6, 1980

IN THE PRIVY COUNCIL No. 33 of 1979

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

IN PROCEEDINGS NO. C.A. 191 OF 1978

BETWEEN: MAX COOPER & SONS PTY. LIMITED

Appellant and Cross-Respondent
(Plaintiff)

AND: THE COUNCIL OF THE CITY OF SYDNEY

Respondent and Cross-Appellant
(Defendant)

CASE FOR THE RESPONDENT

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CASE FOR THE RESPONDENT

RECORD

I. THE CIRCUMSTANCES OUT OF WHICH THE APPEALS ARISE

1. The Appeals concern the interpretation of a "rise and fall" clause contained in a building contract entered into between the parties in 1976. The rise and fall clause was expressed to be designed to provide for adjustments to the contract sum "for fluctuations in cost of labour and material" which were used in the performance of the contract. 46

2. By its Summons dated 11 February, 1977, the Appellant (the builder under the contract) sought declarations that certain specified matters were required to be taken into account in applying the rise and fall clause. The proceedings at first instance were heard by his Honour, Mr. Justice Yeldham who made declarations substantially as sought by the Appellant. 1 133

RECORD

3. The Respondent appealed to the Court of Appeal of the Supreme Court of New South Wales which set aside the declarations made by his Honour Mr. Justice Yeldham and granted a different declaration in lieu thereof. 196

II. THE ISSUES

4. The Court of Appeal held that increases in the cost to the Appellant of effecting workers' compensation insurance and in the cost of meeting payroll tax did not, on the true construction of the rise and fall clause, entitle the Appellant to an adjustment by way of increase in the contract sum. The Appellant now appeals against this decision only insofar as it relates to increases in the cost of effecting workers' compensation insurance. 177-181

5. The Court of Appeal also held that increases in the entitlement of workers to fares, sick leave, long service leave, annual leave (and annual leave wage loadings) and accident pay did, on the true construction of the rise and fall clause, entitle the Appellant to an adjustment by way of increase of the contract sum. The Respondent appeals against those findings. 172-177

6. The Court of Appeal further held that the Appellant was not entitled to an adjustment under the rise and fall clause where the cost of 174(20) -177(9)

providing to workers the benefits referred to in "5" above arose not from any change in the nature of those entitlements (such as an increase in the number of weeks annual leave) but only from an increase in the wage rate. These cost increases were described in the Court of Appeal as "consequential" or "derivative". The Appellant does not now appeal against the decision of the Court of Appeal on this issue.

III. THE NATURE OF THE RISE AND FALL CLAUSE

7. For the purpose of adjusting the contract sum to reflect fluctuations in cost, the parties have deliberately chosen an arbitrary index. The alternative would have been to provide for adjustments by reference to actual costs incurred.

8. The formula is in fact arbitrary in its operation:

a) The index is based upon changes in certain labour costs. It is however used to adjust the contract sum to compensate for all alterations in the cost of both labour and materials. It is inevitable that disparity between increases in the cost of labour and increases in the cost of materials will occur during the currency of the contract. The index pays no heed to this.

b) The index is based upon the level of wages

of the listed categories of workmen but these categories by no means necessarily comprise all the categories of workmen employed on the site of the contract works.

9. The manner in which the formula operates is as follows:

a) 0.295% is the percentage which the rise and fall clause stipulates is to be applied to the uncompleted portion of the contract sum in respect of each one cent increase in the "average hourly wage".

b) The "average hourly wage" is said by the clause to be the average of the listed hourly rates of pay, viz: 46(30) -47(6)

	$
Carpenters	3.45
Bricklayers	3.43
Painters	3.38
Plumbers	3.50
Plasterers	3.45
Builders' labourers	3.12

c) The average of these rates is $3.389 (i.e. $20.33 ÷ 6). This is thus the "average hourly wage".

d) One cent expressed as a percentage of this "average hourly wage" is:

$$\frac{1}{338.9} \times \frac{100}{1} = 0.295\%$$

e) Thus, if the average hourly wage rises by one cent the whole of the uncompleted portion of the contract sum is increased by the same percentage as one cent is of the "average hourly wage" (i.e. 0.295%). What is increased is not merely that portion of the uncompleted portion of the contract sum which represents the amount which the builder has allowed to compensate himself for wages paid to employees, but also those portions which represent his overhead, his profit, his material costs and his obligations to his employees other than wages (for instance, provision of holidays and sick leave).

f) For example, assume a contract sum of $9 million. The builder may have apportioned that sum in the following manner:

Labour costs	$3 million
(incl. - wage costs $2 million - other entitlements $1 million)	
Material costs	$3 million
Overheads	$1 million
Profit	$2 million
	$9 million

If "the average hourly wage" increases by one cent, each of the above items will be

increased by 0.295%, not merely the item "wage costs".

g) The formula thus provides a means of identifying a percentage by which the contract sum should be varied to meet fluctuations in the cost of performance of the work. The principle involved would be no different if the parties had chosen, instead of alterations to the "average hourly wage", an index such as the Consumer Price Index as their index.

10. In these circumstances and in light of the higher rate of increase in labour costs as compared to materials costs (which may be seen from the evidence), the formula may be described as one which is weighted in favour of the builder. It does not therefore follow that the exclusion of the variations sought to be brought by the Appellant within the operation of the formula would lead to an under-recovery of costs by the Appellant.

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IV. THE NATURE OF THE INDEX

11. The parties' intentions as to which labour cost items, changes in which were intended to alter the index and thus bring the rise and fall clause into operation are, in the Respondent's submission, best ascertained by an examination of the base of the index,

i.e. the "average hourly wage" as at the date of tender. This is so because, if it be found that the parties expressly excluded certain labour cost items from that base, it should be assumed that the parties did not intend that subsequent changes to those items could alter that base.

12. The distortion which would arise from allowing subsequent changes in items excluded from the base to alter that base may be illustrated as follows:

a) Assume:

Wage:	at date of tender	$100
	12 months later	$110
	increase	$ 10
	percentage increase	10%
Wage plus cost factors:		
	at date of tender	$150
	12 months later	$165
	increase	$ 15
	percentage increase	10%

b) In these examples the percentage increase is an undistorted one because a comparison is made in each case between comparable figures. In the first case, the wage level at date of tender is compared to the wage level prevailing 12 months later. In the

second case, the "wage plus cost factors" level at date of tender is compared to the "wage plus cost factors" level 12 months later.

c) If however the increase in the "wage plus cost factors" ($15) is taken as a percentage of the "wage" at date of tender ($100) the percentage increase is 15%. This is a substantially higher increase than that in either the "wage" or the "wage plus cost factors". The distortion that thus results arises from the fact that although the "cost factors" were not included in the base (i.e. the "wage"), increases in those cost factors have been taken into account in determining the amount by which the base has increased.

d) If such a distortion were allowed to occur in a contract such as that presently under consideration, the effect in financial terms would be likely to be very substantial indeed. The following example illustrates this proposition:

Assume:

Contract sum	$10 million
Time taken to complete contract: 3 years	
Average value of uncompleted contract sum	$ 5 million

Applying the percentage increases set out above:

Additions to Contract Sum

	Undistorted	Distorted
Year 1	$½m (10%)	$3/4m (15%)
2	$½m (10%)	$3/4m (15%)
3	$½m (10%)	$3/4m (15%)

i.e. the difference is $750,000.

13. The six rates of pay from which the "average hourly wage" was derived were, as stated in the rise and fall clause itself, to be found in certain specified industrial awards. The evidence showed that the hourly rates of pay of each of the selected tradesmen were constituted by the following components (all specified in Clause 3, the "wages" clause, of each award): 125-132, 48-50

Basic wage,

margin,

follow the job loading,

sick leave loading,

loading for excess travelling time,

tool allowance,

industry allowance,

special allowance.

14. The seven labour cost factors changes in which the Appellant contended in its Summons should trigger the operation of the rise and fall clause were: 1

Excess fares,

sick leave pay,

long service leave, 10

annual leave entitlement and loading,

accident pay,

workers' compensation premiums,

payroll tax.

15. None of these items formed part of the "hourly wage" for any of the listed tradesmen. This was so, notwithstanding the fact that each of the items, with the exception of sick leave pay and annual leave loading, was in existence as at the date of tender and dealt with either by 125-132 20 statute or the very same industrial award in which the computation of the "hourly wage" was to be found.

16. The defined wage which was adopted by the parties as the base for their index was thus not open to speculation or argument. It was a known, agreed figure established or calculated in a known and agreed way. There was no doubt

but that it did not include the items changes in which are said now to be able to be used to increase the base for the index which was adopted. The Appellant's submissions involve the argument that the "average hourly wage" should be altered by changes in cost factors which the parties deliberately excluded from its computation.

17. Knowledge of these facts enables the decision of the High Court in T.C. Whittle Pty. Limited v. T. & G. Mutual Life Society Limited, 52 A.L.J.R. 173 to be distinguished as it was expressly stated in that case by Barwick C.J. (with whom Mason J. agreed) that there was in that case "no information in the contract or associated documents or before the Court in evidence as to the manner in which the sum of $90.21 was calculated. We do not know how precisely the various components of the average wage were treated in its computation" (at p. 175). In the event that it is found that there is an inconsistency between the above submissions and the decision in Whittle, it is submitted that Whittle should not be followed.

RECORD

V. THE PROPER CONSTRUCTION OF THE RISE AND FALL CLAUSE

18. In the light of the fact that each of the items, changes in which the Appellant asserts triggers the operation of the rise and fall clause, was excluded from the base for the index which was chosen, it would, in the Respondent's submission, be only in the face of the clearest of words in the rise and fall clause that the Appellant's submissions would be accepted. In fact however a detailed examination of the wording of the clause supports the Respondent's contentions that the items presently under consideration do not trigger the operation of the clause.

19. The formula provided for in the rise and fall clause operates only upon an alteration to the defined wage. Such an alteration may occur in either of two ways: 46 (13 & 14)

    a) A direct monetary alteration to that wage, or

    b) An equivalent monetary alteration to that wage due to a change in standard working hours or any other condition of employment.

20. Under the first head there must be an alteration in the rate of pay within the common law concept or an alteration in one or more of the specific components included in the defined wage

by the listed awards. Wage payments in the common law sense are rates of pay for work or labour performed by workmen (see London County Council v. Henry Boot, (1959) 1 W.L.R. 1069 and Perini Corporation v. The Commonwealth, (1969) 2 N.S.W.R. 530).

21. Under the second head, the condition of employment must be:

a) Non-monetary, otherwise it would fall within the first limb;

b) Capable of monetary expression in the concept of an hourly rate of pay; and

c) Of its nature an alteration in a wage condition in the sense defined - that is, a change in standard working hours or other similar change.

22. For the reasons following, it is clear that only an alteration to such a special type of condition of employment may cause an alteration in the average hourly wage:

a) The second head is primarily concerned with changes in standard working hours, which would not alter wages as such.

b) Because the formula is concerned with changes to the defined wage, the second head must be limited to alterations to non-monetary conditions of employment which

are of a wage nature, such as provisions that ordinary hours of work should include meal times, rest periods or a specified period at the commencement and conclusion of daily work for changing or cleaning or, for that matter, travelling.

Payments made pursuant to such provisions would be of a wage nature in that the conditions of employment specified are "on the job" conditions of the day's work. From these may be distinguished annual leave payments which may never be described as a payment for work done (Boots case supra.) i.e. as a wage.

23. In addition to being a wage condition, from its context, the condition of employment must be one eiusdem generis with or at least controlled by the expression "change in standard working hours". The examples given in (b) above meet this requirement.

24. The formula is not concerned with a change in any condition of employment resulting in an increase in the cost of performance of the work. Effect has to be given to the fact that the formula's operation is limited to changes in conditions resulting in a change in the defined wage. An example of a formula which was not so limited is that which fell for consideration in

Re Sanders 1969 Qld. Rep. 29 - "increase in the basic wage or equivalent extra cost arising from ...".

25. These aspects of construction lead to the conclusion that the seven labour cost items asserted in these proceedings by the Appellant to trigger the operation of the rise and fall clause do not have that effect for the following reasons:

a) None of the items was included in the base for the index i.e. the "average hourly wage" at the date of tender.

b) With the exception of sick leave, long service leave and annual leave entitlement, the items are monetary.

c) None of the items are wage payments.

d) None of the alterations are analogous to a change in standard working hours.

e) In respect of the alterations to the leave provisions (including the annual leave loading) the incidence of cost occurs a considerable time after the relevant change. Those alterations are therefore not "immediate" in their operation and therefore not capable of monetary expression in the concept of an hourly rate of pay.

f) The entitlement of workers to sick leave,

long service leave and excess fares is contingent. The consequent uncertainty as to the quantum of benefit to the listed workmen and the differing application of it to individual workmen renders an alteration to these entitlements incapable, for this reason alone, of expression in the concept of an hourly wage and therefore incapable of altering the defined wage. It is not permissible to look at the position ex post facto. The relevant date is the date of the alteration. The fact that it might be found that all sick leave has been availed of cannot alter its contingent nature.

g) None of the items listed in the Plaintiff's Summons involved payments for work performed.

26. The "rider" to the clause does not assist the Appellant. The substantive portion of the rise and fall clause is "in a form generally used throughout the construction industry" (Whittle ibid at 180). 46(25)

27. In the present case the parties evinced the intention to be bound by the provisions prevailing in the industry generally. This is confirmed by their inclusion of the rider which indicated that certain matters were to be taken into account in the operation of the rise and fall

clause only if the industry clause on its proper construction, was apt to extend to those matters. The words "unless contrary to case law" appearing in the rider reveal that the parties did not intend to depart from the position prevailing in the industry generally.

VI. INCREASES IN WORKERS' COMPENSATION PREMIUMS

28. Changes in Workers' Compensation premiums payable by the Appellant to the relevant insurer are asserted by the Appellant to trigger the operation of the rise and fall clause. The submissions made above as to the proper construction of the rise and fall clause, if accepted, would result in the rejection of the Appellant's assertions as to Workers' Compensation premiums in the same way that they would result in the rejection of the Appellant's assertions as to the other six items in issue.

29. There is however a persuasive additional reason for the exclusion of changes to Workers' Compensation premiums.

30. Workers' Compensation premiums do not form part of the "average hourly wage" paid to workers. (In fact they are not paid to workers at all but to an insurance company). If changes in their level were to give rise to the operation of the rise and fall clause they would therefore

have to fall within the "second limb" of the clause, i.e. "the equivalent monetary alteration (to the average hourly wage) due to a change in standard working hours or any other conditions of employment ...". As Barwick C.J. said in Whittle (ibid at 177), "it is fundamental to the operation of the clause that to be relevant to its application in this case, the alteration must be an alteration in the conditions of employment". "The change", he said, "to be allowed, must be a change in the obligations of the employer towards the employee in the employment or a change in the entitlement of the employee to action by the employer in the employment" (ibid at 177). He concluded (Mason J. concurring) that the obligation to pay workers' compensation did not form part of the contract of employment and that "the consequential increase in premiums to maintain a policy of insurance acceptable under the workers' compensation legislation is even further removed from the relationship inter se of employer and employee" (ibid at 179). Changes in the premiums payable in respect of workers' compensation insurance policies were therefore not considered to be changes in "conditions of employment". The

respondent adopts and relies upon those views and that conclusion.

31. In the courts below the Appellant however relied upon the rider to support the submission that a different result should follow in the present case.

32. The general submissions made above in relation to the meaning of the rider are relied upon by the Respondent in answer to the Appellant's submission that the rider extends the operation of the rise and fall clause so as to require the taking into account of items which were not to be taken into account under the industry clause.

33. There are however a number of additional reasons why the extended operation of the rider for which the Appellant contends should not, certainly so far as changes in workers' compensation premiums are concerned, be accepted.

34. At the trial, the Appellant adduced extrinsic evidence in an attempt to show that the expression "pay loadings" in the rider by trade usage included premiums paid to workers' compensation insurers. The necessity to deal with this evidence only arises if the construction of the rider which the Respondent has contended above is rejected. The Respondent's submissions as to that evidence are however as follows:

RECORD

35. The extrinsic evidence was not admissible.

The trial judge held that the Respondent was not itself engaged in the building trade but concluded that, because it was "the local government body to which came all applications for building approval within the City of Sydney", "it would necessarily be familiar with the notorious meaning which the expression 'pay loadings' bore and was used by most, if not all, professional bodies and persons associated with that trade". There was however, no evidence from which it could have been inferred that the Respondent's receipt of building applications would give it notice of the alleged meaning of "pay loadings". If it was proper for the trial judge to take judicial notice of the subject matter of applications to the Respondent for building approval, his Honour's conclusion should have been that such applications do not contain detailed information as to the costing of the proposals and would accordingly not have contained information of the nature found in the annexures to the Affidavit of A.A. Cooper sworn 15 April, 1977.

152(28) -153(10)

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36. The extrinsic evidence did not demonstrate that the term "pay loadings" bore a trade meaning of the nature contended for.

The evidence may have demonstrated that the word "loadings" bears, for costing or estimating purposes, a particular meaning. This did not however distinguish between the meaning of "loadings" and "pay loadings". Although there were many references to "loadings" in the documents tendered, none of them used the term 178 (25)
"pay loadings". As was held by Glass J.A. (Moffitt P. concurring), the extrinsic evidence 179 (17) 10
was "entirely silent" on the question whether workers' compensation premiums were comprehended within the meaning of the term "pay loadings".

37. The expression "pay loadings" is a narrower expression than "loadings". The use of "pay" as an adjective to qualify "loading" must be given some recognition. The proper conclusion is, it is submitted, that reached in the Court of Appeal i.e. that the term "pay loadings" 179 (22)
denotes "those loadings which are paid to the 20
worker and does not include costs such as payroll tax and workers' compensation which are paid with respect to workers and not them". If given this meaning the words "award rates of pay, pay loadings, holidays etc." appearing in the rider each bear separate and distinct meanings. If the expression "pay loadings" had the meaning which the Appellant asserts, the

words, "holidays etc." would be redundant as the Appellant's evidence as to trade usage would indicate that "holidays etc." were included within the meaning of "loadings".

38. The Court of Appeal was entitled to draw its own conclusions from the undisputed extrinsic evidence which was adduced and was not bound by the trial judge's conclusions in relation thereto. The relevant principle is as stated by the High Court in Warren v. Coombes, 53 A.L.J.R. 293: "in general an Appellate Court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it" (at 300 - 301).

VII. INCREASES IN PAYROLL TAX AND ACCIDENT PAY

39. As well as the Respondent's general submissions set out under III, IV and V above, the Respondent's further submissions relating to workers' compensation premiums (VI) apply equally to payroll tax and accident pay. Both are, in the

Respondent's submission, analogous in their nature to workers' compensation premiums. Neither therefore constitutes a "condition of employment" and the rider does not operate to extend the industry clause to these items. Payroll tax is a tax paid to the government and not to the worker - it is therefore a payment "with respect to workers" and not a payment "to workers". Similarly, accident pay is supplementary to and similar in character to workers' compensation. It mattered not, in the view of Barwick C.J. in Whittle (ibid at 179) that the employer might be a self insurer in respect of workers' compensation. So also with accident pay, the choice exists for employers between being a self insurer and making a payment to an approved accident pay scheme.

VIII. ORDERS SOUGHT

40. The Respondent seeks by way of variation of the declaration made by the Court of Appeal a declaration that increases in the seven items specified in the Appellant's Summons fall outside the purview of the formula contained in the contract between the parties.

41. In addition, the following formal orders are sought:-

1. That the Respondent's appeal be allowed.

2. That the Appellant's appeal be dismissed.
3. That the declarations and orders made in the Court of Appeal be set aside.
4. That the Appellant pay the Respondent's costs of the trial, of the proceedings in the Court of Appeal, of the Respondent's appeal herein and of the Appellant's appeal herein.

R.L. HUNTER, Q.C. 10

R.B.S. MACFARLAN