

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Clara Ritchie and others v. Hudson Brothers,
Limited, from the Supreme Court of New
South Wales; delivered 31st July 1896.*

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

The Appellants are the executors of one Robert Adam Ritchie deceased. For some years prior to and in the year 1883 both Robert Adam, Ritchie and the Respondents carried on the business of manufacturers of railway rolling stock. Mr. Ritchie's works were at Wickham near Newcastle which was then the terminus of the Great Northern Railway in the Colony of New South Wales. The Respondents' works were near Granville in the same Colony near which place the Great Southern and Western lines branch. The Great Northern and the Great Southern and Western Railways are Government Railways under the control in the year 1883 and until 1888 of the Commissioner for Railways. In the year 1888 the control of the Government Railways was transferred to and vested in three Commissioners who are constituted a body corporate.

On the 2nd of October 1883 the Commissioner for Railways issued an advertisement inviting tenders for the supply of rolling stock (other

than locomotives) required for the Government Railways of New South Wales for the five years ending 31st December 1888. The advertisement stated that estimates of requirements for each year and specifications and forms of tender might be seen and further particulars obtained at the office of the Locomotive Engineer. In a note to the advertisement it was stated that tenders would be received from persons willing to contract for the supply of rolling stock for five years for the South and West lines and the Northern line separately and the contract would be sub-divided as follows tenders being received for each sub-division :—

“ Contract No. 6. First-class carriages including composite and sleeping cars.

“ Contract No. 7. Second-class carriages mail vans prison vans hearses powder vans meat vans and covered vans.

“ Contract No. 8. Brake vans.

“ Contract No. 9. Cattle waggons sheep trucks and horse boxes.

“ Contract No. 10. Waggons A B D E ballast and carriage trucks.”

The contracts for the Northern lines were distinguished by the addition of the letter “A” to the number *e.g.* as “6A” and so forth.

Mr. Ritchie sent in tenders in response to the advertisement and his tenders for Contracts 6A 7A 8A 9A and 10A for the Northern line and Contracts 7 and 8 for the South and West lines were accepted. The form of acceptance was not put in evidence and their Lordships have it not before them. Probably therefore nothing turns upon it and it is clear from what subsequently took place that it was contemplated that a formal contract should be entered into between the Contractor and the Commissioner.

Taking Contract No. 6A as a specimen the tenders were in the following form :—

“ For 3 First-Class Bogie Carriages (Redfern
 “ type) 4 Composite Bogie Carriages (Red-
 “ fern type) delivered free of all charges
 “ for freight packing insurance &c. on the
 “ railway at Newcastle.

“ Sir,

“ Having read the Specifications I hereby
 “ offer to supply the following vehicles in
 “ accordance with the clauses and terms of the
 “ respective Specifications at the prices and dates
 “ respectively stated below viz. :—

“ 3 First-class bogie carriages (Redfern type)
 “ to Specification No. 267 at 957*l.* each to be
 “ delivered as follows :—

“ One during the year 1884 in twelve months
 “ from the date of the order.

“ One during the year 1885 in twelve months
 “ from the date of the order.

“ One during the year 1886 in twelve months
 “ from the date of the order.

“ during the year 1887 in twelve months
 “ from the date of the order.

“ during the year 1888 in twelve months
 “ from the date of the order.

“ 4 Composite bogie carriages (Redfern type)
 “ to Specification No. 208 at 830*l.* each to be
 “ delivered as follows :—

“ One during the year 1884 in twelve months
 “ from the date of the order.

“ One during the year 1885 in twelve months
 “ from the date of the order.

“ One during the year 1886 in twelve months
 “ from the date of the order.

“ One during the year 1887 in twelve months
 “ from the date of the order.

“ during the year 1888 in twelve months
 “ from the date of the order.”

The rest of the form is not filled up.

The Specifications were all (so far as material
 for the present purpose) in the same form.
 Specification No. 267 for a first-class bogie

carriage (Redfern type) contains a minute description of the materials to be used the dimensions to be worked to the arrangement of the body and other particulars. The Specification contains certain general clauses as to additions alterations and variations and refers to General Conditions which are annexed thereto.

Without reading them at length their Lordships will observe that in their opinion the effect of the clauses in the Specification and General Conditions read together is as follows :—

1. Alterations ordered by the Engineer within the spirit of the Specification are to be executed free of extra charge.
2. The Specification may be supplemented by a more complete and detailed one not at variance with the spirit and intention of the specification.
3. But the Engineer may without invalidating the Contract alter the description in the Specification in any or all of the enumerated particulars which according to the expert evidence comprise and appear to their Lordships to comprise almost every detail of construction.
4. The alterations are to be executed without any extra payment provided that the length breadth height of the body or carrying capacity is not increased or decreased more than 5 per cent. but with liberty to the Engineer in his discretion to make a deduction from or addition to the Contract price in respect of the variations ordered.
5. But if the variations exceed the limit of 5 per cent. an addition or deduction is to be made to or from the Contract price the amount thereof to be determined in default of agreement by arbitration.

In the meantime Mr. Ritchie agreed with the

Respondents to sell his business to them with the benefit of his accepted tenders. But it was arranged that he should apply to the Government to be relieved of his tenders for Contracts 7 and 8 in order to enable the Respondents to tender for them in their own names. The Government accepted Mr. Ritchie's surrender and the Respondents tendered for Contracts 7 and 8 at different and in most cases higher prices and their tender was accepted.

The agreement between Mr. Ritchie and the Respondents was carried out by a deed dated 7th April 1884 whereby after a recital that Ritchie had entered into or in pursuance of tender or otherwise was entitled to enter into the Contracts mentioned in the first schedule thereto (being Contracts 6A to 10A) Ritchie in consideration of 15,000*l.* assigned to the Respondents the Contracts mentioned in the first schedule and all monies to become payable in respect thereof or thereunder and the business carried on by him and all benefit and advantage thereof respectively. The deed also contained the following covenant and proviso on the construction of which the questions in this Appeal mainly depend :—

“ And it is hereby agreed by and between the said parties
 “ hereto that if the gross amount received by the said Com-
 “ pany in respect of the work covered by the said contracts
 “ mentioned in the said first Schedule hereto and the contracts
 “ mentioned in the second Schedule hereto shall exceed the
 “ sum of One hundred and fifty thousand pounds then the said
 “ Company or its assigns shall pay to the said Robert Adam
 “ Ritchie his executors or administrators a bonus calculated at
 “ the rate of twelve and a half per cent, on the gross amount to
 “ be received by the Company or its assigns in respect of all
 “ works done under the said contracts in the first and second
 “ Schedules hereto over and above the sum of One hundred
 “ and fifty thousand pounds as aforesaid such bonus to be paid
 “ in portions as each article in such work shall be delivered
 “ proportionately to the amount received in respect of such
 “ article respectively Provided always that with regard to
 “ each article delivered under the contracts mentioned in the
 “ said second Schedule the said bonus shall only be allowed or

“ paid according to the prices mentioned in the third Schedule
“ hereto.”

The second schedule contains Contracts 7 and 8. The third schedule contained a statement of the prices for which Ritchie had tendered for Contracts 7 and 8 for the Southern and Western line.

An Agreement dated the 23rd October 1884 was made between the Respondents and the Commissioner of Railways, and thereby after reciting the five tenders of Ritchie for the Southern and Western lines (which were annexed to the Agreement) and the transfer of them to the Respondents it was witnessed that the Respondents and the Commissioners declared that the Contract created by the said tenders and their acceptance by the Commissioner was as followed.

It is apparent from this language and from the absence of any indication of an intention to make a new or additional contract that the parties did not conceive themselves to be making and did not intend to make or make any new contract by this instrument but it was a mere expression or expansion into a formal shape of the terms contained or implied in the contract created by the tenders and their acceptance. Their Lordships therefore think that whatever rights were acquired or obligations assumed by the Respondents must be taken to be the rights and obligations of the contracts assigned by Ritchie and whatever was done under the Contract of 23rd October 1884 (which is referred to in the correspondence as the five-years Contract) must be taken to have been done under the assigned contracts.

The third clause of this Contract has been the subject of controversy before their Lordships and it must be owned is not free from some ambiguity. Both sides seem to agree that it obliged the Respondents to accept and execute

during the period of five years orders for a number of vehicles of the description mentioned in the specifications in excess of the numbers therein mentioned—in fact treating the numbers specified as an estimate only which might be exceeded in the later years of the currency of the Contract. But the Respondents contended that this was a new Contract ultra the assigned contracts and that consequently the Appellants were not entitled to a bonus on the orders given and executed for vehicles in excess of the specified numbers. Their Lordships have already expressed their opinion that if the clause has the construction suggested the Appellants are entitled to the benefit of it. On the construction of the clause itself for reasons which will be presently stated they do not find it necessary to express an opinion and they must not be taken as doing so.

It appears from the evidence that in carrying out these Contracts large variations were made by the order of the Commissioner or the Engineer. A considerable number of vehicles in excess of the numbers mentioned in the specifications were supplied by the Respondents. Additions were made to and extras supplied for vehicles admittedly within the specifications and in many instances the type of carriage or vehicle required was changed and such variations were made in the structure and details of construction as required a new Specification in substitution for the original one. These substituted specifications appear to have been in the same form as those for which they were substituted but they bear a note in the following words (*mutatis mutandis*):—

“ *Note.*—This carriage is to supersede in the
 “ 5-years’ contracts the type of first-class known
 “ as the ‘ Redfern ’ the Contract for which with
 “ the exception of those already constructed or

“ in course of construction is to be considered
“ as hereby cancelled in favour of the carriage
“ indicated in the present Specification and its
“ accompanying plan or drawing.”

But it must be observed that the general classification of rolling stock stated in the advertisement appears to have been maintained, *e.g.*, the substituted carriage in Contract 6A., was still a first-class carriage and so forth. The price for the additions or the substituted vehicles was in most cases agreed but in some cases was determined by arbitration in accordance with the provisions of the general conditions.

The Respondents delivered to Mr. Ritchie in his lifetime “ a statement of vehicles delivered
“ to the Commissioner of Railways Great
“ Northern line under Contracts No. 6A, 7A, 8A,
“ 9A, 10A, named in Agreement ” purporting to shew a total amount of 75,814*l.* 7*s.* 2*d.* received in respect of work done under those contracts and a similar statement with respect to Contract 7 and 8 showing a total amount of 56,189*l.* They therefore contended that no bonus was payable under their Agreement with Ritchie.

On 8th March 1892 the Appellants (Mr. Ritchie having died in the meantime) commenced the present suit and on 4th October 1892 a decree was made by the Chief Judge in Equity referring it to the Master to take an account of rolling stock supplied and work performed by the Respondents under the contracts. The Respondents brought in their account showing a total amount of 129,886*l.* only received under the contracts. The Appellants filed a falsification (which was more properly a surcharge) in respect of items charged in the Respondents' account at an insufficient amount and a surcharge in respect of items altogether omitted. The

Master by his Report dated the 12th September 1892 found that the Defendants had supplied rolling stock and performed work under the Contract, and received in respect thereof the sum of 215,801*l.* 17*s.* Both parties were dissatisfied with this report and took out summonses to vary it which were heard before the Chief Judge in Equity. By an Order dated the 26th October 1893 the learned Judge varied the Master's Report in certain particulars and found 178,608*l.* 3*s.* only had been received by the Respondents. Again both parties appealed and by an Order of 9th May 1894 the Full Court dismissed the Plaintiffs' appeal with costs and allowed the Defendants' appeal with the result that the amount received by the Respondents was reduced to 139,460*l.* The present appeal is from this Order.

It is unnecessary and would be almost impossible for their Lordships to examine in detail the numerous items in dispute. The Appellants in their case have classified them under four heads so as to bring out the questions of principle upon the answer to which the decision must turn. As the Respondents' counsel in their argument adopted this classification their Lordships will follow it in the remarks they have to make.

Class (1) comprises items for additions or extra work not comprised in the specifications on which Ritchie's tenders had been made and for vehicles made under new and substituted specifications.

Class (2) contains what were called the compensation items.

Class (3) contains items which raise the question on what principle the amount received for work done under Contracts 7 and 8 should be accounted for.

Class (4) contains items of small amount

which were agreed to before the Master and on which no question arises.

The first point raised by the Respondents on the items comprised in Class (1) their Lordships cannot entertain. The Respondents contended that no vehicles should be allowed in excess of the numbers specified in the specifications. Their Lordships can find no trace of this specific point being raised at any stage of the long and exhaustive inquiry before the Master and it is not mentioned in the judgments either of the learned Judge in Equity or of the Full Court. Moreover in their accounts rendered before suit and those brought in under the decree the Respondents themselves included and allowed credit for a number of vehicles of the same class as those specified but in excess of the number mentioned in the Specification. It is clear that for some reason whether self-interest or the construction they agreed to put on the 3rd Clause of the Contract or their previous experience of these Government Contracts ranging over a defined period or for some other reason the point was not raised or insisted on in the Court below. If it had been some light might have been thrown upon it in the Colony which is not accessible to their Lordships.

On the general point applicable to the items comprised in Class 1 the Master held that the Appellants were entitled to participate in extra work performed under the Contract and in those cases in which there was a new and substituted Specification he held that having regard to the general conditions applicable to variation the works were covered by and done under the Contract. The Chief Judge in Equity and the Full Court held that where new and distinct Specifications were required the work was not done under the assigned Contracts but under substituted and different Contracts. In fact

they seemed to think it sufficient to say that the work was done under different specifications from those mentioned in Ritchie's tenders. In both Courts reliance was placed on the note contained in the substituted specifications quoted above. Their Lordships cannot agree with either of these views. They think that the Courts below did not give sufficient weight to the very large powers of variation in the Specification and General Conditions. Their Lordships do not attach so much importance as the Courts below to the mere fact of there being a new specification. A description of the altered or substituted vehicle there must be and whether it was on the old form or not does not seem to their Lordships conclusive either way. Nor do they take the same view of the note as the Judges below. On the contrary it seems to their Lordships to import that the work was intended to be and was executed under "the " five years' Contract " and the latter words do not necessarily import more than the substitution of one type of carriage for another in that Contract. If it was necessary however to form a concluded opinion whether the new specification in all cases came within the powers of variation in the original one their Lordships do not think they have the necessary materials before them for that purpose. But in the opinion of their Lordships it is not necessary. Whether work was done under the Contracts is a question of fact and if the evidence shows that the work was ordered accepted and executed without objection as being under the Contract and charged and paid for as work done under the Contract their Lordships are prepared to hold that it was work *de facto* done under the Contract even if the Respondents, had they cared to do so, might have successfully contended that the work required was outside the powers of variation in the Conditions and not

within the Contract—or not work which they could have been required to execute.

Take as an example item 34, for one first-class American car. This was a first-class bogie carriage made under Specification 242A, in substitution for a first-class bogie carriage (Redfern type) under Specification 267, from which it differs in several important particulars of arrangement and construction. The Master came to the conclusion that the variations were within the limits. Their Lordships do not dissent from this finding but they do not rely upon it alone. The order for this vehicle was dated 10th March 1888. The Commissioner requests that the contractors will have “constructed and delivered in terms of your Contract for supplying rolling stock to this department the following vehicles,” . . . and adds, “I have to refer you to the Locomotive Engineer who will furnish you with all particulars but before any work is entered upon any of the vehicles not provided for in the list of stock estimated for this line the prices must be arranged for in the manner prescribed by the contract.” The writer of this letter (whether he was entitled to do so or not) is obviously giving an order for execution under an existing contract and to be paid for in the manner prescribed by that contract and the Respondents obtained the order on that understanding. In the Respondents’ books and in the voucher certified by the Government officer on which the Respondents obtained payment and the receipt signed on behalf of the Respondents the work is described as executed, and the money to be owing to the Respondents under “Rolling Stock Contract No. 6A.” These circumstances do not of course create an estoppel against the Respondents but they form strong *prima facie* evidence against them that the work was *de*

facto done under the Contract which evidence in the opinion of their Lordships is not rebutted by production of the Specification.

Their Lordships are therefore of opinion the claim for the items in Class 1 amounting to 22,629*l.* 14*s.* must be allowed.

It is not necessary to go into details as regards the items in Class 2. The claim is in respect of certain orders which were given by arrangement in compensation partly for "shortages," *i.e.*, for breach of contract in not ordering the goods specified and partly for cancelling an order already given and partly executed. A writ had been already issued in respect of the "shortages." Their Lordships agree with the Full Court that the orders under which these vehicles were made were given in satisfaction of a claim for damages. They are not therefore work done under the Contract but a compensation for depriving the contractor of the opportunity of doing work under the Contract. The claim in respect of the 100 cattle vans and 75 sheep vans presents more difficulty. But the whole of the items were comprised in one agreement and the same principle applies to these items as well as to those executed in compensation for shortages. Their Lordships therefore do not differ from the Full Court as to this class of items.

The decision of the items in Class 3 depends on the construction to be placed on the proviso to the covenant in the Contract of 7th April, 1884. The learned Judge in Equity and the Full Court have construed it as confining the claim of the Appellants to the actual prices named in the third Schedule without any allowance for extras additions or variations. On the other hand the words "according to the "prices" are susceptible of the meaning "on

“the basis of the prices” taking those prices as the starting point or datum line instead of the prices in the Respondents’ tenders and this is in substance the view taken by the Master as very clearly explained in his note. The Appellants are to get their bonus on the amount received by the Respondents on all works done under Contracts 7 and 8 as well as the assigned Contracts. Extras additions and variations (if within the prescribed limits) are undoubtedly works done under the contracts but if the construction adopted by the Courts below be followed the Appellants will receive no bonus on extras &c. Their Lordships think that the construction put on the covenant by the Master was the right one. The principle applied by their Lordships in dealing with the items in Class 1 are applicable to many of the items in this class also and their Lordships think that in cases where extra or additional works were executed on vehicles under Contracts 7 and 8 the amount of such extra or additional works should be allowed. The Master has allowed the charges for extras and additions as regards items 15 and other similar items of falsification collected on p. 26 of the Appellants’ Case and his finding on these items and on items Nos. 105 and 106 should be restored which will add to the account 22,980*l.* less 4,665*l.* (against which there was no appeal by the Respondents) making 18,315*l.*

On the same principle their Lordships think that where an order for one type of carriage has been executed in substitution for another under Contracts 7 and 8 the extra payment received by the Respondents for the work executed beyond their original Contract price should be added to the prices in the 3rd Schedule.

As regards item 96 and the other items down to item 138 collected on pages 27 and 28 of the

Appellants' case the Master allowed only the scheduled prices. As it is not quite clear upon what principle the Master proceeded and as the amounts drawn by the Appellants may require some further investigation their Lordships think it the better course to remit these items for further inquiry with an intimation of their opinion.

The items in the Fourth Class were agreed at the inquiry before the Master and have probably been omitted by an oversight it making no difference in the result in the view taken by the Court below. The amount is only 91*l.* 4*s.*

The Order of the Court below therefore should be varied. The Master's finding on the several items enumerated in Classes 1 and 4 as set forth in the Appellants' case and on the several items of falsification 15 and so forth (being those enumerated on page 26 of the Appellants' case) and items 105 and 106 (except those in respect of which there was no appeal) should be restored in the certificate. It should then be declared that in taking the account of work done by the Respondents under Contracts 7 and 8 the excess of the amounts received by them in respect of the several brake vans referred to in items 96 &c. to 138 (being those enumerated on pages 27 and 28 of the Appellants' case except items 105 and 106) above the prices mentioned in the Respondents' tenders ought to be added to the corresponding prices in the third Schedule to the Indenture of 7th April 1884 and those items should be remitted for further inquiry by the Master to find the respective amounts thereof having regard to this declaration and it should also be referred back to the Master to find the total amount of the work done under all the Contracts, having regard to the Certificate as varied.

Their Lordships will humbly advise Her Majesty accordingly. Their Lordships will not disturb the Order as to costs before the Judge in Equity but the costs before the Full Court and of this Appeal must be paid by the Respondents.
