39/84

No. 10 of 1984

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT

OF QUEENSLAND

B E T W E E N:-

THE QUEENSLAND ELECTRICITY GENERATING BOARD

Appellant

- and -

NEW HOPE COLLIERIES PTY. LTD.

Respondent

CASE FOR THE APPELLANT

BRIEF SUMMARY OF APPELLANT'S SUBMISSIONS

1. (a) The litigation concerns a contract for the sale of a large amount of coal to be used for power generation. The contract was made on 12th July, 1978. It specified prices to be paid for coal supplied to the end of 1982, although those prices were subject to variation in accordance with formulae set out in the contract. There was also provision for changing these formulae, to reflect the effects of changes in the supplier's costs. A dispute arose about that; the Respondent said that the contract permitted retrospective changes in the formulae to a date years before any change was requested - indeed, even before the contract was made. As to that dispute the Respondent succeeded; the Supreme Court held the formulae could be changed in an arbitration

RECORD

p.458,1.1.
p.492.
p.474,1.25-
p.484,1.45.
p.474,11.30-47.
p.17,1.25-
p.19,1.37.
p.562.11.20-30;
p.586,1.47-

RECORD

p.587,1.10. back to 1st July, 1978.

(b) The other dispute was concerned with the fact that p.473,1.17. the contract did not specify "the terms of supply of additional quantities beyond the initial five year period...", which p.24.1.52- ended on 31st December, 1982. The Respondent said, and the p.26a,1.23. Appellant denied, that if the parties did not agree about such terms then they were to be fixed by Arbitration. On that point, also, the Respondent succeeded. 10

(c) As construed by the Supreme Court, the contract is such that at no time during its performance (including the day of its making) is it possible for the Appellant to know either its liability in respect of coal supplied in the past or the current cost of coal. At the end of each five years, on the contruction attacked by the Appellant, it becomes (in the absence of agreement) obliged to pay at rates and on other 20 conditions fixed by an Arbitrator, using vague criteria.

(d) Further, on the Supreme Court's view, although for some years the Appellant acted on the basis that the prices it p.565,1.40. had paid were final, no estoppel could arise; in this respect p.591,1.30. also, the Appellant challenges the Supreme Court's decision and will urge that too narrow a view of the notion of estoppel was taken. 30

DETAILED CASE

pp.577-594. 2. The judgment under appeal is dated 6th December 1983 and is one of a Full Court which dismissed an appeal from a pp.553-576. judgment of a single Judge dated 26th July 1983. The latter judgment dismissed the claims by the Appellant for 40 declarations as to the effect of the agreement and made p.576.11.10-20. declarations sought by the Respondent.

p.3,1.34; 3. The Appellant is a body corporate created by statute p.15,1.25. charged with the generation of electricity which is supplied to bulk purchasers within the State of Queensland. The 50

Appellant has a number of generating plants within the State, including one at Swanbank near Brisbane. That plant is located on the West Moreton Coal Field and the Respondent operates mines located in that Coal Field. RECORD

4. The agreement in issue, although made on 12th July, 1978, was expressed to commence from 1st January, 1978. It was varied three times but none of these variations matters for the purposes of the Appeal. p.461,1.13. p.580,1.30.

5. About November, 1981, there were discussions between officers of the Appellant and officers of the Respondent as to what were said to be cost pressures on the Respondent related to its performance of the contract. On 10th February, 1982 the Respondent wrote to the Appellant referring to such pressures and on 19th March, 1982 wrote again, saying that it had closed its main mine and opened additional mines to continue supply under the agreement. That letter claimed that the price should be changed by adding back a sum which had been deleted during negotiations. On 17th June, 1982 the Respondent submitted a "request for a variation in the price of coal with respect for the period up to July 31st, 1981, together with a request for a revised base price from August 1st, 1981". p.511,1.25. p.511. p.513. p.513,1.45. p.514,1.16. p.518.

6. Schedule A to the contract identifies some 10,209,000 tonnes of coal in specified seams, from which the total quantity available for purchase over fifteen years (six million tonnes) as set out in Schedule B was to be taken. The contention advanced to the Appellant in the letter of 10th February, 1982 amounted, the Appellant would say, to a claim for increased costs arising from the fact that the Respondent was supplying coal from sources other than those contemplated by the agreement. After some further correspondence, on 23rd December, 1982 a notice was served upon the Appellant by the Respondent purporting to refer to Arbitration questions, disputes or differences in relation to the price variation provisions, as follows: p.489. p.489,1.20. p.491,1.40. p.511. p.302.

RECORD

"(a) Whether the escaltion provisions of the said agreement during all or part of that period of the said agreement until 31st December, 1982 properly reflected the effects of changes in costs on the cost of producing and supplying coal under the said agreement during such periods and, if not, in whole or in part, the manner and extent to which such escalation provisions have failed to properly reflect the effects of changes in costs on the cost of producing and supplying coal under the said agreement during such periods.

(b) Whether there should be any and if so what alterations in the price variation provisions of the said agreement in respect of all or part of that period of the agreement until 31st December, 1982."

7. Clause 8.7 of the contract provided in part that: "The p.473,1.18. terms of supply of additional quantities beyond the initial five Year period (from the Commencement Date to 31st December, p.406. 1982) shall be finalised before 31st December, 1981". On 7th January, 1983 a notice was served upon the Appellant by the Respondent purporting to refer further questions, disputes or differences relating to the terms of supply after 31st December, 1982, as follows:

p.406,1.30. "The terms of supply of the additional quantities of coal after 31st December, 1982 and, in particular, but without limitation the manner and extent to which the price or prices for such additional quantities of coal shall reflect all the changes in costs to NEW HOPE COLLIERIES PTY. LTD. including economies resulting from the amortisation of capital items still in use, technological advances, and items of expenditure not repeated, including the restoration of any open-cut workings for which special allowances have been made in the Base Price, as well as changes in costs resulting from changes

in mining conditions, new mining plant and the scale of operations."

RECORD

8. The Appellant and the Respondent were unable to agree upon the appointment of an Arbitrator and the party nominated by the contract to appoint an Arbitrator in that event declined to do so, on or about 28th February, 1983.

p.26,l.17; p.29, l.52. p.26,l.48;p.29a, l.12.

9. The first issue dealt with by McPherson J., the question of restrospectivity, has as its central point the interpretation of Clause 9.1 which is as follows:

"It is a fundamental condition of this Agreement that the escalation provisions shall properly reflect the effects of changes in costs on the cost of producing and supplying Coal under the Agreement. If the formulae employed are not properly reflecting such changes or if indices used for the purposes of this Clause cease to be available or continue to be unavailable for a period of six months, a review of the price variation provisions shall take place upon request by either party. Where the parties agree to an alteration it will be incorporated in the Agreement and will apply thenceforth. In any event such review shall take place at not more than five yearly intervals. Should the award working hours be reduced from 35 hours per week, then such review shall be undertaken forthwith, especially to assess the impact on non labour compenents."

p.474,l.25.

10. His Honour referred to the fact that the third sentence provides that "where the parties agree to an alteration it will be incorporated in the Agreement and will apply thenceforth" but said that it did not "in terms exclude the possibility of a review which, when accomplished, has a retrospective application to prices already paid for coal delivered". The Appellant submits that Clause 9.1 plainly says that if the parties agree to an alteration, a request having been made for a review of the price variation provisions, that applies

p.560,l.50. p.561,l.10.

RECORD

"thenceforth". Clause 9.1 makes no reference to the possibility of an arbitration resolving the question if there is no agreement, or to the date from which an arbitrated alteration may be made to operate. The effect of the decision under appeal is to read the contract as providing that if the parties agree, the alteration applies from the date of agreement but if they do not, it may be made to apply from any prior date, even before the request for a review. The sensible construction is to regard the parties as intending that an arbitrated alteration shall commence on a date corresponding to an agreed alteration; otherwise there is an incentive for the Respondent not to reach agreement. The process of arbitration begins with the reference to arbitration or perhaps, at best for the Respondent, with the request for a review and ends in the award. It will respectfully be submitted that the decision in Superior Overseas Development Corporation v. British Gas Corporation [1982] 1 Lloyds Reports 262 which McPherson J. said he followed was (as the Full Court held) readily distinguishable. It is submitted that the view taken below is unreasonable insofar as it attributes to the parties an intention sharply to distinguish, as to the date from which a variation may operate under Clause 9.1, instances in which the parties agree from those in which the variation is imposed by an award. It also produces the result that even after (say) ten years of supply without any request for review, the price can be re-fixed right back to the inception of the contract.

[1982] 1 LLR 262

p.562,1.20.

p.587,1.48.

11. A better guide, it is respectfully submitted, to the parties' intentions is the notion that the arbitration process is there merely to achieve what the parties might have done had they agreed on the proper amount of variation.

12. The Appellant further submits that the Courts below erred in declining to hold in favour of the Appellant on its estoppel argument. The Respondent foreshadowed no claim for restrospective price review under Clause 9.1 until 19th

p.565,1.40; p.591,1.37.

p.513.

March, 1982. On the evidence the Appellant acted to its prejudice in a number of ways in reliance on final prices notified in invoices delivered by the Respondent: RECORD

(i) By, when determining in or about September, 1979 the merit order of its generating facilities, placing the Swanbank Power Station ahead of the Collinsville and Gladstone Power Stations at full output. Had it known that the price of coal delivered to its Swanbank Generating facility would have been greater, it would have had economic cause to vary the merit order; p.32,1.1-p.37,1.15. p.428,1.10.

(ii) By failing to settle insurance claims upon terms which reflected higher generating costs, for example, a claim connected with the breakdown of unit 5 at Collinsville B Power Station on 12th August, 1978; and p.39,1.1-p.40,1.25.

(iii) By its Chief Finance Officer relying on current coal prices in preparing budgetary forecasts for submission to the State Electricity Commission each year to determine bulk supply prices under Section 71 of the "Electricity Act, 1976-1980", which were the real and effective determinants of the prices charged to bulk consumers for electricity. p.142,1.25-p.144,1.40; p.418,11.12-58; p.452,11.8-12.

13. McPherson J. made no specific finding in relation to these matters set out above, but said that "decisions were on occasions made, and actions taken, which might have been differently made or taken had the plaintiff or its officers been made aware that the relevant coal or electricity might in the end be going to cost more than was supposed". The Appellant submits that it is enough that the Appellant was influenced by the Respondent's actions: Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] Q.B. 84 at p. 104. McPherson J. found it p.564,1.5. [1982] QB 84 at p.104.

RECORD

p.564,1.45. impossible to regard the expression "final price" in the invoices as constituting a sufficient representation and held p.565,1.5. that there was no evidence that officers of the Appellant were induced by the word "final price" to assume that no review of that price or its components would ever be claimed.

14. It is respectfully submitted that this is too narrow a view and that whether the Appellant's officers specifically turned their minds to a particular clause in the contract is not critical; they plainly acted on the basis that the Appellant had paid all it had to pay, and were entitled to do so until the Respondent suggested otherwise. The Respondent must have been aware that the cost of the coal would play a significant part in formulation of a price for electricity and would be relied on.

15. The last question, which McPherson J. described as the p.565,1.43. "more difficult" of the two construction questions, had to do with the effect of Clause 8.7, read with the arbitration clause, the latter being in a fairly conventional form. Clause 8.7 reads as follows:

p.473,1.18.

> "The terms of supply of additional quantities beyond the initial five Year period (from the Commencement Date to 31 December, 1982) shall be finalised before 31 December, 1981. The new pricing structure to apply to such additional quantities shall reflect all the changes in costs to the Company including economies resulting from the amortisation of capital items still in use, technological advances, and items of expenditure not repeated, including the restoration of any open cut workings for which special allowances have been made in the Base Price, as well as changes in costs resulting from changes in mining conditions, new mining plant, and the scale of operations. The Generating Board shall have the right to satisfy itself that the new pricing structure reasonably reflects all such factors."

16. The effect of this Clause had to be considered against the background of the fact that the manner of appointment of an arbitrator contemplated by the agreement failed. It was submitted that there could be no order under the Arbitration Act for the appointment of an arbitrator by the Court, on the authority of National Enterprises Ltd. v Racal Communications Ltd. [1975] 1 Ch. 397. McPherson J. thought it unnecessary to decide that point, because the Respondent did not press for the appointment of an Arbitrator, but it is submitted that if the gap could not be filled, there was no warrant for making (as His Honour did) a declaration that the Respondent is entitled to have certain matters arbitrated.

RECORD

[1975] 1 Ch 397.

p.575,1.33.

p.576,1.10.

17. On the Supreme Court's view, a determination as to the terms of supply beyond 1982 may turn out to be tentative. If, for example, the Respondent determines after some years that the price so fixed is inadequate, it may apply for a substantial retrospective increase - perhaps because a new and even more expensive mine is being operated.

18. It is submitted that it should not be too readily assumed that in every instance in which the contract contemplates a further agreement between the parties, failure to agree entitles either party to require the other to submit to an arbitrated result. Clause 2.5 says that: "The Base Price and provisions for variations in prices for changes in costs for purchases after 31 December, 1982 shall be agreed by the parties prior thereto in accordance with Clause 8". No doubt it was expected that a further agreement would be made, but not every clause of the contract in which further agreement is contemplated brings in the arbitration clause on a failure to agree. A further example is to be found in Clause 4.10 and other in Clause 7.3. Reading Clause 8.7 as a whole, and with Clause 2.5, it is by no means obvious that a failure to agree can be cured under the contract. The last sentence of Clause 8.7 which gives the Appellant the "right to satisfy itself that the new pricing structure reasonably reflects all

p.463,1.48.

p.467,1.14.

p.469,1.44.

p.473,1.35.

RECORD

such factors" tends against the notion that, even if not satisfied that a particular structure "reasonably reflects all such factors", the Appellant might have to accept it.

19. It is submitted that the interpretation of this provision made by the Supreme Court gives it no practical effect:

p.592,1.30. D.M. Campbell, J. thought that its object was "to give the Appellant access to information when the parties were in the process of trying to finalise a new pricing structure". That makes the "right to satisfy itself" under Clause 8.7 merely a procedural matter, and rather a pointless one, for it could hardly have been expected that the Appellant would accept a proposed pricing structure when denied information to support it. It will be noted that not all the provisions of the agreement are intended to create obligations on either party;

p.463,1.5. an example is Clause 2.1.

p.464,11.6-35. 20. Clause 3.1 and Clause 3.2 speak of agreement to supply and agreement to purchase covering the whole 15 years, but they are both to be read "subject to these presents" and in particular subject to the immediately preceding Clause 2.5 referred to above.

21. It is respectfully submitted that McPherson J. was in

p.569,1.20. error in holding, as he did, that because the pricing arrangements were not agreed or finalised before 31st December, 1982, the Sale of Goods Act operated to imply a reasonable price. The operation of Section 11(2) of that Act is subject to there being no contrary agreement; here the parties clearly intend that the price after 1982 shall -

(a) be fixed by agreement;

(b) comply with the general criteria set out in Clause 8.7; and

(c) be such that the Appellant is satisfied with its compliance therewith.

22. The Supreme Court was wrong in thinking that a sufficient "means or standard" is indicated in Clause 8.7. It is not as if there is some obvious way of translating changes in the Respondent's circumstances, as regards mining, into price changes. RECORD p.593,1.47.

23. It should be kept in mind that there is in Queensland no provision comparable to Section 10(2) of the United Kingdom Arbitration Act. Section 17 of the Queensland Arbitation Act 1973 provides, so far as is relevant, as follows:

In any of the following cases:-

(a) where an agreement to arbitrate provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an Arbitrator;

.....

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within fourteen clear days after the service of the notice, the Court or a Judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

24. The Appellant therefore humbly submits that the judgment of the Primary Judge and of the Full Court of the Supreme Court of Queensland ought to be set aside and that this appeal should be allowed for the following amongst other

R E A S O N S

1. BECAUSE the agreement in question did not stipulate the terms of supply of coal beyond the period of five years from its inception and no means, other than further agreement, are available to fix those terms.

2. BECAUSE the Respondent is not entitled to have the escalation provisions reviewed retrospectively, except from the date of request for review or from the date of reference to arbitration of the request.

3. BECAUSE the Respondent is estopped from asserting any right to additional payment for coal delivered prior to the date of request for a review or, at the earliest, prior to 19th March 1982.

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No. 10 of 1984

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BETWEEN:–

THE QUEENSLAND ELECTRICITY GENERATING BOARD

Appellant

– and –

NEW HOPE COLLIERIES PTY. LTD.

Respondent

CASE FOR THE APPELLANT

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