Privy Council Appeal No. 33 of 1978

G. Abignano Pty. Limited – – – – – *Appellants*

v.

Commissioner for Main Roads – – – – – *Respondent*

FROM

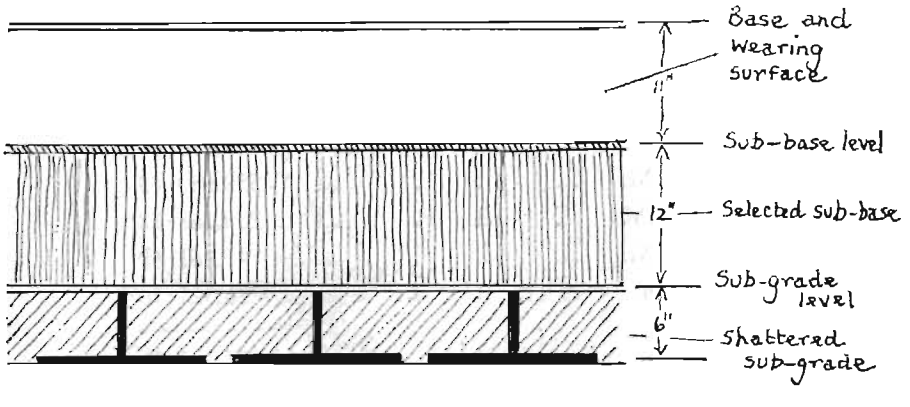
THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH APRIL 1979

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD SIMON OF GLAISDALE
LORD SALMON
LORD SCARMAN

[*Delivered by* LORD SIMON OF GLAISDALE]

This appeal is concerned with the interpretation of identical clauses in two contracts for the construction of two stretches respectively of a freeway. The appellants were the road contractors; the respondent was the freeway authority. The appellants were not responsible for the actual surface of the freeway ("the pavement construction", also called "the base and wearing surface"), but for the preparation of that part of the roadway formation on which the base and wearing surface would be laid. The top of the work for which the appellants were responsible (so that it would be immediately under the base and wearing surface) was called "the sub-base layer". This was the top of a twelve-inch layer called "the selected sub-base". The bottom of the selected sub-base was called "the sub-grade level". Below that was a six-inch layer which had to be broken up and compacted. This was called "the shattered sub-grade". The following diagram illustrates the various layers and levels:



All this was, of course, only the fabric of the roadway. In addition, drainage was required. More substantially, suitable gradients had to be constructed by raising embankments and excavating cuttings. The material obtained from the excavation of cuttings would, unless unsuitable, be used for making the embankments. Any shortfall was to be made up from suitable material obtained by excavation elsewhere (" borrow "). Finally, the two stretches of freeway called for the construction of some bridges.

In the making of the freeway unsuitable material might be encountered not only in what was excavated in the cuttings but also in the construction of the fabric of the roadway itself or in the construction of the drainage. So far as concerns the fabric of the roadway itself, the unsuitable material might be encountered either above or below the sub-grade level. This appeal is concerned with unsuitable material encountered below sub-grade level only. It turns on what, on the interpretation of the relevant common clause of the two contracts, was the proper remuneration for the removal of unsuitable material from below the sub-grade level.

The contracts each consisted of a number of documents. The respondent prepared Specifications of the work to be done (incorporating drawings). There were also " General Conditions of Contract ". Accompanying the Specifications and General Conditions was a " Schedule of Quantities, Rates and Amounts " itemising in summary form the different types of work involved. Contractors would use this Schedule for their tenders, themselves quantifying (1) the work to be done in accordance with the Specifications and General Conditions, (2) the rate per unit they would charge and (3) the resultant sum for each item. On acceptance of one of the tenders the contract was completed by a Deed by way of bulk sum contract, incorporating (so that they became contractual terms) the Specifications, drawings, General Conditions and Schedule.

Their Lordships have been provided with the Schedule of Quantities, Rates and Amounts of one of the contracts: the following items are relevant (all except " Item No." and " Description of Work " would be filled in by the tendering contractor):

Item No.	*Description of Work*	*Quantity*	*Unit*	*Rate*	*Amount*
3	Earthworks (Excavation to subgrade level)	1,430,000	Cu. yds.	1·89	2,702,700·00
4	Removal of topsoil from the area covered by embankments loose in stockpile	112,000	Cu. yds.	0·60	67,200·00
8	Excavation for pipes, gully pits, etc. including backfilling	13,600	Cu. yds.	14·90	202,640·00
[19 items in all]					
				Earthworks Total	$3,861,886·00

There followed in this Schedule itemisation for some bridges, the Schedule having at the end the following " Summary ":

Earthworks etc.	3,861,886·00
Bridges at 64·3M.	558,680·43
Bridges at 65·24M.	209,168·18
Bridges at 65·6M.	741,061·60
Bridge at 67·9M.	286,527·70
	$5,657,323·91

The appellants' tender having been accepted, the figure of $5,657,323·91 became the stipulated total remuneration in the lump sum contract. Provision was made for remuneration for extra work ordered by the respondent's Engineer.

The appellants claim that the cost of extra work in removing unsuitable material from below sub-grade level comes within Item 8 of the Schedule, so as to be remunerated at $14·90 per cubic yard. The respondent claims that it comes within Item 3, so as to be remunerated at $1·89 per cubic yard; though he also claimed alternatively that the work in question should be remunerated on a basis of quantum meruit (which the appellants deny). In a most careful judgment, giving full weight to the arguments put forward on behalf of the appellants, Sheppard J., giving reasons for rejecting a quantum meruit as the basis for remuneration, held the work to fall within Item 3. The appellants now appeal to the Queen in Council. There being no cross-appeal the question of quantum meruit disappears. Their Lordships would be content merely to adopt the judgment of Sheppard J. were they not concerned that such a course might appear ungrateful for the meticulous argument with which counsel have favoured them. Their Lordships therefore set out the main arguments for the appellants and the main points that seem to their Lordships to be conclusive against the appellants.

The crucial clause dealing with unsuitable material appears in the Specification, of which Part B deals with " Earthworks " and Part C with " Stormwater Drainage ". Part B consists of three sections—" 1. General ", " 2. Clearing and Grubbing ", " 3. Excavation and Filling ", each containing paragraphs. Paragraph B3.03 is entitled " Earthwork(s) Quantities and Nature of Material " (the plural appears in the index to, not the body of, the document). **B3.05** is entitled " Excavation ". It is divided into eight sub-paragraphs, of which (f), entitled " Unsuitable Material ", reads:

> " Where the Engineer considers that material in the bottoms of cuttings or in the natural surface beneath embankments is unsuitable, such material shall be removed and spread at locations outside the working area, as directed by the Engineer. Suitable approved material shall be backfilled and compacted as specified in Clause B3.06(f). 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 ".

The appellants point to " the scheduled rate for excavation " here in B3.05(f), contrasting it with " the scheduled rate for earthworks " in sub-paragraphs 3.05(a) [Removal of Topsoil [over cuttings]] and 3.05(d) [Benching in Cuttings]. It is argued that " the scheduled rate for earthworks " obviously refers to Item 3, and that the contrasting " scheduled rate for excavation " must therefore refer to another Item. The only other Item appropriate is 8, which opens with the very word "Excavation ". And although the " Excavation " there appears at first sight to refer to drainage, the word " etc." in Item 8 (not to be construed *ejusdem generis*) is apt to include " unsuitable material ", argue the appellants.

Further, on this argument, the inaptness of Item 3 to embrace unsuitable material removed from below sub-grade level is reinforced by the words in the parenthesis in Item 3 " to subgrade level ".

In a carefully drawn statute the differentiation of terminology on which the appellants principally rely (" scheduled rate for excavation "/" scheduled rate for earthworks ") would no doubt appear *prima facie* to be of great significance—though even in a statute with a commercial subject-matter the court would shrink from a construction involving commercial absurdity. And it is the commercial absurdity involved in the appellants'

contention which primarily impresses their Lordships. The appellants accept that removal of unsuitable material falls under Item 3 if above sub-grade level. But go one inch deeper and it falls under Item 8, attracting a more than sevenfold increase in rate, if the appellants are right. This cannot be so.

And, indeed, when one examines the contract, one finds that the sharp dichotomy between " scheduled rate for excavation " and " scheduled rate for earthworks ", which is the foundation of the appellants' argument, simply disappears. To look no further than the index and headings of Part B of the Specification, " Part B—Earthworks " includes " Section 3 —Excavation and Filling ", which in turn includes paragraph B3.03 " Earthwork(s) Quantities and Nature of Material " as well as B3.05 " Excavation ". In other places too the draftsman appears to have used " earthworks " and " excavation " interchangeably: see B3.03, B3.05(d), B3.05(e), B3.06(a), all noted in the judgment of Sheppard J. This is understandable in a contract in which excavation and earthworks are so often equally apt descriptions of the same operation.

As for the argument based on the words in parenthesis in Item 3, these cannot on any showing be definitive of " earthworks ", which include, for example, the raising of embankments and the use of borrow.

Their Lordships consider that Item 8 is correlative with Part C of the Specification (" Stormwater Drainage "). As for " etc." in Item 8, removal of unsuitable material above sub-grade level is admittedly included in Item 3: it would be an extraordinary piece of drafting merely to insert " etc." in Item 8 with the intention of picking up the removal of unsuitable material from below sub-grade level. In fact, the " etc." has a perfectly sensible and natural function when Item 8 is correlated to Part C: it picks up the work specified in Part C other than pipes and gully pits —*i.e.* " headwalls, inlet and outlet drains, minor diversion drains, catch drains and other open drains, the lining of open drains and any other operations necessary for the complete construction of the stormwater drainage in accordance with this Specification and the Drawings " (C1.01).

Part C contains in paragraph C2.03 an important indication in favour of the respondent's contention:

> " If the Engineer orders the removal of unsuitable material below the level of the bottom of the excavation for the bedding, it shall be removed and replaced with non-plastic granular material compacted in accordance with the above requirements, in which case payment will be made for the removal and replacement of the unsuitable material at the scheduled rate for excavation in accordance with Clause B3.05(f) ".

On the respondent's interpretation this last phrase (" in which [etc.] ") has a sensible and necessary function. If it were not there the work would be paid for under Item 8: being there, the work is paid for under Item 3, like all other removal of unsuitable material, so that commercial anomaly is avoided. But, according to the appellants, the work is still payable under Item 8 notwithstanding the cross-reference, which thus becomes completely unnecessary and useless.

For these reasons, as well as those which appear in the judgment of Sheppard J., their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.

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In the Privy Council

G. ABIGNANO PTY. LIMITED

v.

COMMISSIONER FOR MAIN ROADS

DELIVERED BY

LORD SIMON OF GLAISDALE

Printed by HER MAJESTY'S STATIONERY OFFICE
1979