G. F. A. JONES,
SOLICITOR, ETC.

TELEPHONE 3237
47 Queen Street.
Melbourne, October 7th 1918

The Chairman
Hawthorn Tramways Trust
City

Dear Sir /

re Opinion

I forward herewith copy opinion herein.

Yours truly,

G. F. A. Jones

the trench to the top of the sleepers. The latter of 15th. September 1915, gave authority to the Contractor to use this old material "for the bottom of the trenches". It is difficult to say what these words would cover, whether the lowest layer of three inches only, or the 10½ inches from the bottom upwards specified to consist of new metal.

The authority to the Contractor to make the change was given upon the advice of the Engineer and was safeguarded by the provision that the use of the old material should be carried out according to the Engineer's instructions. What instructions were given by the Engineer to the Contractor as to the screening or cleansing of the old material or whether any such instructions were given nowhere appears. It does appear however that in fact a great deal of old ballast was used without being properly sifted as required by Clause 19 of the specifications, and this in my opinion involved a breach of his duty on the part of the Engineer first in permitting it to be done and secondly in certifying for payment without discovering it, or if he already knew of it, without requiring the matter to be put right.

Apart altogether from the quality of the ballast used, there are other departures from the specifications. The most serious is in the shortage of quantity or depth of ballast over at least

O P I N I O N

I answer the first three questions submitted to me as follows:-

1. No, subject to what is said below in Paragraph 3.

2. YES.

3. No.

1. Dealing first with the facts, I am satisfied after a perusal of all the papers including the Engineers reports and after a conference with Mr. Robertson upon certain technical matters that there were very material departures from the specifications in carrying out the works.

One very material alteration appears to have had the express sanction of the board. That is, the substitution of old excavated metal for the new metal specified to be used from the bottom of the trench to the top of the sleepers. The latter of 15th. September 1915, gave authority to the Contractor to use this old material "for the bottom of the trenches". It is difficult to say what these words would cover, whether the lowest layer of three inches only, or the 10½ inches from the bottom upwards specified to consist of new metal.

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Apart altogether from the quality of the ballast used, there are other departures from the specifications. The most serious is in the shortage of quantity or depth of ballast over at least

a considerable portion of the track. This in itself would, of course, constitute a clear and serious breach of contract for -- which an action would lie against the Contractor were it not for the obstacles created by Clauses 39 and 40 of the Contract. These clauses in effect make the Engineer the judge in any dispute between the Trust and the Contractor. The anomalous result arising under clauses of this kind that the representative of one of the parties is put very often in the position of being a judge in his own cause, operates in most cases very hardly against the the Contractor, but under the circumstances of the present case -- would tell so much against the Trust that it seems to me it would be mere waste of time to ask Mr. McCarty to now decide as a dispute arising out of the contract the questions whether the Contractor has broken his part of the Contract and has been greatly overpaid. If the Engineer were a strong man, and had been -- deceived or misled by the Contractor into giving certificates -- which could be proved erroneous, it might be worth while for the Trust now to formally raise its claim against the Contractor and proceed to take the decision of Mr. McCarty on the matters in dispute. Such a decision is a condition precedent to any action - See clause 19.

The members of the Trust are perhaps in a position to -- judge best on this question for themselves. I have no personal knowledge of Mr. McCarty and no knowledge of the methods of supervision which he employed. But from the nature of the defaults -- complained of and from the circumstances attending the cessation of Mr. McCarty's employment by the Trust, it seems to me that the chance of the Trust obtaining from him a favorable award would be very remote indeed.

In the foregoing observations I have adopted the view that Mr. McCarty is still the person to decide disputes under Clauses -- 39 and 40 notwithstanding that he has ceased to be the Engineer -- for the Trust. This, in my opinion, is the correct view. The definition of Engineer in the contract does not embrace the --- engineer of the Trust for the time being, but only such other -- person as might have been appointed to act in Mr. McCarty's place,

which means, in my opinion, in his capacity as Engineer for superintending and carrying out the contract works. These were completed and taken over long before Mr. McCarty vacated his office. The result is that Mr. McCarty remains the person designated by -- the contract to whom disputes are to be referred.

2. AS to matters arising out of Mr. McCarty's own contract with the Trust no difficulties of procedure arise, and if he --- were a man of any substance I should feel no difficulty in advising the Trust to proceed against him for the recovery of all overpayments and other damages arising either from his want of care or -- want of competence in the discharge of his duties.

I am asked in question 4 as to the prospects of success in such an action. I take this to mean, of course, success in obtaining a favorable judgment and my answer is that on the assumption which I of course make that the reports of the Engineers can be substantiated, the prospects of success are very good.

Before entering upon such an action it would be necessary to express in figures, more definitely and with more detail than there has so far been occasion for, the estimate of damages sustained by the Trust.

3. IN my short answers to the questions and in my reasons for those answers given above I have excluded from consideration altogether any action founded upon fraud. I have done so because on the material before me I can find no evidence of fraud.

Such evidence may, however, be found and I therefore wish to make it clear that if any fraudulent collusion between the -- Contractor and the Engineer could be established Clauses 39 and -- 40 would cease to apply and an action could be brought against -- both or either.

Evidence of such collusion(even if it had existed) must -- necessarily be difficult to get at this late stage. If figures -- and statements submitted by the Contractor in support of applications for certificate are still in existence they might repay -- scrutiny. If it could be proved that the Contractor submitted false figures knowing them to be false and obtained payment upon them it would require very slight evidence indeed to justify the

inference that Mr. McCarty either knew they were false or purposely abstained from verifying them.

I am not in a position to make further suggestions -- though other channels of inquiry may possibly suggest themselves to officers of the Trust familiar with the methods adopted in working out the Contract.

F. W. MANN

5th. Octr. 1918.