Judgment 8, 1972

No. 38 of 1970

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

BETWEEN :-

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

- and -

THE COUNCIL OF THE CITY
OF GOLD COAST Respondents

CASE FOR THE RESPONDENTS

1. This is an appeal brought by the above named Appellant against the following judgments of the Full Court of Her Majesty's Supreme Court of Queensland (Hanger Acting S.P.J., Lucas and Hoare JJ.) namely:-

In the Supreme Court of Queensland

Record

(a) A judgment of 28th October, 1969, allowing the Respondent's demurrer to the Appellant's Statement of Claim in Action No. 421 of 1969; and — Pages 11-12

(b) A judgment of 14th November, 1969 refusing the application of the Appellant to amend its said Statement of Claim and ordering that judgment in the said action be entered for the Respondent with costs. — Pages 38-9

2. On 19th December, 1969, conditional leave was granted to the Appellant by the said Full Court (Hanger Acting S.P.J., Stable and Kneipp JJ.) to appeal to Her Majesty in Council from the said — Pages 42-4

In the Supreme Court of Queensland

Record (Contd.)

Pages 56-7

judgments and it was ordered that the said appeals be consolidated. Final leave to appeal was granted by the said Full Court (Hanger Acting S.P.J., Hart and W.B. Campbell JJ.) on 17th March, 1970.

Page 2, paragraph 3

3. By a written agreement of 5th March, 1965, the appellant agreed to execute and complete certain works for the Respondent. (Certain disputes having arisen between the parties the Appellant stopped work under the said agreement and thereafter the Respondent cancelled the same).

Page 4, lines 34-41
Page 5, lines 3-25

4. On 6th January, 1966, the parties referred to the arbitration of one F.S. Laws all matters and differences between them. On 8th November, 1966, the said F.S. Laws awarded that the Respondent pay the Appellant $478,478.00 in full satisfaction of all claims by each of the parties against the other together with costs.

Page 5, lines 36-8

5. The parties agreed the sum of $13,808.02 as the costs of the Appellant of the arbitration and award.

6. A motion by the Respondent to set aside the said award was refused by the said Full Court (Sheehy S.P.J., Douglas and Hoare JJ.) on 2nd May, 1967, and an appeal to the Full Court of the High Court of Australia was dismissed by that Court (Barwick C.J., McTiernan, Kitto, Menzies and Windeyer JJ.) on 2nd February, 1968. The reasons for judgment of the said Full Court of the High Court are reported in 118 Commonwealth Law Reports at pp. 58 to 78.

Page 6, paragraph 9

7. The Respondent paid to the Appellant the amounts of the said award and costs as follows:-

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

Pages 1-2

8. On 13th May, 1969, the Appellant issued out of the Supreme Court of Queensland Writ No. 421 of

1969 against the Respondent, claiming $49,386.90. The Statement of Claim of 15th May, 1969 shows this sum to be compound interest at twice the ruling rate of interest of the Commonwealth Savings Bank of Australia on deposit accounts on the said amounts of the award and costs from the date of the said award until payment thereof. Pages 6-7, paragraphs 10-11

9. The Appellant's claim purported to be made pursuant to Clause 35(c) of the said agreement of 5th March, 1965, which read 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." Page 3, lines 3-14

10. On 4th June, 1969, the Respondent demurred to the said Statement of Claim 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. Pages 8-11

And on other grounds sufficient in law.

11. Pursuant to Order 29 Rule 6 the Respondent Pages 8-10

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Record (Contd.)

Page 5

set out in paragraph 1 of its said demurrer so much of the award of the said F.W. Laws as it considered to be material, the said award having been referred to by the Appellant in paragraph 7 of its said Statement of Claim.

12. Order 29 Rule 6 aforesaid reads as follows:-

> "Demurrer to Claim Founded on Document. When the claim or defence of any party depends, or may depend, upon the construction of a written document, and the party in his pleading refers to the document but does not set it out at length, the opposite party may, in his demurrer, set out the document at length, or so much thereof as is material, and demur to the claim or defence founded upon it, in the same manner as if it had been pleaded at length by the other party.
>
> If he does not set out the document truly or sufficiently, the Court or a Judge may order the demurrer to be struck out or amended.".

13. In the decision of the appeal to the Full Court of the High Court of Australia referred to in paragraph 6 of this Case it was held by the majority (Kitto, Menzies and Windeyer JJ.) that the whole document of 8th November, 1966, was the award of the arbitrator and should be perused by the Court to determine whether there was an error of law on the face of the award.

118 C.L.R. at pp. 68, 72-73 and 77.

Barwick C.J. and McTiernan J. were of the contrary opinion.

118 C.L.R. at pp. 65-6.

Page 9, lines 27-31
Page 9, lines 32-35
Page 10, lines 10-19

14. The award of the said F.W. Laws included $152,830.00 damages for loss of profits, $110,226.00 damages for loss of use of the appellant's plant and interest on such sums at 7% for a period of 6 months, which said interest he purported to award under clause 35(c) aforesaid.

15. By the said decision of the Full Court of the High Court of Australia it was held that the said award of interest was erroneous in point of law.

118 C.L.E. at p. 63 per Barwick C.J. (with whom McTiernan J. agreed)

at p. 74 per Menzies J. (with whom Kitto J. agreed)

at pp. 66 and 68 per Kitto J.

and at p. 77 per Windeyer J.

16. By the said Statement of Claim the Appellant sought to recover under clause 35(c) aforesaid not only further interest on the amount awarded for which (as was held by the High Court of Australia) there is no warrant but interest on the interest improperly included (as was held by the High Court of Australia) by the said F.W. Laws in the said sum of $478,478.00

17. The application by the Appellant to amend its Statement of Claim on 14th November, 1969, was not opposed by the Respondent and the Respondent by its Counsel so informed the Full Court of the Supreme Court and refused to move for judgment in the action. The said amendment was refused and judgment entered by reason of the submissions of the Appellant to the said Full Court.

18. The issue raised by this appeal is whether interest is payable under the provisions of clause 35(c) aforesaid on the amounts of the award and of costs set forth in paragraphs 4 and 5 of this Case.

19. The terms of arbitration referred to in paragraph 6 of the Statement of Claim make no provision for an award of interest as part of the award or for the recovery or payment of interest on the award.

20. The Statute Law of Queensland makes no provision for the payment of interest on judgments or on awards. In particular there is no provision such as S. 17 or S. 18 of the Judgments Act 1838

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Record (Contd.)

(U.K.) (1 & 2 Vict. c. 110) or S.20 of the Arbitration Act 1950 (U.K.) (14 Geo. VI c. 27) Cf. The Queen v. County Court Judge of Essex 18 QBD. 704.

21. The amounts awarded by the said F.W. Laws were not payable on a day certain and there is no allegation of demand in writing by the Appellant giving notice to the Respondent that interest would be claimed from the date thereof and the said amounts were not paid pursuant to a judgment.

22. S.72 of the Common Law Practice Act 1867 of the State of Queensland which derives from 3 & 4 William IV c. 42 s. 28, reads as follows:-

> "72. Interest to be allowed on trials and assessments in certain cases. 3 & 4 Wm. IV. c. 42 s. 28. - Upon all debts or sums certain hereafter to be recovered in any action the jury on the trial of any issue or assessment of any damages may if they think fit allow interest to the creditor at a rate not exceeding eight per centum (or in respect of any bill of exchange or promissory note at a rate not exceeding twelve per centum per annum) from the time when such debt or sum was payable if payable by virtue of some written instrument and at a date or certain time or if payable otherwise then from the time when demand of payment shall have been made in writing giving notice to the debtor that interest would be claimed from the date of such demand.
>
> Provided that nothing herein contained shall extend to authorise the computation of interest on any bill of exchange or promissory note at a higher rate than eight per centum per annum where there shall have been no plea pleaded."

23. Order 47 Rule 17 of the Rules of the Supreme Court reads as follows:-

> "17. Amount of Money and Interest to be recovered to be Indorsed. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or

other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of five per centum per annum from the time when the judgment or order was entered or made, together with the costs of the writ; Provided that in cases where there is an agreement between the parties that more than five per centum interest shall be secured by the judgment or order, then the indorsement may be to levy the amount of interest so agreed."

24. There is no provision of the law of Queensland for the issue of a writ of execution to enforce an award unless it has first been made a rule of Court:

Killen v. Lomax (1888) 5 W.N. N.S.W.

27. An award may be made a rule of Court under S. 8 of the Interdict Act 1867 of the State of Queensland. There is no allegation that the award of the said F.W. Laws was made a rule of Court or that a writ of execution issued to enforce payment of the said amounts.

25. The Respondent humbly submits that the Judgment of the Full Court of the Supreme Court of 28th October, 1969 should be affirmed on the following grounds:-

REASONS

(1) On the proper construction of clause 35(c) aforesaid it provides for the payment of interest to the Appellant on moneys payable under the contract of 5th March, 1965 and not otherwise.

(2) The award of 8th November, 1966, or alternatively such award together with the payments referred to in paragraph 7 of this Case operated to discharge the contract of 5th March, 1965, by way of accord and satisfaction.

In the Supreme Court of Queensland

Record (Contd.)

Dobbs v. National Bank of Australasia Ltd. (1935) 53 C.L.R. 643 at p. 653, 656; Doleman v. Ossett Corporation (1912) 3 K.B. 257.

(3) The claim of the Appellant to recover interest on the award and the costs thereof is not warranted by the contract between the parties, the Terms of Arbitration or the statute law of the State of Queensland.

(4) The said amount of $478,478.00 represents one global sum imposing a new obligation on the Respondent and on the pleadings no part of it can be treated as merely ascertaining the existence and measure of an original liability; Commings v. Heard (1869) L.R. 4 Q.B. 669; Ayscough v. Steed Thomson & Co. (1923) 92 L.J.K.B. 878. Contrast Allen v. Milner (1831) 2 Cr. & J. 471,149 E.R. 20 which was,however, correctly decided.

(5) The Appellant's claim in the arbitration was for damages for breach of contract and was unliquidated. Alternatively, the pleadings do not show any part of such claim to have been liquidated.

(6) The Respondent's liability to the Appellant in respect of the said amount of $478,478.00 derived from the award. It was not pleaded that it derived from the contract of 5th March, 1965 and it did not so derive.

(7) A judgment for a principal debt is a bar to any claim for subsequent interest (although in England interest will run on the judgment pursuant to s. 17 of the Judgments Act 1838). This is because in point of law the moneys are no longer payable under the contract providing for the payment of interest but under the judgment.

Re Fewings (1883) 25 Ch.D. 338 especially at p.353 per Lindley L.J. and at p.355 per Fry L.J. Florence v. Jennings 2 C.B.N.S. 454.

(8) The original cause of action merges in a judgment and a second action cannot be brought on it:

8 Halsbury (3rd Ed.) p. 221 para. 379.

Similarly an award on a cause of action in contract is a bar to an action thereon: 2 Halsbury (3rd Ed.) p. 45 para. 98; 15 Halsbury (3rd Ed.) p. 213 para. 400. Gueret v. Andouy (1893) 62 L.J.Q.B. 633 at p. 637 per Smith L.J.

26. The Respondent does not desire to be heard by their Lordships on the appeal against the Judgment of 14th November, 1969, save on the question of costs.

P.D. Connolly Q.C.

P.V. Loewenthal

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CASE FOR THE RESPONDENTS

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