[HIGH COURT OF AUSTRALIA.]

THE CARPATHIA TIN MINING COMPANY, NO LIABILITY . . . . . } APPELLANTS;

AND

THE WHITE CRYSTAL TIN MINING COMPANY, NO LIABILITY . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

SYDNEY, *April* 10, 11, 25.

Barton, Gavan Duffy and Rich JJ.

Contract—Construction—Agreement for crushing and concentrating ore—Measurement of ore.

The appellants entered into an agreement with the respondents by which the respondents agreed to crush tin ore for the appellants and to extract therefrom a certain proportion of the tin in the form of concentrates which should contain a certain proportion of metallic tin, and to hand over to the appellants all the concentrates. In the absence of means for weighing the ore which was delivered, the agreement provided that the weight of the ore delivered should be estimated according to the weight of several cubic feet of ore, the cubic contents of one of the trucks in which the ore was delivered, and the number of truck loads delivered. A provision was also made for taking assays of the crushed ore and of the tailings at regular intervals during the treatment.

Held, that in the circumstances the provision for taking assays, which provided the factors necessary for ascertaining the proportion of the tin extracted from the ore, must be taken to be the agreed method of ascertaining whether the respondents had extracted the agreed proportion of the tin from the ore, and therefore if, applying that method, it was found that the respondents had extracted the agreed proportion of tin and if all the concentrates produced, which in fact contained all the required proportion of metallic tin, were delivered to appellants, the respondents had performed the contract.

Decision of the Supreme Court of New South Wales affirmed.

H. C. OF A. 1918.

CARPATHIA TIN MINING CO., NO LIABILITY v. WHITE CRYSTAL TIN MINING CO., NO LIABILITY.

APPEAL from the Supreme Court of New South Wales.

On 17th August 1916 an agreement was made between the Carpathia Tin Mining Company, No Liability, and the White Crystal Tin Mining Company, No Liability, which, so far as is material, was as follows :—

1. The White Crystal Company to crush in its battery 4,000 tons or more of tin ore which is to be supplied by the Carpathia Tin Mining Company.

2. The White Crystal Company to extract 74 per cent. of the metallic tin in the form of concentrates from the ore delivered by the Carpathia Tin Mining Company, and the concentrates recovered therefrom shall be dressed to contain 65 per cent. of metallic tin.

4. The Carpathia Tin Mining Company shall deliver the ore to be crushed into a bin at the White Crystal Company's open cut and as directed by the White Crystal Company's manager or his deputy.

8. The Carpathia Tin Mining Company to supply bags and provide labour for the bagging and weighing of concentrates.

9. The White Crystal Company shall immediately hand over to the Carpathia Company all concentrates when dressed to a marketable condition, and such concentrates shall be removed by the Carpathia Tin Mining Company as may be required by the White Crystal Company.

11. The Carpathia Tin Mining Company has the right to appoint some suitable and competent person or persons to inspect and report at any time on all work being carried out during the crushing and dressing operations, and the White Crystal Mining Company agrees to allow such persons to inspect the work and offer any information thereon that may be desired.

12. The battery pulp and tailings shall be sampled by a representative of the Carpathia Tin Mining Company and the manager of the White Crystal Company at regular intervals, a referee sample to be taken and sealed with date and number thereon and all results calculated on the fire assay by cyanide reduction. In the event of a dispute in assay results the sealed referee sample to be forwarded to the secretary of the Carpathia Tin Mining Company, who shall

submit same to an independent and competent assayer in Sydney. The White Crystal Company shall offer every facility for the sampling of the battery pulp and tailings, and the assay value of same shall be based on the average of samples taken over a period of a fortnight.

14. If any dispute arises between the Carpathia Tin Mining Company and White Crystal Company as to the observance of any of the covenants, conditions and stipulations therein contained the same shall be decided by arbitration under the provisions of the *Arbitration Act* of New South Wales.

15. The quantity of ore delivered by the Carpathia Tin Mining Company shall be determined by weighing several cubic feet of ore, and measuring the cubic contents of a truck from which the contents of each truck shall be calculated. All the trucks will be counted and the average weight obtained. This rule shall be observed throughout the crushing. The whole of the crushing shall be under the supervision of the manager of the White Crystal Mine or his deputy.

16. In the event of either party to this agreement failing to observe the foregoing provisions and conditions the other party shall have the right to terminate and cancel this contract without prejudice to the right to recover damages in respect of any breach.

18. We the undersigned hereby agree in accordance with the foregoing specifications and conditions for the White Crystal Company to crush and dress about 4,000 tons of ore for the Carpathia Tin Mining Company for the sum of £1 1s. 6d. per ton.

After about 2,000 tons of ore had been treated disputes arose between the two Companies which were referred to an arbitrator, and an order was made by the Supreme Court, by consent of the parties, that the arbitrator should make his award in the form of a special case for the decision of the Supreme Court, and should embody in the special case the matter of his construction of the agreement of 17th August 1916 and his findings of fact. The arbitrator thereupon made his award, in which he found the following facts (*inter alia*) :—

1. The word " pulp " means the crushed ore mixed with water

H. C. OF A. 1918.

CARPATHIA TIN MINING CO., NO LIABILITY v. WHITE CRYSTAL TIN MINING CO., NO LIABILITY.

as it flows from the battery and before any of the tin contents has been extracted.

2. The word "tailings" means all the waste product leaving the plant after having been subjected to treatment for the extraction of the tin contents of the original ore: it is crushed ore mixed with water, minus the concentrates which have been extracted by the plant.

3. The word "concentrates" is the term applied to the product resulting from the separation of the heavy material of the ore, in this case chiefly tin oxide, from the lighter and worthless constituents of the ore.

4. The representatives of the two companies agreed upon the method of taking samples of both pulp and tailings. The samples so taken were assayed in accordance with the provisions of the agreement, and, no dispute having arisen as to the accuracy of the assays from the samples, no sample was referred to a referee assayer.

5. The samples of pulp were taken to find the tin contents of the ore and the samples of tailings to find the tin contents of the tailings.

6. If the degree of accuracy between the two sets of samples should arise the method of sampling the pulp would give more reliable results than the method agreed upon of sampling the tailings, which was unreliable.

7. 2,014 tons of ore were delivered by the Carpathia Company to the White Crystal Company of an average value of 2·7 per cent. tin equalling a total content of 54·38 tons of tin, and were crushed. The tonnage was estimated by the method set out in clause 15 of the agreement.

8. 47·97 tons of concentrates averaging 65·9 per cent. tin were delivered by the White Crystal Company equalling 48·63 tons of concentrates averaging 65 per cent. tin and containing 31·61 tons of tin.

9. The agreed average assay of the tailings was 0·46 per cent., which should equal 9·04 tons tin.

10. No appliances were available for weighing the ore either before or after crushing, as was known to the parties when the agreement was made.

11. The ore crushed each week was estimated by the manager of the White Crystal Company and such estimates were forwarded by him to the secretary of the Carpathia Company.

12. The White Crystal Company has delivered all the concentrates it has extracted.

13. If the weighing, sampling and assaying of the pulp tailings and concentrates had been carried out so as to give correctly their metal contents, then the tin in the concentrates delivered should equal the quantity of tin shown as extracted by calculation by the assays of pulp and tailings.

The arbitrator then stated that on the construction of the agreement he was of opinion that clause 2 required the White Crystal Company to extract in the form of concentrates, assaying not less than 65 per cent. of tin, 74 per cent. of the contents of the ore delivered; that clause 2 coupled with clause 9 required the White Crystal Company to deliver to the Carpathia Company the amount that should be extracted under clause 2; and that clause 12 set out the manner in which the value of the ore delivered and the value of the tailings was to be determined.

The arbitrator then set out the contentions of counsel as to the construction of the agreement. The contention of counsel for the White Crystal Company was as follows: "That the assay values of the battery pulp and tailings determined in accordance with clause 12 of the agreement must both be taken into consideration, but that the same are only relevant to and conclusive upon the question whether 74 per cent. of the tin contents of the ore have been extracted in the process, and that if by comparison of such assay values it appears that the tin contents of the tailings do not exceed 26 per cent. of the total tin contents of the battery pulp, and if the concentrates actually extracted have been dressed to contain not less than 65 per cent. of metallic tin, the White Crystal Company's obligation under clause 2 of the agreement is discharged and upon delivery of the whole of the concentrates actually extracted and so dressed its obligation under clause 9 of the agreement is likewise discharged."

The contention of counsel for the Carpathia Company was as follows: "That if the Companies are to be bound by both the assays

H. C. OF A. 1918.

CARPATHIA TIN MINING CO., NO LIABILITY v. WHITE CRYSTAL TIN MINING CO., NO LIABILITY.

of pulp and tailings in determining whether the obligation under clause 2 of the agreement has been discharged, then that the true construction of the agreement requires that the concentrates to be delivered under clause 9 of the agreement should equal the quantity shown as extracted by the calculation of these assays and not only the concentrates found to have been actually extracted."

The arbitrator then stated the following questions for the opinion of the Court :—

(1) Whether his construction of the agreement was correct.

(2) Whether the contention of counsel for the White Crystal Company was correct.

(3) Whether the contention of counsel for the Carpathia Company was correct.

The Full Court answered the first question in the negative, the second in the affirmative, and the third in the negative.

From that decision the Carpathia Company now appealed to the High Court.

Campbell K.C. (with him *Watt* and *H. G. Edwards*), for the appellants.

Knox K.C. (with him *Leverrier* K.C. and *Mocatta*), for the respondents.

Cur. adv. vult.

April 25.

The following judgments were read :—

BARTON J. Upon a reference between these parties under the *Arbitration Act* of 1902, a Justice of the Supreme Court ordered by consent that the arbitrator should make his award in the form of a special case for the decision of the Supreme Court, and should embody in the special case the matter of his construction of an agreement between the parties dated 17th August 1916 and his findings upon the facts which appeared to him relevant to his award and the construction of that agreement.

The arbitrator complied with the order, and the special case included his findings of fact. The questions stated for the opinion of the Court were (1) whether the arbitrator's construction of

the agreement was correct; (2) whether the contention raised by counsel for the respondent Company was correct; and (3) whether the contention raised by counsel for the appellant Company was correct.

To the first of these questions the Supreme Court answered in the negative; to the second in the affirmative; and to the third in the negative. These answers amounted to a determination in favour of the now respondent Company. I need not set out the special case, to which the agreement in question is an annexure.

The appellant Company was in effect claiming damages for an alleged shortage in the delivery of the concentrates from certain tin ore delivered for treatment to the respondent Company. The parcel of ore which the respondent Company agreed to treat was "four thousand tons or more." When tin ore, of a weight estimated at 2,014 tons in accordance with par. 15 of the agreement, had been dealt with, the appellant Company, alleging that the respondent Company had failed to observe the provisions and conditions of the agreement, cancelled it by action under clause 16. The method of approximation adopted by clause 15 for ascertainment of the weight of ore delivered was apparently arrived at because no appliances were available for weighing the ore, either before or after crushing, as was known to the parties when the agreement was made.

Before discussing the agreement it is as well to mention that the parties agreed before the arbitrator, who was of the same opinion, that clause 2 required the respondent Company to extract, in the form of concentrates assaying when dressed not less than 65 per cent. tin, 74 per cent. of the whole metallic tin contents of the ore delivered; but the parties differ radically as to the meaning of the obligation thus imposed on the respondent Company. All the concentrates obtained from the ore delivered were handed over to the appellant Company when dressed to a marketable condition.

The argument on each side rested practically on clauses 2, 12 and 15. But the gist of the contest was as to whether clause 12 was intended for a relative or an absolute criterion. It was indeed argued that it afforded no criterion at all, but I dismiss that contention, because no satisfying reason has been adduced for its

H. C. OF A. 1918.

CARPATHIA TIN MINING CO., NO LIABILITY v. WHITE CRYSTAL TIN MINING CO., NO LIABILITY.

Barton J.

inclusion in the agreement unless it was intended as a test of the one kind or the other.

The appellant Company contends that on the result of the assays of samples made under clause 12 it was entitled to receive concentrates of the agreed percentages, and that the percentages must apply to a weight of 2,014 tons of ore, in which case the shortage is as claimed by it. That is to say, that if clause 12 is to afford a test at all, it is a test of the quantity of tin contained in a fixed weight of ore, although the weight of ore is to be assumed as the result of a process substituted for an actual weighing of the ore. On the other hand the respondent Company contends that it has been underpaid. It argues that the test must be purely relative; in other words, that it was a criterion adopted to show approximately the efficacy of the extraction, and that if its extractions were proved by that test to be according to its undertaking, it had performed its contract.

It will be observed that the agreed method was to take samples of the pulp and tailings and assay them. The basis of this was that the proportion of tin in the pulp less the proportion of tin in the tailings would show the proportion of tin in the concentrates. It was open to the parties to have provided for another method. They could have agreed that the samples to be compared should be the concentrates and the pulp, not the tailings and the pulp. It is obvious that either method would yield an approximately accurate estimate. The method adopted has been condemned by the arbitrator as unreliable. Whether that be so or not, it is that to which the parties agreed. There was no dispute as to the results of the assays, so that there was no occasion to submit a sealed referee sample to an independent assayer. Clause 12 concludes with these words: "The assay value of same" (that is, the pulp and tailings) "shall be based on the average of samples taken over a period of a fortnight."

There is to my mind no sign of an agreement that the results shown by the assays should be applied to any specified weight of ore. The whole frame of clause 12 goes to negative such a supposition as that the respondent Company should apply the results obtained under its operation to any assumed weight of ore.

It is related to the degree of extraction of tin from the ore treated, much or little, and it would be out of reason to say that such results, manifestly relative in themselves, should be applied so as to bind the White Crystal Company to deliver concentrates of a certain strength computed arbitrarily upon a weight of ore which might vary upwards or downwards according to the accuracy of the method adopted under clause 15. According to the test provided by the parties themselves the White Crystal Company arrived under clause 12 at results which were to satisfy or not to satisfy the contract according to the assay values based on the average of samples. The assays showed by the agreed method that by this process it did what was required. The two factors of ascertainment being the pulp and the tailings, the tin values in the pulp and the tailings when compared established in the manner jointly adopted the tin values in the concentrates. It delivered all the concentrates it made from the ore it received dressed to the required percentage. In my view it performed its contract.

It follows that the appeal should be dismissed with costs.

GAVAN DUFFY AND RICH JJ. In order to regulate the performance of the contract under consideration and to adjust the rights of the parties, it was necessary to ascertain the quantity of ore delivered by the appellant Company to the respondent Company and the percentage of metallic tin extracted from that ore by the respondent Company. There were no means available for determining the exact quantity of ore delivered, and the parties by clause 15 established a method by which the quantity could be roughly ascertained, and agreed that the quantity so ascertained should be deemed to be the amount actually delivered. It is to be observed that the liability of the respondent Company was not to extract any proportion of the tin contained in any particular part of the ore delivered but to extract 74 per cent. of the aggregate of the tin in the whole of that ore. We are not able to say whether it would be possible to make an exact appraisement on this head, but such an appraisement, if possible, would obviously require much time and labour. In these circumstances one would have expected to find a specific agreement by the parties to take assays, to accept

H. C. OF A. 1918.

CARPATHIA TIN MINING CO., NO LIABILITY v. WHITE CRYSTAL TIN MINING CO., NO LIABILITY.

Gavan Duffy J. Rich J.

the assays as representative of the whole mass, and to agree that the percentage of tin extracted should be fixed by means of a comparison of the results of the assays. Clause 12 contains elaborate provisions for the making of accurate assays of portions of the ore and of portions of the tailings, and so provides the factors necessary for the determination of the percentage of tin extracted from the ore by the respondent Company, but it does not in terms provide that the question shall be so determined. We think that it is clearly the intention of the parties that it should be so determined and that we must imply an agreement to that effect. If this is so, the decision of the Supreme Court of New South Wales is right and the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Cecil A. Coghlan & Co.*
Solicitors for the respondents, *Perkins, Stevenson & Co.*

B. L.