SUPREME COURT OF QUEENSLAND

CITATION:	*HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & anor* [2012] QSC 4
PARTIES:	**HM HIRE PTY LTD (ACN 131 017 813)** (applicant) **v** **NATIONAL PLANT AND EQUIPMENT PTY LTD (ACN 078 654 323)** (first respondent) **PHILIP DAVENPORT** (second respondent)
FILE NO/S:	8794/11
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	31 January 2012
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	27 October 2011
JUDGE:	Douglas J
ORDER:	**Application dismissed**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where second respondent exercised jurisdiction as an adjudicator under the *Building and Construction Industry Payments Act 2004* (Qld) ("the Act") to decide that the applicant should make a progress payment to the respondent – where contract required the applicant to perform clear and grub works, topsoil stripping and placement at project site – where work actually performed was the excavation and removal of timber and topsoil from the site – whether the work carried out for which payment was sought was "construction work" – whether the work carried out fell within the exclusion under s 10(3)(b) of the Act *Building and Construction Industry Payments Act* 2004 (Qld), ss 10(1), 10(3), 12 *Mineral Resources Act* 1989 (Qld), ss 6A(1), 6A(3) *Queensland Building Services Authority Regulation* 2003 (Qld), reg 5(y)

Brian Leigh Smith v Coastivity Pty Ltd [2008] NSWSC 313 referred
Federal Commissioner of Taxation v Broken Hill Pty Co Ltd (1969) 120 CLR 240 cited
Gonzo Holdings Pty Ltd v McKie [1996] 2 Qd R 240 cited
HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd [2011] NSWSC 604 referred
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 cited
Taylor v Public Service Board (NSW) (1976) 137 CLR 208 cited
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd [2011] QSC 345 followed

COUNSEL: D O Savage SC for the applicant
M D Ambrose for the first respondent
No appearance for the second respondent

SOLICITORS: Morrow Peterson Lawyers for the applicant
Sparke Helmore Lawyers for the first respondent

[1] The issue raised by this case is whether the second respondent, Philip Davenport, was entitled to exercise his jurisdiction as an adjudicator under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act") to decide that the applicant should make a progress payment to the respondent. The particular question is whether the relevant work on a mining site in Central Queensland for which payment was sought was "construction work" as defined in s 10 of that Act. As part of that debate the question arose whether this work fell within an exclusion in s 10(3) dealing with the extraction of minerals. Mr Davenport concluded that he had jurisdiction and ordered the applicant to pay the respondent $516,586.95. In my view he acted within his jurisdiction in doing so.

Background

[2] The applicant, HM Hire Pty Ltd, is a company which provides earthmoving and other equipment for hire for use at mining sites including the Burton Coal Mine in Central Queensland. The first respondent, National Plant and Equipment Pty Ltd, ("NPE"), agreed on or about 13 September 2010 to hire four dump trucks and a wheel loader to the applicant. They were used by HM Hire to perform work pursuant to a subcontract between it and Thiess Pty Ltd dated 22 September 2010 while some of its own equipment was being reconditioned and upgraded.

[3] That contract required HM Hire to perform "Clear & Grub Works, Topsoil Stripping & Placement"[1] at the Burton Coal Project site. Clause Schedule 2.4 of the contract also referred to "Dam Construction" but no price for such work was contained in the pricing schedule and the uncontradicted evidence from HM Hire was that the work required under the contract did not include any dam construction. The failure to confirm that proposition by any evidence from Thiess was, however, criticised by the first respondent.

---

1 Ex 1, Subcontract between Thiess Pty Ltd and HM Hire Pty Ltd, 22 September 2010 clause S2.4.

[4] The contract did originally require drainage work to be performed but, after NPE's contract with HM Hire had been performed, the drainage work required was deleted from the contract by an email dated 25 March 2011 from Thiess to HM Hire.[2]

[5] The work actually performed was the excavation and removal of timber and topsoil from the site. Mr Kemp, the managing director of HM Hire, said that the contract required it to remove timber and topsoil from the areas designated as dumps for the dumping of topsoil and overburden from the pit site and for future expansion of the open cut pit.[3] Mr Spotswood, an employee of NPE, also swore, however, that the work undertaken did not involve the area of the open cut pit.[4] He also swore that the work undertaken by HM Hire included the construction and formation of an access road for the purposes of creating a means of access to the site of the works. That road was about 14 metres wide, several kilometres in length and constructed with a camber on the surface and drainage.[5]

Discussion

[6] Section 10 of the Act defines "construction work" in these terms:

> "(1) ***Construction work*** means any of the following work—
>
> (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;
>
> (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;
>
> (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, airconditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
>
> (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
>
> (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—
>
> (i) site clearance, earthmoving, excavation, tunnelling and boring; and
>
> (ii) the laying of foundations; and

---

2 See ex GGK1A to the affidavit of GG Kemp filed 10 October 2011.

3 See affidavit of GG Kemp filed 10 October 2011, para 8.

4 See affidavit of J Spotswood filed 27 October 2011, paras 10 and 11.

5 See affidavit of J Spotswood filed 27 October 2011, para 7.

(iii) the erection, maintenance or dismantling of scaffolding; and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;

(g) carrying out the testing of soils and road making materials during the construction and maintenance of roads;

(h) any other work of a kind prescribed under a regulation for this subsection.

(2) To remove doubt, it is declared that ***construction work*** includes building work within the meaning of the *Queensland Building Services Authority Act 1991*.

(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."

[7] Section 12 entitles a person to a progress payment if the person has undertaken to carry out construction work or supply related goods and services under the contract. "Related goods and services" means, amongst other things, plant supplied for use in connection with the carrying out of the construction work.[6]

[8] The work that was done as described in the evidence can certainly be described as "works forming … part of land including … roadworks";[7] and as an "operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in [s 10(1)(a), (b) or (c)], including … site clearance, earthmoving … site restoration, landscaping and the provision of roadways and other access works".[8] When NPE agreed to hire its vehicles to HM Hire it was also in respect of a contract where HM Hire was then required to strip and place topsoil for drains which very arguably amounted to the construction of "installations for land drainage".[9]

[9] Although the applicant contended that the work did not clearly fall within s 10(1) it seemed to me that it did. The applicant's argument focussed then on whether the work it did was excluded from the definition of "construction work" by s 10(3) as the extraction or surface working of coal, it being a mineral. That coal is a mineral was accepted by the parties. Mr Savage SC argued, by reference to a number of practical examples, that, to limit the operation of the exclusion to the extraction of coal from an existing pit, would create immense uncertainty in practice, as where

---

6 See s 11(1)(a)(ii) of the Act.

7 See s 10(1)(b) of the Act.

8 See s 10(1)(e) of the Act.

9 See s 10 (1)(b) of the Act.

the same truck was used for multiple loads on the same day, sometimes carrying overburden and sometimes coal. Thus, he argued that s 10(3)(b) should be construed as applicable to all work at the mine site directed to the extraction of minerals.

[10] Mr Ambrose submitted, however, that the words "extraction … of minerals" in s 10(3)(b) should be confined in their meaning to work done as part of the process of extraction of minerals. In making that submission he pointed out that s 10(3) was limited in its language to the extraction of minerals and did not include any reference to preparatory work as did s 10(1)(e). He also referred to the availability of other statutory language with a wider meaning which the legislature could have included had it wished the exclusion to be broader.[10] He used those arguments to illustrate what he submitted was the narrowness of the concept identified in s 10(3)(b).

[11] He also submitted, in reliance on two decisions of the New South Wales Supreme Court dealing with their equivalent legislation, and as an answer to the practical concerns raised by Mr Savage about the potential differences between trucks carrying overburden and coal on the same day, that the definition of "construction contract" did not require that all the work to be performed under a contract fall within that definition, merely some of it.[11] In that context, he submitted that the obligations under the contract, as I have found, fell within the type of work described in s 10(1) and did not refer to anything, properly described, as the "extraction of minerals".

Conclusion

[12] During the submissions I was informed that a similar issue had arisen in another matter which had not then been determined. The case was *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd*,[12] decided by Fryberg J. His Honour concluded that coal was a mineral and proceeded to consider the proper construction of s 10(3) in the context of the facts of that case. He decided that none of the work performed by the first respondent in that case (Warren) was the extraction of a mineral.[13] His reasons focussed on the limitations inherent in the language of the section. He said:[14]

> "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."

---

10 See s 5(y) of the *Queensland Building Services Authority Regulation* 2003 (Qld) which refers to "construction work in mining"; the definition of "mining" discussed in *Gonzo Holdings Pty Ltd v McKie* [1996] 2 Qd R 240, 248 and the definition of "carrying on … of operations on a mining property" discussed in *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (1969) 120 CLR 240, 244-245 and the definition of "mine" in s 6A(1) of the *Mineral Resources Act* 1989 (Qld) in conjunction with the definition of "extraction" in precise terms in s 6A(3) of that Act.

11 See *Brian Leigh Smith v Coastivity Pty Ltd* [2008] NSWSC 313 at [35] and *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd* [2011] NSWSC 604 at [30].

12 [2011] QSC 345.

13 [2011] QSC 345 at [40]-[49].

14 [2011] QSC 345 at [42].

[13] I agree with his Honour's reasons dealing with the proper construction of the section. The facts of this case are also similar to the facts then being considered by his Honour. It also seems to me to be necessary to construe s 10(3) in the context set by s 10(1) which describes a relatively broad set of circumstances amounting to construction work. It would detract unnecessarily from the apparent purpose of the legislation and the normal understanding of s 10(1) and its hierarchy in the section[15] to extend the meaning of "extraction of minerals" to cover work associated with such extraction where the legislature, as Mr Ambrose submitted, could readily have made such a purpose clear by the use of familiar language of wider meaning than this phrase. There is no reason why s 10(3) should be read so as to displace or render nugatory the meaning of s 10(1).[16]

[14] The practical concerns expressed by Mr Savage about the differences between trucks carrying overburden and coal pursuant to the same contract lose force when one accepts the effect of the decisions from New South Wales that the definition of "construction contract" does not require that all the work to be performed under a contract fall within that definition but merely some of it.

[15] Accordingly, the adjudicator acted within his jurisdiction in making the decision challenged.

Order

[16] The application will be dismissed. I shall hear the parties as to costs.

---

15 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382 at [69]-[71].

16 *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208, 213; Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths Australia, 2011, 7th ed) at pp116-118, paras [4.2]-[4.3].