SUPREME COURT OF QUEENSLAND

CITATION:	*CSR Ltd v Tanco Kimpex Export Corp P/L & Anor* [2003] QCA 568
PARTIES:	**CSR LIMITED** ACN 000 001 276 (plaintiff/respondent) v **TANCO KIMPEX EXPORT CORPORATION PTY LTD** ACN 073 364 388 (first defendant/first appellant) **KERRY FRANCIS MOORE** (second defendant/second appellant)
FILE NO/S:	Appeal No 5240 of 2003 DC No 3412 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2003
JUDGES:	McMurdo P, Davies and Williams JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Judgment set aside** **3. In lieu, judgment for the respondent for $179,114.76** **4. Appellants to pay respondent's costs of the appeal**
CATCHWORDS:	CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - IMPLIED TERMS - OTHER CASES - where parties entered into contract for supply of timber - where terms of contract partly written and partly oral - where written purchase order from appellant contained condition that a number of stated imperfections in timber were not allowed - where appellant's representative inspected timber at respondent's mills - where appellant's representative said he was happy with the quality of timber on inspection - where evidence was that timber inspected contained a number of imperfections - where learned trial judge held that terms of purchase orders were modified

during inspections - whether condition in purchase order that imperfections were not allowed was a term of the contract pursuant to which timber was supplied

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337, considered
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 186 ALR 289, considered

COUNSEL: D J S Jackson QC, with P A Freeburn SC, for the appellants
J B Sweeney for the respondent

SOLICITORS: Tucker & Cowen for the appellants
Carter Newell for the respondent

[1] **McMURDO P:** I agree with Davies JA and with the orders he proposes.

[2] **DAVIES JA:** This is an appeal from a judgment given in the District Court on 30 May 2003 giving judgment for the respondent against both appellants in the sum of $181,590.98 with interest and costs. The judgment sum was for monies due and owing for goods and services supplied to the first appellant, the second appellant being a guarantor of the first appellant's debt. There was also included in that sum a small amount for collection costs. Subject to the inclusion in that sum of $2,476.23 for indemnity legal costs pursuant to the terms of sale referred to below, there is no question between the parties as to the correctness of the above amount if the substantive questions are resolved against the appellants.

[3] Two questions resolved by the learned trial judge in the respondent's favour are the primary questions sought to be argued by the appellants in this Court. The first of those is whether a term contained in two purchase orders of the appellant both dated 28 May 1999 was, applied literally, a term of the contract pursuant to which the goods, timber, were supplied by the respondent to the first appellant. That term was:

"**NOT ALLOWED**
1) Black Knots
2) Cone Holes
3) Loose Knots
4) Pith
5) The resin pockets maximum 2 x 30 m/m long Per Board on best face."

[4] Mr Jackson QC, for the appellants, conceded that unless that question is resolved in this Court in the appellants' favour, that is, in the affirmative, this appeal in substance fails.

[5] The second of those questions which depended on an affirmative answer to the first, is whether the timber delivered by the respondent pursuant to the contract, complied with that term. It does not appear to be contended in this Court, although it appears to have been at trial, that the timber delivered did not comply in quality with that observed on inspections on 8 and 9 June 1999.

[6] It was common ground between the parties in this Court that there was at all material times a contract pursuant to which the relevant timber was supplied. However they differed markedly in their contentions as to what that contract was.

[7] It is plain that the contract between the parties was not one solely in writing. The evidence to which I am about to refer tends to show that it consisted partly of writing, partly of oral communication and partly of conduct. The oral negotiations for the contract were conducted by Mr Marlborough for the first appellant, which I shall call Tanco, and Mr Bergner for the respondent, CSR. In his judgment the learned trial judge made strong findings against the reliability of Mr Marlborough's evidence. Consequently Mr Jackson QC did not rely on it in this appeal.

[8] CSR was the manufacturer and wholesale supplier of timber. Tanco, it seems, was a buyer and reseller of timber. In late 1998 or early 1999 Bergner and Farmer of CSR met Marlborough of Tanco in Tanco's office. Marlborough said he was interested in buying pine from CSR to export it to a furniture manufacturer in Malaysia. He said that the potential volumes were large.[1]

[9] Then on 17 March 1999 Tanco applied to CSR for commercial credit. In that application it agreed to attached terms of sale. Those terms included the following:

> "We make no warranties or representations about goods offered for sale other than warranties contained in these terms of sale. We warrant only that goods offered for sale will be generally similar to other goods of the same description. You accept that any particular delivery of goods may vary from goods of the same description displayed, advertised or delivered on a different occasion.
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> To the fullest extent permitted by law, all terms, conditions, and warranties, statutory or otherwise, not expressly provided in these terms of sale, are excluded.
>
> To the extent that
>
> - any term, condition, or warranty not expressly provided in these terms of sale cannot be excluded due to the provisions of section 68A of the Trade Practices Act 1974 or any other statute, and we breach such term, condition, or warranty, or
> - you make a claim as provided below and we agree that the goods were damaged or defective at the time of delivery
>
> our liability is limited to (at our option) replacing the goods or crediting you with the purchase price of the goods."

A deed of guarantee and indemnity executed by the second appellant, Moore, also formed part of the same document.

[10] Some discussion about supply took place between Bergner and Marlborough and then, on 20 April 1999, Bergner sent a fax to Marlborough, the subject of which was "150 x 50 / 90 x 90 RSKD" and the first paragraph of which, dealing with 150 x 50 RSKD, that is rough sawn kiln dried timber, reads:

> "We currently have one container in volume of the 150 x 50 that we would be able to supply. This is at Tumut which would be the mill that would produce the product.

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[1] Tanco had purchased one 40 ft container of timber from CSR in July 1998 and had apparently also purchased timber from it in August 1998 but both of these were, it seems, of much smaller quantities.

> Before we commit ourselves to volume production we would like confirmation that the product is suitable to this end. We can send a trial shipment or alternatively you could view the product. The price of $A250/m^3 is o.k."

Neither of the above dimensions were the same as those the subject of the contract in issue but this fax is of some relevance in the factual matrix against which the contract must be construed.

[11] At about the same time as that fax was sent, Marlborough, to whom the fax had been sent by Mr Bergner, rang Bergner and said to the effect that he wanted to place a large order for 100 x 30 and 100 x 25 RSKD pine. These were the dimensions of two of three different dimensions of pine the subject of the contract. Bergner's response was to the effect that he would be happy to help; could Marlborough fax him with the details of what he was after and when and he would look into it. Bergner's evidence, which was accepted by the learned trial judge, was that he always asked his customers for a written specification of the timber required. He would then consult to determine whether and if so how CSR could supply the timber required and at what price and by what timetable. He would then get back to the customer usually in a day or two.

[12] Sometime between that date and the purchase orders dated 28 May 1999, Mr Farmer of the respondent had one or two meetings with Marlborough about what was proposed. According to Farmer, whose evidence the learned trial judge generally accepted, Marlborough said he wanted rough sawn kiln dried timber in 30 mm x 100 mm and 25 mm x 100 mm sizes to be used for furniture, including table tops and tables etc and asked what could CSR offer him. Farmer said that he told Marlborough that all that CSR could supply was "run of stack" industrial timber where he took the good with the bad. Farmer proposed a trial shipment of 40 cubic metres of each kind of timber so that, before a much larger order was supplied, Marlborough could make sure he was happy with the quality of the wood. Marlborough did not say that he wanted timber of any higher grade or quality than that which Farmer described.

[13] Then on 24 May 1999 Bergner sent a fax to Tanco, for attention Marlborough, under the subject "100 x 30 RSKD". The substance of that fax was as follows:

> " (1) 100 x 30 RSKD O.K. @ $250/m^3 FOB wharf Syd 1st container available 4 weeks after 1st order. Balance of order filled in 9-10 weeks (approx 1 container/week). [We are conservative here. Once we get going availability should be better]
> Product ex Tumut mill.
> We would suggest trial shipment to ensure and confirm that the quality/grade of product is acceptable.
> (2) Option to above: Supply 90 x 35 x RL (heavy) F4 packs ex Tumut. Could supply 10 containers in 2-3-4 weeks. Price is $205/m^3 FOB wharf Syd.
> With option (1) above there may be some twisting due to 'small' E.S. being dried. This F4 product tends to exhibit less of this problem.
> Trial shipment, again, would be suggested. Timber is Radiata Pine.
> I appreciate some of the issues (indecipherable) this end-section but may be worth considering."

[14] On 27 May Bergner sent a further fax to Marlborough asking:

"Could you please update me on the following:

(1) 100 x 30 RSKD @ $250/$m^3$. I understand our delivery is an issue but if we could get orders from you for say July/August we would have product available to suit your requirement

(2) 90 x 35 - F4 ex Tumut available ex stock @$205/$m^3$

Have you had any joy with this

(3) 100 x 25 RSKD - we quoted $/$m^3$ $275AUS

If you could advise typical monthly demand we may be able to adjust prices. Please advise."

[15] The prices quoted in those faxes, according to Bergner, were for rough sawn, kiln dried, run of stack timber. Timber of that quality usually had some black knots, cone holes, loose knots and pith. It was possible to buy pine with no black knots, no cone holes, no loose knots and no pith but not from Bergner. CSR's Tumut mill did not produce such timber. Mr Bergner said that he estimated that the buying price for such timber in Australia would be between $300 and $400 a cubic metre.

[16] On the following day CSR received two purchase orders from Tanco in identical form except as to quantity. It is sufficient to reproduce one only of these, the substance of which was in the following terms:

"We hereby confirmed to [sic] purchase from you the following merchandise to be shipped / delivered in good in [sic] condition subject to the terms and particulars as stated below.

Items	Quantity (M3)	Description	Unit Price	Amount
			AUS$/M3	**AUS$**
1	40 M3	RSKD 30mm Thickness x 100mm Wide x Length - 2,3,4,5,6 M	$250.00/m3	$10,000.00
1	40 M3	RSKD 25mm Thickness x 100 mm Wide x Length - 2.5 - 5.4M	$275.00/m3	$11,000.00
1	40 M3	F4 ExTumut 35mm Thickness x 90mm Wide x Length - 2.5 - 5.4 M	$205.00/m3	$8,200.00
		Remark: Premium Grade Australian Pine (Kiln Dried) Solid Pine Wood - (Furniture Grade) Moisture Contant [sic] 10-12% **NOT ALLOWED** 1) Black Knots 2) Cone Holes 3) Loose Knots 4) Pith 5) The resin pockets maximum 2 x 30 m/m long Per Board on best face DELIVERY: FOB Sydney Above Purchase Order Should Load 3 x 40FT Containers PAYMENT: ACCOUNT		$29,200
			TOTAL	$29,200.00

Please quote our P/O number in your invoice and acknowledge if unable to supply by date required."

[17] The other purchase order of the same day ordered substantially larger quantities of RSKD 30 x 100 (360 cubic metres) and of RSKD 25 x 100 (120 cubic metres) at the same prices. It did not order further F4 35 x 90.

[18] The dimensions and kind of two of the kinds of timber in the purchase orders (RSKD 30 x 100 and 25 x 100) were of the timber discussed with Bergner on about 20 April and with Farmer on two occasions. The first kind (100 x 30 RSKD) was also the subject of the faxes of 24 and 27 May; and both kinds were also the subjects of the fax of 27 May. The third kind of timber in the first purchase order (90 x 35 F4) was also the subject of both faxes. And the prices in the purchase orders for all timber were those stated in those faxes.

[19] When it is seen that the above dimensions and prices the subject of oral discussions and faxes were for "run of stack" timber, it can be seen that the heading "NOT ALLOWED" and what followed in the purchase orders, if read literally, purported to add a new term, inconsistent with what had been previously understood, in the negotiations.

[20] Sometime after the fax sent by Bergner to Marlborough of 24 May, in which Bergner had suggested that Tanco take a trial shipment, there was some discussion that, instead, Marlborough would come and inspect the pine to make sure that he

would be happy with what the respondent intended to supply. It is unclear whether this conversation occurred before or after the purchase orders of 28 May.

[21] Marlborough with Bergner made inspections of the 100 x 25 RSKD timber at Boral's Oberon mill, which was going to supply it, on 8 June. And they made inspections of the 100 x 30 RSKD timber and the 90 x 35 F4 timber, at the respondent's Tumut mill, which was producing it, on 9 June. Mr Manson was also present at the first of those inspections and Mr Seymour was also present at the second of those inspections. With one qualification, the timber in each case was "run of stack" ungraded timber which, according to those witnesses, had a variable amount of black knot, cone holes and loose knots. That qualification was that the patterns for production of the 100 x 30 RSKD at Tumut were configured, according to Seymour, so as to minimize the number of faults such as knots. He did this on Bergner's instruction.

[22] As to the first of these inspections Manson said that the timber inspected was run of stack ungraded product which had a variable amount of black knot, cone holes and loose knots. Bergner said that many pieces "may" have exhibited the visual features later complained of; knot holes, cone holes etc. He used the word "may", he said, because "would" implied to him that every piece would have some imperfections and that was not correct.

[23] As to the second, Mr Seymour said that the sample produced did not contain a significant amount of knots or cone holes and contained only a minimal amount of pith. He was not prepared to say that there were no knots, or cone holes. Bergner said of this inspection that there may have been black knots occasionally, some wane and the odd cone hole in the samples but not a great deal. Again, he said, he used the word "may", because to use the word "would" to him implied that nearly every piece would have some sort of imperfection in it. What he was saying was that there was some imperfections but there would have been some pieces of timber that had none.

[24] A number of samples of the timber (apparently not including F4 timber) which Tanco alleged was of the quality of the timber supplied, were produced by the appellants in evidence. Bergner, Seymour and Manson all said, on inspecting these samples, that they were, in effect, generally of the quality observed on inspection on 8 and 9 June. Their evidence was accepted by his Honour in the following terms:

> "i. ... The weight of the evidence is that of Mr. Seymour, Mr. Manson and Mr. Bergner who were not shaken in cross examination. What they observed on the inspections accords with what they observed in the samples produced by Mr. Marlborough and Mr. Lim from Malaysia."

As mentioned earlier, the appellant did not seek to overturn that finding which was based on credit.

[25] Bergner said that Marlborough also inspected the F4 place at Tumut mill. Marlborough accepted in his evidence that this timber was not free of black knots, cone holes, loose knots or pith and said that he never expected that it would.

[26] At each place Marlborough said that he was happy with the quality of the timber which he inspected. Indeed, that was Tanco's case at trial; and that Marlborough

would not have gone ahead with the purchase unless he had been happy with the quality on inspection.

[27] It appears from that last statement that Marlborough, like Bergner, saw the inspection as critical to the making of the contract. But that may have been, as Tanco alleged, because Marlborough would not make the contract unless what he inspected complied with what was set out under the heading "NOT ALLOWED" in the purchase orders. Or it may have been, as CSR alleged, because the contract was made on the basis that what was delivered complied, in quality, with what was produced for inspection on 8 and 9 June.

[28] In order to determine which of these is correct it will be necessary to look at the surrounding circumstances and from those circumstances discern the objective which the parties had in view.[2] These circumstances include the background, the context and the market in which the parties were operating.

[29] His Honour concluded, in effect, that the significance of the inspection was for the reason contended by CSR. He found:

> "j. In effect, what Mr. Marlborough told Mr. Bergner was that what he saw on the inspections in June was adequate for the Purchase Orders viz. 100mm x 25mm produced by Boral at its Oberon mill, and the ungraded 100mm x 30mm produced by the Plaintiff at its Tumut mill.
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> k. The terms of the Purchase Orders were modified by Mr. Marlborough on the inspections in June at the respective mills to reflect what he observed as being adequate to fulfil the Purchase Orders. Also, the Court is entitled to look at the factual matrix to determine the common understanding of the parties."

[30] That must plainly be correct with respect to the F4 timber the subject of the first of the purchase orders. Although the purchase order, read literally, required that it have no black knots, no cone holes, no loose knots and no pith, Marlborough acknowledged that he did not expect that it would satisfy that requirement. It was therefore plainly not a requirement of the sale of that timber.

[31] And once it was accepted that the other pine which Marlborough inspected at Oberon on 8 June (100 x 25 RSKD) and at Tumut on 9 June (100 x 30 RSKD) did not comply with that part of the purchase orders under the heading "NOT ALLOWED", but that Marlborough proceeded to enter into the contract for purchase of pine after such inspections, it necessarily follows, in my opinion, that that part of the purchase orders was not part of the contract. The contract was, therefore, one for the sale of timber of the quality inspected on 8 and 9 June.

[32] This conclusion is also consistent with what had occurred before and after the purchase orders. What CSR was offering at the prices it quoted in the faxes of 24 and 27 May, which prices were incorporated in the purchase orders, was run of stack timber and that, with one modification referred to earlier, is what was being produced for inspection on 8 and 9 June. The conclusion is also consistent with Marlborough's evidence that, if what had been delivered had been of the same

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[2] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352, 401; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289 at 292 - 293.

quality as that which he inspected on 8 and 9 June he would have had no criticism of it. It is most unlikely that, on those days, he did not observe that the pine, other than the F4 pine, did not comply with the strict requirements stated under "NOT ALLOWED" in the purchase orders.

[33] Once that conclusion is reached, as Mr Jackson QC for the appellant rightly conceded, subject to the obligation to pay the sum of $2,476.23 by way of indemnity costs, this appeal must fail.

[34] The respondent did not claim that sum at the trial although it was included in the amended statement of claim. Nor did it contend in this Court that it was entitled to it. On the contrary Mr Sweeney, for the respondent, conceded that it was wrongly included in the judgment amount. Accordingly the judgment amount should be reduced by that amount. That the appellants succeed in that respect only, but substantially fail, means that they should pay the costs of the appeal.

Orders

1. Appeal allowed.
2. Judgment set aside.
3. In lieu, judgment for the respondent for $179,114.76.
4. Appellants to pay respondent's costs of the appeal.

[35] **WILLIAMS JA:** The relevant facts are fully set out in the reasons for judgment of Davies JA which I have had the advantage of reading.

[36] It is clear that the purchase orders from the first appellant to the respondent dated 28 May 1999 contained the condition “Not Allowed” fully set out in the reasons for judgment of Davies JA. The real difficulty for the appellant is that there is no evidence, and certainly no finding by the learned trial judge, that the respondent accepted those terms as part of a contract of supply between the parties.

[37] As the learned trial judge rightly said the purchase orders were no more than offers. The initial response of the respondent was to suggest a trial shipment to confirm the quality and grade of the product involved. That was clearly not accepted by the first appellant, but instead an inspection of product took place at the respondent’s mills on 8 and 9 June 1999. The learned trial judge held, and there was evidence to support such a finding, that the purpose of the inspections was to determine whether the quality of the timber was satisfactory to the first appellant. The finding made at trial was that the timber inspected on those occasions was “run of stack” production which inevitably involved black knots and other imperfections.

[38] As a result of the inspections the parties clearly proceeded on the basis that there was a contract to supply the quantity of timber, with the specified dimensions, as set out in the purchase orders. The real question in issue in the litigation was what were the other terms of the contract of supply, and in particular was the “Not Allowed” condition incorporated. As Davies JA has indicated in his reasons the contract was concluded partly by words spoken in the course of the inspections, and partly by conduct. The learned trial judge found that Marlborough, acting on behalf of the first appellant, told Bergner, on behalf of the respondent, that what he saw on the inspections was adequate for the purchase orders. It followed, to use the language of the learned trial judge, that the terms of the purchase order were modified during the inspections to reflect what Marlborough observed as being adequate to fulfil those orders.

[39] If the terms of the contract of supply were not as held by the learned trial judge then the only conclusion open on the evidence would be that there was no agreement between the parties as to the quality of timber to be supplied. As I have already said there was clearly no evidence to support a conclusion that the respondent accepted the "Not Allowed" condition contained in the purchase orders.

[40] Against that background the learned trial judge was, in my view, justified in reaching the conclusion which he did as to the formation of the contract and its terms. It follows that I agree with the reasoning of Davies JA in concluding that the appeal on the substantive issues should be dismissed.

[41] I agree with the orders proposed by Davies JA.