39/84

IN THE PRIVY COUNCIL — Appeal No. 10 of 1984

ON APPEAL
FROM THE FULL COURT
OF THE SUPREME COURT OF QUEENSLAND

BETWEEN

10 THE QUEENSLAND ELECTRICITY GENERATING BOARD — Appellant (Plaintiff)

- and -

NEW HOPE COLLIERIES PTY. LTD — Respondent (Defendant)

20 CASE FOR THE RESPONDENT

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PART I - INTRODUCTION

A. THE ISSUES

1. This appeal turns upon the resolution of three issues which for brevity may be described as:-

(a) "retrospectivity";

(b) "estoppel" and

(c) "uncertainty".

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Retrospectivity and estoppel are connected temporally and concern the operation of the price fixing mechanisms of the contract in question ("the Agreement") in respect of coal supplied by the Respondent to the Appellant in the five years 1978 to 1982. Uncertainty is concerned with the question whether the Agreement is enforceable in respect of the period after 1982.

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2. Those issues, stated more fully, are as follows:-

(a) "Retrospectivity" - Whether the Respondent is entitled to have referred to arbitration the question whether the price variation provisions of the Agreement properly reflected the effects of changes in costs on the cost of producing and supplying coal under the Agreement during the five years 1978 to 1982.

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(b) "Estoppel" - Whether, if the answer to (a) would otherwise be "yes", the Respondent is estopped from contending that during some or all of that period the price variation provisions did not properly reflect the effects of changes in costs on the costs of producing and supplying coal under the Agreement.

(c) "Uncertainty" - Whether, in respect of coal to be supplied after the first five years of the Agree-

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ment, i.e. after 1982, the Respondent is entitled to have determined by arbitration the Base Prices and escalation provisions to be applicable under the Agreement.

3. (a) The circumstances out of which these issues arise and the Respondent's contentions in relation to each issue appear in Parts II, III and IV.

(b) Part V deals with an aspect of the Reasons for Judgment in the Full Court where it is submitted an error was made which, if not corrected in these proceedings, would affect the parties' contractual position in the future.

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B. OUTLINE OF THE AGREEMENT

4. The Agreement is, as appears from Recital B thereto, one of a number of contracts entered into with the Appellant (a body established by s.80 of the Electricity Act 1976-1980) by companies operating coal mines in the Ipswich, Queensland area for the supply of coal to the Appellant's power station at Swanbank, Ipswich.

p.458,1.46

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5. The Agreement pursuant to which the Respondent was such a supplier was numbered CS/29/2 and was entered into on 12th July, 1978, although deliveries under it were deemed to have commenced in January, 1978. See cl.4.9., the opening words of cl.8.7, and the definition of "commencement Date" in cl.1(e).

p.458,1.1

p.467,1.12)
p.473,1.18)
p.461,1.13)

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6. Under the Agreement (cl.3.1):-

p.464,1.6

(a) the Respondent agreed to supply to the Appellant; and

(b) the Appellant agreed to purchase from the Respondent;

quantities of coal determined in accordance with the Agreement. The quantities were expressed in terms of "Tonnes Eq.", a term defined by reference to the heat content of the coal received by the Appellant (cl.1(u)).

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p.462,1.42

7. For the first year of the Agreement, the calendar year 1978, the agreed Firm Purchase (cl.1(1)) was to be 400,000 Tonnes Eq. (cll.3.1 and 4.1). In respect of years after

p.462,1.4)
p.464,1.6)
p.465,1.26)

1978, however, the quantity of coal to be supplied in any year was to be notified by the Appellant to the Respondent at least six months prior to the commencement of that year (cl.4.1) by the giving of a Firm Purchase Notice (cll.1(m), 4.1 and 4.2).

p.465,1.26
p.462,1.10)
p.465,1.26)

8. The Appellant had some discretion as to the quantity which might be the subject of a Firm Purchase Notice in any year, but the ambit of that discretion was limited by several provisions of the Agreement, in that:-

p.465,1.36)

(a) cl.3.3 in its second paragraph specified certain Guaranteed Minimum Purchases (a term defined in cl.1(n)) in respect of each of the first five years;

p.464,1.48
p.462,1.14

(b) cl.3.3 also required that the Firm Purchase for any year after 1978 be not less than 90 per cent nor greater than 110 per cent of the Firm Purchase in the preceding year; and

p.464,1.36

(c) by cl.3.1 the Appellant had agreed to purchase overall a Contract Minimum Purchase (a term defined in cl.1(g)) of not less than 3,290,000 Tonnes Eq..

p.464,1.6
p.461,1.26

9. The quantities to which reference has been made above were expressed (cl.3.1) to be minimum quantities, and the total quantity which the Respondent might be obliged to supply over the term of the Agreement was 6,000,000 tonnes (see the expression "Total Quantity Available for Purchase" in cl.3.3, and its use in Schedule B to the Agreement). Of course, if purchases remained constant at the initial level of 400,000 tonnes per annum the Agreement would run for the period of 15 years referred to in cl.3.4 and elsewhere in the Agreement.

p.464,1.6
p.464,1.26
p.491,1.40
p.465,1.18

10. As might be expected, the Agreement made elaborate provision in respect of the quality of the coal to be supplied under it (cl.6), the methods of weighing, sampling and analysis (cl.7), and the price to be paid for the coal supplied under it (cll.8, 9 and 10).

p.468,1.20
p.469,1.24
p.472,1.14

11. It is in the end the provisions of the Agreement as to price and pricing structure which have given rise to the

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issues in this appeal, and these provisions are dealt with in the succeeding Parts of this Case.

PART II - RETROSPECTIVITY

A. CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

12. As appears from cl.2.5, the Agreement distinguished between the provisions as to price applicable in respect of the first five years of the Agreement, and those as to price applicable thereafter.

p.463,1.40

13. The provisions as to price in respect of the first five years involved three elements, namely:-

(a) Base Prices;

(b) provisions for variation of the Base Prices by reason of changes in costs of producing and supplying coal; and

(c) provisions for variation of the price variation provisions themselves.

The issue of retrospectivity relates to the last of these elements.

14. The starting point for ascertaining the price payable for coal supplied during the first five years was the Base Price per tonne specified in Schedule C to the Agreement. (It should be mentioned that Schedule C appears in the Record both in its original form, and in the form which it took after the making of the Variation Agreement of 20th October 1981).

p.492
p.504
p.499

15. The Base Prices per tonne:-

(a) were calculated (cl.1(c)) as at the Base Date, which was (cl.1(b)) 30th June, 1977; and

(b) varied with the quantity to be supplied (cll.8.1 and 8.4).

p.460,1.50
p.460,1.45
p.472.1.16)
p.472,1.40)

16. The Base Prices were expressed to be related to the "costs of labour, materials and supplies, and all other cost factors incurred by" the Respondent "in the production and supply" of coal as at the Base Date (cl.8.3).

p.472,1.26

17. Each Base Price specified in Schedule C (in both its forms) was arrived at by taking into account the various Components shown in Schedule D. See cl.8.3. (Schedule D was itself amended at the time of the amendment to Schedule

p.492, p.504
p.493)
p.472,1.26)
p.505

C to which reference has earlier been made).

18. The second element (see paragraph 13(b) above) in the calculation of price during the first five years consisted of the provisions for increase or decrease in costs which are hereinafter called, for brevity, "the escalation provisions", a term used for that purpose in the Agreement itself (see, e.g. cl.9.1).

p.474,1.26

19. In relation to the escalation provisions cl.8.3 provided that all the Base Prices in Schedule C were themselves subject to increase or decrease for changes in costs in the manner set out in cl.9 and the Contract Price from time to time for coal supplied under the Agreement was the relevant Base Price as altered by the application of the escalation provisions (cll.1(h) and 8.6).

p.472,1.26
pp.492,504
p.474,1.26
(p.461,1.32
(p.473,1.10

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20. The application of the escalation provisions to the Base Price was to occur monthly (cl.9.3) and the method of adjustment was by the application of the formula set out in cl.9.8. It is not necessary to go into the detail of the formula but two matters may be mentioned:-

p.475,1.11
p.476,1.20

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(a) The factors in the "original" formula were those referred to in the original Schedule D as Components of the Base Price.

p.476,1.20
p.493

(b) The Variations of the Agreement entered into on 15th August 1978, 5th June 1980 and 20th October 1981 effected some alterations to the formula and its application, but the alterations are not material to the appeal.

p.498b.
p.498d.,p.499

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21. The third element (see paragraph 13(c) above) in the calculation of price during the first five years, i.e. the provision which contemplated variation of the escalation provisions themselves, was cl.9.1.

p.474,1.26

22. Cl.9.1, reflecting Recital G stated that:-

(p.474,1.26
(p.460,1.19

"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."

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and then proceeded:-

"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 components."

23. Cl.9.1 does not itself state any means which is to be used to resolve the situation if the parties fail to agree on the need for, or the result of, a review under that provision. The Agreement, however, contains in cl.13.1 an arbitration clause which provides that:-

p.474,1.26

p.486,1.36

"13.1 If at any time any questions, dispute or difference whatsoever shall arise between the Generating Board and the Company upon, or in relation to, or in connection with the Agreement, which cannot be resolved by the contracting parties within a period of 3 months either party may as soon as reasonably practicable thereafter by notice in writing to the other party specify the nature of such question, dispute or difference, and call for the point or points at issue to be referred to Arbitration."

24. The essential facts which, in the light of the provisions referred to above, have given rise to the issue of retrospectivity commence with the fact that on 14th July 1982 the Respondent made a request in writing (set out in full in paragraph 6(a) of the Defence) to the Appellant that a review of the escalation provisions take place in accordance with cl.9.1 on the ground that such provisions did not properly reflect the effects of changes in costs on the cost of producing and supplying coal under the Agreement. (The making of that request on that day is admitted on the pleadings.

p.17,1.24

p.474,1.26

p.5,1.43 See Statement of Claim paragraph 9, Defence and Counterclaim paragraph 6(a), Reply and Answer paragraph 2(a)).

p.17,1.24
p.28,1.28

25. It is admitted on the pleadings (Defence and Counterclaim paragraph 6(b), Reply and Answer paragraph 2(a)) that after the making of such request the Appellant and the Respondent:-

p.18,1.20
p.28,1.28

(a) failed to agree on whether during the period 1st July 1978 to 31st December 1982 the escalation provisions properly reflected the effects of changes in costs on the cost of producing and supplying coal under the Agreement; and

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(b) also failed to agree on whether there should be any and if so what alteration in the price variation provisions of the Agreement in respect of all or part of such period.

26. It should be mentioned that, notwithstanding paragraph 25(a) above, it is now admitted on the pleadings that during the period 1st July 1978 to 31st December 1982 the escalation provisions of the Agreement did not in fact properly reflect the effects of changes in costs on the cost of producing and supplying coal under the Agreement (Defence paragraph 6(d)(ii), Reply and Answer paragraph 2(b)).

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p.19,1.20
p.28,1.38

27. The Respondent contended that the matters referred to in paragraph 25 above were "questions, disputes or differences" in terms of cl.13.1 and that in terms of that provision it was entitled (after the expiration of three months from 14th July 1982) to have those "questions" or "disputes" or "differences" referred to arbitration. Accordingly, on 23rd December 1982 the Respondent gave the Appellant notice referring those issues to arbitration (Statement of Claim paragraph 10, Defence and Counterclaim paragraph 6(e)(ii) and Reply and Answer paragraphs 1 and 2(c)).

p.486,1.38

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p.5,1.52
p.19,1.30
p.27,1.38)
p.29,1.11)

28. The Appellant then on 28th February 1983 issued its Writ and by its Amended Statement of Claim (8th April 1983) sought declarations in relation to the effects of any review pursuant to cl.9.1 of the Agreement. The declarations sought were in substance that a review pursuant to cl.9.1

pp.1,2
p.8,1.18
p.474,1.26

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could not alter the quantum of the Appellant's liability to make payments for coal delivered:-

(a) prior to the completion of such a review; or alternatively

(b) prior to 31st December 1982; or alternatively

(c) prior to 14th July 1982 (the date on which such a review was requested); or alternatively

(d) such other date as might be fixed by the Court.

29. The claims for declarations were expressed to be made upon two bases, namely:-

10 (a) as a matter of construction of the Agreement (paragraph 11 of the Statement of Claim); and p.6,1.56

(b) in reliance upon an estoppel (paragraphs 12 to 18 of the Statement of Claim). p.7,1.4

"Retrospectivity" is concerned with the first of these contentions.

30. The Appellant's contentions in relation to retrospectivity were not accepted by the primary Judge. p.559,1.21-p.563,1.41

20 31. The Appellant's appeal to the Full Court in relation to retrospectivity was on the following ground, as stated in the Notice of Appeal to that Court:-

"1. That the learned trial judge erred in holding that upon the proper construction of the Agreement the plaintiff could be liable to pay any further amount to the defendant in respect of coal delivered pursuant to the Agreement prior to:

30 (a) the determination of any review of the price variation formulae established pursuant to the Agreement; or

(b) the date upon which such a review was requested by the defendant."

32. The Appellant's contentions of this issue were rejected by the Full Court. p.584,1.40-p.587,1.48

33. It should be mentioned that although the relief claimed in

40 the Statement of Claim suggests (it is submitted) that the question in relation to this issue was whether an arbitrator might vary the escalation provisions as from a date prior to p.8,1.18

his decision, or alternatively prior to the date on which a review was requested under cl.9.1, the argument both before the primary Judge and before the Full Court ranged more widely. A further issue was whether an arbitrator might in such a case make a decision which operated entirely prospectively (in the sense that it applied only to coal supplied after the date of his decision) but which sought to compensate a party in respect of events of the nature referred to in cl.9.1 which had occurred prior to that date.

p.474,1.26

B. RESPONDENT'S CONTENTIONS

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34. It is submitted that an arbitrator, resolving a difference which has arisen under cl.9.1 may make a decision which has an express retrospective effect. Such a decision would be one which altered the escalation provisions from some date selected by the arbitrator prior to the date of his decision.

p.474,1.26

35. It is further submitted that an arbitrator in such circumstances may make a decision which has an indirect retrospective effect, i.e. whilst the substituted escalation provisions apply only to coal delivered after the date of the decision, the variation of the escalation provisions is intended to compensate one party or the other for the earlier deficiency in the escalation provisions which gave rise to the review.

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36. These contentions are, and the Appellant's submissions (paragraph 31 above) are not, supported by a number of matters.

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p.474,1.26)
p.460,1.19)

37. Firstly, the terms of the first sentence of cl.9.1 and the terms of Recital G which they reflect both suggest that there is to be a relationship between the price payable for coal at any time and the costs incurred in producing and supplying it. The provisions suggest that the purposes of cl.9.1 are twofold, namely:-

(a) to provide a means whereby the provisions will achieve that aim in the future; and

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(b) to provide a means whereby the "discrepancy" in the past will be rectified.

p.474,1.30

38. Secondly, the terms of the second sentence of cl.9.1

support this view. In this regard there are three events which that sentence contemplates may give a right to a review, namely:-

(a) if the formulae employed are not properly reflecting such changes;

(b) if indices used in the escalation provisions cease to be available: or

(c) if indices used in the escalation provisions are unavailable for a period of six months.

10 39. If the Appellant's contentions are correct, there could not be any alteration of the escalation provisions to deal with the period during which (in a case of the nature referred to in paragraph 38(b) above) the indices were unavailable. In a case of the nature referred to in paragraph 38(c) above, there could not be alteration of the escalation provisions in respect of the period of six months during which the indices were unavailable.

20 40. Thirdly, the Appellant's primary contention, namely that no review could alter the situation prior to the completion of the review, would also have the effect of:-

(a) encouraging delay in resolution of the differences; and

(b) making the rights of the parties dependent on the date at which the arbitrator chose to deliver his decision.

30 It seems unlikely that the parties would have so intended, bearing in mind that the Agreement is to continue while the arbitration is in progress (cll.8.11 and 13.6). (p.474,1.3 (p.487,1.31

41. The Appellant's secondary contention on this point (namely that the variation of the escalation provisions cannot go back beyond the date on which a review was requested) is subject, it is submitted, to the same objections. Cl.9.1 does not itself attach any special significance to the date on which p.474,1.26
40 a review is requested, and indeed seems to require that an event giving rise to a right to review shall have occurred before a review may be requested.

42. In truth, the Appellant's contentions appear to be founded on the use of the words "and will apply thenceforth" in the third sentence of cl.9.1. That sentence does not, it is submitted, have the effect that a variation of the escalation provisions by an arbitrator may not operate retrospectively, and it does not do so for the following reasons:-

p.474,1.46

(a) That sentence says nothing about the content of an alteration, but requires simply that it be placed in a particular form, and provides that until it is in that form it is to have no effect.

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(b) The sentence only applies to an alteration consequent upon agreement.

43. Finally, a decision made in relation to cl.9.1 need not necessarily be expressed to operate retrospectively. Whilst one result of a review under the clause might be to alter, as from a date in the past, the price variation provisions, another way of achieving the same financial result would be for the parties, or the arbitrator, to provide entirely prospectively for a higher rate or price in the future so that the future price likely to be determined by the operation of the escalation provisions will accommodate past deficiencies.

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PART III - ESTOPPEL

A. CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

44. As noted in paragraph 2(b) above, the issue which arises in relation to estoppel is whether, if the issue of retrospectivity would otherwise be answered in favour of the Respondent, the Respondent is yet estopped from contending that during some or all of the period 1978 to 1982 the escalation provisions did not properly reflect the effects of changes in costs on the costs of producing and supplying coal under the Agreement.

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45. The nature of the Respondent's conduct upon which the Appellant relies to found the estoppel is stated in paragraph 9 of the Reply and Answer in the following way:-

p.296,1.44

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"9. ...the Plaintiff relied upon, inter alia, the prices of coal as notified by the Defendant to the Plaintiff from time to time in proforma invoices and adjusted from time

to time in final invoices submitted pursuant to clause 8.11 of the Agreement..."

The references to "proforma" and "final invoices" in this paragraph of the pleading derive from the provisions of the Agreement as to payment for coal supplied.

46. By cl.8.10 the Respondent was to submit to the Appellant each month a claim for payment for coal delivered during the preceding month, and the Appellant was to pay for such coal by the end of the month following delivery or within fourteen days of receipt of the claim. p.473,1.47

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47. Cl.8.10 also provided that payment was to be made at the Contract Price determined in accordance with the Agreement (i.e. the price arrived at after application of the escalation provisions to the Base Price (see cl.8.6)), and adjusted in accordance with cl.10, which provision allowed for variations in price depending on quality. p.473,1.47 p.473,1.10 p.483,1.36

48. The Agreement recognized that some of the "indices or determinations" used in the escalation provisions might not be available when an account was submitted and in that regard cl.8.11 provided that:- p.474,1.13

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> "8.11 If the appropriate indices or determinations which establish the price variations applicable under the Agreement are not available at the time of submitting an account, pro forma invoices shall be submitted on the basis of previous information available. Subsequent adjustments shall be made when final invoices are submitted at some later date."

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49. The course in fact adopted by the Respondent was in conformity with cl.8.11. The method adopted is set out in the affidavit of Norman Ross Walker and the exhibits thereto. In short, it was as follows:- pp.266-267 pp.269-293

(a) At the end of each month the Respondent submitted an invoice for coal delivered during that month. Exhibit "A1" is such an invoice and shows deliveries of 37,067.68 tonnes of coal. There is a deduction of 139 tonnes for "moisture" giving a balance quantity of 36,928.68 tonnes. The coal is then charged at the rate of $38.97 per tonne. p.269

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p.269

(b) The rate of $38.97 per tonne used in Exhibit "A1" was the rate which had been calculated by Messrs. Spry Walker & Co., Touche Ross & Co., chartered accountants, as being the rate applicable during the preceding month, April 1982. The calculation appears in Exhibit "C2" and is summarized on the first half of page 1 of that exhibit. A similar calculation in respect of the month of March, 1982 appears in Exhibit "C1" and the figure there arrived at is $38.64 per tonne.

pp.285-294 p.285 pp.275-284

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(c) The figures of $38.64 for March and $38.97 for April were then included in the text of Exhibit "B", the accountants' summary of the position.

p.273

(d) The differences between the prices earlier charged for March and April and those calculated in accordance with Exhibits "C1" and "C2" were there shown as .06 cents and .16 cents per tonne, and those figures were the subject of a separate invoice from the Respondent to the Appellant. That invoice is Exhibit "A2".

pp.275-284 pp.285-294) p.271

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50. It will be seen from Ex."B" that the accountants' calculations of the price payable for coal delivered in preceding months used the expression "final price" to describe the price payable after re-calculation of the amount payable in accordance with the escalation provisions, further information having become available as to the actual figures to be used in the escalation formula then applicable.

p.273

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51. The Appellant alleged that in reliance upon the use of the term "final price" in the accountants' calculations, it altered its position in the manner alleged in paragraphs 6, 7, 8, 10, 11 and 12 of the Reply and Answer.

p.29a,1.45- p.29f,1.10

52. The primary Judge found against the Appellant on this issue on two grounds, namely:-

(a) that the expression "final price" in the accountants' calculations was not capable of constituting an unambiguous representation by the Respondent that it would never seek a review under cl.9.1; and

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(p.564,1.42- (p.564,1.50

(b) that there was no evidence that any officer of the Appellant was induced by the presence of the words "final price" in the accountants' calculations to assume, or to act on the assumption, that a review under cl.9.1 would not be claimed by the Respondent. (p.564,1.50- (p.565,1.12

53. The ground of the Appellant's appeal to the Full Court from those findings was as follows:-

"2. That the learned trial judge erred in holding that the defendant was not estopped from now asserting any claim in respect of coal delivered prior to one or other of the above dates."

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54. The Full Court did not need to discuss the issue in detail because it was of opinion that no relevant representation was made. (p.587,1.50- (p.591,1.38 p.591,11.28-38

B. RESPONDENT'S CONTENTIONS

55. The finding that no representation was made that a review would not be sought pursuant to cl.9.1 was clearly correct. p.474,1.26

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56. In the first place, as McPherson J. said:- p.565,11.24-30

"The author of the invoice/letter dated 20th June 1983, and others like it, was therefore simply repeating the language of cl.8.11, and that clause is merely one part of an agreement which in cl.9.1 and elsewhere contemplates the possibility of a review of a price even though it is referred to as 'final'."

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57. Secondly, the first paragraph of Ex."B", the document which forms the foundation of the suggested estoppel, states specifically that the calculations are "of the current coal prices escalated according to the provisions of the above contract". It does not suggest in any way that the figures are not capable of change by the operation of cl.9.1. p.273,11.24-26 p.474,1.26

58. Further, it is apparent from the evidence that the documents were not treated by the Appellant as being any more than calculations of the price as escalated in accordance with the Agreement.

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59. Thus in the cross-examination of Mr. Baguley, the Appellant's Operations Resources Manager, the following appears:-

p.440,11.21-28

> "Q. Do you know what system operates in that department for dealing with these documents as they come in?
> A. Only superficially. We receive a copy of a calculation from Spry Walker which tells us what the price is that should be paid under the escalation provisions of the contract, and that is sent to the finance department. I think it is a copy of what is sent to the actual mines themselves. Then the colliery itself just sends the account in based on information from Spry Walker, and the price according to the escalation provisions."

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and:-

p.440,1.53-
p.441,1.22

> "Q. So far as the notifications of the cost of coal and adjustments to it that have been given by New Hope over the years are concerned, are they the documents that are Exhibits A1 and 2 - documents of that type to Mr. Walker's affidavit to which I took you a moment ago?
> A. I would tend to think they were more the other ones. Al and 2 are adjusted for quality, so they are not really the straight contract prices. The contract prices would be the ones that come from Spry Walker even though it comes via a third party. It is still really coming from the colliery.
> Q. Is there an arrangement between QEGB and all the coal suppliers who have contracts similar to this with Spry Walker?
> A. Do all the calculations. They cost -------
> Q. In accordance with the agreement and then notify both sides?
> A. Right.
> Q. And then, of course, the contract itself contemplates that there will have to be adjustments to it once further information becomes available?
> A. This is just on indices, yes.

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Q. And the way in which all that has happened over the years it has been going has been that Spry Walker work out the price in accordance with the contract and tell both parties?

A. That is right. That is how I understand it, yes.

Q. Those are the notifications of the price that have been given by New Hope so far as you are aware?

A. That would be my interpretation."

60. Again, in the cross-examination of Mr. Walker, the Appellant's Chief Finance Officer, the following passage occurs:- p.462,1.44-) p.453,1.2)

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"Q. The documents that are exhibited to your shorter affidavit set out two invoices in the form of an invoice and also set out a letter of 14 June 1982 from Spry Walker and Company and the enclosures to it. Am I right in thinking that that form of document had been used throughout the first five years of the contract?

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A. To the best of my knowledge, yes.

Q. The prices set out there are, from your understanding, the coal prices escalated according to the provisions of the contract?

A. Yes.

Q. In other words, the amount calculated in accordance with the contract?

A. Yes."

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61. Finally, and alternatively, it was in any event apparent to the Appellant from November, 1982 that a claim under cl.9.1 would be made. See Exhibit 4 and Mr. Baguley's evidence in cross-examination:- p.474,1.26 p.511 p.436,1.6-32

"Q. There was a claim served on you - a more formal claim served on you - on 14 July 1982, wasn't there?

A. Sorry, 1982, yes.

Q. But before that, there had been discussions between officers of the QEGB and officers of New Hope in relation to the cost pressures that New Hope said it was feeling and the fact that it wanted an increase in price?

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A. They were foreshadowed before that date - a notice that we would be making some claims.

Q. And the discussions stated in the latter part of 1981, did they not?

A. Yes, I believe so.

Q. So, can you tell me when it was in 1981?

A. I think it was just before Christmas - November, or something like that.

Q, From at least November 1981, you knew that there was likely to be a claim in respect of the increased costs of coal?

A. We knew that they had foreshadowed that there was claims. We weren't sure how the claims would be put forward, no.

Q. At that time, it was apparent, was it not, that the coal supply, at least after that time, was coal in respect of which it was likely that they would seek to have the price reviewed?

A. They would seek to. It was possible. It didn't say the claim was necessarily paid.

Q. Of course not. You knew, did you not, from the latter part of 1981 - from November 1981 - that New Hope was claiming that the price should be reviewed?

A. It didn't have a formal - we knew there was a possibility of them reviewing the price - of asking for a review of the price."

62. The Appellant also failed to prove the second element necessary to found the estoppel, namely that any officer of the Appellant ever regarded the documents forwarded each month as being:-

(a) other than price currently payable under the Agreement; or

(b) a representation that no review would be sought under cl.9.1.

p.474,1.26

p.564,1.50-) p.565,1.12)

63. This was an issue of fact and McPherson J. found:- "But the fundamental difficulty for the Plaintiff is that there is in the end not a shred of evidence that any of

the officers of the Plaintiff who saw or knew of invoices of that kind was induced by the presence of the words 'final price' to assume, or to act on the assumption, that no review of that price or its components would ever be claimed by the defendant."

PART IV - UNCERTAINTY

A. CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

64. As noted in paragraph 2(c) above, the issue which arises in relation to uncertainty is whether, in respect of the coal supplied after the first five years of the Agreement, i.e. after 1982, the Respondent is entitled to have determined by arbitration the Base prices and escalation provisions to apply under the Agreement.

65. The Agreement did not make detailed provision in relation to the pricing structure after the first five year period of the Agreement. Cl.2.5, however, provided that the general terms of the Agreement applied to the coal agreed to be supplied under the Agreement, but that the Base Prices and the escalation provisions applied only to purchases in the first five year period, and that:- p.463,1.40

> "The Base Price and provisions for variations in price for changes in costs for purchases after 31 December 1982 shall be agreed by the parties prior thereto in accordance with Clause 8."

66. The provision of cl.8 to which cl.2.5 referred was cl.8.7, which was in the following terms:- p.473,1.18

> "8.7 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."

67. The price and price structure for the period after 31st December 1982 had not been agreed by 31st December 1981 (the date referred to in cl.8.7) and had not been agreed by the time of delivery of the Counterclaim. Those facts were admitted (Defence and Counterclaim paragraph 20, Reply and Answer paragraph 4(a)).

p.473,1.18

p.24,1.4

p.29,1.38

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68. On 7th January 1983 the Respondent gave the Appellant notice referring that issue also to arbitration pursuant to cl.13.1 (Defence and Counterclaim paragraph 21 and Reply and Answer paragraph 4(b)).

p.486,1.36

p.25,1.18
p.29,1.44

69. The parties failed to concur on the appointment of an arbitrator to decide that issue (Defence and Counterclaim paragraph 22, Reply and Answer paragraph 4(c)) and accordingly the Respondent, by its Counterclaim in the action, sought:-

p.26,1.18

p.29,1.51

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p.26(a),1.22

(a) a declaration that the Respondent was entitled to have the terms of supply of coal after 31st December, 1982 determined by arbitration pursuant to the Agreement; and

(b) an order appointing an arbitrator to arbitrate that question.

70. Although not pleaded specifically, the contention that the Agreement was uncertain in respect of the period after the first five years was argued by the Appellant at the trial and on appeal before the Full Court by way of defence to the Respondent's claims.

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71. McPherson J. held, in favour of the Respondent, that the issue was capable of being referred to arbitration under the Agreement.

p.565,1.42-)
p.575,1.21)

72. In the Appellant's appeal to the Full Court, the ground of appeal urged on this issue was:-

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"3. That the learned trial judge erred in holding that the agreement previously referred to was, in respect of the period after the 31st December 1982, binding upon

the parties thereto in relation to deliveries of coal after that date."

73. This view was also rejected by the Full Court. p.591,1.40-) p.594,1.12)

B. RESPONDENT'S CONTENTIONS

74. The Appellant's contention is essentially that in respect of the period after 1982 the Agreement is no more than an "agreement to agree" and thus unenforceable in the absence of agreement. p.58,1.20

75. It is submitted that this contention is not correct for the
10 following reasons.

76. Firstly, it is clear from the provisions of the Agreement that the parties contemplated that it would operate for a period longer than five years. Thus:-

(a) By cl.3.1 the Appellant agreed to purchase a minimum of 3,290,000 tonnes, a figure which could not have been reached in the first five years even with Firm Purchases at the maximum rate of 110 per
20 cent referred to in cl.3.3. p.464,1.5

(b) The Agreement contains numerous additional references to the fact that the term would exceed five years. See:- p.464,1.36

Recital B, p.458,1.46

Recital C, p.459,1.22

cl.1(v), p.462,1.46

cl.2.1, p.463,1.4

30 cl.2.4, p.463,1.30

cl.2.5, p.463,1.40

cl.3.3, p.464,1.36

cl.3.4, p.465,1.26

cl.4.4, p.465,1.49

cl.5.3, p.468,1.4

cl.8.7, p.473,1.18

cl.9.1, p.474,1.24

40 Schedule B, and p.492

Recital A to the Variation Agreement. p.499,1.42

77. Secondly, it is apparent from cl.2.5 that the only provisions of the Agreement in respect of the period after p.463,1.40

1982 which were to be different after 1982 were the Base Prices and the escalation provisions.

78. Thirdly, in determining the new Base Prices and the new escalation provisions in respect of the period after 1982, the Agreement specified various criteria which were to be taken into account. Those criteria were:-

(a) the new pricing structure would again involve:-
    (i) Base Prices; and
    (ii) escalation provisions;
    because of the terms of cl.2.5; (p.463,1.40)

(b) the new pricing structure would be for a period of five years (Recital G and cl.9.1); (p.460,1.28; p.474,1.26)

(c) the new pricing structure was to reflect "all the changes in costs to" the Respondent (cl.8.7) including such changes as were attributable to the matters specifically mentioned in cl.8.7; and (p.473,1.18)

(d) the effect sought to be achieved by the escalation provisions was to be that stated in the first sentence of cl.9.1. (p.474,1.24)

79. Despite the fact that the Agreement provides the criteria pursuant to which the Base Prices and escalation provisions in respect of the period after 1982 are to be decided, it is obvious that the parties might fail to agree upon the application of those criteria.

80. That difficulty is resolved, it is submitted, by the presence of the arbitration clause, cl.13.1. (p.486,1.36)

81. Cl.13.1 is drawn in the widest possible terms. It refers not merely to any "dispute", but as well to any "questions" or "differences" which might arise between the parties "upon, or in relation to, or in connection with" the Agreement.

82. Such a provision, it is submitted, is plainly wide enough to encompass a failure to agree upon the Base Prices and escalation provisions in respect of the period after 1982. See, e.g.:-

(a) F.G. Sykes (Wessex) Ltd. v. Fine Fare Ltd. (1967) 1 Lloyd's Rep. 53;

10 20 30 40

(b) Attorney-General v. Barker Bros. Ltd. (1976) 2 N.Z.L.R. 495;

(c) Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd. (1967-68) 118 C.L.R. 429.

83. Once the view is taken that the terms of cl.13.1 are wide enough to enable an arbitrator to resolve a failure to agree under cl.8.7, it is clear that any possible "uncertainty" which might be created by the terms of cl.8.7 is removed by the presence of the arbitrator. After all:-

p.486,1.36
p.473,1.18

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(a) it is "well established that the parties to a contract may leave terms - even essential terms - to be determined by a third person" (Booker Industries Pty. Ltd. v. Wilson Parking (Qld.) Pty. Ltd. (1982) 56 A.L.J.R. 825 at 826, per Gibbs C.J., Murphy and Wilson JJ.); and

(b) "in modern times the courts are readier to find an obligation which can be enforced, even though apparent certainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be fixed". (Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk (1965) A.C. 520 at 536, per Lord Wilberforce).

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84. There are two other features relating to this issue which should be mentioned.

p.570,1.6-
p.575,1.20

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85. The first is that the primary judge was of the view that for the Agreement not to be uncertain, it was not sufficient for there to be an arbitrator appointed (i.e. a "means"), but that there must in addition be a "standard" provided by the Agreement for the arbitrator to apply. (The words "means" and "standard" are taken from the remarks of Lord Wilberforce in Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk quoted above. It is submitted that:-

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(a) The terms "means" and "standard" are alternatives, and it is sufficient if areas of possible uncertainty may be resolved by arbitration.

p.572,1.26-) p.575,1.8) p.593,1.20-) p.594,1.12)

(b) In any event, as both the primary judge and the Full Court held, the Agreement in the present case provides both a "means" and a "standard".

86. The second is that considerable reliance was placed by the Appellant on the last sentence of cl.8.7 which states that the Appellant:- (p.473,11.34-36)

"... shall have the right to satisfy itself that the new pricing structure reasonably reflects..."

all the factors earlier mentioned in cl.8.7.

p.567,1.14

87. It was submitted by the Appellant that the presence of this sentence meant that the Appellant could never be bound to buy coal after 1982. 10

p.567,1.9-) p.568,1.13) p.592,1.22

88. That submission was rejected by the primary judge and by the Full Court. It is submitted that the rejection of that submission was correct, because:-

(a) That part of cl.8.7 is plainly directed only to the situation prior to agreement, or determination by arbitration. 20

p.592,1.22

(b) That part of cl.8.7 is inserted, as the Full Court held, to allow the Appellant access to information concerning the Respondent's operations at a time when the parties are endeavouring to agree on a new pricing structure.

PART V - AN ERROR IN THE REASONS FOR JUDGMENT OF THE FULL COURT

89. It is respectfully submitted that the Reasons for Judgment of the Full Court contain an error in relation to the first issue which, whatever be the fate of the appeal on the first issue, should not be perpetuated. 30

90. That error appears in two passages in those Reasons. The first is where D.M. Campbell J. said:- (p.586,1.31)

"The restriction is that there must be an interval of five years between reviews."

and the second is a little later where he said:- (p.587,1.11) 40

"The restriction in cl.9.1 that a review is not to take place more frequently than once every five years is subject to award working hours not being reduced below

35 hours per week."

91. The view expressed in these passages is an interpretation of that part of cl.9.1 which states:- p.474,1.24

"In any event such review shall take place at not more than five yearly intervals."

92. The Full Court has treated that expression as meaning that a review may not take place more frequently than each five years. The true interpretation, it is submitted, is that reviews must take place <u>not less frequently</u> than each five years.

93. The reasons which the Respondent's contention should be accepted, it is submitted, are:-

(a) Firstly, and most importantly, it is the natural meaning of the words.

(b) The preceding words of cl.9.1 state circumstances in which either party to the Agreement has an option to request a review. This part of cl.9.1 requires that a review take place at least every five years. p.474,1.24

(c) The Respondent's contention is more in accord with the first sentence of cl.9.1, and the terms of Recital G. p.474,1.24 p.460,1.18

PART VI - SUMMARY

94. It is submitted that the appeal should be dismissed because:-

(a) in relation to retrospectivity, the Agreement permits a review by an arbitrator of the operation of the escalation provisions in respect of past deliveries, and permits both a variation of those provisions which has an express retrospective effect and also a variation which, while operating prospectively, takes into account events which have occurred in the past;

(b) in relation to estoppel, the Appellant proved neither representation nor reliance upon it; and

(c) in relation to uncertainty, the provision for arbitration provides a "means", or "means and standard"

for resolving any possible uncertainty.

D.F. JACKSON

J.D.M. MUIR
Counsel for the Respondent 10

No. 10 of 1984

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND.

BETWEEN:-

THE QUEENSLAND ELECTRICITY GENERATING BOARD

Appellant (Plaintiff)

– and –

NEW HOPE COLLIERIES PTY. LTD.

Respondent (Defendant)

CASE FOR THE RESPONDENT

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