Privy Council Appeal No. 33 of 1979

Max Cooper & Sons Pty. Limited – – – – – *Appellants*

v.

The Council of the City of Sydney – – – – – *Respondents*

and Cross-Appeal

from

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH MARCH 1980

Present at the Hearing:

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD SALMON
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

[*Delivered by* LORD DIPLOCK]

This appeal raises questions as to the construction of a "rise and fall clause" in a building contract for the erection of a large building in Sydney for a lump sum price. Under the clause in question the additional remuneration to which the Builders were to be entitled by reason of increases in the cost of both labour and materials after the date of tender is linked mainly (but not, in their Lordships' view, exclusively) to the wages, hours of work and other conditions of employment prescribed for six main classes of building workers by periodic State or Federal Awards made under the Industrial Arbitration Act, 1940 as amended. Such awards, although they affect directly the cost of labour only and not that of materials, nevertheless contain, in the national basic wage for adult males by reference to which the awards are made, an element which reflects the general trend of inflation in Australia.

Rise and fall clauses of this general kind are not uncommon in building contracts in Australia but, as is illustrated by the instant case, they do not appear yet to have assumed a standard form. The rise and fall clause that was the subject of close analysis by the High Court of Australia in *T. C. Whittle Pty. Ltd. v. T. & G. Mutual Life Society Ltd.* (1978) 52 A.L.J.R. 173, can be found set out in the Chief Justice's judgment in that case at p. 175. Although it bears a close resemblance to the rise and fall clause which falls to be construed by their Lordships in the instant case, it is not in identical terms, and in particular, it omits entirely an exegetical statement which forms part of the clause now to be construed and, in their Lordships' view, extends its ambit. It has been referred to in these proceedings as "the Rider". It forms the fourth paragraph of the rise and fall clause which is in the following terms:

"RISE AND FALL CLAUSE

"[I] Amounts calculated in accordance with this clause are adjustments for fluctuations in cost of labour and material which are used in the performance of this Contract.

[II] Where, after the date of closing of tenders, and during the progress of the work alterations occur in the actual cost to the contractor in performing the contract as a consequence of alteration in the average hourly wage as hereinafter defined or the equivalent monetary alteration due to a change in standard working hours or any other conditions of employment arising from any statute, statutory regulation or award or order of an Industrial tribunal

[III] THEN FOR EACH CENT OF SUCH ALTERATION TO THE AVERAGE HOURLY WAGE THERE SHALL BE ADDED TO OR DEDUCTED FROM THE CONTRACT SUM AN AMOUNT REPRESENTING 0.295% OF THE VALUE OF THE UNCOMPLETED PORTION OF THE CONTRACT AS AT THE DATE OF ANY SUCH ALTERATION.

[IV] The Clause will apply to all alterations in Award Rates of pay, pay loadings, holidays, etc. unless contrary to case law.

[V] (a) The average hourly wage shall be the average of the hourly rate of pay for the listed workmen. The workmen listed and their relevant awards are:

(The rates shown are the rates as at the date of tender, 12th November, 1974)

1. Carpenter (Carpenter & Joiners & Bricklayers' Construction (State) Award)	$3.45
2. Bricklayer (Carpenter & Joiners & Bricklayers' Construction (State) Award)	$3.43
3. Painter (Painters' (State) Award)	$3.38
4. Plumber (Plumbers and Gas Fitters' (State) Award)	$3.50
5. Plasterer (Plasterers' (State) Award)	$3.45
6. Builder's Labourer (Builders Labourers' (Construction on Site) (Federal) Award)	$3.12

[VI] The value of the uncompleted portion of the contract shall be determined from time to time by the Architect and shall not include any amounts for Quantity Surveyors' Fees, Contingency Sums, Prime Cost Allowances or Monetary Sums, or any sum for which a separate Rise and Fall agreement is included."

(The numbering of the paragraphs by Roman numerals has been inserted by their Lordships for ease of reference.)

As a matter of arithmetic, one cent represents 0.295% of the average of the six hourly rates of pay set out in paragraph V as applicable at the time of tender to the six classes of workers. What paragraph III does is to provide that whenever there is an increase to that average hourly wage or what under paragraphs II and IV is to be treated as an increase in it, then so much of the contract sum as is ascribable to the portion of the contract that is uncompleted at that date shall be increased in the same proportion.

The actual figures that appear in paragraph V are described in each of the awards from which they are taken as the "ordinary hourly rate of wages" for the class of building tradesman to which the award relates. The ordinary hourly rate of wages is arrived at by a process of calculation from the national basic weekly wage as increased by the appropriate margin for particular trade skills, together with allowances for certain other payments and benefits to which the worker is entitled under the award. The ordinary hourly rate of wages can be regarded as the all-important figure in the award. On it are based not only pay for work during standard working hours, but pay for overtime and payments for periods for which the worker is entitled to be paid by his employer when he is not actually doing any work, such as time lost through inclement weather, sickness and holiday pay, travelling time, etc. When the ordinary hourly rate of wages goes up the cost to the employer of providing each of these other benefits goes up automatically in the same proportion. It is convenient to refer to the resulting increases in the cost of other benefits as "derivative increases."

Not all the rights and benefits which successive awards have secured to the worker over a period of years and which add to the employer's costs of labour enter into the actual calculation of the ordinary hourly rate of wages, in such a way that any increase in them is reflected by an increase in that rate itself. Among those which do not enter into the calculation of the ordinary hourly rate of wages and are relevant to the instant appeal are (1) payments for fares and travelling allowances; (2) payments while absent on sick leave; (3) long service benefits; (4) holiday pay; and (5) accident pay. The cost of each of these benefits, other than (1), is subject to derivative increases with each increase in the ordinary hourly rate of wages; but, quite apart from derivative increases, the cost to the employer of providing the benefit may be increased by alterations in the qualifications for entitlement to the benefit or in the period for which it is enjoyed or by specific alterations in the amount of the benefit without any corresponding alteration in the ordinary hourly rate of wages. It is convenient to refer to these non-derivative increases as "Additional Award Costs".

To Additional Award Costs falling on the employer which do not enter into the calculation of the ordinary hourly rate of wages, there is also to be added the cost of compulsory insurance against liability for workers' compensation. The obligation to pay workers' compensation to employees and to insure against the liability to do so does not arise from awards made under the Industrial Arbitration Act but under the Workers' Compensation Act, 1926. The insurance premiums payable by employers ("Insurance Costs") are fixed by Schemes made under that Act and represent the actual cost to the employer of satisfying his liability to his employee under this head.

In the instant case during the period that elapsed between the date of closing of tenders and the completion of the contract by the Builders, not only were there increases in the ordinary hourly rate of wages of each of the six classes of workers referred to in paragraph V, but there were also changes in the Additional Award Costs under heads (1), (2) and (3) and in Insurance Costs, all of which were independent of and additional to derivative increases which followed automatically upon the increases in the ordinary hourly rate of wages. Since questions of quantum do not arise in this appeal their Lordships can deal briefly with these non-derivative or independent changes.

(1) During the relevant period payments for fares and travelling allowances increased. Such payments are not related to the ordinary hourly rate of wages, but are additional to it.

(2) At the date of closing of tenders a worker was not paid any wages when absent from work owing to sickness. Sick leave was at that time dealt with by including in the calculation of the ordinary hourly rate of wages a component representing a notional payment of wages, at the national basic weekly wage plus margin for trade skill, for a period of one week and three days in a year, during which it was assumed, for the purposes of the calculation, that the average worker would be away from work sick and not in fact drawing any wages. During the currency of the contract and without excluding or making any alteration in the calculation of the component for notional sick leave pay in the ordinary hourly rate of wages, a national award made provision for actual payment of wages during absence from work owing to sickness, up to certain maximum numbers of days in the year.

(3) Long service benefits, consisting of additional annual leave with pay for which a worker qualified by long service, were provided for by awards current at the date of closing of tenders. Thereafter during the relevant period the qualifications entitling a worker to long service benefits were made less onerous by regulations made under the Long Service Payment Act, 1947; and consequently a higher proportion of the workers employed by an employer became entitled to such benefits.

(4) At the date of the closing of tenders workers were entitled under the relevant awards to four weeks' annual holiday with pay at a rate which exceeded the ordinary hourly rate of wages by 17½%. If this bonus had been awarded during the currency of the contract it would have constituted an Additional Award Cost; but it was already in force when the lump sum for the contract was fixed.

(5) Awards made before the date of closing of tenders gave to the workers in the listed classes an entirely new benefit called accident pay. In effect it placed on the employer an obligation to pay to a worker who sustained injury in the course of or arising out of his employment a sum of money representing the difference between the compensation to which the worker was entitled under the Workers' Compensation Act, 1926, and his ordinary hourly rate of wages. Had it been awarded for the first time during the currency of the contract it too would have constituted an Additional Award Cost.

Insurance Costs also increased during the relevant period. In part these increases merely reflected increases in ordinary hourly rates of wages; but there were other increases in rates of premium under the Statutory Schemes that were independent of this cause.

Disputes arose between the parties to the contract as to whether any and, if so, which of these Additional Award Costs or any increase in Insurance Costs entitled the Builders to an addition to the contract sum under the rise and fall clause. The Builders contended that each one of them did; the Council contended that none did. These rival contentions came before Yeldham J. upon a construction summons taken out by the Builders for declarations as to the construction of the clause. His Honour made all the declarations sought by the Builders. In the course of the hearing of the summons the Builders made it plain that they claimed that they were entitled to have taken into account under the rise and fall clause derivative increases in the cost of providing benefits under

the various heads in respect of which they sought declarations, as well as any Additional Award Costs which could be shown to have occurred. His Honour accepted this submission and incorporated in his order a specific declaration to that effect.

The Council appealed to the Court of Appeal (Moffitt P., Glass and Mahoney J.A.), who allowed the appeal (Mahoney J.A. dissenting in part) and substituted for the order of the learned judge declarations in the following form:

> "On the proper construction of Paragraph 6 of Annexure 'A' to the contract between the Appellant and the Respondent dated 31st March, 1976 and relating to the contruction of a building on the corner of Kent and Druitt Streets, Sydney and in applying the 'rise and fall' formula set forth therein: —
>
> (1) The following matters are required to be taken into account:
>
> (a) Increases in the amounts payable for fares pursuant to State and Federal Awards.
>
> (b) The provision in Clause 27 of the National Building Trades Construction Award for the payment of sick leave.
>
> (c) Increases in the cost of the provision of long service benefits pursuant to the Long Service Payment Act, 1974,
>
> insofar as such increases have, and such provision has, occurred independently of wage increases and as a result of increases in the entitlement of workers to such allowances.
>
> (2) The following matters fall outside the purview of the said formula: —
>
> (a) Increases in the cost of the provision of annual holidays and/or the payment of holiday pay pursuant to the Annual Holidays (Amendment) Act, 1974 and in the payment of a loading of 17½% thereon pursuant to State Awards.
>
> (b) Increases in the cost of the provision and payment of accident pay pursuant to the Building Trades Injuries Award made on 21st May, 1971 and subsequent variations thereto and the incorporation thereof in Clause 28 of the National Award,
>
> insofar as such increases have not occurred as a result of increases in entitlement of workers to such allowances but only consequentially upon wage increases.
>
> (3) The following matters fall outside the purview of the said formula: —
>
> (a) Increases in the cost of meeting payroll tax payable pursuant to the Payroll Tax Act, 1971.
>
> (b) Increases in the cost of effecting workers compensation."

It is to be observed that the declarations fall into three categories. The first relates to the three heads under which there had in fact been Additional Award Costs as well as derivative increases. The second to two heads under which there had been Additional Award Costs as a result of awards before the closing date of tenders, but only derivative increases thereafter. The third so far as is relevant to the appeal to this Board relates to Insurance Costs, increases in which were partly derivative and partly independent of increases in ordinary hourly rates of wages.

The Builders' appeal to this Board is against so much of the order of the Court of Appeal as declares that increases in the cost of insuring against

liability for workers' compensation fall outside the purview of the rise and fall clause. They contend that such increases ought to be included in declaration (1) as matters to be taken into account in so far as they have occurred independently of wage increases. The Builders have expressly abandoned before this Board any claim that derivative increases of costs under any of the heads should be taken into account in the rise and fall clause additionally to such adjustment to the contract sum as is required by paragraph III to give effect to the increase in the average hourly wage (i.e. ordinary hourly rates of wages) itself.

The Council on the other hand cross-appeal against all the declarations made by the Court of Appeal except Declaration (3) which excludes from the operation of the clause alterations in payroll tax and in the cost of providing workers' compensation.

With this introduction their Lordships now turn to an examination of the rise and fall clause itself with particular reference to those respects in which it differs from the corresponding rise and fall clause in the *Whittle Case.* The *Whittle Case* was not decided by the High Court until after the contract in the instant case had already been entered into; so it cannot be said that the similarities and differences of language between the rise and fall clauses in the instant case and the *Whittle Case* were adopted by the Builders and the Council in the light of the High Court's analysis of the language of the latter clause. Nevertheless in an area of law in which the High Court and their Lordships' Board now have concurrent final appellate jurisdiction, their Lordships consider that in the interests of legal certainty, they should give to decisions of the High Court the same respect as they give to previous decisions of this Board itself and, although not strictly bound by those decisions, they ought to follow them unless convinced beyond a doubt that they are wrong.

Paragraph I of the rise and fall clause was absent in the *Whittle Case.* In their Lordships' view it serves no other purpose than to make it clear that the adjustments to the contract sum for which the subsequent paragraphs provide are to cover fluctuations in cost of materials as well as labour notwithstanding that the calculation of the adjustment is based on factors which affect the cost of labour only.

Paragraph II is very similar to the corresponding paragraph in the *Whittle Case.* To bring the clause into operation several conditions must be satisfied. First there must be an alteration in the actual cost to the Builders of performing the contract from one of the causes specified in the clause. Thus, if the ordinary hourly rate of wages of bricklayers was increased after all bricklaying work had been completed, no adjustment to the contract sum would be authorised by the clause. The specified causes of alterations in costs which do justify an adjustment fall into three categories. The first is one which can be expressed only as a monetary sum, viz. an alteration in the average hourly wage. The definition of average hourly wage in paragraph V makes it clear that this means the average of the ordinary hourly rate of wages prescribed in awards under the Industrial Arbitration Act relating to the six classes of workers listed in that paragraph. The second category is a change in standard working hours. The change must arise from some "statute, statutory regulation or award or order of an Industrial Tribunal". The expression "standard working hours" used in the paragraph is clearly a reference to what in the relevant awards are described as "ordinary working hours". The change in hours must also be capable of being expressed in the form of an "equivalent monetary alteration" in the average hourly wage; but this presents no difficulty because in the relevant awards the basic wage and margin for trade skill is stated as a weekly wage

and this is reduced to an hourly basis in calculating the ordinary hourly rate of wages, by dividing it by the number of ordinary working hours per week. The third category is a change in "any other conditions of employment arising from any statute, statutory regulation or award or order of an Industrial Tribunal". To fall within this category the change must be capable of being expressed as an "equivalent monetary alteration" in the ordinary hourly rate of wages in the relevant awards; but this requirement presents no obstacle in the case of any of the five Additional Award Costs that are the subject of declarations in the instant case. The matter is fully dealt with in the judgment of Barwick C.J. in the *Whittle Case*, and their Lordships gratefully adopt what he there said about it.

In the *Whittle Case* the High Court held that in the rise and fall clause of the contract that had there to be construed (which omitted paragraph IV, "the Rider", incorporated in the corresponding clause in the instant case) the expression "conditions of employment" was ambiguous, and the Court resolved this ambiguity in favour of the narrower of two possible meanings and in such a way as to exclude changes in Insurance Costs. Their Lordships will revert to the effect of the presence of the Rider later; but even upon the narrower construction of the phrase in the context in which it appeared in the rise and fall clause in the *Whittle Case*, the High Court held that all the fringe rights or benefits which an employer is required to grant to his workers by an award made under the Industrial Arbitration Act, 1940, as amended, fell within the purview of the expression "conditions of employment". Their Lordships agree with the reasons of the High Court for reaching this conclusion. They do not find it necessary to restate them here. Accordingly the cross-appeal by the Council must fail.

As has been mentioned, it has been conceded by the Builders in the argument before this Board that where rights or benefits to a worker that are not included in the calculation of the ordinary hourly rate of wages involve payments of wages at that rate during periods when the worker is not actually doing work for his employer any derivative increases in the notional cost to the employer of providing such rights and benefits, if they are merely the automatic consequence of increases in the ordinary hourly rate of wages, are to be treated under the clause as the consequence of the alteration in the average hourly wage, and not as a consequence of any change in other conditions of employment for which the employee is entitled to an additional monetary equivalent. In their Lordships' view the reasons given by the majority of the Court of Appeal in the instant case for so holding are convincing and the concession made by the Builders before their Lordships' Board that this was so, was clearly right.

Lastly, their Lordships turn to increases in Insurance Costs in so far as these were not merely derivative increases. In the *Whittle Case* where the paragraph which corresponds to paragraph II in the instant case was not followed by any explanatory words such as are to be found in paragraph IV of the clause which now falls to be construed in the instant case, the High Court concluded that in Australia, where so many of the terms on which a worker is employed are not a matter of negotiation between him and his employer but are prescribed by law, the expression "conditions of employment" is capable of two possible meanings apart from the particular context of the clause. The wider of those meanings is:

> "the conditions dictated by statute or award which are consequential upon the employment of a workman: the conditions under which employment may take place".

The narrower meaning is that the expression includes:

> "only the conditions on which, as between employer and employee, the employee works; in other words, the expression relates only to the terms of the contract of employment express or implied".

In the context of the rise and fall clause in the *Whittle Case* the majority of the High Court (Barwick C.J. and Mason J: Murphy J. dissenting) preferred the narrower meaning. They therefore excluded non-derivative increases in Insurance Costs claimed under that clause.

In the instant case the context in which the expression "conditions of employment" is used is significantly different by reason of the inclusion of paragraph IV. This is an exegetical interpolation which purports to explain what are the "alterations" that are referred to in paragraph II and are to have the consequences provided for in paragraph III. They are described as "all alterations in Award Rates of pay, pay loadings, holidays, etc.". This much is clear, though the meaning of the words that follow—"unless contrary to case law"—is obscure; but no one has plausibly suggested that this obscurity can affect the meaning of the preceding words.

The crucial expression in this paragraph is "pay loadings". It is a technical term, or term of art, used in the building industry. It is not an expression that is used in ordinary speech; without extrinsic evidence from a witness experienced in the building industry and familiar with the technical terms used in it, a judge could only speculate as to the meaning of "pay loadings". That the ordinary meaning in which a technical expression is used in a particular industry is not a question of construction but is a question of fact to be decided upon expert evidence, has been undoubted law since it was laid down by Baron Parke in *Shore v. Wilson* (1842) 9 Cl. and Fin. 355. A question of construction (which is one of law) arises only when it becomes necessary to determine whether the particular context in which the expression is used shows that in that context it was intended to bear its ordinary technical meaning or some more extended or restricted meaning.

In the instant case there was unchallenged expert evidence by Dr. Cooper on affidavit to the following effect:

> "I have been engaged in the building industry for the past forty years. The terms "loadings" and "pay loadings" are commonly used in the industry generally and by builders, architects and quantity surveyors. In their common usage in the industry they include the payment of or provision for fares, annual leave and holidays, sick leave, long service leave, payroll tax, workers' compensation insurance, accident pay, statutory holiday pay and picnic day pay".

This was supplemented by a later affidavit to which were exhibited specimens of documents used in the building industry in which *inter alia* Workers' Compensation Insurance was shown under the heading "Loadings" and the sum resulting from adding that and other loadings and allowances to ordinary hourly rates of wages was described as the average "loaded weekly wage".

It was on the basis of this unchallenged evidence that Yeldham J. held that increases in Compensation Costs came within the rise and fall clause. In the Court of Appeal Mahoney J. A. would have reached the same conclusion; but Glass J. A. considered that the documents exhibited to Dr. Cooper's second affidavit did not bear out his statement that the description "pay loadings" as distinct from "loadings" and "loaded wage" was

commonly used in the building industry to include workers' compensation insurance. This criticism of the uncontradicted evidence of Dr. Cooper seems to turn upon drawing a distinction between "wage" and "pay"–terms which are used interchangeably in the relevant awards and in paragraph V of the rise and fall clause itself. Their Lordships are unable to accept that this is a valid ground for rejecting Dr. Cooper's evidence.

Moffitt P. excluded Insurance Costs on the ground that paragraph IV was not capable of extending the ambit of the alterations as defined in paragraph II which were to give rise to adjustments in the contract sum: and that, since "conditions of employment" had been held in the *Whittle Case* not to include Insurance Costs, these could not be brought in independently by paragraph IV. But this, in their Lordships' view, is to treat the *Whittle Case* as authority for something which it did not decide. As has been pointed out the High Court took the view that the expression "conditions of employment" was ambiguous. It had a wider meaning which would embrace the employer's obligation to insure against liability to pay Workers' Compensation and a narrower meaning in which such obligation would be excluded. In order to determine which of these meanings was intended in the rise and fall clause then under consideration the High Court examined the whole context of that clause: and decided that the context showed that it was intended to be used in the narrower sense. In the instant case the rise and fall clause itself contains in paragraph IV an explanation of what is intended to be included in the expression "other conditions of employment" in paragraph II. The effect of this can, in their Lordships' view, be put in either of two ways. If one follows the same steps as the reasoning of the High Court in the *Whittle Case*, paragraph IV resolves in favour of the wider meaning a potential ambiguity in the expression "conditions of employment" in paragraph II; or, put more simply, there is no ambiguity in the meaning of the expression "conditions of employment" as used in the rise and fall clause in the instant case, when it is read as a whole.

For these reasons the appeal by the Builders succeeds and the declarations made by the Court of Appeal require to be amended by deleting "increases in the cost of effecting workers compensation" from the matters specified in Declaration (3) and declaring them to be a matter required to be taken into consideration in applying the rise and fall clause in so far as such increases have occurred independently of wage increases.

So in the final result the Builders have failed on their original claim for derivative increases but have succeeded on their claim for Additional Award Costs and on their claim for Insurance Costs so far as the increases in these are not derivative increases.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the cross-appeal dismissed and the order of the Court of Appeal varied (1) by deleting the words "(b) Increases in the cost of effecting workers compensation" from Declaration (3) and, in lieu thereof, declaring such increases to be matters required to be taken into consideration in applying the rise and fall clause in so far as such increases have occurred independently of wage increases, and (2) by ordering that there be no order for costs of the trial or the appeal to the Court of Appeal. The respondents must pay the appellants' costs of the appeal and cross-appeal to Her Majesty in Council.

Privy Council Appeal No. 33 of 1979

MAX COOPER & SONS PTY. LIMITED

v.

THE COUNCIL OF THE CITY OF SYDNEY

DELIVERED BY LORD DIPLOCK

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