Privy Council Appeal No. 10 of 1984

The Queensland Electricity Generating Board *Appellant*

v.

New Hope Collieries Pty. Ltd. *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER 1984

Present at the Hearing:

LORD DIPLOCK
LORD FRASER OF TULLYBELTON
LORD ROSKILL
LORD BRIGHTMAN
SIR ROBIN COOKE

*[Delivered by **Sir Robin Cooke**]*

This appeal is brought in proceedings between the parties ("the company" and "the board") to an agreement, dated 12th July 1978 and subsequently varied in writing on several occasions, for the supply of coal by the company to the board. The issues in the appeal are whether the agreement entitles the company to have certain matters arbitrated.

To adopt the language of a recital in the agreement, the companies operating coal mines in the Ipswich district of Queensland and the board recognised that the continued demands of the board for coal for its Swanbank power station were basic to resolve uncertainties concerning the future of the coalfield and to provide an orderly and predictable market for coal for the companies. Accordingly, the companies and the board agreed to long-term coal supply arrangements, of which the instant agreement is one, the period specified in the recitals and the agreement itself being approximately 15 years commencing on 1st January 1978.

[39] For the first five-year period from 1st January 1978 to 31st December 1982 the agreement contains a

scale of base prices and elaborate "escalation" or "price variation" provisions for adjusting the base prices for changes in the company's costs. Payments for coal delivered are to be made monthly. For purchases after the first five years the general terms of the agreement are to continue but the base price and the variation provisions are to be agreed. There is a comprehensive arbitration clause. Not only is a new price structure to be negotiated for the period after the first five years, as already mentioned, but also it is provided as one of the general terms of the agreement that the price variation provisions themselves are to be reviewed in certain circumstances upon request of either party, and that in any event such reviews shall take place at not more than five-yearly intervals.

On 14th July 1982 the company gave the board written notice requesting a review of the variation provisions. The request was intended to relate at least to the period from 1st July 1978 to 31st December 1982; in terms it related back to the very commencement of the agreement. The requested review not having taken place, the company gave written notice to the board dated 23rd December 1982 calling for arbitration on whether there should be alterations in the price variation provisions in respect of all or any part of the period of the agreement until 31st December 1982. Further, as agreement had not been reached on the terms of supply after 31st December 1982, the company gave written notice to the board dated 7th January 1983 calling for that question also to be referred to arbitration.

The board issued a writ of summons in the Supreme Court of Queensland on 28th February 1983. The board's amended statement of claim relates to the company's notices of 14th July 1982 and 23rd December 1982 and asks for declarations including as one alternative a declaration that the company is not entitled pursuant to any such review to any increase in the liability of the board to make payments for coal delivered prior to 14th July 1982. By an amended defence and counter-claim the company alleges that it is entitled to have determined by arbitration not only the questions set out in the two 1982 notices but also those set out in the notice of 7th January 1983. By an amended reply and answer the board alleges that in any event the company is estopped from claiming additional payments for (inter alia) coal delivered prior to 14th July 1982. This plea is based on allegations that in making decisions as to the order in which its various generating facilities would be used and as to what coal would be purchased, and in settling certain insurance claims, the board had relied on the prices notified by the company in adjusted invoices described as "final".

The case was tried by McPherson J. who, for reasons fully given by him in a reserved judgment, decided all issues in favour of the company and made declarations accordingly. An appeal by the board was dismissed by the Full Court (Douglas, D.M. Campbell and Demack JJ.) for reasons given by D.M. Campbell J. The board now appeals to Her Majesty in Council. The three main questions raised by the appeal are concerned with retrospectivity, estoppel and uncertainty.

The Arbitration Clause

Before turning to the questions it is desirable to set out the arbitration clause in full:

"Arbitration

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 three 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.

13.2 Arbitration shall be effected:-

(i) By an arbitrator agreed upon between the parties, or failing agreement upon such an arbitrator;

(ii) By an arbitrator appointed by the committee of the Southern Queensland Branch for the time being of The Australasian Institute of Mining and Metallurgy, provided always that in any case wherein the question, dispute or difference involves a matter of law, the person to be appointed by the said committee shall be a barrister at law practising in Brisbane.

13.3 The submission to arbitration shall be deemed to be a submission to arbitration within meaning of the Arbitration Act of 1973 or any statutory modification thereof.

13.4 The award of the arbitrator shall be final and binding on the parties.

13.5 Any reference to arbitration howsoever made shall not exclude the jurisdiction of any competent court in the State of Queensland in particular the Supreme Court of Queensland on any matter of fact or law.

13.6 Pending decision on awards hereunder the parties shall so far as it is reasonably practicable so to do continue to perform and

comply with their respective rights and obligations under this agreement."

The Retrospectivity Question

One of the recitals in the agreement declares with reference to price variations "the clear intention of the parties that any of the clauses of the agreement relating thereto are intended to reflect the effects of changes in costs of producing and supplying coal under this agreement". To that end the agreement makes detailed provisions.

Adjustment of invoices is dealt with by clause 8.11:-

"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."

Variation in price for changes in cost is dealt with in clause 9, sub-clause 1 containing the review provisions and sub-clauses 2 to 14 containing very extensive provisions for the adjustment of base prices. Clause 9.1 should be quoted in full:-

"9.1 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 components."

The complexity of the provisions for the adjustment of base prices may be indicated by reproducing the opening part of clause 9.8:-

"The base price shall be adjusted for changes in costs by the following formula:-

$P = (A_B\frac{Q}{Q_B}+C_B\frac{S}{S_B}+D_B+E_B\frac{U}{U_B}+Z+Y)$"

The sub-clause goes on to define what the letters represent. Thus P = contract price per tonne to apply from *beginning of the next Month* (italics supplied); AB = component of base price applicable to labour and labour related costs; QB = the weighted weekly labour rate (as defined later) applicable at the base date; Q = The escalated value of QB; and so on. In other sub-clauses there are some specific provisions as to when adjustments are to be made. The most important of these is clause 9.3:-

> "9.3 The components of base prices shall be subject to adjustment monthly and shall apply from the beginning of the month immediately following that in which the change in cost factor or index occurs with the exception of adjustments to the statutory charges components which shall apply from the date upon which the change in the cost factor occurs."

It will be seen therefore that the general scheme of the provisions for adjusting base prices (which, it is to be remembered, applies only in the first five years) is that changes shall operate prospectively - that is to say, from the beginning of the next month or, in the case of statutory charges, forthwith. Clause 8.11, previously set out, recognises that pro forma invoices will sometimes be necessary because of the unavailability of indices or determinations. When the machinery of pro forma and final invoices is available in terms of that sub-clause and is used, the prices shown initially are in effect announced to be no more than provisional. Subject only to that limited machinery, retrospective adjustment of base prices is not contemplated by the automatic variation provisions of the agreement. Their Lordships are unable, with respect, to agree with the Full Court that monthly adjustments are "clearly retrospective", if that proposition was intended in any general sense.

Nevertheless it is argued for the company and has been accepted in the Queensland Courts that clause 9.1, in combination with the arbitration clause, entitles either party to a retrospective re-opening of the prices of coal delivered, charged and paid for before any review has been requested. The extent of the changes that could be compelled on this view is illustrated by a letter from the company to the board dated 19th March 1982, contending that a "mining risk factor" which had been excluded from the base price during the original negotiations should be re-instated with effect from 30th June 1977. From the inception of the contract all invoices and payments would be no more than provisional. And it is said that, as regards electricity consumed in the past, liability to make payments for coal could be in effect imposed on present and future consumers, in

two ways: a retrospective price increase could be made payable by the board as a lump sum, or prices for future supplies could bear an impost to compensate for past undercharging.

It is of course competent for the parties, in the exercise of their ordinary freedom of contract, to agree specifically on a retrospective price change. Indeed that was done by a variation dated 20th October 1981 whereby certain agreed changes were made effective from 1st July 1979. The issue, however, is whether a total re-writing of the price formula, resulting in changed prices for several years before a review has been sought, may be imposed by arbitration.

If worded with appropriate clarity, an arbitration clause could have that drastic scope. But clear wording would be required, since such an unstable agreement is at least rare. From the outset nothing concerning price could be relied on as fixed. The possibilities of revision would be almost endless. For example, if surcharges were resorted to, the result could not be reliably calculated in advance. They would have to be open to constant reconsideration in the light of recoveries in fact achieved and the additional costs falling to be recovered from time to time.

In holding that such was the scope of the instant clause in its context, McPherson J. said that he followed the decision of the English Court of Appeal in *Superior Overseas Development Corporation v. British Gas Corporation* [1982] 1 Lloyd's Rep. 262; but their Lordships agree with the Full Court that the terms of the agreement there considered, and what was said in the judgments, are not close enough to the present case to be of significant help.

Clause 9.1 is the key provision on this question. There are three significant features of its wording. First, the condition "If the formulae employed are not properly reflecting such changes .....". Second, when after a review has been requested the parties agree to an alteration, it will be incorporated in the agreement and will apply "thenceforth". Third, in the event of a reduction of award working hours from 35 per week, a review is to be undertaken "forthwith". The first feature suggests that it is contemporary reflections of changes in costs at which, as far as practicable, the sub-clause as a whole is aimed. The second suggests that changes to apply in the future are contemplated. The third, stipulating for an urgent review in certain circumstances, suggests that this is needed to ensure that a change will apply as early as possible. While not conclusive, those indicia tell against the degree of retrospectivity for which the company contends. On

the other hand there is nothing in the agreement telling positively in favour of such an unusual degree of retrospectivity.

In the Courts below an argument in the forefront of the board's case was that, if a review requested under clause 9.1 failed to produce agreement and was followed by arbitration under clause 13, any changes decided on by the arbitrator could not take effect before the date of his award. The incentive to delay which this interpretation would offer to one party appears to have had an influence on the Queenland judgments. In the Queensland Courts the board's adherence to that contention may have distracted attention from the strength of its more reasonable alternative contention that the date of the request for the review is the crucial one. The more extreme contention was not pursued before their Lordships; and they accept that, reading clauses 9.1 and 13 together, the right interpretation is that changes decided on in an arbitration, after failure to agree on changes when a review has been requested under clause 9.1, may not take effect before the date of the request for the review. As the two clauses do not deal with the point expressly, the interpretation to be preferred is the one which serves best the general purpose of clause 9.1 reviews and is fair to both parties. The date of the request is the earliest date on which, if the review procedure were strictly followed, the parties could agree to a change. A request for a review puts the other party on notice that the escalation provisions are now in question. To the limited extent of allowing an award to relate back to the date of the request for a review, retrospectivity fits the pattern of the review provisions. The much more sweeping retrospectivity contended for by the company sits uneasily with those provisions and in the view of their Lordships must be rejected.

In the reasons for the Full Court judgment it is said more than once that clause 9.1 requires an interval of at least five years between reviews (except when weekly award hours are reduced below 35). What weight the Full Court placed on this is not entirely clear, but the error has to be noticed. Consistently with recital G, clause 9.1 requires reviews at <u>not more than</u> five-yearly intervals.

Before their Lordships, counsel for the company attempted to argue that, if the date of the request for a review is the critical one, something which could pass muster as a request, even if informal, had been made at some date before 14th July 1982. But it was the notice given on that day which the company pleaded and with reference to which the case was fought in the courts below. The company cannot be permitted to change its stand at this late stage.

The conclusion already reached on the retrospectivity question makes consideration of estoppel unnecessary.

The Uncertainty Question

Although not pleaded specifically, the contention that the agreement is uncertain as to the period after the first five years was put forward by the board at the trial and before the Full Court by way of defence to the company's claims. The contention is that as to this period there was nothing more than an agreement to agree. It turns primarily on the wording of clauses 2.5 and 8.7:-

"2.5 The general terms of this agreement apply to the quantity of coal agreed to be purchased by the Generating Board under this agreement whereas the base price and provisions for variation in prices for changes in costs apply only to purchases in the first five-year period from 1 January 1978 to 31 December 1982. 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."

"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."

Words used by Lord Diplock in disposing of a somewhat similar question in *Sudbrook Trading Estate Limited v. Eggleton* [1983] A.C. 444, 476, apply mutatis mutandis to the instant agreement. Clause 8.7 and all the other provisions indicating that the agreement was not confined to the first five years were obviously intended by both parties to have legal effect. What other reason could there be for making such elaborate provisions, emphasising its long-term nature? At the present day, in cases where the parties have agreed on an arbitration or valuation clause in wide enough terms, the courts accord full weight to their manifest intention to create

continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the courts for making contractual rights effective, exert minimal attraction. *Sudbrook* is now the leading English case in the field. The same tendency has been apparent elsewhere in the Commonwealth, as illustrated by *Calvan Consolidated Oil and Gas Co. Limited v. Manning* [1959] S.C.R. 253; *Attorney-General v. Barker Bros Limited* [1976] 2 NZLR 495; and *Booker Industries Pty Limited v. Wilson Parking (Qld) Pty Limited* [1982] 56 A.L.J.R. 825.

In accordance with the approach adopted in those cases, their Lordships have no doubt that here, by the agreement, the parties undertook implied primary obligations to make reasonable endeavours to agree on the terms of supply beyond the initial five-year period and, failing agreement and upon proper notice, to do everything reasonably necessary to procure the appointment of an arbitrator. Further, it is implicit in a commercial agreement of this kind that the terms of the new price structure are to be fair and reasonable as between the parties. That is the criterion or standard by which the arbitrator is to be guided. If there are cases where the true meaning of the contract is that the arbitrator is to aim, not at objectively fair and reasonable terms, but merely at some result which appeals to him subjectively, they must be rare indeed and the present is certainly not one of them. The statements of basic intention in the recitals and in clause 9.1, together with the detailed pricing provisions for the first five years, supplement the ordinary implication of a fair and reasonable test. They lay down broad guidelines as to the object to be achieved; and how the system has worked during the first five years is likely to provide the arbitrator with much help in determining what is fair and reasonable for later periods.

Some reliance was placed for the board, in support of the uncertainty argument, on the last sentence of clause 8.7. Like some other express statements in the lengthy text of the agreement, this may not have been strictly necessary. The Full Court took the view that its object was to ensure that the board had access to information when the parties were in the process of trying to finalise a new pricing structure. Their Lordships accept that interpretation. The sentence is clearly a subsidiary provision. Neither it nor any of the other incidental provisions elsewhere in the agreement which were touched on in argument by counsel for the board can be allowed to subvert the fundamental contractual intention of the parties.

For these reasons their Lordships agree with the result reached in the Queensland Courts on the

uncertainty question, a result embodied in the terms of the second declaration made by McPherson J. and upheld by the Full Court.

Some difficulty had arisen because of what was said to be the unwillingness of the committee of the Southern Queensland branch of the Australasian Institute of Mining and Metallurgy to appoint an arbitrator. Ultimately, however, counsel informed their Lordships that, in the event of a decision that the company was entitled to arbitration, the parties had agreed on an arbitrator. Accordingly it is unnecessary to discuss the previous difficulty or the power of the Court to appoint an arbitrator or to order an inquiry when the parties cannot agree.

Orders

In the result their Lordships will humbly advise Her Majesty that the appeal should be allowed on the retrospectivity question but dismissed on the uncertainty question. Consequently the first declaration made in the Supreme Court should be vacated and replaced by the following declaration, the wording of which was acceptable to counsel on both sides in the event of their Lordships reaching the conclusions already stated:-

1. That the defendant is entitled to have determined by arbitration pursuant to the agreement made between the plaintiff and the defendant dated the 12th day of July 1978, as subsequently varied, the following questions, disputes and differences, namely whether during the period from the 14th day of July 1982 to the 31st day of December 1982 the escalation provisions referred to in clause 9.1 of the said agreement properly reflected the effects of changes in costs on the cost of producing and supplying coal under the said agreement as so varied and whether there should be any and if so what alterations in the price variation provisions of the said agreement as so varied in respect of all or any part of such period; but that the defendant is not entitled to any further payment in respect of coal delivered prior to the 14th day of July 1982.

The second declaration made in the Supreme Court should stand and reads:-

2. That the defendant is entitled to have determined by arbitration, pursuant to the said agreement as so varied, the following questions, disputes or differences, namely, the terms of supply of the additional quantities of coal after the 31st day of 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 the defendant, 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 liberty to apply reserved in the Supreme Court should likewise stand. The orders for costs in the Courts below should be vacated. Each party should bear its own costs throughout all the proceedings.