32/79

IN THE PRIVY COUNCIL No. 35 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION IN CAUSE NO. 12093
OF 1978

BETWEEN:

THE UNIVERSITY OF NEW SOUTH WALES — Appellants

- and -

MAX COOPER & SONS PTY LIMITED — Respondents

RECORD OF PROCEEDINGS

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Appellants Solicitors

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Respondents Solicitors

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INDEX OF REFERENCE

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No. 1

Judgment of The Hon. Mr. Justice Hope

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Judgment of The Hon. Mr. Justice Hope
13th December 1977.

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

C.A. 133 of 1977
C.L. 3633 of 1976

CORAM: HOPE, J.A.
HUTLEY, J.A.
GLASS, J.A.

TUESDAY, 13TH DECEMBER 1977

MAX COOPER & SONS PTY. LIMITED v.

THE UNIVERSITY OF NEW SOUTH WALES

Appeal from Supreme Court - Building contract - Construction - Printed condition entitling builder to claim for loss or expense incurred as a result of delays of specified classes - Special condition as to variation of contract sum in the event of variation of wages - Claim by builder

No. 1

Judgment of The Hon. Mr. Justice Hope 13th December 1977. (cont'd)

for loss or expense by reason of increased wages resulting from delays - Whether claim consistent with provisions of special condition - Reference to arbitration - Stated case by arbitrators - By majority builder held entitled to claim.

HOPE, J.A.: The dispute in this appeal concerns the construction of a building contract, and arises from the addition of special conditions to a printed form. Max Cooper & Sons Pty. Limited (the builder) entered into a contract with The University of New South Wales (the proprietor) for the construction of a building for the sum of $2,072,938 (the contract sum). The form of contract adopted by the parties was basically the printed form of lump sum contract approved by the Royal Australian Institute of Architects and the Master Builders' Federation of Australia Inc., and to this printed form the parties added a number of special conditions. One of these was special condition No. 3, which had a heading "Variation of Contract Sum by Application of a Rise & Fall Provision". Paragraph (a) of this condition provided:-

> "The Contract Sum is subject to variation by the application of the provisions of this clause to take into account variations in the cost of labour."

The condition went on to specify how these variations were to be ascertained, and included a definition of "the uncompleted portion of the contract sum". Paragraph (d) of the condition provided:-

> "(d) In the event of there being an award or other variation affecting the average hourly wage (including a variation resulting from alteration of ordinary working hours) the Contract Sum shall be adjusted by increase or decrease as the case may require by 60% of the amount that bears the same proportion to the uncompleted portion of the net Contract Sum as at the date when such variation shall have become effective as the increase or decrease in the average hourly wage consequent upon such variations shall bear to the average hourly wage as defined in sub-clause (c) hereof."

The date for the practical completion of the works was 18th July, 1973, and cl. 27 of the contract required the builder to pay liquidated and ascertained damages to the proprietor at the rate of $500 for each week by which the practical completion of the works was delayed beyond this date or beyond any extended time fixed pursuant to cl. 24.

Clause 24 of the printed part of the contract contained provisions entitling the builder to obtain an extension of the date for practical completion in certain events, and also entitling it to reimbursement of loss or expense incurred by it as a result of a delay in the progress of works where a number of conditions were satisfied, including the actual or deemed extension of the date for practical completion. When the progress of the construction of a building has been delayed, the builer may incur loss or expense at various times. He may incur loss or expense during the period of delay in the progress of the works; thus if there is a strike of workmen for a period of five days, he may have to employ and pay a number of persons, and bear other expenses, during or in respect of this period although no building work is going on. In such a case he may also incur loss or expense after the fixed date for practical completion, during the period of five days for which the time for practical completion has been extended because of the strike. During this period, if there is an increase in wages at or after the original date for practical completion, the builder will have to pay workmen at a higher rate than if the delay had not occurred. And he may incur loss or expense between these two periods. There were long delays in the present case, resulting in extensions totalling 329½ days, of which 59 days were allowed for delays in respect of which the builder was entitled to claim reimbursement for any resulting loss or expense. The builder claims that it is entitled to be paid on the basis of the 60% formula for any increase in wages in respect of these fifty-nine days pursuant to special condition No. 3, and there is no dispute about this; but it also claims that it is entitled to be paid the difference between this amount, that is, the amount arrived at by applying the 60% formula, and the whole wage increase which difference, so it claims, represents a loss or expense incurred as a

result of the relevant delays. The parties not agreeing on the matter, the dispute was referred to arbitration, and the arbitrators stated a case for the opinion of the Supreme Court as to whether the builder is entitled to be reimbursed for the loss or expense that I have described. The stated case came before Collins, J., who decided that special condition No. 3 regulated the rights of the parties in relation to alterations in the contract sum as a result of variations in the cost of labour, and that the builder was limited by the terms of this clause to claiming, in respect of those variations, an amount determined by applying the 60% formula.

Clause 24 provides a rather complex system for the obtaining by the builder of an extension of the date for practical completion because of delays arising from specified causes, and for the builder's reimbursement of loss or expenses resulting from some of these delays. Upon it becoming evident to the builder that the completion of the works is likely to be delayed, he is required forthwith to notify the architect (cl. 24(a)), and if the delay has been caused by one or more of the causes described in cl. 24(g), the builder is entitled to claim and shall be allowed an extension of time, subject to the provisions of the clause (cl. 24(b)). Within a reasonable time of it being practicable to do so in respect of any such delay, the builder is required to give written notice to the architect setting out the cause of the delay (and by reason of a special condition accompanied by supporting evidence including the activities affected which are critical to the time schedule) and stating a fair and reasonable period by which in his opinion the date for practical completion of the works should be extended. The period so specified shall be deemed to extend the date for practical completion unless the architect gives notice that he disagrees and specifies some other period (cl. 24(c)). If a dispute ensues it can be referred to arbitration. The architect may himself extend time without an application being made (cl. 24(f)). Clause 24(g) sets out the causes in respect of which any resulting delay will entitle the builder to an extension. There are fourteen such causes, including the architect's instructions or variations, strikes, and matters, causes or things other than those listed beyond the control of the builder. The Builder is

required constantly to use his best endeavours to avoid delay in the progress of the works and to do all that may be reasonably required by the architect to expedite the completion of the works (cl. 24(h)).

The provision under which the builder claims for loss or expense is cl. 24(i), which is in the following terms:-

"24(i) The Builder shall be entitled to reimbursement of loss or expense incurred by him as a result of a delay in the progress of the Works where all the following apply:

(i) Delay was caused by:

(A) one or more of the causes numbered (i), (ii), (iv), (ix), (x) and (xiii) in sub-clause (g) of this clause; or

(B) one or more of the causes numbered (iii), (vii), (viii) and (xiv) in sub-clause (g) of this clause where in the opinion of the Architect the Builder has so acted that he should be reimbursed for such expense;

(ii) An extension of the Date for Practical Completion has been made or should properly have been allowed pursuant to this clause;

(iii) The delay is not due to any default of the Builder or to any act of the Builder other than an act proper for the performance of this Contract;

(iv) The Builder has taken all practicable steps to avoid or reduce the delay and to keep expense resulting from the delay to a minimum;

(v) The loss or expense has not been and should not be included in the value of any variation;

(vi) The Builder in giving notice to the Architect pursuant to sub-clause (c) of this clause has stated his intention to make a claim under this sub-clause;

(vii) The Builder has given to the Architect details in writing of the nature of the claim as soon as practicable after commencement of the delay and at a time when details could be checked;

(viii) Within a reasonable time of the Date for Practical Completion being extended or being deemed to be extended the Builder has given to the Architect in writing details of the items of expense and the amounts therefor or a close estimate thereof;

and in any such circumstance, the loss or expense incurred shall be ascertained by the Architect and the Contract Sum shall be adjusted accordingly."

It is submitted for the builder that special condition No. 3 and cl. 24(i) cover different matters. If in the course of constructing the works there are variations in the cost of labour, the builder is entitled to the amount determined in accordance with special condition No. 3(d), and it is entitled to this sum whether the relevant wages are payable before the original date for practical completion fixed by the contract, or during any subsequent period included in an extension of that date. However a delay in the progress of the works may require the payment of higher wages than if the construction of the work had proceeded without delay, and in this event its loss or expense, so it is submitted, is 100% of any increase in wages. To the extent that it is reimbursed pursuant to special condition No. 3, there is no loss or expense; but in so far as it is not reimbursed pursuant to that condition, then it is entitled to recover the difference provided it has otherwise satisfied the conditions of cl. 24(i).

There would be a number of difficulties in construing cl. 24 and in particular cl. 24(i) even if there were no special condition such as special

condition No. 3. However, in general terms, the way in which cl. 24 works is clear enough. When the builder appreciates that the completion of the works is likely to be delayed for any cause he must notify the architect, and if the delay is caused by any one of the reasons in cl. 24(g) he must give a notice to the architect setting out the causes of the delay and specifying his opinion as to what the period of the delay will probably be. At the same time, if he wishes to make a claim for reimbursement for loss or expense, he must state in this notice his intention to make such a claim. As soon as practicable after the delay commences, and at a time when the relevant details can be checked, the builder must give the architect details in writing of the nature of the claim for reimbursement, and within a reasonable time of the date for practical completion being extended or being deemed to be extended the builder must give the architect written details of the items of expense and the amounts therefor or a close estimate thereof. The architect investigates the matter and adjusts the contract sum accordingly.

These provisions for reimbursement of loss or expense are appropriate to be applied in relation to any loss or expense arising during the actual period of delay, as, for example, during the time when the construction of the works is held up by a strike or during a time when progress is delayed because necessary materials have not been delivered. I have no doubt that the clause is primarily directed to this kind of loss or expense, and does apply to it. Clause 24(i)(v) is only explicable on this assumption. However it may not be limited merely to loss or expense incurred directly during this period, and may extend to some losses or expenses incurred at a later date. For example, if it had been planned that materials should be supplied during the period of the delay, but they could not be received at the site because of a strike, any increase in the cost of the materials between the planned time of delivery and the time when they are able to be delivered may be recoverable under the sub-clause. It is however difficult, although it may not be impossible, to adapt the conditions of the sub-clause to what, without any limitation of context, may be regarded as a resulting loss or expense but which is not suffered or incurred

until some years later, and which does not relate to what happened, or should have happened, during the actual period of delay but to other and subsequent activities during the construction of the works.

However I do not think it is necessary, for present purposes, to decide whether the somewhat artificial meanings contended for by the builder can be given to the words used in cl. 24(i). Thus it is not necessary to consider whether a builder, who could have no real knowledge of what the inflated rate of wages would be in two years time, would be giving details of those increases or a close estimate of them within a reasonable time of the date for practical completion being extended if he gave them to the architect two years after that extension had been granted; or whether he would have given the architect details of the nature of his claim in this regard as soon as practicable after the commencement of the delay if he gave that notice some two years after the delay had commenced. The present question of construction depends primarily upon the relationship between cl. 24(i) and special condition No. 3, in the context of the whole contract.

Before going to that relationship, it is useful to understand what the builder's loss or expense would be, in relation to an increase in wages, if a delay occurred which entitled it to an extension of the date of practical completion. The builder's right does not depend upon the way in which it has made its claim in the present case - and it is difficult to see how on any view that claim could be justified - but the construction of cl. 24(i) upon which its claim depends requires the architect, or the arbitrator, to look to the period of extension which has been granted by reason of the delay, and to compare wages payable in that period with wages payable at some earlier time. In its claim the builder seems to have sought to compare wages payable at the time of the original date for practical completion, that is, 18th July, 1973, with wages payable in the ensuing year during periods covered by extensions of this date. This approach does not seem to conform with the language of cl. 24 (i), which speaks of loss or expense incurred as a result of delay in the progress of the works, and not in the completion of the works. If, for example, there were a strike of five days duration

in September, 1972, causing a delay in the construction work, the builder would incur a loss or expense in respect of moneys which it had to pay out during this period when no construction work was being carried out. This would be a loss or expense incurred as a result of a delay in the progress of the work, and the builder has claimed and been allowed loss and expenses of this kind. However, if at some time later during the construction work wages increased, there would be a period of five days in respect of which it may be able to say, in a literal sense, that had it not been for the earlier delay in the progress of the works, it would be paying its workmen wages at a lower rate to do whatever they did during this later period of five days, and that the difference it has to pay during those five days is also a loss or expense resulting from the delay in the progress of the works. And at the time of each subsequent increase of wages there would be a similar loss or expense for a period of five days, and this whether the five day period was before or after 18th July, 1973. It could be of course, and probably would be, the position that the work which was not done during the period of the five day strike was done immediately afterwards at no greater cost, and the increased wages which I have been describing have been paid in respect of other work which had to be done under the contract.

This description of the consequences of the delay in respect of increases in wages does not resolve the question of construction, but does throw light upon the nature of the problem. Both cl. 24(i) and special condition No. 3 are directed to variations of the contract sum. One is specifically directed to loss or expense arising from delays, and the other is specifically directed to variations in wages, no matter when they occur. I do not think that it is an answer to the proprietor's rejection of the builder's claim to say that cl. 24(i) and special condition No. 3 are directed to separate and distinct areas, for they are both directed to matters which the parties anticipated would almost certainly arise during the working out of the contract and in respect of each of which they wished to make a special provision. The payment by the builder of increased wages as a result of a delay is an expense (rather than a loss) incurred by him, but it is an expense in respect of which a special

provision prescribes what is to happen. As I have pointed out, that expense is not something which will be incurred at any one point of time; it will be incurred at each point of time when there is an increase in wages, and at each such time for a period as long as the relevant delay. The more numerous the periods of delay the more complex the working out what the relevant expense was would be, particularly when extensions are granted some falling within and some not falling within cl. 24(i). Many of the builder's extensions were because of bad weather, and could not found a claim under cl. 24(i). Moreover, there could be, and it is unlikely that there were not, delays not coming within the ambit of any part of cl. 24; delays, e.g. occasioned by the default of the builder, or which it could have avoided. How is account to be taken of wage increases to which, on the builder's submission, cl. 24(i) applies, occurring after delays of these kinds? But quite apart from these problems expenses resulting from wage increases are a special form of expense falling within the description of variations of wages, and the parties seem to me by special condition No. 3 to have prescribed the way in which their rights in respect of this type of expense were to be regulated, no matter when or (subject to special condition No. 3(h)) in what circumstances the expense is incurred. It so happens in the present case that the delays were so extensive that special condition No. 3, in the long run, worked to the builder's prejudice. In other circumstances it would have worked to its advantage. But reading the contract as a whole, and also having regard to the fact that the special condition was added to a printed form, I think that the learned Judge at first instance was correct in construing the contract so as to treat special condition No. 3 as regulating the rights of the parties in relation to matters arising out of or concerning variations of wages, whether or not the payment of those varied wages occurred at times when work was being done which, had it not been for a delay, would have been done at an earlier time when wages were lower.

Some support for this view is to be found in the provisions of para. (g) and (h) of special condition No. 3. These paragraphs provide:-

"(g) The value of extra work ordered at

schedule rates or at rates comprised in a priced Bill of Quantities shall be adjusted by increase or decrease as the case may require in such manner and to such extent as to give effect to the provisions of this clause (mutatis mutandis) that may be appropriate.

(h) Extra work not at schedule rates comprised in a priced Bill of Quantities shall not be subject to the provisions of this clause unless so agreed."

Special condition No. 4 provides that a fully priced copy of the bill of quantities on which the builder's tender was based with the rates extended so that they agree with the tender sum should be handed to the architect for checking and amending if necessary by mutual agreement prior to the signing of the contract. Clause 19 of the contract contains provisions for the pricing of variations including variations to the works, and for the addition to or deduction from the contract sum of the amounts of the value of the variations. Where there is a priced bill of quantities, as special condition No. 4 requires, the unit prices contained in that bill were to determine the valuation of work of similar character executed under similar conditions in all respects as the work so priced. By par. (g) of special condition No. 1, sub-cl. (g) is added to cl. 19 to provide that claims for variations should be for the complete amount of the variation, and a claim for cost variation should include consequent claim for time variation, if any, and vice versa, otherwise it should be held that no such consequent claim should exist. The words "and vice versa" must mean that any claim for a time variation because of variation of works should include a claim for the relevant cost variation.

The result of these provisions seems to be that if there is a variation requiring extra work to be carried out, including extra work which will involve a delay in the progress of the works, the value of that extra work is to be determined by the rates in the priced bill of quantities adjusted, in so far as any variation in the cost of labour is concerned, in accordance with the provisions

of special condition No. 3. This would result in the adjustment being effected on the basis of the 60% formula. If however the extra work is not such that it is regulated by the rates in the priced bill of quantities, then it is not subject to the provisions of special condition No. 3, unless so agreed, and presumably the builder could ask that any increase in wages be allowed in full. These provisions, especially when coupled with cl. 19(g) which expressly contemplates claims or time variation in respect of extra work, seem to be inconsistent with a construction of the contract that would allow, in those cases where special condition No. 3(g) requires the value of extra work to be assessed, as regards variations in wages, in accordance with the other provisions of that special condition, the Builder to recover any difference between wages paid in respect of other work delayed by the carrying out of the extra work, and the amount which those wages would have been had the extra work not been carried out, pursuant to the provisions of Cl. 24(i). Paragraphs (g) and (h) of special condition No. 3 seem to assume that the special condition regulates the entitlement of the builder to any payments which he claims by reason of variations in the cost of labour.

A possible construction of cl. 24(i), which depends upon its language, is that it relates only to loss or expense incurred during the period of the delay in the progress of the works, or at any rate to that loss or expense and to any other loss or expense directly related to matters which otherwise should have occurred during that period of delay. This would limit the loss or expense to the matters already claimed by and allowed to the builder, and to losses or expenses such as the additional cost of materials which should have been delivered during the period of delay. Losses or expenses incurred at later points of time because work which was to be done otherwise than during the period of delay is carried out at a time when wages are higher would, on this construction, be excluded from the reimbursement to which the builder is entitled. Such a construction is more consistent with the various provisions of cl. 24(i) and particularly with those which deal with the way in which the builder must make his claim and give notice of his intention to claim, and give particulars of his claim to the architect. However having regard to my conclusion as to the application of

special condition No. 3 to the circumstances of the present claim, it is not necessary for me to resolve this question.

In my opinion the appeal should be dismissed with costs.

(sgd)

13/12/77

No. 1

Judgment of The Hon. Mr. Justice Hope 13th December 1977. (cont'd)

No. 2

Judgment of The Hon. Mr. Justice Hutley

No. 2

Judgment of The Hon. Mr. Justice Hutley 13th December 1977.

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

C.A. 133 of 1977
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CORAM: HOPE, J.A.
HUTLEY, J.A.
GLASS, J.A.

TUESDAY, 13TH DECEMBER 1977

MAX COOPER & SONS PTY. LIMITED v.

THE UNIVERSITY OF NEW SOUTH WALES

HUTLEY, J.A.: This is an appeal from a decision of Collins, J. on a case stated by arbitrators in arbitration between Max Cooper & Sons Pty. Limited, hereinafter referred to as "the builder", and The University of New South Wales, hereinafter referred to as "the owner". The builder had on 6th July, 1972 contracted to erect for the owner a biological sciences building, the contractual date for completion being 18th July, 1973. This was ultimately extended by the architects to 28th August, 1974. The contract made provision for the increase in the contract price to meet the increased cost of labour during the period of construction. Special Condition 3 makes detailed provision for this and in particular provides for an adjustment of the contract sum by reference to increases in the average hourly rate as defined in that condition. The formula is referred to in some of the documents as the 60% formula, this being one of the figures which are included in the

calculation of the ultimate increase. The builder contended that it had suffered losses which were not recouped by the formula provided in Special Condition 3 and that to the extent to which it had suffered losses it sought to recover the difference by an application made under Clause 24(i) of the general conditions of contract. It based its calculations on what may be called the 85% formula, though the question whether in fact this was the correct method of calculating its loss does not arise in the stated case.

The question asked in the stated case was answered by Collins, J. in the negative, that is, he found that the builder was not entitled to bring a claim in respect of losses which were experienced because of the increase in the price of labour beyond what he could recover under Special Condition 3. He held that the effect of an application under Clause 24(i) of the general conditions of contract would be to nullify the express limitation in Special Condition 3 of compensation for the increase in the cost of labour.

I am unable to agree with this reasoning. Special Condition 3 is concerned with the adjustment of the contract sum to absorb the costs of labour, however occurring. It is not concerned with the matter of delay in the progress of the works and the adjustments consequential thereupon and I can see no reason why the two clauses which give separate and distinct rights to the builder cannot be both given effect to. I am unable to agree with the basis upon which the claim of the builder was rejected by his Honour.

In my opinion it is necessary to consider in detail whether or not the builder has, on the material which was before the arbitrators and embodied in the stated case, failed to bring itself within the terms of sub-clause 24(i) so that the architects and the arbitrators were entitled to reject the claim out of hand without examining its factual basis.

Clause 24(i) provides as follows:

"The Builder shall be entitled to reimbursement of loss or expense incurred

by him as a result of a delay in the progress of the Works where all the following apply:

(i) Delay was caused by:

(A) one or more of the causes numbered (i), (ii), (iv), (ix), (x) and (xiii) in sub-clause (g) of this clause; or

(B) one or more of the causes numbered (iii), (vii), (viii) and (xiv) in sub-clause (g) of this clause where in the opinion of the Architect the Builder has so acted that he should be reimbursed for such expense;

(ii) An extension of the Date for Practical Completion has been made or should properly have been allowed pursuant to this clause;

(iii) The delay is not due to any default of the Builder or to any act of the Builder other than an act proper for the performance of this Contract;

(iv) The Builder has taken all practicable steps to avoid or reduce the delay and to keep expense resulting from the delay to a minimum;

(v) The loss or expense has not been and should not be included in the value of any variation;

(vi) The Builder in giving notice to the Architect pursuant to sub-clause (c) of this clause has stated his intention to make a claim under this sub-clause;

(vii) The Builder has given to the Architect details in writing of the nature of the claim as soon as practicable after commencement of the delay and at a time when details could be checked;

(viii) Within a reasonable time of the Date for Practical Completion being extended or being deemed to be extended the

> Builder has given to the Architect in writing details of the items of expense and the amounts therefor or a close estimate thereof;
>
> and in any such circumstance, the loss or expense incurred shall be ascertained by the Architect and the Contract Sum shall be adjusted accordingly.

In my opinion, it is clear that paras. (i) to (iv) can be taken to have been made out at least to some extent. There have been delays caused by circumstances for which an extension of the date for practical completion has been given and I am prepared to assumed that though this would ultimately be a matter for the arbitrators, the builder can establish paras. (iii) and (iv).

Counsel submitted, however, that para. (v) excludes the builder's claim in that there is a reference to Special Condition 3. Special Condition 3, it is true, is concerned with variations, namely, variations in the cost of labour but this is not the type of variation to which para. (v) is directed. The variation with which it is concerned is not a mere variation in costs, it is a variation which has an independent value. If the words "the value of" had been omitted from this paragraph, it would in my opinion have had the effect contended for by counsel. The types of variation with which this paragraph is concerned is the variation referred to in para. 1(a)(ii), namely, "variation of the works". I am of the opinion that para. (v) does not preclude the builder making this claim.

Included in the stated case are applications made by the builder to the architect pursuant to sub-clause 24(c). This sub-clause specifies the steps which the builder has to follow if he wishes to make applications for the extension of time by reason of delays set out in sub-clause (g). Para. 24(g)(viii), for example, makes provision for an extension by reason of strikes affecting the progress of the works. The applications annexed to the stated case do not give notice to the architect of the builder's intention to make this particular kind of claim under sub-clause 24(i). It is a condition of the builder's entitlement to reimbursement under sub-clause 24(i) that it fulfils all the relevant conditions

and in my opinion this technicality has been observed. The first intimation of a claim of the kind now formulated was made on 17th July, 1974 in a letter from the builder to the architects which, omitting formal parts, reads as follows:-

> "As you are no doubt aware that, due to the inflationary conditions, the '60% rise and fall' formula is no longer equitable. The degree of error has been so great that both the State and Commonwealth Departments of Works have seen fit to change the formula for new projects and certain existing projects to one based on labour and materials.
>
> Our calculations indicate that there is a shortfall after the 18.7.73, in all claims on uncompleted work of approximately 25%, totalling $28,601.76. As it was impossible for this item to be ascertained or even made known to you until recently, we consider it is now recoverable under the loss and expense clause of our contract. There is no question that delays to the progress of the works have projected the construction programme into an inequitable situation in relation to rise and fall claims".

However, the builder had made a series of claims under paragraph (vi), namely, claims for costs and expenses involved. The claims were for different amounts and on different principles from that now made. If every consequence of such a claim has to be spelled out this paragraph has not been complied with. However, I do not consider that every consequence of a claim under this paragraph has to be spelled out when it is first made. What is required is an intimation of the intention to make a claim based on this paragraph, the further specification of the amount of the claim being given later, as provided in paragraph (viii).

The construction of paragraph (vii) has caused me difficulty. The builder is required in sub-clause 24(c) to state in detail the cause of delay and its claim for extension of time. Paragraph (vii) would appear to involve a similar but less detailed claim, all that is required being the setting out of the nature of the claim.

No. 2

Judgment of The Hon. Mr. Justice Hutley 13th December 1977. (cont'd)

I have come to the conclusion that the two can be reconciled. The requirement of sub-clause 24(i) that compliance with all the paragraphs is a condition of the right of reimbursement is very drastic and paragraph (vii) allows for recovery even though there are deficiencies by the builder in the performance of his duties under sub-clause 24(c). Even if he has not done everything required under 24(c), he could succeed in a claim provided that he gives sufficient information as to the nature of the claim and at the time when details could be checked.

The applications which the builder made under sub-clause 24(c) can, in my opinion, function as notice under paragraph (vii) and, when examined, they do give sufficient details of the nature of the claim, that is, the nature of the claim that the work has been delayed.

I am further of the opinion that paragraph (viii) has been sufficiently complied with by the letter of 14th July, 1974 and amendments thereof to merit the consideration of the architect. Whether the builder will be able to substantiate this claim or any part of it does not arise for consideration in these proceedings. I consider that the question in the stated case should be answered in the affirmative and remitted to the arbitrators with this expression of opinion.

The appeal should be allowed with costs, the respondent to have a certificate under the Suitors' Fund Act.

(sgd)

13.12.77.

No. 3

Judgment of The Hon. Mr. Justice Glass 13th December 1977.

No. 3

Judgment of The Hon. Mr. Justice Glass

IN THE SUPREME COURT OF NEW SOUTH WALES

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HUTLEY, J.A.
GLASS, J.A.

No. 3

Judgment of The Hon. Mr. Justice Glass 13th December 1977. (cont'd)

TUESDAY, 13TH DECEMBER 1977.

MAX COOPER & SONS PTY. LIMITED v.

THE UNIVERSITY OF NEW SOUTH WALES

GLASS, J.A.: The contractual provisions and evidentiary background relevant to the present appeal have been set out in the judgments of Hope J.A. and Hutley J.A. which I have had the benefit of reading. There is no need for me to restate that material. The stated case enquires in paragraph 17 whether the Builder is "entitled to be reimbursed for any loss or expense incurred by it in respect of the said unrecovered increased costs of performance of the said works". The question is formulated in that manner because of paragraphs 10 - 12 of the stated case which are set out below:

> "10. Following the date for practical completion of the works stipulated in the contract namely the 18th July , 1973 the cost of performance of the works was increased by variations in the cost of labour within the meaning of special condition 3 of the said contract.
>
> 11. Such increased costs for work performed after the 18th July, 1973 exceeded the amount recovered by the Builder pursuant to special condition 3 for such work.
>
> 12. In respect of such unrecovered increased costs of performance of the works the Builder claimed to be entitled to reimbursement as loss or expense pursuant to clause 24(i) of the said contract in the terms of its letters of the 17th July, 1974, 13th August, 1974 and 14th August, 1974, copies of which are hereunto annexed marked "W" to "Y" inclusive".

It will be seen that the term "increased costs of performance" appearing in paragraph 17 relates back to increase in costs by reason of variations in the cost of labour to which paragraph 10 refers.

No. 3

Judgment of The Hon. Mr. Justice Glass 13th December 1977. (cont'd)

However, before this Court, the Builder's right of recovery was argued on a broader base. It was supported in respect of all increased costs whether they related to labour,materials or administration. There was also an express disclaimer of the approach adopted before the arbitrators of calculating the Builder's loss by means of a percentage formula of 85%. As these wider questions were fully argued on both sides, I consider that it is proper to deal with them notwithstanding the limited formulation of the stated case.

The question for decision is the manner in which clause 24 and special condition 3 interact in working an adjustment of the contract sum. The claim relates to the work done after the date for practical completion viz. 18th July, 1973. The period of such work occupied fifty nine days which was the total of the extensions granted by the architect under clause 24. As appears from paragraph 9 of the stated case the contract price was revised on five occasions in respect of this period in accordance with special condition 3. The trial judge held that once these increases had been made, the builder's rights under the contract were exhausted and no further claim was maintainable. With respect I am unable to agree.

In my opinion clause 24 and special condition 3 are independent sources of rights both of which are designed to enlarge the remuneration due to the builder. The first allows him in the case of certain specified delays to claim an extension of time to avoid the liability he would otherwise incur under clause 27 to pay liquidated damages by reason of failure to complete by the due date. It also allows him in the case of certain of these delays and on compliance with certain conditions to recoup his loss or expense as a result of the delay. The date for practical completion was extended by fifty nine days. Except for thirteen and a half days caused by a variation within the meaning of clause 19, these delays were all due to strikes, The builder claimed and was allowed expenditure described as "on site costs" as set out in the final column of paragraph 8 of the stated case. This was calculated on a daily rate which costed the various items of expense described as general overhead job organisation and plant charges which accrued even when no construction work was being done. But the builder claims that

it is entitled to recoup under clause 24 other expense incurred by it as a result of the delay caused in the progress of the works. It seeks to prove e.g. that work which would have been completed before 18th July, 1973 was completed within fifty nine days thereafter at a cost which had sharply risen in the meantime due to wage variations. It also seeks to prove that materials which would have been earlier acquired but for the delays had risen in cost by the time they were needed and/or available. It acknowledges that credit must be given in calculating its loss for the increase in the contract sum brought about by the application of special condition 3. But it claims that there is a balance in its favour which it is entitled to recover. The proof of these matters will obviously pose problems of some difficulty. It is clear that a blanket percentage formula may not be an acceptable means of measuring the differential costs to the builder when comparing performance assuming no delays and performance affected by the delays which occurred. The builder may have difficulty in proving his compliance with clause 24(i)(vii) and clause 24(i)(viii). But these evidentiary problems are not raised by the stated case.

What it does present for consideration is the owner's submission that the provisions of the printed clause 24(i) have been superseded by special condition 3 so far at any rate as concerns increased costs of labour. This is a construction which does not appeal to me. The special condition is a form of indexation applied to the contract sum. In a contract requiring sixty calendar weeks for its performance, the parties contemplated that the cost of materials and labour would rise above the levels which existed at the time of the tender. To measure the rise in both components by 60% of the movement in labour costs alone was no doubt a rough and ready formula acceptable to both parties in circumstances where exactitude was not possible. By adjusting the contract sum in accordance with this formula the builder's profit margin was secured against erosion. It was protected should the cost of labour and materials rise above tender levels while construction work adhered to the timetable. If the sixty weeks is protracted by strike action, the builder's profit margin is threatened from a different direction. He must continue to build

No. 3

Judgment of The Hon. Mr. Justice Glass 13th December 1977. (cont'd)

at a time when labour costs and material costs are mounting to levels which would not have prevailed if delays had not been suffered. This additional expenditure is recoverable under the 60% formula of special condition 3 but it may not be fully recoverable. But he is also forced to incur the expenditure of moneys which would not otherwise have been disbursed e.g. by keeping his organisation intact when no work is being done. Clause 24 is designed to recoup to him all the additional expense which he incurs by reason of strike delays and to recoup it fully. Special condition 3 will recoup to him some of his expenditure although perhaps not completely and some of his expenditure not at all. In these circumstances I am of opinion that although the two means of adjusting the contract sum may in certain areas overlap, they stand upon independent ground and the typed condition does not drive the printed clause out of the agreement. It follows that if the builder is able to prove a loss or expense which exceeds the sum by which the contract price has been augmented under special condition 3, he is entitled to recover it.

I would propose that the question in the stated case be answered in the affirmative and that the case be remitted to the arbitrators with this expression of opinion. The appeal should be allowed with costs, the respondent to have a certificate under the Suitors' Fund Act.

No. 4

Order 13th Devember 1977.

No. 4

ORDER

IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

CL 3633 of 1976

CA 133 of 1977

The Court orders that:

1. The Appeal be allowed.

2. The question asked in the stated case be answered yes but without expressing any opinion as to quantum.

3. The stated case be remitted to the arbitrators with this expression of opinion.

4. The Respondent to pay the costs of the Appeal and to have a certificate in respect thereof under the Suitors' Fund Act.

No. 4
Order
13th December
1977.
(cont'd)

ORDERED: 13th December 1977

AND ENTERED: 3rd August, 1978.

BY THE COURT

(sgd)

REGISTRAR

I admit entry forthwith.

No. 5

Award of Arbitrators

No. 5
Award of
Arbitrators
7th April
1978.

IN THE MATTER OF AN ARBITRATION
between
MAX COOPER & SONS PTY. LTD. Builder
and
UNIVERSITY OF NEW SOUTH WALES Proprietor

THIS ARBITRATION coming on to be heard before us the undersigned Harry Oswald Hall and Geoffrey Lawrence Lumsdaine sitting as joint Arbitrators on 23.2.76, 24.2.76 and 13.3.78 WHEN Mr. V. Bruce of Counsel appeared for the Builder and Mr. A.B. Shand of Queens Counsel and with him Mr. D.I. Cassidy appeared for the Proprietor AND UPON READING the Points of Claim of the Builder and the Points of Defence of the Proprietor as amended AND questions of law having arisen as to the right of the Builder upon a proper consideration of the provisions of the Contract between the parties in relation to facts that had happened in performance of the said Contract to be reimbursed for loss or

No. 5

Award of Arbitrators 7th April 1978. (cont'd)

expense incurred by the Builder in respect of otherwise unrecovered increased costs of such performance AND we having stated a case for the opinion of the Supreme Court upon the said questions of law AND the matter having been decided by the Court of Appeal upon appeal from the Supreme Court wherein it was stated as the opinion of the Court and appeal that the Builder was entitled to recover from the Proprietor for loss or expense by reason of increased wages resulting from delay AND the Court remitted the stated Case to us with that expression of opinion AND HAVING HEARD AND CONSIDERED the evidence adduced on behalf of the respective parties AND what was alleged by Counsel WE FIND that the Builder is entitled to recover in respect of the provisions of Contract the subject of the said stated case the sum of twenty thousand five hundred and sixty two dollars.

WE ACCORDINGLY AWARD that the Proprietor pay to the Builder the said sum of twenty thousand five hundred and sixty two dollars ($20,562.00) in satisfaction and discharge of all moneys claimed by the Builder in this Arbitration AND WE FURTHER AWARD that the Proprietor pay the costs of the Builder of and incidental to this Arbitration and in default of agreement as to the amount of the said costs WE DIRECT that the same be taxed by the proper officer of the Court AND WE FURTHER AWARD that the Proprietor bear the expenses of this arbitration other than the expense of obtaining transcript of evidence AND WE ASSESS the said expenses at the sum of one thousand nine hundred and forty five dollars ($1,945.00) as follows:-

Room hire, R.A.I.A.	$ 35.00	
Appointment Fee, R.A.I.A.	20.00	
Appointment Fee, M.B.A.	20.00	
Administration Fee, M.B.A.	10.00	
Arbitrator's Fees:		
H.O. Hall	900.00	
G.L. LUMSDAINE	960.00	$1,945.00

AND SUBJECT to any special agreement between the parties WE FURTHER AWARD that the Proprietor bear the expenses of obtaining transcript of evidence AND WE DIRECT that any necessary adjustment be made between the parties.

DATED this seventh day of April, 1978.

SIGNED and PUBLISHED BY the said Harry Oswald Hall in the presence of: (sgd) H.O. Hall

AND by the said Geoffrey Lawrence Lumsdaine in the presence of: (sgd) G.L. Lumsdaine

(sgd)

No. 5

Award of Arbitrators 7th April 1978. (cont'd)

No. 6

S U M M O N S

No. 6

Summons 5th May 1978.

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION No. 12093 of 1978

THE UNIVERSITY OF NEW SOUTH WALES Plaintiff

MAX COOPER & SONS PTY. LIMITED Defendant

The Plaintiff claims:

1. An order that the award made on the 7th April 1978 by Messrs. Harry Oswald Hall and Geoffrey Lawrence Lumsdaine in an arbitration between the Plaintiff and the Defendant may be set aside.

2. That the Defendant pay the costs of this Summons and the costs of the arbitration.

TO THE DEFENDANT: Max Cooper & Sons Pty. Limited, 87 Darling Street, East Balmain

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence.

Before any attendance at that time you must enter an appearance in the Registry.

Time: 2nd June, 1978 at 10.00 a.m.

Plaintiff: The University of New South Wales, Anzac Parade, Kensington.

No. 6

Summons
5th May 1978.
(cont'd)

Plaintiff's Address for Service:	Bartier Perry & Purcell 17th Floor, 167 Macquarie Street, Sydney.
Address of Registry:	Supreme Court of N.S.W. Queen's Square, Sydney

Notice for Service at Document Exchange:

The Plaintiff may be served at the following exchange box in Sydney of the Australian Document Exchange Pty. Limited.
Bartier Perry & Purcell DX 109 SYDNEY

(sgd) Kenneth Ramsay

Kenneth Bately Ramsay,
Solicitor for Plaintiff

FILED: 5th May, 1978.

No. 7

Affidavit of Kenneth Bately Ramsay
5th May 1978.

No. 7

Affidavit of Kenneth Bately Ramsay

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION No. 12093 of 1978

THE UNIVERSITY OF NEW SOUTH WALES Plaintiff

MAX COOPER & SONS PTY. LIMITED Defendant

ON 5th May 1978, I, KENNETH BATELY RAMSAY of 167 Macquarie Street, Sydney in the State of New South Wales, Solicitor, say on oath:

1. I am the Solicitor for the abovenamed Plaintiff.

2. The Plaintiff is a body incorporated pursuant to the Technical Education and New South Wales University of Technology Act, 1949 as amended by The University of New South Wales Act 1959, and other Acts of the Parliament of New South Wales and the Defendant is a company incorporated pursuant to the Companies Act of the State of New South Wales which carries on business as a builder.

3. By written agreement of the 6th July, 1972, the Plaintiff employed the Defendant to erect a certain building upon its premises at Kensington. The said agreement, to which the Plaintiff craves leave to refer when produced at the hearing as if the same were fully set forth herein, contained an arbitration clause.

4. The said agreement also contained provisions relating to loss and expense rise and fall and extension of time. After the completion of the works disputes arose between the Plaintiff and the Defendant as to the proper application and inter-relation between those clauses. The said disputes were submitted to the arbitration of Messrs. Harry Oswald Hall and Geoffrey Lawrence Lumsdaine.

5. On the 3rd June, 1976, the arbitrators stated a case for the opinion of this Honourable Court. On the 27th April 1977, the Honourable Mr. Justice Collins pronounced his opinion in favour of the Plaintiff's contention as to the meaning and extent of the loss and expense clause. On the 24th May 1977, the Defendant filed a Notice of Appeal (C.A. No. 133 of 1977) from the decision of Mr. Justice Collins to the Court of Appeal. On the 13th December, 1977 the Court of Appeal by majority (Hutley and Glass J.J.A., Hope J.A. dissenting) allowed the Appeal and remitted the case stated to the Arbitrators with that expression of opinion. The order and judgments of the Court of Appeal are hereunto annexed and marked with the letters "A1-A4" respectively.

6. On the 13th March, 1978, the parties again appeared before the Arbitrators and on the 7th April 1978, the Arbitrators published their Award in accordance with the opinion of the majority of the Court of Appeal to the effect that the Plaintiff should pay to the Defendant $20,562.00 and costs including the expenses of the arbitration. Annexed hereto and marked with the letter "B" is a copy of the said Award.

7. The Plaintiff contends that the opinions of Mr. Justice Hope and Mr. Justice Collins are to be preferred to those of Mr. Justice Hutley and Mr. Justice Glass and asks that the Award of the Arbitrators in favour of the Defendant be set aside and that the Defendant be ordered to pay the Plaintiff's costs of this Summons of the

No. 7

Affidavit of Kenneth Bately Ramsay 5th May 1978. (cont'd)

proceedings on the stated case and of the arbitration.

SWORN by the Deponent at Sydney, before me:) Kenneth Ramsay

(sgd) L. Stubbs J.P.

A Justice of the Peace

Annexures "A1 to A4" and "B" are reproduced on pages 1 to 24 in the record.

No. 8

Judgment of The Hon. Mr. Justice Sheppard 2nd June 1978.

No. 8

JUDGMENT OF THE HON. MR. JUSTICE SHEPPARD

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION No. 12093 of 1978

CORAM: SHEPPARD, J.

FRIDAY, 2ND JUNE, 1978

UNIVERSITY OF N.S.W. v.

MAX COOPER & SONS LIMITED

JUDGMENT

HIS HONOUR: By its summons in this matter the plaintiff seeks an order that an award made by arbitrators in the arbitration between the plaintiff and the defendant be set aside. The ground of the application is that the award discloses an error of law upon its face. The award is dated 7th April, 1978, and includes the following statements:

> "AND we having stated a case for the opinion of the Supreme Court upon the said questions of law AND the matter having been decided by the Court of Appeal upon appeal from the Supreme Court wherein it was stated as the opinion of the Court and appeal (sic) that the Builder was entitled to recover from the Proprietor for loss or expenses by reason of increased wages resulting from delay AND the

Court remitted the stated case to us with that expression of opinion AND HAVING HEARD AND CONSIDERED the evidence adduced on behalf of the respective parties AND what was alleged by Counsel WE FIND that the Builder is entitled to recover in respect of the provisions of Contract the subject of the said stated case the sum of twenty thousand five hundred and sixty two dollars".

The award then formally awards that sum to the builder and goes on to deal with certain consequential matters. The builder is of course the defendant and the proprietor the plaintiff.

What occurred in the matter was that one of the parties sought a stated case pursuant to s.19 of the Arbitration Act 1902 whilst the arbitration was in progress. That section is as follows:

> "Any referee arbitrator or umpire may at any stage of the proceedings under a reference and shall if so directed by the court or a judge state in the form of a special case for the opinion of the court any question of law arising in the course of the reference".

It has been held by the High Court in Minister for Works for the Government of Western Australia v. Civil and Civic Pty. Limited, 116 C.L.R. 273 that the comparable section of the Western Australian Act confers upon the Supreme Court power to give an advisory opinion only. The significance of that decision was that in the view of the High Court there was no appeal from the decision of the Supreme Court to it whether as of right or by leave special or otherwise.

The case stated by the arbitrators in the present proceedings was dealt with at first instance by Collins, J. It went on appeal to the Court of Appeal. The appeal was by majority allowed. The present plaintiff is and has at all times been dissatisfied with that decision but felt itself unable to prosecute an appeal to the High Court by reason of the decision of the High Court earlier mentioned. Notwithstanding that that was the advice that it had had, it has in fact filed both a notice of appeal and an application for leave to appeal against the decision of the Court of Appeal but the appeal and the application have not been prosecuted.

No. 8

Judgment of The Hon. Mr. Justice Sheppard 2nd June 1978. (cont'd)

It is the plaintiff's submission that an error or law appears on the face of the award because the arbitrators in their award have made the judgment of the Court of Appeal part of it. They submit of course that that judgment, or at least the majority judgments, are in error and that therefore the award does disclose an error of law upon its face. Counsel for the defendant has submitted to me that assuming, contrary to his principal submission, that the judgments of the majority of the Court of Appeal do disclose error, there is nevertheless not an error disclosed upon the face of the award. He has referred me to decisions of the High Court in Gold Coast City Council v. Canterbury Pipelines (Australia) Pty. Limited, 118 C.L.R. 58 and Tuta Products Pty. Limited v. Hutcherson Bros. Pty. Limited 127 C.L.R. 253. I have given dicta in the majority judgments in these cases consideration. I do not regard the matter as free from doubt but in my opinion there is a sufficient incorporation of the judgments of the majority of the Court of Appeal in the award to indicate that the arbitrators were adopting for their purposes what the majority of the Court of Appeal has said. It is true that the words that the arbitrators have used in what I have quoted above do not say expressly that the opinion of the majority has been adopted by them in reaching their conclusions but I think that that is the clear inference which arises. Accordingly, I reject the submission of the defendant that such error of law as there may be in the majority judgments of the Court of Appeal does not appear on the face of the award.

Notwithstanding that conclusion, I must dismiss the application which is now made. That is because, assuming the judgments to be incorporated in the award in the way that I think they are, they disclose no error. I must take the view that I am bound by them and that accordingly the arbitrators have followed a correct view of the law. It was submitted to me by counsel for the plaintiff that by reason of what had been said in some of the judgments in two of the cases to which I have referred it was open to me to reconsider the matter unimpeded by the judgments which have been delivered. I do not take that view. Even if in some way the judgments are not strictly binding upon me, a position which I very much doubt, I take the view that I am bound at least

as a matter of comity to follow the majority view. That being the situation I did not myself think it necessary or appropriate that I should embark upon a consideration of the question of whether the majority view was to be preferred to that adopted by Collins, J. and I have not embarked on that exercise.

For the reasons I have given the award does not in my opinion disclose an error of law upon its face with the result that the plaintiff's summons should be dismissed. That is the order which I make. I order the plaintiff to pay the defendant's costs of the summons.

No. 9

O R D E R

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION No.12093 of 1978

THE UNIVERSITY OF NEW SOUTH WALES Plaintiff

MAX COOPER & SONS PTY. LIMITED Defendant

THE COURT ORDERS THAT:

1. The Plaintiff's Summons be dismissed.

2. The Plaintiff pay the Defendant's costs of the Summons.

ORDERED: 2nd June 1978.

AND ENTERED: 29th June 1978.

By the Court

(sgd) G.J. BERECRY L.S.
Deputy Registrar.

No. 10

Notice of Motion 16th June 1978.

No. 10

NOTICE OF MOTION

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION CLD No. 12093 of 1978

THE UNIVERSITY OF NEW SOUTH WALES Applicant

MAX COOPER & SONS PTY. LIMITED Respondent

The University of New South Wales will, at 10.00 a.m. on the 23rd June 1978 at the Supreme Court, Queens Square Sydney, move the Court for an order that it have conditional leave to appeal to Her Majesty in Council from the decision of the Court (Mr. Justice Sheppard) given on the 2nd June 1978 whereby the Applicant's application to set aside the award of Harry Oswald Hall and Geoffrey Lawrence Lumsdaine made on the 7th April, 1978 in an arbitration between the Applicant and the Respondent was dismissed, on the following grounds:

1. That there is directly involved the amount of $20,562,00, being the amount of the arbitrators' award in favour of the Respondent and in addition there is involved the amount of the costs and expenses of the arbitration which, according to the arbitrators' award, were to be paid by the Applicant.

2. That the following matters of general public and legal importance arise:

(a) The proper interpretation of clauses commonly appearing in or as part of a form of building contract in general use in New South Wales and published jointly by the Royal Australian Institute of Architects and the Master Builders Federation of Australia.

(b) The choice between the correctness of the advisory opinion given by two Judges of the Court of Appeal (Hutley and Glass J.J.A.) in favour of the interpretation of these clauses contended for by the Respondent in matter no. 133 of 1977 between the same parties and the opinion of the remaining Judge of the Court of Appeal (Hope J.A.) and

of the Judge at first instance (Collins J.) in favour of the Applicant.

(sgd) .....
Solicitor for Applicant

No. 10
Notice of Motion 16th June 1978. (cont'd)

FILED 16th June 1978.

TO: Max Cooper & Sons Pty. Limited
c/- its said Solicitors,
Colin Biggers & Paisley,
33 Bligh Street,
SYDNEY 2000.

No. 11

No. 11
Affidavit of Kenneth Bately Ramsay with Annexure 16th June 1978

AFFIDAVIT OF KENNETH BATELY RAMSAY WITH ANNEXURE

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION CLD 12093 of 1978

THE UNIVERSITY OF NEW SOUTH WALES Applicant

MAX COOPER & SONS PTY. LIMITED Respondent

ON 16th June, 1978, I, KENNETH BATELY RAMSAY of 167 Macquarie Street, Sydney in the State of New South Wales, Solicitor, being duly sworn make oath and say:

1. I am a member of the firm of Bartier of Bartier Perry & Purcell, the Solicitors for the Applicant.

2. The Applicant is a body incorporated pursuant to the Technical Education and New South Wales University of Technology Act, 1949 as amended by The University of New South Wales Act 1959, and other Acts of the Parliament of New South Wales and the Respondent is a company incorporated pursuant to the Companies Act of the State of New South Wales which carries on business as a builder.

3. By written agreement of the 6th July, 1972, the Applicant employed the Respondent to erect a

No. 11

Affidavit of Kenneth Bately Ramsay with Annexure 16th June 1978 (cont'd)

certain building upon its premises at Kensington. The said agreement to which the Applicant craves leave to refer when produced at the hearing as if the same were fully set forth herein contained an arbitration clause.

4. On the 3rd June, 1976, two arbitrators, Harry Oswald Hall and Geoffrey Lawrence Lumsdaine appointed pursuant to the arbitration clause referred to in Clause 3 hereof stated a case for the decision of this Honourable Court. The Respondent claimed in the arbitration $20,562.00 alleged to be loss or expense incurred by it as a result of a delay in the progress of the works. The particular loss or expense alleged was that during the extra time taken to complete the contract as a result of the alleged delays the price of goods and wages had increased. The Applicant alleged that the building contract contained a special condition covering rise and fall of costs and that the Respondent was limited to the amounts payable in accordance with this Clause.

5. On the 27th April, 1977, the Honourable Mr. Justice Collins pronounced his opinion in favour of the Applicant's contention as to the meaning and extent of the loss and expense clause and a copy of His Honour's decision is annexed hereto and marked "A".

6. On the 24th May, 1977, the Respondent filed a Notice of Appeal (C.A. No. 133 of 1977) from the decision of Mr. Justice Collins to the Court of Appeal. On the 13th December, 1977, the Court of Appeal by majority (Hutley and Glass J.J.A., Hope J .A. Dissenting) allowed the Appeal and remitted the case statedto the Arbitrators with that expression of opinion. The order and judgments of the Court of Appeal are hereunto annexed and marked with the letters "B1-B4" respectively.

7. On the 13th March, 1978, the parties again appeared before the Arbitrators and on the 7th April, 1978, the Arbitrators published their Award in accordance with the opinion of the majority of the Court of Appeal to the effect that the Applicant should pay to the Respondent $20,562.00 and costs including the expenses of the arbitration. Annexed hereto and marked with the letter "C" is a copy of the said Award.

8. On 5th May, 1978 the Applicant filed a Summons in this Honourable Court in proceedings No. 12093 of 1978 seeking, inter alia, an Order that the Award referred to in paragraph 7 hereof be set aside and on the 2nd June, 1978 the Summons was heard before Mr. Justice Sheppard. His Honour held that if the Court of Appeal were in error this would constitute an error of law on the face of the record, but His Honour declined to question the majority judgment of the Court of Appeal and accordingly held that there was no error of law on the face of the record and dismissed the Summons.

9. The amount in dispute is in excess of $20,000.00, being the amount of $20,562.00 awarded by the Arbitrators plus costs of the arbitration and of the proceedings hereinbefore referred to.

10. I am informed by John Trevor Gui a member of Robertson & Marks Pty. Limited, Architects of 117 Pitt Street, Sydney and I do verily believe that the said Clause 24 is a printed clause in the Royal Australian Institute of Architects and Master Builders' Federation of Australia's copyright form of contract Edition 5b first printed in January 1971 which is in general use in the building industry and that although Special Condition 3 is typed it is a clause which either in that or in a very similar form has been very commonly used in the building industry and particularly in conjunction with Clause 24.

11. I am further informed by Robert Kenneth Fletcher the Business Manager (Property) of the Applicant and I do verily believe that Special Condition 3 or a very similar clause together with Clause 24 or a very similar clause appears in the bulk of the contracts entered into by the Applicant since 1968, involving some tens of millions of dollars.

12. I am informed and do verily believe that the economic conditions precedent to the dispute that has here arisen, that is to say a period of high inflation in the building industry and of great delays in building contracts caused by matters beyond the control of the parties such as strikes, are likely to recur.

13. The Applicant submits that this is a matter appropriate for the granting of conditional leave

No. 11

Affidavit of Kenneth Bately Ramsay with Annexure 16th June 1978 (cont'd)

to apply to Her Majesty in Council on the ground that the following matters of general public and legal importance arise:

(a) The proper interpretation of clauses commonly appearing in or as part of the form of building contract in general use in New South Wales and published jointly by the Royal Australian Institute of Architects and the Master Builders Federation of Australia.

(b) The choice between the correctness of the advisory opinion given by two Judges of the Court of Appeal (Hutley and Glass J.J.A.) in favour of the interpretation of these clauses contended for by the Respondent in matter no. 133 of 1977 between the same parties and the opinion of the remaining Judge of the Court of Appeal (Hope J.A.) and of the Judge at first instance Collins J.) in favour of the Applicant.

SWORN by the Deponent at Sydney before me:) (sgd) Kenneth Ramsay

L. Stubbs J.P.

A Justice of the Peace

Annexure "A"

ANNEXURE "A"

JUDGMENT OF THE HON. MR. JUSTICE COLLINS

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION No. of 197

CORAM: COLLINS, J.

WEDNESDAY 27th APRIL, 1977

IN THE MATTER OF AN ARBITRATION BETWEEN

MAX COOPER & SONS PTY LIMITED

and

THE UNIVERSITY OF NEW SOUTH WALES

HIS HONOUR: This is a Case Stated on agreed facts under s. 19 of the Arbitration Act (1902). The applicant for the Case Stated is Max Cooper & Sons Pty. Limited, hereafter referred to as the Builder, and The University of New South Wales, hereinafter referred to as the Proprietor.

By an agreement in writing dated 6th July, 1972, the Builder agreed to erect for the Proprietor a building at the University known as the Biological Sciences New Building. The price for the contract was $2,072,938. The date for practical completion of the work provided for in the contract was 18th July, 1973. The contract was in the printed form agreed to by the Royal Australian Institute of Architects and the Master Builders' Federation of Australia Inc. There were a number of delays during the progress of the work, in respect of which the builder claimed extensions of time for completion, and an entitlement to reimbursement for loss and expense incurred by it as a result of such delays.

The printed form of contract contains clauses dealing with causes of delay and reimbursement for loss or expense incurred by a builder as a result of delay, and such are provided for in printed conditions No. 24(g) and 24(i) in the contract.

The subject matter of this Case Stated is based upon the conditions, and Mr. Bruce of Counsel for the builder relies conditions as the basis for his claim that the question stated in the case should be answered in the affirmative.

It is convenient at this stage to set out the terms of conditions 24(g) and 24(i), inasmuch as the Builder relies upon them. These conditions, however, are preceded by conditions 24(a), (b) and (c), which provide that when it becomes evident to the Builder that the completion of the work is likely to be delayed he shall forthwith notify the Architect, and that if the delay is caused by one or more of the causes described in sub-cl. 24(g), the Builder shall be entitled to claim and shall be allowed an extension of time; and condition 24(g) then proceeds as follows:-

> "24(g). The causes of delay as referred to in sub-cls. (b), (c) and (f) of this clause are:

Annexure "A" (cont'd)

(i) By reason of Architect's instructions or variations, excepting instructions issued pursuant to Clause 10 of these conditions; and

(viii) By reason of civil commotion, any combination of workmen, or strikes or lockouts affecting the progress of the Works; and

(xiv) By reason of any other matter, cause or thing beyond the control of the builder". 10

In view of arguments addressed by Mr. Bruce, and by Mr. Shand, Q.C., of Counsel for the Proprietor, sub-condition 24(i) is quoted, insofar as it is relevant:

"24(i). The Builder shall be entitled to reimbursement of loss or expense incurred by him as a result of a delay in the progress of the Works where all the following apply:

(i) Delay was caused by: 20

(A) One or more of the causes numbered (i) ... in sub-cl. (g) in this clause; or

(B) One or more of the causes numbered ... (viii) and (xiv) in sub-cl. (g) of this clause where in the opinion of the Architect the Builder has so acted that he should be reimbursed for such expense; 30

(ii) An extension of the date for Practical Completion has been made, or should properly have been allowed in pursuance of this clause;

(vi) The Builder in giving notice to the Architect pursuant to sub-cl.(c) of this clause has stated his intention to make a claim under this sub-clause;

(vii) The Builder has given to the Architect details in writing of the nature of the claim as soon as practicable after the commencement of the delay, and at a time when details could be checked; 40

(viii) Within a reasonable time of the Date for Practical Completion being extended, or being deemed to be extended, the Builder has given to the Architect in writing details of the items of expense, the amount thereof or a close estimate thereof". Annexure "A" (cont'd)

The case as stated recites that in respect of certain delays the Builder claimed extensions of time for the completion of the work and entitlement for remuneration of loss or expense incurred by it as a result of such delays. A very substantial list of such delays is contained in the statement, but it is unnecessary to refer to this.

Paragraph 9 of the case as stated sets out:

"9. During the performance of the contract the contract sum was varied pursuant to special condition 3 thereof as follows".

Paragraph 9 then sets out the average wage as at tender, and the variation and date of rises, which were numerous.

The essence of the present dispute is reached when special condition 3 referred to in par. 9 of the case stated is examined.

There were a number of special conditions, which are in typewritten form and are annexed to the printed contract form; but special condition 3 provides for what is familiarly known as a Rise and Fall provision. That reads:

"SPECIAL CONDITION NO. 3. VARIATION OF CONTRACT SUM BY APPLICATION OF A RISE & FALL PROVISION.

(a) The Contract Sum is subject to variation by the application of the provisions of this clause to take into account variations in the cost of labour".

Then follows a clause fixing the times at which wage rates are to be examined, a number of definitions, and then the important sub-condition (d) of special condition No. 3 is set out in full:

Annexure "A" (cont'd)

"(d) In the event of there being an award or other variation affecting the average-hourly wage (including a variation resulting from alteration of ordinary working hours) the Contract Sum shall be adjusted by increase or decrease as the case may require by sixty per cent. of the amount that bears the same proportion to the uncompleted portion of the nett Contract Sum as at the date when such variation shall have become effective as the increase or decrease in the average hourly wage consequent upon such variations shall bear to the average hourly wage as defined in sub-cl.(c) hereof".

There are a number of other sub-conditions in special condition 3, the last of which is designated by the letter (h), but it is unnecessary to refer to these sub-conditions.

The matter of fundamental importance is that the parties agreed to a special condition limiting the increase or decrease in a rise and fall situation to sixty per cent. of the relevant amount.

Paragraph 10 of the case as stated relates that following the date for practical completion of the work the cost of performance of the work was increased by variations of the cost of labour, within the meaning of special condition 3 of the contract, and that such increased costs for work performed after 18th July, 1973, exceeded the amount recovered by the builder pursuant to special condition 3 for such work.

The critical claim by the Builder is stated in par. 12 of the case, in that it relates:

"12. In respect of such unrecovered increased costs of performance of the works, the Builder claimed to be entitled to remuneration as loss or expense pursuant to cl. 24(i) of the said contract ..."

The extent to which the increased costs appear is set out in cl. 16 of the case stated:

"The Builder claims reimbursement in this arbitration for such unrecovered increased costs of performance of said works and particularises such claims as follows: Annexure "A" (cont'd)

ADJUSTMENT to 60% 'Rise and Fall' Clause after the original Practical Completion date 18/7/73

On Uncompleted Work as at 18/7/73 = $420,937.97.

Av. Increases - 1972-1973 to 1973-1974 -

Labour 16.53%

Materials 12.18% p. (Ref. C/Stats. Index.) When Labour increases 100.00%

Materials increases 73.68%

& Combined Inputs increase 85.00%

This result is equivalent to labour rises only on 85% of the Contract Sum.

Deficiency in recovery of rises = 85% - 60%

= 25%".

The builder claims the sum of $20,562 by an increase on the claim of sixty per cent of uncompleted work to eighty-five per cent of uncompleted work after 18th July, 1973.

The question for the opinion of the Court is stated in the following terms:

"17. The question for the opinion of the Court is whether upon the true construction of the contract and upon the agreed facts set out herein the Builder is entitled to be reimbursed for any loss or expense incurred by it in respect of the said unrecovered increased costs of performance of the said works".

Despite the complexity of the statement of the basis for this claim, in my opinion the answer to the question can be simply stated: the builder's contention amounts to a claim that on the true

Annexure "A" (cont'd)

construction of the contract he is entitled to ignore the express limitation to sixty per cent contained in special clause 3(d). For the builder to succeed it would be necessary to read that specific limitation out of the contract.

It is my opinion that special condition 3, and sub-conditions 24(a) to 24(i) in the printed form do not operate in the same field. As Mr. Shand submits, the contention that cl.24(i) can be used to increase the rise and fall provision to eighty-five per cent, notwithstanding the express limitation of condition 3 to a sixty per cent rise and fall provision, amounts to an obvious contradiction in the construction of the contract.

No authorities were quoted in the course of argument no doubt because the case turns solely on the construction of this particular contract. Mr. Shand subsequently referred me to a par. 309 of the 21st Edition of Chitty on Contracts, where the following principle is stated:

> "General words in an agreement will be qualified by a subsequent special provision, unless full effect can be given to both parts of the instrument, without altering or modifying either". (Rigby v. Great Western Railway (1849) 4 Ex. 220 at 229.)

This statement in Chitty is only a re-statement of the old legal maxim, generalibus specialia derogant.

Even if the general words in printed conditions 24(a) to 24(i) could be construed as a general provision dealing with a rise and fall situation, it would obviously be qualified by the subsequent special provision limiting to sixty per cent the rise and fall situation. However, as previously indicated, I am of opinion that that printed clause and special condition 3 do not operate in the same field, and the contract clearly confines any rise or fall situation to a sixty per cent limitation.

I find it unnecessary to discuss other arguments advanced by Mr. Shand on the basis that in any event the provisions of printed cl.24(i) could not possibly be applied to the situation

as it existed particularly sub cll. 24(i)(i) B, 24(i)(ii), 24(i)(vi), 24(i)(vii) and 24(i)(viii) which are quoted above. Annexure "A" (cont'd)

In my opinion the builder's contention fails in limine under special condition 3. The question in the case stated is therefore answered in the negative.

The case may be returned to the arbitrators with this expression of opinion.

Annexures "B1 to B4" and "C" are reproduced elsewhere in the record.

No. 12

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL

No. 12
Order granting conditional leave to appeal 2nd August 1978

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION No. 12093 of 1978

THE UNIVERSITY OF NEW SOUTH WALES Applicant

MAX COOPER & SONS PTY. LIMITED Respondent

The Court orders that conditional leave to appeal to Her Majesty in Council is granted subject to the following conditions:

1. THAT the Appellant, within 21 days, enters into a bond or gives other security to the satisfaction of the Prothonotary in the amount of $100.00 for the due prosecution of the appeal and the payment of all such costs as may become payable to the Respondent in the event of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal as the case may be.

2. THAT the Appellant, within 42 days, have prepared the record, consisting of:

(a) The award of the arbitrators dated 7th April 1978,

(b) The judgments and order of the Court of Appeal of the 13th December, 1977,

No. 12

Order granting conditional leave to appeal 2nd August 1978. (cont'd)

(c) The Summons and Affidavit in the application made to this Honourable Court to set aside the arbitrators award and dealt with on the 2nd June 1978.

(d) The judgment and order of this Honourable Court thereon.

(e) The present application for conditional leave and the Affidavit filed in support thereof.

(f) This order.

It shall not be necessary to reproduce as part of the record more than once documents that are annexed to or form part or more than one of the documents lettered (a) to (f) above.

3. THAT within the said period of 42 days the Appellant shall dispatch the record so prepared to the Registry of Her Majesty's Privy Council.

4. THAT no proceedings shall be taken by the Respondent under Section 14 of the Arbitration Act, 1902, as amended, or otherwise for the enforcement of the award pending the decision of the appeal or the further order of Her Majesty in Council or of this Court and the time for the Respondent to take any such steps shall not run pending the decision of the appeal or such orders.

5. THE costs of this application shall be costs in the appeal.

ORDERED: 23rd June, 1978.

AND ENTERED: 2nd August, 1978.

BY THE COURT

L.S.

DEPUTY REGISTRAR

No. 13

Order granting Final Leave to appeal to Her Majesty in Council 13th September 1978

No. 13

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION No. 12093 of 1978

THE UNIVERSITY OF NEW SOUTH WALES Applicant

MAX COOPER & SONS PTY. LIMITED Respondent

The Court orders that:

1. Final leave to appeal to Her Majesty in Her Majesty's Privy Council from the whole of the Judgment and Order of this Honourable Court given and made herein on 2nd June 1978, be and the same is hereby granted to the Appellant.

2. Costs of the Application to be costs in the Appeal.

ORDERED: 13th September, 1978

AND ENTERED: 20th September, 1978

BY THE COURT

(SGD) G. WHALAN L.S.

DEPUTY PROTHONOTARY.

IN THE PRIVY COUNCIL No. 35 of 19[redacted]

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION IN CAUSE NO. 12093 OF 1978

BETWEEN:

THE UNIVERSITY OF NEW SOUTH WALES — Appellants

- and -

MAX COOPER & SONS PTY LIMITED — Respondent

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