

SUPREME COURT OF QUEENSLAND

CITATION: *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Ors* [2013] QSC 141

PARTIES: **THIESS PTY LTD ABN 87 010 221 486**
(applicant)
v
WARREN BROTHERS EARTHMOVING PTY LTD
ABN 45 107 002 93
(first respondent)
RICS AUSTRALASIA PTY LTD ACN 089 873 067
(second respondent)
JONATHON SIVE
(third respondent)

FILE NO/S: BS No. 1975 of 2012

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ABN 45 107 002 93
(applicant)
v
THIESS PTY LTD ABN 87 010 221 486
(first respondent)
RICS AUSTRALASIA PTY LTD ACN 089 873 067
(second respondent)
JONATHON SIVE
(third respondent)

FILE NO/S: BS No. 4471 of 2012

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 May 2013

DELIVERED AT: Brisbane

HEARING DATE: 19 April 2013

JUDGE: Ann Lyons J

ORDER: **In relation to the application in BS No. 1975 of 2012:**

- 1. The decision of the third respondent dated 20 February 2012 in relation to Adjudication Application 1064504-818 is declared void.**
- 2. Judgment in BS No. 1927/12 is set aside.**
- 3. The moneys paid into Court of \$499,321.28 on 7 March 2012 by the applicant, together with any accretions, be paid out of Court forthwith to the**

applicant.

- 4. The applicant's undertaking as to damages is declared discharged.**
- 5. The first respondent pay the applicant's costs of and incidental to the proceedings including the hearing on 19 April 2013 on a standard basis to be assessed.**

In relation to the application in BS No. 4471 of 2012:

- 6. The application is dismissed.**
- 7. The applicant pay the first respondent's costs of and incidental to the proceeding (including any reserve costs) on a standard basis to be assessed.**
- 8. The first respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973*.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where Thiess Pty Ltd filed an application seeking a declaration that the adjudication decision of the third respondent was void or should be set aside due to jurisdictional error – where Warren Brothers contended that the adjudication decision should not be declared void as the jurisdictional error affected only part of the decision and a more convenient and satisfactory remedy existed – whether the adjudication decision should be declared void

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – where Thiess Pty Ltd put forward three grounds of contention and was successful on the first ground but failed on the second and third grounds – where Warren Brothers submitted that the third ground of contention was dominant and separable from the first ground and therefore warranted a costs order which departed from the general rule – whether the court should depart from the general rule that costs follow the event

PRACTICE AND PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – WHEN GRANTED – whether an indemnity certificate should be granted to Warren Brothers pursuant to s 15 of the *Appeal Costs Fund Act 1973*

Appeal Costs Fund Act 1973 (Qld), s 15
Building and Construction Industry Payments Act 2004 (Qld)

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2) [2013] QSC 67, distinguished
Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor [2011] QSC 327, cited
Hughes v Western Australian Cricket Association (Inc) (1986) ATPR 40-748, cited
James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors [2011] QSC 145, cited
Multiplex Constructions Pty Ltd v Luikens & Anor [2003] NSWSC 1140, cited
Permanent Trustee Aust Ltd v FAI General Insurance Co Ltd (1998) 44 NSWLR 186, cited
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389; [1949] HCA 33, cited
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Ors [2012] QSC 373, cited
Walton Construction (Qld) Pty Ltd v Plumber by Trade Pty Ltd & Ors (No 2) [2012] QSC 280, cited

COUNSEL: T P Sullivan SC for the applicant/first respondent
P Franco for the first respondent/applicant

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

ANN LYONS J:

The applications

- [1] Pursuant to an application filed on 2 March 2012 in proceeding BS No. 1975 of 2012, Thiess Pty Ltd (“Thiess”) sought to have declared void, or alternatively set aside, an Adjudication Decision by the second respondent, Rics Australasia Pty Ltd, under the *Building and Construction Industry Payments Act 2004* (Qld) (“BCIPA”). That decision was made by the third respondent, Jonathon Sive (“the Adjudicator”), on 20 February 2012. He awarded an amount of \$480,035 in favour of Warren Brothers Earthmoving Pty Ltd (“Warren Brothers”).
- [2] On 27 November 2012, I delivered my reasons in relation to that application and determined that the Adjudicator had failed to exercise his power in accordance with the BCIPA and that, accordingly, Thiess was entitled to a declaration that the decision of the Adjudicator was void.
- [3] Pursuant to their application in BS No. 4471 of 2012, also filed on 21 May 2012, Warren Brothers sought a declaration that the Adjudicator be permitted to correct the error in his Adjudication Decision of 20 February 2012 by issuing a fresh Adjudication Decision in an amount of \$439,416.08, which is \$40,619.06 less than the original decision, and that he be ordered to issue a fresh Adjudication Decision in that amount. That application was not successful.

[4] Paragraph [85] of the reasons was in the following terms:

“[85] As it may be necessary to consider consequential orders I will hear the parties in relation to the terms of orders and on the issue of costs. I would propose however that essentially there be orders that:

1. In BS No. 1975 of 2012: Declare the decision of the third respondent dated 20 February 2012 in relation to Adjudication Application 1064504-818 Void; and
2. In BS No. 4471 of 2012: The application is dismissed.”¹

[5] Accordingly, as orders had been foreshadowed but not made, submissions were sought in relation to the form of the orders and as to costs. Those submissions were provided by the solicitors for Warren Brothers on 6 December 2012 and by Counsel for Thiess on 11 December 2012.

[6] The amount of \$499,321.28 had been paid into Court on 7 May 2012 pursuant to a consent order dated 5 May 2012. That sum comprised \$480,035.14 together with interest on the adjudicated amount of \$11,047.38 and adjudication fees of \$8,238.76.

[7] Prior to the delivery of my decision on the form of the orders and costs, the solicitors for Warren Brothers sought leave to make further submissions in relation to the consequential orders. The basis for the further submissions was that Warren Brothers sought orders in reliance on the decision of Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)*² (“BMA Decision”), which was delivered on 22 March 2013. The matter was accordingly relisted for argument on 19 April 2013.

The orders sought by Warren Brothers

[8] Counsel for Warren Brothers relies on the *BMA* decision to argue that I should exercise my discretion and decline to make an order declaring the decision of the Adjudicator void. Counsel argues that in the *BMA* decision, Applegarth J refused to declare void an adjudication determination in circumstances where jurisdictional error affected only part of the determination by the adjudicator and a more convenient and satisfactory remedy existed for the jurisdictional error. His Honour referred to the High Court decision of *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*³ and the reference to grounds upon which the court may, in its discretion, withhold a remedy where “circumstances appear making it just that the remedy should be withheld”.⁴ His Honour continued:

“[9] ...

¹ *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Ors* [2012] QSC 373.

² [2013] QSC 67.

³ (1949) 78 CLR 389.

⁴ *BMA* decision, at [9] citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33.

This passage has been cited with approval in more recent times. I am not concerned with the grant of a constitutional writ, however, similar principles governing the exercise of the discretion to withhold a remedy in the exercise of the Court's supervisory jurisdiction apply. Where relief is sought in the form of an order quashing or setting aside an adjudication decision, or an order is sought declaring the decision to be void, an aggrieved applicant who has established a jurisdictional error ordinarily will be entitled to such a remedy, but the remedy may be withheld as a matter of discretion if the circumstances make it just to do so. One example is if a more convenient and satisfactory remedy exists."

- [9] In the *BMA* decision, the question was whether a decision of an adjudicator affected by an excess of jurisdiction, which related to a relatively small component in the adjudicated amount, should not be declared void. The affected portion was an amount of \$4.3 million in relation to an adjudicated amount of \$28 million. His Honour considered that a critical issue was whether the form of conditional order proposed by BGC (who were entitled to the adjusted adjudication amount) represented a more convenient and satisfactory remedy than an order declaring the decision void. BGC had essentially proposed that it would repay to BMA that part of the decision which was affected by error together with interest and GST on that amount. His Honour considered that more generally, the issue was "whether the circumstances make it just to withhold the declaratory and other relief sought by BMA in the circumstances, which include the objectives of the Act, the nature of the jurisdictional error, its ascertainable monetary consequences and BGC's undertaking to remedy those consequences by repaying...BMA."⁵
- [10] His Honour considered that the adjudicator's decision did not lack effect notwithstanding his finding of jurisdictional error and that the adjudicator's decision retained its effect unless he exercised his discretion to grant a declaration or make an order quashing or setting aside that decision. He also considered that the adjudicator had correctly assumed his jurisdiction to decide the application but exceeded his jurisdiction by including termination costs in the progress payment claimed and held:
- "[33] ... The consequences of his jurisdictional error are readily ascertainable. The error affected his decision in that the statute requires him to make a single determination, not many. However, unlike a denial of natural justice or some other jurisdictional error which might have tainted the whole of the decision-making process, the jurisdictional error in this case did not affect the determination and quantification of other parts of BMA's claim. Absent the jurisdictional error, BGC would have obtained an adjudication decision for an ascertainable amount in the order of \$24M.
- [34] The error deprived the parties of an adjudication decision in accordance with law. If BMA is correct in

⁵ Ibid, at [21].

its contention that there is no scope to remit the matter to the second respondent (or any other adjudicator) to determine the adjudication application according to law, then BGC (and indeed BMA) will have been deprived of their statutory entitlement to an adjudication decision according to law. BGC will have been deprived of its statutory entitlement to an interim payment of about \$24M, with adverse consequences for its cash flow, contrary to the objects of the Act.”

- [11] His Honour then considered the consequences of declining to declare the decision void and making a conditional order as sought by BGC and held:

“[35] In enacting and amending the Act, Parliament has not purported to regulate the Court’s exercise of its supervisory jurisdiction, including the circumstances in which the Court will decline to declare an adjudication decision void. To decline to exercise the discretion to declare void an adjudication decision on condition that the claimant repays the amount found to have been erroneously included in an adjudication decision is not to legislate a remedy in the form of a declaration of partial invalidity. Instead, it is to exercise the discretion to decline declaratory relief, or relief in the nature of prerogative relief, on a well-recognised basis, namely the availability of a more satisfactory remedy.

[36] To do so deprives BGC of the easily-identified amount that was paid to it as a result of the jurisdictional error, and no more. Account is taken of the nature of the jurisdictional error and the statutory context in which the jurisdictional error challenge arose. Requiring BGC to pay the amount in question and other amounts necessary to remedy the effect of the jurisdictional error is apt to remedy the excess of jurisdiction in the circumstances of the case.

[37] In many other cases, jurisdictional error is of a fundamental kind and ordinarily an adjudication decision will be quashed or set aside or a declaration made that the decision is void. The fact the jurisdictional error resulted in an identifiable and relatively small part of the adjudicated amount is a relevant consideration. This is not an ‘ordinary case’ of jurisdictional error in which an order in the nature of *certiorari* would be made ‘almost as of right.’”

- [12] In making the conditional order as sought by BGC, his Honour essentially made an order which, in practical terms, reflected the position that would have prevailed if the adjudicator had not made the jurisdictional error.

- [13] Counsel for Warren Brothers argues that in the present case, the jurisdictional error identified in the reasons similarly only affects part of the determination of the Adjudicator. In particular, it is argued that in the *BMA* decision, the adjudicator mistakenly included an amount for termination costs which was one component of the overall award. It is argued that the present case is similar because the Adjudicator intended to award the entire amount claimed by Warren Brothers for item 1, but mistakenly awarded \$101,032.48 inclusive of GST, rather than \$36,926.42 plus GST (\$40,619.06). Item 1 was just one of three items comprising the overall work. It is argued that in the present case, the jurisdictional error affects a minority of the overall determination such as in the *BMA* decision. It is argued that without the jurisdictional error, the Adjudicator would have valued the construction work at an amount that can be precisely calculated and that an amount of \$36,926.42 plus GST (\$40,619.06) is the amount in question with the affected portion being \$60,413.42 from an award of \$480,035.14.
- [14] Counsel for Warren Brothers advised the Court at the hearing that it is not now possible for Warren Brothers to simply make a fresh payment claim as the 12 month limitation period in the BCIPA has expired. Accordingly, it is submitted that the effect of declaring the determination void with no ability to remit the matter back to the Adjudicator would be not only to deprive Warren Brothers of an amount of \$419,621.72, which was determined to be owed to it, but also to prevent Warren Brothers from obtaining a new adjudication determination.
- [15] It is argued that the jurisdictional error was one which arose in the course of the decision-making process itself rather than in the application stage of the decision-making process and that the jurisdictional error can be confined to a discrete part of an item. It is also argued that no allegation of bad faith is made against the Adjudicator.
- [16] Warren Brothers also argues that the present case can be compared with *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor*⁶ where McMurdo J held that it would penalise the claimant to deprive him of the benefit of the entirety of the adjudication determination even though more than half of the determination was infected by the claimant's fraud. The claimant in that case was permitted to retain \$2.36 million out of an award of \$4.8 million. It is clear that in this case there is no allegation of fraud.
- [17] Warren Brothers also submits that a feature of the present case which is a distinguishing factor is that Warren Brothers did not request the Adjudicator to take the step that constituted the error and accordingly, it should not be penalised because of the error made by the Adjudicator.
- [18] Counsel for Warren Brothers argues that, but for the jurisdictional error, the Adjudicator's amount would have been \$419,621.72 and that the reduction represents 12.5 per cent of the total adjudication amount and together with interest of 12.3 per cent of the total amount paid into court.

⁶ [2011] QSC 327.

- [19] Accordingly, it is argued that the most convenient and satisfactory remedy is an order similar to that made in the *BMA* decision and that there should be orders requiring payment to Thiess of 12.3 per cent of the funds in court, being the proportion of the adjudication determination affected and for the balance to be paid to Warren Brothers. Counsel for Warren Brothers advised the Court that an undertaking is offered not to rely on the adjudication determination to obtain another judgment.

What are the appropriate Orders?

- [20] In the present case, there is no doubt that Warren Brothers' original payment claim comprised three items and that, in its payment schedule, Thiess disputed Warren Brothers' calculation in relation to all three items. Item 1 related to the cost of moving loads of topsoil and involved a total claim of \$101,032.48. Item 2 related to Variations and amounted to \$49,423.17. Item 3 related to Standby and Demobilisation costs and was an amount of \$360,764.25. The adjudication award related to those three items and whilst it adjusted the amounts claimed for Items 2 and 3, the amount for Item 1 was allowed in its entirety.
- [21] It is also clear that in its application to set aside the adjudication award for jurisdictional error, the major argument by Thiess was on the claimed error by the Adjudicator in relation to Item 1. I was ultimately satisfied that there had been a jurisdictional error made by the Adjudicator in relation to Item 1 and foreshadowed a declaration that the Adjudicator's decision was void.
- [22] Should that foreshadowed declaration that the Adjudication Decision is void be withheld as a matter of discretion because, as Warren Brothers argues, the circumstances make it just to do so and because a more convenient and satisfactory remedy exists? Without deciding whether such a declaration may be withheld as a matter of discretion in BCIPA cases when those requirements are in fact satisfied, I am not satisfied that those requirements have in any event been satisfied in the circumstances of this case.
- [23] I also consider that the factual circumstances in the *BMA* decision were somewhat different to the current facts. Having considered the decision in *BMA*, it is clear that the jurisdictional error in that case was confined to a discrete part of an item. In that case the adjudicator exceeded his jurisdiction by including termination costs in the amount of the progress payment to be paid by BMA to BGC. His Honour held that the error affected his decision in that the statute required the adjudicator to make a single determination and not many. His Honour concluded however that unlike a denial of natural justice or some other jurisdictional error which might have tainted the whole of the decision-making process, the jurisdictional error in that case did not affect the determination and quantification of other parts of BMA's claim. His Honour concluded that absent the jurisdictional error, BGC would have obtained an adjudication decision for an ascertainable amount in the order of \$24,000,000. His Honour considered that the jurisdictional error on the part of the adjudicator deprived BGC of the easily identified amount that was paid to it as a result of the jurisdictional error.

- [24] As outlined above, the order that Warren Brothers seeks in this case is that 12.3 per cent of the moneys paid into court be paid to Thiess and that they receive the balance. I am however not satisfied that the calculation in that regard is in fact accurate and note that counsel for Thiess submits that the figure should be 12.5 per cent. In any event, I consider that there is a more fundamental difficulty with the argument advanced by Warren Brothers, which is that in my view, the circumstances which gave rise to the jurisdictional error cannot be confined to a discrete part of the decision which can be conveniently excised.
- [25] Significantly, in my reasons I indicated:
- “[60] What is of significant concern to me, however, is the fact that the Adjudicator based his rejection of Thiess’ submission in relation to Item 1 on that basis of his view that Thiess’ submission was ‘generally unreliable and non-responsive to the real issues in dispute’ and that Thiess’ material ‘does not provide a picture of constancy and reliability but portrays one consisting of a procedure prone to human error factors.’ It would seem to me that if he had actually considered the Thiess submission and the Warren Brothers recalculation at the time he actually made his decision he would have seen that it was Warren’s claim which was subject to human error and that it was Warren had in fact not responded to some of the issues in dispute. To proceed on a factually flawed basis is in my mind a significant failure. I consider that the consequence of the failure of the Adjudicator to genuinely attempt to exercise his power in accordance with the BCIPA is that the Adjudication Decision is void.”⁷
- [26] On the basis of the findings that I have already made, I am unable to accept the submission from Warren Brothers that the Adjudicator’s failure went to a discrete part of Item 1 only and that, as such, that identifiable part can now be taken out without any effect on the remaining Adjudication Decision. It would seem to me that a finding that the Adjudicator’s view of Thiess’ submission was flawed necessarily affects the entire decision. I consider that the approach of the Adjudicator as revealed in his decision at paragraph 102 indicates that his view was that Thiess’ material “does not provide a picture of constancy and reliability but portrays one consisting of a procedure prone to human error factors” and at paragraph 103 that Thiess’ “material generally is unreliable and non-responsive to the real issues in dispute. My confidence in [Thiess’] material therefore becomes doubtful and suspicious.”
- [27] Accordingly, I consider that the jurisdictional error in fact tainted the whole of the decision-making process and as such it may well have actually affected both the determination and the quantification of other parts of Warren Brothers’ claim.

⁷ *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Ors* [2012] QSC 373.

- [28] Warren Brothers clearly have an entitlement to be paid for work they have done pursuant to the contract and it is unsatisfactory that because of a flawed Adjudication Decision the fast track payment scheme under the BCIPA has not been able to be successfully accessed. Warren Brothers however has other remedies available to it. It is simply that the BCIPA option is no longer able to be accessed. As Palmer J stated in *Multiplex Constructions Pty Ltd v Luikens & Anor*:⁸

“99 The consequences of the Court’s order in this case will doubtless be inconvenient and expensive for the parties. That is, principally, the result of the way in which the Act is structured and because it makes no express provision for what is to happen if a determination under s.22 or a judgment entered pursuant to s.25(1) is set aside for jurisdictional error of law.”

- [29] I would once again reiterate my previous remarks and those of Atkinson J in *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors*⁹ and Applegarth J in the first *BMA* decision that the failure to expressly provide for this eventuality can be remedied by an amendment to the legislation which is what has in fact occurred in Victoria where the amendments include provisions which allow an adjudicator’s decision to be declared partially void in some instances.
- [30] I do not consider that there is a sufficient basis to grant the relief sought by Warren Brothers to decline to make the declaration sought by Thiess.
- [31] Accordingly, the decision of the Adjudicator is declared void.
- [32] I turn now to the issue of costs.

Costs in relation to the application in BS No. 1975 of 2012

- [33] There is no doubt that Thiess was largely successful in its application. Three contentions, however, were raised by the applicant Thiess in BS No. 1975 of 2012:
- (i) Asserted failure by the third respondent to genuinely attempt to exercise his power;
 - (ii) Jurisdictional dispute – no reference date for payment claim; and
 - (iii) Jurisdictional dispute – not construction work under s 10 BCIPA.
- [34] Although there is no doubt that Thiess was successful on the first of those three contentions, it failed on the second ground. It also failed on the third ground, when the Court of Appeal handed down its decision on 12 October 2012 in CA No. 11871 of 2011.
- [35] Warren Brothers however argues that, in this case, as there were multiple contentions, the Court should make some order as to costs other than the order that costs follow the event. Reliance is placed on the decision of Hodgson CJ in the matter of *Permanent Trustee Aust Ltd v FAI General Insurance Co*

⁸ [2003] NSWSC 1140.

⁹ [2011] QSC 145.

Ltd,¹⁰ where his Honour noted the difference between cases which involve clearly discrete issues for determination and cases which involve inseparable, or at least sufficiently linked, issues.

- [36] Warren Brothers also relies on the observations of Toohey J in *Hughes v Western Australian Cricket Association (Inc)*¹¹ to seek orders that it not be required to pay the cost of all of the applications and relies on the following principles:
- (i) Ordinarily, costs follow the event in the absence of special circumstances justifying some other order;
 - (ii) Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed; and
 - (iii) A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may also be ordered to pay the other party's costs of them. In this sense 'issue does not mean a precise issue in the technical pleading sense but any disputed question of fact or law'.
- [37] Warren Brothers argues that half of the affidavit material filed by the parties in BS No. 1975 of 2012 related solely to the third ground, which failed. It also argues that, of the submissions filed by the parties, approximately one third went to each ground and of the time spent during the hearing, approximately half was spent on the second and third grounds.
- [38] Warren Brothers argues that the third ground was both dominant and separable from the first ground of contention and, therefore, the appropriate order for costs is that Warren Brothers pay Thiess its costs of contention one, but that Thiess pay the first respondent's costs of grounds two and three. Alternatively, it is argued that the appropriate order is that both parties pay their own costs.
- [39] I do not accept the submission that half of the affidavit material filed by the parties in BS No. 1975 of 2012 related solely to the third ground, which failed. Whilst both parties filed affidavits which went solely to the third ground of contention, which ultimately failed due to the Court of Appeal decision, no substantive submissions were made on the issue during the hearing of the applications and I was not required to consider that material in any detail. It was clearly really provided by way of background information. In my view, no substantive submissions were made on the third ground and no real time was spent on that issue at all either during the course of the trial or in the written submissions.
- [40] It would also seem to me that, as Thiess correctly asserts, the interlocutory application became necessary due to the conduct of Warren Brothers, who did not give Thiess the undertaking requested not to take any steps to obtain an adjudication certificate or otherwise take steps to enforce the decision of the Adjudicator. It would seem that Warren Brothers obtained the certificate and

¹⁰ (1998) 44 NSWLR 186.

¹¹ (1986) ATPR 40-748.

then filed it with the Court so it would take effect as a judgment pursuant to the BCIPA.

- [41] I consider that all of the costs associated with the interlocutory application were properly incurred and should be paid by Warren Brothers. I consider that in this case, costs should follow the event.
- [42] I consider therefore that the first respondent in BS No. 1975 of 2012 should pay the applicant's costs of and incidental to the proceeding (including all reserved costs) on the standard basis, to be assessed.
- [43] I also consider that the first respondent should pay the cost of the hearing on 19 April 2013 on the standard basis, to be assessed.

Costs in relation to the application in BS No. 4471 of 2012

- [44] In BS No. 4471 of 2012, Warren Brothers acknowledges that the application related solely to the first ground of contention, upon which Thiess was successful.
- [45] Warren Brothers should therefore pay Thiess's costs of that application on the standard basis.

Indemnity Certificate pursuant to the *Appeal Costs Fund Act 1973*

- [46] Counsel for Warren Brothers seeks a Certificate under the Appeals Cost Fund in accordance with *Walton Construction (Qld) Pty Ltd v Plumber by Trade Pty Ltd & Ors (No 2)*.¹² In that decision Wilson J held:

“[25] The first, fourth and fifth respondents sought an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973*.

[26] Section 4 of the Act provides –

“*appeal* includes an order to review, a case stated for the opinion or determination of a superior court on a question of law, a question of law reserved in the form of a special case for the opinion of a superior court, a motion for a new trial and any other proceeding in the nature of an appeal.”

“*court* includes any board, other body or person from whose decision there is an appeal to a superior court on a question of law or which may state a case for the opinion or determination of a superior court on a question of law or reserve any question of law in the form of a special case for the opinion of a superior court.”

[27] The legislation is remedial and so to be given a beneficial interpretation. The definition of “appeal” is inclusive, and it has been held to include proceedings for the issue of certiorari. In *JB Geraghty & ors v Dairy Industry Tribunal* I held that an application for

¹²

[2012] QSC 280.

judicial review of a decision of the Dairy Industry Tribunal on the grounds of error of law and breach of the rules of natural justice was a proceeding in respect of which a certificate under s 15 might be granted.

[28] I consider that the adjudicator's decision was a "decision of a court" within s 15, and that the application to have it declared void for jurisdictional error was an "appeal" against that decision within the meaning of s 15.

[29] The first, fourth and fifth respondents should be granted an indemnity certificate in respect of the application."

[47] I am similarly satisfied that an indemnity certificate in the form sought by the first respondent should be granted.

ORDERS

[48] In relation to the application in BS No. 1975 of 2012:

1. The decision of the third respondent dated 20 February 2012 in relation to Adjudication Application 1064504-818 is declared void.
2. Judgment in BS No. 1927/12 is set aside.
3. The moneys paid into Court of \$499,321.28 on 7 March 2012 by the applicant, together with any accretions, be paid out of Court forthwith to the applicant.
4. The applicant's undertaking as to damages is declared discharged.
5. The first respondent pay the applicant's costs of and incidental to the proceedings including the hearing on 19 April 2013 on a standard basis to be assessed.

In relation to the application in BS No. 4471 of 2012:

6. The application is dismissed.
7. The applicant pay the first respondent's costs of and incidental to the proceeding (including any reserve costs) on a standard basis to be assessed.
8. The first respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act 1973* (Qld).