SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor* [2011] QSC 345
PARTIES:	**THIESS PTY LTD** **ABN 87 010 221 486** (applicant) **v** **WARREN BROTHERS EARTHMOVING PTY LTD** **ABN 45 107 002 997** (first respondent) **RICS DISPUTE RESOLUTION SERVICES** **ABN 18 089 873 067** (second respondent)
FILE NO:	BS 2486 of 2011
DIVISION:	Trial
PROCEEDING:	Civil
DELIVERED ON:	2 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2011, further submissions 7 November 2011
JUDGE:	Fryberg J
ORDERS:	**1. Application dismissed;** **2. The amount paid into Court by the applicant of $213,868.78 (plus accretions thereon) be released to the first respondent;** **3. The applicant pay the first resondent's costs of and incidental to the application, including reserved costs, on a standard basis to be assessed; and** **4. The parties have liberty to apply.**
CATCHWORDS:	Contracts – Building, engineering and related contracts – Remuneration – Statutory regulation of entitlement to and recovery of progress payments – Adjudication of payment claims – Generally – "construction contract" – Open cut mine – Construction of dams and drains, and stripping, hauling, excavating and storing topsoil, and clearing and grubbing – Trimming and scaling batters and walls, clearing excavated material, assisting bulldozers, and cleaning the interface between the overburden and coal seam – *Building and Construction Industry Payments Act 2004* (Qld), s 10 Words and phrases – "mineral".

Building and Construction Industry Payments Act 2004 (Qld) s 7, s 8, s 10, s 11
Environmental Protection Act 1994 (Qld) Ch 5
Mineral Resources Act 1989 (Qld) s 270A (repealed)

Commissioner of Taxation v Sherritt Gordon Mines Ltd [1977] HCA 48; (1977) 137 CLR 612, cited
Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd and Ors [2005] NSWCA 228; (2005) 63 NSWLR 385, cited
McCann v Butcher [1917] HCA 49; (1917) 23 CLR 422, cited
New South Wales Associated Blue-Metal Quarries Ltd v Commissioner of Taxation [1956] HCA 80; (1956) 94 CLR 509, cited
Peter's of Kensington v Seersucker Pty Ltd [2008] NSWSC 897, followed
Smith v Coastivity Pty Ltd [2008] NSWSC 313, cited

COUNSEL: J Bond SC and A Fraser for the applicant
S Couper QC for the first respondent

SOLICITORS: Thomsons Lawyers for the applicant
Mooloolaba Law for the first respondent

[1] **FRYBERG J:** It is well known that the Bowen Basin in central Queensland contains vast resources of coal and a number of open cut coal mines. Two of the mines are called Lake Vermont and Burton; associated with the latter is one called Bullock Creek. All have been (and are) operated by the applicant, Thiess, pursuant to contracts with the respective mine owners. As part of its mining operations Thiess enters into subcontracts. This case concerns three such subcontracts, one in respect of the Burton/Bullock Creek mines and the other two in respect of the Lake Vermont mine. All three subcontracts were made between Thiess and the respondent, Warren.

[2] The issue broadly stated is whether and to what extent if any the *Building and Construction Industry Payments Act 2004* ("the Act") applies to the subcontracts. The object of that Act is:

> **"7 Object of Act**
> The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—
> (a) undertakes to carry out construction work under a construction contract; or
> (b) undertakes to supply related goods and services under a construction contract."

That object is to be achieved by granting an entitlement to progress payments whether or not the relevant contract makes provision for them and by establishing a

procedure for their recovery.[1] Part of that procedure involves the adjudication of payment claims by an independent adjudicator. It is common ground that an adjudicator has jurisdiction only if the contract in question is a construction contract within the meaning of the Act.

[3] In the present case Warren made claims for payment in respect of each contract purportedly under the Act. Disputes arose about those claims; the disputes were decided by an adjudicator[2]; and in each case the decision was in Warren's favour. Thiess applied to this court for declarations that the adjudication decisions were void and for an injunction restraining Warren from seeking adjudication certificates in respect of them. Upon payment into court of a sum equal to the adjudicated amounts, the adjudicator's fees and interest, it obtained an interlocutory injunction in those terms by consent.

[4] Thiess now seeks final relief. It submits that the adjudicator had no jurisdiction because the contracts in question were not construction contracts within the meaning of the Act. That submission failed before the adjudicator, but it is common ground that this does not inhibit the right to seek relief in this court.

[5] As Mr Bond SC submitted, the focus of the definition of construction contract is on the undertaking, not the work actually carried out. Evidence of the latter will, however, often be relevant in identifying what work was the subject of the undertaking. In the present case it was common ground that it was relevant for this purpose also to have regard to the head contract. The latter forms a convenient starting point.

THE BURTON MINE

The head contract

[6] The contract for the operation of the Burton mine was made between Thiess and Burton Coal Pty Ltd as agent for the mine owners. As might be expected it was a lengthy and detailed document. It was dated 21 December 1997, but there were amendments over later years as the scope of work expanded. The nature of the contract was described in the general conditions thus:

> "(a) The Contractor undertakes, in accordance with this Contract, to conduct an open pit mining operation known as the Burton Coal Project for the Contract Sums.
>
> (b) This Contract is co-ordinate with the Infrastructure Development Contract and the Infrastructure Expansion Contract between the Principal and the Contractor executed on even date herewith pursuant to which the Contractor will undertake the design and construction of all-expansion infrastructure works necessary to permit the conduct of the open pit mining operation known as the Burton Coal Project."

The works originally involved continuing the operation of three existing pits, Burton, Ellensfield and Wallanbah, and the opening of a new pit, Plumtree. By the

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1 Section 8.

2 The adjudicator was made a party to the proceedings, but played no active part in them. Neither party now seeks any order against it.

time the facts giving rise to the present case occurred, they involved the expansion of the Plumtree pit. The expansion involved new areas of strip mining and extension of the terrace mine, both downwards and outwards[3], and work on the nearby Bullock Creek pit.

[7] The contract specification began with an overview of the project. It suffices for present purposes to quote some extracts from that overview:

> "The Works are to be carried out at the Burton Coal Project situated approximately 120km south west of Mackay, Queensland in the Shire of Nebo.
>
> The Contractor will do all things necessary to achieve this specification, in accordance with the relevant Acts and Regulations, and complying with safe, good and best work practice, Plan of Operations, EMOS, ML conditions and Landowner Agreements to achieve 5 Mt/a rate of ROM and product to specification in accordance with the Mine Plan and Production Schedule.
>
> ...
>
> The Contractor shall provide all necessary expertise, equipment and labour required to operate the Principal's Infrastructure so as to produce and process 5 Mt/a ROM coal and approximately 150,000t/a of oxidised coal into the products required for the Principal's marketing program during the currency of this Contract. This includes all in-put drilling and testing, planning and design, mining, haulage of coal, coal processing, coal handling, coal blending, trainloading and all associated support activities which are required to provide a complete continuous operational activity in a safe manner and under the conditions specified under the Mining Lease Environmental Management and Overview Strategy ('EMOA'), Plan of Operations, Landowner Agreements and Railfreight Agreements.
>
> ...
>
> The mining will take place in two stages:
>
> **Stage 1** includes the extension of the open cut to nominally 110 metres deep (to top of coal) with excess overburden waste generally being placed in waste dumps located adjacent to the pit as set out in clause 6.11. The initial excess overburden was removed during the transition of the existing 80m depth to the agreed depth of 110m which is in excess of the current 80m pit steady state design quantities shall be referred to as 'capitalised waste'. This material and this material alone will be paid for in accordance with **Schedule 4 clause 2.(i)(a)**. Any subsequent increase or decrease in waste movement associated with the changing depth of the pit will be included in the appropriate mining schedule and paid at the agreed RPT associated with that schedule.
>
> **Stage 2** includes the removal of overburden waste, the mining of the underlying coal deposit and the haulage and placement of the waste into previously mined areas of the pit in order to progressively rehabilitate the area for a post mine land use of grazing.
>
> Excavated coal will be hauled to the coal preparation area where it will be dumped directly into the crusher hopper when possible, or

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3 Specification, Section 5.2.2.

> alternatively, placed in stockpiles on a ROM pad adjacent to the primary crusher. After crushing and washing the coking, thermal and other coal products will be transported via a haulroad to the Mallawa Siding where it will be stockpiled, blended and loaded onto trains for railing (by QR) to Dalrymple Bay for export or other destinations as required by the Principal."

The mining method required by the specification made Thiess responsible for clearing and topsoil removal.[4] It also made Thiess responsible for handling groundwater[5] and for planned rehabilitation of the area.[6]

[8] The owners were obliged to pay Thiess in accordance with sch 4 of the specification. That schedule applied to the whole Thiess operation. Annexure A to the schedule set out revised rates of payment as at April 2007 for each of the four locations named above. Broadly speaking, the work was divided into three payment classes: overburden, pit infrastructure and tonnage (of coal).

[9] In the case of the Plumtree expansion, pit infrastructure relevantly included work of three types:

- clearing and grubbing;
- topsoil removal to out-of-pit stockpiles; and
- interim drainage construction.

That applied to the new strip mining. For the terrace mine, topsoil removal was to be paid at the same rate as overburden removal.

[10] I turn to some other particular provisions of the specification which threw light on the nature of the relevant or potentially relevant part of the work.

Clearing and grubbing

[11] Section 6.20 of the specification provided:

> "Where necessary clearing and grubbing shall be carried out in all areas to be worked. Where appropriate light vegetation shall be crushed (by dozer truck or similar) and mixed with stripped topsoil to facilitate reseeding."

This was modified by section 6.46.2:

> "Clearing and grubbing shall be carried out to all areas to be disturbed as defined by the footprint shown on Plan Plu-ext-min-001 'Plumtree Extension Mining Block Layout'.
>
> All timber shall be windrowed and burnt unless necessary for habitat preservation."

That plan is not in evidence, but the wide expression "areas to be disturbed" suggests that clearing was to be carried out for purposes other than simply exposing coal seams. I infer that areas intended for use as roads, stockpiles, dams and drains were to be cleared, and it might also have been necessary to clear areas for site offices, vehicle parks and even accommodation.

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4 Section 6.46.

5 Section 6.15.

6 Section 6.46.9.

[12] Thiess was also responsible for compliance with condition L11 of the Environment Authority in accordance with the following table:

EA CONDITIONS		CONTRACTOR OBLIGATION	PRINCIPAL OBLIGATION
L11	Cleared vegetation from the site must be managed in accordance with the following hierarchy:		
a)	reuse, eg. use of logs and tree stumps as shelter for fauna in rehabilitated areas;	**Yes**. Contractor to salvage timber for re-distribution on rehabilitated areas wherever practical to do so.	**No.**
b)	recycle, eg mulching of vegetation and use in rehabilitation on the site; and	**Yes.** Contractor to review potential costs of mulching for sizeable areas of clearing.	**Yes.** Principal may request the contractor to carry this out as a variation.
c)	other alternative management options implemented in a way that causes the least amount of environmental harm.	**Yes.** Alternatives include stockpiling around perimeter of excavations with internal areas to be windrowed and burnt, and the potential for commercial salvage.	**No.**

Dams and drains

[13] Under section 6.15 of the specification, Thiess was solely responsible "for preventing the inflow of any storm or runoff water from entering the pit". That section further provided that all pit water would form part of the dirty water management system and that Thiess should ensure that it was handled in accordance with the project EMOS.[7] Thiess was responsible for transferring dirty water back to the system where it was to be available for use in the wash plant. Some more specific provision was made by section 6.19.5:

> "Bunds will be required to divert rainwater runoff from the east of the mine around working pit areas. These bunds, which may include water storage dams, will be constructed to a design approved where necessary by the DPI Water Resources. The bunds and associated works shall be rehabilitated in conjunction with the pit rehabilitation."

Topsoil stripping

[14] Section 6.21 of the specification provided:

> "Topsoil shall be stripped to a depth generally between 0.2 and 0.5 metres from all areas to be worked. The required depth at each

[7] Environmental Management Operation Strategy under s 270A (now repealed) of the *Mineral Resources Act 1989*. Later amendments referred to the Environmental Authority (EA) described in para [14].

> location will depend on soil and subsoil conditions and will be as approved in the Plan of Operations."

Thiess was made responsible for compliance with condition L9 of the Environmental Authority issued under ch 5 of the *Environmental Protection Act 1994*.[8] That condition provided that topsoil resources suitable for use in rehabilitation must be salvaged ahead of mining disturbance for strategic use in rehabilitation of the mine area. Thiess was also responsible for the rehabilitation. Section 6.46.3 provided:

> "Topsoil shall be removed from the pit area, disturbed infrastructure areas and from the out of pit dump footprint as detailed on Plan Plu-ext-min-001 'Plumtree Extension Mining Block Layout' to a depth consistent with local topsoil horizons (approximately 200 to 300mm) as determined from advance topsoil mapping. Topsoil shall be stockpiled at the various locations to minimise haul distances. Stockpiles shall be constructed in accordance with good mining practice and in compliance with the applicant EA ('EA' means the Environmental Authority applicable to the Plumtree Pit).
>
> The Contractor shall leave any surplus stripped topsoil on completion of its rehabilitation obligations as set out herein in stockpiles (suitably shaped) for the later use by the Principal to rehabilitate those areas that the Contractor is not required to rehabilitate."

Rehabilitation

[15] That rehabilitation obligation was expressed in section 6.46.9. Under that provision Thiess was obliged to carry out rehabilitation to areas shown on a certain plan. The section also provided (among other things):

> "**6.46.9 Rehabilitation**
>
> The out of pit dump batters shall be rehabilitated by the construction of perimeter contour banks at nominally 50 metre slope spacing discharging into rock lined down drains at approximately 250 to 300 metre centres.
>
> Topsoil shall be respread on all out of pit dump slopes (after profiling to 1 in 6 grade) and the out of pit dump upper surface. Topsoil shall be spread to a minimum thickness of 200mm or such other depths as may be determined from results of topsoil quality surveys.
>
> ...
>
> The Contractor may subject to satisfying the abovementioned provision progressively relinquish back to the Principal completed areas of rehabilitated landforms."

[16] The specification detailed how this was to be done:

> "Once the landform and drainage structures have been constructed, topsoil is picked up from surrounding topsoil stockpiles and applied to all surfaces at a minimum depth of 200mm, (and no deeper than 300mm). Topsoil will be applied evenly and overspread the shoulders of the rock lined structures.

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8 Attachment 3.

> The topsoil management plan is then to be updated showing the reduction or removal of stockpiles as the final quantity applied to the landform.
>
> The landform is then continuously contour deep ripped to a minimum of 500mm on the contour avoiding the created drainage banks. Dozers will not track across rock lined structures, but will contour rip the surface between the structures."

[17] It also provided:

> "Rehabilitation shall follow closely behind the advancing pit with only sufficient room for the advancing dump to be worked in front of the advancing rehabilitation.
>
> The final ground surface will be profiled for suitable drainage."

The subcontract

[18] Thiess subcontracted part of the work involved in performing its responsibilities to Warren. The subcontract was a standard form document provided by Thiess, which owned the copyright in it. It was named "BULLOCK CREEK DAMS AND DRAINS/PLUMTREE SOUTH CLEAR GRUB, TOPSOIL STRIPPING AND DAMS AND DRAINS". It was dated 10 June 2010. It was a schedule of rates contract. It obliged Warren to commence and perform "the work under the Subcontract".[9] That expression was defined to mean "the work which the Subcontractor is or may be required to execute under the subcontract". The definition included variations. Thiess was authorised at any time to direct Warren to perform additional work[10], and if that direction expressly stated that it was given in accordance with the variations clause, it constituted a variation to the work under the subcontract.[11] Warren was bound to carry out such variations as if they were part of the work under the subcontract originally included in it.[12] Work was required to commence on 1 June 2010 or as agreed by the parties and substantial completion was required by 31 May 2011.

[19] The work originally included in the subcontract was shown in sch 1 against the heading "General description of the Services to be performed" as "Bullock Creek Dams and Drains/Plumtree South Clear Grub, Topsoil Stripping and Dams and Drains at Thiess Burton Coal Project".[13] The scope of that work was indicated in more detail in tabular and diagrammatic form in sch 2, where provisional quantities were set out. Areas to be cleared and grubbed were categorised as Heavily Timbered and Lightly Timbered. Topsoil stripping was to take place over 10 identified blocks. The volume of material to be excavated was small compared to the total amount of excavation which Thiess had to perform, even where it consisted of clearing and removing topsoil from above the coal seam, as the following photograph demonstrates:

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9 Clause 9.

10 Clause 14.2.4.

11 Clause 14.3.

12 Clause 14.4.

13 Schedule 1, item 1.

Eight thousand lineal meters of drain were to be constructed at Plumtree South, and three dirty water drains and three clean water diversion drains were to be constructed at Bullock Creek. An idea of the length and size of the drains can be gained from these photographs of clean and dirty water drains respectively:

At least one dam was to be constructed at Plumtree South and two (a dirty water dam and a sediment dam) at Bullock Creek. The dirty water dam is depicted below:

The case was conducted on the basis that the work under the subcontract was part of the work which Thiess undertook to perform for the owners.[14] I find that it was a relatively small part of that work.

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14 The subcontract described the Principal as Peabody Energy Australia Coal Pty Ltd, not the original owners who were parties to the head contract. No point arose about that.

[20] A further indication of the nature of the work is found in the notes to the provisional quantities in the schedule. They stated:

> "Clear and Grub Notes:
> 1. All material is to be stockpiled in a pile suitable for burning.
> 2. Timber sizing varies from Saplings to well establish Timber.
>
> Topsoil Stripping Notes:
> 1. Topsoil will be required to be stripped from undisturbed ground (insitu) and previously rehabilitated areas (quantities provided below)
> 2. Topsoil stripped from undisturbed ground is assumed to be stripped to 300mm.
> 3. Payment for Topsoil stripping will be as measured in Loose Cubic Metres in stockpiles.
> 4. Topsoil stockpiles will be required to be stockpiled to a maximum height of 3m.
> 5. Topsoil stockpiles to be shaped to minimise erosion.
>
> Dams & Drains Notes:
> 1. Dam pricing to include compaction to required standard
> 2. Drains will be of a suitable width for excavation by scrapers."

[21] Schedule 2 also set out the rates for each task. For "Clear, Grub and Stockpile", two rates were prescribed: one for lightly timbered areas and the other for heavily timbered areas. For "Strip Topsoil", four rates were prescribed depending upon the length of haul to the stockpile. The haul distances were expressed in 500m increments up to 2 km. Rates for "Construction of Drains" were divided into two classes. The first covered hauling material to stockpile; the second hauling to a compacted embankment. Three rates were prescribed in each class depending on haul lengths in increments of 500m up to 1.5 km. Rates for hauling to embankments were the higher, presumably to cover the cost of compaction. "Construction of Dams" was divided into the same two classes and the same rates were provided as for the drains.

[22] The schedule also included rates for a task not originally included in the subcontract. This rate was called "Place Topsoil". This evidently referred to moving topsoil from the stockpile to areas to be rehabilitated, and placing it in those areas. Four rates were prescribed, depending upon the length of haul to the rehabilitation area. Plainly Warren was required to do this work if given a variation order under the subcontract.

[23] Lastly the schedule provided hourly hire and standby rates for Warren's equipment, if required. That equipment comprised scrapers, bulldozers, a grater, an excavator, a loader, a compactor and a water truck. It did not include dragline or any other equipment of the size appropriate for digging out or transporting coal.

[24] Understanding the nature of the work described in the subcontract is also assisted by the uncontradicted evidence of Mr Mallan, Project Manager for Thiess:

> "8. I observed that approximately 65% of the works performed under the Subcontract related to the stripping of top soil and scrub with WBE's scrapers and dozers. Those scrapers and dozers stocked the topsoil for later rehabilitation of the mine.

9. The stripping of top soil and scrub is the first part of the coal mining process. That process is followed by removal of overburden which covers the coal seam, which continues to be carried out by Thiess on Site. The stripping of the top soil and scrub, and the removal of the overburden which covers the coal, are a necessary and integral part of accessing the coal seam for the purpose of extracting coal.

10. Further the remainder of the works performed under the Subcontract related to the implementation of water protection measures such as drain channels and embankments on the edge of the coal mine pit, and the excavation of topsoil and earth for a brown water dam.

...

12. The purpose of the drain channels and embankments is to prevent water ingress into the pit that would obstruct the mining operations. If water entered the pit, it would prevent the ongoing operations of the coal extraction process as the plant that was clearing the overburden and extracting the coal would not be able to enter the flooded areas in the pit.

13. The purpose of the water management activities is also to protect the environment as required by the relevant environmental legislation. The water management activities minimised the clean water infiltrating the pit and become contaminated, which would then require the mine affected water to be pumped out from the pit, and to prevent the mine affected water runoff into clean water catchments."

[25] Thiess did not dispute that Warren had undertaken to carry out the foregoing work. The issue was whether any of that work was construction work under s 10 of the Act. The answer depends upon whether the work fell under s 10(1), and if it did, whether it was excluded by the operation of s 10(3).

The legislation

[26] Under the Act, "construction contract" relevantly means a contract, agreement or other arrangement under which one party undertakes (among other things) to carry out "construction work" for another party. Construction work is extensively defined. So far as is relevant, the Act provides:

"**10 Meaning of construction work**

(1) Construction work means any of the following work—

(a) … ;

(b) the construction … of any works forming, or to form, part of land, including walls, … and installations for land drainage …;

…

(e) any operation that forms an integral part of, or is preparatory to … work of the kind referred to in paragraph (a), (b) or (c), including—

(i) site clearance, earthmoving, excavation, tunnelling and boring;

…

(v) site restoration …;

…

(3) Despite subsections (1) and (2), ***construction work*** does not include any of the following work—

(a) the drilling for, or extraction of, oil or natural gas;

(b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose."

[27] Thiess submitted that the work which Warren undertook to carry out under the subcontract was not covered by sub-s (1), and (alternatively) that if it was covered, the work was the extraction of minerals within the meaning of sub-s (3)(b). On each point Warren submitted the opposite. It is therefore necessary to identify precisely what work Warren undertook to carry out.

Section 10(1)

[28] "Works to form part of land" is evidently a phrase of wide meaning. In my judgment it plainly encompasses the future construction of a dam or a drain. Thiess did not argue that a dam or a drain would not be works in the ordinary sense of the word. It submitted that the words "forming or to form part of land" were intended to indicate that the works must be something added to the land or intended to be added to the land, not merely a channel through it or a hole in it. I reject that submission. Building a dam or a drain does add something to land. Dams and drains are in my judgment works and when constructed they form part of the land on which they are built. They are just as much works as are bund walls and gravel roads, which are expressly included in the class of works covered by the statute.

[29] I add that in any event, it appears that the dams in question in this case were formed by constructing raised embankments, not by digging holes.

[30] Stripping and hauling topsoil to stockpile does not fit so readily into that definition. On the other hand hauling topsoil from the stockpile and spreading it to a depth of a few hundred millimetres in order to rehabilitate the land does; the specification mandates aspects of how it is to be done and it produces a result affecting the land form. Indeed, site restoration is explicitly mentioned in para (e)(v). That being so, stripping and hauling the topsoil to the stockpile is at least preparatory to its spreading as part of that process. It is therefore covered by para (e)(i).

[31] Thiess submitted that to fall within para (b) works should be intended to be permanent. I reject that submission. There is nothing in the section to support it, and such a construction would make the section unworkable. It would be difficult to give a sensible meaning to permanent in this context.

[32] That leaves the work of clearing and grubbing. As the head contract showed, environmental considerations were relevant to this work also. The evidence does not permit a finding of how much clearing was necessary to enable the construction of dams, drains, roads, stockpiles, et cetera compared to how much was for the purpose of digging down to the coal. However there is no indication in s 10 that such fine distinctions are required. Site clearance is explicitly included in para (e)(i) and nothing in the section suggests that it is necessary to differentiate among locations within the site. This section should be given a practical interpretation which will minimise potential areas of dispute. On that approach, I am satisfied that

the work of clearing and grubbing was construction work within the meaning of s 10(1).

Section 10(3)

Is coal a "mineral"?

[33] It was common ground between the parties that the meaning to be given to the term mineral is controlled by the context and subject matter. Warren submitted that the starting point was that a mineral is generally an inorganic substance. That seems to accord with the usage of the term in geology.

[34] It further submitted that if mineral had been intended to include substances of organic origin, there would have been no need for a separate identification of them in s 10(3)(a) as substances falling within the scope of the exclusion. That submission may be summarily dismissed. Geological usage also requires a mineral to have crystal form[15], which implies it must be solid. Indeed, the Oxford Dictionary of Environment and Conservation explicitly defines it as a solid. On the geologists' approach, oil and natural gas would still have to be dealt with separately.

[35] But there is no reason to think that the Act has used the word in its geological sense. This is not an Act dealing with matters geological. The context suggests the word should have an ample meaning and there is authority for rejecting the scientific meaning:

> "9. The meaning of the words 'mine' and 'mining' like the word 'minerals' is by no means fixed and is readily controlled by context and subject matter. Few words have occasioned the courts more difficulty than 'minerals' but in some degree that is because in legal instruments it is seldom, if ever, used in its accurate or scientific sense and yet the word possesses no secondary meaning at once accepted and definite."[16]

[36] The Macquarie Dictionary gives a number of meanings. The first two are:

> "**Mineral** 1. a substance obtained by mining; ore. 2. any of a class of substances occurring in nature, usually comprising inorganic substances (as quartz, feldspar, etc.) of definite chemical composition and definite crystal structure, but sometimes taken to include aggregations of these substances (more correctly called rocks) and also certain natural products of organic origin, as asphalt, coal, etc. 3. a substance neither animal nor vegetable. 4. *(usually plural)* mineral water. – *adjective.* 5. of the nature of a mineral; relating to minerals. 6. impregnated with a mineral or minerals. 7. neither animal nor vegetable; inorganic … ."

[37] The relevant definitions in the Oxford English Dictionary are:

> "a. A naturally occurring substance of neither animal nor vegetable origin; an inorganic substance. (Not now in technical use.)

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15 See Collins Dictionary of Geology, a copy of which was provided to me by counsel for Warren.

16 *New South Wales Associated Blue-Metal Quarries Ltd v Commissioner of Taxation* [1956] HCA 80; (1956) 94 CLR 509 at p 522.

> b. A substance obtained by mining; a product of the depths of the earth, *esp.* one other than a native metal. Also in *Mining*: an ore. Also *fig.* In some modern contexts not distinguishable from sense 2c.
> c. *Science*. A solid, naturally occurring, usually inorganic substance with a definite chemical composition and characteristic physical structure and properties (such as crystalline form). Cf. mineraloid n."

[38] As Mr Bond SC submitted, not even the definition in the *Mineral Resources Act 1989* uses the geological meaning. It provides its own definition, one which amply embraces coal.

[39] I accept the Thiess submission. I hold that mineral in s 10(3) of the Act includes coal.

Extraction

[40] The Oxford English Dictionary adopts Dr Johnson's meaning for its first definition of extract: "In general sense: 'To draw out of any containing body or cavity' (Johnson)." The Macquarie Dictionary is similar: "1. To draw forth or get out by force: *to extract a tooth*." The word is used in many contexts, but the general meaning seems appropriate in the present one. That seems implicit in the submissions of both sides. Warren accepted that had its work involved digging coal, that work would rightly be described as extraction of the coal. It accepted that this would remain the position even if the work involved digging other material, such as intrusions, along with coal. It submitted that these tasks were not analogous to what it did.

[41] Thiess submitted that removal of various layers of topsoil, subsoil and overburden down to the coal seam and implementation of water management measures (including the creation of drain channels, embankments and dams) to ensure that the pit does not fill with water were activities without which it would be impossible to dig the coal out of the seam. It submitted that those activities were a necessary and integral part of the coal mining process.

[42] I accept that the work performed by Warren was a necessary part of opening the coal mines. But that is not the issue. The exemption given by s 10(3)(b) is not expressed to apply to work done for the purpose of opening or as preparatory to operating a mine. The words used are much more limited than that. They focus purely on the process of extraction. In my judgment the ordinary meaning of the word, considered in isolation, does not apply to the work done by Warren.

[43] Both sides sought to gain advantage from the context of the subparagraph and the words used in and around it. Thiess referred to the words "tunnelling or boring or constructing underground works" as indicative of the fact that a broad meaning should be attributed to extraction. Warren submitted that these words were there because without them, extraction would not cover such activities. It pointed out that there was no equivalent inclusion of aboveground works such as the creation of walls or batters or dams or drains. It also submitted that extraction should be given the same meaning in subpara (b) as it bore in subpara (a). It submitted that if extraction bore the meaning for which Thiess contended, the reference to drilling in the latter subparagraph would have been unnecessary.

[44] I do not find the last submission persuasive. If, as Thiess contends, extraction includes work which is a necessary precursor to the actual removal of the thing extracted, the omission of the reference to drilling in subpara (a) would make that provision narrower than it presently is. The reason for that is that it would cease to apply to cases where the drilling was unsuccessful; in other words where no oil or gas was found. Subpara (a) is in my view neutral as regards the correct construction of extraction.

[45] There is more force in Warren's other submission. It is difficult to see how constructing underground works could ever amount to extracting in the ordinary sense of the word. The words seem intended to extend that ordinary sense. In my judgment the same must be true of the references to tunnelling and boring. Those activities might in some situations result in the extraction of mineral as an incidental consequence, but they should not be construed as limited to such situations. It is sufficient if they take place for the purpose of extraction; they need not themselves be methods of extraction. The effect of the inclusion is in my judgment to extend the meaning of extraction to activities which would not usually be within the meaning of the word. That is an old technique of statutory drafting:

> "Now, it is very plain that fixing an artificial name for the description of a thing which in common parlance does not answer to that name is a thing very commonly done, especially in Statutes. Cases are numerous in which appellations are given to things, persons and circumstances which they could not in ordinary conversation bear or be supposed to bear."[17]

[46] I accept that the presence of words of inclusion does not exclude the ordinary meaning of the defined term. In my judgment, however, that ordinary meaning is not adequate to describe the work done by Warren.

[47] In reaching that conclusion I find that the work was remote and different from the processes used to win the coal. First, in some cases, it was remote in place. Coal was never to be extracted from the land which contained the dams and drains. Second, it was remote in time. The dams and drains were built before major digging took place; they had to be in place to permit the excavation to proceed. Even where the work consisted of clearing and removing topsoil from above the coal seam, it was carried out as part of a preliminary operation. Third, the plant and machinery used by Warren was very different from the machinery used in the extraction of coal. Fourth, much of Warren's work was carried out for an intermediate purpose. The dams were built to provide water, both clean and dirty, for use around the mine and, I infer, in connection with washing coal after its extraction. The drains also served that purpose, as well as the purpose of keeping the pits dry. The topsoil was not simply removed and dumped; it was stored and relayed (or stored to be relayed) to protect the environment and to comply with the Environmental Authority. All of these collateral purposes contributed to and were probably necessary for the success of the mine. That is not enough to make the word extraction applicable to the activities carried out.

[48] Of course the terms of the contract cannot control the meaning of "extraction" in the Act. Nonetheless it is worth noting how the word was there used:

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17 *McCann v Butcher* [1917] HCA 49; (1917) 23 CLR 422 at p 424; see also *Commissioner of Taxation v Sherritt Gordon Mines Ltd* [1977] HCA 48 at [21]; (1977) 137 CLR 612 at p 623.

"**5.2.5 Detailed Schedules**

The Production Schedule will form the basis of more detailed weekly and monthly plans and production schedules which will be regularly updated and available to the Principal and will include:

- location and approximate dimension of all blocks to be mined
- detail of Coal *extraction* sequence
- estimated volume of Coal and Waste to be mined from that area
- stockpile rehandling (if required)
- sampling requirements
- blasting requirements
- preparation plant activities
- rehabilitation and environmental activities.

Subject to Schedule 4, the Principal reserves the right to initiate alterations to the Production Schedule at any time.

5.3 Open Cut Production Level

The expected total quantity, of the 'capitalised waste' referred to in section 1, to be *excavated* from the open cut extension before steady state mining can proceed is approximately 2.81 million insitu cubic metres. The Contractor shall satisfy itself as to the actual quantities involved. The total excess overburden waste is estimated at 9.0 million bank cubic metres.

The waste for the out of pit dumps will be placed in permanent out of pit spoil dumps.

The topsoil from the open cut area, and from the area under the surface dumps, will be e*xcavated* and stockpiled in accordance with EMOS provisions, for later use in rehabilitating the dumps."

"Extraction" referred to the removal of coal. Overburden and topsoil were "excavated". That is some evidence of how the words are used in the mining industry by an experienced miner.

[49] In my judgment none of the work performed by Warren was the extraction of a mineral within the meaning of s 10(3)(b) of the Act. It follows that the subcontract was a construction contract within the meaning of the Act, and therefore that the adjudicator had jurisdiction to deal with the matter.

THE LAKE VERMONT MINE

The head contract

[50] The head contract was made between Lake Vermont Resources Pty Ltd as agent for the owners and Thiess. It was undated, but expressed to commence on 9 October 2007. It was entitled Mining Operations and Maintenance Contract. It consisted of a relatively short (nine clauses) formal instrument of agreement and a set of general conditions of contract in the form AS 2124-1992. The latter included 18 schedules. Thiess was appointed as "the mine operator"[18] (apparently the mine was already in existence). It was obliged to carry out and complete the work under the contract,

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18 Formal instrument, cl 5.1.

and the principal was obliged to pay it for that work in accordance with the schedule of rates.[19] That work included:

> "all things, other than those things provided by the Principal, to operate and maintain the Lake Vermont Mine to produce and rail 4 million tonnes of product coal to the principal's specifications at a consistent production rate."[20]

[51] Schedule 1 contained a breakdown of the work under four headings. The first, mobilisation, included hire of any plant necessary to complete the works.[21] The second, site overhead and planning, included maintenance of all facilities and infrastructure provided by the Principal. The third, schedule of rates work, set out the work to be paid in accordance with the schedule of rates apart from work involved in coal operations; this was covered in the fourth schedule headed CHP P and CLO (train load out). Work in the third schedule included land clearing and grubbing within areas used as out of pit overburden dumps, topsoil stripping in these areas, recovery of topsoil and placement either in stockpile or directly onto areas prepared for rehabilitation, all surface water management including maintenance of water management structures and sediment control dams and provision, operation and maintenance of all mining and stripping equipment. It also included excavation, loading, haulage and dumping of overburden and preparation and maintenance of overburden dumps, as well as spreading and placement of overburden to form a final landform consistent with obligations in the Environmental Authority and other planning documents.

[52] Schedule 2 was the schedule of rates. For mobilisation and site establishment it provided fixed quantities and rates. It further provided for a fixed monthly charge. Then rates were provided for overburden removal, coalmining, topsoil stripping, rehabilitation, and a wrapped up rate for processing specified tonnages of coal and loading it onto trains. Day work rates for a variety of equipment, including relatively small excavators, were also included.

The subcontracts

[53] The subcontracts were entitled Plant Hire Contract – "dry hire" as it was called in argument. Each was for the hire of an excavator. One, commencing on approximately 16 February 2010, involved a Komatsu PC 1100-6 excavator and the other, commencing on 14 December 2009, a Caterpillar 330 DL. Both comprised a formal instrument of agreement and a set of general conditions of contract having five schedules in one case and four in the other. Both were standard form Thiess contracts, copyright 2009 and 2007 respectively. Their subject matter was similar and for present purposes it suffices to describe the Komatsu contract.

[54] The recitals to the formal instrument recorded that Warren was the owner of the Komatsu (the excavator and its accessories), that it had offered to hire the equipment to Thiess and to carry out maintenance services on the equipment, and that Thiess had accepted that offer. Thiess agreed to pay rent in consideration of the due and proper performance of the contract by Warren. Rent was calculated at a nominated rate "per SMU hours" with minimum hours per month nominated plus mobilisation and demobilisation costs and "excess walking rate". Commencement

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19 Formal instrument, cl 7; general conditions cl 3.1.

20 Schedule 1, cl 1.1.

21 Clause 1.4.1(j).

date of the hiring was approximately 16 February 2010 and the term of hire was seven months, subject to extensions under the contract. Thiess was entitled to terminate the contract at any time for its own convenience.[22]

[55] Warren was obliged at its cost to deliver the equipment to the Lake Vermont coal project. Thiess was obliged to supply an operator and fuel and other consumables, and was responsible for daily servicing and minor repairs. Warren was responsible for scheduled servicing and maintenance and major repairs.

[56] Clause 34.5 anticipated that Warren might suspend the whole or any part of the hire pursuant to the Act.

[57] The subcontract contained no provision relating to the purpose of the hiring. However it referred to the head contract in respect of which it imposed confidentiality obligations on Warren. I infer that both parties envisaged that it would be used for the purposes of performing Thiess's obligations under the head contract. There was no provision limiting the type of work upon which Thiess might employ the excavator.

Surrounding circumstances

[58] It was common ground between the parties that one use to which both excavators were to be put was "in connection with the carrying out of work being trimming and scaling batters and walls in the coalmine overburden and clearing away the material thus excavated, in order to access the coal seam".[23] Batters are the near-vertical faces of the stepped terraces constructed on the sides of the mine pit.

The Caterpillar contract[24]

[59] Negotiations for the hire of the Caterpillar excavator took place between Darryl Warren on behalf of Warren and Timothy Fuller on behalf of Thiess at the site office for the Lake Vermont project in November 2009. Thiess required the excavator to replace one then under hire from another company. Unknown to Mr Warren, at the time of the negotiations that excavator was loading overburden into trucks which had been hired by Warren to Thiess under another hire contract. It was also stripping the last 300 mm of waste off the top of the coal to prevent coal losses which would occur were a larger excavator to be used.

[60] Mr Fuller said to Mr Warren words to the effect, "I need to hire plant from [Warren] to replace the existing excavator currently operating on site and loading your trucks." Mr Warren replied, "I can provide plant to Thiess to replace that existing excavator." Representatives of Thiess told Mr Warren that the Caterpillar would be excavating topsoil, overburden and rock, assisting bulldozers to take excavated topsoil, overburden and rock to the paddock for removal, and building dams and drains. Being a 30 tonne machine, it was too small to dig up coal. Thiess had 500 tonne machines for that purpose.

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22 Clause 6.1 and sch 1.

23 Supplementary submissions on behalf of Thiess at [23].

24 Finding the necessary fact was not made easier in this case by the absence of any cross-examination of relevant witnesses and by Mr Warren's understandable mistaken belief about which contract Mr Fuller was referring to in his affidavit as hire contract 1 and hire contract 2.

[61] Mr Fuller deposed that the Caterpillar was used to strip the last 300 mm of waste off the top of coal to prevent coal losses by over digging with the larger excavators. Mr Warren did not work in the pit and did not see this. Mr Fuller resigned from Thiess in around April 2010 and left the site. Mr Stansfield, a successor as site manager deposed that the excavator was primarily used to strip the last 300 mm of waste off the top of the coal. However he estimated that it was also used for water management outside the pit (building dams and drains) on an ad hoc basis for about 25% of the time it was on site.

The Komatsu contract

[62] Negotiations for the hire of the Komatsu excavator took place between the same corporate representatives at the site office in February 2010. At that time another excavator, owned by Thiess, was assisting the stripping bulldozers by pulling overburden from the high wall (ie the side of the pit). A Thiess employee showed Mr Warren that activity.

[63] When Mr Warren returned to the office, Mr Fuller said words to the effect, "I need to hire plant from [Warren] to relieve the existing excavator so that it can carry out other tasks on site." Mr Warren replied with words to the effect, "I can provide plant to Thiess to relieve the existing excavator." He was told that the excavator would be pulling batters down and assisting the bulldozer to push excavated rock to the rock dump in the paddock for removal.

[64] Mr Fuller deposed that the Komatsu was used to pull the overburden from the high wall. This was an activity which occurred in the pit and again, Mr Warren did not see it. Mr Stansfield deposed that the excavator was primarily used to trim and scale batters and walls in the pit and to clean the interface between the overburden and the coal seam. However he estimated that it was used for water management outside the pit (building dams and drains) on an ad hoc basis for about 25% of the time it was on site.

The legislation

[65] Under the Act, "construction contract" relevantly means a contract, agreement or other arrangement under which one party undertakes (among other things) "to supply related goods and services to another party".[25] A reference to related goods and services includes a reference to related goods or services.[26] The issue is whether the hire contracts were construction contracts in the defined sense.

[66] Both parties assumed that "related goods and services" as used in the definition of "construction contract" bore the meaning assigned to it by s 11 of the Act. So far as is presently relevant, s 11 provides:

> "**11 Meaning of related goods and services**
>
> (1) Related goods and services, in relation to construction work, means any of the following—
>
> (a) goods of the following kind—
>
> (i) …;

25 Schedule 2, definition.

26 Section 11(2).

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work".[27]

Submissions

[67] Warren submitted that "for use in connection with" was a composite phrase concerned only with establishing a relationship in fact between the plant or materials and the carrying out of construction work. It would be sufficient to satisfy the phrase if construction work was actually carried out. Consequently a contract for the supply of plant would be a "construction contract" if it were a contract by which one party undertook to supply plant to another party and the plant was in fact used in connection with the carrying out of construction work. Warren submitted that the purpose of the Act was to make the progress payment provisions available in all cases where the plant supplied was actually used in connection with the carrying out of construction work. The purpose of the Act would be significantly impaired, it submitted, if the words "for use in connection with" required a contractual provision denoting the use. Moreover the mechanisms of the Act would not function properly if those words could be satisfied by inferring the intended scope of use at the time of entry into the contracts from potentially conflicting versions of precontract conversations. It would be anomalous, it submitted, if the words were not satisfied in a case where the plant was in fact used for carrying out construction work. The words in relation to construction work in the opening paragraph of s 11(1) were consistent with this approach.

[68] Thiess submitted that a contract for the supply of plant would be a construction contract if it were one under which one party undertook to supply the plant with the object or purpose of use in connection with the carrying out of construction work by the other party. It submitted that the object or purpose of supply pursuant to a contract was an objective construct to be determined by the court. That, it submitted, should be decided by reference to what a reasonable person in the position of the parties would conclude as to the object or purpose of the contract having regard to:

(a) what the terms of the contract provided as to what the party has actually undertaken to carry out;
(b) the surrounding circumstances known to the parties; and
(c) evidence of the genesis, background, context and market in which the parties were operating which sheds light on the purpose and object of the transaction.

[69] Both parties submitted that evidence of an un-communicated subjective purpose of one party would not be relevant

A preliminary question: "in relation to construction work" in s 11(1)

[70] Warren's submission that its interpretation is consistent with the phrase "in relation to construction work" in the opening words[28] of s 11(1) draws attention to those words. The submission gains some slight support from one sentence in the

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27 Although I have not quoted the remainder of s 11(1), I have considered it in determining the construction of the part which I have quoted.

28 The chapeau, to use the term drawn from international treaty law and practice which has become fashionable in New South Wales.

judgment of McDougall J in *Peter's of Kensington v Seersucker Pty Ltd*.[29] In that case his Honour was concerned with the supply of services under s 11(1)(b) rather than goods under para (a), but both paragraphs are governed by the opening words under discussion. His Honour said, "That concept requires the services of the kind prescribed … must be provided or performed in relation to construction work." The first difficulty with this approach, as his Honour recognised, is that it makes the words redundant:

> "Indeed, that requirement appears twice: firstly in the introductory words of s 6(1), and secondly in the words of subpara (ii) itself. Quite what was intended by this duplication I do not know."

[71] Another difficulty is that treating the words as introducing a requirement for proof of a fact is in conflict with the natural construction of the words in the context of a statutory definition. The natural meaning of the introductory paragraph is, "'related goods and services' when used in relation to 'construction work' means …". But this approach too is problematic. The expression is separately used in about 19 contexts in the Act. In 15 of those[30], the context refers to related goods and services supplied (and sometimes undertaken to be supplied) "under a construction contract" and not to related goods and services in relation to construction work. On only three occasions do the words appear in the latter context. It is difficult to see why the definition would not be applied on all occasions. Perhaps there was a perception that in the context of a reference to a construction contract, definitional circularity might be introduced. That is not a particularly convincing explanation. On one occasion, the definition of construction contract itself, neither context appears. Does that mean that the common assumption of the parties in the present case, namely that the s 11 meaning applied in that definition, was wrong?

[72] Like McDougall J, I do not know what was intended. For present purposes it suffices to say that the difficulty which surrounds the introductory words defeats their use in support of Warren's submission.

"Plant … for use in connection with"

[73] In my judgment, "for use in connection with" is not satisfied simply by proving that the plant or materials supplied were used in connection with the carrying out of construction work. Warren's submission to that effect should be rejected. "For" is a word of wide denotation. In the present context it carries a purposive meaning. It suggests that the phrase must be satisfied at the outset of the transaction, before the plant or materials are used. Evidence of the use to which plant or materials were put may support an inference as to the purpose for which they were at that time to be used, but such evidence could not satisfy the phrase without such an inference.

[74] That conclusion is supported by the manner in which "related goods and services" is used in the Act. The most important use is in the definition of construction contract, a definition which relevantly refers to a "contract, agreement or other arrangement". As noted above, in most other contexts in which the expression is used it is used to refer to related goods and services supplied under a construction contract. That suggests that the contract or arrangement will supply an important part of the evidence by which the proposed use of the plant or materials is to be identified. The

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29 [2008] NSWSC 897 at [21].

30 Sections 3(2), 4, 7, 12, 13, 14, 16, 17, 19, 20, 27, 30, 33, sch 2 "progress payment" and sch 2 "reference date".

use must be able to be identified at the time of the contract or arrangement or possibly, if the supply takes place at an earlier time, at the time of the supply.

[75] There is support for this approach. In *Smith v Coastivity Pty Ltd* the first issue was whether various types of work and the nature of project management activities fell within the expression "related goods and services". If they did not, the New South Wales equivalent of the Act did not apply to the contract between the parties. McDougall J held:

> "34 The question to be decided in relation to this issue requires attention to be focused on the obligations that are undertaken under the contract that is alleged to be a construction contract. Work in fact performed is at best of limited relevance. If it can be seen as falling within the obligations undertaken, it goes no further than the contract (although it may provide concrete examples, or demonstrations, of the obligations undertaken)."[31]

[76] Thiess submitted that the focus of the definition of construction contract was on the undertaking, not the work actually carried out, but it did not suggest that the contract or arrangement alone could determine the issue presently under consideration. The test proposed by Thiess[32] is attractive. It is unnecessary to consider whether it is capable of application in all circumstances, nor whether it is comprehensive in its ambit. It is adequate for the present case provided that the nature of the plant hired is taken into account as part of the surrounding circumstances.

[77] Another problem to which the phrase "for use in connection with" gives rise is the level of specificity with which the object or purpose for which the plant or materials are to be used must be stated. In the present case there was no express limitation in this subcontract on the use to which Thiess was entitled to put the excavators, although a limitation to use in the performance of any of Thiess's obligations under the head contract for which they were suitable might be implied. Use expressed in these terms is expressed at a considerable level of generality. A contract or arrangement is a construction contract if it contains an undertaking of the type specified in the definition of construction contract, notwithstanding that it contains other undertakings or imposes other obligations not within the definition, and claims for progress payments under the Act are not limited to payment for construction work and related goods and services.[33] A finding that the excavators were supplied for a use expressed at a wide level of generality might have surprising consequences.

[78] It is unnecessary to reach a conclusion on that point. I find that the excavators were for use in connection with the performance of any of Thiess's obligations under the head contract for which they were suitable; but I also find that they were for use in connection with construction of dams and drains; trimming and scaling batters and walls in the coalmine overburden and clearing away the material thus excavated; excavating topsoil, overburden and rock; assisting bulldozers to take excavated topsoil, overburden and rock to the paddock for removal; and cleaning the interface between the overburden and the coal seam.

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31 [2008] NSWSC 313.

32 Paragraph [68].

33 *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd and Ors* [2005] NSWCA 228 at [38]-[40], [55], [58]; (2005) 63 NSWLR 385 at pp 387, 400.

Construction work

[79] I have already held that the construction of dams and drains and excavating topsoil and removing and storing it are the carrying out of construction work within the meaning of the Act. That is sufficient to dispose of this case, for it means that the excavators were planned for use in connection with the carrying out of construction work. Consequently both subcontracts were construction contracts.

[80] In case it should matter, however, I also hold that clearing overburden by trimming and scaling batters and walls, clearing the excavated material, assisting bulldozers to remove the excavated material and cleaning the interface between the overburden and the coal seam are not the carrying out of construction work. That work does not fit within any part of s 10(1) of the Act. It can fairly be described as earthmoving or excavation, but it is not earthmoving or excavation which forms an integral part of or is preparatory to work of the kind referred to in paras (a), (b) or (c) of s 10(1).

Conclusion

[81] All of the subcontracts were construction contracts. The Act applied to them. The adjudicator had jurisdiction to determine the matters before him. Consequently the application must be dismissed with costs.

[82] I shall hear the parties as to the form of consequential orders.