SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor* [2012] QCA 276
PARTIES:	**THIESS PTY LTD** ABN 87 010 221 486 (appellant) **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/S:	Appeal No 11871 of 2011 SC No 2486 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2012
JUDGES:	Holmes and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 (paragraph 52).**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where decision made by adjudicator under the *Building and Construction Industry Payments Act* 2004 – whether the adjudicator had jurisdiction to determine the adjudication applications – whether the contracts were "construction contracts" within the Act – whether an incorrect determination of the extent and quantum of the work that comprised "construction work" under a construction contract for the purposes of the Act was a matter of jurisdictional error *Building and Construction Industry Payments Act* 2004 (Qld), s 10, s 11

Brian Leigh Smith v Coastivity Pty Ltd [2008] NSWSC 313, cited
Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, considered
Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors (2005) 63 NSWLR 385; [2005] NSWCA 228, considered
Fifty Property Investments Pty Ltd v O'Mara [2006] NSWSC 428, cited
HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd [2011] NSWSC 604, cited
HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor [2012] QSC 4, considered
J Hutchinson Pty Ltd v Galform Pty Ltd & Ors [2008] QSC 205, cited
James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors [2011] QSC 145, cited
Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd [2011] NSWSC 165, cited
Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 217, considered
Rail Corporation of NSW v Nebax Constructions [2012] NSWSC 6, cited
Walton Construction (Qld) Pty Ltd v Salce & Ors [2008] QSC 235, cited

COUNSEL: D J S Jackson QC, with A B Fraser, for the appellant
S Couper QC for the first and second respondents

SOLICITORS: Thomsons Lawyers for the appellant
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[1] **HOLMES JA:** I have had the advantage of reading the judgment of Philippides J. Its comprehensive setting out of the facts, the parties' arguments and the primary judge's reasons allows me to put my conclusions very briefly.

[2] I consider the appellant correct in its argument that the learned judge erred in finding that clearing and grubbing land, and stripping and hauling top-soil to a stockpile with the intention of spreading it later, all undertaken in connection with the Burton mine, was construction work. Those activities were neither "works forming…part of land" nor "an integral part of … preparatory to or …for completing" other work falling within the definitions of construction work in s 10(1)(a), (b), and (c). Unlike Philippides J, I agree with the learned primary judge's view that some of the work on the Lake Vermont project – trimming and scaling batters and walls, clearing excavated material and cleaning the interface between the overburden and the coal seam – was not construction work. But I concur with her Honour, for the reasons that she has given, in concluding that the sub-contracts were all contracts under which Warren undertook to carry out construction work (the construction of dams and drains) within the meaning of s 10

of the *Building and Construction Industry Payments Act* 2004, so that each was a construction contract as defined in Schedule 2 to the Act.

[3] The appellant advanced here for the first time its argument that the adjudicator had no jurisdiction to deal with the claims because some of the work under the sub-contracts was not construction work. That contention, it seems to me, encounters the obstacle that it is impossible to discern from the payment claims and such invoices as are in the evidence what work undertaken under the dry-hire contracts the claims relate to, so as to say whether the argument has any factual foundation. In any event, I agree with Philippides J, for the reasons she has given, that an adjudicator does not exceed his jurisdiction by determining, on the material provided to him in accordance with the Act, the extent to which a payment claim is made for construction work or related goods and services. A mistake of fact made in that exercise does not amount to jurisdictional error so as to invalidate the determination.

[4] **WHITE JA:** I have read the reasons for judgment of Philippides J where her Honour has fully set out the relevant facts, the competing submissions and the decision below. I agree with her Honour that the appeal should be dismissed. I agree with her Honour's reasons for doing so save for the matters raised by Holmes JA. Like her Honour I do not agree with the primary judge that the contract specification to clear and grub land and strip topsoil and remove and stockpile it for later rehabilitation use carried out by Warren for the Burton Mine project was construction work within the meaning of s 10 of the *Building and Construction Industry Payments Act* 2004 (Qld).

[5] I also agree with Holmes JA that the primary judge was correct in concluding, in relation to the Lake Vernon project, 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, was not carrying out construction work.

[6] Nevertheless, the subcontracts were, as the primary judge found, all construction contracts pursuant to which Warren undertook to carry out and did carry out construction work.

[7] In addition to Philippides J's reasons for dismissing Thiess' contention that the adjudicator had no jurisdiction to entertain the claim by Warren I agree with the further observations of Holmes JA.

[8] I agree with the orders proposed by Philippides J.

[9] **PHILIPPIDES J:**

Background

[10] The appellant, Thiess Pty Ltd (Thiess), is the operator of certain mines in the Bowen Basin region, namely at the Lake Vermont Coal Project and the Burton Coal Project, where it extracts coal by open pit mining techniques pursuant to contracts with the respective mine owners. It entered into three contracts with the first respondent, Warren Brothers Earthmoving Pty Ltd (Warren), being:

- the Burton Coal Project subcontract for Bullock Creek Dams and Drains/Plumtree South Clear Grub, Topsoil Stripping and Dams and Drains (the subcontract);
- the Lake Vermont Coal Project Plant Hire Contract for the dry hire of one Komatsu PC 1100-6 Excavator (PC 1100) (the Komatsu contract);
- the Lake Vermont Coal Project Plant Hire Contract for dry hire of one 330 CL Excavator (the Caterpillar contract).

[11] Warren made claims for progress payments in respect of each contract under the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act) which Thiess disputed. The claims were determined by an adjudicator, who in each case made adjudication decisions in Warren's favour.

[12] Thereafter, Thiess brought an application in the Supreme Court seeking declarations that the adjudication decisions were void and an injunction restraining Warren from seeking adjudication certificates in respect of them. Thiess did so on the same basis as unsuccessfully argued before the adjudicator, that the adjudicator had no jurisdiction to determine the adjudication applications because the contracts were not "construction contracts" within the meaning of the Act. An interlocutory injunction was obtained by consent upon payment into court of an agreed amount.

[13] On 2 December 2011, the learned primary judge dismissed the application, finding that the contracts were "construction contracts" within the Act and that the adjudicator consequently had jurisdiction to determine the adjudication applications. It is that decision which is the subject of appeal.

The primary judge's findings as to the nature of the undertakings

[14] The primary judge noted at [6] of his reasons that, under the head contract with the mine owners, Thiess undertook to conduct an open pit mining operation known as the Burton Coal Project. The works included the opening of a new pit, Plumtree and its expansion. The mining method required by the specification made Thiess responsible for clearing and topsoil removal, as well as handling groundwater and planned rehabilitation of the area – reasons at [7].

[15] Broadly speaking, the work was divided into three payment classes: overburden, pit infrastructure and tonnage (of coal). In the case of the Plumtree expansion, pit infrastructure relevantly included clearing and grubbing, topsoil removal to out-of-pit stockpiles and interim drainage construction – reasons at [8]-[9].

The undertakings under the subcontract

[16] The subcontract held by Warren in relation to Thiess' operation of the Burton/Bullock Creek mine contemplated work including building dams and drains, stripping and hauling topsoil, and clearing and grubbing. The primary judge's description of the subcontract is not the subject of dispute:

> "[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'. 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 … 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. … 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 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. I find that it was a relatively small part of that work.

[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."

[17] In understanding the nature of the undertaking under the subcontract, his Honour derived assistance from the following affidavit evidence of Mr Mallam, who at the relevant time was the Project Manager for Thiess at the Burton Coal Project, extracted at [24]:

"8. … approximately 65% of the works performed under the Subcontract related to the stripping of top soil and scrub with [Warren's] scrapers and dozers [which] 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."

[18] Warren did not challenge Thiess' summary of the primary judge's findings that, with respect to the subcontract, the work to be performed (using scrapers, bulldozers, a grater, an excavator, a loader, a compactor and a water truck provided for at an hourly rate and standby rate from Warren) comprised work falling into the following categories:

(a) constructing dams and drains (the rates differing for lightly timbered and heavily timbered areas);

(b) stripping and hauling topsoil to stockpile (with different rates depending upon the length of haul to the stockpile) and a rate to "Place Topsoil" (moving topsoil from the stockpile to areas to be rehabilitated and placing it in those areas, also payable at different rates depending on the length of haul); and

(c) clearing and grubbing (with different rates for lightly timbered and heavily timbered areas), with material to be stockpiled in a pile suitable for burning.

The nature of the undertakings under the hire contracts

[19] Likewise, there was no dispute concerning the primary judge's findings as to the nature of the undertakings under the dry hire contracts for the Lake Vermont Coal Project. They provided for the "dry hire" of excavators (without the supply of an operator) from Warren to Thiess. The contracts contained no provision relating to the purpose of the hiring. However, the primary judge held that the subject of the undertaking under the hire contracts was the hire of excavators for use in connection with the performance of any of Thiess' obligations under the head contract for which they were suitable.

[20] His Honour noted at [58] that 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". Batters are the near-vertical faces of the stepped terraces constructed on the sides of the mine pit.

[21] His Honour then made the following observations at [59]-[61] as to the Caterpillar contract:

> "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.
>
> 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.
>
> 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."

[22] His Honour made the following observations as to the Komatsu contract at [62]-[64]:

> "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.
>
> 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.
>
> 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."

[23] His Honour found at [78] that the excavators were for use in connection with:

(a) the construction of dams and drains;

(b) trimming and scaling batters and walls in the coalmine overburden and clearing away the material thus excavated;

(c) excavating topsoil, overburden and rock; assisting bulldozers to take excavated topsoil, overburden and rock to the paddock for removal;

(d) cleaning the interface between the overburden and the coal seam.

[24] In respect of the Caterpillar excavator, the primary judge proceeded on the basis that it was used primarily to strip the last 300 mm of waste off the top of the coal to prevent coal losses by over digging with the larger excavators, but was also used for water management outside the pit (building dams and drains) on an *ad hoc* basis for about 25 per cent of the time it was on site.

[25] In respect of the Komatsu excavator, he proceeded on the basis that it was used to pull the overburden from the high wall in the coal mining pit. Its primary use was to trim and scale batters and walls in the pit and to clean the interface between the overburden and the coal seam, but was also used on an *ad hoc* basis for water management outside the pit (building dams and drains) for about 25 per cent of the time it was on site.

The primary judge's finding that the contracts were construction contracts

[26] Under the Act, "construction contract" is defined as meaning "a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party": s 9, sch 2.

[27] In respect of the subcontract, the relevant inquiry was as to whether that contract was one under which Warren undertook to carry out "construction work" within the meaning of s 10. As for the hire contracts, the issue was as to whether they were contracts under which Warren undertook to supply "related goods and services" for the purposes of s 11.

(a) Application of s 10 of the Act to the subcontract

[28] The term "construction work" is relevantly defined in s 10 as follows:

> "**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, 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 coastal protection;
>
> …
>
> (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
>
> …

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

[29] The primary judge held that the work Warren undertook to carry out under the subcontract was "construction work" under s 10 of the Act, as it fell within s 10(1) and was not excluded by s 10(3). Accordingly, the adjudicator had jurisdiction to determine the adjudication application concerning the subcontract.

(i) "Construction work"

[30] His Honour held at [28] that the expression "works to form part of the land" in s 10(1) was a phrase of wide meaning. The primary judge found that the construction of dams and drains (which in any event were formed by constructing raised embankments) were such works.

[31] As for stripping and hauling topsoil to stockpile, while his Honour found at [30] that that did not fit so readily into the definition, he considered that spreading to a depth of a few hundred millimetres to rehabilitate land did; the specification mandated aspects of how it was to be done and produced a result affecting the land form. His Honour noted that site restoration was explicitly mentioned in s 10(1)(e)(v). On that basis, his Honour found at [30] that stripping and hauling topsoil to a stockpile was at least preparatory to its spreading as part of that process and covered by s 10(1)(e)(i).

[32] As for clearing and grubbing, his Honour held at [32]:

> "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)."

[33] The primary judge thus held that all the work undertaken to be carried out came under the definition of construction work provided in s 10(1).

(ii) The operation of s 10(3)

[34] The primary judge accepted at [39] that coal was a "mineral" within the meaning of that term in the Act, concluding that there was no reason to think that the term

"mineral" was used in its geological sense in the Act and that the context suggested that the word should have an ample meaning.

[35] The question then became whether any of the work was covered under the exception for "extraction" of minerals in s 10(3)(b) of the Act. His Honour had regard to the ordinary meaning of "extract", observing at [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."

[36] The primary judge noted at [41] the argument put forward by Thiess, that the removal of various layers of topsoil, subsoil and overburden down to the coal seam and the implementation of water management measures (including the creation of drain channels, embankments and dams) to ensure that the pit did not fill with water, were activities without which it would be impossible to dig the coal out of the seam. He accepted at [42] that the work so performed by Warren was a necessary part of opening the coal mines. But his Honour considered that not to be the issue, stating that 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."

His Honour thus found that the ordinary meaning of the word, considered in isolation, did not apply to the work done by Warren.

[37] His Honour also had regard to the context of s 10(3) and the words used in and around it. He noted at [43] the competing submissions as to the effect of the words, "including tunnelling or boring or constructing underground works". Thiess' submission was that the words were an indication that a broad meaning should be attributed to extraction. Warren submitted that the presence of the words of inclusion indicated that without them extraction would not cover such activities. There was no equivalent inclusion of above ground works (such as the creation of walls, batters, dams or drains). His Honour accepted Warren's submission, concluding at [45] that the effect of the inclusion was "to extend the meaning of extraction to activities which would not usually be within the meaning of the word". Such a drafting technique, he observed, was supported by authority: *McCann v Butcher* (1917) 23 CLR 422 at 424; see also *Commissioner of Taxation v Sherritt Gordon Mines Ltd* (1977) 137 CLR 612 at 623.

[38] His Honour thus found at [46] that the presence of words of inclusion did not exclude the ordinary meaning of the defined term. He concluded that the ordinary meaning was not adequate to describe the work done by Warren. It was not

sufficient to cover the remote (both in place and in time) activities conducted by Warren, which used different machinery from the processes of extracting coal, and had an immediate purpose outside of the extraction of coal. His Honour explained at [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."

[39] Although the primary judge observed that the terms of the contract could not control the meaning of the word "extraction" in the Act, he noted at [48] that the subcontract itself called the removal of coal "extraction", but the removal of overburden and topsoil "excavation".

[40] His Honour concluded that none of the work performed by Warren was the extraction of a mineral within s 10(3)(b) of the Act and thereby excluded from being "construction work". Accordingly, the adjudicator had jurisdiction to deal with the matter.

(b) The application of s 11 to the hire contracts

[41] Section 11 of the Act 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) …;
>
> (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work."

[42] The primary judge held that the hire contracts were contracts under which Warren undertook to supply "related goods and services" within the meaning of s 11. Section 11(1)(a)(ii) was engaged because the excavators were plant or materials for use in connection with the carrying out of construction work. The hire contracts were therefore construction contracts in the defined sense.

[43] His Honour held at [73] that the definitional requirement of the words "for use in connection with" was not satisfied simply by proving that plant or materials supplied were in fact used in connection with the carrying out of construction work. Rather, the phrase was required to be satisfied on the outset of the contract or transaction, reflecting a purposive meaning.

[44] The primary judge also commented at [77] that the phrase "for use in connection with" gave rise to a further problem, being "the level of specificity with which the object or purpose for which the plant or materials are to be used must be stated". As already mentioned, in the present case, although there was no express limitation as to the use to which Thiess was entitled to put the excavators, his Honour held "a limitation to use in the performance of any of Thiess's obligations under the head contract" could be implied. Nevertheless, that use entailed a considerable level of generality. His Honour stated at [77]:

> "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. A finding that the excavators were supplied for a use expressed at a wide level of generality might have surprising consequences." (footnote omitted)

[45] The primary judge reasoned at [79] that, given the findings that the construction of dams and drains, and excavating topsoil and removing it and storing it were "construction work", it was sufficient that the excavators were to be used in connection with that work for the dry hire contracts to be "construction contracts". Nevertheless, the primary judge added at [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)."

[46] Given the finding that the hire contracts were construction contracts, his Honour held that the adjudicator had had jurisdiction to determine the adjudication applications.

Grounds of appeal

[47] Thiess argued that the appeal should be allowed because, contrary to the findings of the primary judge, the adjudicator had no jurisdiction to determine the adjudication applications. The Notice of Appeal stated, as grounds of appeal, that the learned primary judge:

1. erred in law as to the proper construction of the Act by holding that claims for progress payments under the Act were not properly limited to "construction work" or "related goods and services" within the meaning of ss 10 and 11 respectively;

2. having found that the plant supplied by the first respondent to the appellant under the hire contracts was, in part, for use in connection with the carrying out of work that was not "construction work" within the meaning of s 10(1) of the Act, erred in holding that the first respondent was entitled to a progress payment in respect of that component of the supply of the plant as constituting "related goods and services" (as per s 11 of the Act);

3. erred in failing to construe the word "extraction" in the context of the text "extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose" and the wider context of the Act;

4. erred in having regard to the contract between the parties as evidence of the meaning of words used in the mining industry (as attributed to an experienced miner) for the purpose of construing the plain language of the section;

5. erred in holding that the subcontract was a contract under which the first respondent undertook to carry out "construction work" within the meaning of s 10 of the Act;

6. erred in concluding that each of the hire contracts was a contract under which the first respondent undertook to supply "related goods and services" within the meaning of s 11 of the Act.

Issues

[48] Essentially two issues were raised by Thiess. The first issue was whether the subcontract and hire contracts were "construction contracts", failing which the adjudicator lacked jurisdiction to determine the adjudication applications (grounds 3 to 6 of the Notice of Appeal). Thiess contended that they were not "construction contracts" within the meaning of the Act on the bases that:

(a) the work to be performed under the subcontract was not "construction work" (as defined in s 10(1));

(b) alternatively, to the extent that the work might otherwise have been "construction work" under s 10(1) for the purposes of s 10 and s 11, it was excluded by the operation of s 10(3) as it constituted "the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose";

(c) consequently, in relation to the hire subcontracts, the excavators were not supplied for use in connection with the carrying out of construction work and were not "related goods and services" for the purpose of s 11(1)(a)(ii).

[49] The second issue was whether the adjudication decisions concerning the hire contracts were void as being beyond jurisdiction, because they included amounts for the supply of excavators which were not for use in connection with the carrying out of construction work, so not for "related goods and services" (grounds 1 and 2 of the Notice of Appeal).

Was there error in the finding that the contracts were "construction contracts"?

The application of s 10(1)

[50] Thiess conceded that the construction of dams was the construction of "reservoirs" and the construction of drains was the construction of "installations for land

drainage" and thus came within the express examples of "works forming part of the land" for the purposes of s 10(1)(b).

[51] However, it contended that the work of stripping and hauling topsoil and clearing and grubbing was not "works forming part of the land" for the purposes of s 10(1)(b). Nor did it come within the ambit of s 10(1)(e), since it was not an integral part of, nor preparatory to, the construction of works forming part of the land covered by s 10(1)(b).

[52] It was contended that the primary judge erred in finding that stripping and haulage of topsoil to stockpile and hauling topsoil from the stockpile and spreading it to a depth of a few hundred millimetres in order to rehabilitate the land, was construction work as defined in s 10(1). Thiess argued that it did not follow from the fact that the operations produced a result "affecting the land form", that they constituted "works forming part of the land". That was borne out by the fact that para (e)(v) expressly specified that the relevant operation must form "an integral part of" or be "preparatory to" or be "for completing" other work, namely work of the kind specified in s 10(1)(a), (b) or (c).

[53] Further, the judge erred in holding that the work fell within the category of s 10(1)(e)(i) as preparatory to the process of site restoration under s 10(1)(e)(v). This was because, to the extent that paras (e)(v) and (e)(i) provided that (respectively) site restoration, and site clearance, earthmoving and excavations, were "construction work", that was only so if the work formed an integral part of or was preparatory to, or was for completing work of the kind (relevantly) referred to in s 10(1)(b). (Moreover, the finding was said to be consistent with the primary judge's findings at [80] in relation to trimming and scaling etc under the hire subcontracts, which Thiess adopted.)

[54] Thiess made similar criticisms with respect to the judge's finding that the work of clearing and grubbing came within the meaning of site clearance under s 10(1)(e)(i), and that there was no indication in s 10 that it was necessary to differentiate between locations within the site. The operation of site clearance in para (e)(i) was only encapsulated within the definition of "construction work" to the extent that it was "integral or preparatory to" some other construction work (relevantly in this case of the kind referred to in s 10(1)(b)).

[55] Warren did not cavil with Thiess' submission that para (1)(e) was only engaged when there existed the required connection with work of the kind referred to in para (1)(a), (b) or (c). (That conclusion was, in my view, correctly made and reflects the proper construction of para 1(e).) However, it argued that, for the subcontracts to be "construction contracts" as defined in the Act, it was sufficient that there was some construction work falling within s 10(1) that was not excluded by s 10(3). Given that Thiess did not challenge the judge's findings that the subcontract included constructing dams and drains which fell within 10(1)(b), and that the excavators were supplied, *inter alia*, for use in connection with that work, it followed that all three contracts were for "construction work", provided the work did not come within the exclusion in s 10(3)(b).

[56] In my view, his Honour was clearly correct in stating at [77] that "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". It also accords with the approach taken in New South Wales in respect of equivalent legislation: see *Brian Leigh Smith v Coastivity Pty Ltd* [2008] NSWSC 313 at [35]; *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd* [2011] NSWSC 604 at [30]. What is required for the purposes of the definition of "construction contract" is that it is one under which a party undertakes to carry out some "construction work".

[57] I accept the submission made by Warren that the concession made by Thiess (that the three contracts included work in constructing dams and drains, which comprised "construction work" within s 10(1)) meant that, provided that work was not excluded by s 10(3), no additional work was required to be identified as coming within the meaning of that term for the purposes of establishing the existence of a "construction contract". For the purposes of the determination of the first issue, whether the work of construction of dams and drainage fell within the exclusion in s 10(3)(b) assumes a critical importance. If that work was not excluded by s 10(3), the need to consider the nature of the other work undertaken, for the purposes of determining whether a construction contract existed, is obviated.

The operation of the exclusion in s 10(3)

[58] Thiess contended that the primary judge erroneously applied a narrow definition of extraction in construing s 10(3), contrary to the principles of statutory interpretation outlined in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at [69] and contrary to s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) which directs preference to be given to the interpretation that will best achieve the purpose of the Act.

[59] It was submitted that the primary judge erred in failing to construe the word "extraction" in the primary context of s 10(3) and in the wider context of the Act and, consequently, erred in finding that the work that he considered was prima facie within the definition of "construction work" was not excluded by the operation of s 10(3). Thiess' criticism was that his Honour failed to appreciate the purpose of the Act and s 10(3) in particular, and that he misinterpreted the text of that section. Thiess argued that its construction was to be preferred because it gave effect to each and all of the words in s 10(3) in the primary context of that section and the wider context of the Act.

[60] Thiess argued that the object of the Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work or to supply related goods and services under a construction contract: s 7. That object is 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: s 8. It was submitted that the effect of s 10(3), in excluding particular work from that which would otherwise be "construction work", with the consequence that a contract for that work is not a "construction contract" for the purposes of the Act, was not to limit rights that a party would otherwise have under its contract; rather its effect was to identify that work which attracted the additional rights conferred by the statute. On that basis, Thiess argued that there was "no reason in principle to give the Act a construction that would favour an interpretation limiting the operation of an exclusion clause of rights already enjoyed by a person".

[61] Thiess submitted that s 10(3) was directed to work constituting mining industry operations, viz drilling for, or extraction of, oil or natural gas and the extraction of minerals. The purpose was to identify relevant activities of the mining industry insofar as the relevant work (which would or might otherwise constitute "construction work") was concerned. That was achieved by fastening on the activities comprised in the extraction of minerals or oil or natural gas. In the case of minerals, the meaning of extraction included underground works and tunnelling and boring, which depending on the facts might be less directly associated with the winning of the relevant mineral than was the removal of overburden and overlying material in the context of open cut mining. In that context, the purpose of s 10(3) was not furthered by adopting a meaning of extraction by surface working which included the winning of coal at the seam, but not the removal of the overlying strata, including topsoil. Accordingly, the primary judge erred in adopting a meaning of "extraction" that did not further the purpose of s 10(3).

[62] I do not find these submissions persuasive. As Warren submitted, Thiess' argument as to what may be derived from a purposive approach is circular – it assumes that which it seeks to establish, namely that s 10(3) is directed at work "constituting mining industry operations". I do not find anything in the purpose of the provision itself, or of the Act generally, which requires the words in s 10(3)(b) to be given a broad meaning. Indeed, the contrary is the case. The beneficial purpose of the Act is directed at providing a speedy interim means of payment to those who undertake to carry out construction work or to supply related goods and services under a construction contract. It is difficult to see how that beneficial purpose is promoted by a wide interpretation of the exception in s 10(3).

[63] I note that the approach taken by the primary judge with respect to s 10(3) was adopted in *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor* [2012] QSC 4, which concerned similar factual issues to those in the present case. I endorse the following observations made in that case by Douglas J at [13]:

> "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 to extend the meaning of 'extraction of minerals' to cover work associated with such extraction where the legislature … 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)." (footnotes omitted)

[64] Nor can the complaint that the primary judge's construction of s 10(3) failed to have proper regard to the language of the subsection in its full textual context be made out. It is apparent that in s 10(3) "extraction, whether by underground or surface working, of minerals" refers to an outcome and process, namely extraction, which can be carried out in more than one way, that is "by underground working or surface working". The question, as Thiess identified it, was whether s 10(3), properly construed, distinguishes between the final steps in the process and the removal of overburden and anterior operations.

[65] Thiess complained that the judge's finding as to the narrow ambit of s 10(3)(b) resulted from the judge considering the meaning of the word "extraction" without proper regard to the phrase "by underground or surface working". It was thus submitted that the primary judge erred by focusing on the word "extraction" in isolation, without regard to the immediate textual context; in terms, the subsection referred to "extraction … by surface working". That working, it was said, started at the surface, not at the mineral which was in the seam below. It was only when the working at the surface reached the mineral, by removing the overlying strata, that the mineral was removed. The whole process was extraction by surface working, within the ordinary meaning of those words. This conclusion was reinforced by the phrase "for that purpose" which referred back to the extraction of the mineral as the purpose of the relevant working. The contrary conclusion reached by the primary judge rendered the words "by underground or surface working" and "for that purpose" otiose. In the case of underground workings, the express inclusion of "tunnelling or boring, or constructing underground works, for that purpose" made it clear that it was not merely the final step of physically winning the coal at the coal seam that fell within the meaning of extraction of the mineral. Extraction by surface working, it was argued, included activities (such as constructing the dams and drains), "without which it would be impossible to dig the coal out of the seam". The relevant nexus was also described as including activities that were "a necessary and integral part of the coal mining process" or which were "essential for the exposing of the coal seam for removal of coal".

[66] Contrary to Thiess' submissions that the judge had no regard to the phrase "by underground or surface working", the reasons make it clear that his Honour did have regard both to those words and the remaining words in s 10(3)(b) and used them to derive textual assistance as to the proper construction of the term "extraction". His Honour noted that, with respect to "underground working", tunnelling, boring and the construction of underground works was expressly included in the provision. His Honour rightly considered that to be a textual indication that "extraction" did not have the broad meaning urged by Thiess. His Honour was correct in his reasoning that the effect of the inclusion was "to extend the meaning of extraction to activities which would not usually be within the meaning of the word". As a matter of construction, it is pertinent that s 10(3)(b) made an express inclusion of "tunnelling or boring, or constructing underground works" but made no express inclusion of equivalent surface works.

[67] Nor is there substance in the argument that his Honour's approach renders the words "for that purpose" otiose. Those words referred to the phrase "including tunnelling or boring, or constructing underground works" and, as Warren submitted, simply served to emphasise that tunnelling or boring, or the construction of underground works for the purpose of extraction of minerals (operations, which would otherwise fall outside the scope of "extraction") were expressly included within its scope.

[68] Had it been the legislative intention, to extend the ordinary meaning of the phrase "extraction … by … surface working" to activities which are integral to or necessary for the extraction of minerals, it would have been a simple matter to do so by clear words. That was not done. By contrast, the legislative intention to widen the scope of s 10(1)(e) was made explicit by the broad terminology used in that subsection, which expressly extends to activities that are "an integral part of, or … preparatory to or … for completing" the relevant work.

[69] His Honour was correct to conclude that the construction of dams and drains did not come within the exclusion.

[70] For completeness, I add that there is no substance to the complaint (the subject of ground 4 of the Notice of Appeal) that, in construing the meaning of "extraction" for the purposes of the Act, his Honour had regard to the use of the word "extraction" in the subcontract. It is abundantly clear that his Honour did not do so, as he expressly stated.

Conclusion

[71] Given that the judge was right to find that the construction of dams and drains constituted "construction work" within s 10(1) to which s 10(3) did not apply, he was also correct in concluding that there was a sufficient basis to find that the hire contracts were also construction contracts.

[72] There was no error in rejecting the argument that the adjudicator had no jurisdiction to determine the adjudication applications because the subcontract and hire contracts were not construction contracts.

Were the adjudicator's determinations in relation to the hire contracts void because they included amounts for work which was not construction work and thus not relevantly "related goods and services"?

[73] Thiess' alternate argument was that the primary judge erred in law as to the proper construction of the Act by holding that claims for progress payments under the Act were not properly limited to "construction work" or "related goods and services" within the meaning of ss 10, 11 and 17(2) respectively. (Appeal Ground 1.) Consequently, Thiess argued that the primary judge, having found that the plant supplied by Warren to Thiess under the Caterpillar and Komatsu contracts was, in part, for use in connection with the carrying out of work that was not "construction work" within the meaning of s 10(1) of the Act, erred in holding that Warren was entitled to a progress payment in respect of that component of the supply of the plant as constituting "related goods and services" (as per s 11 of the Act). (Appeal Ground 2.)

[74] The alternative basis raised by Thiess to challenge the validity of the adjudicator's determination was expressly confined to the determinations concerning the hire contracts. No similar submissions were made consequent on Thiess' arguments that the undertaking under the subcontract, other than that relating to dams and drains, was not "construction work" within s 10(1).

Thiess' submissions

[75] Ground 1 centres on the primary judge's finding at [77] (citing *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors* (2005) 63 NSWLR 385 at 387, 400) that "claims for progress payments under the Act are not limited to payment for construction work and related goods and services". Thiess submitted that there was no warrant in the Act for that conclusion, given that:

(a) as s 7 expresses it, the object of the Act is to ensure a person is entitled to receive progress payments if the person undertakes to carry out construction work under a construction contract or supply related goods and services under a construction contract;

(b) the right to a progress payment conferred under s 12 is expressed in the same way;

(c) the amount of the payment is tied under s 13 to "the value of construction work carried out or undertaken to be carried out, or related goods and services supplied";

(d) the same language is carried through into the more detailed valuation provisions in s 14;

(e) section 15 repels the effect of a "pay when paid" provision "in relation to any payment for construction work carried out or undertaken to be carried out" and in relation to any payment for "related goods and services supplied"; and

(f) section 17(2) requires that the payment claim "must identify the construction work or related goods and services to which the progress payment relates".

[76] Thiess thus argued that "if a party to a construction contract served a payment claim in respect of work that was not 'construction work', the payment claim under the Act was invalid to that extent; and/or the adjudicator had no jurisdiction to make an adjudication decision in respect of the payment claim to that extent". Further, it submitted that once a finding was made that any part of an adjudicator's determination was unlawful, the whole adjudication was defective: see *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors* [2008] QSC 205 per Chesterman J at [38]. There was no mechanism available to sever any unlawful finding that was infected by jurisdictional error from an adjudicated amount: see *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors* [2011] QSC 145 per Atkinson J at [57]-[59]. Accordingly, if the work included in a payment claim under the Act was not able to be differentiated from that which was not "construction work", or the adjudicator failed to do so, any adjudication certificate was invalid. Thus, given the judge's finding that not all of the hire subcontracts were for the purpose of construction work (in relation to the trimming and scaling etc), the adjudicator had no jurisdiction to include such amounts in the adjudication determinations, with the result that the determinations were void.

[77] In advancing the alternate contention, Thiess relied on the uncontroversial proposition that an adjudication decision under the Act may be successfully attacked for jurisdictional error: see *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 398-400 (esp 398) per Spigelman CJ; 408-414 per Basten JA; 444-445 per McDougall J; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 22 at [7], [37], [71]-[72] and [78]. An adjudicator cannot obtain additional jurisdiction by reaching an incorrect conclusion as to the existence of jurisdictional facts: see *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428 per Brereton J at [18].

[78] While Thiess did not raise the alternative contention now advanced at first instance, it was argued that the issue was within the legitimate scope of the appeal, as it concerned a matter of law which did not depend on any disputed facts. There was thus no impediment to the point being raised, which was one of statutory construction. It was not to the point that the alternate argument was not raised in the payment schedule; that could not impact on the existence or otherwise of the relevant jurisdictional fact. And s 24(4) of the Act, which confines the adjudication response to the matters in the payment schedule, had no relevance to the question of jurisdiction: see *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011]

NSWSC 165 per Ball J at [11], followed in *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 per McDougall J at [34]-[39] (dealing with the equivalent section 20(2B) in the *Building and Construction Industry Security of Payment Act* 1999 (NSW)).

Warren's submissions

[79] Warren argued against Thiess being permitted to advance its alternate contention as to the invalidity of the adjudication decisions concerning the hire contracts given that the matter was not raised in the payment schedule, the adjudication response, or at first instance. Alternatively, the remedy sought was discretionary and should for that reason be refused.

[80] However, if it was necessary to consider the matter, Warren sought to argue that the primary judge was wrong to hold at [80] that the activities referred to therein were not construction work for the purpose of s 10(1) of the Act. Warren contended that, as an open pit itself constituted works to form part of the land, all of the work to which the three contracts related fell within the scope of s 10(1)(b) and (e) as operations that formed an integral part of or were preparatory to work of the kind referred to in paragraph (b). It was also argued that, as all of the works affected the land, they were works that formed part of the land. (No objection was taken to these arguments being made, notwithstanding that they were not raised by way of a Notice of Contention, nor was leave to do so opposed.)

[81] Alternatively, Warren submitted that there was, in any event, no error as to jurisdictional fact involved in including the amounts in the adjudication decisions, given that s 26(2) of the Act identified the only matters to which the adjudicator may give consideration. Warren's contention involved the proposition that the adjudicator should have had regard to a matter of fact not ascertainable from any of the matters in s 26(2)(a)-(e). Further, it contended that what parts of the payment claim were for "construction work" or "related goods and services" were not matters of jurisdictional facts but matters within the scope of the adjudicator's authority to determine and any error as to that matter was not a jurisdictional error.

Discussion

[82] Thiess' alternative argument going to the adjudicator's jurisdiction does not arise if the primary judge's finding at [80] is incorrect. It is therefore first necessary to consider Warren's contention that that finding was erroneously made.

[83] That requires a consideration of the phrase "works forming, or to form, part of the land". The learned primary judge held that the phrase was one of wide meaning. That is clearly the case. I also agree with the primary judge, that the works do not need to be permanent to form part of the land and that such a requirement would make the provision unworkable. There is nothing in the section to warrant restricting the ambit of the phrase to works that are permanent. However, in my view, more is required than that the works "affect" the land form for them to come within s 10(1)(e). So much is made apparent by the fact that the activities mentioned in s 10(1)(e) are insufficient alone to constitute construction works, unless it is preparatory etc to the work in (a), (b) or (c).

[84] Warren argued that the excavation of an open pit mine was work that formed part of the land within s 10 (1)(b) and that the work referred to in [80] of the reasons (being

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; cleaning the interface between the overburden and the coal seam) were operations that fell within s 10(1)(e). Further, that work was not excluded by s 10(3), with the result that it was "construction work" within s 10(1). Accordingly, the excavators were plant for use in connection with the carrying out of construction work.

[85] Thiess sought to support the finding at [80] not only on the basis articulated by the primary judge, but also on an additional basis. Thiess contended that when regard was had to the full context of the phrase in s 10(1)(b), it is apparent that the relevant "works" were intended to be works that are "added to land or intended to be added to the land, and not merely site clearance, earthmoving and excavation of itself (ie being a part of the process of open cut mining)". The primary judge dealt with a similar argument at [28] stating:

> "[Thiess] 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."

[86] While, as I have already stated, for the purposes of s 10(1)(e) I consider that it is insufficient that particular works merely "affect" the land form, I agree with the judge's conclusion that it is not necessary that the works must be something "added to the land or intended to be added to the land" – some structural alteration to the land form may be sufficient.

[87] Warren submitted that implicit in his Honour's reasons and the finding at [80] is the view that a large open cut pit, including the batters which comprise its walls and the road works which allow access to the pit, cannot be within the definitional requirement in s 10(1)(b) of "works forming, or to form, part of land". However, it was argued that, given that the phrase is one of wide meaning and the finding that dams and drains when constructed form part of the land on which they are built and that the express inclusions include walls and road works, there was no reason in logic or principle why an open cut pit is not in the class of works forming, or to form, part of land. It was submitted that it could not be the case that, simply because such a pit was related to mining activity, it fell outside the scope of the term "works". The limitation on the meaning of "construction work" for the purpose of the Act concerning mining activity was that which was expressly set out in s 10(3). Section 10(3) contemplated as its starting point works which otherwise fall within s 10(1). Accordingly, Warren contended that if it was accepted that the open cut pit itself was within the category of works to form part of land, then all of the work to which the three contracts related fell within the scope of s 10(1)(e) as operations that formed an integral part of or were preparatory to work of the kind referred to in paragraph (b).

[88] I note that the Lake Vermont Coal Project was explained by Mr Stansfield, who was Thiess' site manager at that project in his affidavit as follows:

> "The Lake Vermont Coal Project is an open pit coal mine which is a method of mining coal whereby the topsoil and subsoil are removed and stockpiled for further use in the mining operations. Then the overburden is removed to either a waste dump or 'in pit' dump, the surface of the coal is cleaned, and the coal is extracted and removed to a 'run of mine' stockpile.
>
> Open pit mines are dug into the ground on benches, which are the vertical levels of the hole. The open pit mine walls are stepped. The inclined section of the wall is known as the batter, and the flat part of the step is known as the bench or berm."

[89] Given the examples provided in s 10(1)(b) of works forming part of the land which extends to include such matters as walls, road works, aircraft runways and wells, it is difficult to see why the construction of an open pit mine, such as the Lake Vermont Coal Project, which is infrastructure that involves excavation that requires the construction of walls or stepped terraces, would not constitute works forming part of the land. And, as Warren submitted, the exclusion in s 10(3) proceeds on the basis that mining works, including for mining by surface working, may fall within in s 10(1). I accept Warren's submission that the construction of an open pit mine is the construction of works that form part of the land and thus comes within the ambit of s 10(1)(b).

[90] As to the work referred to in [80] of the reasons, I note the affidavit evidence of Mr Stansfield, that the use of the excavator to trim and scale batters and walls in the pit and to clean the interface between the overburden and the coal seam was an integral part of the coal mining process, and was required in order to allow a smaller excavator to strip the remaining waste off so that the coal could be accessed. I also note his evidence, like that of Mr Mallam, was that the stripping of the topsoil and scrub and the removal of the overburden were a necessary and integral part of accessing the coal seam. Batters, it will be recalled, are the near-vertical faces of the stepped terraces constructed on the sides of the mine pit. I consider that all these works can be seen as an integral part of, or as preparatory to or as for completing the open pit mine, which itself was work within s 10(1)(b). (It was common ground that none of the excavators were used to remove the coal itself.)

[91] Although Thiess sought to argue that the work mentioned in [80] was part of the extraction process within s 10(3), for the reasons already given, I consider that submission should be rejected. As the learned judge correctly found, s 10(3) does not pick up work done for the purpose of opening a mine or preparatory to that purpose. It is not concerned with work that is a necessary or integral part of the construction of an open pit mine; its focus is much more limited.

Conclusion

[92] In my view, the learned primary judge was wrong to consider that the work referred to at [80] was not "construction work", because it was not earthmoving or excavation which formed an integral part of or was preparatory to work of the kind referred to in s 10(1)(a), (b) or (c). I consider that the work was encompassed by s 10(1)(e) and did not come within the exclusion in s 10(3). Accordingly, the

excavators were supplied for use in connection with the carrying out of construction work and were "related goods and services".

[93] I note that Warren sought to argue that all the work under three contracts was construction work. Given that the alternate ground raised by Thiess was expressly confined to the adjudications concerning the hire contracts, it is not necessary to determine whether the primary judge's findings at [30] and [32] are correct. Bearing in mind the correct construction of s 10(1)(e), the work referred to in [30] and [32] would be required to satisfy the necessary nexus referred to in [46] of these reasons.

[94] While the conclusion I have reached concerning the primary judge's finding at [80] is a sufficient basis to dispose of the alternate basis for invalidity urged by Thiess, for completeness I shall address the matter of jurisdictional error should my view of the finding at [80] be wrong.

Jurisdictional error?

[95] The centrality of the distinction between jurisdictional and non-jurisdictional error identified by the High Court in *Craig v South Australia* (1995) 184 CLR 163 acquired a constitutional dimension in State law as a result of the decision in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, as Spigelman CJ noted in *Chase Oyster* at 402. In *Chase Oyster*, McDougall J stated at 426-427, with reference to *Kirk*:

> "The majority pointed out (at [71]) that '[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error'. However, by reference to the decision in *Craig v South Australia* (1995) 184 CLR 163 at 177-178, the majority identified three categories of jurisdictional error (at [72]):
>
> > '(1) The mistaken denial or assertion of jurisdiction, or (in a case where jurisdiction does exist), misapprehension or disregard of the nature of or limits on functions and powers;
> >
> > (2) Entertaining a matter or making a decision of a kind that lies, wholly or partly, outside the limits on functions and powers, as identified from the relevant statutory context;
> >
> > (3) Proceeding in the absence of a jurisdictional fact; disregarding something that the relevant statute requires to be considered as a condition of jurisdiction, or considering something required to be ignored; and misconstruction of the statute leading to misconception of functions. (Of this last example, it was said in *Craig* (at 178) that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.")'"

[96] The following pertinent observations were also made by McDougall J in *Chase Oyster* at 427-429:

> "As Gleeson CJ and McHugh J observed in *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at [24], '[j]urisdiction is the authority to decide'.
>
> A 'jurisdictional fact' is, in general terms, 'a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question' (*Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120 at [43]).
>
> Spigelman CJ pointed out in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [37] that '[t]he parliament can make any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality)'. As his Honour said (at [38]), those two features 'are two inter-related elements in the determination of whether a factual reference in a statutory formulation is a jurisdictional fact in the relevant sense'. The interrelationship arose because essentiality may often suggest objectivity.
>
> Whether something is a jurisdictional fact is ascertained by a process of construction, undertaken in the usual way. The court will have regard to the full statutory context and to the object that the legislation seeks to achieve. One asks, in essence, whether the legislature intended that the presence or absence of the factual condition should invalidate an attempted exercise of power: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] (McHugh J, Gummow J, Kirby J and Hayne J)."

[97] Likewise, in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 McLure P said at [11]-[12]:

> "Whether a criterion is a jurisdictional fact is a question of statutory construction. A consequence of characterising a fact as 'jurisdictional' is that it significantly enlarges the scope of judicial review. The court's judicial review power is confined to intervening when a decision-maker has made a jurisdictional error (or there is an error of law on the face of the record). Ordinarily, an error of fact does not give rise to a jurisdictional error and thus is outside the scope of the court's review power. Not so when a fact is jurisdictional. The court must be satisfied that a jurisdictional fact actually (objectively) exists. …
>
> Another consequence (at least for inferior courts, tribunals and administrative decision-makers) is that the non-existence of a jurisdictional fact invalidates any order, determination or other outcome flowing from the exercise of the relevant statutory power. Any purported exercise of the power is invalid (that is, it is void not voidable). This consequence underpinned the historical reluctance of the courts to characterise a statutory criterion as a jurisdictional fact: *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369."

[98] Both parties referred to *Coordinated Construction Co Pty Ltd*. But that case did not consider the issue raised by Thiess' alternate argument. Rather, it concerned the question of whether delay damages and interest payable under the contract could be

claimed to be due "for construction work carried out" or "for related goods and services supplied" within the definition of "claimed amount" in s 4 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW). Ipp JA and Basten JA agreed with Hodgson JA's reasons at 397 [38]-[45] that a claim for a progress payment under that Act could be made for expenses incurred which were not directly attributable to the carrying out of "construction works". Hodgson JA held at [41]:

> "In my opinion, the circumstance that a particular amount may be characterised by a contract as 'damages' or 'interest' cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as 'damages' or 'interest'; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work."

[99] Having found that delay damages and interest under the contract in question could be claimed to be due "for construction work carried out or for related goods and services supplied", it was unnecessary for the court to address the further question raised as to whether, if there was error by the adjudicator in not excluding the amounts in question from the determinations, that error rendered the adjudication void. I note, however, that Hodgson JA expressed the following view at [45]:

> "… in my opinion, even if s 13 [the equivalent of s 17] is construed as limiting claims to claims for payment for construction work carried out or for related goods and services supplied, it would be for the adjudicator to determine whether or not such amounts should be included in the amount determined, having regard particularly to s 9(a) [the equivalent of s 13(a)] and other provisions of the Act and the contract. This appears to be what each adjudicator did; and I am not satisfied even that any error of law on the face of the record has been established, much less an error of the kind that could invalidate a decision."

[100] In contending that the adjudication decision was void as beyond jurisdiction, Thiess expressly disavowed the proposition that a payment claim which relates in part to construction work and in part to other work was *wholly invalid*, such that the adjudicator may not embark upon the adjudication. Rather, Thiess contended that, in order to be valid, an adjudication decision must be limited to "construction work" or "related goods and services" within the meaning of ss 10 and 11. It was submitted that, as that requirement "underpinned the existence of a valid adjudication, its satisfaction (or otherwise) constituted a jurisdictional fact". Accordingly, since "the adjudication decisions included amounts that were not for 'construction work' or 'related goods and services' within the meaning of ss 10 and 11", the adjudicator acted without jurisdiction and the adjudication decisions were invalid.

[101] Clearly, the existence of a construction contract is a prerequisite to the exercise of the adjudicator's jurisdiction to determine an adjudication application and whether or not there is such a contract is a "jurisdictional fact": *Fifty Property Investments* at [20]; *Walton Construction (Qld) Pty Ltd v Salce & Ors* [2008] QSC 235 at [7]. It

was one of the "basic and essential requirements" for a valid adjudication decision identified in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. But the element of jurisdictional error identified in Thiess' alternate argument was not error as to the existence of a construction contract.

[102] Rather, Thiess' contention was that the element of jurisdictional error concerned the incorrect determination of the extent and quantum of the work that comprised "construction work" for the purposes of the Act. It was that determination as to how much of the payment claim was for "construction work" or "related goods and services" that was said to concern a matter of jurisdictional fact. (There was no issue raised as to error of law on the face of the record.)

[103] Thiess' alternative argument cannot be accepted. Where no jurisdictional error is shown to have been made by the adjudicator in proceeding to determine the adjudication application on the basis that the payment claim concerned a construction contract, the adjudicator's determination as to the extent and value of the "construction work" or "related goods and services" the subject of the payment claim does not, in my view, concern a matter of jurisdictional fact.

[104] I do not consider that the scheme and object of the Act supports the approach urged by Thiess. On the contrary, the scheme of the Act indicates that, with respect to construction contracts, the determination as to the extent and value of construction work and related goods and services is the matter that the adjudicator is empowered to determine under s 26. Nor would the approach urged by Thiess promote the object of the Act, which is to provide a speedy interim solution to progress payment disputes arising under construction contracts. Indeed, it would undermine it. It would result in the invalidity of the adjudication determination no matter how small the component incorrectly determined to be construction work.

[105] Furthermore, the arguments advanced by Thiess in the present case, as to why it was not required to raise the issue now ventilated before the adjudicator, serve to illustrate the unattractive situation which would follow if its alternate contention were accepted. The payment schedule in the present case only asserted that there was no construction contract because none of the work was construction work. There was no factual material presented to the adjudicator (in the event that that submission were rejected) relating to the nature and value of the various components of the work undertaken under the hire contracts that would have permitted a discrete consideration by the adjudicator as to what parts of the payment claim ought to be considered for related goods and services. The dilemma is compounded by the fact that an adjudicator is constrained by s 26(2) as to the matters which are to be considered in deciding an adjudication application.

Orders

[106] In my view, Thiess has not succeeded in showing any error by the learned primary judge, as contended in grounds 3 to 6 of the Notice of Appeal. Further, there was no jurisdictional error by the adjudicator, as contended by Thiess in its alternate argument raised in grounds 1 and 2.

[107] The appeal should be dismissed.

[108] The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 (paragraph 52).