SUPREME COURT OF QUEENSLAND

CITATION:	*Stroppiana & Ors v Mackay Sugar Ltd* [2017] QSC 217
PARTIES:	**REX CORRADO STROPPIANA AND ANDREA RUTH STROPPIANA** (first applicant) **SIMON LEE MATTSSON** (second applicant) **COLIN ASH** (third applicant) **v** **MACKAY SUGAR LTD ACN 057 463 671** (respondent)
FILE NO/S:	BS5960/17
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	5 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2017
JUDGE:	Jackson J
ORDER:	**THE ORDER OF THE COURT IS THAT:** 1. **IT IS DECLARED THAT THE EXPENSES THE SUBJECT OF THE CHARGE OF $2 PER TONNE OF CANE IMPOSED BY THE RESPONDENT ON 2 JUNE 2017 ARE NOT EXPENSE ITEMS DEEMED TO BE APPLICABLE TO ALL SALES OF SUGAR WITHIN THE MEANING OF ANNEXURE D TO THE CANE SUPPLY AND PROCESSING AGREEMENT.** 2. **THE APPLICATION IS OTHERWISE DISMISSED.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the Cane Supply and Processing Agreement between the parties is subject to the *Sugar Industry Act* 1999 (Qld) – where the respondent purported to vary provisions of the Cane Supply and Processing Agreement by agreement with bargaining representatives of growers – whether the Cane Supply and

Processing Agreement can be varied without agreement and signatures of each individual grower

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where a Cane Supply and Processing Agreement between the parties provides that "Other expense items that are deemed to be applicable to all sales of sugar" are to be deducted from cane payments under the agreement –whether the respondent may unilaterally deem a charge of $2 per tonne of cane for the operating cost, repair, improvement and maintenance of the respondent's infrastructure to be an expense applicable to all sales of sugar

Sugar Industry Act 1999 (Qld), s 31, s 33, s 33A, s 35
Sugar Industry Reform Act 2004 (Qld)

Clarke v Earl of Dunraven [1897] AC 59, distinguished
Electricity Generating Corporation v Woodside Energy Ltd (2014) 251 CLR 640, applied
Mackay Sugar Ltd and anor v Quadrio [2015] QCA 41, discussed
Morris v Baron & Co [1918] AC 1, cited
Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, applied
Phillips v Ellinson Bros Pty Ltd (1941) 65 CLR 221, cited
Raguz v Sullivan (2000) 50 NSWLR 236, distinguished
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34, cited

COUNSEL: N Ferrett for the applicants
M Hodge and F Lubett for the respondent

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

[1] **Jackson J**: The applicants apply for declarations as to the operation of a contract and an injunction to prohibit breach of the contract. Each of them is a grower of sugar cane in the area of a sugar mill or mills operated by the respondent in the Mackay region of North Queensland. The respondent is the mill owner who operates four sugar mills in the Mackay region and Mossman.

[2] The contract is a standard form supply contract styed "Cane Supply and Processing Agreement" ("CSPA") made between the respondent and growers for the supply of sugar cane by growers to the respondent.

[3] There are two ultimate questions. First, did the respondent and bargaining representatives of growers have power to vary provisions of the CSPA for the growers represented by the bargaining representatives? Second, did the respondent have a unilateral express contractual power to deem a charge to be an expense applicable to all sales of sugar?

[4] In both instances, the purported effect of the power to alter or deem was to authorise the respondent to deduct an amount of $2 per tonne of cane supplied by growers to the respondent's mills in the Mackay area from the cane payments that would otherwise be payable by the respondent to growers.

[5] The questions for decision raise four points. First, is the CSPA a contract made between all the growers on the one part and the respondent on the other, so that any variation to its terms requires the assent of all growers? Second, can any variation be made to the CSPA without the signature of a grower who is to be bound by the variation? Third, does the provision of the CSPA that authorises deduction of an expense item deemed to be applicable to all sales of sugar from cane payments apply to an expense item that is not agreed to by an individual grower? Fourth, does the same provision authorise deduction of a charge for future improvements to the respondent's infrastructure?

Mackay Sugar as the mill owner and growers

[6] On 17 July 2008, the respondent's incorporation was transferred to that of a public company under the *Corporations Act* 2001 (Cth) ("CA"). Prior to that, it had operated as a cooperative within the meaning of the *Cooperatives Act* 1997 (Qld).

[7] Three of the sugar mills owned by the respondent are based in the Mackay region, being the Fairley, Marion and Racecourse mills. Approximately 878 growers supply the Mackay area mills.

[8] The respondent supplied raw sugar to Australia Sugar Ltd's ("ASL") Racecourse sugar refinery. That refinery is located adjacent to the respondent's Racecourse Mill in Mackay. Other raw sugar is supplied to QSL under the raw sugar supply agreement between QSL and the respondent.

[9] In 2007, the respondent entered into the CSPA for the 2007, 2008, 2009 and 2010 seasons with growers in the Mackay area. At the time, all growers were represented by bargaining representatives, being Mackay Cane Growers Ltd ("MCG") and Australian Cane Farmers Association Ltd ("ACFA").

[10] In 2009, the respondent negotiated with growers' bargaining representatives over variations to the terms of the CSPA. The negotiations resulted in changes to the terms of the 2007 contract that were incorporated into the document in the form of the present CSPA. The 2009 amendments for the CSPA were circulated to growers for signature by each grower. Unless the respondent received the 2009 signature page a grower would not have supplied cane or received cane payments for the 2009 season.

[11] Since the 2009 season, where there is a new grower, or an existing grower purchases or leases another existing cane farm, or a grower restructures in ownership, the grower must execute a 2009 form of the CSPA signature page to supply cane or receive cane payments for the upcoming season or seasons.

Charge of $2 per tonne of cane supplied

[12] In about August 2016, the respondent appointed a consultant firm, Kidder Williams, as advisors. Summarising, in early 2017, Kidder Williams initially recommended (short of sale of the respondent's undertaking or shares) to the respondent:

(a) sale of some assets to raise capital and repay debt;
(b) adjustment of the current cane payments formula to yield $1 per tonne of cane supplied to the respondent as against the growers; and
(c) a further reduction of cane payments to growers, described as a cane grower contribution, of $2 per tonne of cane supplied.

[13] Following consultation with growers, Kidder Williams, in April 2017, finally recommended to the respondent:
(a) sale of the Mossman mill and the Racecourse Cogeneration Plant for electricity production;
(b) reduction of cane payments to growers by a "mill improvement charge" of $2 per tonne of cane supplied.

[14] The mill improvement charge was described as necessary to enable the respondent to operate with sufficient cash to operate and to repay debt associated with STL by the financial year ending 30 June 2024.

[15] On 23 May 2017, the respondent and MCG and ACFA as bargaining representatives for most growers agreed on amendments to the contract on the terms contained in a deed styled "Variation Deed – Cane Supply Processing Agreement" dated 23 May 2017 ("variation deed").

[16] At the time, MCG was the appointed bargaining representative of the second applicant and ACFA was the appointed bargaining representative of the third applicant. However, neither of those companies was the appointed bargaining representative of the first applicants.

[17] The effect of the amendment made by the variation deed was to insert a further item of expense into Annexure D to the CSPA described as follows:

> "An amount of $2 per tonne of cane to cover expenses or future expenditure relating to the operating costs, repair, improvement, maintenance for the mill owners infrastructure, which is an expense that is deemed to be applicable to all sales of sugar."

[18] On 2 June 2017, the respondent wrote to the male first applicant stating:

> "We are now writing to notify you that the board of Mackay Sugar has determined it appropriate to charge the grower/s for which you are the bargaining representative an amount of $2 per tonne of cane to cover expenses related to the operating costs, repair, improvement and maintenance of Mackay Sugar's infrastructure. The board of Mackay Sugar has deemed this amount to be an expense item applicable to all sales of sugar …
>
> The board has formed this view on the basis that the expenses related … constitute necessary presale expenses and will assist in supporting the operational needs of the business, including facilitating the efficient billing, crushing and delivery of sugar for sale (therefore are expenses that are applicable to sugar sales)." ("2 June decision")

Relevant provisions of the *Sugar Industry Act* 1999 (Qld)

[19] The relevant provisions of the *Sugar Industry Act* 1999 (Qld) ("SIA") to the present case are:

> "31 Supply contract
>
> (1) A grower may supply cane to a mill for a crushing season only if the grower has a supply contract with the mill owner for the season.
> (2) A supply contract may be for 1 or more than 1 crushing season.
> (3) A supply contract may be either an individual contract or a collective contract.
> (4) An interested third party may be a party to a supply contract between a mill owner and a grower.
> (5) Each of the parties to a supply contract must sign the contract.
>
> 32 Individual contract
>
> An individual contract—
> (a) is a supply contract made directly between a grower and a mill owner; and
> (b) may be for all or part of the supply of cane grown by the grower.
>
> 33 Collective contract
>
> (1) A collective contract is a supply contract made between 2 or more growers (a group of growers) and a mill owner.
> (2) Each grower in a group of growers must sign the collective contract.
> (3) A group of growers may appoint a bargaining representative to negotiate a collective contract on behalf of the group.
> (4) There may be more than 1 collective contract in force at the same time for a mill.
> (5) A grower may be a party to more than 1 collective contract.
> …
>
> 35 Variation of supply contract
>
> (1) The parties to a supply contract may, in writing, vary the contract.
> (2) The varied supply contract is taken to be the supply contract for this part."

Genesis and surrounding circumstances of the CSPA

[20] The genesis of the CSPA lies in the legislative deregulation of the Queensland sugar industry in 1999[1] and 2004.[2]

[21] From 2004, the relationship between a grower or growers and the mill owner of a sugar mill supplied by the grower or growers has been contractual. But the broad economic structure of those relationships owes its existence to the long history of the sugar industry in the State. A central feature that persists today is that growers and mill owners share in the economic risk of the sale price of raw sugar produced by the mill owner from growers' cane. The mechanism is that the price paid by the mill owner to a grower for cane supplied is calculated as a proportion of the amount received by the mill owner for the sale of raw sugar ("cane price formula"). Although a pricing mechanism to similar effect has a long history, it is unnecessary to recount the history in order to decide the questions raised in this case. The

[1] *Sugar Industry Act* 1999 (Qld).
[2] *Sugar Industry Reform Act* 2004 (Qld).

grower's proportion or share is commonly described as the "cane payment" or "cane payments".

[22] At the time when the CSPA was agreed (and continuing to the present time) raw sugar produced by the respondent was and is sold in the domestic market and the export market. In particular, the respondent sells sugar in the domestic market to ASL. Apart from local sales, raw sugar produced by the respondent is transported to the storage facilities at a bulk sugar terminal operated by Sugar Terminals Ltd. From the terminal, raw sugar may be sold in the export market.

[23] At the time when the CSPA was entered into, export sales of raw sugar from Queensland were made by Queensland Sugar Ltd ("QSL").[3] Export sales of raw sugar were shipped from the terminal to the buyers' ports of destination.

[24] Sugar cane is an annual seasonal crop. Broadly speaking, the crushing season for a mill starts sometime in June and will continue until sometime in November. The start and end dates vary according to a number of factors including area growing conditions, weather conditions during the growing period, severe weather or other events which might damage the crop before maturity, weather conditions during the cutting and crushing periods, mill capacity, production rates and the extent to which crushing and raw sugar production are affected by mechanical or other interruptions.

[25] This structure of industry operations informs a number of matters that were mutually known facts between growers and the respondent as mill owner at the time of entering into the CSPA. First, broadly speaking, the expenses incurred by the grower to the point of delivery of cane to the mill owner are to the growers' account and at the grower's risk. Second, from the point of delivery of cane to the mill owner to the point of production of raw sugar the expenses incurred by a mill owner are to the mill owner's account and at the mill owner's risk.

[26] Third, when the proceeds of sales of raw sugar by the mill owner for a season are divided between the grower and the miller under the cane price formula, each of them meets the expenses to their own account from their proportion of the proceeds. Fourth, however, the proportion payable to the grower is calculated after first deducting the expenses of sale of the raw sugar whether to the domestic or export markets. Those expenses may include transport of the raw sugar to the bulk sugar terminal, storage and handling costs of the raw sugar at the bulk sugar terminal, any expenses incurred in maintaining the stored raw sugar or insuring it until the risk passes to the buyer on sale and the marketing and administrative costs incurred in connection with making sales of raw sugar.

[27] The first step in the deregulation of the Qld sugar industry was made by the repeal of the *Sugar Industry Act* 1991 (Qld) and its replacement by the SIA. The latter act followed a number of developments, including the review of the industry carried out by the Sugar Industry Review Working Party and that body's report published in November 1996. The report reviewed major policy areas and contained

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[3] For a description of QSL's activities for the 2010 season, see *Papale v Wilmar Sugar Australia Ltd* [2017] QSC 72.

recommendations for reform, in particular to the structure of the Qld Sugar Corporation as it existed at that time.

[28] It is unnecessary to say more about the SIA as originally enacted because the industry reforms that provide the context for the contract in the present case were made by the *Sugar Industry Reform Act* 2004 (Qld). As the explanatory notes to the Bill for that Act observed, from early 2002 to February 2004 four separate reports were commissioned into the causes of and remedies for the industry's decline at that time. In particular, the Hildebrandt Report: an Independent Assessment of the Sugar Industry, June 2002, commissioned by the Commonwealth Government, reflected the extent of the difficulties being experienced.

[29] Generally speaking, the legislative response in the *Sugar Industry Reform Act* 2004 (Qld) was to remove a number of features of the legislative structure up to that time. They included the removal of the concept of a cane production area to which a grower was assigned. That enabled some growers to transfer supply from one mill to another mill.

[30] The statutory bargaining system where a negotiating team negotiated a collective cane supply and processing agreement with the mill owner was also removed. Statutory cane supply agreements had been binding on all assigned growers for the relevant mill. They were replaced by voluntary supply contracts. A purpose was to enable grower or a group of growers to engage more freely in the market for the supply of cane and to be able to participate in opt-in collective arrangements with mill owners and other interested third parties. The Act recognised the opportunity but not an obligation of the parties to bargain collectively.

[31] As well, from 31 December 2005, the prior compulsory arbitration process was replaced by a dispute resolution process where a grower and a mill owner are unable to reach agreement on a term or terms of a supply contract.

[32] Lastly, the statutory arrangements under which all raw sugar upon manufacture was compulsorily vested in QSL was removed. Generally speaking, however, the "single desk" marketing scheme for export sales of raw sugar previously conducted by QSL was continued, but on a contractual basis. Sugar mill owners entered into raw sugar supply agreements with QSL which had that effect. QSL carried on that business as a not for profit marketing organisation. STL operated the bulk sugar terminals by leasing them to QSL.

[33] These were the background arrangements in place between 2007 when the CSPA was originally adopted and through to 2009 when the current form of the CSPA as amended was adopted.

Single multipartite contract

[34] The applicants contend that the CSPA is a single contract between the applicant and all growers who have signed it, creating obligations, first, between the respondent and each grower and, second, among the growers, inter se. The applicant identifies more than 25 references to parts of provisions of the CSPA as suggesting that is its proper characterisation and construction, starting with the description of the parties to the CSPA as the respondent as mill owner and growers supplying cane to the respondent's mills who have executed the signature page. It is right to say that a

number of provisions of the CSPA refer to growers collectively. However, other provisions refer to an individual grower where that is relevant.

[35] The applicants submit that the textual references on which they rely combine with the purpose of the CSPA to establish the set of rules by which cane is supplied and the respondent pays for the supply by cane payments calculated in accordance with the cane payment formula. It points to the "pools" into which revenue derived from sales of raw sugar and other products of the cane supplied is allocated by the respondent, reflecting a system where a substantial part of the price payable to each grower is calculated as the grower's share of the income generated by all growers and the respondent in conjunction.

[36] In particular, the applicants rely upon cl 18.4 of the CSPA as requiring the result that it should be characterised or construed as a "multipartite" contract between the respondent on the one hand and the growers collectively on the other. That clause provides:

> "18.4 Either:
>
> (a) the Growers who supply 50 percent or more, Bargaining Representatives who represent Growers who supply 50 percent or more of the Cane supplied during the Season, by written notice to the Miller; or
> (b) the Mill owner, by written notice, to the Growers and Bargaining Representatives,
>
> may elect not to further extend the term in accordance with cl 18.3. Such written notice may be provided on or before 31 December in any year and the parties agree that upon receipt of such written notice this Agreement will terminate upon the conclusion of the balance of the term still outstanding at that time. For example, if notice is provided on 31 December 2007 the Agreement will terminate at the end of the 2010 season. If notice is provided on 31 December 2008 the Agreement will terminate at the end of the 2011 season."

[37] The applicants submit that the consequence of their characterisation and construction of the contract as "multipartite" is that the respondents and other growers are not able to amend the terms of the contract without the applicants' individual agreements.

[38] The applicants rely on *Clarke v Earl of Dunraven*[4] and *Raguz v Sullivan*[5] as cases supporting the characterisation of the CSPA for which they contend. However, in my view, those cases do not assist. *Clarke* decided whether and when entrants to a yacht race conducted under rules that included provision for a participant to pay for any damage caused to a competitor's yacht by a breach of the rules had contracted to be bound by the provision. *Raguz* decided whether judokas competing for selection for Australia for an Olympic Games under selection rules that included an arbitration process had contractually agreed to be bound as between themselves by an arbitral award made under the process.

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4 [1897] AC 59.
5 (2000) 50 NSWLR 236.

[39] The applicants did not identify the terms of the CSPA that they contend operate as a promise as between each of the growers who are a party to the CSPA, inter se. Instead, they contend that all of the promises under the CSPA operate not only as between the respondent and each grower but as between each grower and every other grower.

[40] In my view, at that level of generality, the applicants' contention must be rejected. Were it accepted, any minor operational variation to the contractual relationship that is the subject of the contract under the CSPA as between the respondent as mill owner and a particular grower would be practically impossible because of the need to obtain the agreement of every other grower before it would be binding.

[41] However, it is not necessary to explore that reasoning or the terms of the CSPA to which it would apply in further detail, because even if the applicants' contention might otherwise have been correct, the question would be subject to the operation of cls 5 and 7 of the CSPA.

[42] Clause 5 of the CSPA provides that the payment for cane will be calculated by the addition of the sugar value, the molasses value and the fibre value. The sugar value is calculated according to a formula which adjusts the Base Sugar Value, which in turn is calculated by an adjustment to the Sugar Price. The Sugar Price which is used in this calculation is determined in accordance with Annexure D.

[43] Clause 7 provides as follows:

> "7. Operational matters
>
> (a) The parties agreed that there are various operational matters dealing with the harvesting, delivery and crushing of cane that may vary 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 operation of the Mill owner and to meet the needs of the Growers.
> (c) In order to meet these operational needs and to ensure fair and consistent treatment for all Growers the parties agreed that:
> (i) in respect of Annexure A, the Mill owner 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 Mill owner;
> (iii) in respect of Annexure C, the Cane Audit Committee; and
> (iv) in respect of Annexure D, the Mill owner in consultation with Bargaining Representatives
>
> may at any time alter the operational matters and the terms of the Annexures and will as appropriate advise Growers of any changes."

[44] Simply put, whatever the correct characterisation of the CSPA, every grower who has signed it has agreed to the terms of cl 7 as to variation by, inter alia, altering Annexure D.

[45] Annexure D contains provisions that deal with the amount and timing of cane payments by the respondent to growers for cane supplied. It comprises six pages, divided into two parts. The first part relates to the final sugar price and net revenue

pools. In the context of Annexure D, the word "pool" is used with different meanings. The common factor is that revenue or parts of the revenue from sales of produced raw sugar, molasses and fibre are to be dealt with by allocation to a pool of revenue that relates to the relevant product class and, in the case of raw sugar, into which the revenue for a category of sales is to be allocated.

[46] Thus, paragraph (a) of the first part of Annexure D relates to sales of raw sugar.

[47] The final sugar price payable to a grower under Annexure D turns on the relevant revenue and expenses allocated to the various pools of revenue for sales of raw sugar. "IPS Sugar" is a measure of the commercial value of raw sugar expressed in tonnes. For a particular grower, the final sugar price payable is a function of the percentage of the grower's cane supplied, as allocated to each of the relevant revenue pools from sales of sugar. The method of calculation involves the ascertainment of the sugar price for a particular revenue pool by reference to the tonnes of IPS Sugar for the raw sugar sales allocated to the pool and the net sugar revenue from sales allocated to that pool. For a particular grower, the final sugar price will represent a weighted average of all the sugar pools into which that grower's cane was allocated, arrived at by calculating the product of the sugar price per tonne for the pool and the tonnes of cane supplied by the grower.

[48] There is no dispute on the facts of this case that, as between the respondent and every grower, cl 7(c) of the CSPA purported to authorise the respondent in consultation with the bargaining representative of the grower to agree to alter the operational matters, the terms of Annexure D and to, as appropriate, advise the growers of any changes. That is what was done by the variation deed for most growers. Accordingly, it is not necessary to consider further the applicants' primary contention that the terms of Annexure D could not be varied without the express agreement of every grower because of the characterisation of the CSPA as a multipartite agreement.

Section 35 of the SIA

[49] The applicants submit that, in any event, the variation deed is of no effect because it does not comply with the provision in s 35(1) of the SIA that the parties to a supply contract may in writing vary the contract. The applicants submit that a variation to the CSPA must be signed by each grower who is an existing party to the CSPA before it is binding. The respondent submits that there is no express requirement that a variation must be signed by each grower and that s 35(1) should not be construed to require that. In my view, the applicants' contention should be rejected, for the following reasons.

[50] The parties did not make any particular submissions as to the relevant principles of statutory interpretation. As was recently reaffirmed:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and

> not at some later stage and it should be regarded in its widest sense".[6] (footnoted omitted)

[51] As well, s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) provides that:

> "In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

[52] In *Mackay Sugar Ltd and anor v Quadrio*, Fraser JA considered the purpose of Pt of Ch 2 of the SIA (which contains s 35), as follows:

> "The purpose of the relevant provisions is stated in s 29 as being to ensure that the supply of cane by, and reciprocal payment to, growers is 'governed by written contracts (each a ***supply contract***) between growers and mill owners.' That does not explain why the Act insists upon writing and signing. The Explanatory Notes for the Bill for the *Sugar Industry Reform Act* 2004 (Qld) which introduced these provisions do assist in elucidating the statutory purpose. That material may be taken into account in construing the ambiguous provisions in ss 29 and 31. The context was that, before the introduction of these reforms, negotiations and contracts for the supply of cane to mills were very highly regulated. The Explanatory Notes explained that the reforms were intended to secure to individual growers more autonomy in negotiating and contracting to supply cane to mills. Most relevantly, the Explanatory Notes state:
>
> > '**Creation of Supply Contracts**
> > The bill supports normal commercial processes to drive positive outcomes and trends for the sugar industry. The Bill allows growers to freely engage in the market for the supply of their cane. Importantly the Bill also enables growers to participate in "opt in" collective arrangements with millers, as well as other interested third parties. There is an opportunity, not an obligation, to bargain collectively. Parties to supply contracts are provided with scope to participate in more than one such contract. Removal of the existing and onerous statutory bargaining system will result in industry participants benefiting from greater freedoms to direct and control their own interests.'
>
> The purposes expressed in the Explanatory Memorandum stand in stark contrast with the purpose of the writing and signature requirements for various contracts stated in the preamble to the *Statute of Frauds* 1677 (Imp): 'For prevention of many fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury…'. Sections 29 and 31 do not seem to have been based upon any similar concern about the evidence by which contracts might be proved in the case of a dispute. The emphasis upon grower autonomy in negotiating and contracting also suggests that, whilst the grower and mill owner must 'sign' a 'written contract', no particular form of written contract or signature is

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6 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, [14].

> required. So far as a grower is concerned, the purposes of requiring writing and signing appear to be to emphasise the existence of the choice, and to facilitate the making of the choice, whether to contract individually or collectively."[7]

[53] Section 31 of the SIA provides that each of the parties to a "supply contract" must sign the contract. In the case of an "individual contract" within the meaning of s 32, the individual grower must sign it.[8] In the case of a "collective contract" within the meaning of s 33, each grower in the group of growers must sign the collective contract. As defined in s 33(1), a collective contract is one made between two or more growers, defined as a "group of growers", and as provided in s 33(3) a group of growers may appoint a "bargaining representative" to negotiate a collective contract on behalf of the group. The definition of "bargaining representative" in s 30 requires the person who is that representative to have the written authority of each grower who is a member of the group. It will be noted there is nothing in the text of s 31 or s 33 that requires particular terms of a supply contract. However, s 31(1) makes the existence of a supply contract a condition precedent to the growers' entitlement or right to supply cane to a mill or a mill owner. That is, each grower must sign it before they supply cane to the mill or mill owner.

[54] There are a number of features that affect or may affect the proper construction of s 35(1). It is notable that it does not require expressly that any variation to a supply contract must be signed by the grower or growers.

[55] Next, s 35(1) is expressed in permissive or facultative language, so that any prohibition against varying a supply contract other than in writing must be a matter of implication. Generally speaking, under modern unwritten law, the parties to a contract may vary the contract at any time without the need for writing. However, that may be affected by a statutory provision that requires the contract be in writing. Provisions derived from the *Statute of Frauds* 1677 (Imp) provide that some classes of contract are enforceable by action only if the contract or a memorandum or note of the contract is in writing and signed by the party to be charged or by some person by the party lawfully authorised.[9] As a matter of statutory construction, courts have held that although the parties to such a contract can lawfully terminate it orally, generally speaking, varied terms may only be enforced if both the contract and the variation or a note or memorandum thereof are in writing and signed by the party or agent.[10] Accordingly, it might have been thought that, absent s 35(1), there would be a requirement that any variation of a supply contract must be signed by the grower or growers who were required to sign the original contract under s 31 or s 33.

[56] The express effect of s 35(2) is that a varied supply contract is taken to be the supply contract for the purposes of Pt 2 of Ch 2 of the SIA. That part has two divisions. The sections of Div 1 and Div 2 may be divided into two groups. Sections 31 to 33 require that a supply contract must be made for each grower before the grower may supply cane to a mill and that the contract must be one

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7 *Mackay Sugar Ltd and anor v Quadrio* [2015] QCA 41, [27]-[28].

8 As to signature under s 31, see *Mackay Sugar Ltd and anor v Quadrio* [2015] QCA 41.

9 For example, *Property Law Act* 1974 (Qld), s 59.

10 *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 243; *Morris v Baron & Co* [1918] AC 1.

signed by the grower, thus impliedly requiring that it be a contract in or evidenced by writing. A more recent addition is a specific provision about the content of some of the terms of the contract as provided for in s 33B.

[57] The other group provides for what is to happen if a grower is unable to negotiate a contract with a mill owner to conclusion. In that case, s 33A provides for a dispute resolution process by referral to arbitration, with the outcome that the arbitral tribunal may decide the term or terms in dispute. As part of the arbitral process, s 33A restricts the terms of the process of arbitration which the parties may agree to employ in order to settle a dispute about the terms of a supply contract.

[58] The context of s 35(1) in the SIA includes recognition in s 33 of collective contracts negotiated by bargaining representatives. Bargaining representative organisations have a long history of representing growers in negotiations with mill owners and others over the supply of sugar cane to mills.

[59] The wider context includes that the likely subject matters of a supply contract include many of the subject matters that are covered by the terms of the CSPA in the present case. They include that in the operation of a supply contract over the term of a particular season (or longer) there are operational matters relating to harvesting, delivery and crushing that may need adjustment from time to time, as well as matters dealing with the sale of raw sugar that may vary. Some such matters might need to be dealt with on an urgent basis where it may be difficult to obtain the individual signatures of all growers before any agreement for variation could come into effect or may be of such a kind that some compromise of different positions among growers or groups of growers inter se must be reached before the arrangements can be varied.

[60] In context, in my view, s 35(1) should be construed as having both facilitative and protective purposes. The protection is that the parties to a supply contract are not to be bound by terms that would vary the contract if they are not in writing. The facilitation is that provided the terms are terms in writing that are agreed, it is not required that the variation be signed by each grower.

[61] Accordingly, in my view, s 35(1) does not expressly or impliedly require that the signature or individual agreement of each grower must be obtained before the grower can be bound to a variation of a supply contract.

[62] It follows, in my view, that the variation deed was effective to vary the supply contract between the respondent and each of the growers for whom CGM and ACFAL were bargaining representatives when it was made, including the second and third applicants.

Deemed expense items

[63] The respondent does not contend, however, that the first applicants are affected by the variation deed. At the time it was made, neither CGM nor ACFAL were the first applicants bargaining representative. Instead, the respondent contends that the 2 June decision of the board of the respondent had the effect that a $2 per tonne of cane charge to cover expenses related to the operating costs, repair, improvement and maintenance of the respondent’s infrastructure is deductable from the first applicants' cane payments under another provision of Annexure D.

[64] An overarching pool under Annexure D is described as the "Shared Pool". The significance of the Shared Pool, for present purposes, emerges from three facts. First, the Shared Pool is a compulsory pool, meaning that all growers participate in the revenue allocated to and derived from the pool in respect of the sales described as the US Quota, Malaysian and Korean long term contracts and sales of raw sugar that is not sold on the basis of ICE No 11 pricing. Second, raw sugar produced by the mill is allocated first to meet the sales to the markets that earn the revenue allocated to the Shared Pool. Third, as a compulsory pool that is for the sales of raw sugar that are to be first supplied, the following expenses are allocated to the Shared Pool, rather than to any other pools of revenue from sales of raw sugar:

> "Expenses
> • Marketing expenses of both Qld Sugar Ltd and the mill owner;
> • Costs for the storage of sugar and the costs of sales contracts;
> • Funding costs of the advances program;
> • Other expense items that are deemed to be applicable to all sales of sugar."

[65] For brevity, I will describe the last dot point of that list of expenses and costs as the "Other expense category".

[66] Unlike the revenue from raw sugar sales allocated to the Shared Pool, the revenue from raw sugar sales allocated to the "Long Term Pool" and the "Long Term Grower Pricing Pool" are the subject of forward pricing contracts which are to be taken into account as an element of profit or loss on hedging transactions or swap agreements or other related financial products for raw sugar sales allocated to that pool. Lastly, the "Short Term Pool" relates to revenue from raw sugar sales of the balance of sugar production, not already allocated in accordance with the agreed order of sales of raw sugar produced to the other sugar pools. It too includes an element of profit or loss on hedging transactions.

[67] The first applicants contend that the $2 per tonne of cane charge does not come within the meaning of the Other expense category, on its proper construction. There is more than one point. First, the first applicants contend that an expense item can only be deemed to be applicable to all sales of sugar if all parties to the contract agree to that. Second, the first applicants contend that the charge of $2 per tonne of cane is not, in any event, an expense item that can apply to all sales of sugar for calculating the final sugar price.

[68] The parties did not address any specific submissions as to the relevance of the general principles of construction of commercial contracts.[11] However, a statement from *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* illustrates:

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[11] See *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Electricity Generating Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8] and 174 [53]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2000) 219 CLR 165, 179 [40]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461-462 [22].

> "In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract…
> Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties … intended to produce a commercial result'. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'."[12] (footnotes omitted)

[69] As well, it is necessary in construing the contract in a case like the present to have regard to the genesis and surrounding circumstances of the contract, as summarised in *Electricity Generating Corporation v Woodside Energy Ltd*:

> "…The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *The Golden Key Ltd (in rec)*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience.'"[13] (footnotes omitted)

[70] It must be acknowledged that there are difficulties in ascertaining the meaning of the phrase "[o]ther expense items that are deemed to be applicable to all sales of sugar" that comprises the Other expense category. Because the phrase is cast in the passive voice, no subject is identified as the person or mechanism that does the deeming. Hence the dispute between the parties as to whether the respondent, on the one hand, or both parties to the contract, on the other hand, have the power to do it. Nevertheless, in my view, there are three initial reasons why it is more likely that the respondent is to do the deeming.

[71] First, generally speaking, the parties to a contract are always free to vary its terms as and when they see fit. It is not necessary to make express provision for their ability to do so. Accordingly, if the phrase is construed to mean no more than that the parties may agree to make an item of expense applicable to all sales of sugar, it is unnecessary.

[72] Second, as a matter of context, cl 7 already contains an expressly agreed contractual mechanism for altering the terms of Annexure D. That can be done by agreement in

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12 (2015) 256 CLR 104, 116-117 [6] and [51].
13 (2014) 251 CLR 640, 656-657 [35].

consultation between the respondent and the bargaining representative. It is unlikely that the parties intended, by the Other expenses category, to provide that expense items for the purposes of Annexure D are required to be the subject of a different mechanism for agreement between the parties, in the absence of any commercial reason that would explain the difference.

[73] Third, as a matter of ordinary meaning of the text, had the parties intended to say only that expenses agreed to be applicable to all sales of sugar would be allocated to the Shared Pool it was unnecessary to use the word "deemed" as opposed to the word "agreed".

[74] On the one hand, the ordinary meaning of the word "deem" includes to decide that something is so. On the other hand, in legal drafting, it is commonly a word deployed to denote that the deemed thing is to be included in a class or group of things, whether or not it would otherwise belong there. It is used in that way to confirm or extend the ordinary meaning of words that otherwise define the class or group.

[75] In the context of the Other expense category, it is not obvious in which sense the word "deemed" is being used. The opening words of the phrase, "Other expense items" invite attention to the three preceding dot points of expenses and costs, as context. A notable characteristic is that most of them relate to expenses or costs that would be incurred in relation to sales of sugar, not in the production of raw sugar. The "marketing expenses of [QSL]" relate to its activities as the single desk marketer of export sales of raw sugar produced in Qld. The "marketing expenses of… [the respondent]" relate to sales by the respondent of raw sugar in both the domestic and export markets. The "costs of storage" of raw sugar includes those costs in the bulk sugar terminal or terminals of STL after the production of the raw sugar. The costs of CIF sales contracts are the costs of shipping and insurance for the benefit of the buyer for sales of raw sugar to be shipped.

[76] The "funding costs of the advances program" are less specifically related to sales of raw sugar. The advances program is a reference to the sugar price advances that are provided for in cl 5.7 of the CSPA. In particular, cl 5.7(d)(i) provides for the respondent to develop and devise an interim price payment schedule that takes into account the costs of providing an advance cane payment program and the cash flow requirements of both the respondent and growers. It provides that it is agreed that consultation will take place between the respondent and bargaining representatives of growers before the advance payment program is finalised and advised to growers and that any subsequent changes will be advised to growers and the bargaining representatives immediately.

[77] Accordingly, the funding costs of the advances program are costs related to funding the prepayment of amounts expected to be earned as revenue under the pools provided for in Annexure D. The costs of the advances program, in that general sense, are connected to the distribution of the revenue from sales of raw sugar and other products provided for in Annexure D. Accordingly, the funding costs of the advances program can, in a broad sense, be said to relate to sales of sugar and the revenue from those sales and its distribution.

[78] Having regard to that context, the inclusion by the Other expenses category of expense items deemed to be applicable to all sales of sugar may be construed to

mean that expenses which would not otherwise be applicable to all sales of sugar may be deemed to be so.

[79] In my view, taking into account those matters, and having regard to the overall commercial purposes of the long term commercial arrangements provide for under the CSPA, that is the construction to be preferred. Further, in my view, the Other expense category should be construed to mean that it is the respondent who may deem an expense item to be applicable to all sales of sugar.

[80] To reach that conclusion does not mean that the respondent's power in that respect is unconstrained. A cornerstone of the CSPA is that the cane payment or payments are a proportion of the revenue generated from the cane supplied through sales of the products from the respondent's milling operation in the form of raw sugar, molasses and fibre. For that reason, cl 5.1(a) provides that the price of cane is defined to be the sum of the sugar value, molasses value and fibre value as defined and expressed as dollars per tonne and that the formula aims to pay the grower 62.22 percent of the revenue generated.

[81] Apart from the "Expenses" to be deducted from the revenue from sugar sales allocated to the Shared Pool under Annexure D, the respondent is to pay its business expenses from its intended 37.67 percent proportion of the revenue to be generated from sales of raw sugar and other products produced from the cane supplied under the CSPA for a season. In like fashion, growers must pay their business expenses from their intended 62.33 percent proportion of that revenue.[14]

[82] Seen in that light, if a business expense incurred by the respondent that is not otherwise applicable to all sales of sugar is to be deducted from the revenue in the Shared Pool before it is divided in accordance with the cane price formula, the effect is to shift the relevant expense from one borne by the respondent to one that is to be borne by the growers as well. If the respondent had an unfettered power to shift expenses in that way, the potential prejudice to the growers would be great. In my view, in that context, the relevant power is one that is constrained by considerations of good faith and reasonableness.

[83] The respondent submits that the applicants' challenge is not that the charge of $2 per tonne was not made in good faith or is unreasonable, so it is not relevant to further consider any constraint on the respondent's power to deem an expense to be applicable to all sales of sugar on those grounds. I agree.

[84] However, that conclusion does not deal with the remaining question whether the proposed charge of $2 per tonne of cane to "cover expenses related to", inter alia, "…improvement and maintenance of [the respondent's] infrastructure" can constitute an expense for the purposes of the Other expenses category.

[85] From the evidence, it appears that the charge of $2 per tonne is not to cover expenses that have been incurred or will be incurred in the current season. Instead, it is an amount calculated on the footing that it will supplement the respondent's cash inflows over a period of years from 2017 to 2024, having regard to a number

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14 *The Millaquin Sugar Company Ltd v Lutz* [1919] St R Qd 25 is an historical example of a dispute as to whether an expense is to the mill owner's or grower's account.

of assumptions and forecasts, so as to meet forecast expenses of all kinds over that period.

[86] Another fundamental feature of the structure and operation of the CSPA is that although its term is intended to extend over more than one season, the supply of cane and production of raw sugar so as to produce the revenue from which the price of cane is to be ascertained and paid by cane payments is a seasonal process from year to year. Both revenue and expenses are to be those that relate to the year in question. Accordingly, in my view, it is not permissible for the respondent to make provision for the expenses for a future year's crop and raw sugar production by way of a charge to be treated as an expense against the revenue to be allocated into the Shared Pool from sales of raw sugar, in order to ascertain the part of the final sugar price from the Shared Pool for the current season. In my view, a charge that is made for an "expense item" must be a charge for an item of expense that has been incurred or will be incurred in the current season of sugar production and resultant sales of raw sugar.

[87] In my view, in setting the charge of $2 per tonne of cane, the respondent paid no attention to the distinction between a charge intended to "cover" expenses incurred in the current season as opposed to future years. For that reason, in my view, the charge as determined by the board of the respondent is not an "expense item" within the meaning of the Other expense category.

Conclusions

[88] The first applicant is entitled to a declaration substantially to the effect of par 1 of the originating application, although the form of the declaration should make it clear that it applies to the charge of $2 per tonne of cane that was purportedly deemed by the respondent on 2 June 2017 to be an expense item that is applicable to all sales of sugar.

[89] Otherwise the application should be dismissed.

[90] I will hear the parties as to the form of orders otherwise.