty two dollars ($8,892,982.00) or such other sum as should become payable under the contract.

p. 46-47

5. The contract contained a rise and fall

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p. 46-47

clause to take account of fluctuations in the cost of labour and materials. The rise and fall clause was in the following terms:

"RISE AND FALL CLAUSE

Amounts calculated in accordance with this clause are adjustments for fluctuations in cost of labour and material which are used in the performance of this Contract.

Where, after the date of closing of tenders, and during the progress of the work alterations occur in the actual cost of the contractor in performing the contract as a consequence of alteration in the average hourly wage as hereinafter defined or the equivalent monetary alteration due to a change in standard working hours or any other conditions of employment arising from any statute, statutory regulation or award or order of an Industrial tribunal

THEN FOR EACH CENT OF SUCH ALTERATION TO THE AVERAGE HOURLY WAGE THERE SHALL BE ADDED TO OR DEDUCTED FROM THE CONTRACT SUM AN AMOUNT REPRESENTING 0.295% OF THE VALUE OF THE UNCOMPLETED PORTION OF THE CONTRACT AS AT THE DATE OF ANY SUCH ALTERATION.

The Clause will apply to all alterations in Award Rates of pay, pay loadings, holidays, etc. unless contrary to case law.

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(a) The average hourly wage shall be the average of the hourly rate of pay for the listed workmen. The workmen listed and their relevant awards are:

(The rates shown are the rates as at the date of tender, 12th November, 1974).

1.	Carpenter (Carpenter & Joiners & Bricklayers' Construction (State) Award)	$3.45
2.	Bricklayer (Carpenters & Joiners & Bricklayers' Construction (State) Award)	$3.43
3.	Painter (Painters' (State) Award)	$3.38
4.	Plumber (Plumbers and Gas Fitters' State Award)	$3.50
5.	Plasterer (Plasterers' (State) Award)	$3.45
6.	Builder's Labourer (Builders Labourers' (Construction on Site) (Federal) Award)	$3.12

The value of the uncompleted portion of the contract shall be determined from time to time by the Architect and shall not include any amounts for Quantity Surveyors' Fees, Contingency Sums, Prime Cost Allowances or Monetary Sums, or any sum for which a separate Rise and Fall agreement is included."

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For ease of reference the fourth paragraph of the above clause is hereafter referred to as "the rider clause".

6. During the progress of the work the builder incurred increases in costs as follows:

p. 5 l.14 (a) Increases in the average hourly wage as defined in the rise and fall clause;

p. 5 l.16 (b) Increases in fares payable to employees, such increases being occasioned by an award made by the Industrial Commission of New South Wales as distinct from an increase in the average hourly wage;

p. 5 l.23 (c) Increases in the cost of the provision of annual holidays to employees and in the cost of holiday pay, such increases being occasioned by the increase in the average hourly wage;

p. 6 l.1 (d) Increases in the cost of providing sick leave for employees, such increases being occasioned by a new award entitlement, as distinct from an increase in the average hourly wage;

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p. 6 l.12 (e) Increases in the cost of paying payroll tax pursuant to the Payroll Tax Act, 1971, such increases being occasioned by the increase in the average hourly wage;

p. 6 l.15 (f) Increases in the cost of effecting Workers Compensation insurance, such increases being occasioned in part by the increase in the average hourly wage and in part by increases in the rates of premiums payable under the relevant legislation;

p. 6 l.24 (g) Increases in the cost of providing long service benefits to employees, such increases being occasioned by amendments made to the relevant legislation granting such benefits;

p. 6 l.29 (h) Increases in the cost of providing public holiday pay and picnic day pay, such increases being occasioned by the increase in the average hourly wage;

p. 7 l. 5 (i) Increases in the cost of providing accident pay, such increases being occasioned by the increase in the average hourly wage.

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7. The builder claimed that such increases in costs entitled it to additional payment under the rise and fall clause. The builder and the Council could not reach agreement as to which, if any, of such alterations in cost entitled the builder to

p. 1 1.10 additional payment under the contract. Accordingly the builder sought a declaration from the Supreme Court that on the proper construction of the rise and fall clause all the abovementioned increases in costs were required to be taken into account in applying the formula in the clause.

Hearing before Yeldham J.

8. The proceedings came before Yeldham J. on 31st March 1978. The builder did not seek any quantification of the sums to which it claimed to be entitled in the event that one or more of the matters referred to in the preceding paragraph was declared to be required to be taken into account under the rise and fall clause, it being indicated that this could be left either to the agreement of the parties or to the determination of an arbitrator.

9. There was evidence before Yeldham J. as

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to the components of each of the awards referred to in the rise and fall clause. There was also evidence that the terms "loadings" and "pay loadings" are commonly used in the building industry and that in their common usage in the industry they include the

p. 7 l.13 payment of or provision of fares, annual leave and holidays, sick leave, long service leave, payroll tax, workers' compensation insurance, accident pay, statutory holiday pay and picnic day pay. The accuracy of this evidence was not challenged, but it was objected to as being irrelevant.

10. Yeldham J. made all the declarations sought by the builder. The declarations made by

p. 157-158 His Honour related to alterations resulting from alterations in the average hourly wage or otherwise, provided that it could be demonstrated that they had altered the actual cost to the builder in performing the work.

Hearing before the Court of Appeal

11. The Council appealed to the Court of Appeal which by majority (Moffitt P. and Glass J.A., Mahoney J.A. dissenting) allowed the appeal in part. The Court held, in substance, that on the proper

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construction of the rise and fall clause:

(a) Increases in amounts payable for fares, sick leave, and long service benefits were required to be taken into account insofar as such increases had occurred independently of wage increases;

pp. 196-198

(b) Increases in the cost of the provision of annual holidays and accident pay were not required to be taken into account if such increases had occurred as a consequence of wage increases;

(c) increases in the cost of meeting payroll tax and effecting workers' compensation insurance were outside the purview of the clause and were not required to be taken into account.

SUBMISSIONS

12. It is submitted that the builder is entitled to additional payment under the contract for all the cost items referred to in paragraph 6. However, it is conceded that the builder will be sufficiently reimbursed for some of the increased costs by the

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adjustment to the contract price brought about by the increase in the average hourly wage. Thus, when the average hourly wage increases, the consequent adjustment to the contract price will be sufficient to cover increases in costs brought about solely by a rise in wages. These increases may conveniently be described as "consequential" increases. This will not be the case when increases in costs are brought about otherwise than by a variation in the average hourly wage, e.g. an increase in workers' compensation insurance premiums as a result of increased benefits payable to workmen. Such cost increases may conveniently be described as "independent" increases. The consequential cost increases are those referred to in paragraph 6(a), (c), (e), (h) and (i), and also such part of the cost increase (6(f)) as was occasioned by the increase in the average hourly wage. The independent cost increases are those referred to in paragraph 6(b), (d), (g) and such part of the cost increase referred to in (f) as was occasioned by increases in the rates of workers' compensation insurance premiums.

13. This appeal is pursued only in respect of

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independent cost increases. These cost increases related to fares, sick leave, long service leave and increases in workers' compensation insurance premiums. The Court of Appeal found the builder to be entitled to the first three of these independent cost increases, but not to the fourth. The appellant therefore pursues this appeal only in respect of the fourth item, i.e. increases in workers' compensation insurance premiums.

14. No question of double counting arises in this appeal and those parts of the reasons of the Court of Appeal relating to double counting do not arise for consideration.

15. The rise and fall clause must be construed in its proper context. It formed part of a building contract for the erection of a large building made between the builder and the Council which, as
p. 153 l.7 Yeldham J. found was necessarily familiar with the notorious meaning which the expression "pay loadings" bore.

16. The intended operation of the clause, according to its terms, was that it should make
p. 46 l.8 provision for "fluctuations in cost of labour and

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material" and that it would apply not only to alteration in wage rates but also "to all alterations

p. 46 1.25 in .... pay loadings ... etc.". This being so, and all the items claimed by the builder (particularly workers' compensation premiums) being manifestly costs of labour and "loads" on wages from the builder's point of view, a construction of the clause which excludes such cost increases from consideration is unduly narrow and fails to give effect to the manifest intention of the parties. Where a builder has to make a payment because he employs a workman, that payment is a cost of labour whether or not it is made to the worker or to a third party. No rational explanation can be given for supposing that the parties intended to exclude an increased cost of labour occasioned by a payment to a person other than the builder's employees.

17. Extrinsic evidence was admissible to elucidate the sense in which the words "pay loadings" were used in the building trade. See Appleby v. Purcell (1973) 2 N.S.W.L.R. 879; Attorney General for the Isle of Man v. Moore (1938) 3 All E.R. 263 at 267 and Myers v. Sarl 3 Ellis & Ellis 306 at p. 319; 121 E.R. 357 at 462. The evidence as to the meaning

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of "pay loadings" was quite specific and unchallenged.

p. 177 l.27 Glass J.A. was clearly in error in holding that the evidence was silent on the question whether payroll

p. 179 l.17 tax and workers' compensation are comprehended within the meaning of "pay loadings". Moreover, His Honour was in error in deducing from the documentary evidence that the term "pay loadings" denotes loadings which are paid to a worker and does not include costs such as payroll tax and workers' compensation premiums which are paid with respect to workers, and not to them.

18. The finding of Yeldham J. as to the mean-

p. 153 l. 16 ing of "pay loadings" should not have been disturbed. It was a finding of fact. See Chatenay v. Brazilian Submarine Telegraph Co. (1891) 1 Q.B. 79 at 85; Life Insurance Co. of Australia Limited v. Phillips (1925) 36 C.L.R. 60 at p. 78, and Australian Gas Light Co. v. The Valuer General 40 S.R. 126 at 137-8. Glass J.A. felt free to ignore Yeldham J's finding

p. 180 l. 21 as to the meaning of "pay loadings" because the construction of words in the contract is a question of law and an appellate court was entitled to give effect to its own conclusions. But the construction of a document only becomes a question of law after the true meaning of the words used has been

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ascertained as a fact. See Chitty on Contracts, 24th Edition, p. 700. "Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts."

19. Glass J.A. was in error in rejecting the evidence of Dr. Cooper as to the meaning of "pay loadings". His Honour rejected the evidence because he thought that the documentary evidence contradicted Dr. Cooper's evidence and showed that "loadings" and "pay loadings" had different meanings, the former being a payment to a worker and the latter a payment with respect to a worker. Dr. Cooper's evidence was unchallenged either by cross-examination or by the tender of contrary evidence. It was not incumbent on the builder to support this unchallenged evidence by documentary evidence or otherwise. Moreover there was nothing in the documentary evidence which detracted from Dr. Cooper's evidence or contradicted it, and much of it is supportive of his evidence that in their common usage in the building industry the words "pay loadings" include, inter alia, the payment of or provision for workers' compensation insurance.

p. 178 l.23

p. 179 l.10

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p. 22 and 23 1.24

p.22

p. 33 1.20

p.38 and 39 1.7

20. Exhibit "D" to Dr. Cooper's affidavit shows that the term "loaded weekly wage" includes workers' compensation insurance. The word "wage" is synonymous with "pay". It is to be noted that workers' compensation insurance is included with annual leave under the same heading of "loadings". It is clear that "loading" is used with reference not only to an amount paid directly to an employee but also to a third party for the purpose of providing workers' compensation benefits to the employee. Annexure "E" also indicates that a loaded weekly wage is to take into account variations in the loading for workers' compensation. In Annexure "F" "Loaded Building Wage" includes workers' compensation insurance. If the expression "pay loadings" has the restricted meaning attributed to it by Glass J.A. then the items to which the rider applies are all items which, without the assistance of the rider, fall within "other conditions of employment" and the rider becomes redundant. Accordingly, it is to be inferred that the parties intended by the use of the expression "pay loadings" to expand upon "other conditions of employment" and that

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the expression will include an item such as workers' compensation insurance. The intention of the parties is reinforced by the addition of"etc." to

p. 46 l.25 the rider clause.

21. It would have been extraordinary for the builder and the Council to have omitted to make provision for variation in the cost of workers' compensation whilst making provision for much lesser cost items. The omission would have been even more extraordinary having regard to the current social climate in which benefits payable to workmen are frequently improved with consequential major effects on building costs.

22. Even if regard is not had to the extrinsic evidence, the term "pay loadings" comprehends all the disputed cost items. The ordinary dictionary meaning of "load" comprehends extra or special burdens or payments. The term "loadings" is used in the context of industrial awards. See In re Municipal Employees (The Municipal Council of Sydney) Interim Award (1950) A.R. 152 at p. 162. In the context of a building contract for the construction of a major city building the term is wide enough to include amounts paid by a builder in respect of

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matters such as payment of holiday pay and the 17½% loading thereon, payment for sick leave, payments for payroll tax and workers' compensation insurance, and the cost of the provision of long service benefits and accident pay. The first paragraph

p. 46 l.7

of the rise and fall clause makes it clear that the clause is directed to compensating the builder for "fluctuations in cost of labour and material ...". The term "cost" is not limited to cost which arises because of payments made directly to workmen. When the parties used the terms "cost of labour" and "pay loadings" they must have intended to refer to labour costs incurred by the builder. Nothing said by Barwick C.J. in Whittle's Case is contrary to this submission. For example, at p. 174D in Whittle's Case Barwick C.J. held that workers' compensation benefits did not fall within the rise and fall clause there in question, but his Honour did so for reasons unrelated to the meaning of "cost". The Chief Justice's decision was that an alteration in cost due to a rise in workers' compensation premiums did not occur "in consequence of an alteration in conditions of employment".

23. The words of the rider clause, appearing

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as they do in an entirely separate paragraph in the rise and fall clause, should not be construed as adding nothing to the cost alterations to which regard may be had. Moffitt P. was in error in so construing the rider clause. The words "unless

p. 164 l.22

contrary to case law" can hardly limit the subject matters referred to in the preceding paragraph, as Moffitt P. thought. For example, a change in a condition of employment arising from a statute can hardly be said to be "contrary to case law" whatever meaning is given to those admittedly obscure words.

24. In any event, the construction adopted by Moffitt P. involves the proposition that the cost items referred to in the rider clause, i.e. alteration in rates of pay, pay loadings and holidays etc., are within the class of items referred to in the preceding paragraph. If this construction is adopted, the consequence is that "pay loadings" are within the expression "any other conditions of employment arising from any statute ...". If these words are to be construed as comprehending "pay loadings" they have a meaning wide enough to include increases in workers'

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compensation premiums. Nothing said in Whittle's Case would stand in the way of this submission, because in that case, the High Court was not concerned to construe the words "conditions of employment" in a context in which they were taken to include "pay badings".

25. The rise and fall clause is expressed to operate in three situations, namely:

(a) where there is an alteration in the average hourly wage;

(b) where there is an equivalent monetary alteration due to a change in standard working hours or any other conditions of employment; and

(c) where there are "alterations in Award Rates of pay, pay loadings, holidays, etc., unless contrary to case law."

It is submitted that each of the cost increases claimed by the builder are within one or other of these three categories.

26. FARES. The Council did not argue before

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p. 137 l.16 Yeldham J. that increases in fares were not covered by the rise and fall clause. Fares paid to a workman are a condition of employment. See T.C. Whittle Pty. Limited v. T. & G. Mutual Life Society Limited 52 A.L.J.R. 173. All the judges in the

p. 172 l. 9 Court of Appeal and Yeldham J. were of the opinion

p. 190 l.23 that increases in fares were within the rise and fall clause.

27. COST OF ANNUAL HOLIDAYS AND PAYMENT OF HOLIDAY PAY. The builder's claim under this heading arises by reason of the increased cost of the provision of annual holidays to employees and of the payment of holiday pay to such employees, such increased cost having been brought about by an increase in the average hourly wage as defined in the rise and fall clause. Annual holidays fall within the expression "conditions of employment" as used in the rise and fall clause. See Whittle's Case, supra. However, it is conceded that the adjustment to the contract price which is brought about by the alteration in the average hourly wage sufficiently compensates the builder for these increased costs.

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28. SICK LEAVE PAY AND PROVISION FOR LONG SERVICE LEAVE. All the members of the Court of Appeal and Yeldham J. were of the view that sick

p. 154 l.17 leave pay and provision for long service leave were

p. 172 l.10 within the rise and fall clause. Payment for sick

p. 193 l.11 leave and long service leave are "conditions of

p. 194 l. 9 employment" within the meaning of the rise and fall clause. See Whittle's Case (supra).

29. WORKERS' COMPENSATION. For the reasons advanced above, it is submitted that the term "pay loadings", as used in the context of the rise and fall clause, comprehends alterations in workers' compensation premiums.

30. In addition, as to changes in the amount of workers' compensation premiums, they are, in any event, allowable under that part of the rise and fall clause which refers to "a change in ... any other conditions of employment arising from any statutory regulation ...". Workers' compensation premiums are payable pursuant to the provisions of the Workers' Compensation Act 1926, as amended, and regulations made thereunder. The reasoning of the majority of the High Court in Whittle's Case which

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led to the result that similar words were held not to refer to increases in workers' compensation premiums should not be applied to the clause under consideration in this appeal. The clause considered by the High Court differed from the clause under consideration in this appeal in two important respects. First, it did not contain the words which appear in the first paragraph of the subject clause, i.e. "Amounts calculated in accordance with this clause are adjustments for fluctuations in cost of labour ...". Second, it did not contain the rider clause referring to "pay loadings ... etc.". The additional words in the subject clause give colour to the words "conditions of employment" as those words are used in the subject contract.

31. In any event, the better view is that the right to receive workers' compensation is a condition of employment, and the majority view in Whittle's Case to the contrary is erroneous. In the context of the building contract the words "conditions of employment" refer to conditions under which employment takes place, whether those conditions form part of the contract of employment or not, i.e. conditions which may rise or fall in cost and which

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may consequently require adjustment to be made to the contract price. The manifest intention of the rise and fall clause is to make provision for rises and falls in the cost of erecting the building. To read the words "conditions of employment" as referring only to the terms of the contract of employment between the builder and its employees partially frustrates that manifest intention. The expression "conditions of employment" is clearly wide enough to cover conditions imposed by statute which have a cost impact upon the employer and in the context of the rise and fall clause, the expression should be so construed. Barwick C.J. was of the opinion (p. 177 E) that the terms of an industrial award could properly be regarded as part of the contract of employment "in so far as they fix wages and other employee benefits.". But the right to receive workers' compensation is an employee benefit in a real sense, and the circumstance that such a right exists pursuant to a statute and not an award made under a statute is of no consequence. It is therefore submitted that if (contrary to the argument put in paragraph 30 above) it is held that the clause under consideration in Whittle's Case is indistinguishable for

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relevant purposes from the clause under consideration in the present appeal, it should nevertheless be held that the right to receive workers' compensation is a condition of employment within the meaning of the rise and fall clause.

32. PAYROLL TAX AND ACCIDENT PAY. As the only increases in payroll tax and accident pay were occasioned by increases in the wages paid by the builder, the increased costs are recouped to the builder by the adjustment to the contract price brought about by the alteration in the average hourly wage. No separate claim is made for these items, and hence no question of double counting arises.

33. The appellant respectfully submits that the appeal ought to be allowed and the cross appeal ought to be dismissed for the following, amongst other

R E A S O N S

A. That all the increases in costs claimed by the builder fall within the rise and fall clause;

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B. That the extrinsic evidence as to the meaning of the term "pay loadings" was admissible and should have led the Court of Appeal to hold that all the increased cost items claimed by the builder were within the meaning of the term "pay loadings" as used in the rise and fall clause.

C. That the Court of Appeal should not have disturbed the finding of Yeldham J. as to the meaning of "pay loadings" in the rise and fall clause.

D. That a worker's entitlement to workers' compensation is a condition of employment and the increased cost of effecting workers' compensation insurance is recoverable under the rise and fall clause.

T.R. Morling

P.P. Strasser