SUPREME COURT OF QUEENSLAND

CITATION:	*Parkinson v Mackay Sugar* [2018] QSC 168
PARTIES:	**GARY MICHAEL PARKINSON AND TRUDI PARKINSON ATF THE GM & T PARKINSON FAMILY TRUST** **(applicant)** **v** **MACKAY SUGAR LTD** **(respondent)**
FILE NO:	SC No 30 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	1 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2018
JUDGE:	Holmes CJ

ORDERS:

1. **It is declared that:**

    a) **the respondent cannot amend Annexure D with effect against the applicants without the agreement of their bargaining representatives;**

    b) **the deeds poll executed on 12 April 2018 are of no effect.**

2. **The respondent is to pay the applicants' costs of the application, including the reserved costs resulting from the adjournment of the application on its return date.**

CATCHWORDS: CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the applicant canegrowers and the respondent mill owner entered into a Cane Supply and Processing Agreement – where Clause 7(c) of the Agreement gives the respondent power to alter the terms of

the Annexures to the Agreement in consultation with growers' bargaining representatives – where the respondent purported unilaterally to amend Annexure D by deed poll so as to impose a $2 per tonne levy on cane supplied to the mill – where the applicants contend that on the proper construction of Clause 7(c), the respondent cannot amend Annexure D without the agreement of their bargaining representatives – where the respondent contends that the clause is unambiguous and gives the applicants no more than a right for their representatives to be heard on any proposed change – whether the clause is unambiguous – whether the clause requires the agreement of the applicants' bargaining representatives to amendment of Annexure D

Sugar Industry Act 1999 (Qld), ss 30, 31, 33, 34
Sugar Industry Reform Act 2004 (Qld)

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, applied
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, applied
Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1, cited
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australian v QR Limited [2010] FCA 591, cited
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 34 ALR 58, applied
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640, applied
Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407, applied
Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs [2014] FCA 25, cited
Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199, applied
Placer Development Ltd v Commonwealth (1969) 131 CLR 353, followed
Stroppiana & Ors v Mackay Sugar Ltd [2017] QSC 217, applied

COUNSEL: N H Ferrett for the applicant
D L K Atkinson with F Y Lubett for the respondent

SOLICITORS: Wallace & Wallace Lawyers for the applicant
McCullough Robertson for the respondent

[1] This application concerns the proper construction of a clause of a Cane Supply and Processing Agreement ("the Agreement") made between the applicants, who are cane growers, and the respondent, the proprietor of sugar mills. The Agreement provides for cane growers who have signed it to supply cane to the mills operated by the respondent. The final price paid to growers for their cane is determined pursuant to Annexure D to the Agreement. Clause 7(c) of the Agreement gives the respondent power to alter the terms of the Annexures to the Agreement; in the case of Annexure D, "in consultation with" the bargaining representatives of growers. At issue is a decision by the respondent unilaterally to amend Annexure D by deed poll so as to impose a $2 per tonne levy on cane supplied to the mill. The applicants seek a declaration that on the proper construction of cl. 7(c), the respondent cannot amend Annexure D without their agreement or that of their bargaining representatives, with a consequential declaration that the deed poll is either ineffective or not binding on them.

The background to the Agreement

[2] The background to the Agreement has, for reasons which will become apparent, some relevance in its construction. The details which I now set out are drawn in part from the affidavit of Mr Peter Gill, a senior employee of the respondent, but are uncontroversial for the purposes of this application. The respondent was a co-operative until 2008, when it was incorporated; it was common ground between the parties that share ownership is limited to cane growers. It owns three sugar mills in the Mackay region, to which 851 growers supply cane. In 2007, the respondent and growers entered into a form of the Agreement, which was varied in 2009, after the respondent's incorporation. Any cane grower who wishes to supply cane to the respondent must execute a copy of the 2009 version of the Agreement.[1] This requirement reflects s 31 of the *Sugar Industry Act* 1999, which provides that a grower may supply cane to a mill for crushing season only if he or she has a supply contract with the mill owner for the season.

[3] The Agreement acknowledges by way of background that it provides for the supply of cane by growers to the respondent's mills "as referred to in [the] *Sugar Industry Act* 1999 and the *Sugar Industry Reform Act* 2004". It recognises the position of "bargaining representatives", defined as

> "a person appointed by written authority under the *Sugar Industry Act* 1999 to represent one or more Growers".

Under s 30 of the *Sugar Industry Act,* "bargaining representative", for a group of growers, is defined to mean

> "a person with the written authority of each grower who is a member of the group";

a "group", by virtue of s 33, being two or more growers. "Grower" is defined in the Dictionary to the Act as "a person who supplies cane to a mill".

[4] Under s 34 of the *Sugar Industry Act*, a group of growers is entitled to appoint a bargaining representative to negotiate a collective contract on its behalf. When the Agreement was made, all the Mackay growers were represented by two bargaining representatives, Mackay Canegrowers Limited and Australia Cane Farmers Association

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[1] Cl. 15.3 of the Agreement.

Ltd, and the 2009 changes to the Agreement were negotiated by the respondent with those entities acting on behalf of the growers. As recently as 2017, however, some cane growers have nominated other bargaining representatives. The applicants are represented in each case by individuals as bargaining representatives.

[5] The respondent receives cane at railway sidings for transfer to its mills. Sugar cane is cut and crushed between late May and November each year. How long the crushing season lasts depends on the available milling capacity, cane maturity and whether cane fields are sufficiently dry and firm for harvester access, but it is typically 26 weeks. To minimise loss of sugar content, the cane needs to be crushed within 16 hours of cutting; the peak period for sugar content in the cane is between September and October. Since sugar content is a factor in the amount growers receive for their cane, it is advantageous for them to have their cane crushed in the September-October period, but limited mill capacity makes it impossible for all growers to have their crops processed in that period. For that reason, some management of harvesting times and cane delivery is needed to achieve fairness as between growers. Not all cane will necessarily have been harvested by the time the respondent closes the crushing season.

Relevant terms of the Agreement and Annexures

[6] By virtue of cl. 3 of the Agreement, any grower who is a signatory to it must supply any cane grown for crushing to the respondent. If a grower wishes to end that arrangement he or she must give, in effect, four years' notice. Clause 3.2 of the Agreement obliges the respondent to accept cane for crushing (with some exceptions relating to quality and variety). Clause 3.3 contains some further obligations imposed on the respondent and expresses the Agreement's intent:

> "3.3 Processing of Cane by Millowner
>
> (a) The Millowner will use all reasonable endeavours to process the Cane the subject of this Agreement during the Season.
>
> (b) The intention of this Agreement is for the efficient, cost effective, harvest, delivery and processing of the Cane. In order to achieve this the Millowner will during the course of each Season meet with Bargaining Representatives regarding the management and progress of the harvest."

[7] Clause 5 provides mechanisms for the determination of the price of cane, for both weekly interim payments and the final payment made to growers. Clause 5.1 sets out a formula, the expressed aim of which is to pay growers approximately 63% of the cane revenue. One of the components of the cane price is the "sugar value," which in turn is calculated by reference to the "sugar price" and the level of sugar recoverability from the cane. Clause 5.3(c) provides that the "sugar price" is defined by, and varies according to, cl. 5.7, but, importantly for present purposes, the "final sugar price", which forms part of the calculation for the final cane payment, is to be determined in accordance with Annexure D. Clause 5.7 contains a system for determining the interim payments. The initial cane price is based on the level of sugar recoverability from cane, which is either an average from previous seasons or is to be agreed between the respondent and bargaining representatives, and to which a calculation formula in Annexure C is applied; as well as the sugar price, based on an advance price agreed between the respondent and bargaining representatives. Under cl. 5.7(d), the respondent is to develop an advance payment program, in respect of which

"[c]onsultation will take place with the Bargaining Representatives before the …program is finalised and advised to Growers."

The final cane payment is to be made within two days of the respondent's receiving its final payment for sugar.

[8] Clause 7, which contains the power to amend the Annexures, is set out below:

"OPERATIONAL MATTERS

(a) The parties agree that there are various operational matters dealing with the harvesting, delivery and crushing of Cane that may vary from Season to Season.

(b) The parties agree that the matters contained in the Annexures may be varied from time to time both during the Season and between Seasons in order to allow for an orderly conduct of the operations of the Millowner and to meet the needs of the Growers.

(c) In order to meet these operational needs and to ensure a fair and consistent treatment for all growers the parties agree that;

  (i) In respect of Annexure A, the Millowner in consultation with Bargaining Representatives, as set out in this Agreement and the Annexures;

  (ii) In respect of the Mackay Sugar Grouping Policy (Annexure B), the Millowner;

  (iii) In respect of Annexure C, the Cane Audit Committee; and

  (iv) In respect of Annexure D, the Millowner in consultation with Bargaining Representatives

may at any time alter the operational matters and the terms of the Annexures and will as appropriate advise the Growers of any changes."

[9] Annexure D deals with, among other things, the way revenue from sales of raw sugar, molasses and fibre is to be treated (by allocation to "pools") and the calculation of payments to growers. It provides for the determination of the final sugar price for each grower, which is calculated by reference to a weighted average price of all pools and the percentage of the grower's cane allocated to revenue pools. There is a "Shared Pool" in which all growers participate. The allocation of sugar production to it is determined by certain overseas contractual obligations, and is given priority to allocation to other pools. From the revenue allocated to the Shared Pool, expense items are to be deducted to arrive at net revenue, and the sugar price for the pool is calculated by dividing that figure by the tonnes of sugar allocated to the pool. Expense items are prescribed in cl. D.1(a)(i) of Annexure D (before amendment) as follows:

"Expenses

- Marketing expenses of both Queensland Sugar Limited and the Millowner
- Costs for the storage of Sugar and costs of CIF sales contracts
- Funding costs of the advances program
- Other expense items that are deemed to be applicable to all sales of sugar."

[10] Of the other Annexures to the Agreement, Annexure A deals with harvesting arrangements. It gives the respondent the power to determine when crushing will commence in every season, although it may amend that date by agreement with the bargaining representatives.[2] The respondent also has the right to decide when crushing

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[2] Cl. A.1

operations are to be terminated for the season; it may do so, "after consultation with Bargaining Representatives", when: all the cane has been crushed; or the supply has fallen below a prescribed amount; or to continue the operation would be uneconomic; or "as otherwise agreed".[3] The Annexure also provides for harvesting group arrangements, the respondent's allotment of delivery tonnages to harvest groups, delivery of cane, cane quality requirements and the growers' responsibilities in relation to cane delivery.

[11] Annexure B is concerned with growers' harvest groups (new groups and variations to existing groups must be approved by the respondent) and the rosters established by the respondent that they will follow for harvesting. Annexure C deals with the cane analysis and audit program, which concerns the procedures and duties involved in weighing and analysing cane and cane juice at the respondent's mills, so that, for example, the recoverable sugar percentage can be determined. Under cl. 3.4 of the Agreement, Mackay Canegrowers Limited is responsible for administration for those employed in the program and for determining the program's costs.

[12] Clause 12.1 of the Agreement provides that

> "Any dispute by or between the parties to [the] Agreement, other than the Annexures, not able to be resolved by negotiation between the Millowner and the Grower and/or their Bargaining Representatives shall proceed to mediation and/or arbitration."

Dispute resolution "pertaining to the Annexures" is as prescribed in the Annexures. Other than Annexure B, for which there is no such provision, the Annexures require disputes to be resolved by negotiation between the respondent and the grower or the grower's bargaining representative. If resolution cannot be achieved in that way, the status quo is to prevail.[4]

[13] Clause 14 of the Agreement provides for amendment of the Agreement itself:

> "No amendment to this Agreement, but specifically excluding the Annexures, has any force unless it is in writing and signed by all of the parties to this Agreement."

Clause 18 specifies the crushing seasons for which the Agreement is to apply, with provision for extensions of, and elections not to extend, the season. The clause reiterates, subject to cl. 7, the basis on which the terms of the Annexures may be varied. Clause 18.5, "Material change in circumstance", provides:

> "The Millowner in consultation with the Bargaining Representatives may decide that there have been some significant changes in circumstance that require an immediate revision of the previously agreed terms and/or conditions of the Agreement."

The disputed amendment

[14] In 2016, the respondent received advice from a consultant about its financial difficulties, particularly concerning the operation and maintenance of mechanical equipment at the mills. That advice led to the decision to seek a contribution from growers. Relevantly to the present application, on 12 April 2018, directors of the respondent executed two deeds poll, one expressed as made in favour of the first

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[3] Cl. A.2.1

[4] Cl. A.9; Cl. C 13.5; Cl. D.2.

applicants as bargaining representatives for their family trust and the other expressed as made in favour of the second applicants as bargaining representatives for themselves and (a small number of) others. By way of background, each deed poll recites that the respondent may, under cl. 7(c) of the Agreement, at any time alter the operational matters and terms of Annexure D in consultation with bargaining representatives; that it has consulted with the applicants on a number of occasions in relation to varying the Agreement's terms; and that it has now determined to alter the terms of annexure D to provide for the levy of $2 per tonne of cane. The deeds poll purport to amend the expense items by including a further item:

> - "An amount of $2.00 per tonne of Cane to cover expenses or future expenditure related to the operating costs, repair, improvement and maintenance of the Millowner's infrastructure, which is an expense item that is deemed to be applicable to all sales of sugar."

They also provide for a "deferred cane payment"; in essence, if the respondent's ownership were to change or it were to become the subject of insolvency proceedings, the levy would be refunded.

[15] Mr Gary Parkinson, one of the first applicants, has sworn an affidavit in which he concedes for the purposes of the application that the respondent consulted with him as a bargaining representative for his family trust, but says that he did not agree to the changes to be effected by the deed poll. Ms Gloria Paul, one of the second applicants, simply says that she is the bargaining representative for the second applicants and she did not agree to the proposed changes.

An earlier amendment to the same effect

[16] In 2017, the respondent reached agreement with Mackay Canegrowers Limited and Australia Cane Farmers Association Limited, as bargaining representatives for most growers, to amend Annexure D of the Agreement by a deed of variation. The amendment effected by the deed of variation was in identical terms to that disputed here; it inserted the cane levy as a further item of expense, with, again, provision for a "deferred payment".

[17] In *Stroppiana & Ors v Mackay Sugar Ltd*[5] Jackson J considered the effect of cl. 7(c) of the Agreement and the deed of variation. It had been argued by the applicant cane growers in that case that the Agreement was a single multipartite contract between the cane growers and the respondent, so that all the promises it contained operated as between the respondent, each grower, and every other grower, with the result that the respondent and particular growers could not amend the Agreement's terms without the individual consent of all other growers. Jackson J rejected the contention, noting that it would render practically impossible any variation, however minor, to the contractual relationship between the respondent and a particular grower, because of the need to obtain the agreement of all other growers. However, he found it unnecessary to explore the issue further. Observing that there was

> "no dispute on the facts of [the] case that cl. 7(c) of the [Agreement] purported to authorise the respondent in consultation with the bargaining representative of the

[5] [2017] QSC 217.

> grower to agree to alter the operational matters, the terms of Annexure D and to, as appropriate, advise the growers of any changes",[6]

his Honour held that the deed was effective to vary the Agreement as between the respondent and the growers whose bargaining representatives had agreed to it on their behalf.

[18] The position was different, though, in respect of those growers who had not, through their bargaining representatives or otherwise, agreed to the variation. In respect of their position, the respondent contended that a decision of its board was sufficient to insert the additional charge, on the basis that it was entitled under cl. D.1(a)(i) of Annexure D to deem the payment an "expense item applicable to all sales of sugar". Jackson J concluded, as a matter of construction, that it fell to the respondent to deem an expense item to be applicable to all sales of sugar, subject to its obligation to exercise that power reasonably and in good faith. However, the charge was not designed to cover expenses incurred in the current season; it was calculated to supplement the respondent's cash inflow for a period from 2017 to 2024. The Agreement, however, was designed to operate on a seasonal basis from year to year and the relevant revenue and expenses were those relating to the year in question. Accordingly it was not permissible, his Honour held, for the respondent to make provision for future years' expenses; a charge made for an "expense item" must be a charge for an item of expense occurred in the current season.

The applicants' submissions

[19] The applicants did not advance any argument on this application that the levy fell outside the power conferred by cl. 7(c) by reason of its purpose; the dispute was confined to the manner in which the respondent went about imposing it. The applicants contended that cl. 7(c)(iv), although it speaks of "consultation", should be read as requiring the agreement of bargaining representatives before the respondent may alter the terms of Annexure D. The alternative construction for which the respondent argued, that cl. 7(c) entitled it unilaterally to amend the pricing mechanism in Annexure D, provided it first consulted with bargaining representatives, would mean that consideration under the Agreement became illusory, so that there would be no enforceable contract. The respondent could amend to say that it would pay nothing to the grower. Reliance was placed on an observation of Kitto J in *Placer Development Ltd v Commonwealth*:[7]

> "wherever words which by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought at all".[8]

In that case, the Commonwealth had agreed to pay a timber company a subsidy on its products, of an amount or at a rate which the Commonwealth would determine. That promise was meaningless in the absence of a specified amount or some basis of calculation, and there was no general standard of reasonableness which could be applied to determine the quantum of the subsidy. No contractual obligation was created by it.

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6 At [48].
7 (1969) 131 CLR 353.
8 At 356.

[20] A construction of the contract which upheld it ought to be preferred to one which rendered it unenforceable. In addition, a commercial contract ought to be construed as intended to produce a commercial result. To give one side absolute control over price was uncommercial. The more commercial view of the clause was that it was intended to emphasise the authority of bargaining representatives, who could agree to amendment without having to refer it to growers for their consent. Such a construction would mean that decisions were made by agents of the growers, whose interests would thus be represented.

[21] So far as the opening words of cl. 7(c), "in order to meet these operational needs and to ensure a fair and consistent treatment", might be thought to operate as some constraint on the respondent's exercise of the power to amend, the difficulty was that even if "operational needs" could be defined, there were no means of ascertaining what limitation the expression "fair and consistent treatment" would actually impose on the respondent's capacity to determine what it would pay the growers. Nor would it suffice to imply an obligation to act reasonably or in good faith, because again there was no "readily ascertainable external standard"[9] available by which that could be judged.

The respondent's submissions

[22] The respondent's submission was that cl. 7(c) simply did not lend itself to any meaning other than the one for which it contended. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australian v QR Limited*,[10] a case which concerned an industrial agreement which required the employer to "consult with affected employees" before changing their conditions of employment, Logan J observed that, in ordinary usage, an obligation to consult entails the party to be consulted being given notice of the subject on which its views are sought before any final steps are taken, with a meaningful opportunity being afforded to that party to present its views; but a right to be consulted "is not a right of veto".[11] Reference was also made to *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs*,[12] in which Kenny J adopted Logan J's interpretation of the word, "consultation". In the present case, the respondent argued, it had to listen meaningfully to the growers, but they did not have the right of veto over its decision.

[23] Clause 14 of the Agreement was significant; it constrained amendment to the Agreement by requiring bilateral agreement, with the important exception of the Annexures. Amendment of the Annexures, by virtue of cl. 7(b), could only take place for particular purposes: to allow for an orderly conduct of the respondent's operations and to meet the growers' needs. A further constraint lay in cl. 7(c); the terms of the Annexures could be altered only in order to meet the respondent's operational needs and to ensure a fair and consistent treatment for all growers. In addition, there was an implied term that a party would act reasonably.

[24] The contrast in requirements under cl. 7(c) was also of some significance. Consultation with the growers' representatives was necessary if Annexure A or Annexure D to the agreement were to be altered, as opposed to Annexures B and C, which could be altered by, respectively, the respondent and the Cane Audit Committee without any

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9 *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 27.
10 [2010] FCA 591.
11 At [44].
12 [2014] FCA 25.

requirement for consultation. The respondent suggested that this might be explicable by the fact that neither Annexure B nor Annexure C involved contentious decisions: the former concerned rostering of harvesting groups, not any question of payment, while the latter was concerned with scientific questions of how sugar content was to be determined.

[25] Annexure A illustrated the intended dichotomy between consultation and agreement. It gave the respondent power to make some determinations entirely unilaterally without consultation, such as the decision as to when crushing was to commence; on the other hand, alteration of that date would require agreement. Annexure A also gave the respondent the right to terminate crushing operations in specified circumstances, including when, in its opinion, to continue would be uneconomic; but it also reserved the right to do so in other circumstances by agreement.

[26] Similarly, elsewhere in the Agreement there was a clear distinction drawn between which matters required consultation and what was to be the subject of agreement. The Agreement contemplated that the respondent would speak to the growers' representatives about certain matters which were, nonetheless, ultimately its responsibility. Clause 3.3(b) was an example; it required the respondent to meet with the growers' representatives in order to achieve efficient harvesting, delivering and processing of the cane. Another was cl. 5.7(d), which required the respondent to consult before finalising an advance payment programme, in contrast with cl. 5.7(b), which required agreement in relation to sugar recoverability rates.

Principles of construction

[27] If the clause is unambiguous, it must be given effect, even though it may produce an unfair result, or one which the parties did not intend. If, on the other hand, two constructions are available, preference is to be given to the one which will "avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust". The whole of the Agreement must be considered in determining the meaning of cl. 7(c), and to the extent possible, all the clauses must be given a construction which makes them harmonious with each other.[13]

[28] The construction of the clause must be approached by considering what a reasonable business person would have understood it to mean,[14] and on the basis that the parties intended to produce a result which makes commercial sense.[15] An understanding of the Agreement's commercial purpose is likely to be advanced by considering

> "the genesis of the transaction, the background, the context [and] the market in which the parties are operating".[16]

Ambiguity

[29] The expression "the Millowner in consultation with Bargaining Representatives may at any time alter" in cl. 7(c)(iv) is not, in my view, unambiguous in the way for which the respondent contends. The choice of the preposition "in", as opposed to "after", cannot

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[13] *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J.

[14] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 34 ALR 58 at [16].

[15] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 34 ALR 58 at [17].

[16] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 35.

be disregarded. While (as the respondent points out) the word "consultation" does not itself suggest a requirement for agreement, the use of the phrase "in consultation with" suggests a temporal connection between the consultation and the exercise of the alteration power. In that way, it differs from the obligations considered in the *QR Limited* and *Gondarra* cases, which were, in each case, to consult with other parties *before* making a decision. The cl. 7(c)(iv) phrase implies, instead, a state of affairs during which the alteration is made; that is, that consultation and alteration occur in combination. That being the case, it is necessary to look further, to context, commercial purpose and background to determine how the clause should in fact be read.

The contractual context

[30] I agree with (and the parties did not challenge) Jackson J's view that the Agreement is not one multipartite contract; rather, each grower has contracted separately with the respondent, so that consultation under cl. 7(c), whatever that involves, must occur with each of the bargaining representatives on behalf of the growers it, he or she represents.[17] Clause 7 recognises that a need for variation of the Annexures may arise because of the operational needs of either party, respondent or grower, and that the interests of both are relevant. The terms "operational matters" and "operational needs" are not defined, but it appears from the structure of cl. 7(c) that it is contemplated that all of the Annexures involve operational matters which can be affected by their amendment. It does not seem that the words "as set out in this Agreement and the Annexures" in cl. 7(c)(i), apparently qualifying "consultation" where Annexure A is concerned, in fact add anything; neither Agreement nor Annexures prescribe any particular form of consultation for amendment of the Annexures[18] beyond that contained in cl. 7(c) itself.

[31] There is, as the respondent says, a contrast to be made between the amendment procedure for Annexure D and the procedures for alteration of Annexures B and C, in respect of which, respectively, the respondent and the Cane Audit Committee are given an unequivocal unilateral power to amend. It was suggested that the reason amendment of Annexure B did not require consultation was that it concerned harvesting groups and had no nexus with payment; which may well be right. It was also suggested that amendment of Annexure C did not require consultation with growers or their bargaining representatives because it concerned non-contentious scientific matters. That is less convincing, because the determination of recoverable sugar in the cane directly affects the return to growers. The better view may be that while growers' interests are liable to be affected by alteration of Annexure C, they will, in a general sense, be represented in any decision by the Committee in that regard, because the Committee consists of representatives of both the respondent and one of the major bargaining representatives representing a large number of growers, Mackay Cane Growers Limited.[19]

[32] What light might be shed by other parts of the Agreement on the construction of cl. 7(c)(iv)? It may be contrasted with the language of cl. 5.7(d), which requires the respondent to consult with bargaining representatives *before* finalising a payment program and that of cl. A.2.1 of Annexure A, which gives the respondent the right to

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[17] In this regard, I do not see any merit in the applicants' submission that as a matter of commerciality it should be assumed that where a grower had not appointed a bargaining representative, he or she should be regarded as meeting that description for the purposes of cl. 7(c). "Bargaining representative" is clearly defined and used throughout the agreement distinctly from "grower".

[18] As opposed to decision-making about certain operational matters.

[19] Cl. 1, definitions.

end crushing operations *after* consultation with bargaining representatives. Those clauses are unambiguous, indicating a process to be gone through before the respondent makes the relevant decision; an intention that consultation and decision take place as distinct events in a sequence. The different form of expression in cl. 7(c)(iv) suggests a different intent.

[33] Clause 18.5 of the Agreement also bears consideration because, like cl. 7(c)(iv), it uses the expression "in consultation with". That clause enables the respondent in consultation with the bargaining representatives to decide that there has been a material change in circumstances requiring immediate revision of the Agreement's terms. Nothing can result from that decision alone, however. To achieve the desired amendment, cl. 14 requires that the respondent obtain the consent and signature of the other parties to the agreement; an outcome which seems unlikely if the bargaining representatives, although consulted, have not reached the same view as the respondent. There seems no point to cl. 18.5 except to facilitate, through negotiation between the respondent and the bargaining representatives resulting in joint recognition of the need for revision, agreement to amendment under cl. 14. The obvious conclusion is that cl. 18.5 contemplates consultation between the respondent and bargaining representatives resulting in a mutual decision. [20] That conclusion favours the applicants' reading of cl. 7(c)(iv). Absent some contrary indication, it is reasonable to expect consistency in meaning of the same phrase used in different clauses of the Agreement.

[34] It is also relevant to consider the status of the bargaining representatives in this Agreement in considering whether it was intended that their views should be merely informative, or instead, determinative, as to whether any change should take place. The role of bargaining representatives in negotiating agreements of this kind was the subject of statutory recognition,[21] and the Agreement itself recognises, by way of background, their statutory status in representing growers. The Agreement in numerous respects assigns a consultative or joint (with the respondent) decision-making role to the bargaining representatives. It can be said, at least, that their importance and authority in the Agreement in representing the interests of growers is consistent with their having a negotiating role so far as amendment of the Annexures is concerned.

Commerciality and background

[35] The respondent's history as an organisation of and for cane growers is a factor in considering whether growers (in this instance, through their agents, the bargaining representatives) might reasonably be expected to have a greater role in decision-making about operational matters than would be expected as between parties without that history. Importantly, too, the purpose of the Agreement, to be derived from cl. 3.3, is to ensure that at all stages the cane is dealt with as efficiently as possible. That involves close co-operation, as prescribed by the Agreement, between the respondent and the bargaining representatives at all points. The effective operation of the mills is in the interests of both the growers and the respondent in order to ensure that as much cane as possible is crushed and to maximise the returns to both. That makes it reasonable to

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[20] It appears that the parties when they varied the Agreement may have understood cl. 18.5 to require consensus between them; the document expressed their joint determination that there had been significant changes in circumstances requiring a revision of the Agreement. However, post-contractual conduct is not admissible to prove what the parties meant by the terms used in the contract: *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407 at [6-13]; [307-318].

[21] Section 33 *Sugar Industry Act* 1999.

infer that the bargaining representatives, as the growers' agents, will not hinder necessary amendments designed to meet the operational needs of the respondent in running the mills, within the further constraint that growers should be treated fairly and consistently. In that regard, I consider that an obligation in both parties to act reasonably and in good faith in the amendment process is properly implied in the context of this contract, which in so many instances requires the parties (or, in the case of the growers, their agents the bargaining representatives) to consult or agree in order to arrive at a result to their mutual advantage. That is so whether that implication occurs as a matter of law[22] or of fact, on the *BP Refinery*[23] test, the criteria in which are met here.

[36] There is considerable force to the applicants' contention that to reside the power to amend the pricing provisions contained in Annexure D in one party alone is uncommercial. It would be remarkable – and not something a reasonable business person would ordinarily contemplate – for one party to agree that the other could unilaterally determine (even with some constraints as to the purposes for which it may be done) what price it should be paid for its produce. Against that, of course, is the consideration that the references in cl. 7 to operational needs and variation both between and during seasons indicate that it may be necessary to make alterations to the Annexures at short notice. It may be inferred that quick and flexible decision-making is intended, in the commercial interests of both parties.

[37] But in considering the implications of a need for speedy decision-making, it is significant that the consultation contemplated is between the respondent and the bargaining representatives of the growers, rather than the growers themselves. Change can be made without seeking the consent and signature of every one of the 851 growers (as amendment to the Agreement itself requires); instead cl.7(c)(iv) prescribes consultation only with the bargaining representatives, of whom there are a limited number. By definition, the number of bargaining representatives can never exceed half the number of growers; and, in fact, when the Agreement was entered, there were only two bargaining representatives. A streamlined process of negotiating agreement to amendment, involving only the bargaining representatives, makes for a practical commercial outcome, combining recognition of both the need for expedition and the need to take into account the growers' interests.

[38] I should add as a final feature relevant to commerciality that, should agreement not be reached pursuant to cl. 7(c)(iv), the parties would have available to them the Agreement's dispute resolution procedure, notwithstanding that the dispute concerned amendment of an Annexure. That is because amendment is a step to be taken pursuant to the Agreement itself, so that cl. 12.1 applies, rather than the negotiation procedure contemplated by cl. D.2; which, in my view, is limited to disputes as to the existing subject matter of the Annexure.

[39] Having regard to all these considerations, a reasonable business person would regard it as commercially rational that there be a joint decision-making approach to amendment of Annexure D.

Conclusion

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[22] *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199.
[23] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.

[40] The matters I have identified as to context (contractual and historical) and commerciality lead me to conclude that the applicants' reading of cl.7(c) as requiring the agreement of the bargaining representatives to amendment of Annexure D is correct. Accordingly I will declare:

1. that the respondent cannot amend Annexure D with effect against the applicants without the agreement of their bargaining representatives;

2. that the deeds poll executed on 12 April 2018 are of no effect.

The respondent is to pay the applicants' costs of the application, including the reserved costs resulting from the adjournment of the application on its return date.