IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : FROST, J.

BETWEEN P.D.C. CONSTRUCTIONS (NG) PTY. LTD.

AND THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT.

1969.
[illegible] 24, 25, 26, 27 and 28.
[illegible] 12
PT. MORESBY.
Frost, J.

This is an action for declaratory orders brought by the plaintiff against the Commonwealth under a contract made on the 17th May, 1965 for the construction of Army buildings at Port Moresby, Moem and Vanimo, which was known as the Army Expansion Programme in Papua-New Guinea. Basically the issues in the case are twofold: first, whether Condition 39(3) of the General Conditions of Contract was applicable, pursuant to which the three declaratory orders were sought, and secondly, the construction of that condition.

At the outset I propose to consider the terms of the contract, upon which the plaintiff relied. During 1964 the Minister of Works of the Commonwealth of Australia called for tenders for the execution of certain works, in accordance with certain plans and specifications, General and Special Conditions of Contract, under three contracts, namely:-

(1) Erection of residences at Murray Barracks, Taurama Barracks and Goldie River Training Centre;
(2) Erection of buildings and construction of associated engineering services at Murray Barracks, Taurama Barracks and Goldie River Training Centre;
(3) Erection of residences and buildings at Moem and Vanimo.

By tender dated 20th January, 1965, "under and subject to the Conditions of Tendering and the General and Special Conditions of the Proposed Contract/s", the plaintiff tendered to execute and perform the works contained in the three contracts in accordance with the plans and specifications, for the following sums:-

Contract No. 1.

(i)	Murray Barracks	£932,000	
(ii)	Taurama Barracks	£357,000	
(iii)	Goldie River	£300,800	= £1,589,800

.../Contract

Contract No. 2.

(i)	Murray Barracks	£3,706,848	
(ii)	Taurama Barracks	£1,010,000	
(iii)	Goldie River	£2,110,000	= £6,826,848

Contract No. 3.

Moem and Vanimo £3,770,862

Total Tender Price = £12,187,510

It is important to note that the plans and specifications required construction of the buildings generally in a metal substance called "Galbestos". In the letter to the defendant dated 20th January, 1965, enclosing the tender the plaintiff submitted for the consideration of the defendant not only the actual tenders, which it referred to as "conforming tenders", but also "Alternative Tenders" for the construction of the buildings generally in pre-cast concrete instead of "Galbestos", as follows:-

"(a) Contract 1. £1,419,786.
A pre-cast concrete design for both European and L.E.P. Housing.

(b) Contract 2. £6,663,300.
(i) A pre-cast concrete design for barracks-type buildings;
(ii) Pre-stressed concrete portal frames in lieu of steel for major span buildings;
(iii) Nauru-type roof in view of roof design specified;
(iv) Pre-cast concrete wall panels for external walls of store buildings.

(c) Contract 3. £3,541.000.
(i) A pre-cast concrete design for both European and L.E.P. Housing with the exception of Vanimo.
(ii) Barracks-type building redesigned as in Contract 2(ii) above.
(iii) Nauru-type roof as in Contract 2(iii)."

It is necessary to refer further only to Contracts 2 and 3, under which the matters in dispute arose. The plaintiff's letter referred to Contract 2 as follows:- "The tender price for this alternative was based upon the following:-

(a) Replacement of the ten R & F Barracks and the living quarters section of the 3 officers and 3 sergeants messes with a precast concrete panel design for the internal walls and floors as shown on certain Drawings, and the substitution of the Nauru type roof

.../for

for that specified, and the framing to the external wall panels to be in timber in lieu of aluminium with zinc annealed louvre frames.

(b) The substitution of prestressed concrete for steel for the portal frames where of major span.

(c) Substitution of the Nauru type deep trough steel deck roof for that specified.

(d) Substitution of precast concrete panels for the external walls of the main store buildings where we have previously redesigned the portal frames in prestressed concrete.

These barracks and mess blocks are identical in layout to the conforming design, but are of more durable construction, and have virtually an identical appearance ...."

As to Contract 3, the plaintiff stated:- "The tender price for this alternative is for the works at Moem only and is based upon the following:-

(a) ....

(b) ....

(c) The redesign of the three R & F barracks blocks and the living quarters section of the officers and sergeants messes, to be identical to those blocks as offered in (a) of our Alternative Tender for Contract 2.

(d) Substitution of Nauru Type roof as in (c) of our Alternative Tender, Contract 2."

Thus what the plaintiff was offering as an alternative was construction in precast concrete and a different roof design, but to the same layout. By letter dated 21st January, 1965, the defendant notified the plaintiff that the conforming tender dated 20/1/1965 had been accepted for the works contained in all three contracts, specifying certain documents to be incorporated in the contract documents, that the alternative tenders were under consideration, and it would be advised of their acceptance in whole or in part at the first opportunity.

The legal position of the parties at that date is determined by the Conditions of Tendering, paragraph 5, which provides "........ if the Commonwealth decides to accept a tender, Notice of Acceptance shall be served on the successful tenderer, who shall thereupon enter into a formal contract for the execution of the works, but the written Notice of Acceptance of a tender shall constitute a binding contract between the Commonwealth and the successful tenderer whether such formal contract is or is not subsequently executed." Thus, on 21st January, 1965, the plaintiff and the defendant were bound together in contract and, as Mr.

.../Hope

Hope rightly argued, in three contracts, although only one tender was submitted and there was only one form of notification of acceptance.

I should now refer to the Bill of Quantities. In accordance with the normal procedure in these matters, before tendering, the plaintiff had been supplied with Bills of Quantities for the proposed contract works. These were dealt with in the specifications for each of the contracts in the following clause under the heading "Preliminary and General Clauses":-

"5. Priced Bill of Quantities.

See Condition 39 of the General Conditions of Contract.

(i) If a tenderer notices any mistake in the Bill of Quantities or other statements as to quantities of work supplied to him and which qualify for adjustment under the terms of Condition 39, he shall draw attention to the mistake in his tender letter to the Director of Works, but the Tenderer's price shall be based on the Bill or other statements as to Quantities as it or they exist and not on a Bill or other statements as to Quantities corrected as may be necessary.

(ii) A fully priced Bill of Quantities and Priced Schedule of Quantities with all rates and extensions shown (added and checked) and in agreement with the amount of the tender, shall be lodged with the Director of Works and be approved by the Director of Works as to rates, before signing the Contract.

(iii) ...."

The Bill of Quantities for each of the contracts also contained a general clause (A10) which, although not in the same terms, referred to Condition 39(3) and was substantially to the same effect as Clause 5 (supra). The purpose of Clause 5 was, no doubt, as Mr. Hope submitted, to provide for the human errors which in large contracts inevitably occur, and to ensure that each tenderer based his tender on the same quantities, thus providing the Commonwealth with a standard of comparison of the prices. But it plainly provided that the tenderer's price should be based on the bill; so far as the Bill of Quantities was concerned, all that was outstanding once the tender was accepted by the defendant, was the lodging with the Director of Works of a fully priced Bill, added and checked and in agreement with the amount of the tender, and the approval by the Director of the rates before signing of the contract.

We thus come to Condition 39 of the General Conditions of Contract which is crucial to this case. It provides as follows:-

.../39 Lump

39. LUMP SUM CONTRACTS.

(1) A lump sum Contract is a Contract to complete the whole of the work for a stated total price referred to as a lump sum.

(2) In a lump sum Contract, the prices included in any Bill of Quantities or other statements as to Quantities of wok supplied to the Contractor or in any Schedule of Prices other than a Schedule of Material Prices accepted by the Commonwealth for rise and fall purposes shall be used for the following purposes only in connexion with the Contract -

(i) as a basis for computing progress payments, and

(ii) for the valuation of variations as provided for in Condition 5 of these General Conditions of Contract.

(3) In a lump sum Contract, the Quantities included in any Bill of Quantities or other statements as to Quantities of work supplied to the Contractor whilst believed to be correct are merely for the guidance of the Contractor and shall not form part of the Contract or necessarily be a basis for progress or other payments. Provided that if it is shown to the satisfaction of the Director of Works that:-

(a) any quantity specified in the Bill or other statements as to quantities in relation to any item which has been included therein is incorrect and the extent of the error exceeds five per centum of the value of that item or £1,000, whichever is the lesser; or

(b) any item which has been included therein should have been omitted therefrom; or

(c) any item which should have been included therein has been omitted therefrom;

then in the case of -

(i) additional quantities or items to be so supplied, upon the application in writing to the Director of Works by the Contractor within fourteen days of the date of completion of the item or the work associated with the relevant trade; or

(ii) quantities to be so reduced or items so deleted, upon the notification thereof in writing to the Contractor by the Director of Works at any time during the continuance of the Contract,

the contract price shall save and except in any case where the value of the adjustment is less than £100 be adjusted accordingly."

Sub-paragraph (3) of this Condition which thus provides for the adjustment of the errors in the Bills of Quantities, was rendered

.../necessary

necessary by reason of the contractor being compelled to tender strictly in accordance with the Bill.

The only other provision of the General Conditions which it is necessary to refer to is Condition 5, "Extra and Variations", which provides that if at any time whilst the works are in hand it shall be deemed expedient by the Director of Works to order material or work of a different description from that specified, etc. etc., he should have full power to do so and to order and direct any such variations and additions, and the work involved in any such variations and additions should be executed by the contractor if of the class of work provided for in the Bills of Quantities at the prices set out in the Bill of Quantities and schedule of prices, if any, and no such variations or additions shall in any way annul the contract (sub-paragraph (1)); if any portion of the work so ordered to be done shall not be, in the opinion of the Director of Works, of the same value or class of work provided for in the Bills of Quantities, the same shall be executed by the contractor at such prices as may be agreed upon with the Director of Works (sub-paragraph (2)).

The final contractual document upon which the plaintiff relied was a formal contract executed by the parties on 17th May, 1965. In substance, the contract provided that the plaintiff covenanted with the defendant to well and faithfully execute the works contained in the three army contracts, and in accordance with the documents annexed to the contract, which were incorporated in and forming part of the contract, viz. the plans and specifications, General Conditions and Special Conditions, the tender and letter enclosing same, the acceptance of tender by the defendant and certain other documents, the works to be executed for the price mentioned in the tender.

In fact, in the period after 21st January, 1965 and prior to 17th May, 1965, when the formal contract was executed, correspondence passed between the parties concerning the substitution of pre-cast concrete construction for Galbestos, the effect of which is a main issue in the case. But as the plaintiff relied on the contract as contained in the formal contract dated 17th May, 1965, it is now convenient to refer to the causes of action relied on by the plaintiff.

The plaintiff claims, and it is conceded by the defendant, that there were errors in the Bills of Quantities submitted by the defendant to the plaintiff, as follows:-

(1) For each of the buildings known as Murray Barracks, buildings 4, 5, 6 and 7, two urinals were specified, whereas the contract

.../drawings

2. The attached addendum specification for architectural work shall apply.
3. ....
4. Priced Bills covering the contract as varied shall be submitted under the conditions and at the time specified in the existing contract.
5. Contract No. 1: European and L.E.P. Married Quarters.
No alteration in contract specification or lump sum price. L.E.P. Quarters may be built in precast panels or concrete blocks at Contractors' option.
6. Contract No. 2: Port Moresby Area.
The contract lump sum price will be reduced by £32,300. The times for completion will be as set out in your alternative tender of January 20th, 1965, but no individual building will be built later than the time provided for in the existing contract.
7. Contract No. 3: Wewak Area.
The contract lump sum price will be reduced by £24,400. The time for completion will be as in your alternative tender of January 20th, 1965, but no individual building will be completed later than the time provided for in the existing contract. No European houses are affected by this variation.
8. Any variation of finishes if required to precast concrete units will be paid for at the rates of the contract Bill of Quantities.
9. ....
10. ....
11. ....
12. Will you please advise as soon as possible whether the conditions set out in paragraphs 1 to 8 inclusive above are accepted by you."

In this letter was enclosed an addendum specification which included clauses covering the use of precast concrete elements and consequent variations to the original design.

The plaintiff, by letter dated 12th February, 1965, replied accepting the conditions set out in paragraphs 1 to 8 inclusive of the letter of 8th February, 1965, "........ except that we require the L.E.P. Married Quarters which we have elected to build in precast concrete panels, to have a modified roof. .... Without this roof and ceiling we could not construct the L.E.P. Married Quarters for the prices as varied by your letter of 8th February, 1965 ....

The amended contract sums following this variation now become:

.../(1st

(1st Contract)	£1,589,800
(2nd Contract)	£6,794,548
(3rd Contract)	£3,746,462
The total gross contract sum is	£12,130,810

Would you please confirm your agreement regarding the roofs for L.E.P. Married Quarters."

The defendant by letter dated 16th February, 1965 replied as follows:-

" With reference to your letter dated 12th February, 1965, it is advised that we are in agreement with the amended contract sums as quoted. We are also in agreement with your stipulation in respect of the modified roof to L.E.P. Married Quarters provided that the terms of paragraph 9(b) of our letter of 8th February, 1965 are complied with.

Would you please advise, in writing, your concurrence with this latter aspect."

The plaintiff replied on 22nd February, 1965, acknowledging the letter of 16th February, 1965 and "as requested advise our concurrence with the proviso therein".

Now, although Mr. Davenport relied on later documents and correspondence between the parties, to which I shall refer, his main submission was that upon the correspondence at this stage, there was an agreement for the variation of the contract, whereby the barracks type and store buildings, that is, those known as MB 4, 5, 6 and 7, and 45, which were the subject matter of the first and second claims made by the plaintiff in this action, were to be constructed for a lump sum and that Condition 39(3) was excluded.

But so far as the relevant contracts are concerned, that is, Contracts 2 and 3, all that the Commonwealth proposed in the letter of 8th February, 1965 was a variation of the work to be performed and a reduction of the contract lump sum on the basis of the alternative tender which was accepted by the plaintiff, and none of the proposals required any departure from the framework of the General Conditions.

Mr. Davenport argued that paragraph 4 of the letter of 8th February, 1965, providing that priced Bills covering the contract as varied should be submitted under the conditions and at the time specified in the existing contract, required the plaintiff to prepare and submit a new or altered Bill which indicated that the parties intended to exclude the operation of Condition 39(3). (Later in the correspondence, reference

.../was

was made to the plaintiff submitting rates for the precast concrete and other items required by the variation). See the draft letter dated 14th April, 1965 (infra). This argument fails to take full account of the provision that priced Bills should be submitted under the conditions specified in the contract. However, it is unnecessary for me to consider whether paragraph 4 required the defendant to submit further quantities for the new items in turn to be priced by the plaintiff, or the plaintiff itself to add and price the new items, or whether indeed this was an essential term not yet agreed upon, for, in my opinion, the intention of the parties was that the priced Bill referred to was to include the Bill supplied to the plaintiff by the defendant so far as it remained applicable. There was nothing in the correspondence at this stage which expressly provided that Condition 39(3) should cease to apply to that Bill to the extent that it remained applicable. Nor, in my opinion, is it necessary to give business efficacy to the contract that such a term should be implied.

The next subject matter upon which Mr. Davenport relies is the submission by the plaintiff of the priced Bills covering the contract as varied. By letter dated 7th April, 1965 the plaintiff referred to the priced Bill of Quantities for Contract No. 2 which was forwarded and stated: "We regret the delay ...... but there has been an enormous amount of calculation and transcription ..... complicated by the alternative designs .....

In the case of the R & F Barracks buildings, and the sergeants' and officers' mess, which are completely modified, we have given lump sums for each building and a breakdown for progress payment purposes. For any subsequent variations there are ample applicable rates quoted elsewhere in the Bills of Quantities and you have already indicated that the detailed items will not be required to be used for progress payments.

For the remaining buildings, which have been modified by the alternative design, we are submitting the priced Bill for the original design. We do not propose to revise the Bills for these buildings on account of the alternative design. Totals for each building and the trade totals would still give a reasonable basis for progress payments and there are also adequate rates for adjustments other than those as a result of the alternative design."

The Commonwealth replied by letter dated 14th April, 1965, as follows:-

"In reply to your letter of 7th April, 1965, it is necessary to submit at least a lump sum for each of the R & F Barracks and the Officers' and Sergeants' messes, based on the original designs. These lump sums must be submitted for consideration with the priced Bills

.../for

for all other buildings, based on the original designs. Your prompt advice is therefore requested.

We agree in principle to the submission of lump sums dissected into trade totals for the buildings based on the revised designs, instead of fully priced Bills. However, as some of the trade amounts involved for the larger buildings are quite high, it would facilitate payments if you were to submit for approval a simple sectional break up within each trade. Please provide this in due course.

We also require your unit rates for the main operations which are not included in the original Bills, such as precast concrete components. These rates could be required for subsequent further variations to contract ...."

The next letter is the plaintiff's, also dated 14th April, 1965, as follows:-

"We are forwarding today under separate air freight one copy of the submitted Bill of Quantities for Contract No. 3.
The method of pricing Contract 3 is the same as that for Contract 2, as stated in our letter of 7th April, 1965, i.e. R & F Barracks building, sergeants' and officers' mess are priced on a lump sum basis for each building and other buildings, which have been modified by alternate design, have been priced on the basis of the original design."

These letters refer to the plaintiff's obligations under paragraph 4 of the letter of 8th February, 1965. The priced Bills were required for the two purposes mentioned in Condition 39 sub-paragraph (2) of the General Conditions; that is to say, as a basis for computing progress payments and for the valuation of any variations under Condition 5 of the General Conditions of Contract.

This was proving a complex and time-consuming task, and the plaintiff proposed as a short-cut that, instead of compliance with paragraph 4 of the letter of 8th February, lump sum prices should be submitted for the R & F Barracks and other buildings and that these lump sums should be accepted by the Commonwealth as a basis for computing progress payments. For subsequent variations, the plaintiff proposed the application of rates quoted elsewhere in the Bills of Quantities. So far as these buildings were concerned, in the priced Bill submitted in April, 1965, the relevant quantities were set out in the submitted Bill upon pages 50 to 82 of Book 3. Before submission to the defendant in April,

.../1965,

1965, these pages were removed by the plaintiff from the Bill and in lieu thereof a sheet was inserted in the following terms:-

"R & F Barracks Blocks

Summary of Alterations

1.	Foundations	£5,747
2.	Frame	£23,431
3.	Roof and Ceiling	£5,220
4.	Finishes	£17,210
5.	Mechanical Services	£4,190
6.	Electrical & Fire Alarms	£8,202
	Sub-Total:	£64,000
	x 4	£256,000

Total buildings 4, 5, 6 & 7 to summary £256,000."

The defendant's submission at this point was that the variation involved so far as the R & F Barracks blocks were concerned, "a complete new design in pre-cast concrete", as referred to in a schedule dated 9th April, 1965 prepared by the defendant (Exhibit 23), and that for this new design the plaintiff submitted a lump sum which was not to be subject to alteration, for example, under Condition 39(3), which was accepted by the defendant. It is not necessary for me to consider Mr. Hope's argument that any new agreement on this point was not resolved until much later. In fact, the correspondence shows that the plaintiff submitted the lump sum in lieu of priced bills only for the purpose of computing progress payments. Neither party was adverting to Condition 39(3). The removal of the relevant pages was incidental to this purpose only. There was certainly no such agreement as alleged in paragraph 9 of the defence that those pages should be removed for all other purposes, including reference to Condition 39(3). The use of the priced Bill for computing progress payments is, as Mr. Hope submitted, quite unrelated to the use of any Bill supplied for the purpose of adjusting the contract price under Condition 39(3). It was not inconsistent with any new agreement that lump sums should be submitted by the plaintiff for the individual buildings in lieu of a priced Bill as a basis of computing progress payments, that if the reduced contract price was shown to require adjustment under Condition 39(3), the contract price should be so adjusted and in turn those lump sums should be accordingly adjusted, (although that process would not seem to be necessary, as they constituted progress payments only). Any such agreement did not expressly or by necessary implication exclude the plaintiff availing itself of any rights under Condition 39(3) for later adjustment of that price.

.../The plaintiff

The plaintiff was not making any new offer to waive his rights under Condition 39(3), nor was the Commonwealth accepting any such waiver, nor in my opinion can any such agreement (which is the only one with which it is necessary for me to deal) be implied from these letters.

The subject matter is taken up again in a letter by the defendant dated 1st September, 1965 to the plaintiff headed "....... Price Breakdowns on Substitute Bills of Quantities." The plaintiff's letter of 7th April, 1965 is referred to, thenproceeds as follows:-

"Although you have not specifically said so, it is quite clear that you do not intend to provide priced substitute Bills of Quantities for the buildings in question notwithstanding your undertaking at the time of consideration of your proposed alternative designs.

The lump sums and price breakdowns you have submitted, an example of which is as follows:

....

will not suffice, as it is totally inadequate and now requires correction due to your letter of 20th July, 1965, which effected deduction of Trade Preamble items for conversion to Preliminaries.

An example of the type of breakdown that is suitable for progress payments and which is being provided for all other buildings on the site is given at Appendix 'A'. You are required to provide similar breakdowns for the wholly modified buildings.

....

Notwithstanding this, it will still be necessary for you to submit unit prices of your alternative precast reinforced or unreinforced concrete constructions. Such prices should be in keeping with the spirit of your prices included in the original documents and those already accepted and incorporated in the contract alternative designs. It would be to the advantage of all concerned if these were detailed or analysed prices ...."

In reply to this letter, on 29th September, 1965 the plaintiff wrote to the defendant referring to the previous letter, "requesting price breakdowns of the lump sums included in our submitted Bills for the Officers, Sergeants and R & F Barracks Buildings at Murray, Taurama and Goldie.

We have dissected these in the form suggested by you and we submit these attached ...."

Enclosed with this letter, inter alia, was a document headed "Price Breakdown for Progress Claims, R & F Barracks MB4, MB5, MB6, MB7."

.../Detailed

[illegible]tailed amounts were set out with sub-totals under the following [illegible]adings:

1. Substructure
2. Frame
3. Roof and Ceiling
4. Finishes (including sanitary fittings and sanitary plumbing)
5. Mechanical Services
6. Electrical and Thermal Alarms

[illegible]d at the foot the following items were set out:-

"Lump Sum Total MB4 £64,000
Lump Sum Total MB5 £64,000
Lump Sum Total MB6 £64,000
Lump Sum Total MB7 £64,000"

The defendant's counsel relied strongly on this document [illegible]t again it is quite plain from the heading that the lump sums were [illegible]ing provided for the purposes of progress payments under Condition [illegible](2) and that the correspondence was not referring to the plaintiff's [illegible]ghts under Condition 39(3).

The final portion of the correspondence upon which the defendant [illegible]lies commences with a letter dated 5th October, 1965 by the plaintiff [illegible] the defendant, referring to the substructure of certain of the [illegible]designed buildings. The letter stated as follows:-

"These buildings are at firm lump sum prices which include the substructure. The total lump sum prices for each building are given in the submitted priced bills of May, 1965. Your approval for the substructure on fill is a subsequent variation to the lump sum price for the buildings and we now submit for your approval our price reduction of £442 for G10 ...."

The defendant then relies strongly on the letter dated 12th [illegible]tober, 1965 by the plaintiff to the defendant, which is as follows:-

"We confirm our price deduction of £56,700 for the buildings as per attached list (which included the R & F Barracks, blocks MB 4, 5, 6 and 7).

Following discussion with your Mr. Adds, we have agreed to accept the buildings in their redesigned form at a firm lump sum price. Any subsequent variations to the redesigned buildings will be based on the submitted priced bill and our submitted rates for precast concrete.

We have already submitted price breakdowns for the R & F Barracks,

.../the Officers

the Officers Mess and Quarters, and the Sergeants Mess and Quarters, and in each case it was stated that the bulk excavation is to be measured and paid under the provisional items in the Civils Bill and not in the Building Bill.

We intend to submit price breakdowns on the same basis for the remainder of the buildings effected by this variation."

The reference to submitted price breakdowns and subsequent variations to redesigned building in my opinion shows that the parties were still concerned with sub-paragraph (2) of Condition 39, but that inference is put beyond doubt in the defendant's reply dated 20th October, 1965 headed "..... Substitute Buildings: Clearance by Lump Sum", which refers to the two previous letters, and proceeds:

"Whilst admitting that tentative agreement was reached, (by Mr. Cooper & Mr. Adds) on the possibility of clearance of substituted buildings by lump sum adjustment, based on incorporation of the substituted pre-cast concrete elements in lieu of structural steel etc., and the provisional substructures assuming the buildings are constructed as shown on the original drawings or modified maintaining uniformity with the original buildings, the valuations have yet to be agreed and we, therefore, cannot accept the lump sum prices as submitted by you ...."

At this stage in the performance of the work the parties were concerned with the fact that the quantities involved in the sub-structure, which were provisional under the General Conditions of Contract, Condition 8, were working out differently in the actual construction of the buildings. By letter dated 26th October, 1965, the plaintiff wrote to the defendant as follows:-

"Substituted Buildings - Clearance by Lump Sum.

We refer to your letter of the 20th October, 1965. The matter is complicated, as you are aware, because the price variation of the 8th February and the Bills submitted in April were based upon sketchy information. In our letter of 7th April, and accompanying submitted bills, we should have just provided trade totals for all substituted buildings. We did not do this as we believed you wanted schedule rates for subsequent adjustments. We advised that the schedule rates submitted were for subsequent adjustments to the alternate building design and we were not fully specific that the sub-structure for all of these substituted buildings was no longer provisional but was now a lump sum.

.../Some

Some of these sub-structures have considerable extra quantities and some have less quantities, but on the whole we consider the increases will balance the decreases.

What is also apparent to us is the enormous amount of measurement and agreement that would be necessary in the provisional quantities for all of these buildings ...."

The plaintiff then went on to suggest that it was reasonable to lump sum the whole of the sub-structure (including rock excavation) for all of the buildings covered by the variation of 8th February, and asking the defendant's agreement for the clearance of substituted buildings by lump sum as soon as possible.

Now the meaning which the plaintiff put upon the letter is irrelevant (Life Insurance Company of Australia Limited v. Phillips) (2), but it is significant that at this stage the plaintiff considered that if the provisional quantities of the sub-structure were to be taken as lump sum, a special agreement to that effect was necessary. That the parties were concerned only with the situation which had arisen concerning the substructure is further shown by a letter dated 28th October, 1965 from the plaintiff to the defendant, referring to a meeting between the officers of the plaintiff and the defendant in connection with firm lump sum prices "for certain buildings including MB4, 5, 6 & 7" and confirming an agreement "that in the case of MB.2 our price of £172,000 .... be reduced by certain following amounts which are paid as provisional quantities under the Civils Bill ....
.... The other buildings listed above (which included the numbered buildings referred to) remain as firm lump sums at the respective stated amounts."

The proceedings of the conference were also confirmed by the defendant in a letter to the plaintiff dated 16th November, 1965, headed "......... Substitute Buildings - Clearance by Lump Sum", as follows:-

"........... it was agreed that

(i) Buildings already submitted without a priced Bill, i.e.

Barracks blocks
Sergeants' Messes
Officers' Messes,

would be accepted as lump sums and this would include all sub-structure work including rock in trenches but excluding the provision of level platform (level platform being provided under the civil engineering section of the contract). Further the lump

(2) 36 C.L.R. 60.

.../sum

sum submitted for Building MB2 would be reduced to bring it into line with the other buildings as regards provision of level platform. This has since been confirmed by Contractor's letter of 28th October, 1965 ...."

These last two letters - I refer particularly to the heading "Clearance by Lump Sum" in the letter of 16th November, 1965 - in my opinion, and the tenor of the previous correspondence, indicate that the parties had finally agreed that the lump sums for the Barracks blocks and certain other buildings should be accepted for the purposes of progress payments. They further agreed specially on the substructure and upon the terms set out, provided that it should not be subject to adjustment so far as provisional quantities therein were concerned, so that in that limited respect the contract was "lump sum", in the sense of not subject to price variation. But the agreement went no further and neither expressly nor by implication was it agreed that Condition 39(3) should cease to apply.

At this stage, I should refer to Mr. Davenport's reliance upon the words "lump sum", "firm lump sum", which occur from time to time in the correspondence in relation to the price for substituted buildings. He submitted that the words referred to a fixed price in the sense that they were not to be varied if there were errors in the bill. When used in the General Conditions these words certainly could not bear this particular meaning (having regard to the express provision of Condition 39(3)), nor could they mean "not subject to variation generally" in view of Condition 8, which provides for adjustment of provisional quantities, and Special Condition 1A of the specification, which was a "Rise & Fall" provision in relation to award wages (for which adjustment was in fact made upon the residual value of the contracts, including each of the buildings in dispute in this case). At common law a "lump sum" contract means an entire contract in which the law will not imply a term for any payment prior to completion (Hudson's Building and Engineering Contracts, 9th Edition, pages 150-151). The term was plainly not used by the parties in that sense.

The words are thus of indefinite meaning. In the context in which they were used in the correspondence (except in relation to the sub-structure, with which I have dealt), I consider that all the parties intended was that instead of the contract price being shown as broken up according to the detailed items set out in the Bill of Quantities, so far as the relevant buildings were concerned, those detailed items were "lumped" together, so that the price as reduced was broken up into sums for each type of building for use as a basis of computation of progress

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payments. The defendant did not contend that the term was insufficient to exclude the "Rise & Fall" clause and it is certainly not sufficient to exclude Condition 39(3), the area of operation of which was unaffected in enabling the total contract price to be later adjusted, with consequent adjustments (if necessary) to the lump sum for each type of substituted building.

Variation orders No. 49 and 50 each dated 8th December, 1965 were later issued by the defendant, the particulars of the variation being stated as "Precast concrete construction in lieu of specified construction as per (Head Office) letter 8/2/65 and (plaintiff's) letter dated 12/2/65." Mr. Hope submitted that until the issue of these variation orders the negotiations between the parties had not resulted in an agreement because upon four stated specific matters the agreement lacked certainty. I have not found it necessary to consider this argument, because I have been unable to find that, at any time there was an agreement that Condition 39(3) should not apply to the relevant items of the buildings concerned. But I shall refer to the evidence led by Mr. Davenport as to the establishment of a precast concrete factory by the plaintiff from which he submitted an agreement for the variation should be inferred. This submission (which, of course, was not related to proving any specific term of the agreement) I consider is untenable.

The defendant's argument that the plaintiff is unable to rely on Condition 39(3) so far as the first and second items are concerned, thus fails.

I propose now to deal with the construction of Condition 39. Sub-paragraph (1) is a definition clause. Under the General Clause MA5 of the specification it was provided, "Type of Contract. The contract shall be for a lump sum." Thus the agreement of 21st May, 1965, providing that the work should be performed for £12,187,510, was a "contract to complete the whole of the work for a stated total price referred to as a lump sum," pursuant to Condition 39(1).

Paragraph (2) provides for the only purposes for which the prices and quantities in any Bill of Quantities shall be used. Thus it must refer to a priced Bill, and it seems capable also of referring to an unpriced Bill. Paragraph (3) first provides that, in a lump sum contract, the quantities included in any Bill of Quantities whilst believed to be correct are merely for the guidance of the contractor and shall not form part of the contract. These words are intended to make plain that no adjustment to the contract price is to be made if the quantities in the Bill should prove to be incorrect. (See Hudson's

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Building & Engineering Contracts, 9th Edition, page 150, and the case cited on pages 203-205). The following words, that the quantities shall not "necessarily be a basis for progress or other payments" appear to refer to General Condition 29, which deals with progress payments and provides that, subject to certain conditions, the contractor shall from time to time be entitled to receive 100 per centum of the value of the work done as determined by the Director of Works. The effect of paragraph (2), taken with these words in paragraph (3), appears to be that, whilst the quantities shall be used for the purpose of computing progress payments, they are not to bind the Director of Works in determining the value of the work done. The proviso to paragraph (3) then makes provision for the adjustment of errors in the Bill of Quantities.

The first point of construction is whether paragraph (3) refers to the "tender" Bill or only, as Mr. Davenport submitted, to the Bill when fully priced, so that in the absence of a priced Bill which the contractor has lodged with the Director of Works, paragraph (3) has no application. This point would, of course, conclude the first and second claims in the defendant's favour. Mr. Davenport's submission is supported by the consideration that it is reasonable to suppose that Condition 39 looks forward to the contractor complying with the Specification so that before the signing of the contract, there will have been lodged a fully priced Bill, the rates contained in which will have been approved by the Director of Works. The words contained in paragraph 3(a) "to the extent of the error exceeding five per centum of the value of that item" are also capable of referring to the priced item.

But there are other considerations which support Mr. Hope's submission that paragraph (3) refers to the Bill in the form in which it is supplied by the Commonwealth to the contractor and upon which the tender price is to be based. Thus, as he argued, it fulfils a different function from paragraph (2). Paragraph (3) comes into operation only if there are initial errors in quantities or items which will appear in the unpriced Bill and is designed for correction and adjustment of such items. Next, it is a significant omission in paragraph (2) that there should be no provision that the prices included in any Bill of Quantities should be used for the purposes of the valuation of adjustments to the contract price under paragraph (3). Indeed, paragraph (2) provides that such prices should be used for the two stated purposes only. Further, paragraph (3) is quite capable of operation in the absence of a priced Bill. In the case of an error in quantities under paragraph 3(a) the extent of the error can be shown as exceeding five per centum of the

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value of the item without reference to the priced Bill, and to show that such error exceeded £1000 would not involve any reference to a priced Bill, whether one was lodged or not. Similarly, a priced Bill would not necessarily provide any evidence of the value of any omitted item under paragraph 3(c). Finally, it is useful to consider the operation of paragraph (3) if a priced Bill were submitted, and there were an accidental omission to price one item in dispute. If the defendant's argument is correct, in such a case not only would the contractor lose his rights to an adjustment if there were an error in the quantities to the required extent, but also the Commonwealth's rights would be defeated if it proved to be an item which should have been omitted under paragraph 3(b).

The real function of a Court in construing an instrument is to ascertain what the parties meant by the words they have used. Thames & Mersey Marine Insurance Company v. Hamilton Fraser & Co. (3). There is no express statements in paragraph (3) that it applies only to a Bill which has been supplied to the contractor by the Commonwealth and has been subsequently priced by the contractor, or that the operation of the condition depends on such a Bill having been lodged. But if upon the whole instrument there appears a plain intention to that effect, the Court will be bound to give it that construction. (Clayton v. Earl Glengall (4) per Sugden L.C. (cited Halsbury, Laws of England, 3rd Edition, Vol. 11, page 383). Having regard to the purpose of paragraph (3) and the whole of the words used in Condition 39, I have reached the conclusion that the parties have not indicated their intention that the Bill referred to in paragraph (3) is a priced Bill. I consider that the Bill referred to is the Bill supplied to the contractor for the purposes of tendering. Of course a priced Bill will provide in certain cases evidence of the value of the adjustment, but in a case such as the present in which the parties have by consent dispensed with the lodging of a priced Bill in relation to certain buildings there is nothing in Condition 39 which would prevent the contractor providing other evidence of the extent or value of the error to the satisfaction of the Director of Works.

The next point of construction is Mr. Davenport's submission, in relation to the second claim in respect of the Galbestos, that Condition 39(3) is only applicable if, at the date of the application, the

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(3) 12 A.C.484, per Lord Halsbury at p.491.

(4) (1841) 1 Dr. & War.1, at p.14.

.../contractor

contractor is bound by the contract to supply that item. He based this argument on the words "....... then in the case of (1)

additional quantities or items to be so supplied."

As at the date of the application to the Director of Works an effective variation had been made for the substitution of precast concrete construction for Galbestos, Mr. Davenport submitted that no additional, or indeed any, quantity of Galbestos was to be supplied, and accordingly the contractor was not entitled to any adjustment. Mr. Hope argued that Condition 39(3) was applicable to a claim for adjustment, which was capable of being dealt with at any time after the contract was made, irrespective of the possibility of future variation, and that the words referred to did not involve the meaning of obligation but rather of the future tense. In my opinion, the words do bear the meaning submitted by Mr. Davenport.

But this point ceases to be crucial if Mr. Davenport's other submission is correct, that having regard to the words in paragraph 3(a)(i) immediately following those cited, viz. "upon the application in writing to the Director of Works by the contractor within fourteen days of the completion of the item or the work associated with the relevant trade", paragraph (3) entitled the contractor to an adjustment by way of increase only if the additional quantity or item was in fact supplied. Mr. Hope repeated his submission that the words "additional quantities or items so supplied", indicated the future tense rather than the past tense, as did the words "to be so reduced", and submitted that these phrases demonstrated that paragraph (3) contemplated an adjustment of the contract price normally being made prior to the performance of the contract work. He further argued that paragraph 3(c)(i) fixes the last date for a claim as within fourteen days immediately following the doing of the work, but permitted the claim for adjustment at any time prior thereto.

With regard to the phrase "work associated with the relevant trade", Mr. Hope's submission was that the meaning of "trade" is well known and the various trades were set out in the Bill of Quantities. Thus the item "raking and cutting" is included in the Bill as within the trade of metalwork. The terminal point, he submitted, within which the claim therefor must be submitted, was thus the completion of the work associated with the trade within which the subject work would fall, and this led to the inference that the sub-paragraph was to apply even if the particular item was not completed. He further submitted that if paragraph (3) were not to apply to work which was not done, it would have

.../been

been very easy for the Commonwealth to have expressly so provided. As the General Conditions are in standard form drawn by the Commonwealth, the "contra preferentem" rule applies so that the document should be construed strictly against the Commonwealth and no such limitation as was contended for could be implied. He also submitted that the logical conclusion of the defendants' submission which relates paragraph (3) to work actually done was that a deduction could be claimed by the Commonwealth in respect of the omitted items. I found this submission difficult to reconcile fully with his submissions in relation to the ring handles which were that whilst the plaintiff was entitled to an increase in relation to that item, as the item had not been supplied, there was an admitted default or omission by the plaintiff, so that pursuant to Condition 34 the Commonwealth has suffered loss and was entitled to recover as damages for the breach the corresponding cost of the ring handles. He then went on to submit that, if the defendant invoked Condition 34 to recover for that failure, unless the price were adjusted under Condition 39(3), the contractor would stand a double loss. However, this latter argument ignores the consequence that if any such claim were made by the Commonwealth, the contractor would be entitled to a corresponding increase on the assumption that the ring handles had been installed, so that there would have been no loss.

The conclusion which I have reached is that upon the words used in paragraph (3) and endeavouring to ascertain from those words the intention of the parties, the intention is clear that the contractor is only entitled to an adjustment of the contract price if he has actually supplied the additional quantities or items in question. I consider that the words fixing the time for the application to be made fully indicate this intention. I am unable to uphold Mr. Hope's submission as to the meaning of the phrase "the date of completion of .... the work associated with the relevant trade". In my opinion these words are directed to a case, such as the one I put during the argument, of additional electrical work incidental to a general electrical installation, it being thereby provided that the time for the application to be made is not to expire after fourteen days of/the doing of that actual incidental work, but that the contractor is allowed fourteen days after the whole of the electrical work, including the additional incidental work, has been completed, in which to make application.

This construction also avoids the unnecessary procedure referred to by Mr. Hope of the Director of Works having to grant an increase in the contract price in respect of an item not included in the Bill and

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not supplied, the only result being that the Commonwealth was entitled to a corresponding claim against the contractor under Condition 34. So far as the Galbestos is concerned, I consider that Mr. Davenport's submission is correct that the variation removed these items from the contract so that at the relevant date it was not an "item to be so deleted" within the meaning of paragraph 3(c)(ii) and could not therefore be the subject of a claim thereunder by the defendant.

I am now in a position to consider the plaintiff's claim. So far as the item of the urinals is concerned, it is admitted that the quantity specified in the Bill, viz. two per building, was incorrect, for the reason that the drawings and specification required four to be installed (it was not contested that this was an error in excess of five per centum of the value of that item), that the application was made within time, that the value of the adjustment exceeded £100, and that the additional urinals were installed. Accordingly the plaintiff is entitled to succeed on this claim. It will be for the Director to make the necessary adjustment to the contract price.

So far as the second claim is concerned, the plaintiff's claim fails upon the grounds that at the date of the application the plaintiff's obligation to supply that item had ceased by reason of the variation, and also that the additional or any quantity were not supplied. The third claim fails on the ground that the ring handles were not supplied.

Mr. Davenport conceded that if I found for the plaintiff, a declaratory order should be made. I accordingly declare that the plaintiff is entitled to an increase in the contract price by adjustment thereof to the extent of the value of two additional urinal stalls installed in the buildings known as Murray Barracks, buildings numbered 4, 5, 6 and 7, with costs to be taxed.

Solicitors for the plaintiff : J. Irwin Cromie & McCubbery.

Solicitor for the defendant : S. H. Johnson, Crown Solicitor.