SUPREME COURT OF QUEENSLAND

CITATION:	*Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100
PARTIES:	**LOGAN AREA GROUP APPRENTICESHIP/TRAINEESHIP SCHEME LIMITED** ACN 010 799 809 (plaintiff/respondent/cross-applicant) **v** **ARNOLD ELECTRICAL & DATA INSTALLATIONS PTY LTD** ACN 056 068 896 (defendant/applicant/cross-respondent)
FILE NO/S:	Appeal No 10788 of 2007 Appeal No 10942 of 2007 DC No 106 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 May 2008
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2008
JUDGES:	McMurdo P, Fraser JA and Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**Applications for leave to appeal by both parties are dismissed in each case with costs to be assessed on the standard basis**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES BY LEAVE OF COURT – GENERALLY – where s 118(3) of the *District Court of Queensland Act* 1967 (Qld) confers a general discretion on the Court of Appeal to grant or refuse leave to appeal – where the Court of Appeal held that the primary judge erred in construing the contract – where the argument relied upon to demonstrate that error before the Court of Appeal was not raised before the trial judge – where the evidence placed before the trial judge was unclear – where the pleadings at the trial did not identify any material facts to support the claim – where the quantum in

issue was relatively small – where the matter had already been litigated in two courts – whether leave to appeal should be granted in the circumstances

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the contract contained a 'change clause' – where the change clause referred to an 'award rate' – where the term 'award rate' referred to labour costs – where the relevant labour costs were changed by an 'enterprise bargaining agreement' – whether, on a correct interpretation of the contract, the change effected by the 'enterprise bargaining agreement' amounted to a change of the 'award rate' for the purposes of the contract

EVIDENCE – ADMISSIBILITY AND RELEVANCY – OPINION EVIDENCE – EXPERT OPINION – IN GENERAL – where the defendant alleged that its witness was an expert – where the witness relied upon facts which were not identified and proved or admitted – whether the evidence had any probative effect

EVIDENCE – ADMISSIBILITY AND RELEVANCY – IN GENERAL – OBJECTIONS – where evidence was tendered that allegedly proved various material facts – where no objection was made – whether because of the absence of an objection to its tender the evidence had probative effect

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING GENERALLY – where there was a dispute as to the applicable rate of labour cost to be applied – where the defendant contented that a particular applicable rate of labour applied – where the plaintiff pleaded an explanation for its denial of the defendant's contention – where the defendant submitted that the denial in the plaintiff's pleadings was insufficient – where the defendant's pleadings did not allege any facts to support the contention – where the defendant submitted that r 166 of the *Uniform Civil Procedure Rules* 1999 (Qld) had the effect that the insufficient reply amounted to a deemed admission – whether the insufficient reply amounted to a deemed admission by the plaintiff of the defendant's contention

District Court of Queensland Act 1967 (Qld), s 118(2)
Industrial Relations Act 1990 (Qld)
Industrial Relations Act 1999 (Qld), s 136(2)
Uniform Civil Procedure Rules 1999 (Qld), r 149(1)(b), r 149(1)(c), r 149(3)(a), r 157(a), r 166

ACI Operations Pty Ltd v Bawden [2002] QCA 286, cited
Cohen & Co v Ockerby & Co Ltd (1917) 24 CLR 288; [1917] HCA 58, followed
Gollin & Co Ltd v Karenlee Nominees Pty Ltd (1983) 153 CLR 455; [1983] HCA 38, cited
Groves v Australian Liquor, Hospitality and Miscellaneous Workers' Union & Anor [2004] QSC 142, cited
Hughes v National Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134; [1979] HCA 2, cited
Magburry Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181; [2001] HCA 70, followed
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR; [2004] HCA 35, followed
R v Ping [2006] 2 Qd R 69; [2005] QCA 472, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, followed
Worchild v Petersen [2008] QCA 26, cited

COUNSEL: D R Kent, with A R Fitzsimons, for the plaintiff/respondent/cross-applicant
N H Ferrett for the defendant/applicant/cross-respondent

SOLICITORS: Hall Payne Lawyers for the plaintiff/respondent/cross-applicant
Woods Prince Lawyers for the defendant/applicant/cross-respondent

[1] **McMURDO P:** Both applications for leave to appeal should be refused with costs for the reasons given by Fraser JA.

[2] **FRASER JA:** Logan Area Group Apprenticeship/Traineeship Scheme Limited ("the plaintiff") obtained a judgement in the Magistrates Court against Arnold Electrical & Data Installations Pty Ltd ("the defendant") for $12,834.53. The plaintiff's claim was made under a labour supply contract made in 1998 pursuant to which the plaintiff "hired" electrical apprentices to the defendant at an hourly rate until late 2003.

[3] The defendant pleaded various defences and counterclaimed $89,621.98 by way of restitution on the basis that the plaintiff had overcharged the defendant that amount during the currency of the contract. The Magistrates Court dismissed the defendant's counterclaim with costs.

[4] The District Court allowed an appeal by the defendant against the plaintiff's judgment but refused the defendant's appeal against the dismissal of its counterclaim.

[5] Each of the plaintiff and the defendant now seek leave to appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). The provision confers a general discretion on this Court to grant or refuse leave to appeal which is exercisable according to the nature of the case[1]. That discretion is not circumscribed, but leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[2]

Plaintiff's application

[6] The contract described the hourly rates to be charged by the plaintiff (in the contract called "GTA") in the following terms:

> "The hourly rate charged by GTA covers base pay, sick pay, annual leave (including 17.5%), gazetted holidays, TAFE block release, occupational superannuation, workers compensation insurance, award fares & travel if applicable to trade and includes the award tool allowance.
>
> The hourly rate does not include site allowances, additional travel over standard award rate.
>
> In case of wet days the first wet day will be charged at the normal charge out rate to your account, subsequent consecutive wet days provided the apprentice telephones the office before 8.30am will be paid by Group Training."

[7] The particular provision (which I will call the "change clause") pursuant to which the plaintiff's claim was made provided:

> "If an award rate is changed and backdated whilst the apprentice/trainee is with you the amount will be charged to your account for the relevant period."

[8] The Magistrate found that when that contract was made there was a State award pursuant to which the plaintiff paid its apprentices and that the plaintiff invoiced the defendant throughout the period of the contract with reference to the rates set out in that award.

[9] It is now common ground that, as the Magistrate found, on 26 May 2003 the provisions of that award, insofar as they applied to regulate the plaintiff's obligations to its employed apprentices whilst they were employed at the defendant's workplace, were replaced by a certified agreement (also known as an

---

1 *ACI Operations P/L v Bawden* [2002] QCA 286.

2 *Worchild v Petersen* [2008] QCA 26; *Monte Carlo Caravan Park P/L v Curyer* [2006] QCA 363; [2007] 2 Qd R 57; *Pickering v MacArthur* [2005] QCA 294; *Rigney v Littlehales* [2005] QCA 252; *Pugin v WorkCover Queensland* [2005] QCA 66 at [15]; [2005] 2 Qd R 37 at 40; *Labaj v Brown* [2005] QCA 54.

"Enterprise Bargaining Agreement" or "EBA") entitled "Arnold Electrical & Data Installations Pty Ltd Certified Agreement 2003."

[10] Subsection 136(2) of the *Industrial Relations Act* 1999 (Qld) had the effect that the plaintiff was obliged to pay those apprentices at the rates stated in the certified agreement from 26 May 2003 until the termination of the contract between the plaintiff and the defendant in November 2003. When the plaintiff discovered in November 2003 that the certified agreement had been made some six months earlier it made additional payments to those of its apprentices who had worked at the defendant's workplace in that period to make up the difference between the award rates the plaintiff had paid them and the higher rates payable under the certified agreement.

[11] The Magistrate decided that the plaintiff was entitled to recover those additional costs to it pursuant to the change clause. That decision was set aside in the District Court. The critical reasoning was contained in the following paragraph of the primary judge's reasons:

> "As at 17 August 1991 payment of the apprentices the subject of the agreement was regulated by the State Award. No EBA [meaning "enterprise bargaining agreement", ie the Certified Agreement] was then in existence and there was no evidence to indicate that the term "award" was envisaged by the parties to encompass anything other than award rates. In particular there was nothing to indicate that any instrument, such as a Certified Agreement, was in any way within the contemplation of the parties. Clearly, in my view, the terms "EBA" and "award" cannot be regarded as being interchangeable. The basis of the hiring agreement in this case was that the appellant should be obliged to pay a share of the expenses associated with the particular apprentices determined according to the length of the period of hiring. In my view, on a proper construction of the agreement those charges are to be calculated in accordance with the relevant award and not in accordance with the subsequently introduced Certified Agreement. In my view, those matters which can properly be the subject of charge are those matters expressly provided for in the written agreement."[3]

[12] The plaintiff seeks leave to appeal to argue that the primary judge erred in that construction of the parties' contract.

[13] The construction of the contract is to be determined by what a reasonable person in the parties' position would have understood it to mean having regard to its text, the surrounding circumstances known to them, and the purpose and object of the transaction it embodies.[4]

---

3 *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Limited* [2007] QDC at [6].

4 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; [2004] HCA 35; *Toll(FGCT) P/L v Alphapharm P/L* (2004) 219 CLR 165 at [40]; [2004] HCA 52.

[14] Although the text is ambiguous, on a literal construction it is not "the award" which is required to be changed before the clause operates but the "award rate"; and the change clause does not require that the award rate be changed or backdated by another award. Literally construed, the change clause applies whenever the rate specified in the award is increased by any mechanism (only increases were contemplated, at least in the express terms).

[15] The contrary view is open, but the apparent aim of the change clause also suggests that it should not be construed so narrowly as to exclude reference to increases in labour costs effected by any mechanism having the force of law. In a labour supply agreement under which the supplier recovers from its customer essentially only the supplier's labour costs it is to be expected that the parties will provide for increases to the rate of recovery commensurate with statutorily mandated increases in those costs. Otherwise the supplier will be out of pocket and the “hirer” will receive an unmerited windfall.

[16] The surrounding circumstances point in the same direction. The relevant background information that may be used to inform the proper construction of a contract includes not only that which the parties subjectively knew but also that which was reasonably available to the parties in the situation in which they found themselves at the time of the contract, including matters of law.[5] The legislation current when the contract was made, the *Industrial Relations Act* 1990 (Qld), gave the force of law not only to "awards" but also to "industrial agreements".[6] The prospect of future amendments to the industrial relations legislation must also have been within the contemplation of a reasonable person in the parties’ position. The parties must be taken to have appreciated when the contract was made that awards were not the only means by which the effect of law might be given to future increases in labour costs. In this case there was no evidence contradicting that expectation.

[17] I accept both that the construction I prefer creates some tension with the contractual references to the “award” and that the construction propounded by the defendant (in effect, that the change clause covers only labour cost increases reflected in a new or amended award) is certainly open on the text. Nevertheless, I would reject the defendant’s construction for the reasons I have given: it reads the contract in a "narrow spirit of construction" of a kind long condemned by the courts.[7] Numerous authorities establish that the construction which is adopted must accord with commercial efficacy and commonsense.[8] The manifest unreasonableness of the defendant’s approach to which I have referred is emphasised by the fact that the

---

5 *Maggbury P/L v Hafele Australia P/L* (2001) 210 CLR 181 at [11] per Gleeson CJ, Gummow and Hayne JJ; [2001] HCA 70.

6 *Industrial Relations Act* 1990 (Qld), Pt 10, Div 1 (Awards), Div II (Industrial Agreements).

7 *Cohen & Co v Ockerby & Co* (1917) 24 CLR 288 at 300 per Isaacs J; [1917] HCA 58; see also, for example, *Upper Hunter County District v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 437; [1968] HCA 8.

8 See, for example, *Gollin & Co Ltd v Karenlee Nominees P/L* (1983) 153 CLR 455 at 463; [1983] HCA 38; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [22]; [2000] HCA 65.

increases in the plaintiff's labour costs flowed from an agreement to which the defendant was, but the plaintiff was not a party.

[18] In fairness to the primary judge it must be pointed out that in the District Court, the appellant's argument was the different one that the term "award" was broad enough to encompass a certified agreement. It was that argument which the primary judge was concerned to reject in the passage quoted earlier. The argument which I regard as much more substantial is that, on a literal and purposive construction, the change clause is not confined to changes to the award itself or changes made by a new award: it comprehends also increases in the plaintiff's labour costs brought about by other means that similarly have the force of law, including by certified agreements.

[19] The point concerns only the proper construction of a written contract and it was not submitted that this new argument might have been met by additional evidence. It follows that if leave to appeal were granted it might fairly be contended that it would be "not only competent but expedient, in the interests of justice"[9] to entertain the new argument.

[20] But it does not follow that the fact that the argument relied upon in this Court is new is irrelevant. The plaintiff's failure to put this argument either to the Magistrate or in the District Court is a factor opposed to the grant of leave.[10] I would add that the parties' failure to adduce evidence at trial concerning the surrounding circumstances which I have mentioned lessens the significance of any decision in this litigation as a precedent concerning the proper construction of this contract.

[21] That the amount in issue is relatively small and the matter has already been litigated in two courts also weigh against leave being granted. Furthermore, the construction point was not the only reason given by the primary judge for setting aside the plaintiff's judgment. His Honour also found that the Magistrates Court erred in finding that the plaintiff was entitled to be paid an "administrative cost" (that amount being included in the invoices with reference to which the plaintiff's claim was calculated):[11]

> "There is one further matter to consider, that being the finding by the Magistrate that the respondent was entitled to be paid an administrative cost. This finding seems to have been based upon a concession made by the witness Arnold during cross-examination. In my view that concession represents no more than a statement of opinion by the witness. As the High Court observed in *Toll (FGCT) Pry Limited v Alphapharm Pry Limited and Ors* (2004) 219 CLR 165 at 179 "(it) is not the subjective beliefs or understandings of the

---

9 *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480, quoted with approval in *Suttor v Gundowda P/L* (1950) 81 CLR 418 by Latham CJ, Williams and Fullagar JJ at 438; [1950] HCA 35; and, in a different context, in *Crampton v R* (2000) 206 CLR 161 by Gleeson CJ at [12] and by Gaudron, Gummow and Callinan JJ at [50]; [2000] HCA 60.

10 Cf *Monte Carlo Caravan Park P/L v Curyer* [2007] 2 Qd R 57 at [21] per Keane JA (Jerrard and Holmes JJA agreeing); [2006] QCA 363.

11 *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Limited* [2007] QDC at [9].

> parties about their rights or liabilities that govern their contractual relations". The written agreement here makes express provision for those items which may be subject of permissible charge but these do not include any allowance for administration costs. The finding of the Magistrate in this regard cannot in my view be sustained."

[22] That the plaintiff included in its invoices an "administrative" charge of 25 cents per hour emerged in cross-examination of the plaintiff's operational manager, Mr Taylor. The plaintiff's admission of the defendant's pleaded allegation that the contract entitled the plaintiff to charge for the items expressly described in the contract, coupled with the plaintiff's failures to plead facts supporting its argument that it was also entitled to charge for "administration" and to give particulars of that charge, render it doubtful that the plaintiff was entitled to sustain this charge on the pleadings upon which it went to trial.[12] It is not clear that it was even open to the plaintiff to argue, as it successfully did before the Magistrate, that the contract did not comprehensively identify the permissible charges so that it was entitled to charge the administration fee.

[23] On that construction question, the apparent status of the plaintiff as a non-profit company acting within a governmental scheme is a fact that might well prove to be relevant to the proper construction of the contract. The Court was told of that fact in general terms during argument but no evidence was led about it at trial. If leave to appeal were granted for the purpose of deciding that question, this Court's decision would therefore not necessarily govern any future cases on the same form of contract.

[24] If, as the primary judge concluded, the charge was unsustainable, the amount of the plaintiff's claim (if otherwise successful) theoretically might be sustained in a reduced amount, but the overall financial impact of the charge appears not to have been quantified either by the pleadings or by the evidence. Whether that exercise could now be done with reference to the evidence led at trial was not made clear; whether it would be appropriate to proceed in that way despite the deficiencies in the pleadings is doubtful. What is clear is that deduction of the charge would further reduce the already small amount in issue in the proposed appeal.

[25] It also emerged in argument that the plaintiff's claim under the change clause was premised on the view that the apprentices were doing "construction" work in terms of Schedule B of the certified agreement and not "services" in terms of Schedule C of that agreement. (Much the same issue arose on the counterclaim in the context of an apparently similar division in the former award: I return to this below.) The rate for "other construction work" was higher than it was for "service work". The evidence on behalf of the plaintiff was that it used the charge out rate for "other construction work" because the majority of its apprentices were doing construction work.

---

12 Cf *Uniform Civil Procedure Rules* 1999 (Qld), rr 149(1)(b), 149(1)(c), 149(3)(a), 157(a).

[26] It may well be that the plaintiff was correct in charging in that way but the evidence before the Magistrate on the point was quite unclear. This issue was not raised by the pleadings. The plaintiff did not plead any material facts in support of its claim (exposed during cross-examination) to recover this cost.

[27] There are therefore a number of factors opposed to the grant of leave, but the plaintiff contends that the decision of the District Court, particularly that aspect of it concerning the construction of the change clause, sets an important precedent because this contract was in its standard form. Its counsel stated from the bar table (without objection) that there might still be a very large number of such contracts still in force. That is open to serious doubt, as the plaintiff's counsel properly recognised, because no other claim has been made against the plaintiff even though it wrote a form letter to all of its "customers" in late 2003 seeking to impose a new form of contract. Furthermore, for the reasons I have given the District Court decision should not be regarded as having the effect as a precedent which the plaintiff feared.

[28] For these reasons, although in my respectful opinion the primary judge's construction of the change clause in the contract was wrong (for reasons not agitated in argument before his Honour), I am not persuaded either that there is a substantial argument that the actual decision to set aside the judgment in the plaintiff's favour was incorrect or that an appeal is necessary to correct any substantial injustice. I would therefore refuse the plaintiff's application for leave to appeal.

Defendant's application

[29] The defendant's counterclaim was premised on its contention that the plaintiff had calculated its invoices with reference to the "construction" rate in the former award when the plaintiff should have only charged the lesser "service rate" under that award. The Magistrate dismissed the counterclaim because he was not persuaded that the evidence showed that the apprentices should have been paid at the lesser rate and because of his Honour's conclusion that for the period after commencement of the certified agreement the award did not apply.

[30] The primary judge refused the defendant's appeal against the dismissal of its counterclaim. His Honour concluded:

> "Although there was some generalised evidence before the court as to the type of work done by the appellant company, there was no detailed evidence as to precisely what sort of work was carried out by the apprentices or as to what proportion of their work could properly be described as construction as opposed to service work. The state of the evidence was such in my view that the Magistrate's finding that he was unable to determine which of the service or construction rates should have been charged was one which was reasonably open to him."[13]

---

[13] *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Limited* [2007] QDC at [8].

[31] In my respectful opinion his Honour's decision was correct for those reasons.

[32] On behalf of the defendant it was submitted that the necessary evidence was supplied by Mr Arnold, who swore that it was the service rate that "applied" to the work that his company was doing. It was submitted that he had an extensive knowledge of and expertise in the industry. So much may be accepted but the difficulty remains that only the vaguest description of the work done by the apprentices was given. It was described as "generally commercial, electrical and data installations". Even the award itself was not in evidence.

[33] It is far from being clear that there was any question upon which expert evidence of the character relied upon by the defendant was admissible. But if this was a proper subject for expert evidence Mr Arnold's evidence was of no value because the facts upon which it was premised were not identified. No matter what qualifications are possessed by an expert witness, opinion evidence lacks probative value if the facts upon which it is based are not both identified and proved or admitted.[14]

[34] Contrary to another submission made on behalf of the defendant, the admission at trial without objection of the defendant's four volumes of analyses of the plaintiff's invoices prepared on the premise reflected by Mr Arnold's evidence did not provide the missing evidence of the underlying facts. It was not submitted that these volumes of material contained any information about the precise nature of the work done by the apprentices or as to the precise terms of the award. The submission is also not easy to reconcile with the conduct of the defendant's counsel in making it plain when he tendered those documents that it was proposed to prove them by Mr Arnold's evidence. As I have already indicated, it transpired that Mr Arnold's evidence did not prove the facts necessary to support the counterclaim. In those circumstances, the documentary evidence is not to be treated as having probative effect it otherwise lacked merely because of the absence of objection to its tender.[15]

[35] The defendant's counsel sought to overcome this difficulty by arguing that the defendant was entitled to rely upon a deemed admission under UCPR r 166 that the service rate was the correct rate. It was contended that the plaintiff's pleaded explanation for its denial of the defendant's allegation that it overpaid the plaintiff (that it was not true) was insufficient.[16] These submissions must be rejected. The rule is concerned with allegations of facts in pleadings. The allegation of an overpayment asserted a conclusion based on various matters that were not pleaded. The defendant's counterclaim did not allege any of the facts (as to the nature of the work done by the apprentices and the terms of the award) required to support the conclusion (which was also not pleaded) that the service rate was applicable. Rule 166 cannot be called in aid of a claimant who fails to plead or prove the material facts required to support the claim.

---

14 *R v Ping* [2006] 2 Qd R 69 at [43]-[46]; [2005] QCA 472.

15 Cf *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 153; [1979] HCA 2.

16 Cf *Groves v Australian Liquor, Hospitality and Miscellaneous Workers' Union* [2004] QSC 142 at [15]

[36] There is another reason why this pleading point is an inappropriate basis for the grant of leave to appeal. The defendant's counsel did not take the point when he tendered the documentary evidence and undertook to prove it through the witness at the trial. That conduct was wholly inconsistent with his proposition, not made until final submissions at the trial, that the fact of the overpayment was not in issue.

[37] Further, in light of my conclusion that the proper construction of the contract permitted the plaintiff to charge at the rates expressed in the certified agreement, the defendant's counterclaim also suffers from the fatal deficiency that it was calculated with respect to the different award rates.

[38] In my opinion the defendant has failed to advance any reasonable argument that the primary judge erred in dismissing the defendant's appeal from the decision of the Magistrate. I would therefore refuse the defendant's application for leave to appeal.

[39] I would order that the applications for leave to appeal by both parties be dismissed, in each case with costs to be assessed on the standard basis.

[40] **LYONS J:** I have had the advantage of reading the reasons of Fraser JA. I agree with his Honour's reasons and with the orders proposed.