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IN THE HIGH COURT OF AUSTRALIA

THE COMMISSIONER FOR RAILWAYS

V.

THE PARRAMATTA AND GRANVILLE ELECTRIC SUPPLY COMPANY LIMITED.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY, 12th August, 1949

H. E. Daw, Gov. Print., Melb.

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THE COMMISSIONER FOR RAILWAYS

V.

THE PARRAMATTA AND GRANVILLE ELECTRIC SUPPLY COMPANY LIMITED.

O R D E R.

APPEAL DISMISSED WITH COSTS

THE COMMISSIONER FOR RAILWAYS

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JUDGMENT.

RICH J.
DIXON J.
McTIERNAN J.
WILLIAMS J.

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JUDGMENT.

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McTIERNAN J.
WILLIAMS J.

This is an appeal from an order of the Supreme Court of New South Wales determining questions raised by an award in the form of a special case stated by an arbitrator in pursuance of the power conferred upon arbitrators by sec. 9 of the Arbitration Act 1902 (N.S.W.).

The questions related to the meaning of a few words contained in a letter addressed by one party to the other. The words consist simply in a reference to a clause in an agreement between the parties but they are at issue as to what the words should be understood to refer.

The appellant, who is the Commissioner of Railways, apparently supplies electricity in bulk to electrical undertakings which distribute electric current to consumers. The respondent company conducts such an undertaking. In 1920 the appellant Commissioner and the respondent company entered into an agreement under seal for the supply by the former to the latter of electricity up to a stated maximum load. The agreement had no fixed term but was to remain in force until one party gave to the other two years' notice of termination.

The charge for the electric energy to be supplied fell into two parts. One part consisted of a rate per kilowatt hour for the kilowatt hours supplied. With that the appeal is not concerned. The other part was a charge based upon the average rate of supply in kilovolt amperes measured over a maximum half hour observed during a period. The agreement named twelve months as the period,

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the twelve months of the current financial year ending the thirtieth day of June (cl. 4). It imposed upon the respondent company an obligation to furnish to the appellant Commissioner in the month of July in each year an estimate of the maximum demand anticipated during the period of twelve months commencing on 1st July one year later (cl. 6). Then by clause 7 of the agreement the following provision was made - "If the maximum demand observed in any year be less than 80 per centum of that measured during the preceding year payment shall be made by the Company on a figure equal to 80 per centum of that taken during such preceding year unless the extent of the decrease shall have been forecasted in the Company's estimate (as in Clause 6) of maximum demand and agreed to by the Commissioners." The instrument concluded with a provision for the reference of disputes to arbitration.

After the agreement had been in operation for some sixteen years the appellant Commissioner addressed a letter to the respondent company headed "Alteration in Basis of Calculations of Maximum Demand Charges for Bulk Supplies of Electricity". The letter proposed that in lieu of the method provided in the agreement, payment for the maximum demand recorded during the first month of each quarter of the calendar year should be required, unless such demand were exceeded, for the ensuing two months. "In other words" the letter said, "a quarterly instead of an annual charge will be made". A condition was imposed that the concession involved in the change should be passed on to bulk consumers. The letter concluded by saying that after receipt of acceptance by the respondent company of the alteration and the condition the new basis would be put into operation from 1st July then next. The respondent company replied accepting the offer and the condition. But the reply proceeded to give figures illustrating the company's understanding of the manner in which the new basis would apply. Two further letters were exchanged relating to the working of the new proposal. In the second of these the company, after quoting clause 7, said that the question had been raised as to whether under the alteration in the basis applicable from 1st July it is

intended that payment should be made on a figure equal to 80% of that taken during the preceding year or the preceding quarter, and whether the word "quarter" should be substituted for the word "year" where it appears in three instances in clause 7.

This resulted in the appellant Commissioner replying that as from 1st July clauses 4 and 7 as set out in the agreement no longer applied. For them there should be substituted clauses which the letter proceeded to set forth. They are as follows:-

"Clause 4.

> The term maximum demand hereinbefore mentioned shall mean the average rate of supply as measured over the maximum half hour observed during the first month of each quarter of each calendar year. The figure so obtained shall be taken as the maximum demand for the succeeding two months of each such quarter but should a greater demand be indicated in the second month in each such quarter then that greater demand shall constitute the maximum demand for the second and third month of each such quarter unless in the third month a greater demand be indicated which latter greater demand shall thereupon apply for the one month in which it was obtained.

Clause 7.

> If the maximum demand observed in the first month of any quarter of a calendar year be less than 80% of that for which payment was made during the preceding quarter payment shall be made by the Company for a maximum demand equal to 80% of that for which payment was made during such preceding quarter unless the extent of the decrease shall have been forecast in the Company's estimate of maximum demand and agreed to by the Commissioner or the capital payments shall at the option of the Commissioner be based upon a figure not less than 80% of the maximum demand forecast under the provisions of Clause 6 hereof or upon a figure not less than 80% of such other maximum demand in excess thereof as may be mutually arranged in writing between the parties hereto."

In answer to this letter the respondent company wrote that they desired to express their thanks for the explanation given.

The award in the form of a special case does not say that this, either alone or together with the continued receipt of electric energy, amounted to an acceptance, but the question or questions for the Court are necessarily based on the assumption that there was an acceptance. Nearly two years later the Chief Electric Engineer of the appellant Commissioner wrote a further letter headed "Alterations in Basis of Calculation of Maximum Demand Charges for Bulk Supplies of Electricity". The letter began with

a reference to the first letter written two years before on the same subject and continued -

> ".....I am now able to advise that as a result of further consideration given to the matter, the Commissioner has approved, subject to the conditions set out hereunder, that payment for the maximum demands taken by your Company shall be required for each month separately, the conditions being:
>
> (1) That the Company agrees to the above alteration to the current Agreement for supply of electricity by this Department to the Company.
>
> (2) In Clause 7 of the Agreement, the word 'month' shall be substituted for the word 'year' or 'quarter', whichever has been used in that Clause.
>
> (3) That the Company undertakes that it will, in turn, pass on the concession to each of its consumers purchasing electrical energy in bulk.
>
> Subject to the Company's acceptance, in writing, of the above conditions, the new system of charging will be put into operation from 1st proximo."

The respondent company replied expressing their agreement to take their supply of bulk electricity under the altered conditions set forth in the letter. No question arose concerning the meaning or application of the second clause of the letter of the Chief Electrical Engineer for some years. The reason, it is said, is that until two years ago consumption had continually increased. But a little less than two years ago the parties found themselves at issue upon the correct method of calculating the maximum demand. According to the respondent company the second clause of the letter was intended to express an alteration in clause 7 of the agreement as originally written. According to the appellant Commissioner it should be considered as applicable to the substituted clause 7. He concedes that it is not aptly expressed for the purpose of effecting verbal alterations in the text of the substituted clause 7. But it was a circular letter applying to undertakings obtaining bulk supplies from the appellant Commissioner. That explains the form of the alteration and it should be understood, says the Commissioner, as applicable in substance to the substituted clause 7 and as controlling its operation. The question took the form of a dispute as to the amount due

and payable by the respondent company for electricity supplied by the appellant Commissioner to the company during the month of November 1947. The dispute was referred to Mr. Teece K.C. as an arbitrator and he at the request of the respondent company stated his award in the form of a special case. The Supreme Court decided the question in favour of the respondent company.

One of the grounds taken in the notice of appeal to this Court is that, if clause 2 of the letter does not refer to the substituted clause 7, as the Supreme Court has decided, then no contract was constituted by the letter of the Chief Mechanical Engineer and the company's answer. But that ground is not open, in our opinion, because it is outside the question or questions submitted to the Court by the Arbitrator.

The award says that the question for the decision of the Court is in effect whether on the true construction of the contract constituted by the two letters the words "clause 7 of the agreement" mentioned in the letter of the Chief Mechanical Engineer mean the substituted clause 7 or mean the clause 7 of the agreement as it appears in that document.

It was for the arbitrator to decide whether the letter of the Chief Mechanical Engineer and the company's reply constituted a contract and he appears to have decided that they did constitute a contract and he has reserved no question for the Court on the subject. The question we have to decide is therefore entirely one of interpretation. Treating it as a matter of interpretation we must do the best we can with the materials which the special case brings before us to ascertain the intended application of the reference the Chief Engineer's letter contains to clause 7.

Now the manner in which the letter begins seems to us to be a not unimportant clue to the meaning of the reference. It begins by repeating the old heading and expressly referring to the letter of nearly two years before by which the subject was first raised. Then it goes on to speak of further consideration being given to the matter as a result of which payment for the maximum

demands is to be required for each month separately. Upon the information before us, this appears to mean that in consequence of the consideration given to the original change a decision has been reached to put the maximum demand on a monthly basis. The intervening correspondence between the company including the substitution of another clause 4 and clause 7 shows the kind of consideration that had been given to the subject. This would make it natural to suppose that the alterations which are there proposed contemplate the basal agreement. It is more natural to suppose that they contemplate the original agreement and are in lieu of the alterations made when the subject was first raised/first because you would not expect alterations of alterations to deal with the same difficulty; second because it is a circular letter; and third because it speaks/of "the Agreement". The words "current agreement" are doubtless used in the first of the three clauses expressing the conditions because it is a circular letter. The purpose is to cover the agreement on foot for the time being in the case of each undertaking supplied. That too is the reason of the alternative reference in the second clause to year and to quarter. Some agreements doubtless adopted quarter, others year as the basis. But the words in clause 2 "the Agreement" are an apt description of the basal agreement. The foregoing are pointers but perhaps no more than pointers. When, however, it is seen that the directions in the second clause for the textual amendment of clause 7 will not work if they are applied to the substituted clause 7 and will work if applied to the original clause 7, a very strong consideration is added. That it will work in the one case and will not in the other will be seen if the clauses are rewritten according to the directions. The original clause 7,if "month" is substituted for "year", simply reads:-

> "If the maximum demand observed in any month be less than 80 per centum of that measured during the preceding month payment shall be made by the Company on a figure equal to 80 per centum of that taken during such preceding month unless the extent of the decrease shall have been forecasted in the Company's estimate (as in Clause 6) of maximum demand and agreed to by the Commissioners."

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That is sensible and, it might be thought, produces the result desired. It is unnecessary to set out the substituted clause 7 altering quarter to month. A glance at the text of the substitution will show that the alteration makes it nonsense. The answer made by the appellant Commissioner is that you ought not to apply the directions literally to the substituted clause 7 and make textual alterations therein accordingly; you should make a free application of the directions by gathering the sense. But unfortunately it is a provision specifically dealing with a textual alteration.

We are therefore of opinion that on the materials before us the answer given to the question stated in the special case must be that the words "clause 7 of the Agreement" mean clause 7 of the original agreement as appearing in that document.

We think that the appeal must be dismissed with costs.

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THE PARRAMATTA AND GRANVILLE ELECTRIC SUPPLY COMPANY LIMITED.

JUDGMENT. WEBB J.

This is an appeal from a judgment of the Supreme Court of New South Wales on an award in the form of a special case stated by an arbitrator in a dispute between the appellant Railway Commissioner and the respondent company as to the amount due by the company to the Commissioner for electrical energy supplied by the Commissioner.

On the 21st. April 1920 the predecessors of the parties made an agreement by deed for the supply of electricity. Clauses 4,6 and 7 of the deed provided for the method of payment calculated on a yearly basis. This method was varied by correspondence, initiated by the Commissioner, in 1936 to provide for a quarterly basis, and again in 1938 to provide for a monthly basis of calculation. In 1936 the correspondence appeared to result in a concluded agreement for variation when the company on the 19th of May 1936 accepted the Commissioner's offer, but later the company sought an elucidation of the arrangement and on the 6th July 1936 the Commissioner wrote to the company stating that new clauses 4 and 7 which he set out, should be substituted for those in the deed of 21st April 1920. The company replied by letter of the 7th July 1936 thanking the Commissioner for the explanation. As a matter of fact the new clause 7 contained a provision not mentioned in the negotiations, but I do not think anything turns on that. However I think the letters of 6th and 7th July 1936 should be regarded as part of the new agreement and that the line should not be drawn after the company's letter of 19th May 1936. See Bristol, Cardiff and Swansea Aerated Bread Coy v. Maggs (44 Ch. D. 616 at 624). The correspondence in 1938 when the method of payment was again varied consisted of two letters. The first dated 15th June 1938

from the Commissioner reads as follows, omitting immaterial parts:-

> "...the Commissioner has approved... that payment... shall be required for each month separately, the conditions being
>
> (1) The the company agrees to the above alteration to the current agreement..
>
> (2) In Clause 7 of the agreement the word "month" shall be substituted for the word "year" or "quarter", which ever has been used in that clause. "

The company replied on the 1st. July 1938 accepting the Commissioner's offer.

The Chief Justice of New South Wales in his judgment says that the Commissioner's letter of the 15th June 1938 was a circular letter and that the phraseology of condition (2) was explained by the fact that some of the deeds by which similiar agreements had been made with the other wholesale customers of the Commissioner were on a quarterly and not a yearly basis. It would appear that the Commissioner in setting out condition (2) did so with reference to the terms of Clause 7, as it appeared in the deed of 21st April 1920. As pointed out by Owen J. in the Supreme Court the substitution of "month" for "year" in the original clause 7 makes sense, but would have a meaningless result if made in the new Clause 7 in the letter of 6th July 1936. I think the correct view is that submitted by Mr. Ferguson for the respondent company, namely, that two collateral agreements were made in 1936 and 1938, the latter in substitution for the former, and that each was made with reference to the terms of the original Clause 7. See Nash v. Armstrong (10 C.B.(N.S.) 259 at 260); 142 E.R. 451 at 454).

I would dismiss the appeal.