

18/74

IN 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

- and -

COMMISSIONER FOR MAIN ROADS

Respondent

CASE FOR THE RESPONDENT

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Respondent

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION COMMERCIAL LIST

BETWEEN

G. ABIGNANO PTY. LIMITED

Appellant

- and -

COMMISSIONER FOR MAIN ROADS

Respondent

CASE FOR RESPONDENT

- | | <u>Record</u> |
|--|-----------------------------------|
| 1. This is an appeal as of right from a judgment of the Supreme Court of New South Wales (Sheppard J.) given on 21st April 1978 | pp.21 - 29 |
| 2. The proceedings in the Supreme Court and this appeal involve the correct interpretation of two contracts for the carrying out by the appellant of part of the work involved in the construction of the South Western Freeway on the outskirts of Sydney. | pp.30-99 |
| 3. Clause B3.05(f) of the Specifications enabled the respondent's Engineer to direct the appellant to remove "unsuitable material" found in the bottoms of cuttings (i.e. at or below the subgrade level of Figure 1) or in the natural surface beneath embankments. The | p.61 lines
14-22

p. 50A |

Record

Engineer gave such directions in relation to material in the bottoms of cuttings, and the appellant complied with them, but a dispute arose as to the proper basis on which the appellant should be entitled to payment for this extra work.

p.9 lines
20-31

p.12 lines
25-29

p.6 line 41
- p.7 line 13

4. The dispute concerns the meaning in Clause B3.05(f) of the Specifications of the words:

p.61 lines
20-23

"Payment will be made for the removal of the unsuitable material at the scheduled rate for excavation, irrespective of the nature of the material removed".

5. Sheppard J. accepted the submission for the respondent that "the scheduled rate for excavation" referred to was the rate of \$1.89 per cubic yard for Item 3 in the Schedule of Quantities viz "Earthworks (Excavation to subgrade level)".

p.28 line
32 - p.29
line 7

p.39, p.96

6. The appellant contended in the Supreme Court, and maintains in this appeal that the rate referred to was the rate of \$14.90 per cubic yard for Item 8 in the Schedule viz: "Excavation for pipes gully pits etc including backfilling."

p.39, p.96

Record

7. In his reasons for judgment Sheppard J. substantially accepted the submissions of Counsel for the respondent. No question of legal principle is involved in the appeal, and the question of construction is neither clarified nor confused by prior authority on the construction of similar contracts. pp.21-29
8. The respondent therefore will not lengthen its case by repeating in other language Sheppard J's. reasons for judgment, but respectfully adopts them as part of its case.
9. It is clear from the terms of Item 3 itself that it covers excavation work, but further light is thrown on the meaning of this Item by other provisions of the specification. p.39,p.96
10. Clause B3.03 of the specification provides inter alia: p.56 lines 27-34
- "The scheduled rate submitted for earthworks is to be an average rate for all types of material, and separate rates are not to be submitted for earth and rock. The contractor shall not have any claim on the Department for an increase in the unit rate on account of the nature of the material found in cuttings ... Any material whatsoever met with in

the excavation shall be removed at the contract rate." (Emphasis in original)

11. Clause B3.05(b) dealing with "Cuttings" commences with the words: "Materials of all classes encountered in cuttings shall be excavated at the scheduled contract rate." p.58 lines 8 - 9

12. In the nature of things the "unsuitable material" in the bottom of cuttings referred to in Clause B3.05(f) will be soft material which is not strong enough to form an adequate foundation for the freeway. Similarly "unsuitable material" in the natural surface beneath embankments will also be soft material which is not strong enough to adequately support the weight of the embankment and the freeway to be placed upon it. p.6 lines 23 - 29
p.12 lines 36 - 41

13. The respondent submits that it is highly unlikely that the parties intended that the "scheduled rate for excavation" referred to in Clause B3.05 (f) for the removal of "unsuitable material" from the bottoms of cuttings should be \$14.90 per cubic yard when in other cuttings or in other parts of the same cuttings the Contractor would be obliged by Clause B3.03 and Clause B3.05(b) quoted above to remove hard rock down to the subgrade level at the rate of only \$1.89 per cubic yard. p.61 lines 14 - 22
p.56 lines 27 - 34
p.58 lines 8 - 9

Record

14. In the event of the appeal being allowed the respondent submits that any claim for interest under Section 94 of the Supreme Court Act 1970 should be remitted to the Supreme Court

p. 29 lines
8 - 16

15. The respondent therefore submits that this appeal should be dismissed for the following (amongst other)

REASONS

Because the decision of the Supreme Court was correct.


K.R. HANDLEY Q.C.


K. MASON

Counsel for the Respondent