18/79

IN THE PRIVY COUNCIL No. 33 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

B E T W E E N :

G. ABIGNANO PTY. LIMITED

(Plaintiff) Appellant

- and -

COMMISSIONER FOR MAIN ROADS

(Defendant) Respondent

CASE FOR THE APPELLANT ON THE APPEAL

1. This is an appeal by leave of the Supreme Court of New South Wales finally granted under the Order in Council of 1909 on the 21st day of September, 1978 from an Order dated the 21st day of April, 1978 of that Court (Mr. Justice Sheppard) answering in a manner adverse to the interests of the Appellant certain of the questions of law submitted to that Court by Summons and Cross Summons. p.29.17

2. This Appeal concerns the construction of two contracts made between the Appellant and the Respondent dated respectively October 1978 and August 1974 and whether on the true construction of an identical clause in each of those contracts (Specification Volume 1, Clause B3.05(f)) the Appellant should be paid by the Respondent for the removal of unsuitable material at the rate specified in Item 8 in a Schedule to the Contracts. p.30 p.94 p.61.13 p.39 p.96

3. The contracts concerned the construction of two

sections of the South Western Freeway in New South
p.5.23 Wales being the sections from Yanderra to Yerrimbool from Yerrimbool to Aylmerton. The Respondent invited the submission of tenders in respect of each section.
p.35 Tenders had to conform to certain Conditions of Tendering. Tenderers were required to submit a lump sum price for the work which was specified and shown in certain drawings and was subject to certain General Conditions of Contract. Each Specification was prepared by the Respondent and so far as material to
p.21 the present appeal the Specification, Conditions of Tendering and General Conditions of Contract were
p.51 identical for both sections of the Freeway. Clause B1.01 of the Specification defined the extent of the earthworks to be executed and described the limit of such works by reference to Figure 1 of the Specification
p.35 and cross-sections in a nominated drawing. Under the Conditions of Tendering, a tenderer was required (Condition 3) to furnish a schedule of the estimated quantities, rates and amounts for each item of work described in the schedule and to show how the bulk sum submitted as a tender was calculated. When calculating its bulk sum a tenderer was in a position to know the location, geometry and quantity of material to be removed and placed for such sum in order to obtain the required profile of the Freeway. It could also assess in advance the nature of the material which had to be removed and placed and what was involved in this removal and placement. It could thus calculate the cost of such removal and placement.

4. The Appellant was the successful tenderer in
p.30 respect of the two sections of Freeway referred to in
p.94 paragraph 3 hereof and executed a separate bulk sum contract for each section. The Schedule of Quantities and Rates submitted with each tender became part of the respective contracts as did the Specification and General Conditions of Contract. Clause 17 of the
p.32 General Conditions of Contract made provision for the performance of extra work or for alterations to the work to be performed.

5. In the course of the work material can be
p.5.33 encountered which is considered by the engineer to be unsuitable. In these circumstances the Engineer may direct the contractor to remove the unsuitable material. Within the area of the road the removal of such material always involves excavation below the sub-grade level as
p.50A shown on Figure 1 and drawing 6005 287 RC0014. The
p.92A execution of this work is not included in the bulk sum.
p.22 Having removed the unsuitable material, the contractor

is required to backfill (with material which is suitable) the hole or cavity created by such removal. Neither the contractor nor the Respondent can know in advance whether unsuitable material will be encountered, and if it is, its extent, location, nature and geometry. Unsuitable material can vary from small isolated pockets to larger less confined deposits. The very characteristics which make it unsuitable may likewise make it difficult to handle. The techniques required for its removal may differ from those used in general earth works and the cost of removal can vary greatly. This work is recognised in the earth moving and road making industries as a high risk area of work. Commercial good sense would cause you to expect this high risk to be reflected in a rate of payment higher than the rate applicable to the removal and placement of material which is not unsuitable. (B.P. Refinery (Westernport) Pty. Ltd. v. Shire of Hastings 16 A.L.R. 363).

p.6.13
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p.6.30

6. The principles to be applied to the construction of a commercial contract have recently been affirmed by the High Court of Australia in Australian Broadcasting Commission v. Australasian Performing Right Association Ltd. (129 C.L.R. 99 at 109) in the following terms :-

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the

> construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in Locke v. Dunlop, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also Bottomley's Case. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects', should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd." 1968 118 C.L.R. 429 at 437)

This statement has been applied by the High Court of Australia in Lewis Construction Pty.Ltd. v. Southern Electricity Authority of Queensland ((1976) 11 A.L.R. 305 at 315, 323) and adopts the approach to construction taken in such cases as L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. ((1974) A.C. 235 especially at 251). In Re Alma Spinning Co. (Bottomley's Case) (16 Ch. D. 681 especially at 686). Locke v. Dunlop (39 Ch. D. 387 especially at 393), Tatham v. Brommage & Co. ((1898) A.C. 382 especially at 386), Upper Hunter County District Council v. Australian Chilling and Freezing Co.Ltd. ((1968) 118 C.L.R. 429 at 437).

7. Volume I of the Specification for each contract is divided into five parts as follows :-

Part A - General

Part B - Earthworks

Part C - Storm Water Drainage

Part D - Sub Soil Drainage

Part E - Boundary Fencing

p.39-p.48 p.96-p.99 The schedule to each contract is not divided into parts and the order of items in the schedule does not follow the order of the parts in the Specification.

8. The following items in the Schedule are relevant to an analysis of the specification :-

item 3: Earthworks (Excavation to sub-grade level) p.39 p.96

item 4: Removal of topsoil from area covered by embankments loose in stock pile.

item 5: Trimming and compaction of Selected Sub-base material in place.

item 8: Excavation for pipes, gully pits, etc. including backfilling.

9. When the Specification deals with the area of the road it consistently uses the term "earthworks" to describe the winning and transfer of material from cuttings and its re-use as filling for the formation of the profile depicted in the Contract drawings. The excavation involved extends only as far as the sub-grade level (Clause B1.01). Filling is to be contrasted with backfilling. Filling involves the movement of material into a naturally occurring depression or hole or the raising of an existing level e.g. by creation of an embankment. Backfilling involves the placement of material in a cavity or hole which has been excavated and is done to restore the pre-existing level. Earthworks do not involve backfilling. p.51.13

The work referred to in Schedule Item 8, "excavation for pipes, gully pits, etc. including backfilling" is always carried out below sub-grade level. It contemplates the digging of a cavity or hole and the backfilling of such cavity or hole with suitable material. p.39 p.96

10. Specification Volume I Clause B3.03 provides that "the scheduled rate submitted for earth works is to be an average rate for all types of material, and separate rates are not to be submitted for earth and rock". These words relate to the work previously defined by Clause B1.01, the Contract drawings and Figure 1 and thus do not extend to materials below the sub-grade level. They thus do not apply to unsuitable material. p.56.27 p.51

11. Clause B3,05 is headed "Excavation" and is divided into eight sub-Clauses. p.57.21

12. Clause B3.05(a) deals with the removal of top soil and involves three different rates of payment. The first relates to the removal of top soil over p.57.23

p.57.31 p.55.33 p.50A p.56.12 cuttings. This work is stated to have been included in the earthworks quantities and that it is part of the work covered by the bulk sum. This is consistent with Clause 3.05, Figure 1 and Clause 3.03 since the work is all above sub-grade level.

p.57.35 The other rates dealt with by this sub-Clause are related to the situation in which the contractor is directed by the Engineer to take top soil from areas other than over cuttings and thereafter to stock pile such top soil separately. Payment for this work is made at one of two rates. If such topsoil is within p.57.42 twelve inches of the natural surface payment is made at the rate specified in Schedule Item 4. If it is deeper than twelve inches from the natural surface p.57.1 payment is made at the scheduled rate for excavation (Clause B3.06) being the rate applicable to unsuitable material. If the rate applicable to unsuitable material was intended to be the same as that applicable to earthworks the draftsman would have simply referred back p.57.32 to the rate for earthworks already referred to in Clause 3.05(a). The fact that he has not done this highlights that the rate for unsuitable material is different from the rate for earthworks.

p.58.7 13. Clause B3.05(b) is concerned with cuttings, including slopes. It deals only with work above the sub-grade level. It makes provision for a situation p.58.34 in which the Engineer redetermines the slope of a cutting. Such a change will cause either an increase p.59.9 or decrease in the excavation which is necessary to attain that slope. Extras or deductions based upon variations in the quantities are to be dealt with in accordance with Clause B3.03, that is Schedule Item 3.

p.60.10 14. Clause B3.05(d) deals with benching in cuttings. All the work dealt with by this Sub-Clause is above the sub-grade level and variations in quantities are to be p.60.20 adjusted "at the scheduled rate for earthworks".

p.60.25 15. Clause B3.05(e) is concerned with excavation below the sub-base level. The sub-base level, as p.50A depicted in Figure 1 and drawing 6005, 287. R.C.0014, p.92A is the level of the top of the sub-base layer. This sub-base level is one foot above the sub-grade level. The sub-base layer consists of a layer of selected material one foot thick which is placed on the sub-grade. As the sub-base layer is above sub-grade level the material to be removed is included in the bulk sum p.61.13 and any deletions from such removal give rise to deductions from the bulk sum price at the rate

appropriate to earthworks.

The first paragraph of this sub-clause deals with the level of excavation in cuttings and requires that cuttings will be excavated to a depth of one foot below the sub-base level. Such excavation is thus always above sub-grade level and so is included in the work covered by the bulk sum. p.60.26

The layer of material between the sub-base level and the sub-grade level is called the Selected Sub-base Layer. Work in respect of it attracts two rates of payment. The first rate is for Earthworks (item 3) and the second rate is for Trimming and Compaction (item 5). In this first paragraph provision has been made for a deduction to be made from the earthworks quantities included in the bulk sum whilst still enabling payment to be made for trimming and compaction. p.50A p.60.25

In contrast, the fourth paragraph of Clause 3.05(e) deals with work to be carried out below the sub-grade level. The contractor is required to shatter or loosen the sub-grade material for the full width of the formation to a minimum depth of six inches below the sub-grade level. No extra payment is provided for in respect of this work and the contractor has to provide for its cost in the bulk sum. To ensure that this is done and to maintain consistency in the characterising of work the clause suggests that the cost of executing this work be included in the rate for excavation rather than that for earthworks. It is submitted that the Supreme Court fell into error in concluding that "excavation" in Clause 3.05(e) must be referring to Schedule Item 3. p.61.3 p.27.15

16. Clause B3.05(f) is concerned with the removal of unsuitable material from the bottom of cuttings and from beneath embankments. Both of these locations are by definition below sub-grade level. p.61.14

When the specified work included in the bulk sum has been executed the Contractor may be directed to remove material below sub-grade level because it is unsuitable. Schedule Item 8 and not item 3 is the appropriate rate of payment for this extra work. Item 3 is not appropriate firstly because the words in parenthesis in that item exclude work below the sub-grade level. Secondly, it would be unnecessary to add the words "irrespective of the nature of the material removed" which appear at the end of Clause B3.05(f) if the work was included in earthworks, p.56.12

since Clause 3.03 already makes it clear that the scheduled rate for earthworks is to be an average rate
p.39 irrespective of materials. Thirdly, Clause B3.05(f)
p.96 itself refers to backfilling which forms part of the matters covered by Schedule Item 8.

17. There is a no genus to be found in Item 8 of the Schedule to restrict the word "etc.". Alternatively, if there is, it is one which is concerned with the creation of a hole or cavity below sub-grade level and its backfilling. The removal of unsuitable material involves the creation of a hole or cavity as large or small as the unsuitable material may be and its replacement, by means of backfilling, with material which is suitable. "Etc." is used to indicate that the item covers all other excavation. It is a word of extension not of restriction. (Ambatielos v. Anton Jurgens Margarine Works (1922) 2 K.B. 185 at 196; 205) (1923) A.C. 175) at 183.

p.62.25 18. Clause B3.06(a) is concerned with foundations for embankments. In this sub-clause four categories of work and bases of payment are contrasted. Removal of topsoil to a depth within twelve inches of the surface is to be paid for at the rate provided in Schedule Item 4. When the depth is greater than twelve inches the rate of payment is that provided for in respect of excavation. Sub-soil drainage is to be paid for at the rate scheduled for sub-soil drains (item 14). All other work is included in the bulk sum and forms part of the earthworks. If earthworks and excavation as used in this sub-clause were covered by the same item in the schedule, the method of its drafting would be quite different. The fact that these things are dealt with separately in the same sub-clause points to their being different. But the terminology in Clause B3.05(f) and in Clause B3.06(a) is the same, namely "at the scheduled rate for excavation irrespective of the nature of the material removed". This phrase should be assigned the same meaning in each clause and should be construed as designating Schedule item 8. Such a construction is harmonious with the general approach in the Specification, namely that earthworks cease at the sub-grade level.

19. Clause C2.03 of the Specification provides for the
p.85.5 method of laying pipes. This work is carried out below sub-grade. The pipes are required to be laid on certain types of bedding in trenches or shallow cuts made in solid ground or compacted fill. Provision is made for
p.86.10 the Engineer to order the removal of unsuitable material

below the level of the bottom of the excavation for the bedding. The unsuitable material must be removed and backfilled with "non-plastic granular material compacted in accordance with the above requirements, in which case payment will be made for the removal and the replacement of the unsuitable material at the scheduled rate for excavation in accordance with Clause B3.05(f)." If Clause B3.05(f) were to be interpreted as referring to the scheduled rate Earthworks, Item 3, a lower rate of payment would be applicable for the removal and replacement of the unsuitable material in the bottom of a trench or cut than for the digging of the trench or cut itself, yet the unsuitability of the material would themselves make removal of this material more difficult. Such a result is both unreasonable and contrary to commercial reality, and should be avoided in the construction of the contract. p.6.20

20. The work involved in removing unsuitable material being below sub-grade level cannot properly be fitted within the framework of Schedule Item 3.

21. The Respondent prepared the Specification for the works. If the provisions of Clause 3.05(f) as to payment are ambiguous they should be construed against the Respondent. (South Australian Railways Commissioner v. Egan 130 C.L.R. 506 at 512; Chitty on Contracts 24th edn. paragraph 726.)

22. The Appellant respectfully submits that the Order of the Supreme Court of New South Wales was wrong and ought to be reversed, and that a declaration and orders made as sought by the Appellant in its summons for the following (amongst other)

R E A S O N S

1. BECAUSE the decision appealed from assigns an incorrect construction to the contract.

2. BECAUSE the Court was in error in failing to construe Clause B3.05(f) as requiring payment for the removal of unsuitable material at the rate specified in Schedule item 8 having regard to the terms of the Contract and in particular to Clauses B3.01, B3.03, B3.05, B3.06 and C2.03.

3. BECAUSE the Court, in construing the contract, failed to give weight to commercial considerations which indicated a higher rate of

payment for work that could involve a greater degree of difficulty and higher cost risk.

4. BECAUSE the Court was in error in construing certain items in the Schedule to the Specification as applying exclusively to certain Parts of Volume 1 of the Specification.

5. BECAUSE the Court was in error in its application of the ejusdem generis rule of construction in the interpretation of the word "etc". appearing in the Schedule item 8.

6. BECAUSE the Court was in error in failing to resolve any ambiguity which may exist in the terms of Clause B3.05(f) against the Respondent in accordance with the contra preferentem rule of construction.

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 33 of 1978

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

B E T W E E N :

G. ABIGNANO PTY. LIMITED Appellant
(Plaintiff)

- and -

COMMISSIONER FOR MAIN ROADS Respondent
(Defendant)

CASE FOR THE APPELLANT

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