SUPREME COURT OF QUEENSLAND

CITATION:	*Agripower Australia Ltd* v *Coleman & Anor* [2015] QCA 266
PARTIES:	**AGRIPOWER AUSTRALIA LTD** ACN 132 823 226 (appellant) **v** **JOHN W COLEMAN** (first respondent) **DIANNE L COLEMAN** (second respondent)
FILE NO/S:	Appeal No 5436 of 2015 SC No 189 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns – [2015] QSC 118
DELIVERED ON:	8 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2015
JUDGES:	Margaret McMurdo P and Morrison JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – where the appellant held a mining lease over a large deposit of diatomaceous earth (which has commercial value as a fertiliser and soil conditioner) in North Queensland – where the appellant decided to establish a mining operation to extract and sell that material – where the appellant engaged the respondents to assist in establishing that mining operation – where the respondents undertook various works, including providing equipment for screening the diatomaceous earth – where, after screening, the diatomaceous earth was not of the intended size – where the trial judge gave judgment in favour of the respondents in respect of a claim for remuneration for services undertaken at the appellant's request – where the trial judge dismissed the appellant's counterclaim, for a loss of profits occasioned by the respondents' failure to exercise care and skill in undertaking those services – where the appellant appealed against those orders – whether the primary judge's conclusion, that any loss and damage suffered by the appellant

was not the result of a failure of care and skill on the part of the respondents, was contrary to the evidence – whether, if the appellant succeeded in that contention, the damages suffered by the appellant ought properly to have been set off against monies owing to the respondents, such that the judgment entered in favour of the respondents should be set aside and judgment entered for the appellant in the amount still owing after that set-off

COUNSEL:	D B O'Sullivan, with A C Stumer, for the appellant M A Jonsson for the respondent
SOLICITORS:	Shine Lawyers for the appellant Williams Graham & Carman for the respondent

[1] **MARGARET McMURDO P:** I agree with Boddice J's reasons for dismissing this appeal with costs.

[2] **MORRISON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.

[3] **BODDICE J:** On 5 May 2015, judgment was entered in favour of the respondents in respect of a claim for remuneration for services undertaken at the appellant's request. The appellant's counterclaim, for a loss of profits occasioned by the respondents' failure to exercise care and skill in undertaking those services, was dismissed.

[4] The appellant appeals against those orders. At issue is whether the primary Judge's conclusion, that any loss and damage suffered by the appellant was not the result of a failure of care and skill on the part of the respondents, was contrary to the evidence. Should the appellant succeed in that contention, the appellant submits the damages it suffered ought properly to have been set off against monies owing to the respondents, such that the judgment entered in favour of the respondents should be set aside and judgment entered for the appellant in the amount still owing after that set-off.

Background

[5] The appellant holds a mining lease over a large deposit of diatomaceous earth near Greenvale in North Queensland. Diatomaceous earth is of significant commercial value as a fertiliser and soil conditioner. In 2009, the appellant decided to establish a mining operation to extract and sell that material.

[6] The appellant engaged the respondents to assist in establishing that mining operation. The works to be undertaken by the respondents involved constructing an access road, stripping topsoil, extracting and screening diatomaceous earth, and bagging and storing the end product.

[7] The respondents undertook various works, including providing equipment for screening the diatomaceous earth. The respondents issued invoices for payment for those services between August and November 2009. When the appellant did not pay various invoices, the respondents withdrew their services.

Claim

[8] The respondents instituted proceedings claiming remuneration for services undertaken by them on the appellant's behalf in respect of the mining operation. Relevantly, those

services concerned the screening, processing and storage of the diatomaceous earth. The appellant denied liability, on the basis it had already overpaid for the services.

[9] The appellant also counterclaimed for a loss of profit allegedly suffered by reason of the respondents' failure to process the diatomaceous earth with the appropriate care and skill. Central to those allegations was a contention that the respondents' screening process was to produce product containing granules of between 2 mm and 6 mm, and the product produced contained an excessive amount of consistently oversized granules, rendering it unsaleable.

Primary decision

[10] The primary Judge found that the appellant's director, Peter Prentice, informed the male respondent that the screening process was to produce diatomaceous earth granules in the range of 2 mm to 6 mm. The respondents, who had a screening plant which had been screening gravel, agreed to supply and modify that plant. The screening process involved the use of two screens; a larger screen, to remove the oversized granules, and a smaller screen, to remove the undersized granules.

[11] The primary Judge accepted that the respondents purchased new screens for the project, with sizes of 2 mm, 3 mm, 6 mm and 8 mm. Those screens were stainless steel. The primary Judge found Mr Prentice wanted stainless steel to safeguard the quality of the product, and approved the screens. The appellant also reimbursed the respondents for the purchase of those screens.

[12] The primary Judge found that the screening process undertaken by the respondents was in accordance with the directions of Mr Prentice and an employee of the appellant, Mr Storronning, who were "actively involved in supervising and testing in the early days of the screen operation". Those tests included ascertaining the appropriate angle to achieve the desired product size, and days of sampling the product produced by the screening plant.

[13] The primary Judge found the cause of oversized granules in the screened product was "the screen size settings"; that "the screening plant was configured so as to allow a bigger sized granule than desired".[1] As Messrs Prentice and Storronning were actively involved in supervising and testing in the early days of the screening operation, and there was no evidence of any subsequent variation of the screen size settings, the primary Judge held it was likely any problem with the size of the product generated by screening was "present and undetected from the outset when Messrs Prentice and Storronning oversaw the plant's set up and undertook sampling".

[14] The primary Judge found that any problem with granule size in the completed product was due to the process settled upon by the appellant and not a failure of care and skill on the respondents' part. The screening and bagging process was settled upon at Mr Prentice's direction, and was supervised by Messrs Prentice and Storronning. The respondents were working under the appellant's direction and supervision. There was no evidence the respondents did not carry out the process as settled by the appellant.

Appellant's submissions

[15] The appellant submits the trial Judge's finding that the oversized granules were not a consequence of any failure of care and skill on the part of the respondents was

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1 Reasons, [135] and [268].

glaringly improbable and contrary to the evidence. The compelling inference, on a consideration of the whole of the evidence, was that consistently oversized granules were present in the screened product because the respondents inserted an incorrect screen into the screening plant or failed to maintain the screens in good working condition.

[16] The appellant submits that conclusion followed from the fact that there was no evidence a screen of the correct size could be configured, or that the settings could be adjusted, so as to permit oversized granules to pass through it. The insertion of a wrongly sized screen, or a failure to maintain the screens, could only have occurred by reason of a failure on the respondents' part to exercise due care and skill in undertaking the screening process. The respondents were specially informed of the size of the required product size. The product produced contained granules significantly larger than 2 mm to 6 mm.

Respondents' submissions

[17] The respondents submit the primary Judge's findings were amply supported by the evidence. Further, the inference now contended for by the appellant, namely, that at some point after the initial testing supervised by Messrs Prentice and Storronning, the respondents unilaterally inserted an unauthorised screen into the screening plant or had failed to properly maintain the screens, was not pleaded, was not put to any witness, was not contended for by the appellant in submissions before the trial Judge and is at best speculative and conjectural.

Discussion

[18] The appellant frankly conceded that the inference contended for on appeal was not pleaded, put, or advanced at trial. The appellant's failure to plead the inference now contended for, to put that proposition to the male respondent in evidence, and to contend for that proposition in submissions at trial, render it wholly inappropriate for this Court to consider such a contention on appeal.[2] However, it is unnecessary to determine the appeal on that basis, as the primary Judge's careful findings at trial were amply supported by the evidence accepted at trial.

[19] The primary Judge's conclusion that any problem with the granule size in the completed product was due to the process the appellant adopted, was based in large measure on the acceptance of the male respondent's evidence and a rejection of the evidence of Messrs Prentice and Storronning. The findings in respect of Mr Prentice's evidence were particularly adverse. The primary Judge expressly found Mr Prentice's attempts to distance the appellant, from the extent and consequences of the appellant having directed and supervised the work of the respondents, made Mr Prentice's evidence unreliable. He had shaped his evidence "to divert blame for the problems arising out of this embryonic mining operation away from the obvious cause – the way in which the operation was managed by Agripower".[3]

[20] Those telling findings, plainly open on the evidence and not challenged on appeal, were relevant to the later findings that the screening and bagging process was settled upon, at the direction of Mr Prentice, and supervised by Messrs Prentice and Storronning. Again, those findings were plainly open on the evidence, and are not challenged on appeal. The male respondent's evidence, which the primary Judge accepted, was that

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2 *Multiplex Ltd v Qantas Airways Ltd* [2006] QCA 337 at [10].

3 AB 1795; Reasons at [30] - [31].

after the screening plant was delivered, it was calibrated and Mr Storronning tested its angles so as to achieve the product size desired by Messrs Prentice and Storronning. Both Messrs Prentice and Storronning accepted they had spent days sampling the product when the plant was being commissioned. They also accepted they had taken samples and undertaken the relevant testing of the screened product.

[21] The primary Judge also found there was no evidence of a subsequent variation to the screen size settings by the respondents, suggesting that any problem with the size of the product generated by the screening was likely present and undetected from the outset when Messrs Prentice and Storronning oversaw the plant's set-up and undertook sampling. Again, that finding was amply supported by the evidence. The male respondent emphasised in his evidence that he was told what to do, and that in such circumstances, "I don't go and do the opposite".[4]

[22] There was no basis for the primary Judge, having accepted the male respondent's evidence, to find that the respondents had, after the initial set–up of the screening plant, switched the screen size. Mr Storronning, the appointed site senior supervisor, gave evidence that his role as supervisor involved overseeing all aspects of the process and giving directions. Mr Storronning said if he had seen any departure from what was required, he would have intervened.

[23] Mr Storronning also gave evidence that he on occasions would use a wire brush to clean the screens when they became clogged with clay material. Mr Storronning did not suggest the screen had been altered in any way. There was also no suggestion by him that the screen had been allowed to fall into disrepair. That being so, there was no basis upon which the primary Judge could properly infer that the respondents had switched screens or failed to maintain the screening plant in good working condition.

[24] The appellant's contention that those were the glaringly obvious inferences stems from a submission that as oversized granules were not detected in the initial trialling process, and there was expert evidence that the oversized granules could not fit through the 8 mm screen affixed in the initial set-up of the screening process, there was an obligation on the trial Judge to analyse the root cause of the problem of consistently oversized granules in the finished product, which could only be the switching of the screen size or a failure to maintain the screen in good working order.

[25] A consideration of the expert evidence does not support a conclusion that such an inference was the only reasonable inference. The expert evidence merely raised the issue of an incorrect screen size as a possible explanation for the presence of the oversized granules.[5] However, that expert did not examine the screening plant. The expert therefore could not say that the screen that had been inserted at the outset, under the specific direction and supervision of Messrs Prentice and Storronning, was the 8 mm screen.

[26] Further, the expert referred to the oversize granules not passing through a 6 mm screen, in circumstances where the evidence left open the real probability that an 8 mm screen was inserted at the outset with the equipment being angled to ensure only granules within the requisite range fell into the completed product. Mr Storronning said a seven or eight millimetre screen was inserted at the outset.[6] The evidence was that the only screens purchased were of 2, 3, 6 and 8 mm size.[7] This evidence left open the probability

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4 AB 279/136.
5 AB 587; Ex 1 para 154(c).
6 AB 48/30.
7 AB 900.

of the primary Judge's ultimate conclusion, that consistently oversized granules entered the completed product because the screening plant was unintentionally configured to permit a larger granule range. Responsibility for any such configuration rested solely with the appellant, who had directed and supervised the initial configuration.

[27] It is also significant that this apparently glaringly obvious inference was neither pleaded by the appellant nor relied upon in submissions at trial. If the inference sought to be drawn was that the male respondent, after the trialling process, changed the size of the screen, there was a need for that to be pleaded and contended for at trial. It involved a serious allegation. Similarly, if the appellant wished the primary Judge to infer, from the fact that there were consistently oversized granules in the finished product, that there must have been a failure to properly maintain the screen installed at the direction of Mr Prentice, there was a need to plead that case. It was not fairly raised by the particulars of negligence relied upon by the appellant.

Conclusions

[28] The primary Judge's conclusion that any loss and damage suffered by the appellant was not as a consequence of any failure of care and skill by the respondents was neither improbable nor contrary to the evidence. That finding was amply supported by the evidence accepted at trial. The appellant has shown no error of law or fact.

[29] I would dismiss the appeal, with costs.