SUPREME COURT OF QUEENSLAND

CITATION:	*Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd (No 2)* [2017] QSC 218
PARTIES:	**CIVIL MINING & CONSTRUCTION PTY LTD (ABN 18 102 557 175)** (plaintiff) **v** **WIGGINS ISLAND COAL EXPORT TERMINAL PTY LTD (ABN 20 131 210 038)** (defendant)
FILE NO:	No BS 6050 of 2013
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2017 and 21 August 2017
JUDGE:	Flanagan J
ORDER:	**1. The plaintiff is granted leave to re-open its case to call expert evidence in respect of the quantification of the Delay Claim.** **2. I will hear the parties as to further directions.** **3. Costs reserved.**
CATCHWORDS:	EVIDENCE – ADDUCING EVIDENCE – COURSE OF EVIDENCE – RE-OPENING CASE – BY PARTY – where the plaintiff seeks leave to re-open its case to lead expert evidence to quantify a delay claim arising from the Court's construction of the Contract – where final judgment cannot be given until quantification of the delay claim – whether the defendant would be prejudiced by the plaintiff re-opening the case – whether any issues of natural justice arise – whether the plaintiff should be bound by its pleading – whether the quantification could be done by the court *Water Board v Moustakas* (1988) 180 CLR 491
COUNSEL:	B D O'Donnell QC with S J Webster for the plaintiff D Kelly QC with M G Lyons for the defendant

SOLICITORS: Thomson Geer for the plaintiff
Corrs Chambers Westgarth for the defendant

[1] On 19 May 2017 the Court delivered Reasons in this matter. As a number of issues remained outstanding the Court could not give judgment.

[2] On 25 May 2017 directions were made for the filing and serving of written submissions in relation to:

(a) the quantification of the Delay Claim and the defendant's counterclaim in respect of the Delay Claim;

(b) the return of the Bank Guarantee;

(c) the quantification of payments to be made in relation to the Final Certificate; and

(d) interest.

[3] After the receipt of written submissions the matter was listed for hearing, limited to two hours, on 28 July 2017. On that day it became apparent that the matter could not be completed within the allotted time. A further hearing was conducted on 21 August 2017.

Quantification of the Delay Claim

[4] In the course of the two hearings it became evident that there is a dispute between the parties as to how the Delay Claim should be quantified.

[5] On the second day of hearing CMC made an oral application to re-open its case for the limited purpose of leading expert evidence as to the quantification of the Delay Claim. The re-opening sought by CMC was expressed by Senior Counsel as follows:

> "… both sides would be at liberty to call expert evidence to establish what is a reasonable rate for the overheads for the 208 days, and that expert evidence would be confined to the evidence admitted at the trial."[1]

[6] CMC does not seek to alter the applicable rates in quantifying the Delay Claim but rather asserts that the resources to which those rates apply are not properly captured by a document utilised by both quantification experts, Mr Roberts and Mr Tsipis. The parties refer to this document as the "Overheads Spreadsheet".

[7] WICET opposes any application to re-open primarily on the basis that CMC should be bound by its pleading and how it has conducted its case.

[8] Until this dispute as to the quantification of the Delay Claim is resolved, the Court is not in a position to give judgment. Issues such as WICET's counterclaim, the return of the Bank Guarantee, the final calculation of quantum and interest cannot be resolved until the quantum of the Delay Claim is determined.

[9] These Reasons deal only with CMC's oral application to re-open for the limited purpose identified above.

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[1] T2-75, lines 7-10.

[10] To appreciate the nature of the dispute it is necessary to outline some of the procedural history of the Delay Claim.

Procedural history of the Delay Claim

[11] CMC's pleaded case is that it sought an extension of time for practical completion of 243 days and 21.5 hours. This is pleaded by reference to 11 specific delay events.[2] The Court determined that WICET was responsible for each of these delay events except for events four and five. This reduced CMC's total delay from 243 days 21.5 hours to 226 days 13 hours.[3]

[12] The costs of delay are pleaded in paragraphs 221 and 221A. Relevantly paragraph 221 pleads an amount of $4,474,484, valued on the basis of reasonable rates or prices pursuant to clause 40.5(c) of the General Conditions of the Contract. This same figure appears in Annexure E1 to the Eighth Further Amended Statement of Claim. The figure is derived from Mr Roberts' expert report. Mr Roberts arrived at the figure by identifying the resources that were affected by reason of each of the 11 delay events.[4] Mr Roberts proceeded on the basis that all resources were impacted by the delays.[5] It may be accepted that both Mr Roberts and Mr Tsipis used the Overheads Spreadsheet for the purposes of identifying affected resources for each relevant delay event.[6] The Overheads Spreadsheet was tendered by CMC at trial and no lay witness or expert witness was examined or cross-examined in respect of its accuracy.

[13] In its written closing submissions at trial, CMC for the first time identified as a matter of contractual construction that the relevant delay for which on-Site overheads may be awarded is the Contractor's delay in achieving Practical Completion. CMC's alternative submission was that the assessment of costs must be at the time of the relevant delay. CMC had pleaded its case based on this alternative construction. No objection was raised by WICET as to CMC's primary submission which was not pleaded. There is no explanation before the Court as to why objection was not taken. It was of course a contractual construction point. I also observe that the practical consequence of CMC's primary submission was that any period for an extension of time was reduced from 243 days and 21.5 hours to 208 days. CMC did not make any formal application to amend the pleading to reflect its primary submission. Both parties made written and oral submissions in respect of this construction issue.

[14] The Court accepted that clause 36 of the General Conditions of the Contract identifies the relevant delay as the delay in the Contractor reaching or achieving Practical Completion. The Court therefore accepted CMC's primary submission. As stated in the Reasons:

> "The causal inquiry raised by clause 36 is whether the on-Site overheads are 'attributable' to the delay. The relevant delay is CMC achieving Practical

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2 Eighth Further Amended Statement of Claim, [193].
3 Reasons, [625].
4 Expert Report of Mr Roberts, [54] and Appendix 3.3.
5 Expert Report of Mr Roberts, [48]. See also [70] where the figure of $4,474,484 is identified and Appendix 3.3.
6 Expert Report of Mr Roberts, [56], [57] and [58].

> Completion. CMC is under clause 36, entitled to the on-Site overheads for each of the 208 days of the awarded extension of time."[7]

[15] The difficulty in determining the quantum of the Delay Claim on this basis is that neither quantification expert has carried out this task.

[16] On the second last day of the trial in oral submissions, counsel for CMC tendered Exhibit 427. This exhibit, by reference to delay events 9(a) to (e), 10 and 11, sought to identify an appropriate average daily rate for the 208 days. Counsel explained Exhibit 427 as follows:

> "The primary construction, your Honour understands, puts the delay period for which CMC is paid in the period after 30 August 2012 through to practical completion. Mr Roberts doesn't specifically value that as the discrete period of delay. He values the events as they occur. But a number of the events in fact occur after the 30th of August: that is, much of the Bebo Arch delay occurs after the 30th of August, the financier consent delay. So in Mr Roberts' report, one finds information about an assessment of the costs or the appropriate value of days of delay in the post-30 August period; it's just that he hasn't assessed the whole period in one go. So what we've done in this table is extracted from Mr Roberts' report his valuations for the events which fall after the 30th of August, and derived from his assessment an average daily rate, and then given your Honour the average of that daily rate, and then the multiplication by 208 days. Now that's – it's not perfectly scientific. But it is based on a detailed assessment by Mr Roberts, and that is a reasonable approach, we submit."[8]

[17] At [835] – [838] of the Reasons, the Court identified the difficulty arising from the experts having quantified the Delay Claim on an incorrect construction of clause 36:

> "[835] The difficulty I have in ascertaining the amount for on-Site overheads is that neither of the quantum experts identified an appropriate daily rate reflecting CMC's on-Site overheads for the relevant period of 208 days. As conceded by CMC, there is no direct expert assessment which may assist the Court.[9] A number of the Delay Events which were valued by both Mr Roberts and Mr Tsipis, however, occurred near or after 30 August 2012. Mr Roberts' report contains information permitting an assessment of CMC's on-Site overheads post 30 August 2012. Exhibit 427 identifies the relevant Delay Events occurring near or after 30 August 2012, their duration and Mr Roberts' valuation conducted by reference to Schedule C-4.2 rates. Exhibit 427 arrives at a daily average for on-Site overheads of $24,587.09. This daily average multiplied by 208 days delay comes to $5,114,114.72.
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> [836] There are two difficulties with Exhibit 427. The first is that it uses C-4.2 rates rather than reasonable rates pursuant to clause 40.5(c). Mr Roberts, as an alternative valuation, has used reasonable rates to all resources to arrive at a valuation of $4,474,484. Mr Tsipis has also applied reasonable rates but only to those resources he considered necessarily

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7 Reasons, [834].
8 T35-59, line 44 to T35-60, line 15.
9 T35-39, line 37.

> incurred additional costs by reason of the delays assessed by Mr King. Mr Tsipis' valuation in this respect is $3,633,042. I have examined the Schedules to Mr Roberts' report which evidence that he carried out the same exercise in relation to Delay Events occurring near or after 30 August 2012 using reasonable rates as well as C-4.2 rates. I will require further submissions and assistance in having Exhibit 427 re-calculated so as to reflect the use of Mr Roberts' reasonable rates.
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> [837] The second difficulty with the calculations in Exhibit 427 was raised by WICET in oral submissions.[10] The difficulty is that Exhibit 427 does not constitute a weighted average. The total duration of the relevant Delay Events referred to in Exhibit 427 is 180 days. The total of Mr Roberts' C-4 valuation is approximately $3,683,287. By dividing that figure by 180 days the average daily rate is reduced from $24,587.09 to approximately $20,463. The adoption of a weighted average to arrive at an average daily rate is in my view correct. This weighted average should therefore be applied in calculating the average daily rate once the relevant valuation is calculated by reference to Mr Roberts' reasonable rates rather than the C-4.2 rates.
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> [838] In seeking further assistance in this respect, I am not suggesting that there is not already evidence before the Court that would permit an assessment of the quantum of CMC's Delay Claim."

[18] At Reasons [1069] I found that CMC was entitled to an extension of time of 208 days. The parties were required to provide further submissions in having Exhibit 427 recalculated so as to reflect the use of Mr Roberts' reasonable rates and incorporating a weighted average. The parties have recalculated Exhibit 427 by reference to Mr Roberts' reasonable rates. There is no dispute that the weighted average daily rate is $11,627.63. Using that rate, CMC's total entitlement to on-Site overheads is $2,418,546.03. As WICET has already paid CMC $4,087,233.21 in respect of the Delay Claim, CMC would be obliged to repay WICET $1,668,687.18. CMC submits that this weighted average daily rate cannot be regarded as a "reasonable rate" under clause 40.5(c) of the General Conditions of the Contract and it should not be adopted. CMC submits that there is a more appropriate way to determine a "reasonable rate or price" under clause 40.5(c) for the 208 days of delay caused by WICET that uses Mr Roberts' reasonable rates, but adopts a different methodology for determining the appropriate daily rate.[11] WICET's position is that the quantum of the Delay Claim should be determined by requiring CMC to repay to WICET $1,668,687.18. That is, CMC should be bound by the calculation exercise identified in Exhibit 427.

Consideration

[19] CMC seeks to re-open its case primarily because no expert carried out the task of assessing a reasonable rate for on-Site overheads for the period of 208 days constituting the extension of time. Mr Roberts in carrying out his analysis did analyse each day of the 11 delay events. WICET therefore suggests that Mr Roberts' analysis incorporates all but 28 days of the 208 day period for the extension of time. CMC submits however, that Mr Roberts carried out a different exercise at valuing actual on-Site resources for

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[10] T36-30, line 34 – T36-31, line 22.
[11] Plaintiff's Further Submissions, [7].

discrete periods of delay. Some of the periods of the delay events overlap. CMC therefore submits that Mr Roberts has only analysed 141 days of the 208 days of the extension of time period. Even if it is accepted that Mr Roberts has analysed a large number of days that fall within the 208 day period, it remains the case that neither expert carried out the task required upon a proper construction of clause 36. The Court therefore does not have the benefit of such expert assistance for the purposes of quantifying the Delay Claim.

[20] The real issue in dispute between the parties is whether CMC should continue to be bound by the resources identified in the Overheads Spreadsheet. CMC submits that the spreadsheet contains significant omissions and discrepancies that make it an unsuitable basis for calculating CMC's on-Site overheads. Annexure C to CMC's further submissions identifies 14 substantial omissions in the Overheads Spreadsheet. CMC submits that notably those omissions are at the "back-end" of the project, such that they substantially impact upon the weighted average approach.[12] CMC submits that Mr Roberts' utilisation of the spreadsheet is the basis for only valuing CMC's on-Site overheads by one method (valuing at the time of the delay). This cannot mean that it is automatically suitable to use for another method (valuing at the ending of the project). CMC further submits that the Overheads Spreadsheet was not incorporated into its pleading. It is apparent, in my view, that the figure pleaded in paragraph 221(b) of the Eighth Further Statement of Claim is derived from Mr Roberts' Appendix 3.3 which utilised the Overheads Spreadsheet. The fact that the spreadsheet is indirectly incorporated into CMC's pleading is not however, the end of the matter. CMC has already, without objection, departed from its pleaded case as to how the relevant delay is identified. Having been permitted to depart from its pleaded case in this respect there is no difficulty, in my view, with permitting CMC to re-open its case for the purposes of quantifying the Delay Claim based on the Court's construction of clause 36. Neither CMC's pleading nor how it conducted its case limits CMC in now establishing, by expert evidence, an appropriate average daily rate for on-Site overheads for the extension of time of 208 days. This is the task that clause 40.5(c) of the General Conditions of the Contract requires.[13]

[21] WICET submits that the sentence in [835] of the Reasons which reads, "Mr Roberts' report contains information permitting an assessment of CMC's on-Site overheads post 30 August 2012" constitutes a finding of fact. The sentence should however be viewed as recording CMC's oral submission made on the second last day of the trial. That oral submission is set out in [16] above.[14]

[22] Prior to CMC making its oral application to re-open, it contemplated the Court undertaking the task of identifying an appropriate daily average rate for the 208 days extension of time. This would require the Court to have reference to hundreds of documents for the purposes of determining the relevant on-Site overheads. From the various annexures and response to annexures which are part of the parties' further submissions, I accept, at least on a preliminary basis, that the Overheads Spreadsheet does not capture all of CMC's resources which were detained on-Site for the additional

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12 Plaintiff's Further Submissions, [14]-[15].
13 Plaintiff's Further Submissions, [11].
14 See also T35-59, lines 36-43.

208 days.[15] The task of identifying an appropriate daily average rate would not only be time-consuming, it is also a task for which the Court is ill-equipped. The determination of an appropriate daily rate for on-Site overheads for an extension of time should ordinarily be carried out by an expert. I expressed these concerns on the second day of the hearing.[16] Both parties accept that the quantification task is not an appropriate one for the Court. It was on this basis that Senior Counsel for CMC sought to re-open:

> "CMC does apply to reopen to call expert evidence on the assessment of the appropriate reasonable rate covering the 208 days. Can I say, we would ask for that on the basis that each side may call additional expert evidence on that question, but the expert evidence would be confined to the factual evidence already tendered, that is, no new factual evidence. In our submission, that would have some advantages over proceeding without additional expert evidence, one is that, as your Honour mentioned, greater accuracy in arriving at an appropriate reasonable rate. The second is, it's a time consuming task. It would be time consuming for the court to have to do that task without expert evidence, and the experts are more appropriate – more used to dealing with that sort of analysis of evidence. And the third is, it would alleviate what is said to have been prejudice to WICET by not having addressed to that during the trial."[17]

[23] The reference to "prejudice" is the prejudice identified by WICET in its further submissions.[18] Any issues of prejudice and natural justice may be overcome by permitting both parties to call expert evidence as to the appropriate average daily rate for on-Site overheads for the extension of time of 208 days. In determining this average daily rate the experts will be limited to the evidence already tendered or given at trial.

[24] WICET referred the Court to *Water Board v Moustakas*[19] for the proposition that "a trial is not at large but is of the issues joined by the parties".[20] The High Court in that case further observed:

> "More than once it has been held by this court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied."

This authority does not assist WICET. In the present case the question of whether CMC should be permitted to re-open involves an exercise of discretion. The re-opening is sought on the basis that the Court, in giving Reasons, has construed clause 36 of the General Conditions of the Contract in a way that has not been addressed by either quantity expert. It was not until the Court resolved the competing submissions as to the proper construction of clause 36 that the relevant inquiry for the calculation of on-Site

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15 Annexures C and D to CMC's Further Submissions, including additional evidence of on-Site Overheads between August 2012 and March 2013 (see T1-10, lines 1-5 on 28 July 2017) and CMC's Reply to WICET's Response to CMC's Further Schedule dated 27.07.17 (see T2-4, lines 12-21 on 21 August 2017).

16 T2-2, lines 9-26.

17 T2-10, lines 7-20.

18 [22]-[25].

19 (1988) 180 CLR 491.

20 At 496 per Mason CJ, Wilson, Brennan and Deane JJ.

overheads crystallised. Neither Mr Roberts or Mr Tsipis have yet analysed CMC's overhead resources which were detained on-Site for the additional 208 days from 30 August 2012 to 26 March 2013. The re-opening sought is not in respect of liability but only in relation to the calculation of the quantum of the Delay Claim.[21] In those circumstances it is appropriate that CMC be given leave to re-open its case for the limited purpose of calling expert evidence to quantify the Delay Claim based on evidence that has already been tendered or given at trial.

Disposition

1. CMC is granted leave to re-open its case to call expert evidence in respect of the quantification of the Delay Claim.

2. I will hear the parties as to further directions.

[21] I note that on the last day of trial Senior Counsel for CMC suggested as a possible option the Court receiving further submissions on quantum once it had determined liability: T36-38, lines 16-35.