Privy Council Appeal No. 38 of 1970

F. J. Bloemen Pty. Limited formerly Canterbury Pipelines (Aust.) Pty. Ltd. - - - - - - *Appellant*

v.

The Council of the City of Gold Coast - - - *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2 MAY 1972

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* LORD PEARSON]

These are consolidated appeals against three orders of the Full Court of the Supreme Court of Queensland. The first order which was dated 28th October 1969 allowed the demurrer of the respondents the Council of the City of Gold Coast to the Statement of Claim of the appellants F. J. Bloemen Pty. Limited, formerly Canterbury Pipelines (Australia) Proprietary Limited. The second order which was dated 14th November 1969 refused the appellants leave to deliver an amended Statement of Claim in the form then proposed and by the third order also dated 14th November 1969 judgment was entered for the respondents in the action.

The events leading up to the issue of the writ were—briefly stated—as follows. On 5th March 1965 the parties entered into a contract in writing under which the appellants therein called "the contractor" were to execute some sewage works for the respondents. Clause 35 (*c*) of the contract provided that the Contractor should be entitled to interest on all monies payable to him but unpaid from the date on which payment became due at a rate therein specified and the contract contained an arbitration clause. Disputes arose between the parties in the course of which the respondents purported to rescind the contract and the disputes were submitted to the arbitration of an engineer Mr. F. W. Laws. On 8th November 1966 he made an award in favour of the appellants in the sum of $478,478 and further awarded them the costs of the arbitration. The sum of $478,478 was composed of three elements. First the arbitrator awarded a sum of $200,242 in respect of work

carried out by the appellants for which they had not been paid. Secondly he awarded a sum of $263,056 by way of damages for their loss of profit and loss of the use of their plant. He directed, however, that a sum of $1,000 be deducted from the aggregate of the two sums previously mentioned leaving a balance of $462,298. Finally in purported reliance on clause 35 (*c*) he awarded interest on that sum for a period of six months at the rate of 7%. This interest amounted to $16,180—making up the total of $478,478. After the award was made the respondents applied to the Supreme Court of Queensland to set it aside on a number of grounds. The Supreme Court dismissed the application and the respondents then appealed to the High Court of Australia. After filing their notice of appeal they gave notice to the appellants that on the hearing of the appeal they would seek to argue a further point not argued below or included in their notice of appeal—namely that the inclusion in the award of the sum of $16,180 for interest was an error of law apparent on the face of the award. The High Court by its judgment given on 2nd February 1968 which is reported in 118 C.L.R. 58 held (1) that there was no substance in any of the grounds advanced by the respondents (then appellants) for setting aside the award other than that relating to the inclusion of the sum for interest. (2) that in awarding interest on the sum of $462,298—or at all events on so much of that sum as consisted of an award of damages—the arbitrator had erred in law but (3) that as the point was not taken below or included in the notice of appeal and the sum involved was small in comparison with the total amount of the award the appeal should be dismissed. The award therefore stood (and, so far as this appeal is concerned, still stands) as a binding award notwithstanding the error of law contained in it and the respondents paid the sum of $478,478 due under it by two instalments—one of $403,478 made on 22nd February 1968 and the other of $75,000 made on 28th March 1968. The appellants' costs of the arbitration were agreed at $13,808 and paid by the respondents on 17th April 1968.

By the writ in this action issued on 13th May 1969 the appellants claimed the sum of $49,386 as interest at 7% from the 8th November 1966 on the amount of the award and the costs together with interest at 7% on that sum from the date of the writ until payment. The Statement of Claim was delivered on 15th May 1969. Paragraphs 1 and 2 set out the particulars of the appellants and respondents describing them as "the contractor" and "the principal" respectively. The pleading then continued as follows:

> "3. By an agreement in writing bearing date the Fifth day of March 1965 the contractor covenanted faithfully to execute and complete several works and provisions in accordance therewith and the principal covenanted to pay to the contractor such sums as might become payable pursuant thereto at such times and in such manner as therein provided. The contractor craves leave to incorporate the said agreement in writing herein and will refer thereto at the trial of this action for its full terms true meaning and effect.
>
> 4. Clause 35 (*c*) and Clause 41 of the general conditions of the said agreement in writing bearing date the Fifth day of March 1965 respectively provide as follows:—
>
> '35 (*c*) 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.'

'41 (*a*) Submissions to arbitration. If any question, difference or dispute whatsoever shall arise between the principal and the contractor or the Engineer and the Contractor upon or in relation to or in connection with the contract which cannot be resolved by the contracting parties to their mutual satisfaction, either party may as soon as reasonably practicable by notice in writing to the other party clearly specify the nature of such question, difference or dispute and call for the point or points at issue to be submitted by settlement by arbitration.

(*b*) Arbitration and arbitrators. Arbitration shall be effected—

(i) by arbitrator agreed upon between the parties, or failing agreement upon such an arbitrator,

(ii) by an arbitrator appointed by the President for the time being of the Institution of Engineers, Australia, or failing such appointment,

(iii) by an arbitrator appointed in accordance with the provisions of the arbitration act of the state whose laws govern the contract.

(*c*) Arbitration deemed to be under Arbitration Act. Submission to Arbitration shall be deemed to be submission to arbitration within the meaning of the Arbitration Act of the State whose laws govern the contract.

(*d*) Costs. Upon every and any submission to arbitration the costs of and incidental to the submission and award shall be at the discretion of the arbitrator, who may determine the amount thereof or may direct that the costs be taxed by a proper officer of the Court. The arbitrator shall direct by whom, in what proportion and in what manner costs shall be paid.

(*e*) Continuation of work and payments during arbitration. If it be reasonably possible, work under the contract or any variation thereto shall continue during arbitration proceedings, and no payment due or payable by the Principal shall be withheld on account of the arbitration proceedings unless so authorised by the contractor.'

5. Each of the parties served upon the other a notice of dispute in relation to certain differences between the parties arising out of the said agreement in writing.

6. On the Sixth day of January 1966 the parties executed a document entitled 'Terms of Arbitration' whereby they appointed one F. W. Laws the Arbitrator pursuant to the said Clause 41 of the said agreement in writing, on the terms therein set out and referred to the said Arbitrator all matters and differences between them. The contractor craves leave to incorporate the said 'Terms of Arbitration' herein and will refer thereto at the trial of this action for its full terms, true meaning and effect.

7. By a document in writing bearing date the Eighth day of November 1966 the said F. W. Laws made an award of and concerning the matters so referred to him in the following terms:—

'1. *I award and direct* that the said Council of the City Gold Coast shall pay the said Canterbury Pipelines (Aust.) Pty. Ltd. the sum of *FOUR HUNDRED AND SEVENTY-EIGHT THOUSAND FOUR HUNDRED AND SEVENTY-EIGHT DOLLARS* ($478,478.00).

2. I award that the said sum of *FOUR HUNDRED AND SEVENTY-EIGHT THOUSAND FOUR HUNDRED AND SEVENTY-EIGHT DOLLARS* ($478,478.00) be paid and accepted in full satisfaction of all claims by each of the said parties against the other and of all matters and differences between them.

3. As to costs I award and direct that the said Council of the City of Gold Coast shall pay to the said Canterbury Pipelines (Aust.) Pty. Ltd. its costs of and attending to the said arbitration and shall also pay the costs of this my award.'

Paragraph 8 sets out the agreement as to the amount of costs; Paragraph 9 the payment of the sum awarded and the costs; Paragraph 10 the rate of interest of the Commonwealth Savings Bank by reference to which the rate of 7% was calculated; and Paragraph 11 the manner in which the sum of 49,688 dollars claimed was calculated."

On 4th June 1969 the respondents delivered a demurrer in the following terms:

"1. The Defendant says that the award referred to in paragraph 7 of the Statement of Claim contained as part of it certain reasons (which were delivered at the time of the award and formed part of it) paragraph 12 of which reads as follows:

'Decision on payment.

I have decided that

(*a*) The work done by the Contractor was inadequately recompensed by the schedule rates forming part of the Contract.

(*b*) The Contractor was justified in stopping work.

(*c*) The Principal was not justified in refusing approval for the Contractor to start work in Southport.

(*d*) The Principal was not justified in cancelling the Contract.

There remains to be settled now the question of payment.

In this respect the Contractor's Counsel has set out four alternative methods of payment. This is about the only information I have. The Principal has not assisted very much in helping me to assess any new values assuming a change. Under such circumstances I must be guided solely by the terms of the Contract.

I am loath to accept the Contractor's new rates.

The alternative (says Clause 22F of the General Conditions of Contract) is day labour or else the Arbitrator fixes new rates. The Arbitrator has insufficient information to fix new rates. Therefore recourse must be had to the day labour principle.

I therefore accept as proved

(*a*) The Contractor's claim as set out in exhibit YY in the sum of £100,121.7.3 ($200,242.72).

(*b*) The Contractor's claim as follows

(i) For loss of profit on balance of Surfers Paradise	£10,653
(ii) For loss of profit on Southport	£65,762
(iii) Loss of use of plant at Surfers Paradise ...	£28,233
(iv) Loss of use of plant at Southport	£26,880
Total	£131,528
or	$263,056

(*c*) I agree to a deduction from the Contract Price in the sum of $1,000 (see par. 6).

Total of (*a*) and (*b*) is	$463,298
Less (*c*)	$1,000
Net total	$462,298

It is not proposed to allow any additional payment for overheads.

Clause 35C of the General Conditions of Contract says that the Contractor is entitled to interest on moneys owing to him and the rate is set out at 7%.

Interest is therefore to be paid at this rate on the net total shown in (*c*) for a period of six (6) months that is an amount of

$$\frac{462298 \times 7}{100 \times 2} = \$16180$$

The grand total of the award is therefore

$462298
16180
$478478

The formal award follows immediately hereafter.'

2. The Defendant demurrs to the Plaintiff's Statement of Claim and says that the same is bad in law on the following grounds:

(*a*) The said award was in substitution for, and superseded 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.

And on other grounds sufficient in law ".

On 28th October 1969 the Full Court by a majority (Hanger A.S.P.J. and Hoare J.—Lucas J. dissenting) allowed the demurrer. One reason given by Hanger A.S.P.J. for allowing it was that there was no sufficient allegation in the Statement of Claim that the arbitration was held and the award made under the agreement of 5th March 1965. Hoare J. did not refer to this pleading point in his judgment and Lucas J. rejected it. If and so far as it is well founded the defect could presumably

be cured by an amendment of the Statement of Claim and the respondents did not rely on this point before the Board. The ground upon which Hanger A.S.P.J. and Hoare J. concurred in allowing the demurrer was that the sums of $200,242 and $263,056 totalling (less the $1,000 deducted) $462,298 were not monies payable to the appellants under the contract of 5th March 1965 and were consequently not monies to which clause 35 (*c*) of that contract could apply. They pointed out that the cases—notably *Allen v. Milner* (1831) 2 Crompton and Jarvis 47, *Commings v. Heard* (1869) L.R. 4 Q.B. 669 and *Dobbs v. National Bank of Australasia Ltd.* (1935) 53 C.L.R. 643 at 653—showed that on the one hand an award may go no further than to establish the existence and measure the extent of a liability arising under the contract containing the agreement to submit differences to arbitration but that on the other hand it may go further and substitute a fresh obligation in place of an obligation arising under the contract. In this case it was clear that the award of damages for loss of profit and loss of the use of the plant created a fresh obligation to pay the sum awarded which superseded the obligation arising from the respondent's breach of contract. They further held—though Hoare J. felt some doubt on this point—that the appellants' pleading did not show that the sum of $200,242 was a sum due under the agreement and that accordingly the obligation to pay it had also to be regarded as a fresh obligation arising by virtue of the award. In their view fresh obligations created by an award in substitution for obligations under the contract could not be regarded as monies payable to the appellants within the meaning of clause 35 (*c*) of the contract. Hanger A.S.P.J. further held that as the arbitrator was not entitled to include in his award any sum by way of interest for a period prior to the date of the award on damages awarded by him so much of the total award as consisted of such interest could not in any case be regarded as validly awarded so as to fall under clause 35 (*c*) notwithstanding the fact that the High Court had refused to set aside this award. Hoare J. expressed no view on this point.

The dissenting judgment of Lucas J. may be summarised as follows:

1. Clause 35 (*c*) related only to monies payable by virtue of the contract.

2. In relation to the matters submitted to him the arbitrator's award constituted a fresh obligation replacing the original obligation to perform the contract according to its terms.
But 3. the obligation of the parties to perform the substituted obligation flowed from the agreement to submit differences to arbitration contained in Clause 41 of the contract and
Therefore 4. the amount awarded could fairly be said to be monies payable by virtue of the contract and so within the scope of Clause 35 (*c*). He further held that the fact that the arbitrator had wrongly included interest on damages in his award was irrelevant to the question to be determined since the High Court had allowed the whole award to stand as a valid award.

The demurrer having been allowed the appellants on 14th November 1969 applied to the Full Court—constituted in the same way—for leave to amend the Statement of Claim but their counsel conceded that although the proposed amendments would meet the pleading point taken by Hanger A.S.P.J., in the light of the reasons for the judgment on demurrer given by the majority of the Court even the amended Statement of Claim would appear to be demurrable. The Court accordingly refused leave to amend the Statement of Claim. Counsel for the respondents foreseeing that if judgment was entered for his clients the appellants would probably be entitled to appeal as of right to Her

Majesty in Council declined to move for judgment but the Court gave judgment for the respondents of its own motion. On 19th December 1969 the Full Court—differently constituted—held that the judgment given on 14th November dismissing the action was a final judgment within the meaning of the Rules governing appeals from Queensland to Her Majesty in Council and as they considered it desirable that the Board should deal with all the matters in controversy between the parties they gave the appellants leave to appeal from the orders allowing the demurrer and refusing leave to amend the Statement of Claim.

Their Lordships will deal first with the subsidiary question whether the inclusion by the arbitrator in his award of a sum by way of interest for a period prior to the award on damages awarded by him itself prevents the total sum awarded from being considered as monies payable by the respondents within the meaning of clause 35 (*c*). It is, of course, true that the arbitrator was not entitled to award such interest; but unless and until the award was set aside in whole or in part the total sum awarded including the sum for interest was a sum payment of which the appellants could enforce as having been validly awarded—as indeed the respondents recognised by paying it as soon as their appeal to the High Court was dismissed. Their Lordships agree with Lucas J. that if the total sum awarded would otherwise fall under clause 35 (*c*) the fact that it included this sum for interest would be no answer to the appellants' claim.

Their Lordships turn now to the main point in the appeal. It was common ground—it is indeed obvious—that clause 35 (*c*) can in any event only relate to monies which can be said to have become payable to the appellants under or by virtue of the contract. The contentions advanced by the respondents before the Board on this aspect of the case were twofold. First they submitted that when an arbitrator awards a sum by way of damages for breach of the contract containing the submission his award gives rise to a fresh cause of action which supersedes the original cause of action arising out of the breach and that the sum awarded is a sum payable under the award and not under the contract. Secondly they submitted that even if a sum awarded by way of damages in an arbitration held during the currency of the agreement could be said to be monies payable under the contract the same could not be said of the sum payable under an award such as this which followed a repudiation of the contract by the respondents accepted by the appellants. Mr. Laws' function was to settle once and for all the liabilities of the parties to one another under the contract including clause 35 (*c*) and that clause could not operate as it were a second time on the total sum awarded.

Before considering these contentions their Lordships would observe that even if they are ill-founded and the sum payable under this award can be said to fall *prima facie* within the scope of clause 35 (*c*) it might still be that that clause read in the context of the whole agreement in which it appears bears a more limited construction—is for example, limited to sums payable by the respondents under certificates given by some Quantity Surveyor or other expert in the course of the execution of the works. But although by paragraph 3 of the Statement of Claim the appellants sought to incorporate the whole agreement in their pleading it does not appear that any reference was made below to any parts of it other than clauses 35 (*c*) and 41 and the agreement itself was not placed before the Board. Their Lordships must, therefore, construe clauses 35 (*c*) and 41 as it were "*in vacuo*" for the purpose of this appeal. So construing them they prefer, on the whole, the conclusion as to the *prima facie* scope of clause 35 (*c*) reached by Lucas J. to that

favoured by Hanger A.S.P.J. and Hoare J. It is true—as the cases above referred to show—that when an arbitrator fixes a sum to be paid by one party to the submission by way of damages for breach of contract the award creates a fresh cause of action superseding that arising out of the breach. But it does not appear to their Lordships to follow from that that the cause of action which comes into existence when the award is made cannot be said to arise under the contract which contains the submission. The award of an arbitrator differs materially from a judgment. The plaintiff's right to sue and the Court's right to give judgment for him if he proves his case are not derived from the agreement of the parties and the judgment when given is an entirely fresh departure. The award of an arbitrator on the other hand cannot be viewed in isolation from the submission under which it was made. It was this sort of consideration which led the Court of Appeal in the case of *Bremer Oeltransport G.M.B.H. v. Drewry* [1933] 1 K.B.753 to hold that an action brought to recover a sum awarded by an award made in Hamburg under a submission contained in a contract made in London was an action brought to enforce a contract made within the jurisdiction and their Lordships think that the same reasoning applies here. The distinction between an award which merely establishes and measures a liability under the contract and so does not create a fresh cause of action and an award of damages which supersedes the liability under the contract and creates a fresh cause of action, whatever its validity in other contexts, does not, in their Lordships' opinion govern the broad question at issue here. Accordingly on this point they agree with Lucas J. that sums payable under this award albeit payable in part by way of damages can be fairly said to fall *prima facie* within the scope of clause 35 (*c*).

Turning now to the second contention advanced by the respondents their Lordships think that it is a fair, indeed an inevitable, inference from the facts pleaded not only that the respondents repudiated the agreement but that the appellants accepted the repudiation. The question is what was the effect of the accepted repudiation upon the relevant clauses in the contract. It appears from *Heyman v. Darwins* [1942] A.C. 356 that an arbitration clause of a normal character can be invoked after acceptance of repudiation; but in their Lordships' opinion it follows from the same case, and from principle, that this is an exception to the general consequence that "executive obligations" as they were called by Lord Macmillan or "substantial obligations" of the contract as they were called by Lord Wright do not survive as effective obligations. Clause 35 (*c*) of the contract, their Lordships consider to create an obligation of this kind, performance of which cannot be required after an accepted repudiation, and their Lordships do not see how the absence from the general law of Queensland of any provision for interest upon arbitration awards can affect this result. Upon this view of the pleaded facts and of those provisions of the contract which alone are accessible to them, their Lordships must come to the conclusion, in agreement with the majority of the Supreme Court, that the claim for interest upon the sum awarded by the arbitrator is bad in law and that the demurrer was rightly held to succeed. They will therefore humbly advise Her Majesty that these appeals should be dismissed. The appellants must pay the costs of the appeals.

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In the Privy Council

F. J. BLOEMEN PTY. LIMITED
FORMERLY CANTERBURY
PIPELINES (AUST.) PTY. LTD.

v.

THE COUNCIL OF THE CITY OF
GOLD COAST

DELIVERED BY
LORD PEARSON

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