

*Judgement of the Lords of the Judicial Committee  
of the Privy Council on the appeals of Dibbs  
v. The Bank of New South Wales, and the  
Bank of New South Wales v. Dibbs, from the  
Supreme Court of New South Wales; delivered  
December 17th, 1887.*

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Present :

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

THE argument on this appeal concluded yesterday afternoon. It was full, able, and exhaustive, and the questions in the case which arise on the construction of the contract between the parties were clearly brought out? There is no question of any real difficulty or which involves any result save as it affects the pecuniary interests of the parties. Their Lordships would therefore have pronounced their judgement and delivered their reasons at the close of the argument if it had not been that they desired to consider more carefully the reasons expressed by the then Chief Justice of the Supreme Court (Martin, C.J.) for the decision of that court on the principal question.

There are no facts in controversy, and the pleadings need only be referred to for the purpose of stating that the claim put forward in the first count of the declaration on behalf of the Plaintiffs (the Bank of New South Wales) has been abandoned here most properly. The appeal therefore of the bank against the decision of the Supreme Court is to be dismissed, and the costs of that appeal are to be borne by the bank.

Their Lordships now turn to the contract of February 1881, on the construction of which the questions arise. There had been a prior banking agreement between the parties and negotiations as to the terms of a renewed or new contract, which, on the 7th February 1881, seems to have been concluded, as appears by the letter of the 7th February, in which the general manager of the bank writes to the Colonial Treasurer: "Sir,—Referring to our recent inter-views upon the subject of the renewal of the bank agreement, I have now the honour to submit the terms then mutually agreed upon, which I shall feel obliged by your confirming."

The new agreement thus submitted to the Colonial Government was approved of without further alteration, and the sanction of the Government was signified to the bank on the 16th February 1881. These circumstances are referred to, to dispose of the argument on behalf of the bank, that the 6th article of the contract should be construed most strictly against the Government "*contra proferentem*;" but the words of the 6th article are not the words of one party or the other, but the considered language of both. The maxim is to be applied only where the language is properly attributable to one of the parties in defining his rights or fixing his liabilities, and is ambiguous, so that ordinary rules of construction fail. Their Lordships think that the language of Article 6 is not ambiguous. The contract is one dealing with large interests, and is of a very special character. It constitutes the bank to be the bankers of the Government, and specifies their duties and the conditions under which they are to carry on the banking business of the Government, both at Sydney and in London, including *inter alia* the receipt in effect of the public revenue, the payment

of all cheques drawn for the public service, and of the interest on the public debt whether payable at Sydney or in London, and the performance of all those other duties which appertain to the position of Government bankers. Part II. expresses the conditions of the contract in considerable detail, and in its first article it is provided: “(1) The contract to be for a period of two years from 1st January 1881 certain, and terminable at any time afterwards by six months’ notice from either side.” By Article 6 it is provided that:—“The Government may, at any time during the currency of this contract, anything herein to the contrary notwithstanding, make arrangements with the Bank of England for the negotiation of loans, the management of the public debt, or the payment of the interest thereon. Upon such arrangements being completed, any right acquired under the contract by the bank conducting the Government business for commission or other charge for services of this nature, shall cease, and other provisions of the contract will then become subject to revision, should the contracting bank desire it.” Their Lordships will have occasion to refer to the contract again, but it is not necessary now to go into its details.

There does not appear to have been any controversy as to the meaning and effect of the contract or as to its operation before the month of June 1884. The two years certain expired on the 2nd January 1883, and for a period of 18 months afterwards the parties had been working under a contract “terminable by six months’ notice from either side,” but not containing any provision for its termination otherwise than by such notice.

On the 6th April 1881 an Act passed the Colonial Parliament to enable the Colonial

Government to raise sums amounting in the total to 7,807,500*l.*, for the purpose of public works, either by the issue of debentures or in the form of a funded stock in the Colony or in London. Acting under that Act, which incorporated the provisions of some prior Acts, the Government passed an Order in Council dated the 2nd October 1883 in the following terms:—“The Colonial Treasurer, in view of the rapid progress of railway works, and in order to provide for necessary extensions of existing lines, having submitted for the consideration of his Excellency the Governor and the Executive Council the desirability of making timely provision for those services by the raising of a further aggregate sum of 5,000,000*l.* in the English money market in such amounts, and at such times as may be recommended by the Agent-General and the London banking agents of the Government, who will be instructed to watch the course of the market, and to avail themselves (subject to the approval of the Government) of favourable opportunities of floating the loan, either wholly or in part: and his Excellency in Council having considered the proposals so submitted, is pleased, upon the further recommendation of the Colonial Treasurer, to authorise, and to order and direct the issue of a loan in the form of stock, to be inscribed by the Bank of England to the aggregate extent of 5,000,000*l.* under the Acts 41 Vict. No. 7; 43 Vict. No. 11; 44 Vict. No. 12; and 44 Vict. No. 28; such issue to be made in London at convenient opportunities and according to the state of the English money market.” On the next day a copy of that order was transmitted to the New South Wales Bank. It is probable, though it does not actually so appear, that there had been previous loans floated by the Bank of New South Wales on behalf of the Government

and inscribed by the Bank of England, but whether that is so or not there can be no doubt that the Order in Council made it an essential part of the issue of the loan that it was to be inscribed by the Bank of England. Acting under this authority, and in conjunction with the Agent-General, the New South Wales Bank in December 1883 floated a loan for three millions (part of the five millions) inscribed by the Bank of England. They charged and were allowed their commission on that loan. On the 18th June 1884 the Colonial Secretary received from the Agent-General in London a telegram that the Bank of England objected to inscribe any further loan unless they also issued it. That telegram with the subsequent correspondence on the subject was immediately communicated to the Bank of New South Wales. The Government appears finally to have come to the conclusion that the public interests of the Colony required that the two millions, residue of the five millions, should be raised by the Bank of England, and inscribed by that institution, and they gave immediate intimation of their resolve to the Bank of New South Wales. It is not necessary for their Lordships to inquire into the motive which induced the Bank of England to insist on the issue of the loan as well as its inscription being placed in their hands. It probably was good and sufficient, but whether or not, that institution was in a position to refuse inscription by them, and without that inscription that loan could not have been floated.

It is not necessary that their Lordships should consider or criticise the too copious and sometimes heated correspondence that took place between the Bank of New South Wales and the Colonial Secretary in June and up to the 17th September 1884, when, as appears from the admissions made at the trial, the bank intimated

“ that they required a revision of all parts of  
 “ the contract of which they were entitled to  
 “ demand revision under the sixth clause of the  
 “ agreement.” It is to be observed that the  
 bank in that intimation does not allege that  
 anything had occurred which put an end to the  
 contract, or that they desired to determine it.  
 On the contrary, they seem to adhere to the  
 contract, and desire only that it be reviewed,  
 and with the object probably of seeking for  
 some equivalent in profit to compensate for the  
 deprivation of the floating of the two million  
 loan, by which they might have realised 2,500*l.*  
 less expenses.

Negotiations between the parties were *boná fide* entered into and carried on for the purposes of revision down to about 12th December 1884, but the parties did not agree. It was alleged on the part of the Plaintiff in the Supreme Court that when the Government, acting under their undoubted right, reserved by Article 6, placed the negotiation of the two million loan in the hands of the Bank of England, the other terms of the contract became subject to revision at the option of the New South Wales Bank, and that when that bank required such revision the contract was at an end. This seems to have been very vigorously and successfully pressed in the Supreme Court. The Chief Justice is represented to have said on this question:  
 “ Now, what was intended by this power con-  
 “ ceded to the bank to desire a revision of the  
 “ other provisions of the contract on the Bank  
 “ of England being retained to negotiate loans?  
 “ Some effect must be given to those words.  
 “ What is it? It must necessarily follow, in  
 “ order to give effect to a power of that kind,  
 “ that the bank are to be no longer bound by  
 “ these terms when they once intimate a desire  
 “ to have them revised. There can be no force

“ in these words unless they are so interpreted.”  
 And again, further on, his Lordship adds:—  
 “ Under this contract it appears to me that  
 “ the moment the power of negotiating loans  
 “ was taken out of the hands of the bank, and  
 “ the bank gave notice to the Government that  
 “ they desired a revision of the terms, then  
 “ the contract ceased, and the bank had a right  
 “ to regard the terms as no longer binding upon  
 “ them.”

Their Lordships cannot adopt the reasoning or the conclusions of the learned Chief Justice, and have so far to express their dissent. The parties to the contract did contemplate that at some time or times “ during the currency of the contract,” the Government might find it advisable, and for the public good, to make arrangements with the Bank of England for the negotiation of loans; but they do not appear to have intended, nor have they expressed any intention, that thereupon it should be in the power of the Bank of New South Wales, by desiring a revision, to put an end to the contract and release themselves from their obligations under it. On this question we must not lose sight of the first condition regulating the duration of the contract for two years certain and terminable at any time after by six months’ notice from either party. There is no other provision for its termination, and it does not appear that the Government had been guilty of any infraction of its terms or of any refusal to carry out its conditions. The contract in question has been in argument described as no more than any other banking contract and to be dealt with in the same way; but this allegation is not correct. This was a contract involving the whole of the very large banking business of an important Colony, and their Lordships have not failed to see that the sudden termination of such a contract, embracing the

financial position of the Government at Sydney and in London, would probably be productive of the utmost temporary confusion, and it might be of most disastrous results, and against such mischievous consequences the parties seem to have provided a special guard in the first condition. Their Lordships can find nothing expressed in the contract to warrant them in accepting the conclusions of the Chief Justice. Their Lordships are of opinion that notwithstanding the demand of revision the contract continued in full force, regulating the rights and obligations of the parties, and that if unable to agree on the terms of revision, then the contract could be determined only by the required notice or by mutual agreement.

Their Lordships' decision on this question must largely affect, if it does not absolutely govern, the remaining contentions of the Plaintiff. The negotiations for a review of the terms of the contract continued up to and after the 30th September 1884, though without any result, and on that day the bank manager addressed to the Colonial Treasurer the following important letter: "Dear Sir,—You will of course notice  
 " that we have on this occasion charged the  
 " Government account with a higher rate of  
 " interest, which is in consequence of its altered  
 " condition. I understand, however, that there  
 " are certain points in connexion with the account  
 " which are now being made matter for consi-  
 " deration, and when these are definitely arranged  
 " we can, if necessary, re-adjust the interest." That letter accompanied the Government local banking account which is not in the Record, but in which the bank debited the Government with interest at 8 per cent. on their overdraft from the month of June previous. During this interval the parties had been acting under the contract as an existing contract, and it was not contended before their Lordships that the bank could thus



retro-actively impose interest at 8 per cent. That part of the Plaintiffs' claim was abandoned, but it was vigorously contended that the bank became at least then (30th September 1884) entitled to say, as to the excess of the overdraft beyond the contract sum, "we insist on 8 per cent., being the current rate; it shall not remain at 5 per cent. unless as the basis of a revised contract."

It becomes necessary now again to refer to the contract for the terms which regulated the overdrafts. There are separate provisions for London and for Sydney. The latter are: "(3) The rate of interest which the bank will charge on any overdraft which the Government may require in Sydney, 5 per cent. per annum." Then, "(5) The amount which the bank will be prepared to advance to the Government in Sydney, without security, 250,000*l.*" Then "(6) The amount which the bank will be prepared to advance to the Government in Sydney, over and above the advance referred to in the preceding clause, on the security of Government debentures bearing interest at the rate of 4 per cent. per annum, which must be accepted at their par value and held as security if necessary for a period of one year without power to sell, 250,000*l.*" It will be observed here that there is no limit to the overdrafts which, under clauses 5 and 6, the bank may honour, but they are under no obligation to permit a greater overdraft under clause 5 than 250,000*l.*, and a similar amount under clause 6; but if an overdraft is permitted under either or both, then clause 3 settles the contract rate of interest at 5 per cent. The bank did not make any advance under section 6. The whole overdraft, which it seems was in considerable excess of 250,000*l.*, was made under clauses 3 and 5, and it was so advanced under the contract. It may be conceded

that the bank might, on the 30th September 1884, have given notice to the Government to the effect that the overdraft exceeded the sum stipulated in the contract, and required repayment of that excess within a given period, and added that if not paid they would seek to charge interest at 8 per cent. Their Lordships do not in the least mean to affirm that the latter demand could be maintained. Interest in such case would become damages to be estimated by the proper tribunal, which would probably be guided by the contract rate. But the bank gave no such notice, and for obvious reasons. If such a notice had been given and acted on by the Government in immediately liquidating the amount of the overdraft, the result might have been a very considerable loss to the bank. The state of the London account had also to be considered, and the correlative rights of the Colonial Government in respect of the balance of accounts there. Hence the very diplomatic note of the 30th September 1884, which makes no absolute demand and seems rather to have been intended to coerce the Government to concede the alterations in the terms of the contract which the bank desired.

Their Lordships now desire to refer to a letter of the 16th October 1884, and the reply to it. The letter of the 16th October is from the Treasury to the Bank of New South Wales: "I have the honour, by direction of the Colonial Treasurer, to request that you will transfer from your London branch to the credit of the public account of the Government in your bank here, the sum of 350,000*l.* on this present application, 350,000*l.* thirty days afterwards, and 500,000*l.* thirty days thereafter"—those three sums amounting to 1,200,000*l.*—"under the provisions of the 20th section of the 'terms' of the existing contract. I am to add that the Bank of England

“ is instructed by cable to pay your London  
 “ branch the sum of 1,000,000*l.* for credit of the  
 “ public account of the Government in your said  
 “ branch.” Then the answer to that letter  
 deserves attention. It is dated the following day,  
 the 17th October 1884, and is addressed to “ The  
 “ Honourable the Colonial Treasurer, Sydney. Sir,  
 “ —I have the honour to acknowledge your favour  
 “ of the 16th instant requesting us to transfer  
 “ from our London branch to the credit of the  
 “ public account of the Government here the sum  
 “ of 1,200,000*l.* on certain specified dates, under  
 “ the provisions of the 20th section of the terms  
 “ of the existing contract. I am directed to  
 “ inform you in reply that immediately the  
 “ revision of the terms of our agreement now  
 “ being negociated has been satisfactorily ar-  
 “ ranged, your letter shall have our best attention ;  
 “ pending that settlement we assume that you  
 “ cannot desire us to take action.”

The bank does not now deny that, in declining to comply with the requisition contained in the letter of the 16th October, they committed a breach of duty in respect of which they admit that the Government is now entitled to recover on their cross claim as damages the item of one-eighth per cent. on the 1,200,000*l.* which ought to have been transmitted from London to Sydney to the credit of the Government there, and which, if it had been so transmitted, would probably have extinguished the excess in the overdraft. Their Lordships have not the exact figures before them, but they are of opinion that the bank has failed to establish any right to the large rate of interest whilst the contract remained in existence.

It was then urged that the contract was finally put an end to in December 1884, and that after that date, and until paid, the bank was entitled to insist on being paid interest on the over-

draft at 8 per cent. Their Lordships, however, think that the contract was not finally determined until the letter of the 5th of January 1885, addressed to the general manager of the bank: "Sir,—I have the honour, by direction  
" of the Colonial Treasurer, to acknowledge the  
" receipt of your letter of the 19th ultimo, and  
" I am to inform you in reply that, as you have  
" intimated to the Treasurer, in writing, your  
" refusal to comply with the request contained  
" in Treasury letter of the 16th October last,  
" relative to the transfer of funds from your  
" London office to the credit of the Govern-  
" ment account in your bank here, and as  
" you have further refused to receive our  
" moneys in London and pay interest thereon,  
" in accordance with the terms of the agree-  
" ment, the Government regards these acts  
" as serious breaches of the contract: and  
" I am directed to inform you that Mr. Dibbs,  
" as expressed to you in Treasury letter of  
" the 6th December last, has made arrangements  
" for the conduct of the Government business  
" here and in London through other channels.  
" I am further instructed to state that so soon  
" as it may be convenient to you to furnish us  
" with a statement of the Government account,  
" arrangements will be made for its adjustment.  
" In the meantime I am to request that any out-  
" standing cheques of the Government, other than  
" cheques on departmental accounts (for which  
" provision has been made for the current  
" month) may be paid by you to our debit on  
" presentation thereof or referred to the Com-  
" mercial Bank, where provision is made to meet  
" them." As to any claim for interest at the  
higher rate after that date, their Lordships desire to point out that though the contract was so determined, it did not absolutely cease to affect the rights of the parties in relation

to the transactions under it, and they again refer to the topic, that if the 1,200,000*l.* had been transferred as it ought to have been to the credit of the Government in Sydney, they have nothing before them to show how the excess of overdraft, if any, would have stood on and after the 5th January 1885.

Their Lordships are of opinion, and so rule that the New South Wales Bank has failed to establish any right to interest on the overdraft or any part of it in excess of 5 per cent.

It now remains to consider the form of the order. There is some difficulty on the Record as to that, seeing how the case stood below, but under the circumstances the order which it will be necessary to make will be as follows:—  
Order that the appeal of the Defendant be allowed, that the judgement of the Supreme Court, so far as complained of by this appeal, be reversed, and declare that the Plaintiffs are only entitled to charge 5 per cent. interest on the advances; that they are not entitled to commission on the two millions of loan negotiated by the Bank of England; that the Defendant is entitled to one-eighth per cent. in respect of the 1,200,000*l.* which ought to have been transferred; further to remit the case to the Supreme Court that they may do what is right, having regard to the above declarations; dismiss the appeal of the Plaintiffs with costs, and order the costs of the Defendant's appeal to be paid by the Plaintiffs to the Defendant. Their Lordships will humbly advise Her Majesty accordingly.

