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TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BRADLEY J

No 12939 of 2016

SANTOS LIMITED

Plaintiff

and

FLUOR AUSTRALIA PTY LTD and ANOTHER

Defendants

BRISBANE

4.03 PM, THURSDAY, 16 JULY 2020

JUDGMENT

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is a decision on two applications in a proceeding. The first is brought by the plaintiff (**Santos**), seeking orders for the disclosure of documents, and the second is brought by the first and second defendants (the **Fluor parties**), seeking an order that Santos file and serve further and better particulars of a calculation in a paragraph of the current version of the statement of claim.

Santos was the proponent of a project to extract coal seam gas from fields in the Surat Basin, and supply the gas for commercial sale, or for conversion to liquified natural gas. On 13 January 2011, the first plaintiff (**Fluor Australia**) agreed with Santos that Fluor Australia would engineer, procure and construct facilities for the project. Later, the agreed terms and conditions were amended to become those set out in an attachment to a deed dated 26 August 2011. That document is exhibit 1 in these applications. It is convenient to refer to the agreed terms and conditions simply as the Contract.

The second defendant (**Fluor Corporation**) is the ultimate holding company of Fluor Australia. It is a party to a deed executed on 26 January 2011, pursuant to which Santos contends Fluor Corporation guaranteed the payment by Fluor Australia of certain money, including sums claimed by Santos in this proceeding.

Santos seeks the disclosure orders pursuant to three separate provisions in the *Uniform Civil Procedure Rules*. The more expansive disclosure order, in paragraph one of the application, is sought pursuant to rule 223 and/or pursuant to rule 367.

At the hearing, it was common ground that the order pursuant to rule 223 could be made only if there were special circumstances and the interest of justice required it: see rule 223(4)(a). It was also common ground that in deciding whether to make an order pursuant to rule 367, the interests of justice are paramount: see rule 367(2).

Mr Stewart QC, who appeared with Dr Mitchenson for Santos, identified that the documents sought in paragraph 1 of the application are said to be directly relevant to one or more of the matters in issue in the proceeding, because of the allegations made in paragraph 276 and paragraphs 283 to 285 of the current statement of claim, and the responding paragraphs of the defence filed on behalf of the Fluor parties.

Paragraph 276 is in these terms:

In breach of clauses 5.1.2 and 5.1.3 of the Contract, the hourly rates set out in Table 5.2 in Schedule 3.1 of the Contract:

- (a) *exceeded the amount required to reimburse the First Defendant for the actual costs it incurred as a consequence of the Contractor's Personnel performing Work under the Contract; and*
- (b) *thereby, in breach of Contract, provided a fee or profit to the First Defendant (**Labour Rates Profit**).*

5 This allegation is the subject of particulars set out in the pleading, which identify the total actual costs incurred by Fluor Australia as a consequence of the Contractor's Personnel performing the Work under the Contract, and the total amounts claimed by Fluor Australia, using the hourly rates set out in Table 5.2, and paid by Santos for the performance of the Work under the Contract by the Contractor's Personnel. In the particulars, the total Labour Rates Profit is identified as being the difference between those two other amounts.

10 In the current defence, the Fluor parties deny paragraph 276 of the statement of claim. They then set out what they describe as a direct explanation for their belief that the allegations in paragraph 276 are untrue. Their explanation relies in part on matters pleaded elsewhere in the defence, but also includes the following:

15 *The amounts alleged in the particulars to paragraph 276 are based on direct labour costs only and do not account for all costs incurred as a consequence of the Contractor's Personnel performing Work under the Contract, including the following costs:*

- 20 (i) project level overhead costs; and
(ii) corporate, general and administrative overheads;

25 The allegations in paragraph 283 to 285 of the statement of claim are part of an alternative claim to recover damages or compensation for misleading and deceptive conduct. The import of those allegations is that Fluor Australia included the hourly rates in table 5.2 on the basis of calculations that included an amount on account of profit; and that Fluor Australia represented that the agreed hourly rate set out in that table did not include any amount on account of profit; so that the representation was misleading or deceptive or likely to mislead or deceive.

30 In support of its application, Santos filed and read a number of affidavits and other documents that had been filed in the proceeding. One of those persons who gave evidence by affidavit was Matthew James Fehon, who is a partner in the firm McGrathNicol. He has been engaged by the solicitors for Santos to act as an independent expert in relation to the proceedings. Mr Fehon gave evidence that he had analysed a document referred to as CJI3, which had been produced by Fluor Australia, pursuant to an order made by consent in other proceedings in this Court. Mr Fehon had identified a "variance" between the amounts recorded in that document as payments made or costs incurred by Fluor Australia in respect of Contractor's Personnel, and the amount that had been paid by Santos to Fluor Australia for Contractor's Personnel services, pursuant to the Contract.

45 Mr Fehon's evidence is that in order for him to "properly test and understand" whether that variance "is contained within the labour rates in Table 5.2," and if so, how much of it is attributed to those rates, he requires data for all employees who worked on the project – from the HR module of the SAP program used by Fluor Australia and its related entities. With the benefit of such information, Mr Fehon says, he would be able to examine if the rate that has been applied in the CJI3 database is accurately reported in the costs that Santos has paid. Mr Fehon says that

he also requires working documents from the Fluor parties, including an extract from SAP, in order to assist him in understanding “if there is profit in the labour rates” and also “if the amounts are overheads as the defendants contend.”

5 To date, disclosure of documents in the proceedings has been made pursuant to an
order of the Court and a document management plan and a document management
protocol. As Mr Stewart pointed out, none of these documents operate in a way that
prevents the Court making an order requiring the disclosure of other or further
documents. However, the effect of the order and the document plan and document
10 management protocol is that the parties have been engaged in a process of disclosing
documents that has been the subject of negotiation and agreement. The order and the
plan and protocol are consistent with the contemporary pattern of large-scale
litigation in this and other courts where serious efforts have been made to reduce the
oppression and expense of the observed trend towards voluminous disclosure or
15 discovery. Those matters are relevant to an assessment today of what is required by
the interests of justice in respect of this application for disclosure of further
documents.

20 In the course of oral submissions, the somewhat unusual nature of paragraph 276 of
the statement of claim and the particulars has been explained to the court. The
particulars, on their face, are not particulars of the matters alleged in paragraph
276(a) or, it seems to me strictly speaking, those in 276(b). The particulars provided
put the Fluor parties on notice of the way in which Santos has formulated its claim in
respect of the Labour Rates Profit.

25 In short, Santos says that having examined the data in document CJI3 produced by
Fluor Australia in the other proceeding, on an assumption that it contained all of the
cost information related to the Contractor’s Personnel who performed Work under
the Contract, Santos (or those who advise it) have identified a difference between
30 that total amount of costs and the total amount claimed by Fluor Australia and paid
by Santos for the Work under the Contract performed by the Contractor’s Personnel.
(Mr Fehon calls this the “variance”.) Santos seeks to draw an inference from that
difference, the inference being that the rates set out in Table 5.2 of schedule 3.1 of
the Contract exceeded the amounts required to reimburse Fluor Australia for its
35 actual costs and, thereby, provided a fee or profit to Fluor Australia.

40 As Mr Fehon makes clear in his affidavit, he requires access to the documents sought
in order to form a view as to whether that allegation – by which I mean the
substantive allegation that the hourly rates set out in table 5.2 exceeded the amount
required to reimburse Fluor Australia its costs – is correct or not. The allegations of
misleading and deceptive conduct are related to that in the sense that, I apprehend,
Santos relies upon the implicit allegation that the rates in Table 5.2 were more than
the amount required to reimburse Fluor Australia’s costs as the basis for contending
45 that the table itself is or is part of a misleading and deceptive representation by Fluor
Australia.

In other words, Santos seeks disclosure of these documents under paragraph 1 of the application in order to determine whether its claim is correct or not. And as presently advised by Mr Fehon, Santos does not know whether the claim made in paragraph 276 (and the associated claim of misleading and deceptive conduct) is correct or not. I accept the submissions put by Mr Stewart on behalf of Santos that with the benefit of advice, Santos considered it was able to plead this claim because it drew the inference from its examination of the data in the document referred to as CJI3. However, it is clear that today's application is really an application to seek disclosure of documents in order to test whether the substantive allegation can be made out or not. That is another important consideration in determining whether the interests of justice require an order of the kind sought by Santos.

Mr Stewart put the argument in respect of the Defence as an alternative basis, I suppose, or perhaps as the main basis for seeking disclosure of these documents. Mr Stewart contended that, by their defence, the Fluor parties had raised a positive case that the amounts alleged by Santos in their particulars to paragraph 276 did not include identified overhead costs incurred by Fluor Australia. Mr Stewart submitted that because of that positive allegation it was in the interests of justice for the Fluor parties to be required to produce the documents relevant to that allegation. For completeness, I should note that in its amended reply Santos has joined issue with the denials made by the Fluor parties in paragraph 276 of their defence.

In my view, on a proper analysis of the statement of claim, the defence and the reply, it is clear that the only substantive issue is whether the hourly rates in Table 5.2 of schedule 3 of the Contract include an amount in excess of that required by Fluor Australia to cover its costs and therefore entitle Fluor Australia to some fee or profit.

The matters set out by Santos in its particulars are, no doubt, helpful to the defendants in obtaining an understanding of the case they have to meet. They are, however, particulars and they indicate more a means by which Santos would seek to prove its substantive allegations rather than separate allegations. The Fluor parties' defence is properly understood as a denial of the substantive allegations by Santos.

The direct explanation provided by the Fluor parties for their belief that that substantive allegations are untrue includes matters that address directly the particulars sent out by Santos in its statement of claim. That controversy is incidental to the substantive allegation rather than a substantive allegation itself. In any event, the denial by the Fluor parties does not, in my view, amount to the allegation of some positive case in respect of the substantive allegations. As much is indicated by Santos in its amended reply where it simply joins issue with the denials made in paragraph 276 of the defence.

Even if a proper reading of the defence was that the Fluor parties positively alleged that document CJI3 did not contain the identified overheads, I would still remain of the view that the interests of justice do not require disclosure orders in the terms sought by Santos in paragraph 1 of its application.

This is because in this particular proceeding the otherwise overwhelming burden in respect of the management of documents and obligations of disclosure have been modified by an order, a plan and a protocol to address what have been described as the oppressive and expensive nature of unmodified disclosure obligations. The evidence of Mr Cooper on behalf of the Fluor parties is that the Fluor parties have complied with the obligations under the orders, the plan and the protocol and that the Fluor parties have gone further than is required by those instruments in making additional searches and producing other documents which would assist Santos in understanding the defence raised by the Fluor parties.

I am not satisfied that the interests of justice require orders of the kind set out in paragraph 1 of the application, which would place a considerable additional burden on the Fluor parties. Santos is in a position not unlike a party contemplating litigation who has reason to suspect it may have a claim against another and seeks the assistance of the court in order to obtain access to documents which will confirm (or not) whether the party has a good claim. Once the basis upon which Santos infers or suspects that it has a claim of this kind is understood, one readily sees that the exercise of seeking disclosure of the documents sought in paragraph 1 of the application, might be accurately characterised as a “fishing expedition”.

The less expansive disclosure order sought in paragraph 2 of the application is made pursuant to rule 222. Santos seeks an order that the Fluor parties disclose documents that record or reveal the calculation or build-up of the hourly labour cost rates contained in the CJI3 database, including specifically the Fluor HR module for all Fluor personnel. Santos contends that these documents have been referred to in a witness statement of a witness Fluor Australia proposes to call. That statement has been exhibited to an affidavit sworn by another person, and the affidavit has been filed in this proceeding. It is sufficient to dispose of this part of the application to note that rule 222 does not require a party to produce a document referred to in a document that is exhibited to an affidavit.

The other application before the court is that brought by the Fluor parties seeking an order that Santos provide further and better particulars of the calculation which is set out in the particulars to paragraph 276 of the statement of claim. The particulars sought are those that would specify:

The nature and quantum of each item used in calculating the alleged total actual costs.

The basis for this application is in evidence, from those advising the Fluor parties, that they have been unable to reconcile the figures given in those particulars with the documents setting out various payments made by Santos to Fluor Australia. It appears that a considerable period of time has been spent by an expert advising the Fluor parties in seeking to reconcile these amounts. The exercise has been unsatisfactory.

As Santos points out in its written submissions, the calculations set out in the particulars to paragraph 276 are very likely to be amended, as the exercise of preparing and finalising evidence that Santos would rely upon in a trial reaches finality. That is expected to occur within a few weeks. It is commonly the case, in proceedings where disputes of this kind arise and where the need to undertake an analysis of documents and information in order to conclude what payments were made and what costs were incurred for what purpose, that particulars provided in a pleading are the subject of amendment or adjustment as that evidence is finalised.

In my view, it would be of little assistance at present to require Santos to provide the further and better particulars sought, because whatever particulars might be provided by Santos at this time are likely to be the subject of some adjustment as the matter approaches a hearing. The explanation provided by Santos, in its submissions and in its supporting material for the disclosure application, explains fulsomely the basis upon which Santos makes its claim in paragraph 276 of the statement of claim. Whatever irritation might be suffered by those advising the Fluor parties about precise figures set out in the particulars, in my view, sufficient is presently known to allow the Fluor parties to continue with the preparation of their case in respect of the hearing.

When the evidence that Santos proposes to rely upon, in respect of this part of its claim, is finalised and filed or delivered in accordance with the directions that have been made, then it may well be appropriate for orders to be made – hopefully, by consent – which authorise the parties to bring their pleaded cases into closer alignment with the evidence that they would propose to rely upon at a hearing. For that reason, the relief sought by the Fluor parties for further and better particulars is not appropriate at this time.

I am, therefore, of the view that the orders that should be made today are that the application by Santos for further disclosure, filed on 15 June 2020, should be dismissed, and the application for further particulars, filed by the Fluor parties on 15 June 2020, should be adjourned to a date to be fixed.

...

HIS HONOUR: Well, I will order that the plaintiff pay the defendants' costs of the application filed on behalf of the plaintiff on 15 June 2020, and I will order that the costs of the application filed on behalf of the defendants on 15 June 2020 be reserved.

MR O'SULLIVAN: Thank you, your Honour.

HIS HONOUR: Can I thank you both for your submissions. Particularly, I appreciated the written submissions. They enlightened me about the issues and, within what are very large and, at some points, ungainly documents, they directed me to the vital points. So thank you very much for that. We will adjourn the Court.

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