PARTIES:	HENRY WALKER CONTRACTING PTY LTD
	v
	PEGASUS GOLD AUSTRALIA PTY LTD (ADMINISTRATOR APPOINTED)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL
FILE NO:	Nos 1 and 134 of 1998
DELIVERED:	27 November 1998
HEARING DATES:	20 and 21 October 1998
JUDGMENT OF:	ANGEL J

REPRESENTATION:

Counsel:	
Plaintiff:	Mr M Maurice QC
Defendant:	Mr C Gee QC
Solicitors:	
Plaintiff:	James Noonan
Defendant:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	ang98011
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Nos. 1 and 134 of 1998

BETWEEN:

HENRY WALKER CONTRACTING PTY LTD
Plaintiff

AND:

PEGASUS GOLD AUSTRALIA PTY LTD (ADMINISTRATOR APPOINTED)
Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 26 November 1998)

[1] Angel J: These are applications for summary judgment by the defendant Pegasus Gold Australia Pty Ltd (Administrator appointed) against the plaintiff Henry Walker Contracting Pty Ltd in proceedings 1 and 134 of 1998 in so far as the plaintiff seeks orders for enforcement of three liens said to arise under the *Workmen's Liens Act* (NT). The plaintiff also seeks damages and relief under the *Trade Practices Act 1974* (CTH), but those claims are not relevant to the present applications.

Background facts

[2] The background facts can be stated as follows. On 28 January 1993 a deed was executed between the defendant, the Jawoyn Association Aboriginal

Corporation, and the Northern Territory of Australia whereby the Crown granted the freehold title of a piece of land to the Jawoyn Association Aboriginal Corporation in anticipation of a grant of a mineral lease to the defendant over a portion of that land. On 5 March 1993 the Minister granted Mineral Lease ML N1070 to the defendant (then called Zapopan NL) and Billiton Australia Gold Pty Ltd over a portion of the freehold granted to the Jawoyn Association Aboriginal Corporation. The two grantees of the mineral lease were in a joint venture for the purposes of locating possible deposits of gold and other minerals in the vicinity of Mount Todd.

[3] On 5 September 1996 the plaintiff and the defendant entered into a contract whereby the plaintiff undertook, in return for payment, to perform certain haulage works related to the defendant's mining operations. On the same date a Contractual Rights Deed was executed between the defendant, the plaintiff, Gunyilli Mining Company Pty Ltd, and CDC Nominees (Mt Todd) Pty Ltd whereby the defendant consented to the plaintiff holding the plaintiff's rights and obligations under the haulage works contract on trust for itself, the Gunyilli Mining Company Pty Ltd and CDC Nominees (Mt Todd) Pty Ltd.

[4] The haulage works contract between the plaintiff and the defendant remained on foot until 15 November 1997, when the defendant terminated the contract pursuant to clause 31.4 thereof by serving a notice of termination for economic reasons upon the plaintiff. The plaintiff thereafter commenced proceedings in this Court seeking enforcement of lien NL 372,

damages for breach of contract, and reimbursement of expenses under the haulage works contract (proceedings 134 of 1998), and enforcement of liens NL 266 and NL 367, and payment of unpaid moneys due under the contract (proceedings 1 of 1998). In particular, the plaintiff claims three contractor's liens pursuant to the *Workmen's Liens Act*. The contention for the defendant on the present applications is, taking the facts to be as pleaded, the plaintiff has no enforceable liens.

[5] The defendant attacked the validity of the liens on eight different bases. First, it was said, the plaintiff has commenced proceedings in the wrong capacity. Secondly, it was said, the mineral lease did not amount to an estate or interest in land for the purposes of the *Workmen's Liens Act*. Thirdly, it was said, the plaintiff had failed to obtain the necessary approval of the Minister pursuant to s173(2) of the *Mining Act 1980* (NT) before registering its liens or commencing its proceedings to enforce the liens. Fourthly, it was said, following the termination of the contract the defendant was not obliged to pay to the plaintiff any contract price as defined in the *Workmen's Act*. Fifthly, it was said, the liens were not registered in accordance with s10 of the *Workmen's Liens Act*. Sixthly, it was said, the plaintiff's claims for damages are not lienable. Seventhly, it was said, the accommodation agreement between the parties is not lienable. Finally, it was said, some amounts claimed by the plaintiff had not accrued due for the purposes of s5 of the *Workmen's Liens Act*. I will deal with these arguments in turn.

The plaintiff commenced proceedings in the wrong capacity

[6] In its written outline of argument the defendant relied upon the plaintiff's failure to comply with the requirement in Order 5 rule 6 of the *Supreme Court Rules*. That rule provides:

> "Where a party sues or is sued in a representative capacity, the originating process shall be endorsed with a statement showing that capacity."

[7] The defendant argued that by reason of the creation of the trust pursuant to the Contractual Rights Deed, the plaintiff was obliged to commence its proceedings in its capacity as trustee. The plaintiff has commenced these proceedings in its own name, has not endorsed the originating process pursuant to O5r6, and has not pleaded the existence of the trust.

[8] During submissions the defendant resiled from relying on non-compliance with the Rules and refined its position by arguing that the failure to sue in a representative capacity had the effect that no action had been brought to enforce the lien within the 14 days stipulated by s15 of the Act and hence any lien had ceased. In effect, the defendant submitted that the plaintiff, by his failure to sue in a representative capacity, was suing as a beneficiary and was therefore not entitled to commence proceedings pursuant to s15.

[9] Mr Maurice QC, for the plaintiff, argued that the plaintiff was not suing in a representative capacity, but in its own right as a party to the contract

between the defendant and the plaintiff, and that the plaintiff was not required to plead the existence of the trust as it was not a material fact.

[10] I agree with the submission of counsel for the plaintiff. The plaintiff is not suing as a trustee, nor as a beneficiary under the trust, nor as representative of the beneficiaries of the trust, but as a party to the contract. The existence of the trust is wholly irrelevant. The plaintiff seeks as legal owner to enforce its legal choses in action. That those choses in action are held by the plaintiff on trust for the plaintiff and two other parties, in no way inhibits the plaintiff's right to enforce those choses in action against the defendant in the plaintiff's own name. The plaintiff's actions to enforce the liens can not be gainsaid on this basis.

The mineral lease does not amount to an estate or interest in land for the purposes of the Act

[11] It is common ground that any lien in favour of the plaintiff would be in relation to the mineral lease held by the defendant as opposed to a lien over the fee simple of the land over which the mineral lease is granted. The argument for the defendant is that the Mineral Lease granted to the defendant is not an estate or interest in land for the purposes of s5 of the Act. That section facilitates the creation of contractor's and a sub-contractor's lien. It relevantly provides:

> "A contractor or sub-contractor shall have a lien for the contract price, so far as accrued due, on the estate or interest in land of any owner or occupier in each of the following cases –

(a) where the work is done, with the assent, express or implied, of the owner or occupier to the land or to any fixture thereon;

… ."

[12] The question for determination is whether the mineral lease falls within the class of interest contemplated by the phrase "estate or interest in land". This phrase is not defined in the Act, but there is nothing in the Act to suggest that it should not be accorded its ordinary meaning.

[13] In its outline of submissions the defendant argued that the question must be answered in the negative on the basis that the mineral lease is merely an agreement for the sale of minerals, it grants no right of exclusive possession to the defendant, and the rent payable by the defendant is payable to someone other than the owner of the freehold title and reversionary interest. Of course, these are only some of the factors to be taken into account in determining the true nature of the interest.

[14] The plaintiff submitted that a mineral lease is "in the nature of" a profit a prendre. I take this to mean that a mineral lease is akin to a profit a prendre without in fact falling within that description.

[15] The plaintiff relied upon *Commonwealth v Maddalozzo* (1980) 29 ALR 161. That case, however, turned upon the construction of a notice of acquisition under the *Lands Acquisition Act 1955-1966* (CTH) in circumstances where that Act extended the definition of an interest in land beyond its ordinary meaning. Indeed, it is not clear from reading the judgments in that case

whether their Honours classified the mining lease under consideration in that case as an interest in land by relying upon the phrase "a legal or equitable estate or interest in land" or the wider definition "a right, power or privilege over, or in connection with, the land".

[16] The submissions for the defendant relied upon, in part, an argument that a mineral lease is merely an agreement for the sale of the minerals. There is some judicial support for this view.

[17] In *Gowan v Christie* (1873) LR 2 HL Sc. & Div. 273 at 283-284 Lord Cairns distinguished mineral leases at common law from agricultural leases. He said:

> "But without pursuing the question with respect to agricultural leases further, I should doubt extremely whether dicta of this kind apply at all to leases of mineral subjects; for although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil. It is very difficult to apply to a case of that kind *dicta* which evidently relate to the ordinary process of agriculture."

Similarly, in the reasons for judgment of the Full High Court in Railway Commissioners of New South Wales v Perpetual Trustee Co Ltd (1906) 3 CLR 27 at 39 there appears this passage:-

> "Now, *prima facie*, the owner of property is entitled to do what he likes with his own, and to dispose of it at such times and on such

> terms as he pleases. A mining lease is, as already pointed out, in substance a sale of the minerals."

[18] Even if it be accepted that a mineral lease is in substance a sale of minerals I do not take their Honours to be saying that it is a contract for the sale of chattels as distinct from a sale of realty. In my view these cases are not authority for the proposition that a mineral lease is not an estate or interest in land.

[19] In *R v Toohey and Anor; ex parte Meneling Station Pty Ltd and Ors* (1982) 158 CLR 327 the High Court considered whether a grazing licence amounted to an estate or interest in land for the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (CTH). In arriving at the conclusion that a grazing licence was not a proprietary interest in the land, but rather a right in personam, the Court placed emphasis on the power of the Minister to cancel the licence unilaterally and the inability of the licence to be assigned. The plaintiff relies upon the absence of a power of unilateral termination and the facility of assignment under the *Mining Act* as a basis for distinguishing a grazing licence from a mining lease and categorising the latter as a proprietary interest in the land. In that case, however, Mason J made the following observation (at 344):

> "The grazing licence is the creature of statute forming part of a special statutory regime governing Crown land. It has to be characterized in the light of the relevant statutory provisions without attaching too much significance to similarities which it may have with the creation of particular interests by the common law owner of land."

[20] I am of the opinion that the present applications are not the appropriate occasion for a final decision as to whether a mineral lease granted under the *Mining Act*, by its provisions, does or does not create an interest in land. Suffice it to say, that on the above authorities, and I have been referred to no authorities to the contrary, it is at least arguable that a mineral lease amounts to an estate or interest in land for the purposes of the *Workmen's Liens Act*. I am therefore not prepared to accede to the application to strike out the plaintiff's claim on this basis. As presently advised, I am of the view a right to enter the land of another coupled with the right to excavate and remove minerals from that land assignable with the consent of the Minister can at least arguably be categorised as an estate or interest in land. Martin J, as he then was, in *Thiess Contractors Pty Ltd v. White Range Gold NL* (unreported, 21 October 1991 at 19, 21), held: "It clearly does".

The plaintiff failed to obtain the approval of the Minister pursuant to s173(2) of the Mining Act 1980 (NT) before registering its liens or commencing the proceedings

[21] This ground of attack upon the validity of the plaintiff's assertion of the contractor's liens relies upon the interplay between the *Mining Act* and the *Workmen's Liens Act*. Counsel for the defendant advanced two arguments. First, it was said that a lien is not capable of attaching itself to a mining tenement created pursuant to the *Mining Act* on the basis that the *Workmen's Liens Act* is impliedly repealed in its operation with respect to mining tenements by virtue of the provisions of the *Mining Act*. In the alternative,

the defendant sought to avail itself of the plaintiff's admitted non-compliance with s173(2) of the *Mining Act*.

[22] The first limb of the defendant's argument can be briefly summarised as follows: the *Workmen's Liens Act*, when passed by the South Australian Parliament in 1893, provided for the creation of, inter alia, contractor's liens, including the creation of such liens over mining tenements; however, upon the passing of the *Mining Act* by the Northern Territory Legislative Assembly in 1980, the *Workmen's Liens Act* was impliedly repealed in its application to liens over mining tenements, by virtue of the operation of s173(2) of the *Mining Act*. That sub-section relevantly provides:

> "(2) Subject to this section, a legal or equitable interest in or affecting an exploration licence, exploration retention licence, or mining tenement is not capable of being created assigned or dealt with, whether directly or indirectly –
>
> (a) except
>
> (i) by an instrument in writing signed by the person creating, assigning or otherwise dealing with the interest lodged for registration, and accompanied by the prescribed registration fee; and
>
> (ii) with the Minister's approval of the instrument referred to in paragraph (a); and
>
> (b) until registered in the appropriate register kept under this Act."

[23] At the heart of the defendant's argument lies the proposition that the plaintiff, by registering its three liens, or alternatively, by commencing

proceedings seeking enforcement of the liens, created a legal interest in or affecting a mining tenement.

[24] A court will only entertain an argument of implied repeal in circumstances where two or more legislative instruments are in direct conflict with each other. The defendant says that section 173(2) leaves no room for the creation of a contractor's lien over a mining tenement as it is a legal interest affecting a mining tenement and hence the two Acts are in conflict. Counsel for the plaintiff submitted that s173(2) deals solely with voluntary creations of, dealings with, or assignments of, interests in mining tenements and has no application to interests created by virtue of the operation of statute and therefore no conflict arises.

[25] I agree with the argument advanced by counsel for the plaintiff. Section 173 is in my view directed at voluntary dealings with licences and tenements, such as sale, mortgage or assignment. The term "created" refers to the creation of such interests as are held by mortgagees or assignees as a consequence of a valid mortgage or assignment. The creation of a contractor's lien can not be said to be the result of a dealing with the tenement or licence. It arises by operation of law, ie. by operation of the statute. The liens asserted by the plaintiff are in my view outside the purview of the operation of s173 of the *Mining Act* and their validity can not be challenged on this basis.

[26] Having held that liens under the *Workmen's Liens Act* are entirely beyond the operation of s173 of the *Mining Act*, the occasion for considering the lack of ministerial approval does not arise.

No contract price could accrue due following termination of the contract

[27] This fourth ground of attack upon the validity of the plaintiff's liens is opposed to accepted and fundamentally sound legal principle. The defendant argued that the defendant's termination of the contract on 15 November 1997 avoided any obligation on the defendant to pay for work performed by the plaintiff, which obligation had accrued due prior to the termination, from being characterised as being part of the contract price.

The *Workmen's Liens Act* provides the following definition of "contract price":

> " 'Contract price' means the money payable to any contractor or sub-contractor for any work, or materials furnished or to be furnished in connection with work, under any contract, and whether such price has been fixed by express agreement or not;"

[28] In *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477 Dixon J said:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired."

[29] This statement accurately reflects the position at common law.

[30] In any event, clause 31.4 of the contract itself provides:

> "The Company may by written notice addressed to the Contractor terminate this Contract at any time if in the Company's reasonable opinion the continuation of the Mt Todd Project is not economically viable, for any reason whatsoever. *If the Company exercises its right to terminate this Contract pursuant to this Clause 31.4 the Contractor shall be entitled to payment of the contract value of all Work carried out in accordance with the Contract to the date of Termination* (less amounts previously paid to the Contractor in respect thereof)." (emphasis added).

[31] The defendant's argument is quite untenable.

The plaintiff failed to register the liens within the time limit required by s10 of the Act

[32] This argument raises the contentious question of what Parliament intended when it enacted s10 of the *Workmen's Liens Act*. That section relevantly provides:

> (1) A lien under this Act with regard to land shall be available only if registered before the expiration of 28 days after the wages or contract price in respect of which such lien has arisen shall for the purposes of this section have become due.
>
> (2) Any wages or contract price shall for the purposes of this section be deemed to have become due –
>
> (a) if unpaid for 7 days after the same (being payable) shall have been demanded by notice writing, signed by the person claiming the same and given to the person liable to pay the same, or posted in a registered letter addressed to him at his usual or last known place of abode;
>
> (b) if either before or after the same shall have become payable, the person liable to pay the same shall have called a meeting of his creditors, or committed an act of

> bankruptcy, or executed a deed of assignment within the meaning of the *Bankruptcy Act 1966* of the Commonwealth, or shall have taken or attempted to take the benefit of any law relating to bankrupts or insolvent debtors, or shall have suffered his goods to be taken in execution of seized under legal process or distress for rent.
>
> (3) A lien shall be registered by the person claiming the same lodging with the Registrar-General a notice in the prescribed form to a similar effect, which notice shall be signed by such person and attested, together with the prescribed fee.
>
> (4) A lien may be registered after the wages or contract price have become payable, although the 7 days mentioned in subsection (2) shall not have commenced to run.
>
> … ."

[33] At this stage it is necessary to consider the chronology of events which unfolded in the wake of the termination of the contract on 15 November 1997 as they appear in the plaintiff's statements of claim. I am prepared to proceed on the basis that any outstanding moneys for work done by the plaintiff fell due, under the contract, no later than the termination of the contract. The facts in relation to proceedings 1 of 1998 are as follows. On 12 December 1997 the plaintiff demanded payment by notice in writing of moneys alleged to be payable under the contract and on 24 December 1997 the plaintiff registered liens NL 366 and NL 367. The moneys have to this date not been paid to the plaintiff by the defendant. The facts in relation to proceedings 134 of 1998 are as follows. On 9 June 1998 the plaintiff demanded payment by notice in writing of moneys said to have accrued due

under the contract and on 17 June 1998 lien NL 372 was registered. These moneys also remain unpaid to date.

[34] There are a number questions raised by the submission. Is a contractor's lien capable of registration where the contract price has accrued due under the contract, but is not due in the s10(2) sense as well? If so, when does the 28 day period contained in s10(1) commence, from the date the contract price has accrued due under the contract or the time after expiration of a s10(2) notice or both? Can the contractor choose either the time the contract price is due under the contract or the time after expiration of 7 days of a s10(2) demand for payment, as the commencement date of the 28 day period contained in s10(1) within which to register the claimed lien? Within what, if any, limitation period, is a contractor obliged to register a lien? Within what, if any, limitation period, is a contractor able to serve a s10(2) notice of demand? Does service of a s10(2) notice give rise to a new 28 day period within which a lien can be registered?

[35] Some aspects of s10 were considered by the Court of Appeal in *Leichhardt Development Co Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR 1. In that case a lien was registered on 4 November 1988, a demand for payment was issued on 11 November 1988 and a writ seeking to enforce the lien was issued on 17 November 1988. As the lien had been registered prior to the issue of the s10(2)(a) notice demanding payment, and proceedings to enforce the lien had been commenced before the s10(2)(a) notice had expired, the question for determination by the Court was whether compliance with the

s10(2)(a) procedure was a necessary prerequisite to an action for enforcement of the lien. The majority held the s10(2)(a) procedure was not a necessary prerequisite to legal action for enforcement of a registered lien.

[36] The South Australian Full Court has expressly disapproved *Leichhardt*. In *Marriott Industries Pty Ltd v Mercantile Credits Limited and Anor* (1991) 160 LSJS 288 the Full Court held that two requirements must be satisfied before a lien is available, first, that the contract price is presently payable and secondly, that either a s10(2)(a) notice has been given or an event contemplated by s10(2) (b) has occurred. King CJ said:

> "Scrutiny of the section itself discloses that it is expressed in restrictive terms. That which otherwise exists is 'available' *only* if the contract price 'shall for the purpose of this section have become due' and there is registration within 28 days. Moreover, the natural construction of subsection (2) is as a definition of what is meant by 'become due' in subsection (1). It seems to me, with all respect to those who hold contrary views, that to construe the section as 'facilitative' is to strain if not ignore the language used.
>
> It is noted that the contract price will 'become due' by virtue of the notice procedure only if it is 'payable'. That implies that the price has already accrued due in the section 5 sense. As Napier J pointed out in *Metropolitan Brick Company v Hayward and Anor* [1938] SASR 462 at 466, there is a sense in which money can be 'due' although not yet 'payable' but the converse cannot be true. To say that money is payable is to say that it must be paid, that is to say that it is due and the time for payment has arrived. To say that money is payable in the future is, as Napier J also pointed out, an elliptical way of saying that it is not yet payable but will or may become so in the future. The expression 'being payable' in section 10(1)(a) therefore implies that the contract price or part thereof accrued due in the section 5 sense, but that more is needed to make it 'become due' within the meaning of section 10. It is quite inconsistent with the view that money which has 'accrued due' has ipso facto 'become due' for the purposes of section 10.

> A lien may be registered pursuant to subsection (4) after the contract price has become payable, although the seven days mentioned in subsection (2) has not commenced to run, that is to say before the lien is 'available'. Until the seven day period expires, the lien as it is not available cannot be enforced, in my opinion, and does not operate as a caveat pursuant to section 12. It is true, as Zelling J pointed out in the *Del Fabro* case at p138, that a caveatable interest under the *Real Property Act* must be an existing interest in land. That does not appear to me to present a difficulty. This Act represents a departure from that rule and allows the registered lien to operate as a caveat to protect the statutory right which is inchoate as a lien until it becomes available under section 10. Section 12 refers to the right which is protected not as an interest in land but merely as a "claim". If a lien is registered under section 10(4) before it becomes available, it is not capable of enforcement until the section 10(2)(a) notice has been given and the seven day period has expired or one of the events specified in section 10(2)(b) has occurred. I think that it is clear that the lien must be in an enforceable condition before legal proceedings for its enforcement are instituted. As the lien ceases if legal proceedings for enforcement are not brought within 14 days from registration, there is a practical requirement for the section 10(1)(a) notice to be given before or soon after registration, unless one of the section 10(2)(b) events has occurred."

See also, *Longreef Pty Ltd v Leighton Contractors (SA) Pty Ltd* (SA Full Court 30 May 1991.)

[37] On reflection, I must confess I entertain reservations about some of the reasoning of both Asche CJ and myself in *Leichhardt's Case.* This is not surprising given the notorious difficulty many judges have had over the years arising from the enigmatic language of the Act.

[38] There is, with respect, much to be said for the views of King CJ in *Marriott Industries*. Any judgment of that learned Chief Justice is to be treated with the utmost respect and would only be departed from after the most careful consideration. There is however, if I may say so with respect, much to be

said for an alternative view, namely, that to be available a lien must be registered, but that s10(1) does not in its terms require the occurrence of a s10(2) event before registration or action for enforcement. The decision of King CJ and other members of the court in *Marriott Industries* to the effect that a lien is available only if, first, it is registered, and secondly, a s10(2) event has occurred, is, I think, with respect questionable, although Asche CJ in *Leichhardt* seems to treat s10(1) as requiring something more than timely registration before the lien is available. In *Leichhardt* Asche CJ expressed the opinion that s10(1) and s10(2) operate independently of each other. This view was rejected by the South Australian Full Court in *Marriott Industries*. However it does not necessarily follow from any interdependence of s10(1) and 10(2), that the plaintiff in *Leichhardt* ought to have failed or that the present plaintiff is out of court. Unlike the contractors in *Leichhardt* and *Marriott Industries* the plaintiff here gave s10(2)(a) notices which expired before the actions were commenced. The crucial question here is whether the liens having been registered more than 28 days after the contract price became due under the contract, they are nevertheless available for enforcement by legal action. On one view any 28 day period within which to register a lien which runs from the contract price becoming due under the contract is renewed upon expiration of a subsequent s10(2)(a) notice. On another view there is no legal requirement to register a lien at any particular time after the price has become due under the contract, though should a s10(2) event occur, and a lien not be already registered (as contemplated by

s10(4)) it must be registered within 28 days of the event. This was the view of Kearney J in *Leichhardt* at first instance, (1989) 58 NTR 17.

[39] The Court of Appeal decision in *Leichhardt* was considered by Gray AJ in *Malady Enterprises Pty Ltd v Colstar Pty Ltd and Ors* (unreported, Supreme Court NT, 5 March 1991). In that case an invoice was given on 5 April 1990, the lien was registered on 17 May 1990, a notice of demand was issued 23 May 1990, and a writ was issued 30 May 1990. In contradistinction to *Leichhardt,* the contractor sought to rely on the later of the two possible commencement dates for the 28 day period, namely the expiration of 7 days after the giving of the demand for payment, in circumstances where 28 days had lapsed between the contract price becoming due under the contract and the registration of the lien.

[40] Gray AJ held that a s10(2) notice was not mandatory and that a lien could be registered without the serving of a notice of demand, provided the moneys had become payable under the contract. His Honour held further that once the contract price has become payable under the contract, the 28 day period commenced to run and that it could not be re-commenced by the giving of a s10(2) notice of demand. His Honour said (at 5):

> "In a case where the relevant contract fixes the time when the contract price becomes presently payable, that time, when reached, presents an obvious starting point for the running of time under section 10(1).

> That is the point in time when the lien arises under section 5 and it is to be expected that the Act will require registration within a stipulated time of that event.
>
> In such a case, where registration has not occurred within twenty-eight days of the price having become presently payable, the subsequent giving of notice under section 10(2)(a) does not, in my view, affect the earlier non-compliance with section 10(1)."

[41] In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 42 NTR 1 at 13 Kearney J said it was possible that the giving of a notice of demand, after the contract price had become due under the contract, would cause the 28 day period to run anew, but declined to express an opinion on it.

[42] As a single judge of this Court I am, of course, bound by the decision in *Leichhardt*. Although the reasoning of the majority is wide ranging, it is only authority for what it decided viz. that a lien registered after the contract price has become due under the contract can be enforced notwithstanding that a s10(2) event has not occurred. It is not authority for the proposition that a lien must be registered within 28 days of the contract price becoming due under the contract or that s10(1) and s10(2) are dependent (or interdependent) or that s10(1) requires that to be available a lien must not only be registered but the contract price must be due in the s10(2) sense as well. Given the muddy state of the authorities I do not think the decision of Gray AJ in *Malady Enterprises* ought be disapproved of by me, sitting alone on applications to strike out. Nor, on the other hand do I think I should simply follow it. The correctness of the decision is plainly

arguable. The application of that decision to the present case would result in judgment for the defendant, because the plaintiff would be unable to enforce the liens, the liens having been registered more than 28 days after the contract price became due under the terms of the contract. However, as I am of the view that the decision of the Court of Appeal in *Leichhardt* (particularly given the strictures of King CJ in South Australia) ought to be reviewed, that much of the reasoning of the majority in *Leichhardt* calls for reconsideration, and that the decision of Gray AJ in *Malady Enterprises* is questionable, the appropriate course for me to adopt is, pursuant to s21 of the *Supreme Court Act 1979* (NT), to refer the s10 issue to the Full Court for determination. The issue is a discrete narrow legal issue, properly described by counsel as a "knock out point". If decided adversely to the plaintiff, the plaintiff's whole lien case fails. I am of course mindful of the fact that the plaintiff, in the end, did not press for me to refer the matter to the Full Court and that the defendant opposed that course altogether, but I am nevertheless of the opinion that it is the appropriate course to adopt. The present conflicting state of the cases, not only as to the decisions but as to the reasoning grounding those decisions, calls for an authoritative statement of the true construction and operation of the puzzling provisions of the *Workmen's Liens Act.* In so saying, I do not overlook the difficulty of the task. I am, of course, empowered to refer the issue on my own initiative pursuant to s21 of the *Supreme Court Act 1979* (NT). I shall hear the parties as to the terms of the reference. The referral to the Full Court will raise the

issue: does the fact that the plaintiff's liens were not registered until more than 28 days after the contract price became due under the terms of the works agreement preclude the plaintiff from enforcing the liens in these proceedings?

The claims for damages in proceedings 134 of 1998 are not lienable

[43] The defendant submitted that, as a matter of construction of the *Workmen's Liens Act,* a claim for damages for breach of contract is incapable of giving rise to a lien under the Act as it can not be said to form part of the contract price pursuant to s5. Secondly, the defendant argued that a claim for damages for breach of contract can not be said to be "payable" or to have "accrued due" for the purposes of s5 and s10 of the *Workmen's Liens Act*.

[44] Counsel for the plaintiff sought to support the validity of the lien claimed on three bases. First, the inclusion of paragraph 53 in the Statement of Claim, it was said, prevented this issue from being dealt with on an application for summary judgment. Secondly, some of the claims contained in the Statement of Claim could arguably be said not to be claims for damages, but rather claims for work done pursuant to the contract. Thirdly, provided a plaintiff had an arguable case in relation to some part of the lien claimed, a Court would be precluded from considering the validity of the entirety of the lien until the case goes to trial.

[45] I have already set out s5 of the Act and the definition attributed to "contract price".

[46] As a starting point I think it can safely be said that a bare action for damages for breach of contract is not capable of giving rise to a lien under the Act. It cannot be said that such an action falls within the ambit of the definition of "contract price" as it does not amount to "money payable … for any work, or materials furnished or to be furnished in connection with work, under any contract". Of course, where work *has* been done, and the other party fails to pay for such work, the contractor may indeed have an action for breach of contract, but an action on the contract in relation to an accrued right to be paid in accordance with the contract is a fundamentally different action to one alleging breach of a promise to pay and consequential damage; see generally, H K Lücke "Specific Performance at Common Law" (1965) 2 Tas U L R 125.

[47] The plaintiff seeks to support its lien in a combination of six different claims, respectively termed excessive wear of tyres, dewatering, batters, drill and blast, productivity, and accommodation. Its primary submission is that by virtue of the inclusion of paragraph 53 in the Statement of Claim the Court is not entitled to consider whether or not each of these claims satisfies the definition of contract price. Paragraph 53 reads:

> "The losses and expenses referred to above [the six claims] are moneys payable by the defendant to the plaintiff for work done and materials furnished by the plaintiff in connection with work so as to amount to a contract price or contract prices ('the contract price') within the meaning of the *Workmen's Liens Act*."

[48] The case for the plaintiff is that this is an allegation of fact and the Court, on a summary application, is to take each fact alleged by the plaintiff as proved. Therefore, this Court is, for the time being, precluded from determining whether this allegation is in fact false. However, it seems to me that the above allegation is one of mixed law and fact. It alleges that each of the six claims fits within the definition of "contract price". Surely, if a claim, as pleaded, is, as a matter of law, incapable of falling within the ambit of the definition, that particular pleading loses its character as alleging a pure question of fact and becomes a pleading of mixed fact and law. Paragraph 53 is not pleaded in the alternative, but rather as the result which is said to follow from the facts pleaded in the preceding paragraphs. Consequently, I reject the submission that paragraph 53 can have the effect of turning any bare actions for breach of contract into an action for moneys payable for work done pursuant to the contract.

[49] It is therefore necessary to consider whether each claim has been pleaded as a loss arising from breach of contract or as work done pursuant to the contract.

[50] The claim for excessive tyre wear relies on loss arising from, alternatively, breach of contract, breach of fiduciary duty, and unconscionable conduct contrary to s51AA of the *Trade Practices Act 1974* (CTH) by virtue of breach of the resident manager's duties. The following allegation is made in paragraph 24:

> "It was an implied term of the agreement that the defendant would be responsible for *all additional costs incurred* and productivity losses sustained by the plaintiff as a result of the wrongful exercise of the resident manager's powers."

[51] If that allegation is to be taken as proved then the tyre claim can no longer be said to be solely concerned with an action for damages, but rests at least partially upon the enforcement of a contractual right to be reimbursed for all additional costs incurred and productivity losses sustained as they are incurred and sustained. This claim cannot be said to be a bare action for damages. It is at least arguably a claim for costs incidental to work.

[52] The claim in respect of dewatering is essentially a claim for costs incurred by the plaintiff in removing ground water from the floor of the mine is circumstances where the obligation to remove in fact rested upon the defendant. The claim alleges, in paragraph 31(a) the existence of a term to the effect that "the defendant would be responsible for *all costs attributable* to ground water". Like the claim for tyres, this cannot be said to be a mere claim for damages flowing from breach. It is a claim on the contract for work done.

[53] The claims for batters and drill and blast, however, are expressed purely as actions for losses incurred by the plaintiff in performing work which the defendant, in breach of the contract, had failed to perform. It is not pleaded that the defendant was responsible for the cost of the batters and drilling and blasting, but merely that he undertook to perform such tasks at his own expense. These claims are, as pleaded, bare actions for consequential

damages flowing from breach of contract and are therefore not capable of forming the proper basis for a lien under the Act. In relation to the claim for batters Mr Maurice QC submitted that the plaintiff did the work in relation to the batters as a result of the way the defendant used the explosives and the plaintiff invoiced the defendant accordingly. Therefore, the work on the batters was said to be work done under the contract. Similarly, there was at least a suggestion during oral argument that the work for batters was done at the request of the resident manager. However the plaintiff's case is not pleaded that way. The fact remains that the action for batters has been pleaded as a claim for damages consequential upon breach of contract and it is therefore not lienable.

[54] The claim for loss of productivity relies upon an allegation that the defendant's failure to arrange work schedules so as to maximise productivity, combined with the four claims considered above, caused the plaintiff to suffer productivity losses. Again, these losses, as pleaded, are purely consequential in nature and are therefore not capable of supporting a lien.

[55] The claim for accommodation expenses expressly relies upon an allegation that the plaintiff was entitled to be reimbursed by the defendant for expenses reasonably incurred. Coupled with the allegation that the plaintiff incurred such expenses reasonably, this claim can not be said to be one for consequential damages. It is based on a contractual right to be paid said to

have accrued under the contract. This claim can not be attacked on this basis. I say nothing of whether it amounts to 'any work … under a contract'.

[56] The foregoing raises the question of what to do where a Court is satisfied that part of lien is clearly nor maintainable at law. The plaintiff submitted that as long as the existence of part of the lien is reasonably arguable on the pleadings a Court should not strike out any part of the lien on a summary application. In opposition to this submission, Mr Gee QC submitted that where part of a lien is clearly not reasonably arguable a Court is obliged to strike out the lien in its entirely. I was not referred to any authorities on this point, but I suspect the true principle lies somewhere in between the two submissions and is not necessarily to be discovered in the provisions of the *Workmen's Liens Act*. This is an application for summary judgment in relation to certain relief sought by the plaintiff. In so far as the plaintiff's statement of claim alleges the existence of a contractor's lien on the basis of its claims for batters, drilling and blasting, and loss of productivity, the allegations should be struck out. Whether the remaining issues on the pleadings now reflect the lien as it is registered seems to me to be irrelevant at this stage of the proceedings. Subject to the issue to be referred to the Full Court, this, like all other issues, should proceed to trial.

No lien arises in respect of the accommodation agreement

[57] The defendant alleges, on four different bases, that the oral accommodation agreement pleaded is not capable of sustaining a lien. Neither party made

any substantive oral submissions on this point. Indeed, the plaintiff makes no specific reference to the accommodation agreement in its written submissions (other than under ground 7), but relied, in oral argument, upon the submission that as long as the existence of part of a lien was reasonably arguable a Court should not strike out the unarguable parts. I have already rejected this submission. The claim in respect of accommodation is pleaded as follows:-

> "50. It was orally agreed by and on behalf of the plaintiff and the defendant that in consideration of the plaintiff entering into the agreement the defendant would reimburse the plaintiff for expenses reasonably incurred by it for the accommodation of its employees at the Mt Todd jobsite.
>
> 51. The plaintiff reasonably incurred expenses of $191,114.00 for the accommodation of its employees at the jobsite.
>
> 52. The defendant has not reimbursed the plaintiff in respect of these accommodation expenses."

Despite paragraph 53 of the Statement of Claim, cited earlier, the reimbursement claim is not "for work done" but "for expenses reasonably incurred". On the other hand, arguably at least, the cost of the supply and maintenance of a workforce (including accommodation) is one cost of the work done. Its reimbursement may be seen as part of the consideration for doing the work under the works contract. It is to be noticed that the accommodation agreement was allegedly entered into in consideration of the plaintiff entering into the works contract ie collateral to it. In these circumstances I consider there is an issue to go to trial and that this portion

of the plaintiff's claimed basis for a contractor's lien should not be struck out.

Amounts claimed that have not accrued due for the purposes of s5

[58] The defendant submitted that the lack of the issue of progress certificates for the amounts claimed in proceedings 134 and for the $894,114 of the $2,085,677.41 claimed in proceedings 1, precludes these claims from having "accrued due" for the purposes of s5.

[59] However, Mr Gee QC, during oral argument, informed the Court that the defendant sought only to rely upon this argument in the event I found the moneys claimed not to have accrued due on 15 November 1997, the date of termination. As I have found that they did so fall due, there is no need to consider this argument.

[60] The defendant chose not to rely on Ground 9 of its written submissions, namely that the plaintiff had failed to satisfy certain conditions precedent to its right to sue under the works contract.

[61] I will hear the parties as to the form of order and terms of the referral to the Full Court. Given that I have determined to refer the s10 *Workmen's Liens Act* issue to the Full Court I am amenable to hearing further submissions concerning whether I should also refer the issue whether a Mineral Lease is an estate or interest in land for the purposes of the Act ie whether one can register a contractor's lien over a Mineral Lease, and even perhaps the issue whether, in the event part of the plaintiff's claimed basis for a lien is

unsustainable, the lien as registered fails entirely. Apart from striking out of the Statement of Claim the unsustainable bases for the plaintiff's claims for lien previously referred to and referring a case to the Full Court, I presently propose, subject to further argument, otherwise to adjourn the defendant's summons to a day to be fixed with liberty to apply. I shall hear the parties as to costs and as to any incidental matters.