[HIGH COURT OF AUSTRALIA.]

YORK AIR CONDITIONING AND REFRIGERATION (A/SIA.) PROPRIETARY LIMITED . . . . . DEFENDANT, } APPELLANT;

AND

THE COMMONWEALTH . . . . . PLAINTIFF, } RESPONDENT.

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SYDNEY, *June* 17, 20, 21, 22; *July* 1.

Williams J.

Nov. 8-11, 14; *Dec.* 21.

Latham C.J., Rich, Dixon, McTiernan and Webb JJ.

Contract—Air-conditioning and refrigeration equipment—Supply—Contract between Commonwealth and company—"Maximum price" contracts—General conditions—Clause for reduction of price—Interpretation—Certainty—Option—Exercise within reasonable time—Implied term—Excess payments—Recovery—Money paid under mistake of fact—Money had and received.

During the war a company contracted with the Ministry of Munitions, by eight maximum-price contracts to provide portable cold storage rooms for defence purposes. Clause 1 (*a*) of the General Conditions incorporated in the contracts provided that the price was subject to check by the Director of Finance or his representative and if the profit margin on ascertained costs in accordance with "standard conditions" exceeded ten per cent "the price may be reduced to a figure" which would include a profit margin of not less than ten per cent. The Ministry of Munitions had only one document called "standard conditions." This was headed "Standard Conditions applicable to Contracts on a Cost Plus Profit Basis" and dealt with the ascertainment of production costs. None of the contracts contained provision for progress payments but during the currency of the contracts such payments were made upon the company undertaking to afford all facilities to enable costs to be ascertained in accordance with the terms of the contracts and to refund any amount found to be overpaid. The contracts were terminated on the cessation of hostilities in September 1945. As a result of an investigation of its books the company was informed by the Ministry in March 1946 as to seven contracts, and in July 1946 as to one contract, that "it has been decided . . . that the profit margin shall be limited to 10% and the contract prices reduced as set out," and the company was requested to repay the amount said to have been overpaid. Upon an action by the Commonwealth to recover this amount *Williams* J. gave judgment for the Commonwealth for the amount claimed. Upon appeal,

Held, by *Latham* C.J., *Rich*, *Dixon* and *McTiernan* JJ. (*Webb* J. dissenting) that the appeal should be dismissed; by *Latham* C.J. and *McTiernan* J. on the ground that the money was repayable under the terms of the contracts,

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and by *Rich* and *Dixon* JJ. on the ground that the money claimed was not paid under mistake of fact but was paid provisionally and therefore could be recovered in an action for money had and received.

Held further by *Latham* C.J., *Rich*, *Dixon* and *McTiernan* JJ. (1) that clause 1 (*a*) of the General Conditions was not uncertain but conferred upon the Commonwealth, in cases where the profit margin on costs exceeded ten per cent, an option to reduce the price to the extent of the excess; that that option had been properly exercised, and (by *Latham* C.J., *Dixon* and *McTiernan* JJ.) it had been so exercised within a reasonable time, and (2) that the standard conditions were not, in the circumstances, vague and uncertain. *Per Webb* J.: there should be a new trial on the ground that material evidence was overlooked.

Decision of *Williams* J., by majority, affirmed.

APPEAL from *Williams* J.

In an action brought in the High Court by way of writ of summons the Commonwealth of Australia claimed from York Air Conditioning and Refrigeration (A/sia) Pty. Ltd. the sum of £15,402 7s. with interest.

The amended statement of claim, omitting pars. 6 and 9 which were deleted at the hearing of the action, was substantially as follows:

1. The defendant York Air Conditioning and Refrigeration (A/sia) Pty. Ltd. is a company duly incorporated under the laws in force in the State of New South Wales and able to be sued in that name.

2. The defendant has at all material times been entitled to enter into the agreements hereinafter mentioned.

3. The defendant has at all material times carried on business as a manufacturer and distributor of certain products in the Commonwealth.

4. The plaintiff by the Board of Area Management, New South Wales, of the Department of Munitions entered into certain agreements with the defendant for the supply of certain goods by the defendant to the plaintiff which were required by the plaintiff for the defence of the Commonwealth.

5. Three of those agreements were dated respectively 21st October 1942; 22nd July 1943; and 2nd October 1943, and each of them contained the provision:—"The price is (prices are) subject to check by the Director of Finance or his representative, and if the profit margin on ascertained costs in accordance with 'Standard Conditions' exceeds 10% the price (prices) may be reduced to a figure which would include a profit margin of not less than 10%."

7. The prices in those agreements were duly checked by the Director of Finance or his representative and the profit margin on ascertained costs in accordance with "Standard Conditions"

exceeded ten per cent and the prices were duly reduced by the plaintiff to a figure which included a profit margin of not less than ten per cent within the meaning of the said provisions.

8. Five of those agreements were dated respectively 2nd December 1942 ; 14th January 1944 and identified by the letters M.A.R.N. 1384 ; another agreement of the same date and identified by the letters M.A.R.N. 1389 ; 11th February 1944 ; 14th March 1944 ; and each of them contained the provision :— " The price is (prices are) subject to check by the Director of Finance or his representative, and if the profit margin on ascertained costs in accordance with ' Standard Conditions ' exceeds the percentage shown in the order, the price (prices) may be reduced to a figure which would include a profit margin of not less than such percentage."

10. The defendant agreed with the plaintiff in writing on 6th August 1943, 8th October 1943, 23rd February 1944, 29th August 1944, 8th November 1944 in respect of each and every of those agreements that in consideration of progress payments being made by the plaintiff to the defendant the defendant would afford all facilities to enable costs to be ascertained in accordance with the terms of those agreements and further would refund to the plaintiff any amount found to have been overpaid on such investigation of costs under the terms of the said agreements.

11. The prices under the agreements mentioned in par. 8 hereof were duly checked by the Director of Finance or his representative and the profit on ascertained costs in accordance with " Standard Conditions " referred to in the last-mentioned clause exceeded the percentage shown in the respective orders the subject of those agreements respectively and prices under those agreements were accordingly reduced by the plaintiff to a figure which would include a profit margin of not less than such percentage.

12. The respective amounts of the reductions so ascertained referred to above were as follows :—

Date of Agreement.	*Amount of Reduction.*
21st October, 1942	£3,278 14 11
22nd July, 1943	7,936 1 1
2nd October, 1943	6,406 4 4
2nd December, 1942	247 10 6
14th January, 1944 M.A.R.N. 1384	76 0 1
14th January 1944 „ 1389	122 8 11
11th February, 1944	58 6 11
14th March, 1944	58 7 0
	£18,183 13s. 9d.

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13. After those reductions had been ascertained as hereinbefore mentioned it was agreed between the plaintiff and the defendant by way of account stated by letter from the Acting Crown Solicitor for the Commonwealth to the defendant dated 21st October 1946 and letter from the defendant to the Acting Crown Solicitor for the Commonwealth dated 30th October 1946 that the amount of that reduction was the said sum of £18,183 13s. 9d. and it was agreed between the plaintiff and the defendant that the sum of £2,781 16s. 9d. owing by the plaintiff to the defendant should be set off against the sum of £18,183 13s. 9d. leaving the amount due by the defendant to the plaintiff on accounts stated between them at the sum of £15,402 7s.

14. The plaintiff has paid the said sum of £15,402 7s. to the defendant.

By its amended statement of defence the defendant did not admit that the contents of the agreements mentioned in pars. 5 and 8, or of the documents mentioned in par. 10 of the amended statement of claim, were correctly or sufficiently set forth in those paragraphs, and it submitted that the clauses respectively set forth in pars. 5 and 8 of the amended statement of claim were invalid and inoperative. The remainder of the amended statement of defence was substantially as follows :—

2, 3, 8 and 10. In further answer to pars. 5 and 8 of the amended statement of claim the defendant said that it was a term and condition of those agreements and each and every one of them (2, 8) that any power therein given to the Director of Finance or his representatives to check the price or prices under those agreements or any of them should be exercised by the Director of Finance or his representative within a reasonable time after such price or prices should become ascertainable yet the Director of Finance or his representative did not check the price or prices under those agreements or any of them within such reasonable time ; and (3, 10) that the powers if any therein given to any person to reduce the price or prices under those agreements or any of them as therein stated or at all should be exercised within a reasonable time after the price or prices under those agreements and each and every one of them should become ascertainable but the power if any so to reduce the said price or prices was not exercised by any person within such reasonable time.

6. In answer to par. 7, the defendant denied that the prices therein mentioned were duly or at all checked by the Director of Finance or by his representative or by any person, or that the profit margin on ascertained costs in accordance with " Standard

Conditions" exceeded ten per cent or that the prices were duly or at all reduced by the plaintiff as mentioned therein.

13. In further answer to par. 10, the defendant said that the consideration for the promise if any alleged by the plaintiff was that the plaintiff should make to the defendant progress payments equal to ninety per cent of the value of certain orders given by the plaintiff to the defendant and the plaintiff did not make progress payments equal to such ninety per cent.

14. In answer to par. 11, the defendant denied that the prices mentioned therein were duly or at all checked by the Director of Finance or by his representative or by any person, or that the profit on ascertained cost in accordance with "Standard Conditions" therein referred to exceeded the percentage shown in the respective orders or any of them the subject of those agreements or any of them or that the prices or any of them under those agreements or any of them were accordingly or at all reduced by the plaintiff to a figure which would include a proper margin of not less than that such percentage.

15. In answer to par. 12, the defendant said that it did not know and could not admit that the respective amounts of the alleged reductions were correctly or sufficiently set forth therein.

16. In answer to par. 13, the defendant denied that after the alleged reductions had been ascertained or at any time it was agreed between the plaintiff and the defendant by the letters therein mentioned or at all by way of account stated or at all that the amount of that alleged reduction was the sum of £18,183 13s. 9d. or any sum or that it was agreed between the plaintiff and the defendant that the sum of £2,781 16s. 9d., or any sum owing by the plaintiff to the defendant should be set off against that alleged sum of £18,183 13s. 9d. or any sum, or that there was a sum of £15,402 7s. or any sum due by the defendant to the plaintiff on accounts stated between them or at all.

17. In answer to par. 14, the defendant said that the said sum of £15,402 7s. was at all material times due and owing by the plaintiff to the defendant and was duly paid by the plaintiff to the defendant pursuant to its obligations to the defendant under the said agreements and not otherwise.

18. Alternatively to clause 17 of the amended statement of defence and in further answer to par. 14 of the amended statement of claim, the defendant said that the plaintiff paid to the defendant the said sum of £15,402 7s. in purported satisfaction of the plaintiff's obligations under the said agreements and not otherwise and with the intention that the defendant should receive and deal with that

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sum as its own exclusive property and the defendant had received and dealt with that sum accordingly and had otherwise altered its position to its detriment upon the footing that that sum was due to it under those agreements and that pursuant to the plaintiff's said payment thereof might treat the same as its own exclusive property.

19. In answer to the amended statement of claim the defendant by way of counter claim said that the plaintiff was indebted to the defendant for money payable by the plaintiff to the defendant for goods sold and delivered by the defendant to the plaintiff and for goods bargained and sold by the defendant to the plaintiff and for work done and materials provided by the defendant for the plaintiff at its request, the amount so short paid being the sum of £2,781 16s. 9d.

The plaintiff joined issue on clauses 1 to 18 inclusive of the amended statement of defence. The plaintiff (2) in further answer to the amended statement of defence said that the sum of £15,402 7s. was paid by it to the defendant before the reductions mentioned in par. 12 of the amended statement of claim had been or could be ascertained and that sum of £15,402 7s. was paid by the plaintiff to the defendant as the defendant at all times well knew upon the footing agreed to by the defendant and not otherwise that the defendant would pay to the plaintiff the amount of those reductions when ascertained and the plaintiff had requested the defendant to pay to the plaintiff that sum of £15,402 7s. which the defendant refused and neglected to do and the whole of that sum was unpaid to the plaintiff; and (3), in answer to clause 19 of the amended statement of defence the plaintiff said that it was and always had been entitled to and had set off the said sum of £2,781 6s. 9d. against the sum of £15,183 13s. 9d. referred to in par. 12 of the amended statement of claim.

The defendant joined issue on pars. 2 and 3 of the plaintiff's amended reply.

Final delivery was respectively made under the various contracts as follows:—M.A.R.N. 59—22nd March 1944; M.A.R.N. 1384—3rd February 1944; M.A.R.N. 1389—12th May 1944; M.A.R.N. 1419—26th June 1944; M.A.R.N. 1472—9th October 1944; M.O.N. 2196—2nd March 1944; M.O.N. 3144—12th April 1944; and M.A.R.N. 21—14th June 1945.

The General Conditions (Exhibit C) incorporated in contract M.O.N. 3144, and which was, in effect, typical of other contracts, contained provisions as follows:—" Price Check—(*a*) The price is (prices are) subject to check by the Director of Finance or his

representative, and if the profit margin on ascertained costs in accordance with 'Standard Conditions' exceeds 10% the price (prices) may be reduced to a figure which would include a profit margin of not less than ten per cent . . . Sub-contracts— . . . (c) In the event of any sub-contract being accepted on a firm price quotation or tender it is to be a condition that should prices exceed £500 the following clause will form part of the contract: 'The prices are subject to check by the Director of Finance or his representative, and if the profit margin on ascertained costs in accordance with Standard Conditions exceeds 10% the prices may be reduced to a figure which would include a profit margin of not less than ten per cent.' "

By letters dated 6th August 1943, 8th October 1943, 23rd February 1944, and 29th August 1944 to the Ministry of Munitions, the defendant stated that " in consideration of progress payments equal to 90% of the value " of certain orders referred to in the two first-mentioned and in the last-mentioned letters, and " in consideration of payments equal to the total value of " certain orders mentioned in the letter dated 23rd February 1944, it " undertakes to afford all facilities to enable costs to be ascertained in accordance with the terms of the said " respective orders " and further undertakes to refund to the Commonwealth any amount found to have been overpaid on such investigation of costs under the terms of the said " respective orders.

Orders Nos. M.O.N. 2196 and 3144 were referred to in a letter dated 27th June 1944 from the Ministry of Munitions to the defendant wherein it was stated that as a result of a preliminary investigation of the costs of the orders, and subject to any adjustments which might be necessary in connection with sub-contracts and royalty charges, it appeared that payment had been made of an amount which was something in excess of the amount which would be finally payable to the defendant; that in the circumstances it was not proposed to make further payments against the orders until the investigations were completed and the prices due to the defendant finally determined; and that it would be agreed that no good purpose would be served in paying any sum in excess of the amount which would be due, as such over-payment would have to be refunded to the Department.

A letter dated 8th November 1944 from the defendant to the Ministry of Munitions was, so far as material, in the following terms: " We have received advice from the Accounts Section of the Board of Area Management to the effect that, pending cost investigation, only 75% progress payment will be made on equipment already

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delivered under M.A.R.N. 1472 . . . You will recall that 10% has already been retained by the Board of Area Management in respect of contracts M.O.N. 2196, M.O.N. 3144 and M.A.R.N. 21, amounting to many thousands of pounds, pending cost investigation. In the circumstances we request that full payment be made in terms of our claims on the small contract and to enable our accountancy system to operate without confusion, on the understanding, of course, that a refund will be made by this Company should cost investigation prove the 10% profit to have been exceeded."

In a letter dated 20th March 1946 to the defendant, the State Controller of Munitions referred to Orders M.A.R.N. 59, 1384, 1389, 1419, 1472, M.O.N. 2196 and 3144 and said that " consideration has been given to a Cost Investigator's report on the above orders and it has been decided in terms of the orders that the profit margin shall be limited to 10% and the contract prices reduced as set out hereunder. . . . Payments amounting to £128,420 9s. 10d. have already been made to your company in respect of these orders, thus revealing an overpayment of £11,777 9s. 5d. It would be appreciated if you would be good enough to forward your cheque for this amount at an early date " ; and, by a letter dated 17th July 1946, the State Controller of Munitions informed the defendant that as against that total of £11,777 9s. 5d. contra entries amounting to £2,311 19s. 9d. had been made in respect of the eight contracts leaving a balance of £9,465 9s. 8d. to which balance must be added an amount of £6,406 4s. 4d. overpaid by the Department against Order M.A.R.N. 21, making the total amount immediately owing by the defendant £15,871 14s.

The defendant replied by letter dated 24th July 1946, in which it informed the State Controller, *inter alia*, that " We do not dispute the 10% profit limitation clause existing in the contracts carried out for your Department but we do bring to your notice the fact that it has been expressly stated that the rate of profit may be reduced to 10% at the option of the Department. From this we conclude that under exceptional circumstances such a condition would not necessarily be enforced. . . . On the subject of profit margins generally, we bring to your notice the fact that, following the end of the war and the cancellation of a number of Munitions contracts held by this Company, a considerable difficulty is being experienced in the reconversion of our activities to that of peace-time trading under present industrial conditions. . . . Present day conditions are undoubtedly an aftermath of the war and being such we suggest that they should be taken into serious consideration when assessing amounts alleged to be repayable by

this Company on any contract carried out during the war." To that letter the State Controller replied by letter dated 13th August 1946 that it was not considered that there were any exceptional circumstances existing so far as the Department's contracts with the defendant were concerned that would justify the allowance of a profit in excess of ten per cent except to the extent of making good the loss of £469 7s. incurred by the defendant on order M.A.R.N. 1523, making the net overpayment by the Department to the defendant £15,402 7s. The State Controller said that the then present difficulties of commercial production were appreciated but they were not factors that could be taken into consideration in the settlement of contracts which must be determined in accordance with the terms of the respective orders.

Further facts appear in the judgments hereunder.

The action was heard before *Williams* J.

C. A. Weston K.C. and *E. J. Hooke*, for the plaintiff.

K. A. Ferguson K.C. and *J. G. Coyle*, for the defendant.

Cur. adv. vult.

July 1.

WILLIAMS J. delivered the following written judgment:—

In this action the Commonwealth is suing the defendant to recover certain moneys alleged to have been overpaid in respect of eight contracts entered into between the parties in the period 21st October 1942 to 14th March 1944. They can be identified as MARN 59, MARN 1384, MARN 1389, MARN 1472, MARN 21, MON 2196 and MON 3144. The total amount alleged to have been overpaid on the eight contracts is £18,183 13s. 9d. but the plaintiff admits that there is a sum of £2,781 6s. 9d. short-paid on another contract A105 MARN 1523 which should be set off against this sum so that the plaintiff's claim is for the balance, that is to say £15,402 7s. In the statement of defence the defendant denies that it is liable to repay any part of the sum of £18,183 13s. 9d. on a number of grounds and counterclaims for payment of the sum of £2,781 6s. 9d. The eight contracts in suit were made on behalf of the plaintiff by the Board of Area Management, New South Wales, of the Department of Munitions and were for the supply of refrigeration equipment required by the plaintiff for the defence of the Commonwealth. Each of the contracts contains an agreement by the plaintiff to pay a fixed price for the goods supplied and also an agreement that the

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price is subject to check by the Director of Finance or his representative, and if the profit margin on ascertained costs in accordance with "Standard Conditions" exceeds ten per cent the price may be reduced to a figure which would include a profit margin of not less than ten per cent. The standard conditions (Exhibit B) incorporated in the contracts are stated to be applicable to contracts on a cost plus profit basis and provide for payment to be made to the contractor for the performance of the contract of the sum of (a) production cost as therein defined (b) the remuneration or profits as agreed upon. The standard conditions contain nine paragraphs. Production cost is defined in par. 2. I shall not set out the text of the various items except that of overhead expense. The items are divided into (a) direct material cost; (b) direct labour cost; (c) direct expense; and (d) overhead expense. Overhead expense is defined as "any other cost or expense attributable to the contract which is not conveniently chargeable directly to the product or process and which is not a cost or expense disallowed by these conditions." Paragraph 3 defines certain items which shall be credited to production cost. Paragraph 4 defines items which shall be excluded from production cost. The items include (b) remuneration of directors, officers and other employees to the extent that such exceeds amounts which are reasonable, taking into consideration the size and character of the contractor's business, the nature of the services rendered and the remuneration usually paid for such services in businesses of a similar nature; (e) premiums for insurance . . . (iii) against risks which are not customarily covered by insurance; (i) provision for any contingency to the extent that such contingency is beyond reasonable expectation; (m) any expense that, in the opinion of the Minister, could have been avoided or reduced by the exercise of reasonable and usual care and diligence or the calling of competitive tenders by the contractor, to the extent that such could have been avoided or reduced. Paragraph 5 defines certain expenses which shall not be included in production cost except with the approval of the Minister. Paragraphs 6 and 7 contain provisions relating to the keeping of accounts. Paragraph 8 provides that the Commonwealth shall not be liable to pay for the cost of faulty material, workmanship and fittings rejected by it in excess of a reasonable allowance, but the Minister shall have the power to decide whether, having regard to all the circumstances, the cost or any part thereof of such excess faulty materials, workmanship and fittings ought to be allowed to the contractor. Paragraph 9 provides that any dispute or difference between the parties shall be referred to the Minister whose decision

shall be final. None of the contracts contains provision for progress payments but in the course of the work such payments were made and in connection therewith the defendant entered into certain undertakings. In the case of contracts other than MARN 21, MON 2196 and MON 3144 the plaintiff paid the defendant the whole of the fixed price and the defendant undertook in consideration of such payment to afford all facilities to enable costs to be ascertained in accordance with the terms of the contracts and to refund to the Commonwealth any amount found to have been overpaid. In the case of contract MARN 21 the defendant entered into a similar undertaking in consideration of the payment of £148,000, but the plaintiff only paid the defendant 87.4 per cent of this sum. In the case of contracts MON 2196 and MON 3144 the defendant entered into a similar undertaking in consideration of progress payments equal to ninety per cent of the fixed price, but the plaintiff only paid the defendant 86.9 per cent and 87.8 per cent of these sums. The defendant kept proper accounts of its expenditure and gave the plaintiff every facility to investigate its accounts. As a result of investigations the plaintiff alleges that the fixed prices in all eight contracts are in excess of the costs of production plus ten per cent profit and claims the right to exercise its option to reduce these prices accordingly. On 20th March 1946 the plaintiff wrote to the defendant and gave details of the excesses in the case of all contracts except MARN 21. On 17th July 1946 the plaintiff wrote to the defendant repeating these details and giving the excess in the case of MARN 21. After making certain adjustments the plaintiff claimed that the defendant had been overpaid to the extent of £15,871 14s. The amount claimed as overpaid in the statement of claim is £15,402 7s. but it is common ground that nothing turns on this discrepancy.

The defendant did not at first dispute the accuracy or validity of the plaintiff's claim but sought relief from repayment on certain grounds of hardship. These were rejected by the plaintiff and on 21st October 1946 the Acting Crown Solicitor wrote to the defendant stating that he had received instructions to demand payment from the defendant of the sum of £15,402 7s. due to the Commonwealth and if necessary to take legal action to recover this sum. The letter stated that the defendant received payment for the supply of certain items to the Commonwealth under contracts which provided that should price checks reveal that the defendant's profit margin exceeded ten per cent of its production costs the company would refund the excess. It also stated that this sum represented refunds payable on the eight contracts less certain credits and that,

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unless this sum was paid or some satisfactory proposal for its liquidation made by 31st October 1946, legal proceedings for its recovery would be taken without further notice. On 30th October 1946 the company wrote in reply a letter containing the following paragraphs :—" 2. It is correct that contracts entered into by this company with Department of Munitions provided that should a cost investigation reveal the Company's profit margin to exceed ten per cent, the Department of Munitions may call for refund of such excess profits. As discussed with Officers of the Department of Munitions at that time, any refund claimed would depend on circumstances and conditions at some future date. We have set forth in various correspondence to the Department of Munitions the fact that termination of war-time contracts in September 1945, and the subsequent reconversion to peace time trading has been achieved at such expense to the Company as would justify the writing off of this alleged liability. 3. The statements of account submitted to this Company by the Cost Investigation Branch of the Department of Munitions covering the various contracts enumerated in your letter are not disputed as to correctness. 4. Negotiations in respect of the claim by the Department of the sum of £15,402 7s. have to date been conducted by correspondence and there is still one letter addressed to Department of Munitions by this Company remaining unanswered. We suggest that an amicable settlement of these disputed claims could probably be arrived at in short time were it possible for responsible officers of the Department of Munitions to meet in conference with the writer in the near future. 5. In view of the foregoing, we suggest that any action on this matter be deferred by your Department for the time being and that you might endeavour to arrange the conference as suggested in the last paragraph. The presence of a senior officer of your Department at this conference would be welcomed."

Further negotiations took place between the parties which were brought to an end by the solicitors for the defendant writing a letter to the Crown Solicitor on 24th June 1947 stating that, having taken the opinion of senior counsel, they had advised their client that the clauses in the contracts upon which the plaintiff's claim was based were unenforceable on certain legal grounds, and that they did not agree that the method of computing costs upon which the claim was based was correct. The letter went on to state that their client accordingly withdrew any admissions verbal, written or implied which might have previously been made that the Department's statements of accounts were correct and particularly the

admission in the third paragraph of the defendant's letter of 30th October 1946.

The writ in the action was issued on 18th September 1947. The hearing has been adjourned on several occasions at the request of the parties but in the end the parties have materially assisted the Court and saved a great deal of time and expense by reaching agreement on the arithmetical correctness of the relevant figures, leaving to be determined certain points of law raised by the defendant, and, should these be decided in favour of the plaintiff, one disputed issue of fact. It will be convenient in the first instance to state and discuss the points of law. In the order in which they were argued they are as follows:—(1) that the parties were never *ad idem* as to the provisions for reducing the fixed prices in the contracts to a price based on cost plus ten per cent profit or alternatively that these provisions are void for uncertainty; (2) that assuming that these provisions are valid the amounts overpaid cannot be recovered because they were not paid under a mistake of fact and were not paid under any other circumstances which would entitle the plaintiff to recover them; (3) that the right to substitute for the fixed price a price based on cost plus ten per cent was an option which had to be exercised within a reasonable time and the plaintiff did not exercise the option within a reasonable time; (4) estoppel.

(1) It was faintly suggested that the standard conditions in evidence could not be the conditions the parties had in contemplation because they are stated to be applicable to contracts on a cost plus profit basis, and the eight contracts are not such contracts but contracts for a fixed price. But the very purpose of the option is to give the Commonwealth the right to elect to convert a contract for a fixed price into such a contract and I have no doubt that the standard conditions in evidence are embodied in all eight contracts. The main ground on which it was contended that the parties were not *ad idem* as to the option or alternatively that the option was too uncertain to be enforced was that the standard conditions do not contain any directions as to the manner in which the total overhead of the contractor is to be apportioned between the contracts incorporating the standard conditions and his other business and that in the absence of such a direction it is quite uncertain how the overhead should be apportioned. I was referred to several cases on contracts and also to some recent decisions of this Court where price-fixing orders under the *National Security* (*Prices*) *Regulations* which prescribed formulae for ascertaining prices were held void because the meaning of the word "cost" was uncertain. Of the

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cases on contracts cited I need only refer to: (a) *In re Vince*; *Ex parte Baxter* (1). There a loan was made to a trader and it was provided that the trader should pay a certain sum for interest half-yearly and that in case he should be unable to pay the interest by reason of the deficiency of profits "then and upon every such occasion a due allowance shall be made by the lender to the borrower in respect of the same in a fair and reasonable manner." The Court of Appeal reversed the decision of the Divisional Court and held that the agreement was void as it was expressed in such vague and uncertain terms that it was impossible to say in what mode the "due allowance" in diminution of the interest was to be ascertained (b) *May & Butcher* v. *The King* (2). There the suppliants agreed to purchase from the Controller of the Disposals Board the total stock of old tentage. The agreement provided that "the price or prices to be paid . . . shall be agreed upon from time to time between the Commission and the purchasers as the quantities of said old tentage become available for disposal and are offered to the purchasers by the Commission." The House of Lords held that there was no concluded contract between the parties unless they could agree on the price. Since the agreement did not provide for the payment of a reasonable price an essential term of the contract had still to be determined and there was no contract at all. Lord *Dunedin* said "to be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties" (3). (c) *Scammell and Nephew Ltd.* v. *Ouston* (4). There the respondents agreed to purchase from the appellants a new motor van but stipulated that "this order is given on the understanding that the balance of purchase price can be had on hire purchase terms over a term of two years." It was held that this stipulation was so vague as to the hire purchase terms intended that no precise meaning could be attributed to it, and consequently there was no enforceable contract between the parties. Viscount *Simon* L.C. held that the stipulation was so vaguely expressed that it could not standing by itself be given definite meaning. It therefore required further agreement to be reached between the parties before there could be a complete *consensus ad idem* (5). Viscount *Maugham* held that the agreement was void for uncertainty. He

(1) (1892) 1 Q.B. 587; (1892) 2 Q.B. 478.
(2) (1934) 2 K.B. 17 (n).
(3) (1934) 2 K.B., (n) at p. 21.
(4) (1941) A.C. 251.
(5) (1941) A.C., at p. 254.

said that " in order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the *consensus ad idem* would be a matter of mere conjecture " (1). Lord *Russell of Killowen* and Lord *Wright* thought that the respondents, in the words of Lord *Russell* were faced with a fatal alternative, namely, " either (1) this term of the alleged contract is quite uncertain as to its meaning, and prevents the existence of an enforceable contract, or (2) the term leaves essential contractual provisions for further negotiations between the parties, with the same result " (2). (d) *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.* (3). There sellers of goods accepted an order from intending buyers " Subject to war clause." In fact, war clauses took many forms. Held, that as there was no evidence that the parties had any particular form of clause in mind there was no *consensus ad idem*, and therefore no completed contract. *Scott* L.J., delivering the judgment of the Court of Appeal, referring to the word " clause," said (4) that it was undefined and demanded consensual definition to make it an effective term of the agreement between the parties. Referring to *Scammell and Nephew Ltd.* v. *Ouston* (5) he said that the grounds of the decision were " both that the condition was too vague to carry contractual force and that 'the parties never in intention nor even in appearance reached an agreement' on it. . . . in the case before us the phrase in controversy gave no clue of any sort to indicate what particular war contingencies affecting performance were intended to apply. The stipulation necessarily remained wholly vague till the parties could agree on some particular war clause " (6).

The three cases relating to prices orders relied upon are (a) *Vardon* v. *The Commonwealth* (7). There notice was given to a tailor that the maximum price was fixed at the cost of the goods . . . plus twenty per cent thereof. It was held that " cost " being an equivocal word was so uncertain in its meaning when applied to goods of the description to which the notice referred that no proper formula for a price was specified. (b) *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (8); (c) *Cann's Pty. Ltd.* v. *The Commonwealth* (9). It was held the methods of fixing the cost prescribed

(1) (1941) A.C., at p. 255.
(2) (1941) A.C., at p. 261.
(3) (1944) 1 K.B. 12.
(4) (1944) 1 K.B., at p. 15.
(5) (1941) A.C. 251.
(6) (1944) 1 K.B., at p. 16.
(7) (1943) 67 C.L.R. 434.
(8) (1945) 71 C.L.R. 184.
(9) (1946) 71 C.L.R. 210.

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in the formulae were insufficient as they involved elements of estimation, approximation, and apportionment, and did not establish an objective standard by reference to which prices could be established with certainty. As *Dixon* J. said in *Fraser Henleins Pty. Ltd.* v. *Cody* (1) " it may be conceded, and, indeed, it appears to have been decided, that a bare power to ' fix ' a price cannot be validly exercised without naming a money sum, or prescribing a certain standard by the application of which it can be calculated or ascertained definitely." But I do not think that cases relating to prices orders, which are enforced by penalties and imprisonment and should be so framed that they contain adequate information as to the duties of those who are to obey them, are of any assistance in determining whether some uncertainty of expression in a written document *inter partes* is an obstacle to a concluded and enforceable contract.

If the court comes to the conclusion that parties intended to make a contract, it will if possible give effect to their intention no matter what difficulties of construction arise. In *Scammell and Nephew Ltd.* v. *Ouston* (2) Lord *Wright* said " the object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation . . . it is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain." In *Hillas & Co. Ltd.* v. *Arcos Ltd.* (3) Lord *Tomlin*, referring to the words " of fair specification " said " that is something which if the parties fail to agree can be ascertained just as much as the fair value of a property." Lord *Thankerton* said " I am affected by the consideration that the contract is a commercial one and that the parties undoubtedly thought that they had concluded a contract " (4). Lord *Wright* referred to " the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts . . . it is unnecessary, in my judgment, to multiply illustrations of this principle, which goes far beyond matters of price. After all, the parties being business men ought to be left to decide what degree of precision it is essential to express

(1) (1945) 70 C.L.R. 100, at p. 128.
(2) (1941) A.C., at pp. 268, 269.
(3) (1932) 147 L.T. 503, at p. 512.
(4) (1932) 147 L.T., at p. 513.

in their contracts, if no legal principle is violated" (1). In the present case it is clear that the parties believed that they had made a concluded and enforceable contract and the provisions of the standard conditions are in my opinion sufficiently definite to enable the court to give them a practical meaning. There is no objection to parties agreeing that the ascertainment of some fact in the performance of the contract shall be a matter of "estimation, approximation and apportionment." A contract which states that the price is to be a reasonable price is a valid and enforceable contract (*May & Butcher Ltd.* v. *The King* (2); *Hillas & Co. Ltd.* v. *Arcos Ltd.* (3); *Way* v. *Latilla* (4)) where however the House of Lords held the contract sued on not to have been made. In *Milnes* v. *Gery* (5) Sir *W. Grant* M.R. said "the case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value are pointed out: there is nothing therefore, precluding the Court from adopting any means, adapted to that purpose." In *R.* v. *Ivanhoe Gold Corporation Ltd.* (6) the plaintiff was engaged to improve the poor extraction of gold from a mine on the terms that "if the extraction is still the same at the end of July, the Ivanhoe Company will pay you handsomely, but you will have to take the risk of the extraction being all right then and payment will depend on results" and this was held to be a valid contract. It was held that in an action for damages for breach of contract the proper measure of damages would be to ascertain what would under ordinary circumstances be fair remuneration for the actual services rendered, and to increase that amount by what is reasonable to make it "handsome payment." *Ikin* v. *Cox Bros. (Aust.) Ltd.* (7) in the Full Court of Tasmania, is a case of the same kind. In *Australian Can Co. Pty. Ltd.* v. *Levin & Co. Pty. Ltd.* (8) an option to purchase for a named sum in accordance with certain conditions and "all such conditions and agreements as may in view of the *National Security Regulations* become necessary" to be embodied in the contract was held to be a completed agreement between the parties giving the lessee the right to purchase the property. *Lowe* J., on behalf of *Herring* C.J. and himself, said "We think the fair meaning of the words relied upon is that any provision which the *National Security Regulations* make it necessary to insert in a contract of sale must be incorporated in the contract of the parties. Whether there are any such provisions or what

(1) (1932) 147 L.T., at p. 517.
(2) (1934) 2 K.B., (n) at p. 19.
(3) (1932) 147 L.T., at p. 512.
(4) (1937) 3 All E.R. 759.
(5) (1807) 14 Ves. Jun. 400 [33 E.R. 574].
(6) (1908) 7 C.L.R. 617.
(7) (1929) 25 Tas. L.R. 1.
(8) (1947) V.L.R. 332.

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they are may require some investigation, but so far as the parties are concerned their agreement is complete. *Id certum est quod certum reddi potest.*" (1). *Fullagar* J. said "What is 'necessary in view of' the regulations is a matter capable of being determined by the Court, if the parties disagree about it" (2). It is clear from the evidence that there are a number of methods by which the administrative expenses of a business can be apportioned, and the standard conditions do not specify which of these methods is to be adopted. But the parties have agreed that one item in the production cost shall be "overhead expense" and this means to my mind that a reasonable allowance is to be made in respect of any cost or expense attributable to the contract which is not conveniently chargeable directly to the product or process and which is not a cost or expense disallowed by the conditions. The problem of calculating the sum to be allowed as overhead in accordance with the definition is a similar problem to that of calculating a reasonable price. The parties have agreed that the calculation of a reasonable amount (subject to par. 9) shall be left to the Court and the Court can adopt any means adapted to that purpose. It is a similar problem to that which *Atkinson* J. had to solve in *Edwards* v. *Saunton Hotel Co. Ltd.* (3). There a hotel company agreed to pay the plaintiff a fixed salary and also a commission of twenty per cent on the sum available for distribution by the company at the end of each year. The parties disagreed as to the manner in which the commission of twenty per cent was to be calculated, and this had to be determined by the Court. A question arose as to the proper method of calculating depreciation. His Lordship pointed out that there are two methods which may be adopted: "one is called the reducing value method, by which you deduct the same percentage every year but calculated on the reduced value, and the other method is called the original cost method or straight line method, where you deduct the same percentage every year from cost and write off the value of the assets in that way." (4). His Lordship decided to adopt the former method. In *Rishton* v. *Grissel* (5) there was an agreement that the plaintiff should act as manager of the plaintiff's works and receive in each year seven and one-half per cent of the profits of the business. In taking the accounts to ascertain the plaintiff's share of profits the parties disagreed as to many items, but it was not suggested that there was not a concluded agreement between the parties (see also *L. C. Ltd.* v. *G. B. Ollivant Ltd.* (6)). Similar questions as to depreciation

(1) (1947) V.L.R., at p. 338.
(2) (1947) V.L.R., at p. 340.
(3) (1943) 1 All E.R. 176.
(4) (1943) 1 All E.R., at pp. 179, 180.
(5) (1868) L.R. 5 Eq. 326.
(6) (1944) 1 All E.R. 510.

arose in assessing compensation for the acquisition of ships under the *National Security (General) Regulations* before me in *James Patrick & Co. Pty. Ltd.* v. *Minister of State of the Navy* (1) reported in fragments but not on this point, and before *Dixon* J. in *Minister of State for the Navy* v. *Rae* (2). *Dixon* J. said: "What system of depreciation is to be employed in a given case is in a great measure a question of suitability depending on the facts. The law prescribes none of the systems commonly used in commercial or accountancy practice to the exclusion of the others. It is a matter of what is appropriate to be judged as a matter of fact" (3). Applying these principles I am of opinion that the reference to overhead expense is sufficiently definite to make the promises and performances to be rendered by each party reasonably certain. It is a case where the parties have agreed to leave something which has still to be determined, but the determination does not depend upon the agreement of the parties. The issue is one of fact capable of being determined by the Court if the parties disagree about it.

Similar objections were also raised to the validity of the contracts in relation to the definition of direct material cost, direct labour cost, and direct expense, and to pars. 4 (b), (e) (iii), and (i). But, for the reasons already given, *a fortiori* in the case of the first three items, I am of opinion that these objections also fail.

Paragraph 3 (m) confers a discretion on the Minister to exclude certain expenses. The conditions contain other analogous provisions. But there is no reason why the parties to a contract should not agree that the determination of some of the incidents of the contract should be left to the decision of a third party or to one of themselves. The person nominated is in the position of a *quasi* arbitrator or referee, and his decision is binding in the absence of fraud, mistake or miscarriage—*Halsbury's Laws of England*, 2nd ed., vol. 33, pp. 361, 362. There is nothing in these provisions to make the contracts too uncertain to be enforced.

Finally, there is par. 9 which provides for the submission of any dispute or difference to the Minister. The parties intended, I think, that the Minister in exercising his function under this paragraph should be under a duty to act *quasi* judicially. This paragraph is therefore a submission of disputes and differences between the parties to arbitration. The submission would not include a dispute as to whether there is a concluded contract or not (*Heyman* v. *Darwins Ltd.* (4)). But the presence of the paragraph in the conditions

(1) (1944) A.L.R. 254; (1945) A.L.R. (C.N.) 501, and noted 18 A.L.J. 126.
(2) (1945) 70 C.L.R. 339.
(3) (1945) 70 C.L.R., at p. 346.
(4) (1942) A.C. 356.

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points strongly to an intention of the parties that the standard conditions should be complete without further agreement, and that any disputes or differences that might arise in their performance should be settled by arbitration or by the Court.

(2) The defendant does not advance this ground in the case of the five contracts which were paid in full on condition that any overpayments should be refunded. Accordingly it only applies to contracts MARN 21, MON 2196 and MON 3144 where the express promises to refund are conditional upon progress payments which were not made in full. As payments were not made in full the plaintiff does not claim that it can enforce these promises. The progress payments were made in reduction of the plaintiff's liability under the contracts, but the contracts make no provision for progress payments and the plaintiff was not in law liable to pay for the goods until they had been delivered. It was submitted for the defendant that the plaintiff was entitled to waive its rights under the contract and make progress payments if it liked, but if it paid more than it was eventually liable to pay the overpayments were a waiver of its contractual rights to reduce the fixed prices to cost plus ten per cent. It was contended that if the plaintiff made any mistake it was a mistake of law and not of fact, and the overpayments could not be recovered. Passages in the judgment of *Wynn-Parry* J. in *Re Diplock*; *Diplock* v. *Wintle* (1) on appeal (2) were particularly relied upon. A mistake in the construction of a contract is a mistake of law and payments made under a mistake of law cannot be recovered in an action for money had and received. But I cannot agree that the progress payments were made under a mistake of law. Such payments are simply payments made on account of what the contractor might eventually be entitled to recover from the purchaser (*Lamprell* v. *Billericay Union* (3); *Tharsis Sulphur & Copper Co.* v. *M'Elroy & Sons* (4)). In the last-mentioned case Lord *Cairns* L.C. said: "the payments made under those certificates were altogether provisional, and subject to adjustment or readjustment at the end of the contract" (5). In *Calvert* v. *London Dock Co.* (6) the owner had overpaid the contractor for the work done without the consent of the sureties It was held that the sureties were released. Lord *Langdale* M.R. said: "And the company, instead of keeping themselves in the situation of debtors . . . become creditors to a large amount, without any security" (7). Such overpayments are made under a mistake of fact and

(1) (1947) Ch. 716, at pp. 724-726.
(2) (1948) Ch. 465, at pp. 479, 480.
(3) (1849) 3 Ex. 283, at p. 305 [154 E.R. 850, at p. 860].
(4) (1878) 3 App. Cas. 1040.
(5) (1878) 3 App. Cas., at p. 1045.
(6) (1838) 2 Keen 638 [48 E.R. 774].
(7) (1838) 2 Keen, at p. 645 [48 E.R., at p. 777].

not of law. In the present case the undertakings clearly indicated an intention on the part of the plaintiff to exercise its right to substitute a price fixed on cost plus ten per cent for the fixed price if the former price was found on a price check to be less than the latter. At the time of the progress payments it was not known which would prove to be the lower price, or whether, if cost plus ten per cent proved to be the lower price, the progress payments would exceed this price. There were therefore outstanding questions of fact. The payments were premature and the plaintiff could have waited for further information before making them, but the plaintiff clearly did not intend to pay more than it finally became liable to pay and it did not pay the money intending to part with it whether it was liable or not. In this respect there is an analogy between the present case and *Kerrison* v. *Glyn, Mills, Currie & Co.* (1). The judgment of *Hamilton* J. (as Lord *Sumner* then was), after being reversed by the Court of Appeal, was restored by the House of Lords (2). In *Morgan* v. *Ashcroft* (3) *Scott* L.J. said of this case that " it was definitely decided by *Hamilton* J. and by the House of Lords that the plaintiff was entitled to recover a payment made to the defendants for the purpose of meeting an anticipated liability although he then knew that no actual liability had yet attached to him." The mistake of fact, in the words of *Scott* L.J. in the same case " must be in some aspect or another fundamental to the transaction " (4). But money paid in anticipation to discharge a liability for an uncertain amount which has not crystallized is in my opinion money paid under such a mistake if it eventually turns out that the creditor has been overpaid. Money paid under such circumstances is paid in the words of Lord *Sumner* in *Sinclair* v. *Brougham* (5) " upon a notional or imputed promise to repay." It is therefore unnecessary finally to decide whether the fact that the plaintiff had a right to reduce the price from the fixed price to a price based on cost plus ten per cent if the latter price proved to be less than the former does not necessarily imply that in this event a contractor who has been paid on account of the fixed price more than the latter price would refund the excess. But, as at present advised, I am of opinion that there is such an implication. The progress payments must in such circumstances be subject to adjustment or re-adjustment at the end of the contract and the letters of 21st October and 30th October 1946 indicate that the parties so intended.

(1) (1909) 101 L.T. 675.
(2) (1911) 105 L.T. 721.
(3) (1938) 1 K.B. 49, at p. 73.
(4) (1938) 1 K.B., at p. 77.
(5) (1914) A.C. 398, at p. 452.

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(3) The contracts do not contain any express provision limiting a time within which the plaintiff must exercise the option. But the defendant contends that it should be implied from the terms of the contracts and the surrounding circumstances that the option must be exercised within a reasonable time. The power of the Court to imply particular terms in contracts has been discussed in many cases and recently by Lord *Wright* in *Luxor (Eastbourne) Ltd.* v. *Cooper* (1). The presumption is against the adding to contracts of terms which the parties have not expressed. The material words in the present contracts are that the price is subject to check and if the profit margin on ascertained costs exceeds ten per cent the price may be reduced to a figure which would include a profit margin of not more than ten per cent. If there is an implication that the option must be exercised within a reasonable time, it would presumably have to be exercised within a reasonable time after the goods had been manufactured and delivered because until then the cost could not be finally ascertained. If the goods were partly manufactured, as they were in this case, by sub-contractors it might not be possible to ascertain the cost of the sub-contracts for some considerable time after delivery. All sorts of investigations might have to be made to ascertain the costs. Overhead expenses could probably not be ascertained and apportioned until the end of the financial year. The option is contained in the general conditions and is presumably embodied in a large number of contracts. What would be a reasonable time would vary in the case of each contract because it would depend upon the circumstances of each particular case. It is essential to bear in mind that the implication, if made, is of a term that the Court presumes represents the intention of both parties (*Peters American Delicacy Co. Ltd.* v. *Champion* (2)). It is impossible to my mind to presume that the plaintiff could have intended to bind itself by such a nebulous condition. Further, adapting the remarks of *Jordan* C.J. in *Heimann* v. *The Commonwealth* (3) the contractor may well have been content to rely on the self-interest of the Commonwealth as a sufficiently compelling motive to claim the reduction at an early date (*Re Railway and Electric Appliances Co.* (4)). No such implication should therefore be made and it is unnecessary to discuss whether the options were exercised in a reasonable time.

(4) The statement of defence alleges that the moneys were paid in purported satisfaction of the plaintiff's obligations under the

(1) (1941) A.C. 108, at p. 137.
(2) (1928) 41 C.L.R. 316, at p. 323.
(3) (1938) 38 S.R. (N.S.W.) 691, at p. 696; 55 W.N. 235, at p. 238.
(4) (1888) 38 Ch. D. 597, at pp. 607, 608.

contracts and not otherwise and with the intention that the defendant should receive and deal with them as its own exclusive property and the defendant received the moneys accordingly and has dealt with the same as its own exclusive property, and has otherwise altered its position to its detriment upon the footing that the moneys were due to it under the contracts and that the defendant might treat them as its own exclusive property. But the defendant was fully aware that the plaintiff was examining its accounts to ascertain whether the profit exceeded ten per cent and the undertakings to repay any excess into which it required the defendant to enter as a condition of making progress payments gave ample warning that the plaintiff had not elected to forego the option. *Holt* v. *Markham* (1) was relied on. That was a case where an officer of the Royal Air Force was overpaid on demobilization. More than a year afterwards and before notice of the mistake he spent the money. In an action to recover the excess as money paid under a mistake of fact the Court of Appeal held that the mistake, if any, was one of law and that, as the defendant had been led by the plaintiff's conduct to believe that he might treat the money as his own and in that belief had altered his position by spending it, the plaintiffs were estopped from alleging that it was paid under a mistake. This case was discussed and distinguished in *Weld-Blundell* v. *Synott* (2). It has no application to the facts of the present case because there is no evidence that the defendant was misled by the plaintiff into any belief that it might retain any surplus over cost plus ten per cent. It could only have reasonably believed to the contrary. Further there is no evidence that the defendant has spent the money, and certainly none that it was induced to do so on the faith of such a representation.

I am therefore of opinion that all four defences fail, and it becomes necessary to consider the plaintiff's claim. It was contended for the plaintiff that the defendant was liable to the plaintiff for the £15,402 7s. claimed on an account stated. The evidence relied on to support an account stated is the letter of demand from the acting Crown Solicitor of 21st October 1946 and the defendant's reply of 30th October, 1946. The law of accounts stated is discussed in *Halsbury's Laws of England*, 2nd ed., vol. 7, pp. 294, 295. I was also referred to *Firm Bishun Chand* v. *Seth Girdhari Lal* (3). But the admission of the liability and of the amount due must be absolute and I cannot read the defendant's letter of 30th October 1946 as such an admission. The plaintiff must therefore rely on

(1) (1923) 1 K.B. 504.
(2) (1940) 2 K.B. 107.
(3) (1934) 50 T.L.R. 465.

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its rights under the eight contracts. The issue of fact relates to the production cost in accordance with the standard conditions of the goods manufactured under the eight contracts. The item in dispute is the amount to be allowed for overhead expense. The actual overhead expenses of the defendant for the years ended 30th June 1943, 1944 and 1945 were £13,258 18s. 9d., £17,292 2s. 3d. and £21,756 17s. 5d. totalling £52,307 18s. 5d. But these expenses include items excluded by the standard conditions, and if these items are excluded the overhead expenses for the three years were £12,889, £16,524 and £19,532 totalling £48,945. The plaintiff contends that the proper method of apportioning the overhead expenses of the defendant between the eight contracts and the other business of the defendant is as a percentage of direct labour cost whereas the defendant contends the proper method is as a percentage of sales. As a percentage of direct labour on total overhead expenses of £48,945 the apportionment to the eight contracts would be £17,256, as a percentage of sales on total overhead expenses of £52,308 the apportionment to the eight contracts would be £26,624, a difference of £9,368 and the defendant claims that to this difference there should be added profit of ten per cent and two and one-half per cent royalty payable to the American company. The defendant therefore contends that, subject to all other defences raised in the pleadings, the claim of the plaintiff should be reduced by £10,561.

There is no dispute that the items which were excluded from the actual overhead expenses of the defendant to reduce the total amount for the three years from £52,308 to £48,945 were properly excluded in accordance with the standard conditions. Accordingly I am of opinion that the only overhead expenses that can be taken into account in order to find the sum which should be apportioned as overhead expenses of the eight contracts are the sums of £12,889, £16,524 and £19,532 totalling £48,945. The way in which the defendant carries on its business is to manufacture air conditioning and refrigeration equipment pursuant to orders received for particular equipment. The defendant has a factory but does very little manufacturing itself and lets out most of this work to sub-contractors, so that the factory is used mainly for assembly. The apportionment of overhead expenses on behalf of the plaintiff on the basis of direct labour cost was done by Mr. V. J. Murtagh who is now in practice as a consulting accountant but during hostilities was employed in the Department of Munitions as a cost investigator. Mr. Murtagh holds amongst other qualifications that of an Associate of the Australasian Institute of Cost Accountants. He was emphatic, and he was fully supported in this emphasis by Mr. Scott who is

amongst other qualifications a Fellow and President of the Australasian Institute of Cost Accountants and practises as a cost accountant, that the method of apportioning overhead based on sales adopted by the defendant cannot be a satisfactory method under any circumstances. I accept this evidence. The cross-examination of Mr. Murtagh and Mr. Scott showed that the method of apportioning overhead on the basis of direct labour may not be satisfactory where most of the manufacturing is done by sub-contractors so that the amount of direct labour contributed by the contractor is small, and Mr. Scott's evidence left me with the impression that perhaps the fairest method in such a case, and therefore in the present case, would be to apportion the overhead on the basis of cost of sales. I therefore invited the parties to work out an apportionment on this basis, but the invitation was not accepted by either side. No expert witness was called by the defendant to support its method of apportionment. Mr. Gollan, the accountant of the defendant, said that during the investigation of its accounts the method of apportioning overhead on the basis of direct labour was objected to. But it is a remarkable fact that, despite the initial objection, during the whole of the period between 20th March 1946 when the defendant was first notified of the reduced prices under seven of the contracts and about June 1947, no further objection was taken to the plaintiff's method of apportionment. Indeed I find it difficult to read the third paragraph of the defendant's letter of 30th October 1946 as other than as assent to this method. Accordingly if I had thought that the contracts were originally too uncertain to be enforced because the method of apportionment had not been defined, I would have had seriously to consider whether after this letter the uncertainty had not been removed by the subsequent conduct of the parties (*Oxford* v. *Provand* (1)). This paragraph is at least evidence that the method of apportionment adopted by the plaintiff is reasonable (*Waring & Gillow Ltd.* v. *Thompson* (2)).

Exhibit T contains details of the plaintiff's calculation of the prices payable under the eight contracts based on cost plus ten per cent. Five of the contracts MARN 59, MARN 1384, MARN 1389, MARN 1419 and MARN 1472 are contracts for comparatively small amounts, the prices (I am using round figures) on this basis ranging from £276 to £1,704. The remaining three contracts are for large amounts. The prices on this basis are MON 2196 £41,871, MON 3144 £72,132, MARN 21 £141,179. The goods contracted for under all the contracts except MARN 1472 and MARN 21 were delivered and invoiced between the beginning of February and the end of

(1) (1868) L.R. 2 P.C. 135. (2) (1912) 29 T.L.R. 154.

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June 1944. The goods contracted for under MARN 1472 were invoiced on 9th October 1944 and under MARN 21 on 14th June 1945.

All payments on account of all the contracts were made by the plaintiff to the defendant in the years ended 30th June 1944 and 30th June 1945, and none were made in the year ended 30th June 1943. The total amount paid was £276,006 which includes the sum of £18,183 which the plaintiff alleges was overpaid, and of this sum £213,711 was paid in the year ended 30th June, 1944 and £62,295 in the year ended 30th June 1945. This led Mr. *Hooke*, junior counsel for the plaintiff, to contend that the years to take into account in order to make a reasonable apportionment of overhead expense between the eight contracts and the other business of the defendant should be the years ended 30th June 1944 and 30th June 1945, and that the year ended 30th June 1943 should be excluded. He contended that if this was correct (1) the sales method must be unreasonable because on this basis the eight contracts would be apportioned twelve per cent of the overhead as against 6.7 per cent for the rest of the company's business; (2) that the figure of £17,256 is substantially correct. Mr. *Hooke* handed in an analysis of the figures prepared by the defendant to illustrate his argument, which is with the papers, and his analysis assists me to find that the sum of £17,256 is a reasonable allowance. I am also assisted in this finding by an examination of the details in exhibit T. These show that the percentages of overhead expense allowed in the prices range from eighteen per cent to sixteen per cent in the case of the five small contracts and from five per cent to seven per cent in the case of the three large contracts. The total overhead allowed for all the contracts is of course £17,256. The total price allowed for all the contracts is £258,289. The percentage of overhead is therefore about 6.7 per cent. If the profits £23,269 are excluded, as they probably should be, the percentage of overhead in the cost of production is about seven per cent. It would appear that some part of the administrative expenses of the eight contracts must have been incurred in the year ended 30th June 1943. In this year the percentage of overhead expense on sales calculated in accordance with the standard conditions was 6.7 per cent. Some part of these administrative expenses must also have been incurred in the year ended 30th June 1945 when the percentage was 17.6 per cent. But in this year there was only one contract still incomplete after October 1944, and the bulk of these administrative expenses must have been incurred in the year ended 30th June 1944 when the percentage was

6.5 per cent. The apportionment in exhibit T would not therefore appear to be unreasonable.

On the whole of the evidence I find that the sum of £17,256 is a reasonable and proper allowance of overhead expense in accordance with par. 2 (d) of the standard conditions. And I repeat that I am assisted in this finding by the apparent acceptance of this figure by the defendant for a considerable period. The defendant's attitude until a late stage (when it became clear that the plaintiff would insist upon its claim) was that the reduced price had been correctly calculated but the plaintiff ought not to insist on a refund at all because it would be harsh to do so in view of the financial difficulties the defendant was meeting in the transition of its business from hostilities to peace, and in any event the whole matter should stand over until certain claims for damages by the defendant against the plaintiff for breaking other contracts between the parties had been adjusted.

For these reasons I am of opinion that the plaintiff is entitled to recover the amount claimed £15,402 7s. As to costs, the defendant must pay the plaintiff's costs of the action, but costs were reserved on three occasions and they must be disposed of. Two occasions were when adjournments were granted to the plaintiff during the hearing. As I indicated during the addresses I shall make no order as to these costs. The other reserved costs are those reserved by the order of 16th December 1948. These are the costs of the summons for directions dated 30th November 1948 asking that certain questions of law should be raised for the opinion of the Court by means of a special case. There had been a previous summons for directions in this action and another action brought by the defendant against the plaintiff in respect of certain other contracts between the parties in which I had intimated that unless the parties could agree on the facts "it would not be convenient to have any preliminary questions of law argued before the hearing of the actions. As the parties had not been able to agree on the facts" before the summons of 30th November 1948 was taken out, I am of opinion that the plaintiff was not justified in taking out this summons and that it should pay the defendant's costs thereof. The amount of these costs should be set off against the costs of the action and the balance paid by the defendant to the plaintiff. I give judgment for the plaintiff accordingly.

From that decision the defendant appealed to the Full Court of the High Court.

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G. E. Barwick K.C. (with him *J. G. Coyle* and *J. A. Melville*), for the appellant. The standard conditions (Exhibit B) before the Court have not been identified as being the standard conditions to which the contracts made reference and should not have been admitted. Those standard conditions, upon being admitted, introduced such uncertainty and vagueness into a portion of the contracts relied upon by the respondent, as to destroy the respondent's case. The clause —clause 1 (a) of Exhibit C—set forth in pars. 5 and 8 of the statement of claim is, in itself, too vague and indefinite to be enforced. It has been taken by the respondent to mean that the Director of Finance, or his representative, might fix, in a semi- or quasi-judicial capacity, a price provided the price so fixed did include a profit margin of not less than ten per cent. The words " may be reduced " in that clause do not mean " may be reduced by one of the parties," nor do they mean " may be reduced by the buyer in a semi- or quasi-judicial capacity." The clause, fairly read, means that if the profit margin appears to be too large the parties will negotiate a new price. The words " may be reduced " mean " by the parties," not by one of them but by agreement. That clause was not designed, as concluded by the Judge of first instance, to enable the Ministry of Munitions or the respondent to convert lump-sum contracts into cost-plus contracts. These contracts never became cost-plus contracts, they remained always lump-sum contracts. Assuming, however, that these standard conditions (Exhibit B) were to be treated as part of the contracts, they introduced a position of vagueness and uncertainty, e.g., in clause 2, by whom is the convenience to be determined ? the expressions " cost to the contractor," " productive in character " and " direct expense " are ambiguous. The clause does not stipulate how one is to determine whether the overhead referred to is an expense connected with the process or work itself. The clause is severable. The argument is not that the whole of each contract falls *qua* price, but that this clause for a substituted price falls for uncertainty. In clause 3 (b) of Exhibit B the word " value " is ambiguous and the sub-clause is silent as to who determines whether the products result from manufacture and are " wasted, scrapped, spoiled or otherwise discarded in the process of manufacture." The clause set out in pars. 5 and 8 of the statement of claim called for the substitution of a money sum which is to include another money sum and the determination of that money sum must be antecedent to the substitution of the price. In the absence of provision in such determination recourse cannot be had to the Court. At most that clause does no more than to give the respondent an option to reduce the lump-sum price. The question

then arises: What is the limit of that option in point of time? Such option was exercisable only within a reasonable time, and the very latest date for the commencement of that reasonable time was the date of completion of performance of what were commercial contracts. The time at which the respondent did purport to reduce the price was unreasonably long. The respondent had access to the accounts and was investigating them during the currency of the work. Insofar as the respondent places reliance on the standard conditions to support the contention that the appellant has been overpaid it must show that the standard conditions provide that in certain events a smaller sum be paid and that the conditions have happened entitling the respondent to sue for that smaller sum. Clause 4 (b) is applicable to cost-plus contracts but not to these lump-sum contracts. The circumstances were not such as to raise any implication of a promise to refund; broadly the payments were progress payments. The overhead charges, that is the indirect charges and expenses, should not be spread in proportion to direct labour charges on the subject work and the other work, but, upon the evidence, they should be spread on the cost of sales or prime cost basis. This would make a difference in favour of the appellant of £9,570. Clause 1 (a) in Exhibit C is silent as to who reduces the prices. Having regard to the provision to insert this clause in any sub-contract between the appellant and a stranger this introduces also the uncertainty of who is to determine all the various objective elements, and to determine them before one begins to determine them for the purpose of the contract between the new parties. The correct way to read the clause is that the parties may contractually reduce or agree to reduce the prices, provided they are not reduced below a certain figure. Sub-contractors never saw the head contract. The various investigations and determinations were required to be made in order to enable a fixed price to be nominated. Money paid in anticipation to discharge a liability for an uncertain amount is not, as stated by the Judge of first instance, money paid under such a mistake if it eventually turned out that the creditor had been overpaid. In any event the payments made in this case were not a series of payments to discharge an uncertain liability, or a liability that had not crystallized.

[LATHAM C.J. referred to *Larner* v. *London County Council* (1).]

There was not any mistake. There was a deliberate intention to pay the full amount of the fixed price, without any deduction. The mere fact that after the buyer has exercised such option as it has, the seller assents to the method which the buyer used in arriving

(1) (1949) 2 K.B. 683.

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at that figure, does not supply any necessary consensual or contractual element in relation to the fixation of the price. It did not become an agreed price. The words "may be reduced" in clause 1 (a) of Exhibit C, and referred to in pars. 5 and 8 of the statement of claim, refer to a reduction by the parties consensually; that the parties would discuss the matter. This view is supported by the arbitration clause. Clause 1 (a) otherwise has no legal significance; it could be eliminated and the price remain (*May & Butcher Ltd.* v. *The King* (1)). The clause does not give to the Commonwealth or its officers, or to the Court, the function of determining the figure. It is not committed to the Director of Finance for the Commonwealth. There is not any evidence to identify contractually the standard conditions in Exhibit B, nor is there any internal evidence in Exhibit B which identifies it as the standard conditions referred to in clause 1 (a) of Exhibit C. The standard conditions in Exhibit B are applicable only to cost-plus contracts. The subject contracts are not, and cannot be, such contracts. A fundamental difference is that in cost-plus contracts the Court may fix the final figure, whereas in the subject contracts the Court could never fix the final figure. The standard conditions in Exhibit B cannot be identified with the contracts, but assuming that they do form part thereof they are so uncertain as to leave the clause which incorporated them unenforceable. Various items of those conditions call for subjective determination and they do not nominate the person who is to make those determinations. The greatest assistance will be obtained from the price-fixing cases. In this type of contract reasoning similar to the reasoning in *Vardon* v. *The Commonwealth* (2) and *Cann's Pty. Ltd.* v. *The Commonwealth* (3) should be followed. Other comparable cases are *In re Vince*; *Ex parte Baxter* (4) and *Scammell and Nephew Ltd.* v. *Ouston* (5). Whilst par. (a) and par. (d) of clause 2 of the standard conditions, Exhibit B, are complementary as part of a scheme to give the total cost which was readily and conveniently identifiable with the product, they are not complementary in the sense that of all the factors which go to make cost, the factor must fall within par. (a) or par. (d) so that there must of necessity be obtained the whole cost which has in fact been incurred. They are complementary in a scheme which was designed not of necessity to give the full actual cost but only that which could be readily seen or identified. The payments

(1) (1934) 2 K.B. 17 (n).
(2) (1943) 67 C.L.R., at pp. 444, 445, 450.
(3) (1946) 71 C.L.R., at pp. 219, 220, 225, 234.
(4) (1892) 1 Q.B. 587; (1892) 2 Q.B. 478.
(5) (1941) A.C., at pp. 257, 260, 261.

were not made under a mistake of fact (*Re Diplock*; *Diplock* v. *Wintle* (1); *Lamprell* v. *Billericay Union* (2); *Tharsis Sulphur & Copper Co.* v. *M'Elroy & Sons* (3); *Calvert* v. *London Dock Co.* (4); *Kerrison* v. *Glyn, Mills, Currie & Co.* (5) as cited in the judgment appealed from do not support a claim for money paid under a mistake of fact; they all turn upon the special circumstances of the contracts in those cases respectively, or some other incident in connection with the transactions. In this case the respondent knew the liability. It was not under any misapprehension but endeavoured to protect itself by obtaining an undertaking in respect of every contract. The circumstance that the buyer had an "option to reduce" does not convert the price into a provisional sum and so imply a promise to repay anything received in excess of it by the use of the clause in question. The payments were made on the footing that the appellant was entitled to them. The time within which the price must be reduced, if at all, is not indefinite but must be a reasonable time. In this case it was not reduced within a reasonable time. Abnormal conditions due to war, and the facts, even if proved, that there was a shortage of qualified investigators and that there was an exceptionally large number of contracts in similar terms, have no relevance. The appellant afforded the respondent every facility, and a full investigation was conducted during the currency of the contracts. It was not suggested that the war had anything to do with the costing of the contracts. Assuming that the foregoing submissions are not accepted, and alternative to them, the proper basis on which to spread the overhead charges was as a percentage of the cost of sales, that is, the whole cost of getting the articles ready for sale: see *Scott* on *Cost Accounting*, pp. 559, 569. On that basis the amount, if any, due to the respondent should be reduced by £9,570. The matter of *quantum* of overhead costs and charges was not an issue before the Judge of first instance and it is now too late to make it an issue. The substituted price was fixed as a money sum (Exhibit L). It was a money sum and was not ten per cent or such sum as might thereafter be determined by somebody to be the costs. The issue was: Did the money sum include ten per cent on ascertained costs? The onus of proof was on the respondent. If the ascertained costs were larger than the substituted price then there must be a verdict

(1) (1947) Ch., at pp. 725, 726; (1948) Ch. 465.
(2) (1849) 3 Ex., at p. 301 [154 E.R. at p. 860].
(3) (1878) 3 App. Cas., at p. 1045.
(4) (1838) 2 Keen, at pp. 640, 645 [48 E.R., at pp. 775, 777].
(5) (1909) 101 L.T., at p. 676.

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for the appellant. The power, if any, to reduce was not exercised; it exceeded the limitation.

C. A. Weston K.C. (with him *E. J. Hooke*), for the respondent. On the question of fact two matters only were contested in the Court below, namely, which method was applicable, the direct labour method of distributing overhead charges, or sale prices. The basis of cost of sales is raised for the first time in this Court. Clause 1 (a) of the General Conditions, as set forth in Exhibit C, is, as a matter of contract, quite clear and free from uncertainty. It means, if in fact the profit margin on ascertained costs in accordance with standard conditions exceeds ten per cent, the price may be reduced to a figure which would include a profit margin of not less than ten per cent. The clause, apart from consideration of any difficulties of applying it in any particular circumstances, means the cost is ascertained and the profit is ascertained; if the profit be more than ten per cent the price may be reduced, but it must not be reduced so as to leave the total payment at a figure which would leave a profit of less than ten per cent. "Ascertained costs" is a factual matter, to be proved by evidence. It means nothing more than "cost." If commercial men enter into a contract the Court will endeavour (a) to conclude prima facie that they meant that to define their contractual relationship, and (b) to proceed, if it can, upon the basis that what they there expressed was sufficient to define their legal relationships. Express reference in clause 1 (a) to the Director of Finance imports that he may reduce the price in the manner mentioned, when the conditions precedent were satisfied. He did so reduce the price. The clause also imports that the appellant would enable the Director or his representative to have access to its records. The standard conditions afford a sufficiently definite standard to enable ascertained costs to be determined. These contracts are contracts for a provisional price from the fixed price. The very essence of the transaction was that the price was moveable. It was never intended to be a fixed price. The contracts were for a provisional price and in certain circumstances the price could be altered to cost plus. The standard conditions were there applicable. The appellant was aware, or should have been aware, of those conditions. Exhibit B, in its terms, applies only to cost-plus contracts which is not really important here because the clause in the contracts means only that the standard conditions were incorporated for the purpose of ascertaining costs. The test is not whether the answer as to ascertaining the amount of production is objectively certain, but whether the direction how to ascertain is

sufficiently certain. However clear a statute, contract or other document may be, its application to the facts may give rise to infinite diversity of opinion and infinite difficulty in applying it to facts. If a direction is clear, that is to say, what one is told to do is sufficiently clear, whether or not the result can be predicated with any degree of certainty is entirely immaterial, e.g. wills, architects certificates in building contracts. *Watcham* v. *Attorney-General of the East Africa Protectorate* (1) shows the way the parties acted in these contracts. There was not any uncertainty. Alternatively, any alleged uncertainty in the clause was removed by the action of the parties. "Uncertainty" was discussed in *Naylor* v. *Stephen* (2) and *Melbourne Corporation* v. *Barry* (3). The Director of Finance had right of access to the appellant's books. The performance was by the Commonwealth. The presumption is that when a person acts in an office or purports to do something on behalf of a principal, he has authority to do it, that is to say, that the Director was authorized to convey the information on behalf of the Commonwealth that the prices had been reduced. *May & Butcher Ltd.* v. *The King* (4) was not an issue of uncertainty and is quite irrelevant to this case. *Scammell and Nephew Ltd.* v. *Ouston* (5) does not help on the issue of uncertainty and is irrelevant in so far as it decides that there was not any contract of the sort mentioned in the writing.

[DIXON J. referred to *Life Insurance Co. of Australia Ltd.* v. *Phillips* (6).]

Decisions made under the *National Security Regulations* are in a different category (*Scammell and Nephew Ltd.* v. *Ouston* (7)). The parties certainly reached an agreement and that agreement was neither unjust nor uncertain (*Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.* (8)). Prior to the letter denying responsibility the parties never had a doubt as to what were their contractual rights and obligations. The expression "pay you handsomely" in a contract was held to be sufficiently certain to enable enforcement of the contract (*King* v. *Ivanhoe Gold Corporation Ltd.* (9), see also *Ikin* v. *Cox Bros. (Aust.) Ltd.* (10)). Strong support for the respondent is to be found in *Australian Can Co. Pty. Ltd.* v. *Levin & Co. Pty. Ltd.* (11). The person nominated is not an arbitrator but is a *persona designata*. The Court cannot

(1) (1919) A.C. 533, at p. 538.
(2) (1934) 34 S.R. (N.S.W.) 231; 51 W.N. 94.
(3) (1922) 31 C.L.R. 174.
(4) (1934) 2 K.B. 17 (n).
(5) (1941) A.C., at pp. 254, 255, 257, 258, 260, 272.
(6) (1925) 36 C.L.R. 60.
(7) (1941) A.C., at p. 255.
(8) (1944) 1 K.B., at p. 15.
(9) (1908) 7 C.L.R. 617.
(10) (1929) 25 Tas. L.R. 1.
(11) (1947) V.L.R. 332.

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become the substitute for a *persona designata*. The arbitration clause applies. It is conceded that the money was paid to the appellant in mistake of fact. The excess moneys are moneys had and received, there being a total failure *qua* an excess of consideration (*Bullen and Leake's Precedents of Pleading*, 3rd ed. (1868), p. 48; *Ashworth* v. *Mounsey* (1); *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 283, par. 394). The contract was for a provisional price; it depended upon circumstances whether it would become a fixed price. There was not a fixed price in the sense of a price which would be payable in all circumstances. The excess is "unjust enrichment." On the facts, that is to say, by the course of conduct, the requests for progress payments, the giving of acknowledgments, and the recognition in the letters that it was so, the obvious meaning of the parties was that payments were provisional only (*Lamprell* v. *Billericay Union* (2)). The interim payments were provisional only and were subject to adjustment or re-adjustment at the end of the contract (*Tharsis Sulphur & Copper Co.* v. *M'Elroy & Sons* (3), see also *Morgan* v. *Ashcroft* (4)). There was not any implied term as to reasonable time (*In re Railway and Electric Appliances Co.* (5); *Heimann* v. *Commonwealth* (6)). The Court does not readily imply agreements or terms in commercial contracts. There was not any obligation to exercise the option within a reasonable time, but assuming that there was such an obligation then, having regard to the abnormal conditions then prevailing, due to the war and its aftermath, the option was exercised within a reasonable time. On the evidence, the Judge of first instance was justified and bound to apply the direct labour method. For the purposes expressed in par. 1 (a) of the contract the judge himself had to find what was the cost, including ten per cent. He had to find objectively what was the actual expenditure so that the appellant would at least get ten per cent profit. It is important that there was not any evidence that the price of the subject articles was controlled. The figures put in on behalf of the appellant are demonstrably not cost-of-sales figures. On the figure of overhead as supplied by the appellant and all other figures in evidence, distribution of overhead on a cost-of-sales basis was impossible. On the expert evidence if a cost-of-sales basis is impracticable or unavailable, distribution on direct labour basis must be used. The expert witness Scott, did not, as thought by the Judge of first instance, elect between one method or the other. The figure used

(1) (1853) 9 Ex. 175 [156 E.R. 75].
(2) (1849) 3 Ex., at p. 305 [154 E.R., at p. 860].
(3) (1878) 3 App. Cas., at p. 1045.
(4) (1938) 1 K.B. 49, at p. 73.
(5) (1888) 38 Ch. D. 597, at p. 607.
(6) (1938) 38 S.R. (N.S.W.), at p. 696; 55 W.N., at p. 237.

on behalf of the appellant was prime cost. The Court is rather against modifying language, whether it be called implication, construction or the like. What were committed or permitted to the Director of Finance were facilities for investigation and there was no warrant for the suggestion that the power to reduce was exclusively entrusted to him. Under the express words of the contract the appellant was not to have more than the reduced price. Alternatively, there should be implied a provision for the return of any excess. Clause 1 means that the price payable should be the reduced price. Alternatively, the respondent had an option of reducing the price and paying only the reduced price. In view of that provision in the contract there has been an overpayment for which no consideration has been received. Where there has been partial failure and not total failure for consideration an action will lie for money had and received (*Rugg* v. *Minett* (1); *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour Ltd.* (2)). It is not the original contract which gives the right; it is that the law superimposes the condition on the parties as the law of tort does (*Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour Ltd.* (3)). On the ground of unjust enrichment reliance is not placed on money having been received. The statement in *Sinclair* v. *Brougham* (4) is inconsistent with the statements in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour Ltd.* (5) and *Moses* v. *Macferlan* (6), see *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 274. The Court is called upon to choose whether the later pronouncement is more correct than the former.

G. E. Barwick K.C., in reply. *Rugg* v. *Minett* (1) turns on the circumstance that the contracts were regarded as separate contracts for the various lots put up; the goods were not in a deliverable state therefore the property had not passed. That case denies the proposition that if at any time one pays more than he ought to pay under a single contract he is entitled to recover the excess as money had and received. The question of whether in the circumstances there had been a total failure of consideration was discussed in *Comptoir D'Achat et de Vente du Boerenbond Belge S/A* v. *Luis de Ridder Limitada* (*The Julia*) (7).

[DIXON J. referred to *Plaimar Ltd.* v. *Waters Trading Co. Ltd.* (8).]

(1) (1809) 11 East 210 [103 E.R. 985].
(2) (1943) A.C. 32, at pp. 48, 64.
(3) (1943) A.C., at pp. 46, 62.
(4) (1914) A.C., at p. 456.
(5) (1943) A.C., at p. 62.
(6) (1760) 2 Burr. 1005, at pp. 1008, 1012 [97 E.R. 676, at pp. 678-681].
(7) (1949) A.C. 293.
(8) (1945) 72 C.L.R. 304.

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If the price " may be reduced " by the Court then the contract is *ex facie* bad. The parties must make their own contracts and cannot leave them to the Court. The contracts do not provide that the appellant shall be paid a specified sum or ten per cent on ascertained costs, whichever is the lower. They never became cost-plus contracts. The Court is not concerned to determine finally what is ten per cent on ascertained costs, but is only concerned to determine whether the named figure equals or is greater than ten per cent on ascertained costs. Clause 1 (a) requires some discretionary or consensual act to determine (a) whether there should be a reduction of the price, and (b) the extent of it. On the question of uncertainty what is to be ascertained are ascertained costs according to the standard conditions, that is to say, all the ordinary rules are displaced, the parties have chosen their method of determining the costs. Thereafter the Court could never be at large on the question. The problem then arises: What have the parties agreed upon as their measure of costs. The mention in pars. (l) and (m) of the opinion of the Minister as the means of determining a particular matter excludes the opinion of any other person as a means of determining a matter under any other of the associated clauses. The contracts did not provide for progress payments. The payments were made under express arrangement and therefore have no similarity to the progress payments made in *Lamprell* v. *Billericay Union* (1). Repayment of such payments was to be made only in certain events. These events did not take place. The respondent's method of spreading overhead does not necessarily result in the reduced figure including ten per cent on ascertained costs.

Cur. adv. vult.

Dec. 21.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of *Williams J.* for £15,402 7s. for the plaintiff in an action by the Commonwealth of Australia against York Air Conditioning and Refrigeration (A/sia). Pty. Ltd. The Commonwealth claimed repayment of what were alleged to be over-payments under eight contracts made between the Commonwealth and the defendant company. The claim was supported in various ways :—money repayable under the terms of the contract; money paid under a mistake of fact; money paid as upon a failure of consideration; and (relied upon by the plaintiff before *Williams* J., but not upon appeal) estoppel. As to five of the contracts, the plaintiff paid in advance the whole of the price

(1) (1849) 3 Ex. 283 [154 E.R. 850.]

fixed by each contract and there was an express undertaking on the part of the defendant to make repayment of any amount which might be found upon investigation to exceed the defendant's costs of performing the contract plus an agreed percentage. In the case of three of the contracts a condition, namely the payment of a certain amount under the contract upon the basis of the undertaking and the condition, had not been performed. I find it unnecessary to consider any of these grounds except the first mentioned, namely the question whether the terms of the contract in themselves entitled the plaintiff to repayment of moneys which exceeded amounts calculated in accordance with the various contracts.

The defendant agreed to supply certain refrigeration equipment to the Commonwealth for defence purposes at prices stated in written orders accepted by the defendant. I take as an example of the contracts Order No. M.O.N. 2196, dated 21st October 1942. This was an order for portable cold storage rooms for an amount of £42,450. The order included the following terms :—

" *Note* : Only the ' General Conditions ' clauses indicated hereon are applicable to this Order."

" *Price Check* : In accordance with Clause 1 (a) of the attached ' General Conditions '."

Clause 1 (a) of the attached General Conditions was :—" The price is (prices are) subject to check by the Director of Finance or his representative, and if the profit margin on ascertained costs in accordance with ' Standard Conditions ' exceeds 10% the price (prices) may be reduced to a figure which would include a profit margin of not less than ten per cent." Another clause of the General Conditions which was made applicable to the contract was a provision that claims for payment should be made on a prescribed form accompanied by an inspection certificate " in respect of each delivery " together with other documents. Thus payment became due under the contract only upon delivery. The other contracts were in the same form as that from which these quotations have been made except that in some of them the profit margin of ten per cent was stated on the face of the order instead of being applied by reason of the express mention of ten per cent in a clause of the General Conditions.

The amount actually paid under the contracts, which include over-payments, according to the plaintiff, of about £15,000, was £276,000. Not unnaturally, in view of the magnitude of the contracts, the plaintiff asked that progress payments should be made. Such payments were made on account of the contracts from time

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to time. These payments, according to the contention of the plaintiff, gave the defendant a profit margin in excess of ten per cent on costs ascertained in accordance with the Standard Conditions. The defendant contends that even if this be the case the plaintiff, having paid the moneys, cannot now recover the over-payment. The defendant further contends that, if the plaintiff is entitled to recover over-payments, a wrong distribution of overhead costs as between the contracts in question which were made with the Department of Munitions and other work of the plaintiff was made and that the sum claimed by the plaintiff should be reduced by about £9,000.

In the first place, the defendant relies upon a particular construction of clause 1 (a) of the General Conditions. Both parties agree that the provision that the prices are subject to check by the Director of Finance does not mean merely that the accuracy of the price charged per unit is to be checked, but that the costs and the profit margin of the defendant may be investigated. The defendant, however, contends that the provision that " if the profit margin on ascertained costs in accordance with Standard Conditions exceeds ten per cent the price may be reduced " means only that the parties may agree upon a reduction of the fixed price to a price which still allows a profit margin of ten per cent upon costs as so ascertained. This contention means, therefore, that if the vendor agrees to a reduction in price the price may be reduced. The reduction of price does not, upon this view, depend upon the profit margin on ascertained costs in fact exceeding ten per cent. It depends upon the defendant voluntarily agreeing to a reduction in price.

Upon this view the clause imposed no obligation upon either party. Indeed, it has no meaning whatever, because, apart from any such clause, the parties could agree upon any reduction in price whatsoever. The reference to a reduction to an amount which still allows a profit margin of ten per cent cannot prevent the parties, if they so choose, agreeing to an even greater reduction. It should not readily be assumed that the clause was intended to be meaningless or to present only an invitation to a reconsideration of the price if both parties desired that it should be reduced. The parties themselves did not regard the clause as meaningless. The price under each contract was investigated and checked on behalf of the Commonwealth. These investigations proceeded during and after the performance of the contracts—with the knowledge and assistance of the defendant. The plaintiff contends that the investigations showed that the moneys actually paid to the defendant by the Commonwealth provided the defendant with a profit margin on

duly ascertained costs exceeding ten per cent and that, according to the terms of clause 1 (a) of the General Conditions, the money over-paid is repayable.

Clause 1 (a) means, in my opinion, that the Director of Finance may check (that is, investigate) all costs under the contract in order to ascertain whether the profit margin on costs ascertained in accordance with the Standard Conditions exceeds ten per cent. If there is such an excess the Commonwealth may then, if it elects so to do, reduce the price but not so as to give the contractor an amount less than such ascertained costs plus ten per cent. The Commonwealth is not bound to make any reduction or to make the maximum reduction possible under the clause. But the provisions of the clause are intended to fix the obligations of the parties in respect of the amounts ultimately payable under the contracts.

The defendant contends, as an alternative construction of the clause, that it means that the Director of Finance or his representative may check the price and that some person or persons—perhaps the Director or his representative—may then subject the price to a process of reduction, with the result that the reduced price becomes the only sum which the plaintiff becomes bound to pay, so that unless the precise sum to which the price is so reduced by such person is at least equal to cost plus ten per cent the reduction is nugatory. Alternatively the defendant submits that the clause is so uncertain that no operation can be given to it because it is impossible to say who is to reduce the price.

I am unable to adopt any of the interpretations of the clause suggested by the defendant. I see no difficulty whatever in reading it as meaning that the contract price is £X but if investigation shows that £X provides to the defendant more than ten per cent as a profit margin on costs ascertained in accordance with the Standard Conditions, the price is reducible to any sum which still allows that profit margin. Any progress payments were made subject to this clause. They were made only on account of contracts which included this clause and, progress payments having in fact been made, the clause means that an adjustment may be made to limit the profits to the agreed margin if the Commonwealth so decides. Progress payments under such contracts are essentially provisional, unless the clause providing for ultimate adjustment is effectively waived. There was no waiver. Both parties, during and after the performance of the contracts, acted upon the basis that the clause was applicable. Any other view in my opinion gives no real effect to the presence of the clause in the contracts.

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I am supported in this view by the fact that it was not until after months of discussion and negotiation that it was suggested on the part of the plaintiff that the clause did not bear the meaning which I have stated. In a letter dated 30th October 1946 the defendant wrote :—"It is correct that contracts entered into by this Company with Department of Munitions provided that should cost investigation reveal the Company's profit margin to exceed ten per cent, the Department of Munitions may call for refund of such excess profits. As discussed with Officers of the Department of Munitions at that time, any refund claimed would depend on circumstances and conditions at some future date. We have set forth in various correspondence to the Department of Munitions the fact that termination of war time contracts in September, 1945 and the subsequent reconversion to peace time trading has been achieved at such expense to the Company as would justify the writing off of this alleged liability. The statements of account submitted to this Company by the Cost Investigation Branch of the Department of Munitions covering the various contracts enumerated in your letter are not disputed as to correctness." The defendant wrote withdrawing these admissions on 24th June 1947, but in fact, at the trial, there was no dispute between the parties as to the figures of ascertained costs.

I can see no reason for holding that clause 1 (a) means that the price is to be reduced by some reducer external to the parties. The obvious meaning of the clause is, in my opinion, that the purchaser may, if it chooses, pay a price smaller than the price fixed provisionally by the contract, but not less than a price which allows ten per cent profit margin on ascertained costs.

It was argued for the defendant that upon the construction of clause 1 (a) which gives the plaintiff a right to reduce the price, the position was that the plaintiff had an option, that the option should have been exercised within a reasonable time, and that it was not so exercised. I agree that the clause does not mean that the plaintiff can insist upon a reduction of price at any time in the indefinite future and that the right to reduce the price must be exercised within a reasonable time. The contracts were performed during 1944 and 1945. The claim of the Commonwealth for a return of over-payments (that is, the specification of the price to which the stated fixed prices should be reduced) was made in March 1946. The contracts were made in time of war. Mr. V. J. Murtagh, an officer of the Commonwealth who had to deal with contracts containing conditions such as those stated, dealt with some 400 contracts of this type for the purpose of ascertaining and

adjusting profit margins. In my opinion the option to reduce the price was exercised within a reasonable time. It would be unreal to ignore the tremendous number of contracts to which the Commonwealth was a party, to pay no attention to war conditions, and to regard as immaterial the intricacy and amount of detail involved in the contracts. In all the circumstances, the Commonwealth was quite reasonably prompt in exercising its option.

But the defendant has other defences to the plaintiff's claim. It is argued that there is no evidence of what the Standard Conditions were and that if a certain document (Exhibit B) is to be regarded as representing the Standard Conditions, the provisions in that document are so vague that they provide no means for ascertaining the basis upon which the ten per cent profit is to be calculated.

Exhibit B is a document headed "Standard Conditions applicable to Contract on a Cost Plus Profit Basis." This document was proved as a document containing standard conditions applied by the Munitions Department to its contracts. It is now suggested that the document was not sufficiently identified as containing the Standard Conditions. It is true that objection was taken to the admission of the document in evidence, but that objection was based upon the ground that the document was described as conditions applicable to a contract on a cost plus profit basis and that the contracts in question were fixed price contracts, so that those Standard Conditions could not be applicable to them. The case before the learned trial judge proceeded on the basis that Exhibit B did contain the Standard Conditions to which reference was made in clause 1 (a) of the General Conditions, and there was no evidence to suggest that there were any other Standard Conditions to which clause 1 (a) could apply. I therefore proceed to consider the case upon the footing that Exhibit B does represent the Standard Conditions. The Standard Conditions, as I have already stated, are described as standard conditions applicable to contracts on a cost plus profit basis. The contracts in question were contracts for the supply of articles at fixed prices and not on the basis of cost plus profit. But I agree with the learned trial judge that the express provision that clause 1 (a) of the General Conditions, which has already been quoted, should be applicable to the orders given means that, if the profit margin on the basis of the fixed price turns out to be greater than ten per cent of ascertained costs in accordance with the Standard Conditions, the price may be reduced upon a cost (that is, such ascertained costs) plus ten per cent basis. In other words, the inclusion of clause 1 (a) does enable the Commonwealth to choose, if the Commonwealth thinks proper, a cost plus

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ten per cent basis as the means of determining the prices to be paid instead of the prices fixed in the contracts. Otherwise the express incorporation of clause 1 (a) would have no meaning whatever.

The Standard Conditions provide means of ascertaining costs. Costs can be ascertained by ascertaining the relevant facts and applying proper principles of accounting. The parties had no difficulty in understanding the method of ascertaining costs set out in the Standard Conditions. In fact they did agree completely upon the costs as so ascertained. They agreed upon precise figures in respect of each contract in relation to all elements making up the costs except that they failed to agree upon the method of distributing overhead costs between the Department of Munitions contracts and the other work which the company carried out during the relevant period—the years 1944-1945.

Upon the appeal to this Court it was urged that the Standard Conditions were so vague and uncertain that no meaning could be attached to many of the provisions. This difficulty in fact had been overcome by the parties, who had no difficulty whatever in understanding what they meant.

It was argued for the defendant that the terms of the contracts excluded the ascertainment of costs by any court if there was a dispute between the parties as to what the costs were when ascertained in accordance with the Standard Conditions. I can only say that I can perceive no foundation whatever for such a contention. The procedure of ascertaining the costs is defined by the standard conditions which a court with proper evidence is quite capable of applying.

The learned trial judge not unnaturally accepted the figures of costs upon which the parties had agreed. An example of the criticism to which the Standard Conditions were subjected is provided by the first clause, which relates to what is called "direct material cost." This is an element of production cost and it is "the cost of the materials or substances from which the product is made provided that such can be identified unmistakenly and conveniently with the product or process," followed by a definition of "cost." It is contended that this provision relating to the substances from which the product is made and the unmistakable and convenient identification of those substances with the product or process cannot be applied—that it is too vague—and it is said that all that it means is that if the parties agree in ascertaining such a cost then they are to be bound by their agreement. I can see no difficulty whatever, if there had been a dispute as to what direct material cost was (which was not the case), in the Court

ascertaining for itself the cost of the materials or substances &c. A similar observation applies to all the other criticisms of the Standard Conditions in respect of suggested uncertainty or vagueness.

The Standard Conditions deal with the ascertainment of production costs. They provide that production costs shall be the sum of (a) direct material cost (defined); (b) direct labour cost (defined); (c) direct expense (defined); (d) "Overhead expense—any other cost or expense attributable to the contract which is not conveniently chargeable *directly* to the product or process and which is not a cost or expense disallowed by these conditions." This provision is followed by a statement that certain items (trade discounts, rebates &c.) are to be credited in ascertaining production cost, and that certain items are to be excluded from production cost—e.g. taxes, remuneration of directors, officers and other employees to the extent that such exceed amounts which are reasonable, certain premiums for insurance &c., and provision for any contingency to the extent that such contingencies are beyond reasonable expectation. As to these and other provisions, it was contended that they were uncertain in that they did not provide for the fixation of a precise amount or provide means for the ascertainment of such amount. I agree with the learned trial judge that there is no difficulty (as the parties before this litigation also agreed) in an ascertainment of amounts under all of the relevant heads by the Court itself; for example, under the last-mentioned exception, if the parties were in controversy on this subject it would be for the Court to determine whether a particular contingency was in the circumstances beyond reasonable expectation. When the parties have shown by their conduct that they understand and can apply the terms of a contract without difficulty, a court should be very reluctant indeed to pay no attention to such conduct by holding that the terms of the contract are unintelligible by reason of uncertainty. It is true that a court might require some explanation of some of the terms of the contract before it could interpret and apply them. I take as an example the exclusion from production costs of premiums for insurance "against risks which are not customarily covered by insurance." Before the Court could apply such a provision as this it would be necessary to hear evidence. But where the parties have already applied provisions containing such a term and have agreed upon the result a court would be departing from all business reality if it were to hold that such a clause was so uncertain as either to make the whole

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contract, under which some hundreds of thousands of pounds had been paid, void, or at least to be void itself.

The parties agreed before *Williams* J. upon all the figures of costs. The total overhead costs during the relevant period were agreed by the parties to be £48,945. General overhead of the whole enterprise, including rent, administration expenses and other similar allowable items, make up "overhead costs." The contest between the parties was as to the proper principle to be applied in allocating this amount between the Commonwealth contracts and the other work carried out by the company. No expert evidence on this subject was given on behalf of the defendant. Expert witnesses for the plaintiff gave evidence with respect to possible methods of allocation. They rejected allocation on the basis of sales of products. The defendant upon appeal did not seek to support this basis. They gave evidence as to allocation on the basis of direct labour cost; that is, upon a comparison of the direct labour cost of the Commonwealth contracts with the direct labour cost of other work. Direct labour cost is defined in the Standard Conditions as being "that portion of the factory wages which is productive in character and which is directly applicable to the product or process." Another suggested method of allocation, which was supported by argument on the part of the defendant, but as to which he called no expert evidence, was allocation upon the basis of cost of sales.

The learned trial judge accepted the evidence actually given on behalf of the plaintiff and allocated the overhead costs upon the basis of direct labour costs. There is no doubt that there was evidence to support this conclusion. The defendant company did not manufacture the whole of the equipment which it supplied under the contracts. It obtained many parts from special contractors and assembled them. His Honour said that the evidence of one witness left him "with the impression that perhaps the fairest method in such a case, and therefore in the present case, would be to apportion the overhead on the basis of cost of sales." But this method, the witness said, could be applied only upon the provision of adequate relevant data and appropriate calculations based thereon, and neither party had provided the necessary material. The defendant asks this Court to attempt to work out a distribution of overhead costs upon this basis and submits some doubtful, or at least disputable, calculations for that purpose. I can see no justification for adopting such a course. At the trial the defendant declined an opportunity to submit such material to the Court. The defendant alternatively contends that in effect the

learned trial judge decided that his decision was wrong, and that there should therefore be a new trial. A court frequently has to do its best with the evidence which is available, though it may be apparent that other evidence, if it existed, might have led to a different result. The decision of the learned trial judge was supported by the evidence which the parties thought proper to tender, and the statement of his Honour that other evidence might perhaps have produced a more accurate result if the necessary data were ascertainable and were provided gives no ground for allowing the defendant a new trial for the purpose of making a new case.

It is agreed that overhead costs in the relevant period, making allowances and excluding elements in accordance with the Standard Conditions, amounted to £48,945. The evidence of Mr. W. Scott, a Fellow and President of the Australasian Institute of Cost Accountants, with extensive experience in cost accounting, and of Mr. V. J. Murtagh, a cost accountant who was formerly an officer of the Department of Munitions, applied the principle of apportionment in accordance with direct labour costs, with the result that £17,256 was said to be a reasonable allowance for overhead costs in respect of the munitions contracts. If this apportionment is taken to be correct there is no dispute that the amount overpaid under the contracts was £18,183 13s. 9d. It was agreed, however, that the defendant had a good counter claim for £2,781 6s. 9d. Accordingly his Honour gave judgment for the defendant, namely £15,402 7s. For the reasons which I have stated, I am of opinion that the decision of his Honour was correct and that the appeal should be dismissed.

RICH J. I have carefully considered this appeal and cannot usefully add to the reasons contained in the decision of *Williams* J. with which I agree.

The appeal should be dismissed.

DIXON J. The appellant company, the defendant in the action, is a supplier of air conditioning and refrigeration equipment. It produces much of the equipment it supplies, partly by direct manufacture but mostly by means of sub-contracts.

During the war it contracted with the Ministry of Munitions to provide portable cold storage rooms for the use of the American Forces. There were eight contracts, made at various dates from October 1942 to March 1944. It appears that the Ministry of Munitions had three descriptions of contracts that it was accustomed to make, fixed price contracts, maximum price contracts and cost

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plus contracts. The contracts with the appellant company were maximum price contracts. A price was named for each unit supplied under the contract, but there was a clause under which a reduction in the price might be made. The contracts took the form of orders which incorporated by reference clauses of the general conditions of the Ministry of Munitions.

One of the conditions so incorporated provided for the reduction of price. Two slightly differing versions of this clause were incorporated in different contracts. One version was as follows :—The price is (prices are) subject to check by the Director of Finance or his representative, and if the profit margin on ascertained costs in accordance with " standard conditions " exceeds ten per cent the price (prices) may be reduced to a figure which would include a profit margin of not less than ten per cent.

The other version of the clause differed only in substituting for the references to ten per cent references to " the percentage shown in the order." But as the orders that incorporated this form of the clause mentioned ten per cent the result is the same in every case.

The Ministry of Munitions had only one document called " Standard Conditions." It is headed " Standard conditions applicable to contracts on a Cost Plus Profit Basis." I think that it is clear enough that it is to these standard conditions the general conditions refer, though this conclusion was contested by the appellant company.

The standard conditions deal with the ascertainment of production costs.

The named prices of the eight contracts amounted in the aggregate to £315,002 18s. 5d. But of this sum three contracts accounted for £311,330 19s. 7d. the named prices of the remaining five aggregating only £3,671 18s. 10d. While the contracts were in course of performance arrangements were made for progress payments. With respect to the five small contracts the Ministry agreed to, and did, pay the full price named, and the appellant company agreed to refund any amount found to have been overpaid on an investigation of costs. With respect to one of the large contracts the Ministry agreed to pay up to £148,000 in progress payments, the named contract price being £168,769 16s. 1d. The Ministry appears to have requested an undertaking to refund which probably was meant to cover a reduction of price under the clause of the general conditions, but the undertaking given in the case of this contract does not seem to have been expressed to cover that event. The payments made in the event fell a little short of £148,000. In the case of the two other large contracts, the appellant company

undertook to refund any amount found to be overpaid in consideration of progress payments amounting to ninety per cent of the value of the respective orders. The amount of the progress payments actually made did not reach ninety per cent of the face value of the orders. The total amount paid with respect to all eight contracts was £276,005 9s. 10d. The Cost Investigation Branch of the Ministry of Munitions conducted an investigation of the costs of the execution of the eight contracts and finally in March 1946 the results led to a demand upon the company by the Ministry for a very large amount. It is not clear whether figures for more than seven contracts were stated at that date, but in a letter from the Ministry to the appellant company of 17th July 1946 it appears that the claim of the Ministry was that on all eight contracts £18,183 13s. 9d. had been overpaid, that is paid in excess of cost plus ten per cent profit.

On other contracts the Ministry owed the appellant company £2,311 19s. 9d. and the company shewed that on one of these contracts it had incurred a loss of £469 7s., which the Ministry agreed to allow for. These two amounts were deducted and brought the claim down to £15,402 7s.

The Commonwealth brought the action to recover this sum. *Williams* J. heard the action and gave judgment for the Commonwealth for the amount claimed. From his judgment the company now appeals.

The principal grounds upon which the appellant company supports the appeal depend upon the interpretation of the provision of the general conditions relating to the reduction of price and upon the operation of the standard conditions to which that provision refers. The argument begins with the proposition, which I do not understand to be contested, that the prices named in the contract stand as the amounts for which the Ministry of Munitions incurred liability on behalf of the Commonwealth unless they are effectively reduced under the general conditions. If, therefore, it can be shewn that the clause in the general conditions is incapable of operation or that the attempt to put it into operation has failed or miscarried for any reason, the appellant company remains entitled to the full amount of the named prices. It may be remarked that the company has not pressed this conception of the matter to its logical conclusion by counterclaiming for the difference between the aggregate of the named prices, namely £315,002 18s. 5d., and the amount it has received, £276,005 9s. 10d.; but that no doubt is not a material consideration.

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The contention that on a proper view of the clause for the reduction of price it cannot operate, or has failed in this case to operate, to reduce the liability of the Commonwealth, rests on alternative reasons.

First it is said that the words in the clause " may be reduced to a figure which " &c. means " may be reduced by the parties to an agreed figure which " &c. The parties have not agreed upon the figure and so, it is said, that is an end of the question. I cannot agree in this interpretation of the clause. It appears to me obviously to mean that the Ministry of Munitions or some officer or officers of the Ministry may reduce the price, that is to say, that the government will reduce it. Then it is argued that, independently of the foregoing construction, the clause is bad for uncertainty. It is bad because it leaves uncertain how or by whom the reduction is to be effected; and it is bad because it requires that the costs shall be ascertained according to the standard conditions and these do not give directions which are sufficiently certain.

If, however, the submission that the provisions for reduction are bad for uncertainty is not accepted then the appellant company places reliance on a further objection. This objection proceeds on the basis that not to accept either the contention that under the clause the parties must agree on a reduction or the contention that it leaves uncertain who makes it or the contention that no sufficiently certain way is provided for ascertaining costs must mean first that the clause is read as giving to the Commonwealth or some one on behalf of the Commonwealth power to make the reduction and secondly that costs can be ascertained as an objective fact and not as a matter of discretion or judgment.

Be it so, says the appellant company. That means an exercise of an option by the Commonwealth to fix a price between the price named in the contract and the cost of executing the contract ascertained objectively plus ten per cent. The Commonwealth has purported to exercise the option and has adopted as the price a figure which it regarded as representing the minimum, viz.: cost plus ten per cent. Now, says the company, we shall show that the Commonwealth adopted an erroneous method of costing. The error lay in the manner of distributing the overhead expenses of the company between the contracts the subject of the suit, on the one hand, and, on the other hand, the rest of the operations of the company. An objective ascertainment of the costs discloses the error and what is more it discloses that on any proper method of allocating or attributing overhead expenses cost plus ten per cent must exceed the figure upon which the Commonwealth has pitched.

The figure is below the permitted limit. Accordingly the purported exercise of the option miscarried and the clause has never been put into effective operation. Thus runs the argument.

In my opinion the clause of the general conditions does not mean to leave the ascertainment of costs open as an objective fact. It means to entrust the ascertainment of costs for all purposes to the Director General of Finance or his representatives. That is the interpretation which I place upon the clause and, if it is right, it puts an end alike to the objection that the standard conditions are not sufficiently certain and to the further objection that the Commonwealth has gone below the limit of costs plus ten per cent objectively found.

It meets the objection of uncertainty because it means that the standard conditions provide no more than a set of rules or directions for the guidance of the Director or his representatives in the performance of an accountancy task committed to them.

It is an accountancy task involving a judgment or discretion which must be exercised by some one, and it appears to me that the clause confides it to the Director of Finance and his representatives.

The interpretation I have placed on the clause puts an end to the objection that the Commonwealth has fixed a price below the limit of costs plus ten per cent ascertained objectively, because the costs are not to be ascertained objectively and because they have been ascertained by a Commonwealth authority, who for anything that appears, may be a representative of the Director General. The authority is described as the Ministry of Munitions Cost Investigation Branch.

I shall return to the question of the identity of the authority or officers ascertaining the costs, but first I shall say why I think this is the correct interpretation of the clause in the general conditions. The clause begins by saying that the price is subject to check by the Director of Finance or his representatives. It then goes on " and if the profit on ascertained costs " &c. To suppose that " subject to check " means only that the Director of Finance may inform himself of the figures seems to me a little absurd. The opening words suggest that he is to ascertain whether the price accords with the principle embodied in the clause. Then the word " ascertained " naturally goes back to the check. " Ascertained " used alone is a word which provokes the question " by whom." The answer to the question lies in the opening words of the clause. The subject of the provision is the costing of the production of goods, or it may be, for the clause is general, of the erection of buildings or of the execution of work.

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Cost accounting depends in many matters upon the judgment or opinion of the accountant and the interpretation of such a clause may well be approached with well nigh a presumption that it contemplates the ascertainment of the costs, if not by the normal operation of the system the contractor employs, then by some appointed authority.

The clause is of course drawn compendiously and without precision. But I think that an intention sufficiently appears that the Director of Finance or his representative is to ascertain the costs and in doing so is to take the standard conditions as a guide.

The appellant's counsel naturally disputed this interpretation and for a time during the argument the respondent's counsel disclaimed it. Perhaps the latter was oppressed with the fact that at the trial neither side had turned its attention to the question who had ascertained the costs and he may have feared that as the general burden of proof was upon the plaintiff a deficiency in the evidence would react against the latter.

The want of information about the Director of Finance and his representatives has caused me some difficulty. But it does appear that the work was done by the Branch of the Ministry of Munitions whose duty it was to investigate contractors' costs. It appears that the costs in a large number of contracts, either costs plus contracts or maximum price contracts, were examined by this Branch, and it further appears that the standard conditions according to which it was done were issued by the Director of Finance. In these circumstances I think that, in the absence of anything to indicate the contrary, it should be presumed or inferred that the accountants of the Cost Investigation Branch were his representatives. If, however, contrary to the view I have expressed, it was the proper interpretation of the clause in the general conditions that the ascertainment of the costs of executing the contracts was not left to the Director of Finance and his representatives, but was left open, so that the costs of performing the contract, costs according to the standard conditions, should be treated as a matter of objective fact, then I do not think I should be prepared to say that the directions given in the standard conditions, considered as the terms of a contract, were sufficiently certain.

It is enough to mention the following matters. In the directions for finding the production costs the standard conditions say that they are the sum of the direct material cost, the direct labour cost, the direct expenses, and the overhead expenses. Direct labour cost is to be that portion of the factory wages which is productive in character and which is directly applicable to the product or

process. Direct expense means any expense which relates to and is directly applicable to the product or process. The overhead expense is defined as any other cost or expense attributable to the contract which is not conveniently chargeable directly to the product or process and which is not a cost or expense disallowed by these conditions.

Now this last doubtless includes both the overhead expenses of the factory and the general administrative expenses of the company. To find what proportion of these expenses is attributable to each of the eight contracts the subject of this suit, it is necessary to apportion or allocate them according to some chosen standard among the various things produced or the works executed. The choice of the basis of apportionment is a discretionary act, particularly in the case of general administrative expenses, "head office overheads." Although the choice should be determined by considerations to which cost accountants are alive, it is in the end nothing but a matter of subjective opinion and in many cases the choice must be almost arbitrary. In the present case the appellant company used one method, the cost accounting branch of the Ministry of Munitions another and an expert witness preferred a third. *Williams* J. was impressed with the last, no doubt rightly so, and would have adopted it, if the parties had provided him with the materials for obtaining the result of applying it. The method employed by the appellant company was to allocate the overhead expenses to the contracts in the proportion which the price of the contract bore to the total sales during the supposedly appropriate period. That of the Ministry was to allocate them in the proportion which the direct labour costs of the contract bore to the total direct labour costs of the company during such a period. The third and preferable method was to employ the proportion which the cost of production, at all events direct labour and materials, ascribed to the contract bore to the like total costs of the company during the appropriate period. Doubtless there are other methods. There is no external test for choosing the method.

It may be possible for a court to apply the definition of direct labour cost and that of direct expense, though there evidently are difficulties.

In the definition of direct material costs "aids to manufacture" are mentioned and are inferentially included. Perhaps this expression might be made more certain of application by evidence of what is understood to come within it, but otherwise it too seems to involve difficulties. So does a provision which excludes the remuneration of directors and officers and employees to the extent that

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they exceed amounts that are reasonable taking the size and character of the contractor's business into consideration, the nature of the services rendered and the remuneration usually paid in a similar business. No doubt it is true that, except over the allocation of overhead expenses, the parties did not before the suit raise any question as to the manner in which these directions have been applied in the present case. No doubt it is also true that the courts do not hold a contractual provision unenforceable on the ground of uncertainty unless no external standard or test of its operation is provided enabling the courts to ascertain the liability of the party as distinguished from simply imposing it upon him.

But in the present case the choice of the method of apportioning administrative overhead expenses makes a great difference to the liabilities arising from the contracts, the parties are at issue about it and I do not see what test or method is provided by the standard conditions for deciding the issue.

I would, therefore, have been disposed to think that there was no sufficient certainty in this part of the standard conditions and therefore in the clause of the general conditions had I not been of opinion that the ascertainment of the costs was made the province of the Director of Finance and his representatives. But as it is I think the objection of uncertainty fails.

The appellant company however, put forward two further answers to the claim of the Commonwealth.

The first is that the clause authorizing the reduction of the price must be put into operation within a reasonable time and that more than a reasonable time had elapsed before the Ministry of Munitions determined to reduce the prices.

The clause for the reduction of price might be brought into operation in a given case before the price was paid or after the named price had been paid provisionally.

There is no express restriction upon the time within which the reduction must be made. But in the first case it is difficult to suppose that payment might be withheld indefinitely pending the ascertainment of the costs and the decision of the Commonwealth as to the amount to which the price should be reduced; and in the second case it is equally difficult to suppose that the contractor is to remain exposed indefinitely to the possibility of a reduction being made resulting in the imposition of a liability upon him to refund part of the payment.

The ordinary prima-facie rule is that when a contract provides for the doing of an act and there is no express provision as to time the law implies that it must be done within a reasonable time.

I should therefore, be disposed to accept the contention that the costs must be ascertained and the election to reduce must be exercised within a reasonable time.

What is a reasonable time is a question of fact to be determined in the light of all the circumstances. Was a reasonable time exceeded ?

In the circumstances of the present case I do not think it was. The work of checking went to the company's knowledge. Neither then nor later was any question of delay raised.

There is little evidence as to the work involved in ascertaining the costs. But the contracts were large. The difficulties of the times were considerable.

It would seem that the execution of the contracts had not all been completed when, under a clause of the general conditions allowing of the termination of contracts, the Commonwealth brought performance to a stop in September 1945.

In these circumstances I do not think that more than a reasonable time had elapsed before the notifications of March and July 1946 were given stating the amounts repayable.

The other answer set up by the company to the Commonwealth's claim relates to the three large contracts and not to the five small contracts. It is that the Commonwealth voluntarily paid the amounts of the progress payments and that the plaintiff is under no liability to repay the money. The engagement on the part of the company to repay the money was conditional, it is said, on ninety per cent of the price being paid in the case of two contracts and in the case of the third of £148,000, and this was not done.

The nature of the contract and the circumstances show that both parties knew that the final liability under the contract was yet to be ascertained when the payments were made and received.

The proportion of the named prices that it was intended to withhold was fixed, doubtless because it was not anticipated that the reduction would be greater, but that is no ground for imputing to the Commonwealth an intention of making the payments once for all. When the company gave express undertakings, it will be recalled that the consideration was stated to be the making of progress payments of ninety per cent in two cases and up to £148,000 in the third. But this does not appear to me to have meant to change the character of the progress payments, which was that of payments made and received on account of a liability yet finally to be ascertained.

Such a payment is prima facie to be considered provisional. When the liability has been ascertained the residue of the money

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lies in the payee's hands un-applied to the purpose for which it was received, namely the discharge of the ultimate debt.

Once it is found to have been paid provisionally and not finally, all difficulty disappears, in my opinion, and the balance can be recovered in an action of money had and received.

I think that *Williams* J. rightly gave judgment for the plaintiff for the amount claimed and the appeal should be dismissed with costs.

McTIERNAN J. In my opinion the appeal should be dismissed.

I have read the reasons of his Honour the Chief Justice and agree with them.

WEBB J. I would allow this appeal and order a new trial.

On the view taken by *Williams* J. as to the method of apportionment and on the evidence given by the Commonwealth itself—hidden away in two of its many exhibits and not pointed out to his Honour—the probabilities are that the Commonwealth obtained judgment for perhaps £9,000 too much. This is a heavy penalty on the company merely for making a wrong submission as to the apportionment of overhead and not relying on any alternative submission. It is really a penalty because the Commonwealth is not entitled to the money under the contract. The failure of the company to rely on a cost-of-sales apportionment, and to point to the Commonwealth's evidence in support of it, was not due to negligence. It was deliberate. But however erroneous its submission may have been judgment should not be given against it for a greater amount than the evidence warrants. On a new trial the Commonwealth's figures in Exhibits "R" and "V" might be proved inaccurate, but if so it would be because of the Commonwealth's attack on them. The company accepts them. In these unusual circumstances, I think a new trial is called for with an appropriate order as to costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Purves, Moodie & Storey.*

Solicitor for the respondent: *G. A. Watson*, Crown Solicitor for the Commonwealth.

J. B.