IN THE COURT OF APPEAL 99.61

SUPREME COURT OF QUEENSLAND

Appeal No. 5735 of 1998

Brisbane

[Stork Wescon Aust. P/L v. Morton Engineering Co. P/L]

BETWEEN:

STORK WESCON AUSTRALIA PTY LTD
ACN 004 448 042
(First Defendant) Appellant

AND:

MORTON ENGINEERING CO. PTY LIMITED
ACN 010 591 929
(Plaintiff) Respondent

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de Jersey C.J.
Pincus J.A.
Thomas J.A.

Judgment delivered 5 March 1999

Judgment of the Court

APPEAL DISMISSED WITH COSTS

CATCHWORDS: **BUILDING AND ENGINEERING CONTRACTS - contract for fabrication and erection of steel structures to support pipeline equipment - whether work "building work" within s. 4 *Queensland Building Service Authority Act* - whether work excluded by cl. 3A(1)(b) Regulation - meaning of installation.**
***Queensland Building Service Authority Act* 1991**
***Queensland Building Service Authority Regulation* 1992, cl. 3A(1)(4)**

Counsel: Mr P A Keane Q.C. with him Mr D A Kelly for the appellant.
Mr B O'Donnell Q.C. with him Mr A B Crowe for the respondent.

Solicitors: Gadens Lawyers for the appellant.
Johnsons (Surfers Paradise) for the respondent.

Hearing Date: 19 February 1999.

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REASONS FOR JUDGMENT - THE COURT

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1 In the south-west corner of this State there is a facility called the Ballera Gas Centre. Natural gas is piped there from many wells and is subjected to treatment processes to make it fit for sale; when treated the gas is to be pumped out to distant markets. The respondent made a contract with the appellant to make and instal part of the equipment at the site and is attempting to recover from the appellant what is said to be money due to it for its work. In these proceedings the appellant says that the respondent cannot succeed because the work was done without a licence which Queensland law requires.

2 This question arises in the context of an application, unsuccessful below, made by

the appellant to cancel a notice of intention to claim charge given under the *Subcontractors' Charges Act* 1974. The case does not involve any question of interpretation of that statute, however, but is concerned with the effect of legislation whose purpose is to regulate the building industry in Queensland. Work in the building industry can have to do with manufacturing and other industrial enterprises; a factory is a building. But the appellant would have the relevant statute and regulation applied so as to catch activities which one would not ordinarily think to be those of the building industry and to catch, in particular, the whole of the respondent's work in making part of the plant we have described. If this is so, then the *Queensland Building Services Authority Act* 1991 and the Regulation made under it have a wider scope than they have previously been understood to have. The important powers of regulation in relation to the building industry, including issuing and cancelling licences (ss. 34 and 48 of the Act) and directing that defective work be rectified (s. 72) would, if the appellant's contentions are correct, be applicable to highly technical work outside the building industry, such as the provision of equipment for making chemicals and refining metals. Indications can be found within the statute and regulation that it was not envisaged that work of that kind would be regulated as part of the system for controlling the building industry. The trade representatives on the Queensland Building Services Board, prescribed by s. 10 of the Act, come from the Master Builders Association and the Housing Industry Association, people who presumably would have no relevant expertise outside the building industry. Further, the Queensland Building Services Authority Regulation 1992 ("the Regulation") provides for 28 types of specialised licences which seem to relate to work in the building industry, in the ordinary sense.

3 As counsel for the appellant emphasised, however, the question raised must depend upon the language of the Act and Regulation. It is only if there is uncertainty as to their effect that broader considerations, such as those which we have mentioned, are likely to be of use. It will be necessary to deal with some particular details of the work done and agreed to be done by the respondent, under its contract with the appellant, but the principal point of the case can be approached after a brief description of the work. It consisted in the main of fabricating, chiefly at the respondent's works in Brisbane, steel structures to support pipeline equipment at the Ballera Gas Centre, together with tanks forming part of the equipment there, and then fixing these things on the site.

4 The Act and Regulation have the effect that "building work" for the purposes of the Act includes the "erection or construction of" "any fixed structure", with certain exceptions, the most relevant one of which is "the installation of manufacturing equipment or equipment for . . . conveying . . . materials or products . . ."; see the definitions of "building work" and "building" in s. 4 of the Act and cl. 3A(1)(t) of the Regulation. If the work was "building work", then the appellant succeeds, for no licence under the Act was held by the respondent. It was argued for the appellant that all of the work fell within the statutory definition of "building work" read with the exception, and alternatively it was said that some of the work did so. It was orally contended that there was no installation done within the meaning of the Regulation, because there was no "host structure" into which the equipment was installed. In the written outline, a rather different argument had been advanced, namely that there was no installation of conveying equipment because the respondent did not place the pipeline into position, only its supports.

5 Counsel argued for the appellant that a person who erects a structure cannot be an installer; it was suggested that the notion of installation is confined to bringing an object to a site and "simply putting it there". That does not accord with usage. An example of what appears to be an older use of the word "installed", given in the Oxford English Dictionary, refers to an electric railway as being "installed", although that work would presumably not have consisted of merely bringing a railway to the site and putting it down. Similarly, one would speak of "installing" air conditioning into a large unairconditioned building, although that might involve very substantial work such as erecting a platform on which to place the equipment, making any necessary changes in the existing building, joining and fixing ducts; see Sheahan v. Carrier Air Conditioning Pty Ltd (1997) 189 C.L.R. 407 at 426.4. The notion of installing equipment may, depending on context, refer to lengthy and elaborate work, or work which is relatively simple; it is not confined to the latter.

6 An example of current usage of the word instal is to be found on the 1995 Hutchinson Encyclopaedia CD under "Headingley": "It was the first club to instal undersoil heating". The broad meaning of that word and of "installation" appears from the following examples to be found in the 1998 Encyclopaedia Britannica CD:

> Montmorency Falls: "Hydroelectric installation at the falls provides power for the region around Quebec City".
>
> Railroad operations and control: "**. . .** a railroad's factory **. . .** has operating and service problems in some respects more complex than those of a major manufacturing installation".
>
> Mackay: "Its deep water artificial port has one of the world's largest bulk-handling installations".
>
> Uddevalla: "**. . .** it has developed into an industrial town with large shipyards and dock installations".

Lajes: "It became a major Allied air installation during World War II . . .".

Cleethorpes: "The district includes Immingham Dock and other industrial installations".

Underground mining: ". . . facilitates the installation of service facilities for such essential activities as human and material transport, ventilation, water handling and drainage, and power".

Sapper: "They provide tactical support on the battlefield by installing portable bridges, tank traps, and other construction . . .".

Petroleum engineering: "The production engineer's work . . . involves controlling and measuring the produced fluids (oil, gas, and water), designing and installing gathering and storage systems . . .".

Sewage system: "Sometimes a combined system provides only one network of pipes, sewer mains, and outfall sewers for all types of sewage. This type of system is less expensive to install in a district . . .".

Austria: "The government was nearly defeated in 1978 over proposals to instal the first nuclear power plant".

7 As to the last example, installing a nuclear power plant involves we believe years of off-site and on-site work. The installers do not simply build or buy a plant and bolt it down on the site; and see the *Nuclear Installation Act* 1965 (U.K.) s.1.

8 Evidence that the concept of installation, both as to the act and result, is a broad one is to be found in the Commonwealth Law Reports: Oceanic Crest Shipping Co. v. Pilbara Harbour Services Pty Ltd (1986) 160 C.L.R. 626 at 680.6 (wharf), Botany Municipal Council v. Federal Airports Corporation (1992) 175 C.L.R. 453 at 455.2 (airport runway), B.P. Refinery (Westernport) Pty Ltd v. Shire of Hastings (1977) 180 C.L.R. 266 at 277.7 (oil refinery).

9 Should "installation" in the present context be given a broad or narrow meaning? An indication that the former is intended is to be found in the concluding words of para. (t):

> "**. . .** but excluding installation of fixed structures providing shelter for the equipment".

If the appellant is right, the exclusion just quoted does not apply, or does not apply to all the work, if the shelters are brought to the site in pieces and assembled and erected there, substantial labour being involved. It is unlikely that those who made the Regulation intended this distinction; shelters were presumably intended to be covered whether or not extensive on-site work might be necessary to achieve their installation.

10 It is hard to think of a rational policy which would underlie bringing manufacturing equipment and the like under the regulatory scheme applicable to the building industry except where it is "installed" by some simple process involving minimal on-site work. Our attention was drawn by the appellant to what were said to be absurdities flowing from the result at which the primary judge arrived; but that a furnace for making steel, vast and fixed enough to be a structure, should be something which can be provided, in Queensland, only by a person licensed under building industry legislation is surely an odd enough outcome to make one doubt that the interpretation advanced is right. Particularly is that so if one keeps in mind that it is the furnace in all its parts which would, on the appellant's argument, be caught, however complex and remote from the skills of those in the building industry its design and construction might be. The only escape from that outcome, if the appellant is correct, is so to arrange matters that the furnace is wholly built off-site and then merely brought to the site and placed there. And even then, if we understand the appellant's argument, all the off-site work would be

caught.

11 The learned primary judge gave the word "installation" a meaning wide enough to encompass all the necessary work to produce the installation; his Honour held that the work the respondent did "in manufacturing and installing the structure that supported [the pipeline] in its elevated position was an essential part of the *installation* of that equipment". Adopting the broad meaning of the word "installation" which is available, we agree. And even if "installation" refers only to the on-site work, still the appellant's contention fails; the exemption of the on-site work, required by the Regulation, leaves only the off-site work to be considered and that is not the "erection or construction" of any "fixed structure", to use the words of the Act.

12 A second principal point taken was that there could be no installation without a "host structure". Sometimes the word "installation" has that implication, but that is not necessarily so. Instances are given above: railway, power plant, port, drainage, runway; but a broader consideration is that the exemption cannot depend upon whether the installation of the equipment is divided into several contracts or let under one contract. In the present case the contractor responsible for the pipeline which is supported is within the exclusion of para. (t), as is the contractor responsible for the pipeline supports. Paragraph (t) covers the work of installation of the equipment and all parts or segments of that work. It would seem improbable that the question whether the installation of an assembly line, being part of a factory's equipment, is excluded should depend on whether the line is installed before or after the factory is built.

13 We turn now to points which depend upon the details of what was done. Some

of the equipment supported consisted of compressors which are necessary to move the gas along the pipelines. It was argued that conveying equipment cannot include compressors, being the means whereby contents of the pipelines are conveyed; the argument is devoid of substance.

14 Then the appellant's counsel argued that the contract provided for the construction of "fixed shelters providing shelter for the equipment" and to that extent at least a licence was required; we find it unnecessary to determine whether there was any such requirement. The contention was that if part of the work is "building work" the decision of this Court in Zullo Enterprises Pty Ltd v. Sutton (Appeal No. 8045 of 1998, 15 December 1998) shows that the whole contract is unlawful and nothing can be recovered under it. But no question arose in that case of part only of the work being covered by the statute. The reason why the contract was unlawful there was that it contained an undertaking to carry out all the building work, there being no licence: s. 42(1) of the Act says that "[a] person must not carry out, or undertake to carry out, building work unless" there is the appropriate licence. There was evidence, here, that the respondent never built the shelters in question, but on the appellant's argument that is of no consequence, for it undertook to do so. The argument depends entirely on the view that no severance is possible. What was described by the Privy Council in Carney v. Herbert [1985] A.C. 301 at 311 as the "classic case" where a contract containing an illegal provision was severed into its lawful and unlawful parts and the lawful part enforced is the decision of the High Court in Thomas Brown & Sons Ltd v. Fazal Deen (1960) 108 C.L.R. 391. There the High Court stated the test of severability as being:

> "If the elimination of the invalid promises changes the extent only but not the kind of contract, the valid promises are severable . . . " (411).

In other cases difficult questions might arise as to severance. But here, the relative importance of the work of construction of the shelters is such that the undertaking to build them, if unlawfully given, could not infect the whole contract.

15 A third point as to the details of what was done is that, on the evidence, some ancillary works consisting in grid mesh platforms were fabricated and erected on site. We are not sure if any point was taken by the appellant about these platforms; on the evidence, they are properly part of the process of installation of the structure to support the pipelines.

16 It should be added that the question of onus of proof of illegality was debated before us. It does not seem necessary to express a concluded view on that; but one would be surprised if the law were that, the point being raised, the onus should lie on the respondent to prove the untruth of the allegation of unlawful conduct made against it.

17 We dismiss the appeal with costs.