TRANSCRIPT OF PROCEEDINGS

State Reporting Bureau, 4th Floor, The Law Courts, George Street, BRISBANE, Q. 4000

Tel. (07) 227.4360

SUPREME COURT OF QUEENSLAND Appeal No 11 of 1991

FULL COURT

McPHERSON ACJ

THOMAS J

BYRNE J

STANLEY T. WADE Respondent

and

JOHN McFAUL and L.M. McFAUL Appellants

BRISBANE

..DATE 13/9/91 9.30 A.M.

JUDGMENT

THE ACTING CHIEF JUSTICE: In this matter I would dismiss the appeal with costs. I agree with the reasons about to be delivered by my brother Byrne.

MR JUSTICE THOMAS: I would also dismiss the appeal with costs. I agree with my brother Byrne's reasons.

MR JUSTICE BYRNE: I agree with the orders proposed by the Acting Chief Justice. I publish my reasons.

THE ACTING CHIEF JUSTICE: The order is: appeal dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 11 of 1991

FULL COURT

BETWEEN:

STANLEY T WADE (Plaintiff) Respondent

AND:

JOHN McFAUL and L.M. McFAUL (Defendants) Appellants

McPHERSON ACJ

THOMAS J

BYRNE J

Reasons for judgment delivered by Byrne J on 13th September 1991. McPherson ACJ and Thomas J agreeing with the reasons of Byrne J. All concurring as to the order.

"APPEAL DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 11 of 1991

Before the Full Court

Mr Justice McPherson A.C.J.

Mr Justice Thomas

Mr Justice Byrne

BETWEEN:

STANLEY T. WADE (Plaintiff) Respondent

AND:

JOHN McFAUL and L.M. McFAUL (Defendants) Appellants

JUDGMENT - BYRNE J.

Delivered the 13th day of September 1991

CATCHWORDS:

Counsel: D.J. McGill for appellant
P.R. Dutney Q.C. and P.J. McHugh for respondent

Solicitors: Andrew P. Abaza for appellant
Primrose Couper Cronin Rudkin for respondent

Hearing dates: 13 and 15 August 1991

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 11 of 1991

BETWEEN:

STANLEY T. WADE (Plaintiff) Respondent

AND:

JOHN McFAUL and L.M. McFAUL (Defendants) Appellants

JUDGMENT - BYRNE J.

Delivered the 13th day of September 1991

This appeal is concerned essentially with conclusions of fact reached after a trial in the Southport District Court in which the respondent obtained judgment for $156,475.35 being moneys owing on a cartage contract, and interest.

The litigation arose out of a supply of fill to the "Sun Village" site at Benowa. The respondent is an earthmover with more than 40 years experience in that business. The appellants and the respondent had submitted tenders for the earthworks construction. Before doing so they agreed orally that, if the appellants' tender were accepted, the appellants would "sub-let the carting of the material" to the respondent. The appellants' tender was successful

The respondent succeeded at trial in establishing an entitlement to the balance ($132,957.38) of his $587,957.38 claim for delivery of overburden, sand, select fill and roadbase. The appellants' counter-claim, which was founded on a contention that the respondent's rate of delivery failed to comply with the cartage contract, was dismissed.

Three challenges

There are two disputes as to the terms of the parties' oral contract. One relates to the rate of performance by the respondent. The other concerns a variation resulting from a request by Mr McFaul to provide overburden from the respondent's own pit. The remaining issue relates to the learned trial judge's finding that the respondent had sufficiently proved the quantities of earth and fill delivered to the site.

Variation to increase the price

The parties initially agreed that the respondent would supply overburden at a price of $4.15/$m^3$ "loose measure on truck". It was anticipated that the fill would be taken from the Hymix quarry located about 10km from the development. Shortly afterwards, the developer decided to

place “fines” over the Hymix fill. Reedy Creek was the nominated source for this additional material. The parties struck a price of $4.30/m^3 for the respondent to supply it.

The contest in relation to price concerns 37,021 m^3 of overburden, drawn from the respondent's own quarry, charged at $4.30/m^3. The challenge to the judge's finding “that there was, in effect, an agreement” by Mr McFaul to pay that price was based on a contention that there was no evidence to support it. The respondent alleged an oral variation resulting from a request to supply the product.

The learned trial judge described the respondent's evidence concerning this variation as “somewhat vague”. The respondent initially said that he had discussed supplying material from his quarry with Mr McFaul who, the respondent testified, “knew the quality was right and agreed to accept it.” When the subject of agreement on price was first broached in evidence, the respondent could not recall having specifically mentioned the price he proposed to charge to supply this different product. However, when the matter was raised in cross-examination, the respondent said that when Mr McFaul asked him to supply from his own pit, the respondent had “quoted the same price as we were getting from Reedy Creek” - $4.30/m^3. This testimony was supported by Mr McFaul who recalled that the respondent had suggested a price of $4.30/m^3. Mr McFaul also acknowledged that he had accepted the respondent's invoices at that price without comment and conceded that his conduct was such that the respondent was likely to have believed that the quoted price of $4.30/m^3 for the fill from his quarry had been accepted.

The appellants sought to avoid paying the extra 15c/m^3 substantially in reliance on a contention that Mr McFaul did not use words expressly assenting to the new price. “I'd never agreed to $4.30”, he said. Mr McFaul may not have actually voiced his acceptance of the respondent's proposal. But his conduct, viewed objectively, sufficiently evinced an acceptance of the respondent's proposal to

charge at the quoted rate. Any secret hopes Mr McFaul entertained that he might in future negotiate for a lower price are not to the point. His conduct plainly created the appearance of consensus on the new, higher price. The contract was, as his Honour found, varied by the parties to provide for delivery of overburden from the respondent's pit at the rate of $4.30/m^3$.

Rate of supply

The appellants' counter-claim set up two alternative cases founded on the respondent's failure to deliver the overburden at a daily rate of 1,800 m^3. The appellants initially pleaded that the oral agreement included an express term that delivery would be at a rate of not less than 1,800 m^3 daily. The pleading was later amended to allege that delivery would be (i) at a reasonable rate; or (ii) at such a rate as would enable the defendants to complete their contract with the developer within 20 weeks. The amendment also set up that a daily delivery rate of 1,800 m^3 was both reasonable and required to facilitate completion of the earthworks within 20 weeks.

There was conflict whether there was an express agreement concerning a supply rate. This was Mr McFaul's testimony:

> "Was there any discussion about the contract? The time limit on the contract?-- Yes, we discussed the time limit. We agreed it was fairly tight but it could be done.
>
> Was there any further discussion about what was to be done in relation to the time limit?-- It was discussed we would require an amount of approximately 1,800 m^3 per day to finish the contract in the 20 weeks time limit, taking into consideration the stripping and clearing that had to be done." .

The respondent, whose evidence was preferred in this as in other respects, denied such a conversation.

Now, there was nothing inherently implausible in the respondent's account of the pre-contractual negotiations. He said he did not know what time had been fixed for completion by the appellants' contract with the developer. He testified that the arrangement was that he was to continue to supply until the appellants directed him to stop. And in cross-examination Mr McFaul agreed to the suggestion that "basically Mr Wade's agreement ... was simply for him to keep dumping until you told him to stop". These considerations support his Honour's finding that there was no express agreement as to a delivery rate. However, when expressing a preference for the respondent's testimony on this topic, his Honour remarked that "it is significant that at no time did Mr McFaul, or anyone on his behalf, complain to the plaintiff about any delay in the delivery of the material". This was said to be an important mistake. The respondent, who acknowledged that there were problems at times with Hymix's ability to supply the needed fill from the quarry, was confronted in cross-examination with the suggestion that "Mr McFaul was regularly complaining about slow deliveries on your part". The respondent answered "I think he was": a concession which appears inconsistent with his Honour's remarks on absence of complaint. Those remarks, however, may have been intended only to convey that the evidence did not disclose any complaint that the respondent was not adhering to a delivery rate of 1,800 m^3 daily. Mr McFaul said that there were only five days on which more than 1,800 m^3 were carted. However, the extent of his evidence concerning complaints about the rate of performance was limited to this:

> "Did you complain to Mr Wade about the rate of delivery?-
> - On numerous occasions."

In my opinion, the remark about absence of complaint is not a sufficient justification for interfering with the finding that there was no such express agreement as to delivery rate as the appellants alleged.

Nor was the learned trial judge persuaded that a term should be implied providing for a daily delivery rate of

1,800 m^3. I agree with his conclusion that the implication of such a term was not required to give this contract business efficacy: cf. Australian Meat Industry Employees' Union v. Frugalis [1990] 2 Qd.R. 201, 206-207. There may have been an expectation that the appellants would obtain all the fill from the respondent: and he too may well have been optimistic that he would be asked to supply all the sand and overburden required for the project. But neither those facts nor any other feature of the case disclose an implied promise that the appellants would not purchase some of their requirements elsewhere or an obligation on the respondent's part to deliver all fill the appellants required. The evidence, in short, did not reveal that by the contract the respondent had a right and a duty to deliver all the fill the appellants required. In these circumstances, the conclusion that no term should be implied to the effect that a daily (or average daily) rate of 1,800 m^3 was required was correct. Accordingly, the counterclaim failed.

Quantity

The remuneration was by reference to a rate per cubic metre of uncompacted material. The respondent adduced evidence showing that he had supplied from the Hymix quarry, Reedy Creek and his own pit a total of 134,314 m^3 of overburden and from the Pacific Hotel site 4,294 m^3 of sand. The figures were based on volumes attributed to each truck load. The appellants contended that no more than 110,598 m^3 of overburden and 2,367 m^3 of sand was supplied. Their figures were based on calculations from estimates of the quantity of fill in its compacted state at the conclusion of the appellants' earthworks contract.

The respondent did not accept that it was possible to estimate the loose measure carried by the trucks from an assessment of the volume of compacted material. There were, he said, too many points of potential inaccuracy in this exercise. This view, which the learned trial judge accepted, was supported by a consulting engineer, Mr

Marshall, who preferred to ascertain the quantity of fill delivered to the site by reference to delivery dockets containing the drivers' estimates of the quantities carried. Mr Marshall considered this approach more accurate than the theoretical calculations advanced for the appellants. Before considering Mr Marshall's criticisms, the respondent's system of recording deliveries should be mentioned.

Deliveries began in May 1988 and continued for six months. More than 7,000 truck loads were delivered. In the first few weeks, when the source of the overburden was the Hymix quarry, the cartage charges were invoiced by reference to weight of the product carried rather than its volume. This method was unlikely to give rise to much dispute because the quarry had weighing facilities and Mr McFaul was given certificates showing the quantities carried. Later on, the respondent began invoicing by reference to volume. The new method was consistent with the original agreement but it did involve a measure of estimate and therefore some scope for unreliability.

The respondent calculated the volume of uncompacted material using a mathematical formulae he justified by experience: tonnage was divided by 1.5 to produce the number of cubic metres. This calculated volume was then written onto delivery dockets carried by the drivers to the site. The dockets were signed by the appellants' employees to acknowledge receipt of the quantities stated on them. These dockets were then used by the respondent to invoice the appellants at the agreed prices.

During the six months or so the overburden and sand were being delivered, not once did the appellants or their staff dispute that the actual quantities delivered to the site were as stated in the delivery dockets. Moreover, no-one was called for the appellants at the trial to depose to having signed a delivery document with a reservation about its accuracy in identifying the volume of fill carried. Nor was there evidence adduced to dispute the number of truck

loads claimed for. In the six months the respondent supplied the fill, Mr McFaul, although an experienced contractor, had no suspicions that the quantities of earth and sand delivered were less than those charged for. He became worried about this possibility only after the surveyors and engineers made some calculations once the earthworks were compacted.

Competing with the respondent's case were theoretical measures. One involved working back from a particular volume of compacted fill to predict a volume of loose material, using a compaction factor. Another was an attempt to ascertain the weight of the material delivered to the site using information derived from soil tests. Mr Marshall did not accept either of these approaches, both of which suggested that the loose volume of earth delivered was less than 111,000 m^3. They were, as his Honour categorised them, theoretical calculations based on insufficient, uncertain or inherently imprecise data.

Mr Marshall identified several factors which could account for the discrepancy between the amount indicated by working back from a particular volume of compacted fill, using a compaction factor. These included over-compaction by the appellants, consolidation of existing material during filling (requiring more fill), additional fill being required to compensate for shrinkage of clayey materials and losses from the site as fines blew away or when material was pushed into the sub-soil during compaction. Mr Marshall considered that the bulking of the fill was the prime reason for the difference between the quantity delivered and the solid volume as it had been calculated from the survey work.

The second method of calculation was based on an estimate of the volume of compacted material and its density as derived from soil tests. The method involved inserting a known volume of sand in place of material extracted from a dug hole. The exercise assumed that the volume of the sample extracted was equivalent to the known

volume of sand used. The density of the extracted material could be calculated. Moisture content could then be determined and by, allowing for the higher moisture content at the time the product was delivered, estimates made of the volume of loose fill delivered. Asked to describe the limits of the accuracy of the method, Mr Teo, an engineer called for the appellants would not attribute to it a margin of error of less than 20 per cent.

With the assistance of the considerations discussed by Mr Marshall in his testimony and in his report (ex. 16), his Honour was entitled to decide that the respondent's evidence as to the amount of material delivered was both more persuasive than that called for the respondents and sufficient to establish to the civil standard of proof that the quantity of overburden claimed for was delivered.

The same general considerations apply in relation to the claims for sand.

This challenge to the learned trial judge's conclusions also fails.

Orders

The appeal should be dismissed with costs.