

Griffin Coal Mining Company Limited

Appellant

v.

The State Energy Commission of
Western Australia

Respondent

FROM

THE FULL COURT OF THE SUPREME COURT
OF WESTERN AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER 1984

Present at the Hearing:

LORD SCARMAN

LORD DIPLOCK

LORD ROSKILL

LORD BRIGHTMAN

SIR JOHN MEGAW

[Delivered by Lord Brightman]

This appeal from a decision of the Chief Justice of Western Australia concerns the interpretation of a clause in a coal sales agreement. The agreement was made between the Griffin Coal Mining Co. Ltd and the State Energy Commission of Western Australia. The company owns mining leases in the Collie Basin, to the south of Perth, where it carries on open cast operations. The Commission controls the generation and distribution of electricity throughout Western Australia and has a generating station adjacent to the company's mine. The Commission is virtually the company's sole customer.

The agreement is a long term contract for the supply of coal to the Commission. In addition to adjusting the sale price of the coal to accord with increases in cost of production, the agreement requires the Commission to make a further payment to the company if the pre-tax profits of the company in a financial year fall below a certain percentage of the "gross revenue" of the company. The question in issue is the meaning of "gross revenue"; in particular, if the company supplies a smaller quantity of coal than is stipulated by the agreement as a result of "force majeure", whether "gross

revenue" is to be calculated, on the true construction of the contract, by reference to the coal actually delivered or by reference to the coal agreed to be delivered.

The agreement was made on 29th March 1979. Prior thereto RTZ Consultants Ltd. had conducted a feasibility study. This study was made available to the Commission, and the agreement was built round it.

Clause 1 of the agreement is a definition clause. The important expressions are "base tonnage" and "gross revenue". "Base tonnage" is defined as follows, but for convenience their Lordships set out the definition in its three component parts:-

"'base tonnage' means the relevant base tonnage to be supplied by the company to the Commission in any financial year as provided in schedule A and which the Commission must accept or pay for as hereinafter provided;
base tonnage in any quarter means the base tonnage for the relevant financial year divided by four."

To understand that definition, it is necessary to turn to schedule A. It is in the following form:-

Base tonnages of coal to be
supplied in each financial year

Financial year 1	1,200,000
Financial year 2	1,350,000
Financial year 3	1,600,000
Financial year 4	2,000,000
Financial years 5 - 25 inclusive	2,100,000

The financial year runs from 1st July to 30th June, beginning 1st July 1978. This appeal is concerned primarily with financial year 4, 1981/1982, in which there was (according to the company) a deficiency of coal deliveries of 104,000 tonnes due to "force majeure".

"Gross revenue" is defined as follows:-

"'gross revenue' means the base tonnage as specified in schedule A for the applicable year plus any additional quantities of coal delivered multiplied by the base price as adjusted."

The remaining definition to be noticed is as follows:-

"'pre-tax cash surplus' means the pre-tax cash surplus which the company derives from its operations under this agreement determined on an annual basis at the end of each financial year in accordance with schedule F."

Schedule F is in the following form:-

"Definition of Pre-Tax Cash Surplus

Any of the components in the pre-tax cash surplus shall apply to the performance by the company and its obligations under this agreement. The deductions from gross revenue to determine pre-tax cash surplus are those envisaged in the RTZ study. For any other expenditures which were not provided for in the RTZ study [there] shall be a deduction under this schedule F by mutual agreement.

Gross Revenue less:

Labour and Related Costs ..."

The schedule then lists the various deductions envisaged in the RTZ study.

The remainder of schedule F details the pre-tax cash surplus of the company in each financial year as projected by the RTZ study. Their Lordships take the year 1981/82 as an example. Against "Gross Revenue" is the figure "27,400". This is in fact \$27,400,000, and is the result of multiplying the schedule A tonnage figure of 2,000,000 by the assumed base price of \$13.70 a tonne shown in schedule B. This is followed by labour and other costs totalling \$18,332,000. The pre-tax cash surplus is therefore shown as \$9,068,000. The final entry in the table is "Percentage - 33.09%". This is the profit ratio for the year represented by the percentage which the pre-tax cash surplus bears to the gross revenue for that year. It is the correct calculation of that profit ratio, in the light of the shortfall in deliveries, which is in issue.

The right of the company to receive a deficiency payment, because its profit ratio falls short of that assumed by schedule F, arises under clause 8(3)(c)(i) of the agreement. This paragraph is in the following terms:-

"(c) If at any time after the expiration of financial year 3 -

(i) notwithstanding good mining and management practices, in the immediately preceding financial year the pre-tax cash surplus of the company expressed as a percentage of gross revenue falls below the pre-tax cash surplus expressed as a percentage of gross revenue estimated pursuant to the RTZ study computed for that financial year in schedule F, by more than one per centum then the company shall notify the Commission and the Commission within 30 days of receipt of such

notice will pay to the company such amount as is required to restore the pre-tax cash surplus to that estimated pursuant to the RTZ study for such financial year."

The company claims that the definition of gross revenue requires the "base tonnage" in schedule A to be reduced by the force majeure shortfall before such tonnage is multiplied by the adjusted base price in order to produce the "gross revenue" required for the calculation of the pre-tax cash surplus for the relevant year, and the percentage which that bears to gross revenue for that year. The Commission claims that on the proper construction of "gross revenue" no such deduction is to be made, because "gross revenue" is immutably tied to the schedule A tonnage except so far as additional quantities of coal are delivered under clauses 5 and 10 to which their Lordships will refer later.

The arithmetic of the argument can be simply illustrated by making use of the figures presented to their Lordships during the course of the hearing. Suppose that the schedule A tonnage is 2,000,000, the "force majeure" shortfall 100,000 tonnes, the adjusted base price \$25 a tonne, the production costs \$35,000,000 and the assumed profit ratio in the RTZ study 30%. The Commission would claim that no deficiency payment is due, the calculation being as follows:-

Schedule A tonnage	2,000,000
Gross Revenue therefore	\$50,000,000
Deduct costs	\$35,000,000
Pre-tax cash surplus	\$15,000,000
Profit ratio (\$15,000,000 as percentage of \$50,000,000)	30%
Deficiency payment	nil

The company would claim that \$1,748,000 (approximately) is due, calculated as follows:-

Schedule A tonnage less shortfall	1,900,000
Gross Revenue therefore	\$47,500,000
Deduct costs	\$35,000,000
Pre-tax cash surplus	\$12,500,000
Profit ratio (\$12,500,000 as percentage of \$47,500,000) approx.	26.32%
Deficiency against RTZ Study	3.68%
Deficiency payment (3.68% of \$47,500,000)	\$1,748,000

The company would therefore recoup about two-thirds of the amount of the reduction of its receipts resulting from the "force majeure".

The cornerstone of the company's argument is that the definition of "gross revenue" incorporates the definition of "base tonnage", and "base tonnage", by virtue of the second component of the definition, does not mean merely the schedule A tonnage, but that tonnage adjusted so as to represent only the coal which the Commission "must accept or pay for" in that year. In other words, "and which the Commission must accept or pay for as hereinafter provided" means "so far as the Commission must accept or pay for such coal as hereinafter provided". The Commission, on the other hand, maintain that the second component of the definition of base tonnage is merely descriptive of the first component and is not a qualification thereof.

The expression "base tonnage", either alone or in conjunction with the words "as specified in schedule A" is used on a considerable number of occasions throughout the agreement. Their Lordships will refer to the other clauses of the agreement in order to set the definition in context, and to see whether "base tonnage" can be read on the various occasions on which the words appear, with the meaning of "base tonnage as specified in schedule A so far only as the Commission must accept or pay for it".

Clause 2 provides that the agreement is to last for 25 years. Clause 3(1) provides that the company shall deliver to the Commission, and the Commission shall accept, "the aggregate of the *base tonnages* of coal to be supplied in each of the financial years as provided in schedule A at the base price as adjusted." Clause 3(2) enables the Commission to give notice to the company before the start of a financial year "that it requires the *base tonnage* relevant to such financial year to be increased by any percentage not exceeding 5 per centum". If that power is not exercised, clause 3(3) entitles the Commission during the course of the year to give notice "that it requires the undelivered balance of the *base tonnage* for such financial year" to be increased by a like percentage.

Clause 4 is designed to achieve a standard rate of daily delivery of coal. The Commission is to put in fortnightly orders for coal, specifying delivery points. "In determining the quantity of such fortnightly orders the Commission shall ensure that the company is enabled to maintain an average daily rate of delivery of coal to the Commission determined by dividing the relevant *base tonnage* of coal by the number of working days in the relevant financial year".

Clause 5 deals with excess deliveries and shortfalls in deliveries. At the end of each quarter the Commission is to compute the difference between the tonnage ordered and the tonnage delivered. If deliveries exceed orders by one half per cent or more, the Commission has an option. It may "accept such excess as additional to the relevant *base tonnage* at the base price as adjusted"; or it may require the company to make a reduction in future deliveries until the excess is extinguished.

Their Lordships deal with sub-clause (3) of clause 5 later, as it is linked with clause 10. Sub-clause (4) of clause 5 requires the Commission to pay for any undelivered coal within 30 days of the end of a quarter if "the Commission shall fail to accept delivery of the whole or any part of the *base tonnage* of coal to be delivered/sold in that financial year as provided in schedule A in quantities ordered by the Commission up to but not in excess of the *base tonnages* set out herein".

Clause 6 provides for an adjustment either way between the parties if the servicing of certain financial agreements with the banks is greater or less than the cost anticipated by the agreement. The base price for coal, expressed in dollars per tonne, is made up of a number of components including *inter alia* the cost of servicing such agreements, the latter components being designated "LP" and "CF". Clause 6 provides that if the amounts paid by the company under the financial agreements in any quarter differ from "an amount determined by multiplying the components LP and CF, both as adjusted, by the *base tonnages* in schedule A divided by the number of working days in the relevant year and multiplied by the number working days in the relevant quarter", the difference shall be paid by one party to the other party.

Clause 7, which contains complicated provisions for adjusting the base price in line with increases in costs, falls to be noticed only because of the following provision which appears towards the end, "The base price as adjusted when multiplied by the *base tonnage* plus any incremental tonnages equals the gross revenue".

Clause 8 is in two parts. The first part is cross-headed "Price Revision - Events beyond control of the company". Sub-clause (1) predicates the happening of a number of events, such as an alteration in rent or royalty rates payable to the Government, changes in taxation, changes in safety regulations, and so forth. These are called "Defined Events". If the happening of a defined event occasions a change of more than 2% in the after-tax position of the company, either for better or for worse, a payment is

to be made by one party to the other in order to produce the same after-tax position as would have existed if the defined event had not occurred.

Sub-clause (3) of clause 8 is introduced by a new cross-heading, "Price Revision - Financial Performance". Paragraph (a) requires the company within three months after the end of each financial year to supply to the Commission a statement detailing the pre-tax cash surplus and the after-cash surplus "which the company derives from this agreement". Sub-clause (b) is designed to rescue the company if it has insufficient funds during the first three years of the agreement to meet commitments to the banks. If, through no fault of the company, the company fails to comply with its financial obligations under the financial agreements, the Commission is to make to the company a "Financial Deficiency payment" sufficient to enable the company to comply with its obligations. "Such financial deficiency payments shall not form a part of gross revenue for the purposes of this agreement". Their Lordships have already quoted paragraph (c)(i) of clause 8(3). Paragraph (c)(ii) deals with the reverse position should the company's profit ratio exceed that which is assumed by the RTZ study, and requires whole or partial repayment to the Commission.

Paragraph (d) disentitles the company to a payment under sub-clause (3) if the shortfall in pre-tax cash surplus is the fault of the company.

It will be recalled that under clause 3(1) the Commission has a primary obligation to "accept" the tonnage of coal specified in schedule A. This is modified by clause 10, which enables the Commission to take less than the schedule A tonnage. But it must still pay. "The Commission may require the company to suspend any delivery of coal ordered by the Commission or in any financial year order less than the *base tonnage* subject to the Commission paying to the company such amount as would have been payable by the Commission had the Commission ordered and taken delivery of such coal pursuant to clause 4". Payment is regulated by clause 5(3). If as a result of the exercise of its clause 10 power payments by the Commission for coal delivered during a quarter are less than would otherwise have been the case, the Commission must make up the shortfall in payment within 30 days of the end of the quarter. "For the purposes hereof the amount of shortfall in any quarter shall be determined by dividing the *base tonnage* as specified in schedule A for the applicable year by the number of working days for that year and multiplying by the number of working days for that quarter, less the actual tonnage delivered, multiplied by the base price ...".

Lastly, their Lordships turn to clause 24, which is cross-headed "Force Majeure". If either party is unable to perform its obligations under the agreement caused by circumstances beyond the power and control of the party responsible for such performance, such obligations are to be temporarily suspended. For example, the Commission might be unable to accept deliveries for a time if its capacity to generate electricity were interrupted; or the company might be unable to make deliveries for a time as a result of flooding. In such an event, "the obligations of the party responsible shall be suspended only to the extent made necessary by the delay. Deliveries that would otherwise have been made during any period in which the performance of either party is delayed shall be made at such time or times as the company and the Commission agree unless such deliveries are cancelled by agreement". Clause 26 is an arbitration clause, as a result of which any disagreement between the parties as to the time or times at which a "force majeure" shortfall of coal deliveries ought to be made good would be resolved.

The remaining clauses of the agreement do not call for exposition or comment.

In 1982 the Commission issued an originating summons to resolve a large number of doubts which were thought to arise on the agreement. The only question upon which there is an appeal to the Board is that which has been outlined in relation to the construction of the definition of "gross revenue".

The learned Chief Justice rejected the construction submitted by the company. Their Lordships quote from his judgment because they find themselves in entire agreement both with his conclusion and with his reasons.

"The company would construe that definition, in effect, as being so much of the base tonnage for the relevant year as it appears in schedule A as the Commission must accept and pay for. Hence if within the year, for one reason or another, the company is unable to supply ordered coal up to the then schedule A tonnage the Commission is not obliged to pay for the shortfall and the 'base tonnage' in the sense of the definition is to that extent reduced below the schedule A figure. Having taken that step, then the definition of 'base tonnage' so understood is imported into the expression of 'gross revenue' so that the definition reads, in effect, 'so much of the base tonnage specified in Schedule A for the applicable year as the Commission must accept or pay for plus any additional quantities of coal delivered multiplied by the base price as adjusted'. That is a step which I am unable to take. The definition

of 'gross revenue' seems to me to be perfectly clear. The tonnage to be multiplied by the base price as adjusted to produce 'gross revenue' is 'the base tonnage as specified in schedule A for the applicable year plus any additional' - cl. 3(2) or (3) - 'quantities of coal delivered'. Nor can I take the first step within the argument which is centred on the definition of 'base tonnage'. That is a tonnage to be supplied. It is, subject to any increase pursuant to cl. 3(3) of the agreement, a tonnage which is known at the beginning of the financial year and, again subject to cl. 3(3), it remains constant. As defined and when used within the definition of 'gross revenue' it remains constant in the scheduled tonnage and one adds to that cl. 3(2) or (3) coal, if any."

The conclusion reached by the learned Chief Justice appears to their Lordships to be wholly in tune with all the other uses which the agreement makes of the expression "base tonnage". These their Lordships have caused to be emphasised in the print of their opinion for ease of reference. In no instance, as it seems to their Lordships, can "base tonnage" appropriately be read as meaning the schedule A tonnage "only in so far as the Commission must accept or pay for such tonnage". Nor does the company's construction of the definition of "base tonnage" enable good sense to be made of the third component of that definition, which declares that "base tonnage in any quarter means the base tonnage for the relevant financial year divided by four".

Support for the company's argument is sought to be gained from the use of the word "derives" in the definition of pre-tax cash surplus, which is there described as something which the company "derives" from its operations. The same word is used in clause 8(3)(a) as descriptive of the cash surplus which the company "derives" from the agreement. The company does not "derive" cash from coal which it is not obliged to deliver and for which the Commission is not bound to pay. Furthermore, clause 7(4) is followed by a second definition of "gross revenue" which refers to base tonnage without the specific reference to schedule A that is found in clause 1. There is accordingly a conflict between the two definitions which should be resolved in favour of the company, since the company's construction makes business sense of the agreement as a type of "cost plus" contract. So run the appellant's arguments. But their Lordships do not think that they displace the compelling reasoning of the Chief Justice.

It is correct, as the company submits, that the agreement is designed to secure a certain level of profitability for the company, and there are features of the agreement which resemble those of a

cost plus contract. But the interpretation put upon the expression "gross revenue" by the Commission is not inconsistent with these aspects of the agreement in the context of a "force majeure" shortfall. It will have been observed that under clause 24 a "force majeure" shortfall is required (unless otherwise agreed) to be made good by subsequent deliveries which will have to be paid for. These subsequent deliveries will not be "additional quantities of coal" within the definition of "gross revenue", so that any deficiency in pre-tax cash surplus in one year caused by a "force majeure" shortfall in that year will be made good in the next year or a later year without distorting the calculation of "gross revenue" in that year.

To put the matter shortly, the description in the definition clause of the base tonnage of coal as tonnage which the Commission "must accept or pay for," is an accurate reflection of the Commission's obligations under clauses 3(1) and 5(3) of the agreement, and their Lordships can see no justification for converting such description into a qualification. Nor does any clause of the agreement justify importing such a change of sense into the definition.

In the event, the subsidiary questions raised by the appellant's case do not fall to be decided.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.



