

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
1 0 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

Judgment 8, 1972

IN THE PRIVY COUNCIL

No. 38 of 1970

O N A P P E A L
FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

F.J. BLOEMEN PTY. LIMITED formerly CANTERBURY PIPELINES (AUST.) PTY. LIMITED	...	<u>Appellant</u>
- and -		
THE COUNCIL OF THE CITY OF GOLD COAST	...	<u>Respondent</u>

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CASE FOR THE APPELLANT

A. INTRODUCTION (Paragraphs 1-7) Record

1. These are consolidated appeals against
- (a) an Order dated 28 October, 1969 allowing the respondent's Demurrer to the appellant's Statement of Claim (with costs of the demurrer to be taxed) p.11 l.25-
p.12 l. 9
 - (b) an Order dated 14 November, 1969 refusing the appellant leave to deliver an amended Statement of Claim in the form then proposed; { p.38 l.35-
 - (c) Judgment in the action ordered on 14 November, 1969 to be entered for the respondent against the appellant (with costs to be taxed) { p.39 l.26

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each of the orders and judgment being made or given by the Full Court of the Supreme Court of Queensland constited by Hanger A.S.P.J. (as he then was), Lucas and Hoare JJ. in action No. 421 of 1969 in the

Record

- p.42 l. 5-
p.44 l. 6
p.56 l. 4-
p.57 l.20
- p.42 l. 3
p.42 l. 6
- p.3 ll.3-14
- p. 1 l.18-
p. 2 l. 5
- p. 2 l. 7-
p. 8 l. 9
- p.2 ll. 9-32
- p. 2 l.33-
p. 4 l.29
p.3 ll. 3-14
- p. 3 l.15-
p. 4 l.29
- Supreme Court of Queensland. The appeals are brought pursuant to Orders of the Full Court of the Supreme Court of Queensland made on 19 December, 1969 (Hanger A.S.P.J., Hart and Kneipp JJ.) and 17 March, 1970 (Hanger A.S.P.J., Wanstall and W.B. Campbell JJ.), respectively granting conditional and final leave to appeal, and ordering that the appeals be consolidated. The formal document recording the Order made on 19th December, 1969 erroneously bears the date 26 November, 1969 and the name of the Honourable Mr. Justice Stable instead of that of the Honourable Mr. Justice Hart.
2. The principal question involved in these appeals is as to whether, by virtue of a provision (clause 35(c)) in an agreement between the parties bearing date 5 March, 1965 (hereinafter in this Case called "the Contract") imposing an obligation upon the respondent to pay to the appellant interest calculated in the manner therein provided on all moneys payable to the appellant but unpaid from the date on which the payment became due, the appellant is entitled to interest upon all or any part of the amount of \$478,478.00 and costs (agreed at \$13,808.02) awarded in the appellant's favour on 8 November, 1966 by an arbitrator appointed by the parties to decide certain differences between them.
3. The action was commenced by a writ of summons issued on 13 May, 1969 claiming \$49,386.90 as moneys payable under and pursuant to the provisions of the contract and claiming interest thereon from the date of the writ to the date of payment or judgment.
4. The appellant, in its Statement of Claim, delivered on 15 May, 1969 alleged -
- (a) in paragraphs 1, 2 and 3: that it as contractor and the respondent as principal made the contract for the execution of certain works;
- (b) in paragraph 4: that the contract contained -
- (i) a clause (clause 35(c)) which entitled the contractor to interest "on all moneys payable to him, but unpaid, from the date on which payments become due";
- (ii) a clause (clause 41) which entitled either party by written notice served upon the

other to require "any question difference or dispute whatsoever ... upon or in relation to or in connection with the contract" to be submitted by settlement by arbitration.

- (c) in paragraphs 5 and 6: that each party "served upon the other a notice of dispute in relation to certain differences" arising out of the contract and that on 6 January, 1966 by a document entitled "Terms of Arbitration" they "appointed one F.W.Laws the Arbitrator pursuant to the said clause 41" of the contract;
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- (d) in paragraph 7: that the said F.W. Laws by a document in writing dated 8 November, 1966 made an award of and concerning the matters so referred to him whereby he awarded and directed the respondent to pay to the appellant the sum of ~~£~~478,478.00 and its costs of and attending the arbitration and the costs of the award and that the costs were subsequently agreed in the sum of ~~£~~13,808.02;
- (e) in paragraphs 8, 9, 10, 11 and 12: that interest at the rate specified by clause 35(c) of the contract upon the amount of the award and costs from time to time unpaid after 8 November, 1966 amounted as at 8 May, 1969 to ~~£~~49,688.02.
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- The appellant claimed that sum as moneys owed and/or payable by the respondent to the appellant under and pursuant to the contract and further claimed interest upon those moneys from the date of the Statement of Claim until payment or judgment.
p.7 ll.27-36
5. The respondent's demurrer was delivered on 4 June, 1969. As permitted by Order 29 Rule 6 of the Rules of the Supreme Court of Queensland paragraph 1 set out a part of the document dated 8 November, 1966 referred to in paragraph 7 of the Statement of Claim.
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6. From that part of the document set forth in paragraph 1 of the demurrer it appeared that the arbitrator added together several amounts to make the total of ~~£~~478,478.00 which he awarded.
7. By paragraph 2 of its demurrer the respondent set forth the grounds on which it said that the appellant's Statement of Claim was bad in law.
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p. 4 l.30-
p. 5 l. 2

p. 5 l. 3-26

p. 5 l.27-
p. 7 l.26

p. 8 l.13-
p.11 l.21

p. 8 l.21-
p.10 l.24

p.10 l.28-
p.11 l. 8

Record

B. ORDERS JUDGMENT AND REASONS (Paragraphs 8-14)

p.12 1.15-	8. After argument upon the demurrer the Full Court of the Supreme Court of Queensland by a majority (Hanger A.S.P.J. and Hoare J., Lucas J. dissenting) allowed the demurrer. Each of the Judges published his reasons.	
p.38 1.31		
p.12 1.15-	9. In his published reasons, Hanger A.S.P.J. defined the question for consideration to be "whether the money awarded by the Arbitrator or any of it is money payable under the contract within clause 35(c)" and he answered that question in the negative for two reasons:	
p.28 1.25		
p.21 1.29-38		10
p.14 1.25-29-	(a) That there is no agreement to submit matters to arbitration contained in the contract and in any event there is no sufficient allegation in the Statement of Claim that the notices of dispute pleaded in paragraph 5 were given pursuant to clause 41(a) or fulfilled its requirements. Nor is there any sufficient allegation in the Statement of Claim that the parties otherwise submitted matters in dispute to arbitration although there is an allegation in paragraph 6 that the parties did so by the Terms of Arbitration, and the Terms of Arbitration do purport to be (but are not) a submission to arbitration.	
p.27 11.3-5		
p.14 1.30-		
p.15 1.3		
p.27 1.6-8		
p.27 11.14-19		20
p.15 1.4-		
p.15 1.18	(b) That the amount awarded by the Arbitrator fell into three parts:	
p.27 1.8-13		
p.21 1.38-	1. a sum of \$200,242.72 described in the award as "The Contractor's claim as set out in exhibit YY";	30
p.22 1.2	2. damages for loss of profit; and loss of use of plant;	
	3. interest on both these sums	
	and that, apart from the first reason -	
p.21 11.1-28,	(i) the arbitrator had no power to award interest and therefore that part of the amount awarded in respect of interest cannot itself carry interest under clause 35(c) of the Contract;	
p.22 11.8-10,		
p.22 11.26-30	(ii) money is not payable under an agreement if the money is awarded in extinction of a liability	
p.23 11.16-28		
p.27 11.20-29		
p.23 1.30-43		40
p.25 11.5-20		

		<u>Record</u>
	which arose under the agreement and therefore that part of the amount awarded in respect of damages is not money payable under the Contract;	p.26 1.36- p.27 1.2 p.27 1.37- p.28 1.5
10	(iii) the Statement of Claim did not show whether that part of the amount awarded in respect of "The Contractor's claim as set out in exhibit YY" was so awarded in extinction of a liability under the contract or not, and therefore was to be considered on the basis that it was so awarded in which event it is not money payable under the contract.	p.27 11.14-19 p.28 1.6-21
	10. In his published reasons, Hoare J. agreed that the demurrer should be allowed, and expressed reasons which correspond with those reasons of Hanger A.S.P.J. set forth in subparagraphs (b)(ii) and (b)(iii) of the preceding paragraph.	p.36 1.9- p.38 1.31 p.38 11.29,30 p.37 11.12-23, p.38 11.1-21 p.38 11.22-28
	11. In his published reasons Lucas J. who dissented held:	
20	(i) That an award may extinguish an original contractual liability and may substitute a different obligation for the original contractual obligation;	p.30 11.22-42 p.32 11.36-42 p.33 11.35-37
	(ii) That the question in the present action was what gave rise to the respondent's compulsion to perform the award;	p.33 11.37-39
	(iii) That the obligation to pay the amount of the award arose from agreement by the parties.	p.32 1.42- p.33. 1.4
	(iv) That the contract contained the provision which enabled the parties to require resort to arbitration;	p.33 11.4-23 p.33 11.39-45
30	(v) That on the proper construction of the Statement of Claim notices of dispute referred to in paragraph 5 were served pursuant to clause 41 of the contract;	p.31 11.4-19 p.33 11.46-47
	(vi) That the respondent's obligation to pay the amount awarded arose from the contract and the award;	p.23 11.23-27 p.33 1.47- p.34 1.11
	(vii) That the money awarded was money payable within the meaning of clause 35(c) of the contract;	p.33 11.27-30 p.34 11.11-16
40	(viii) That an award only precluded a party from suing in respect of that original contractual	p.30 11.20-40 p.32 11.36-42

Record

liability which the award extinguished;

pp.30 1.40-
p.31 1.3
p.31 11.20-34
p.33 11.12-23

(ix) That it did not appear from the Statement of Claim that the parties referred to the arbitrator or that the award purported to deal with interest upon the amount of the award accruing after the making of the award;

p.31 1.35-
p.32 1.11

(x) That the award did not constitute a determination of all matters which might be in dispute under the contract until its performance was completed;

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p.31 11.28-34

(xi) That the award was not a bar to the appellant's claim;

p.35 11.18-43

(xii) That an examination of the three "parts" of the award was unnecessary.

p.31 11.15-19

12. Lucas J. observed and it was the fact that 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 clause 41 of the contract.

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p.40 11.32-43
p.41 1. 1-5
p.58 1.1-
p.65 1.11

13. The appellants next applied for leave to deliver an amended Statement of Claim in the terms set forth in Exhibit A, the proposed amendments being shown in red. The proposed amendments did not overcome those reasons of Hanger A.S.P.J. referred to in subparagraphs (b) of paragraph 9 of this Case, nor the reasons for judgment of Hoare J. referred to in paragraph 10 of this Case. Counsel for the appellant 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 appellant 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 appellant while not consenting to refusal of the appellant'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 appellant on the proposed amended Statement of Claim, and that the allowing of the proposed amendment would be futile.

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p.39 11.15,16

14. Leave to deliver the proposed amended Statement

Record

of Claim was refused. Although counsel for the respondent declined to move for judgment in the action, the Full Court ordered judgment to be entered in the action for the respondent with costs to be taxed.

p.41 11.26,27

p.39 11.15-20

C. APPELLANT'S SUBMISSIONS (Paragraphs 15-24)

15. The contractual obligation to pay interest is contained in clause 35(c) of the contract. That clause entitles the appellant to interest upon "moneys payable", a term which connotes an obligation to pay the principal moneys in question but which does not expressly define what the source of this obligation must be.

p.3 11.3-14

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16. By clause 41 the parties agreed to have disputes as therein described determined by an arbitrator appointed in the manner therein prescribed provided that a notice of the prescribed type was served. By implication if not expressly (and see clause 41(c)) the parties agreed by clause 41 to be bound by an award made by the arbitrator. The contract and in particular clause 41 thereof contain the obligation to pay the amount awarded.

p.3 11.15
p.4 1.29

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p.4 11.4-9

17. But whether or not the obligation to pay the amount awarded is contained in clause 41, the obligation to pay the amount awarded arises out of the contract and the appellant's entitlement to payment of the money awarded depends upon the contract. That is sufficient, it is submitted, to make the amount awarded "moneys payable" for the purposes of clause 35(c).

p. 3 1.15-
p. 4 1.29

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18. As Viscount Cave said, delivering the judgment of the Judicial Committee in L. Oppenheimer and Company v. Mahomed Haneef (1922) 1 A.C. 482 at 487 "... the award became as fully binding on both parties as if it had been incorporated in the contract."

(1922 1 A.C.
482

19. The majority of the Full Court held that when an arbitrator by an award of an amount of money changes the nature of an original contractual liability (and in particular when he awards an amount in respect of a claim for unliquidated damages for breach of contract) the amount awarded is not payable under the contract and it is as to moneys payable under the contract that clause 35(c) speaks. The cases cited support the proposition that an award may

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Record

extinguish an original contractual obligation of a different character, but not the proposition that the amount of the award is not payable under the contract.

p.21 11.9-20
118 C.L.R.58

20. If the amount awarded erroneously included an amount in respect of interest prior to the date of the award, the error is irrelevant in these proceedings. As to the history of the respondent's failure to have the award set aside, see the judgment of Hanger A.S.P.J. The reasons for judgment of the High Court referred to by Hanger J. are reported: (1968) 118 C.L.R. 58.

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(1971) 2
W.L.R. 1360

21. Alternatively, the amount awarded in respect of interest prior to the date of the award is severable from the rest of the award: Timber Shipping Co. S.A. v. London & Overseas Freighters Ltd. (1971) 2 W.L.R. 1360.

22. The arbitrator awarded the payment of costs, and the subsequent agreement on the quantum of costs does not alter the nature or the source of the obligation to pay them.

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23. The reasons given by Hanger A.S.P.J. with respect to the construction of the Statement of Claim referred to in paragraph 9(a) of this Case did not find support in the reasons of the other members of the Full Court. Lucas J. adopted a contrary view (paragraph 11(ii) of this Case) and Hoare J. did not refer to this aspect. However, if the Statement of Claim properly construed contains any of the defects attributed to it by Hanger A.S.P.J. it is submitted that those defects are removed in the proposed amended Statement of Claim Exhibit "A". It is submitted that, but for the other reasons of the majority of the Full Court, the appellant should have been given leave to deliver the amended Statement of Claim.

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p.11 1.25-
p.12 1.9
p.38 1.35-
p.39 1.26

24. The appellant submits that the consolidated appeals should be allowed and that the orders and judgment of the Full Court of the Supreme Court of Queensland made on 28 October, 1969 and 14 November 1969 should be set aside and that in lieu thereof, the respondent's demurrer should be overruled and the respondent should be given leave to plead to the appellant's Statement of Claim and the respondent should be ordered to pay to the appellant its taxed

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costs of the proceedings in the Full Court of the Supreme Court of Queensland, and the taxed costs of these consolidated appeals including the taxed costs of the motions before the Full Court of the Supreme Court of Queensland for leave to appeal or if the appeal from the Order of the Full Court of the Supreme Court of Queensland made on 28 October 1969 be dismissed the appellant should be given leave to deliver an amended Statement of Claim in the form of Exhibit "A" and the respondent should be given leave to plead to such amended Statement of Claim and the respondent should be ordered to pay to the appellant its taxed costs of the proceedings in the Full Court of the Supreme Court of Queensland other than the costs of the demurrer and the taxed costs of these consolidated appeals including the taxed costs of the motions before the Full Court of the Supreme Court of Queensland for leave to appeal for the following among other

p.11 1.25-
p.12 1.9

p.58 1.2-
p.65 1.11

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R E A S O N S

1. BECAUSE the moneys awarded (including costs) are "moneys payable" within the meaning of that term in clause 35(c);
2. BECAUSE the moneys awarded (including costs) are moneys payable under the contract;
3. BECAUSE the contract was the source of the obligation to pay the moneys awarded (including costs);
- 30 4. BECAUSE the entitlement to payment of the moneys awarded (including costs) depended upon the contract;
5. BECAUSE the award did not deal with or to preclude a claim for interest under clause 35 (c) upon the moneys awarded (including costs);
- 40 6. BECAUSE if some part of the moneys awarded (including costs) were not "moneys payable" within the meaning of that term in clause 35(c), the Statement of Claim was good as to the balance;
7. BECAUSE of the reasons expressed by Lucas J. in his reasons for judgment;

Record

8. BECAUSE the Statement of Claim alleged the facts necessary to establish the appellant's cause of action but, if the Statement of Claim was defective in the respects referred to by Hanger A.S.P.J., the defects are removed in the proposed amended Statement of Claim Exhibit "A".

F. G. BRENNAN

G. E. FITZGERALD

Counsel for the Appellant

