SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J [2005] QSC 354

No 9830 of 2005

PIONEER SUGAR MILLS PTY LTD ACN 009 889 856 — Applicant

and

UNITED GROUP INFRASTRUCTURE PTY LTD ACN 096 365 972 — Respondent

BRISBANE

..DATE 25/11/2005

ORDER

HIS HONOUR: This is an application for declaratory relief to establish that a payment claim delivered by the respondent dated 14th November 2005 is not a payment claim that is subject to the regime for assessment and adjudication established by the Building and Construction Industry Payments Act 2004.

The respondent issued its payment claim, purportedly under that Act, seeking to invoke the statutory procedure established by the legislation for making and enforcing claims for progress payments under "construction contracts".

The Act does not apply to construction contracts, except those entered into after the commencement of parts 2 and 3 - see section 3(1) of the Act. The material date is 1st October 2004.

The applicant's contention is that the contract between the parties was entered into prior to the 1st of October 2004 so that the payment claim in question is not required to be addressed in accordance with the statutory regime.

The parties entered into a written contract on the 15th of March 2004. The obligations assumed related to a project to upgrade a sugar mill for a renewable electricity generation facility.

Subsequently, the parties entered into negotiations for additional works to be performed by the respondent. These are

the subject of a variation agreement brought into existence on the 14th of October 2004 - a fortnight after the material date. The variation considerably expanded the scope of the work the respondent was to perform; and there were other variations.

The fact that the variation was concluded after the Act commenced on the 1st of October 2004 is the central consideration in this dispute.

The respondent contends that the variation is construction work to which the legislation attaches on the footing that it is a "construction contract", that is a contract under which "one party undertakes to carry out construction work for...another party". It is common ground that the additional work to be undertaken pursuant to the variation agreement is "construction work" as defined in section 10 of the Act.

The second contention is that the variation agreement evidences an intention on the part of the parties to abandon or rescind the original agreement, substituting in its place the variation with effect from the agreed variation date: 14 October 2004.

The first question gives rise to a question of statutory construction, namely whether the Act, on its proper interpretation, extends to mere variations which themselves fall within the definition of "construction contract".

The Act itself contains little guidance with respect to this question. It is common ground that no extrinsic material is relevant to the question of statutory interpretation that arises. In these circumstances, the issue falls to be decided largely by reference to the language of the statute, considered in its context, as indicated by the subject matter of the legislation and such extrinsic indications as there are to indicate with legislative intent.

In my view, the Act contains indications that it was not intended to comprehend variations which of themselves fall within a literal interpretation of "construction contract".

There is little reference in the statute to the topic of variations, even though variations are a notoriously common feature of building work in this State. That of itself is a neutral consideration. But there are two indications that a variation as such was not intended to be treated as a stand alone "construction contract" to which the statutory regime was to extend.

Section 14(1)(b)(iii) is concerned with the valuation of construction work to be carried out under a construction contract. Subsection (b)(iii) refers to any variation agreed to by the parties to the contract by which the contract price...is to be adjusted by a specific amount.

This provision looks to presuppose that the Act does not treat each variation, including variations that answer a literal

interpretation of "construction work", as a separate construction contract to which the Act is to apply.

More importantly for present purposes, section 15, which is concerned with a due date for payment of progress claims under a construction contract, gives rise to a consideration which distinctly suggests that a variation is not intended to be a "construction contract".

Section 15(1) provides for the date upon which a progress payment under a "construction contract" becomes payable. If the contract contains a valid provision about the matter, the progress payment is payable on the day on which the payment becomes payable under that provision. If, however, the contract does not contain such a provision, then the due date for payment is 10 business days after a payment claim for the progress payment is made under part 3.

It is highly unlikely that the Parliament intended that different regimes might apply to obligations with respect to payment date under the principal contract on the one hand and a variation which did not expressly provide for a date for payment on the other.

If, for example, the original provides for dates for progress payments but the variation does not do so - as commonly might happen where the variation merely relates to additional work to be performed - then different payment dates would arise for claims under the original contract for the initially agreed

work and under the contract as varied for the variations. There is no indication in the statute that inconvenient consequences of that kind were intended.

Those intrinsic considerations require an interpretation of the statute which would restrict it to the principal contract, and not to mere variations of it, even where the nature of the variations is such that they would fall within a literal interpretation of the expression "construction contract".

This means that the progress payment claim with which this application is concerned is not within the statutory regime unless the effect of the variation was to supplant the provisions of the agreement concluded in mid-March.

The variations were effected by a document which contains some novel provisions.

Clause 3.1 provides, under the heading, "Variation and Restatement", "on and from the variation date, the original document is varied and restated in the form set out in the annexure". That form is a consolidation of the provisions of the agreement in the form in which it was executed on the 15th of March 2004, with interpolated variations required by the agreed variations.

By Clause 3.2, the "restated document" binds the parties; and it is recorded that "the principal and the EPCN contractor

agree to be bound by the restated document on and from the variation date".

The reference to a consensus to be bound from the "variation date" - defined to mean 14 October 2004 - might be thought to be an indication that the original agreement was intended to be entirely replaced by the consolidation. But there are indicia pointing in a different direction.

The question posed by the way in which the variation was structured is this: is the restatement (which forms part of the variation agreement) merely a convenient consolidation of the amended consensus, or does it instead evidence an intention to abandon or rescind the original agreement?

The answer depends upon an objective assessment of the intention of the parties.

It is not suggested that any background facts matter. The question therefore relates to an intention to be gathered, or, more accurately, imputed, essentially by reference to the terms of the contract constituted by the agreed variations.

As has been said, the contract in Clause 3.2 points in one direction. But other considerations point elsewhere. One of the more important is that the consolidated agreement contains this: "Date of agreement: 15 March 2004": that is, the restated agreement is expressed to be dated 15th March 2004 - the date of the original contract. That seems a distinct

indication that the parties were not contemplating that the original would be supplanted by the restatement effected pursuant to the October variation. And there are no other indicia to suggest that the parties had it in mind to put an end to the agreement concluded in March, replacing it with the October variation in its entirety: compare Coghlan v Pyoanee Pty Ltd [2003] 2 QdR 626.

True it is that the variation involves a substantial expansion of the scope of the works to be performed by the respondent. And there are several other alterations of significance achieved by the variation. But the proper conclusion to be drawn from the way in which the parties have set about putting together the restated contract is that the consolidation was created for convenience, not with an intention to extinguish the earlier agreement, replacing it by an entirely new consensus.

There is no factual material to indicate why the conscious choice was made to provide for a variation of the contract rather than the creation of an obvious clearly independent contract providing for the performance of the additional works. Therefore the question concerning the intention to be attributed to the parties must be ascertained from the terms of the contractual documents themselves. They stipulate, in terms and in effect, for a variation of the original contract, not its extinguishment. And as the agreed operative date pre-dates the 1st of October 2004, the agreement was made before the commencement of Parts 2 and 3 of the Act.

The applicant therefore is entitled to declaratory relief that the progress payment claim is not a claim to which the provisions of the Act apply. I will hear the parties with respect to the formal order.

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HIS HONOUR: There will be a declaration that the payment claim made by the respondent dated 14th November 2005 is not a payment claim within the meaning of that expression in the Building and Construction Industry Payments Act 2004.

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HIS HONOUR: I order that the respondent pay the applicant's costs of and incidental to the proceedings, except the costs of the adjourned hearing on 23 November 2005.

I further order that the applicant pay the respondent's costs thrown away by that adjournment.
