IN THE COURT OF APPEAL **[1998] QCA 091**

SUPREME COURT OF QUEENSLAND

Appeal No. 2545 of 1997

Brisbane

[Radair P/L v. Long-Airdox (Aust.) P/L & Ors.]

BETWEEN:

RADAIR PTY LTD
A.C.N. 010 824 076
(Applicant) Appellant

AND

LONG-AIRDOX (AUSTRALIA) PTY LTD
A.C.N. 000 133 595
(Plaintiff) First Respondent

AND

AUSTRALIAN COAL TECHNOLOGY PTY LTD
A.C.N. 064 080 039
(First Defendant) Second Respondent

AND

THIESS CONTRACTORS PTY LTD
A.C.N. 010 221 486
(Second Defendant) Third Respondent

AND

RESOURCE RECLAMATION PTY LTD
A.C.N. 071 332 753 Fourth Resp

AND

POWER SCREEN PACIFIC PTY LTD
A.C.N. 003 585 118 Fifth Respo

AND

BHP AUSTRALIA COAL PTY LTD
A.C.N. 010 221 486 Sixth Respondent

AND

KCE EXCAVATORS PTY LTD
A.C.N. 073 066 118 Seventh Respondent

McPherson J.A.
Thomas J.
Dowsett J.

Judgment delivered 17 February 1998
Further order delivered 15 May 1998

Further order of the Court.

ORDERS:

1. **AS TO THE MONEYS IN COURT IN THE ACTION COMMENCED BY PLAINT NO. 140 OF 1996 IN THE DISTRICT COURT AT MACKAY, IT IS DECLARED THAT ONLY SUCH PERSONS AS HAVE GIVEN TO BHP AUSTRALIA COAL PTY. LTD. NOTICES OF CLAIM OF CHARGE PURSUANT TO AND IN ACCORDANCE WITH S.10 OF THE *SUBCONTRACTORS' CHARGES ACT* 1974 AND OTHERWISE HAVE ESTABLISHED OR SUBSEQUENTLY ESTABLISH THEIR ENTITLEMENT THERETO, ARE ENTITLED TO CHARGES OVER SUCH MONEYS PURSUANT TO THE SAID *ACT*.**
2. **AS TO THE MONEYS IN COURT IN THE ACTION COMMENCED BY PLAINT NO. 145 OF 1996 IN THE DISTRICT COURT AT MACKAY, IT IS DECLARED THAT ONLY SUCH PERSONS AS HAVE GIVEN TO BHP AUSTRALIA COAL PTY. LTD. NOTICES OF CLAIM OF CHARGE PURSUANT TO AND IN ACCORDANCE WITH S.10 OF THE *SUBCONTRACTORS' CHARGES ACT* 1974 AND OTHERWISE HAVE ESTABLISHED OR SUBSEQUENTLY ESTABLISH THEIR ENTITLEMENT THERETO ARE ENTITLED TO CHARGES OVER SUCH MONEYS PURSUANT TO THE SAID *ACT*.**
3. **AS CONCERNS THE SAID ACTIONS, ORDER THAT THE ORDER FOR CONSOLIDATION MADE ON 20 FEBRUARY 1997 BE SET ASIDE AND THAT THOSE ACTIONS BE REMITTED TO THE DISTRICT COURT AT MACKAY.**
4. **FURTHER ORDER THAT THE MONEYS PAID INTO COURT BY BHP AUSTRALIA COAL PTY. LTD. IN THE SAID ACTIONS BE PAID TO THE REGISTRAR OF THE SAID DISTRICT COURT TO ABIDE THE ORDER OF THAT COURT.**
5. **FURTHER ORDER THAT ALL OTHER ORDERS MADE ON 20 FEBRUARY 1997 OR THEREAFTER IN CONNECTION WITH THE CONSOLIDATED ACTION BE SET ASIDE INSOFAR AS THEY CONCERN THE SAID ACTIONS.**
6. **THE ORDER AS TO COSTS MADE BELOW IS SET ASIDE AS BETWEEN THE APPELLANT AND THE RESPONDENTS.**
7. **THE FIRST RESPONDENT IS ORDERED TO PAY THE APPELLANT'S COSTS OF THE APPEAL.**
8. **THE FIRST RESPONDENT IS ORDERED TO PAY THE APPELLANT'S COSTS OF THE PROCEEDINGS BELOW.**
9. **THE FIRST RESPONDENT IS TO HAVE A CERTIFICATE PURSUANT TO THE *APPEAL COSTS FUND ACT* 1973**.

CATCHWORDS: **BUILDING AND ENGINEERING CONTRACTS - sub-contractor's charges - construction of s. 5(3) of the *Subcontractor's Charges Act 1974* - whether order for consolidation of actions should be set aside.**

Hewitt Nominees v The Commissioner for Railways **[1979] Qd R 256**
Hamilton Australia Pty Ltd v Milson Projects Pty Ltd **[1997] 2 Qd R 355.**

In Re Williams, ex parte The Official Assignee **(1899) 17 NZLR 712**
Stapleton v F.T.S. O'Donnell Griffin & Co (Q) Pty Ltd **(1961) 108 CLR 106 .**

Counsel: Mr D Gore Q.C, with him Mr M Williams for the appellant.
Mr S Doyle, with him Mr M. Daubney for the first respondent

Solicitors: Macrossan & Amiet for the appellant
Russell & Co. for the first respondent
Duells for the second respondent
McCullough Robertson for the third respondent
Fourth respondent - unrepresented
Fifth respondent - unrepresented
Allen Allen & Hemsley for the sixth respondent
Grant & Simpson for the seventh respondent

Hearing date: 4 December 1997

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SUPREME COURT OF QUEENSLAND

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Before McPherson J.A.
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REASONS FOR FURTHER ORDER - THE COURT

Judgment delivered 17 February 1998
Further order delivered 15 May 1998

On 17 February 1998 the Court published its judgment in this matter, proposing

certain orders, but inviting the parties to make further submissions as to those proposed orders and as to costs should they be so minded. They have done so. That judgment disposed of a point of construction of the *Subcontractors Charges Act* 1974, which was the primary point argued at the hearing of the appeal. In preparing our reasons, we had assumed that the resolution of that matter would result in the parties being able to agree as to the appropriate orders. In particular, we assumed that there were no other matters in dispute between Radair and Long-Airdox. However Long-Airdox asserts that this is not the case.

As outlined in the earlier reasons, there are on foot five actions in which the various plaintiffs seek to recover money and enforce charges in connection with the project in question. Radair is a plaintiff in two such actions, 140 and 145 of 1996 in the District Court at Mackay. In the first of these, Radair seeks to recover $77,646.58 as moneys owing by Resource Reclamation pursuant to a contract and also to enforce charges under the *Act* against moneys payable by BHP Coal to Thiess and by Thiess to ACT. In that action Radair also claims other charges which are not relevant for present purposes. Radair has recovered judgment against Resource Reclamation for $59,225.82. It is not clear whether Radair accepts this amount as being the total owed to it or whether it seeks to maintain some or all of the balance of its original claim. Pursuant to the *Act*, BHP Coal has paid into court the sum of $77,646.58 from moneys otherwise payable to Thiess. As far as we can determine, no party to that action disputes Radair's entitlement to a charge on the money to the extent of any amount owed by Resource Reclamation, but it appears that Radair has not yet formally proven its entitlement to such a charge. Further, we do not know whether BHP Coal and Thiess accept that judgment as binding upon them for the purposes of the claim of charge.

In Action 145 of 1996, Radair seeks to recover $115,828.59 as moneys owing by ACT

pursuant to a contract and also seeks to enforce charges under the *Act* against moneys payable by BHP Coal to Thiess and by Thiess to ACT. Radair has not yet established its claim against any party and as we understand it, accepts the need to do so. BHP Coal has paid into court the amount of $115,828.59 from moneys otherwise payable to Thiess.

In addition to the moneys paid into court by BHP Coal, Thiess has paid in the sum of $295,617.04 from moneys otherwise payable to ACT. This is said to be the total amount payable by Thiess to ACT and has been paid into court in respect of all five actions. It is the only sum available to meet the various charges claimed in these actions, other than the funds paid in by BHP Coal. The various claimants, apart from Radair, are Long-Airdox, Resource Reclamation and KCE. The moneys paid in by BHP Coal are sufficient to satisfy Radair's claims, and no other party has given notice of claim of charge in respect of those funds. Thus, subject to Radair establishing its claims, the moneys in court will be sufficient to satisfy them. In Action 140 of 1996, the only other parties interested in the moneys paid in by BHP Coal are BHP Coal, Thiess and Resource Reclamation, although neither BHP Coal nor Resource Reclamation seems to have much remaining interest. In Action 145 of 1997, the other interested parties are BHP Coal, Thiess and ACT.

Long-Airdox submits that it should be permitted to intervene in those actions to challenge Radair's claims. *Prima facie,* there is no reason why Long-Airdox should be allowed to do so. It asserts that if Radair fails to any extent in its claims to charges over the moneys paid into court by BHP Coal, additional moneys will become payable to Thiess. No doubt, this is correct. It is further submitted that this would lead to there being additional funds available to meet Long-Airdox's claim in Action 9384 of 1996 in which it sues ACT for moneys payable to it pursuant to a contract and also seeks to enforce a charge over moneys payable by Thiess to ACT.

The material does not disclose why the amount payable by Thiess to ACT (and therefore subject to Long-Airdox's charge) is likely to be affected by the amount which Thiess receives from BHP Coal. It is true, however, that in a letter dated 22 April 1997, the solicitors for Thiess suggested that the amount paid into court by that company was calculated after deducting the amount paid into court by BHP Coal. There is no explanation as to why this step was appropriate, nor was the matter addressed in argument. The implication appears to be that Thiess's obligation to ACT is in some way limited by the amount it is to receive from BHP Coal. The only relevant provision of the *Act* appears to be sub-s. 5(3) which provides:-

> "The total amount recoverable under the charges of subcontractors shall not exceed the amount payable to the contractor or subcontractor under his contract or subcontract, as the case may be."

Given the poor drafting of the *Act*, there is always room for argument as to the variable meanings of the terms "contractor" and "subcontractor", but this sub-section was considered in *Hewitt Nominees v. The Commissioner for Railways* [1979] Qd.R. 256 and again, very recently, in *Hamilton Australia Pty. Ltd. v. Milson Projects Pty. Ltd.* [1997] 2 Qd.R. 355. In the latter case, this court held, expressly following *Hewitt Nominees*, that:-

> "Subsection (3), being aimed at the situation where several subcontractors claim against the same fund, limits the total amount recoverable under charges upon that fund to the total amount of that fund." (p. 360)

The expression "the same fund", is not derived from the *Act* but clearly, it refers to the amount due by one party to another against which amount notices of claim of charge have been lodged. In *Hewitt Nominees* at p.263, W.B. Campbell J. said:-

> "Subsection (3) of s. 5 does not affect the construction I have placed on s.5(1) because it, in plain words, merely limits the total amount recoverable under charges to the amount payable to the particular person in the contractual hierarchy from whom the amounts of the charge are sought."

Again, at p. 265, his Honour said:-

> "Section 6(3) of the *Act* limits the total amount recoverable under charges to the amount payable to the particular contractor or subcontractor under his contract or subcontract and s.8 provides in the case of insufficiency of money, for the abatement of two or more claims in proportion to the amounts of the claims."
> (The reference to s.6(3) is apparently an erroneous reference to s.5(3).)

These cases make it clear that the reference to "the amount payable to the contractor or subcontractor" in s.5(3) is a reference to the amount payable by an employer (or a superior contractor) to a contractor (or subcontractor) with whom the former has contracted. The claiming subcontractor identifies that fund by the notices given pursuant to s.10 of the *Act*. Long-Airdox's claim is against moneys payable by Thiess to ACT. Subject to any special provision to the contrary in their contract, the amount payable by BHP Coal to Thiess will not affect the amount of such moneys. The effect of the *Act* is that an intermediate contractor may be obliged to pay amounts owed to its own sub-contractor to sub-contractors "further down the line" with whom the said intermediate contractor has no contractual relations. It may also be deprived of moneys payable to it because charges have been claimed against those moneys. One would expect that the obvious problems posed by this statutory regime could be addressed by appropriate contractual terms designed to ensure that subcontractors are paid.

That may have been the intention of the legislation. The Court of Appeal in New Zealand said as much concerning similar legislation in *In ReWilliams, ex parte The Official Assignee* (1899) 17 NZLR 712 at pp. 719-720. The relevant legislation conferred a wider range of securities (including security over land and chattels) upon a wider range of creditors (including contractors and workers) than does the Queensland legislation. Edwards J. said, apparently with the approval of the other members of the court, of a section similar in some

respects to our s.5:-

> "...Under it a subcontractor, or a workman employed by a subcontractor, may, to the extent of the moneys owing by the employer to the contractor, assert a lien upon the land or chattel of the employer, though the effect of such a claim may be to defeat the rights of the contractor or of intermediate subcontractors. The results at first sight may appear to be of a startling character. For example, a workman employed by a subcontractor may assert a lien upon the land or chattel ... to the prejudice of the original contractor, though nothing whatever is owing by such original contractor to the subcontractor who employs the workman...
>
> If, however, a contractor should pay his subcontractor in full, which in many cases he may be compelled to do in order to get the work done, he must bear the loss. The only principle upon which such results can depend must be that the workman who does the work is intended, to the extent provided by the statute, to have a charge upon the land or chattel upon which the work is done, and that the contractor and all those who contract under him are charged with the duty of seeing that such workman is paid, and, if they fail so to do, to the extent provided by the statute they must bear the loss. A statutory relation, quite independent of contract, is thus created between the employer and the workman."

At p.721 these general observations were applied to provisions of the legislation which were equivalent to the present provisions. His Honour said:-

> "Here, again, the same principle is apparent, that the man who actually does the work is entitled to be paid, though the result may be to injure the employer, or the intervening contractors who do not actually perform the work."

The decision in *Williams* has often been followed in Australia. See for example the decision of the High Court in *Stapleton v F.T.S. O'Donnell Griffin & Co (Q) Pty Ltd* (1961) 108 CLR 106 at p. 114 and the cases there cited. Although this aspect of the reasoning in the case appears not to have been considered, there is no reason to doubt its correctness.

To the extent that Long- Airdox is entitled to a charge against moneys payable by Thiess to ACT, the relevant fund is the amount payable under the contract between Thiess and ACT. It has no interest in Thiess's relationship with BHP Coal unless the amount payable or likely to be paid by Thiess to ACT will be reduced in some way as a result of that

relationship. We have in mind circumstances such as a contractual tie between the amount payable to ACT and the amount received by Thiess or the possibility of Thiess's insolvency. The courts have recognized that where there is a risk that the defendant in an action may dissipate its assets in such a way as to deprive the plaintiff of the benefit of success in that action, it may intervene to prevent such dissipation by way of a so-called "Mareva" injunction. Where an amount which is subject to a charge might be affected by the conduct of the party to whom such amount is otherwise payable, it may be that the court will intervene in a way which is analogous to the "Mareva" process. Long-Airdox has not sought such relief, nor has it suggested that Thiess is insolvent. It has suggested that Thiess may not be interested in defending Radair's claim, but there is no evidence which would suggest that Thiess was so conducting itself as to dissipate moneys to which it may be genuinely entitled. Long-Airdox has no right to be heard in respect of Radair's claim to a charge over moneys otherwise payable by BHP Coal to Thiess.

The learned Judge at first instance ordered consolidation of all five actions upon the basis that all claimant sub-contractors were entitled to share in the funds paid into court by BHP Coal and Thiess and to permit Long-Airdox (and perhaps other sub-contractors) to be heard in opposition to Radair's claim. We consider that only Radair may be entitled to charges over the BHP Coal moneys and that Long-Airdox and the other subcontractors have no interest in proceedings brought to establish such charges. In those circumstances, Radair submits that the order for consolidation should be set aside. That company is only interested in Actions 140 and 145 of 1998, and so the submission should be limited to the order for consolidation as it applies to them.

All five actions involve claims against moneys payable by Thiess to ACT, and to that extent, there would be some point in maintaining the consolidation. However Radair now

indicates that as its claims can be satisfied from the BHP Coal moneys, it does not wish to proceed further against the Thiess moneys. No doubt there are legitimate advantages to Radair in being permitted to proceed with its actions in the District Court at Mackay rather than in the consolidated action in this court. In the circumstances, the best course would be to set aside the order for consolidation insofar as concerns the Radair actions to permit Radair to proceed to establish its claims in those actions. It will then, presumably, discontinue against the other defendants. Radair offered an undertaking that it would not proceed further to enforce its charge against the Thiess moneys, but we see no value in requiring it.

The formal orders will therefore be as follows:-

(a) A declaration that as to the moneys in court in the action commenced by Plaint No. 140 of 1996 in the District Court at Mackay, only such persons as have given to BHP Australia Coal Pty. Ltd. notices of claim of charge pursuant to and in accordance with s.10 of the *Subcontractors' Charges Act* 1974 and otherwise have established or subsequently establish their entitlement thereto are entitled to charges over such moneys pursuant to the said *Act*.

(b) A further declaration that as to the moneys in court in the action commenced by Plaint No. 145 of 1996 in the District Court at Mackay, that only such persons as have given to BHP Australia Coal Pty. Ltd. notices of claim of charge pursuant to and in accordance with s.10 of the *Subcontractors' Charges Act* 1974 and otherwise have established or subsequently establish their entitlement thereto are entitled to charges over such moneys pursuant to the said *Act*.

(c) An order that insofar as concerns the said actions, the order for consolidation

made on 20 February 1997 be set aside and that those actions be remitted to the District Court at Mackay.

(d) Further order that the moneys paid into court by BHP Australia Coal Pty. Ltd. in the said actions be paid to the Registrar of the said District Court to abide the order of that court.

(e) Further order that all other orders made on 20 February 1997 or thereafter in connection with the consolidated action be set aside insofar as they concern the said actions.

In view of Radair's judgment against Resource Reclamation, we originally proposed a declaration that it was entitled to the sum of $59,225.82, being part of its claim in Action 140 of 1996. After further consideration, it now appears to us that such order should not be made. Although there may not be much in dispute as between Radair, BHP Coal and Thiess, there has, as far as we are aware, been no formal proof of, or admission as to numerous relevant matters, including the amount secured by the charge and the extent of Radair's compliance with the formal requirements of the *Act*, other than as between Radair and Resource Reclamation.

Long-Airdox has also made submissions as to the proposed orders for costs. As far as we can discern, the only variation from the orders proposed in my earlier reasons concerns the costs below. Long-Airdox points out that paragraphs 1 and 2 of Radair's summons sought orders concerning the validity of notices of claim of charge given by Long-Airdox to BHP Coal. Apparently, these notices were withdrawn prior to the issue of the summons. Long-Airdox submits that the costs order should exclude costs associated with these paragraphs. We see no reason to infer that the inclusion in the summons of these two paragraphs would, in the circumstances, have increased the costs in any significant way. In any event, given that

Long-Airdox was still asserting an entitlement to participate in the moneys paid into court by BHP Coal, it was hardly unreasonable for Radair to seek to put beyond doubt any possible basis for such claim. The order as to costs should be:-

(i) That the order as to costs made below be set aside as between the appellant and the respondents;

(ii) That the first respondent pay the appellant's costs of the appeal;

(iii) That the first respondent pay the appellant's costs of the proceedings below;

(iv) That the first respondent have a certificate pursuant to the *Appeal Costs Fund Act* 1973.