Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd & Ors
Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd
[1999] NTSC 62

PARTIES:	JOVISTA PTY LTD (ACN 009 171 420) v PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 028 924) AND ORS HENRY WALKER CONTRACTING PTY LTD (ACN 009 625 138) v PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 628 924)
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	136 of 1997 (9714637); 1 of 1998 (9800216); 134 of 1998 (9813215)
DELIVERED:	17 June 1999
HEARING DATES:	19 March 1999
JUDGMENT OF:	MARTIN CJ, KEARNEY, MILDREN, THOMAS & BAILEY JJ

CATCHWORDS:

STATUTES – interpretation – *Workmen's Liens Act* – meaning of "accrued due" in s 5 – meaning of "available" and "shall … have become due" in s 10(1) – whether registration of lien must be effected under s10(1) within 28 days after contract price has "accrued due" under s 5, for lien to be "available" under s10(1) – meaning of "deemed" in s10(2)(a)

Workmen's Liens Act, ss5, 10(1) and 10(2)(a), 32

Re Sneesby; Ades and Bowes' Contract [1919] VLR 497, followed
Andrew v Arthur H. Dillon Pty Ltd (1942) 59 WN (NSW) 113, followed
K & S Lake City Freighters Pty Ltd v Gordon & Gotch (1985) 60 ALR 509, applied
Sitzler Bros Pty Ltd v DKB Investments Pty Ltd (1989) NTJ 345, approved
Marriott Industries Pty Ltd v Mercantile Credit Limited (1991) 160 LSJS 228, followed
The Queen v The County Council of Norfolk (1891) 60 L.J.Q.B. 379, followed
Metropolitan Bank Company v Haywood [1938] SASR 462, followed
Cooper Brookes (Wollongong) Pty Ltd v F.C.T (1981) 35 ALR 151, applied
Australian Alliance Assurance Co Ltd v Attorney-General (Q'ld) [1916] St R Qd 135, followed

STATUTES – interpretation – *Workmen's Liens Act* - construction of s10(1) and s10(2) – whether s10(2) exhaustively defines when "contract price … shall have become due" in s10(1)

Workmen's Liens Act, ss 10(1) and (2)

Advanced Civil Engineering Pty Ltd v Wyara Pty Ltd (1986) NTJ 715, overruled
Miller's Lime Ltd v Royal Agricultural and Horticultural Society of South Australia [1936] SASR 306, followed
Albert del Fabbro Pty LTd v Wilckens & Burnside Pty Ltd [1971] SASR 121, distinguished
Jennings Construction Ltd v Burgundy Royale Investments (1986) 42 NTR 1, approved
Parob Pty Ltd v Pipeline Properties Pty Ltd and Anor (1988) NTJ 1546, approved in part
Pipeline Properties Pty Ltd v Leichhardt Development Co Pty Ltd (1989) 58 NTR 17, approved in part
Leichhardt Development Co Ltd v Pipeline Properties Pty Ltd (1989) 62 NTR 1, overruled
Malady Enterprises Pty Ltd v Colstar Pty Ltd (1991) NTJ 263, overruled
Marriott Industries Pty Ltd v Mercantile Credit Limited (1991) 160 LSJS

228, followed
Longreef Pty Ltd v Leighton Contractors (South Australia) Pty Ltd (1991) 160 LSJS 270, followed

STATUTES – interpretation – *Workmen's Liens Act* – construction of s10(4) – whether act of registration of lien under s10(4) makes it "available" under s10(1) – whether s10(2) must be complied with despite registration of lien under s10(4), for lien to be "available" under s10(1)

Workmen's Liens Act, ss 10(1) and (2) and (4)

Parob Pty Ltd v Pipeline Properties Pty Ltd and Anor (1988) NTJ 1546, overruled in part
Pipeline Properties Pty Ltd v Leichhardt Development Co Pty Ltd (1989) 58 NTR 17, overruled in part
Leichhardt Development Co Ltd v Pipeline Properties Pty Ltd (1989) 62 NTR 1, overruled
Malady Enterprises Pty Ltd v Colstar (1991) NTJ 263, overruled
Marriott Industries Pty Ltd v Mercantile Credit Limited (1991) 160 LSJS 228, followed
Longreef Pty Ltd v Leighton Contractors (South Australia) Pty Ltd (1991) 160 LSJS 270, followed

STATUTES - interpretation – *Workmen's Liens Act* -desirability of conformity in construction of identical provisions, as between different jurisdictions

Camden Park Estate Pty Ltd v O'Toole (1969) 72 SR (NSW) 188, referred to

STATUTES – interpretation – whether Mineral Lease under *Mining Act* constitutes an "estate or interest in land" under s5 of *Workmen's Liens Act*

Workmen's Liens Act, s5

R v Toohey; Ex Parte Meneling Station Pty Ltd (1982) 158 CLR 327, applied
Thiess Contractors Pty Ltd v White Range Gold NL (1991) NTJ 1013, approved
National Provincial Bank Ltd v Ainsworth [1965] AC 1175, followed
Stow v Mineral Holdings (Aust) Pty Ltd (1977) 51 ALJR 672, applied

REPRESENTATION:

Counsel:

Plaintiff: (proceedings nos 1 and 134 of 1998)	M Maurice QC
Plaintiff: (proceedings no 136 of 1997):	B W Collins QC, with him M Orlov
Defendant:	C G Gee QC

Solicitors:

Plaintiff: (proceedings nos 1 and 134 of 1998):	James Noonan
Plaintiff (proceedings no 136 of 1997):	Cridlands
Defendant:	Ward Keller

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ORDERS

The questions referred to the Court, set out in par [6], are answered as follows:

(1) No.
(2) Not applicable, but clearly the answer to the substantive question is ‘Yes’.
(3) This question does not require answer.
(4) Yes.

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IN THE FULL COURT OF THE
SUPREME COURT OF THE
NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd & Ors
No. 136 of 1997 (9714637)
Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd
No. 1 of 1998 (9800216); No. 134 of 1998 (9813215)
[1999] NTSC 62

No. 136 of 1997 (9714637) BETWEEN

JOVISTA PTY LTD
(ACN 009 171 420)
Plaintiff

AND:

PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 628 924)
First Defendant

AND

BATEHAM PROJECT ENGINEERING PTY LTD (ACN 056 741 596)
Second Defendant

AND

KINHILL PACIFIC PTY LTD
(ACN 101 241 620)
Third Defendant

AND

KILBORN ENGINEERING PACIFIC PTY LTD (ACN 009 864 353)
Fourth Defendant

No. 1 of 1998 (9800216);
No. 134 of 1998 (9813215)

BETWEEN:

HENRY WALKER CONTRACTING PTY LTD (ACN 009 625 138)
Plaintiff

AND

PEGASUS GOLD AUSTRALIA PTY LTD (ACN 009 628 924)
Defendant

CORAM: MARTIN CJ, KEARNEY, MILDREN, THOMAS & BAILEY JJ

REASONS FOR DECISION

(Delivered 17 June 1999)

MARTIN CJ:

[1] I have had the benefit of the draft reasons and decisions of Kearney J. His Honour's extensive review of the conflicting authorities and analysis of the issues in these matters lead me to agree with the answers he proposes to the questions referred to this Court. This Court comprising five Judges, the decisions of the Supreme Court contrary to the result in these matters must be taken to have been overruled.

KEARNEY J:

[2] On 5 February 1999 and 19 March, pursuant to s 21 of the Supreme Court Act, Angel J (in proceedings Nos. 1 and 134 of 1998) and Bailey J (in proceedings No. 136 of 1997) respectively referred the 4 questions of law set out in par [6] to this Court, for determination. For that purpose certain

facts and conclusions set out in the statements of claim filed in the 3 proceedings, were assumed to be correct. As far as presently material, those facts are set out in pars [3], [4] and [5].

[3] *Assumed facts in proceedings No 1 of 1998*

(1.) The defendant is and was at all material times the owner and occupier of Mineral Lease No 1070 known as Mount Todd ('the land').

(2.) The defendant's interest in the land is and was at all material times an estate or interest in land for the purposes of the Workmen's Lien Act [herein 'the *Act*']. [This fact is *not* assumed to be correct, for the purpose of Question (4) in par [6]].

(3.) On 5 September 1996 the parties made a written contract mining agreement ('the agreement') relating to a project known as the Mt Todd Project whereby, in consideration of various payments to be made from time to time by the defendant to the plaintiff, the latter agreed to perform the work and provide the materials set out in Section 3 of the agreement, 'Specifications and Scope of Work'. [It can be seen that the parties were in a direct contractor/client relationship].

(4.) In Section 2, 'General Conditions of Contract', the agreement contained the following term:

> The Contractor [ie the Plaintiff] 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).

(5.) Between the time the agreement was made [5 September 1996] and 15 November 1997 the plaintiff performed work under the agreement to the land and to fixtures thereon and provided materials under the agreement to be used in and about work done and intended to be done to the land and the fixtures thereon, for some of which the plaintiff has not been paid.

(6.) The amounts outstanding under the agreement ('the unpaid monies') are as follows:

Work done and materials supplied for October '97	$2,123,483.98
Work done and materials supplied for November '97	$2,085,677.41

(7.) By written notice dated 15 November 1997 addressed to the plaintiff, the defendant purported to terminate the agreement with effect from that date, on the grounds that in the defendant's opinion the continuation of the Mt Todd Project was not economically viable. In support of this action the defendant expressly relied upon clause 31.4 of the agreement [set out in item (2) in par [4]].

(8.) On the facts set out above the unpaid monies [in item(6) above] accrued due on or before midnight 15 November 1997 [as per item (2) in par [4]].

[The plaintiff then claimed that it became entitled to liens under the Act on the defendant's estate or interest in the land, in respect of the unpaid monies in par (6)].

(9.) On 12 December 1997 [that is, 27 days after the unpaid monies 'accrued due' in terms of item(8)] the plaintiff demanded payment [under s 10(2)(a) of the Act] of the unpaid monies by notices in writing to which its corporate seal was duly affixed, posted in a registered letter to the defendant's registered office at Edith Falls Road, Katherine, NT.

(10.) On 24 December 1997 [that is, 39 days after the date on which that the unpaid monies 'accrued due' in terms of item(8), and 12 days after the demand for their payment was made in terms of item(9)] the liens were registered under the *Act*. [These were Liens Nos. NL366 and NL367 for the November and October 1997 amounts, respectively, as per item(6)].

[The plaintiff then proceeded to claim, inter alia, an order under s 25 of the *Act* for enforcement of the liens].

[4] *Assumed facts in proceedings No 134 of 1998*

Facts to the same effect as those in items 1-3, 5 and 7 in par[3] were assumed correct. The further facts assumed correct are:

(1.) It was an implied term of the agreement [of September 1996] that, except as expressly provided in the document, the defendant would

do nothing to hinder or prevent efficient performance of the agreement by the plaintiff and, further, that the defendant would do everything necessary or proper and reasonable to facilitate efficient performance of the agreement by the plaintiff, maximise productivity and promote the objective of ensuring that the plaintiff operated at a 10% profit margin.

(2.) In section 2, 'General Conditions of Contract', the agreement contained the following term:

> 31.4 The Company [ie the defendant] may by written notice addressed to the Contractor [ie the plaintiff] 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).

[There followed in the statement of claim, claims for losses and expenses in respect of various items of work and materials – tyres, dewatering, battens, drill and blast, productivity and accommodation. The following facts were then assumed correct]:

(3.) The losses and expenses referred to above 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 Act.

(4.) On the facts set out [as per item(7) in par[3]] above the contract price [in item (3)] accrued due on or before midnight on 15 November 1997 [as per item (2)].

[The plaintiff then claimed that it became entitled to liens under the Act on the defendant's estate or interest in land; in respect of the amounts referred to in item(3), the following further facts are assumed correct]:

(5.) On 9 June 1998 [that is, almost 7 months after the contract price in terms of the amounts in item(3) 'accrued due' on 15 November 1997 as per item(4)] the plaintiff demanded payment [under s 10(2)(a) of the Act] of the contract price [in terms of item (3)] by notice in writing dated 5 June 1998 to which its corporate seal was duly affixed, served on the defendant by its solicitors.

(6.) The defendant has not paid the contract price.

(7.) By reason of the service of the notice [of 5 June 1998] and the defendant's non-payment, [pursuant to s 10(2)(a) of the Act] the contract price is deemed to have become due for the purposes of

section 10(1) of the *Act* on or about 16 June 1998 [that is, 7 days after service of the notice of demand in item(5) above].

(8.) On 17 June 1998 [that is, one day after the contract price (in terms of item(3) was deemed to have 'become due' in terms of item(7), some 7 months after the contract price 'accrued due' in terms of item(4) and 8 days after the demand in item (5)], lien No. NL 372 was registered under the *Act*.

[The plaintiff proceeded to claim, inter alia, an order under s 25 of the Act for enforcement of the lien].

[5] *Assumed facts in proceedings No 136 of 1997.*

The second, third and fourth defendants to proceedings No.136 of 1997 (herein "the contractors") had jointly contracted with the first defendant thereto (referred to in this judgment as "the defendant") to supply men and material for the extension of the defendant's mine on Mineral Lease No. 1070. Jovista Pty Ltd contracted with the contractors by 4 contracts numbered 1073, 1075, 1077 and 1078, to carry out certain works at the mine pursuant to the contractors' contract with the defendant. (It can be seen that it is a subcontractor, as far as the defendant is concerned). Jovista Pty Ltd claims that the contractors have refused to pay certain monies due to it being monies due from variations to its 4 contracts, amounts it had been underpaid on Progress Payment Certificates, and retention monies it claims to be now due to it under Contract 1078; these amounts constitute the balance of the

contract price payable by the contractors to Jovista Pty Ltd under the 4 contracts. These facts are for present purposes assumed to be correct, as are the following facts:-

At all material times:

(a) [the defendant] was a lessee, tenant or occupier of land namely the land the subject of [Mineral Lease No.1070], within the meaning of the Act;

(b) the [Contract Nos] 1073, 1075, 1077 and 1078 Works were undertaken by [Jovista Pty Ltd] with the assent of [the defendant].

(1) By 9 June 1997, the following monies, or some of them, were due and presently payable, alternatively due but not presently payable, [by the contractors] in respect of the work undertaken by [Jovista Pty Ltd] pursuant to Contracts 1073, 1075, 1077 and 1078: [the monies in question referred to above as the 'balance of the contract price' were then set out].

(2) By reason of the matters referred to in paragraph (2) above as at 9 June 1997 the following monies were accrued due by [the contractors] to [Jovista Pty Ltd] within the meaning of the Act:

[The monies set out in par (2) were then set out again]

(3) By [separate] Notices of Demand to [the contractors] dated 9 June 1997, pursuant to s 10(2)(a) of the Act [Jovista Pty Ltd] demanded payment of [various sums specified, in respect of each of its 4 Contracts].

(4) [The contractors have] failed to pay any part of the sums demanded by the said Notices.

(5) [2 days after the s 10(2)(a) demands] on 11 June 1997 [Jovista Pty Ltd] lodged and obtained registration of Notices of Workmen's Liens, registered 361, 362, 363 and 364 ('the Liens') in the General Registry at Darwin, in respect of the monies referred to in paragraph (2) above. [It can be seen that the liens were registered *before* the 7-day period in s 10(2)(a) expired on 16 June. Proceedings to enforce the liens commenced on 24 June, 1 day before the 14-day period in s15 elapsed].

(6) On or about 11 June 1997:

(a) [The defendant] received notice of the Liens;

(b) [the defendant] was liable to make payments to [the contractors] pursuant to the [their] Contract in respect of the work performed by [Jovista Pty Ltd] under [its 4] Contracts, which is the subject of [Jovista Pty Ltd's] claims for payment

in these proceedings and in respect of which the monies referred to above in paragraph [(2)] had accrued due.

Against this background of assumed facts and on the assumption that each of the sums in pars (2) and (3) above became due (in the sense that each was due and presently payable to Jovista Pty Ltd) pursuant to the terms of its 4 contracts with the contractors *more than 28 days before the date (11 June 1997) on which it obtained registration of its liens*, Bailey J referred to the Court on 19 March 4 questions identical in effect to those referred by Angel J and set out in par[6].

[6] I note that on the assumed facts demands under s10(2)(a) were made in all 3 proceedings; the part contract prices were all then payable. The liens were all registered *after* the demands were made – in 2 cases *after* the 7 days in s.10(2)(a) had expired, in the other case (No.136 of 1997) 5 days *before* that expiry; it is the last-mentioned case which requires consideration of s 10(4). In all cases the liens were registered more than 28 days after the part contract prices became due under the respective contracts. In the light of the assumed facts in pars [3], [4] and [5] the following 4 questions of law stand referred to this Court:

(1) Are the plaintiff's liens now, and were they at the time of registration, *unavailable* to the plaintiff pursuant to section 10(1) of the *Act*, by reason of the fact that the liens were registered *more than*

28 days after the contract price became due under the Contract Mining Agreement?

(2) If 'yes' to (1), at the time of registration were the plaintiff's liens available for the purposes of the Act, notwithstanding non-registration within 28 days of the contract price becoming due under the Contract Mining Agreement, by reason of the plaintiff's compliance with the procedures set out in section 10(2) of the Act?

(3) If 'no' [to (1)], what is the effect of unavailability [of the liens] on: (a) the existence of a lien; and (b) the enforceability of a lien; and

(4) Does the defendant, as grantee of Mineral Lease No. 1070 under the Mining Act 1980 (NT), have an 'estate or interest in land' for the purpose of the Act? (emphasis added)

I deal with Questions (1), (2) and (3) together in pars[7]-[57], and with Question (4) in pars [58]-[66].

[7] **Questions (1), (2) and (3) in par [6]**

The answer to Question 1 entails consideration of the proper construction of s 10 of the Act. Sections 5 and 10 provide:-

"5. LIEN OF CONTRACTOR OR SUB-CONTRACTOR

> 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;

(b) where the materials are, with the assent, express or implied, of the owner or occupier, used or intended to be used in or about work done, or intended to be done, to the land or to any fixture thereon." (emphasis added)

10. LIEN TO BE REGISTERED

(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 in 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 or 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 or in a form to a similar effect, which notice shall be signed by such a 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.
>
> (5) Notices of lien under this Act shall state the Court in which action will be brought to enforce the same, and any person to whom notice is given may deposit the amount claimed in such Court to abide the event of such action, and thereupon the lien shall be deemed to cease". (emphasis added)

[8] Courts in the Territory and South Australia have expressed different views about the proper construction of s 10. To answer Question (1) in par [6], the first question to be addressed is whether giving a notice of demand under s 10(2)(a), (or the occurrence of one of the events in s 10(2)(b)), is *essential* in order that a contract price ""shall … have become due" for the purposes of s 10(1). In other words, is s 10(1) dependent upon s 10(2), or are they independent provisions? An associated question is whether registration of a lien under s 10(4), without more, renders it 'available' in terms of s 10(1). In other words, does s 10(4) provide a pathway to the availability and enforceability of a lien, separate from that provided by registration *after* the contract price has "become due" in terms of s 10(1)? Before considering the parties' submissions on these questions, it is convenient to review the authorities where they have been discussed. First, the Territory authorities; see pars[9] – [23].

The case-law on the Act

[9] In *Advanced Civil Engineering Pty Ltd v Wyara Pty Ltd* (1986) NTJ 715 there had been a demand under s 10(2)(a) for an amount greater than the

amount certified in a progress certificate. The certificate, pursuant to the contract, resulted in the part of the contract price so certified accruing due, and so gave rise to a lien in terms of s 5. The s 10(2)(a) demand had been made at a time when the certified amount, though "due", was not "payable" in terms of the contract; for a demand under s 10(2)(a) to be valid, the certified amount had to be payable at the time of the demand. A lien was registered 12 days after the demand. Was the lien "available" – that is, enforceable – in terms of s 10(1), despite the invalid s 10(2)(a) demand? Asche J (as he then was) considered that it was, on the basis that a demand under s 10(2)(a) was *not* necessary for the price to "become due" in terms of s 10(1). He considered that it became due pursuant to the terms of the contract, on the issue of the certificate. It can be seen that, in effect, his Honour considered that when part of the contract price "accrued due" in terms of s 5, it had thereby "become due" in terms of s 10(1). This is the essence of the defendant's case in this proceeding – see par [34].

[10] At 745-7, Asche J opined that the provisions of s 10(1) are "*independent"* of the provisions of s 10(2)(a), the latter being simply "*one* way … of determining when a contract price shall be deemed to have become due". In other words, his Honour considered that a contract price could "become due" for the purposes of s 10(1), *other* than via a s 10(2)(a) demand (or a s 10(2)(b) event). His Honour's opinion to that effect is the foundation upon which the edifice of the defendant's case is erected, in par [36]. Asche J was not persuaded that the words "shall for the purposes of this section" in

both ss 10(1) and (2), point to s 10(1) being dependent on s 10(2); to the contrary his Honour considered that -

> "the repetition [of these words in s 10(2)] rather conveys the opposite sense, that the purposes of [s 10(1)] are achieved if the contract price is [either] actually due *or* can be deemed to be due". (emphasis added)

With respect, I am unable to accept that construction of those words.

[11] His Honour noted that his approach that ss 10(1) and 10(2) are independent of each other, differed from that of Murray CJ in *Miller's Lime Ltd v Royal Agricultural and Horticultural Society of South Australia* [1936] SASR 306 at 314. Murray CJ there opined that to acquire a lien –that is, an "available" lien, in terms of s 10(1) – payment must be due *and either* "the amounts due must have been ascertained by a demand" under s 10(2)(a) and a failure to pay the amount demanded within 7 days, *or* one of the events in s 10(2)(b) had occurred "either before or after the seven days [in s 10(2)(a)] have commenced to run or have expired (see 10(4))". It is clear that Murray CJ saw 10(1) and s 10(2) as interdependent; Angas Parsons J agreed at 326. That is to say, Murray CJ considered that a contract price would "become due" for the purposes of s 10(1), *only* by the notice of demand procedure under s 10(2)(a), *or* by the occurrence of an event specified in s 10(2)(b).

[12] In *Wyara Pty Ltd* (supra) Asche J observed that this opinion of Murray CJ on s 10 had been "gravely doubted" by Bray CJ in *Albert del Fabbro Pty Ltd v Wilckens & Burnside Pty Ltd* [1971] SASR 121 at 127. With respect, that

does not appear to be so. *Albert del Fabbro Pty Ltd* (supra) involved a charge under s 7 on money payable, as well as a lien under s 5. Bray CJ's "grave doubts" were as to whether it was necessary "for the perfection of the *charge* ... that a demand should have been made within the meaning of s 10(2)". This was a question of the proper construction not of s 10 of the Act but of s 7(3), which provided that a charge under s 7(1) lapsed unless enforcement action was taken –

> "within 28 days after the …contract price … shall have become due within the meaning of section 10 subsection (2)".

In *Miller's Lime Ltd* (supra) *both* a lien and a charge were involved; in addition to spelling out at 314 the "essentials" to acquire a *lien* Murray CJ at 315 spelled out the "essentials" to acquire a *charge;* he considered that s 7(3) required compliance with s 10(2) in the sense of making a demand. For present purposes, the point is that the "grave doubts" expressed by Bray CJ were directed at Murray CJ's construction of s 7(3), *not* at his observations as to the essentials to acquire an available lien under s 10. There is nothing to suggest that Bray CJ doubted those observations, set out in par[11]. I note in passing that in *W. Curl & Sons Regd. v Buck Industries Pty Ltd* [1972] 2 SASR 335 at 342 Hogarth J distinguished the position relating to a charge claimed under s 7 from that of a lien, and disagreed with Murray CJ's construction of s 7(3).

[13] *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 42 NTR 1 involved seven proceedings. In one of them a progress certificate

had issued on 22 April; under the contract, payment of the amount thereby certified to be due was to be made within 14 days. A demand under s 10(2)(a) was made on 2 June. The lienee contractor lodged its lien for registration on 2 June; this was more than 28 days after the certificate issued on 22 April. The defendant lessee submitted that the amount had "become due" for the purposes of s 10(1) when the progress certificate issued on 22 April; and accordingly the lien was not "available", because the 28 days time limit for registration in s 10(1) had not been met. This is the defendant's submission, in par[34]. The basis of the lessee's submission was that the price could "become due" for the purposes of s 10(1), other than via s 10(2)(a); this had been the approach of Asche J in *Wyara Pty Ltd* (supra) – see par[10]. At 12-13 I differed from the approach of Asche J to the relationship between s 10(1) and s 10(2). I considered that s 10(2) provided the *only* means for fixing the date on which the contract price had "become due", for the purposes of s 10(1). I rejected the submission that moneys could "become due" for the purpose of s 10(1) in ways other than those provided for in s 10(2). There was no consideration in this case of whether s 10(4) provided a pathway separate to s 10(2), to an enforceable lien.

[14] In *Parob Pty Ltd v Pipeline Properties Pty Ltd and anor* (1988) NTJ 1546 Maurice J considered at 1553 that s 10(1) had:-

> "*…the limited but important function of stipulating when time begins to run* against a sub-contractor in whose favour a lien arises under s 5, and who has not yet lodged notice of it for registration against the affected title." (emphasis added)

I observe that this construction of s10(1) does not accord with the accepted view in South Australia – see pars [27] and [32] – that it provides *exclusively* for when a lien becomes 'available', and does so by requiring registration within 28 days of a date determined by a formula set out in ss10(1) and (2).

[15] His Honour considered that the 28 days for registration in s 10(1) was *not* to be reckoned from when the debt became 'due and payable' in the accepted commercial sense of those words, but only from when it was deemed by s 10(2)to have "become due" for the purposes of s 10(1). This was contrary to the approach of Asche J in par [9]. Maurice J considered that in its context, the word "due" in s 10(1) did "not bear its ordinary meaning"; with respect, I agree. As to the concepts "due" and "payable", I note authorities such as *Re Sneesby; Ades and Bowes' Contract* [1919] VLR 497 at 505-6 where Cussen J observed that "money may be due, although not presently payable"; his Honour cited authorities which show that the meaning of "due" in a particular statute is determined by the context. See to similar effect *Andrew v Arthur H. Dillon Pty Ltd* (1942) 59WN (NSW) 113 at 114. I respectfully agree with Cussen J; though the meaning of words in an Act may appear to be clear when they are read in isolation, it is a cardinal rule of statutory interpretation that they must be read in their context in the Act – see *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509 at 514, per Mason J.

[16] Maurice J considered that ss 10(1) and (2) were interdependent when it came to fixing the *time* when the "contract price … shall … have become due" in terms of s 10(1). He preferred the view I had expressed to that effect in *Jennings Construction Pty Ltd* (supra) – see par [13] - which he considered to be "consistent with the weight of South Australian opinion", citing *Miller's Lime Ltd v Royal Agricultural and Horticultural Society of South Australia* (supra), per Angas Parsons J at 326; *Albert del Fabbro Pty Ltd v Wilckens & Burnside Pty Ltd* [1970] SASR 277 at 284, per Bright J at instance and, on appeal, at [1971] SASR 121 at 138, per Zelling J; *W. Curl & Sons Regd. v Buck Industries Pty Ltd* (supra) at 341, per Hogarth J; and *Palyaris Constructions Pty Ltd v Kauri Timber Co.* [1980] 24 SASR 41 at 53, per Legoe J.

[17] One argument raised was that the (first) lien registered by the plaintiff subcontractor had been valid, though registered *before* a demand was made under s 10(2)(a) on the defendant head contractor as "the person liable to pay the same". This gave rise to a consideration of s 10(4). Consistently with his view that the commencement of the time-limit in s 10(1) was fixed *only* via s 10(2), and that s 10(1) was limited to 'stipulating when time begins to run', Maurice J considered that a lien could be registered under s 10(4) *without* triggering the 28-day time limit in s 10(1), and that no demand under s 10(2)(a) was ever required when a lien was registered under s 10(4). His Honour considered that a lien "arises [that is, it comes into existence] when the conditions of s 5 are met" but "it may only be enforced

if registered"; I observe that that now appears to be the accepted view. Section 10(4), in his opinion, enabled a lienee to register his lien "at any time after the lien arises [under s 5]" and the contract price becomes payable, thereby protecting himself against "the risk that the registered proprietor will deal with the land" and thus defeat "the statutory charge [by way of an unregistered, though existing, lien]". I accept that. In effect, his Honour saw s 10(4) as providing a pathway to enforcing a lien, separate to that provided by s10(1) read with s 10(2). This does *not* accord with the current approach in South Australia – see par [14] – which sees s10(1) as providing the solitary path to lien availability and enforcement. His Honour considered that whether a lien was registered under s 10(4), or registered in accordance with s 10(2)(a), enforcement action under s15 had to be brought within 14 days after registration, if the lien was not to cease; I observe that that appears to be the accepted view, though the South Australian approach – see par [32] – requires that a s10(2)(a) notice be given even where registration has been effected under s10(4).

[18] In *Sitzler Bros Pty Ltd v DKB Investments Pty Ltd* (1989) NTJ 345, a demand under s 10(2)(a) was made on 29 August 1988, and liens were registered 25 days later, on 23 September. Inter alia, the defendant contended that the monies payable had "become due" in terms of s 10(1) more than 28 days before the liens were registered, relying on the approach of Asche J in *Wyara Pty Ltd* (supra). That was the defendant's argument here, in par [34]. Martin J (as he then was) rejected that approach, holding

that for the purposes of s 10(1), the contract price will "become due" only by operation of s 10(2).

[19] *Pipeline Properties Pty Ltd v Leichhardt Development Co Pty Ltd* (1989) 58 NTR 17 involved an application to cancel the registration of a lien. It had been registered under s10(4) seven days *before* a demand was made under s 10(2)(a); enforcement action under s 15 was then instituted *before* expiration of the 7-day period in s 10(2)(a) which determined when the contract price was deemed to have "become due" for the purposes of s10(1). Was the enforcement action valid? I approached the matter as follows. The contract price would "become due" for the purposes of s 10(1) *only if* either par (a) or (b) of s 10(2) were complied with. That is to say, s 10(1) and (2) were interdependent, in determining when the price would "become due" for the purposes of s 10(1). Setting aside s 10(4), when a demand was made under s 10(2)(a) a lien had to be registered (and thus became available for enforcement) within the 28 day period commencing 7 days after the demand, when the contract price was deemed to have 'become due'. Since here the 7 days had not elapsed when enforcement action was instituted, the price had not then "become due" and registration of the lien and its availability for enforcement were not open at that time. I considered that if ss10(1) and (2) were the only controlling provisions the demand had to be made and 7 days had to have expired, *before* the lien could be registered and action instituted to enforce it. Since enforcement action was not open at the time it was instituted the action would fail, unless the lienee could "rely on some other

provision of the Act". (I should say that I think Mr Maurice QC is right, that "lienee" is the correct term for the lien holder, though the cases usually refer to him as the 'lienor').

[20] This led to a consideration of the effect of s 10(4). I considered at 20 that a lienee could register his lien pursuant to s 10(4), without any prior s 10(2)(a) demand, provided the contract price had "become payable". This was simply what s 10(4) provided, and it was what appeared to have occurred here. I considered "with great diffidence" that no s 10(2)(a) demand had to be made, following a s10(4) registration. In the result I held that the application to cancel the registration of the lien failed, because the question whether the contract price had 'become payable' in terms of s 10(4) could not be determined at that time. This approach followed that of Maurice J in *Parob Pty Ltd* (supra), that s 10(4) provided a pathway to enforcing a lien separate to that of s 10(2). Implicit in this approach was the 'single function' view of s 10(1) he had expressed in par[14], and its corollary that availability of a lien (in the sense of its enforceability) depended simply on the *fact* of registration *before* expiration of the time limit fixed by s 10(1).

[21] Dismissing the appeal – see *Leichhardt Development Co Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR1 – Asche CJ and Angel J agreed that a s 10(2)(a) demand was *not* essential to support registration of a lien. Asche CJ remained of the same opinion he had expressed in *Wyara Pty Ltd* (supra) - see par[10] - that s 10(1) and 10(2) were independent of each other,

not interdependent; Angel J shared that view. He considered that s 10(2)(a) did not institute *the* procedure which *had* to be complied with before a lien could be enforced; rather it was "facilitative", in the special sense that it provided a procedure which enabled the contractor or sub-contractor to convert moneys payable in the future to him under the contract to moneys payable to him immediately, for the purposes of s 5. I observe that this approach construes the meaning of the words "being payable" in s 10(2)(a), as extending to "being payable in the future", a construction which, with respect, I do not consider in their context those words can bear; cf par[28]. His Honour considered that the time limit of 28 days in s 10(1) commenced *either* from the time when the moneys became immediately payable as a consequence of the contractual arrangements, because the lien was then "immediately registrable" under s 10(4), *or* from the expiry of 7 days after service of a s 10(2)(a) notice if that procedure were used, *or* on the happening of one of the events in s 10(2)(b). His Honour considered that while the words "for the purposes of this section" in s 10(1) could encompass the s 10(2)(a) procedure, they necessarily encompassed the registration procedure in ss 10(3) and 10(4). Asche CJ and Angel J both agreed with the construction of s 10(4) set out in pars[17] and [20]; I observe that that construction sat well with their basic view that ss 10(1) and 10(2) were independent of each other.

[22] Rice J, dissenting, considered that (apart from a s 10(2)(b) event), a demand under s 10(2)(a) was *the* condition precedent to a lien becoming "available"

in terms of s 10(1), for subsequent enforcement under s 15. This had been the approach adopted by Murray CJ in *Miller's Lime Ltd* (supra); see par[11]. Rice J considered that a lien becomes "available" on registration under s 10(1), *only* "after [the contract price] has *also* 'become due'" pursuant to s 10(2)(a). His Honour followed what Bright J said at instance in *Albert del Fabbro Pty Ltd* (supra) at 284, in that regard. He said that a demand under s 10(2)(a) was a "necessary condition precedent to the enforcement of the lien under s 15", citing in support what I had said in *Jennings Construction Ltd* (supra). In that case, I had opined that s 10(2) exclusively determined when a contract price had "become due" for the purpose of s 10(1); however, I did not go on to consider whether a s 10(2)(a) demand was a condition precedent to the enforcement of the lien.

[23] In *Malady Enterprises Pty Ltd v Colstar Pty Ltd* (1991) NTJ 263 a lien was lodged for registration under s 10(4) six days before a demand under s 10(2)(a) was served, and more than 28 days after an invoice issued for work done. The invoice date was conceded to be the date the contract price was 'payable'. Gray J applied the majority view in *Leichhardt Development Co Ltd* (supra), to the effect that a s 10(2)(a) demand was not mandatory to fix the time when the contract price was to "become due", for the purposes of s 10(1). His Honour considered at 266-7 that the time limit of 28 days in s 10(1) for registration of a lien "must be capable of running from a date other than [that] fixed" via a s 10(2)(a) notice. He opined that the commencement date – in terms of s10(1), the date on which the "contract

price shall … have become due"-was when "the relevant contract fixes the time when the contract price becomes presently payable". In this case that time was fixed by the invoice date; so on that date the price had "become due", in terms of s 10(1). His Honour opined at 267 that it was "commercially unacceptable" to construe the Act in such a manner that "where a lien has arisen under Section 5, its registration may be delayed for an indefinite period". With respect, bearing in mind the nature of the lien when it arises under s 5, somewhat akin to a dormant or 'floating' charge, I do not consider that the assessment that this consequence of such a construction would be "commercially unacceptable", is correct; see s 32, referred to in par [38]. At 268 his Honour opined that "the Act is concerned to require that a lien is registered within 28 days of its birth"; that is, its 'birth' under s 5. That is the defendant's argument in par[34]. His Honour held at 269 that the purported registration more than 28 days after the 'birth' of the lien under s 5 was "ineffective by reason of the non compliance with Section 10(1) [in that the lien was registered more than 28 days after the contract price became presently payable and hence had "become due"] and [that defect] has not been cured by the subsequent Section 10(2)(a) notice."

[24] That is the current state of the law on the construction of s 10 in the Territory; it favours the defendant's submissions in par[34]. In South Australia the construction of s10 was last considered in 2 cases in 1991; I deal with these authorities at pars[25]-[32].

[25] In *Marriott Industries Pty Ltd v Mercantile Credits Limited* (1990) 55 SASR 228 a notice of lien was served on 28 April, and lodged for registration on 29 April. It was not registered within 28 days after the contract price became due. It was accepted that there had been no prior demand under s 10(2)(a). The defendant contended that the lien was not "available" in terms of s 10(1) because it had not been registered in compliance with s 10, in that no demand under s 10(2)(a) had been served. Its submission was simple: "Because no [s10(2)(a)] demand has been served, no lien arises". The lienee submitted that while the contract price became due 7 days after invoice, the lien had been duly registered and enforceable under s 10(4). Prior J held that s 10 of the Act is *not* a Code, in that it does not provide the *only* method of calculating when a contract price has "become due for the purpose of the Act"; he agreed with the approach of the majority in *Leichhardt Development Co Ltd* (supra) – see par[21] - that the Act provides in s 10(2)(a) *a* method for doing so. His Honour rejected the defendant's submission; implicitly, he took the same approach to s10(4) as in pars[17] and [20].

[26] The Full Court allowed the appeal; see (1991) 160 LSJS 288. The question was whether the lienee subcontractor had had a valid claim to enforce the lien, immediately prior to its cancellation. King CJ reviewed the authorities and considered that s 10(2) should *not* be construed as 'facilitative' in the sense used by Angel J in *Leichhardt Development Co Ltd* (supra) at par[21]. His Honour considered that "available" in s 10(1) meant "capable of

enforcement by action" and "available as a security"; I respectfully agree. Vitally, his Honour considered that a s 10(2)(a) notice *has* to be given, and the 7 days in that provision *has* to have expired, before a lien already registered under s 10(4) becomes "available" in terms of s 10(1). In other words, his Honour considered (as had Murray CJ in *Miller's Lime Ltd* (supra)) that, setting aside any s 10(2)(b) event, a notice under s 10(2)(a) *always* had to be given, if a lien under the Act were to be 'available' and thus capable of enforcement.

[27] His Honour's reasoning was as follows. Placing his "own interpretation" on the provisions of the Act because of the "great…variety of judicial opinions" and hence lack of "any definitive guidance", he considered that s 10(1) imposed a *dual* requirement for a lien to be "available". First, the contract price had to "have become due" for the purposes of s 10(1), in manner provided for by s10(2). Second, registration of the lien had to be effected within 28 days after that price had "become due" in that manner. I note, by way of contrast, the *single* function attributed to s 10(1) by Maurice J in *Parob Pty Ltd* (supra); see par [14]. King CJ's approach accorded with the unreported decision of the Full Court of the Supreme Court of South Australia in *Giles v Jacob* in 1909, referred to in *Pitt Ltd v The Corporation of the Town of Glenelg* [1927] SASR 501 at 534-5. In *Giles v* Jacob a lien had been registered without a demand made under s 10(2)(a), an action was brought to enforce the lien, and then a s 10(2)(b) event occurred. Way CJ is

reported to have expressed his opinion on s 10 tersely and comprehensively, viz:

> "Two things were necessary before the lien became available [in terms of s 10(1)]. One was that money became due, and the second was registration. The meaning of becoming due was that the money must be payable, *and* unpaid after being demanded. There was a registration [under s 10(4)] of 4 October, which should have been perfected by a demand."(emphasis added)

Way CJ held that because no demand under s 10(2)(a) had been made, the lien registered under s 10(4) was not 'available'. This approach and decision may be contrasted with those in *Parob Pty Ltd* (supra) at par[17], *Pipeline Properties Pty Ltd* (supra) at par [20], *Leichhardt Properties Pty Ltd* (supra) at par [21], and *Malady Enterprises Pty Ltd* (supra) at par [23].

[28] King CJ considered that on its "natural construction", s 10(2) defined the words "become due" in s 10(1); this is somewhat akin to Mr Maurice's approach at par [42]. Since to be the subject of a demand under s 10(2)(a) the (unpaid) contract price, or part of it, had to have the quality of "being payable", it must already have "accrued due", in terms of s 5; I respectfully agree – see below and par [40]. Accordingly - and this is a vital step in his Honour's reasoning - the only "intelligible purpose" of s 10(2)(a) was to impose "an *additional* pre-condition [by way of the demand, the others being that the price had already "accrued due" and "was payable"] to the right to enforce a lien, or to rely upon it as security" (emphasis added). I note that this was what Way CJ meant in par [27] when he said: "The meaning of becoming due [in s 10(1)] was that the money must be payable,

and unpaid after being *demanded*." King CJ observed that while money can be "due" but not "payable", the reverse cannot obtain; I note that was also the view of Napier J (as he then was) in *Metropolitan Brick Company v Haywood* [1938] SASR 462 at 468. Money which is "payable" is money which *must* be paid – "it is due, and the time for payment has arrived"; I respectfully agree. His Honour considered that to say that money is "payable in the future" is really to say that it is not yet payable; cf. the approach of Angel J to the words "being payable" in s 10(2)(a) in par[21], with which King CJ disagreed.

[29] His Honour had then to take account of the role of s 10(4) in the general scheme of s 10. Clearly, he considered that it was ancillary to the scheme embodied in s 10(1) and 10(2), as he perceived it in pars[26] - [28]. He accepted that s 10(4) permitted registration of a lien at any time *after* the contract price had "become payable", even though the 7 days in s 10(2)(a) had not "commenced to run". Vitally, he considered that such registration under s10(4) did *not* mean that the lien thereby became 'available' in terms of s 10(1). Despite registration under s 10(4), the lien could *not* be enforced (that is, it was not "available"), or even operate as the 'deemed caveat' contemplated by s 12, *until* a s 10(2)(a) notice had been given *and* the 7 day period contemplated by s 10(2)(a) had expired. This approach to s 10(4) is in marked contrast to that of most Judges in the Territory thus far - see pars[17], [20] [21] and [23] – though it accords with that of Rice J, dissenting, in par[22]. King CJ accepted that his construction of s 10(4)

presented problems in assigning any "useful purpose" to the requirement (on his approach) that a s 10(2)(a) demand for payment still had to be made *after* registration of the lien under s 10(4). However, he considered that the difficulties in discerning the purpose of s 10(2)(a) would be greater, if it were construed as 'facilitative' in terms of par[21].

[30] Olsson J, with whom Mohr J agreed, observed that the "weight of decided authority" in South Australia ran "heavily counter to the conclusion of Asche CJ" in *Leichhardt Development Co Ltd* (supra) – see pars[10] and [21] – that s 10(2)(a) was merely one method of calculating when the "contract price…shall… have become due" in terms of s 10(1). His Honour reviewed those authorities, which were mainly those listed by Maurice J in *Parob Pty Ltd* (supra) at par[16]. He considered at 310 that the proposition that s 10 (4) "in some way stands alone" from s 10(1) and (2) and "authorises the enforcement of a lien otherwise than as envisaged" by those provisions, was unwarranted both in terms of "the authorities binding upon this court" and as a matter of construction. In his opinion s 10(4) merely permitted "the provisional registration of a notice of lien prior to the issue of a formal notice of demand" under s 10(2)(a), "so as to give notice of the claim and to protect the position of a proposed lienor during the seven day period envisaged by" s 10(2). This conception of registration under of s 10(4) as "provisional" in nature stands in marked contrast to that of most of the Judges in the Territory who have considered the matter; see pars [17], [20] and [21].

[31] I note that on 5 September 1991 the High Court refused special leave to appeal from the Full Court's decision in *Marriott Industries Pty Ltd* (supra). Brennan CJ observed that the Act was "generally acknowledged to raise extreme difficulties of interpretation"; however, since its interpretation was "largely a matter of judicial impression", his Honour considered that a grant of special leave would not be "likely to lead to the elucidation of any general principles".

[32] In *Longreef Pty Ltd v Leighton Contractors (South Australia) Pty Ltd* (1991) 160 LSJS 270 King CJ expressed views on the Act similar to those he had expressed earlier that day in *Marriott Industries Pty Ltd* (supra).
His Honour said that he was unable to agree either with the decision in *Leichhardt Development Co Ltd* (supra), or with the dictum of Angel J at par[21] that s 10(2)(a) was 'facilitative'. At 276 he set out his understanding of the relationship of ss 5, 6 and 10, and the scheme of the Act with respect to liens, as follows: -

> "… a contractor's or sub-contractor's lien can only *arise* when the lienor's title to the debt has accrued under the terms of his contract (section 5), although it may arise notwithstanding that the debt, having arisen, is payable in the future. The extent of the lien is limited by section 6 to the amount due and presently payable by the owner or occupier under the contract for the purpose of which the work was done or the materials supplied. In a situation in which a lien which has arisen because an amount has accrued due under the contract, but there is no amount presently payable by the owner or occupier, the lien is dormant until an amount becomes so payable.
>
> *Although a lien has arisen by reason of the contract price or part thereof having accrued due under the terms of the contract, it is not "available", that is to say "not capable of enforcement" or "valid as*

> *a security", until it has "become due" for the purposes of section 10. That will occur if one or other of the events enumerated in section 10(2)(b) has occurred, or if the price is unpaid for seven days after notice has been given under section 10(2)(a).* That notice can only be given validly after the price is payable, that is to say after the entitlement has arisen under the contract, thereby bringing the lien into existence, and the time for payment has arrived. The lien, if it has acquired a valid existence by reason of the price having accrued due, [and if the price has become payable], may be registered pursuant to section 10(4) *prior* to the section 10(2)(a) notice, *but the action to enforce it cannot be commenced until the lien is "available" under section 10(1).*" (emphasis added)

His Honour is clearly saying in the passage last emphasized that where a lien is registered under s 10(4) its enforcement (which s 15 requires to be instituted "within 14 days from [that] registration")cannot be effected until expiry of 7 days from the essential s 10(2)(a) demand because, as his Honour spells out in the passage first emphasized, only by the price having "become due" by the s 10(2) procedure, does the lien become capable of enforcement under s 15. I note that this could create some practical problems; see par [50].

[33] I note in passing that in *Ginos & Associates Ltd v Accordent Pty Ltd* (unreported, Supreme Court of South Australia (Full Court), 23 December 1998) the Full Court, having cited the views of King CJ on ss 5 and 10 of the Act in *Longreef Pty Ltd* (supra), observed that the correctness of that authority was not challenged in that appeal "nor … could [it] have been". Against this review of the differing approaches in the courts, I turn to the parties' submissions.

The defendant's submissions

[34] The ultimate submission of Mr Gee QC, senior counsel for the defendant, was as follows. The contract price 'accrued due' on 15 November 1997. On the proper construction of the Act the lien which thereby arose under s.5 of the Act, had to be registered within 28 days after *that* date, and *not* within 28 days after a date determined by s 10(2). This admittedly had not occurred. It followed, in his submission, that Questions (1)-(3) in par[6] should be answered: (1) 'Yes'; (2) 'No'; and (3) 'The lien is unavailable and unenforceable'.

[35] He submitted that because the Act had become an enactment of the Territory in 1991, rather than, as hitherto, an Act of South Australia in force in the Territory, ss 55, 62A and 62B of the *Interpretation Act* applied to its interpretation. I accept that, assuming that it is in force.

[36] As to the proper construction of s 10, on which his ultimate submission in par[34] was based, he had 3 submissions. First, there was no difference in meaning between the expressions "accrued due" in s 5, and "become due" in s 10(1). The dueness - the quality of being due - in s 10(1) was the same dueness which was the "essential characteristic" of the lien's existence under s 5. I note that at the heart of the opposing construction advanced in pars [43] and [49], is the concept that "become due" in s 10(1) bears a special and artificial meaning, quite different from the use of "due" in s 5 where it bears its usual meaning; and that that special meaning is determined *exhaustively* by s 10(2) "for the purposes of" s 10(1). Mr Gee submitted that

in the authorities which suggested that there was a difference between the meaning of "accrued due" in s 5 and "become due" in s 10(1), that difference had simply been assumed to exist; however, I note the reasoning of King CJ in *Marriott Industries Pty Ltd* (supra) at par [28]. Mr Gee submitted that, lexicologically, "accrued" and "become" have the same meaning; I observe that while that there is merit in that point in the abstract, these words need to be read in their respective contexts in s5 and s10(1) of the Act. He submitted that the structure of s 10(1) also supported his submission, because it focused on the dueness of the contract price, not on its payability. I consider that this does not really address the opposing submissions in pars [43] and [49] that "become due" is used in a special sense in s 10(1); further, the price must *already* have been payable – and hence already 'due' in the s5 sense - if s 10(2)(a) is utilized to deem it to have "become due" for the purposes of s10(1), and this fact alone suggests that the 'dueness' in s 10(1) is of a special quality, different to that in s 5.

Second, Mr Gee submitted that as a corollary of the suggested identity in meaning between "due" as used in ss 5 and 10(1), once a contract price (or part of it) has "accrued due" under s 5, the 28 days time limit in s 10(1) for registration of the lien (which ex hypothesi has arisen under s 5) immediately starts to run. I agree that if the premise is correct, this conclusion would follow.

[37] Third, Mr Gee addressed a matter the true significance of which bore on the role and function of s 10(4). He submitted that the availability of the lien

provided for in s 10(1) - that is, its enforceability – does *not* depend on the dueness of the contract price, but *only* upon the *fact* of registration of the lien. The dueness of the price is significant in s 10(1) *only* insofar as it fixes the commencement of the *time* within which registration must be effected, apart from registration under s 10(4). It can be seen that this submission accords with the construction advanced in *Parob Pty Ltd* (supra) at par [14]; see also pars [20], [21] and [46]. It is contrary to the construction favoured by King CJ in *Marriott Industries Pty Ltd* (supra) and *Longreef Pty Ltd* (supra) at pars[26]-[28] and [32]. King CJ saw s 10(1) as imposing a *dual* requirement for a lien to be 'available': *both dueness* of the contract price (in a special sense of "due", which entailed a demand for payment under s 10(2)(a) of a payable price, or a s 10(2)(b) event) *and* registration of the lien, were required. Mr Gee rightly noted the "head-on conflict" between the construction he advanced, and that in the passage first emphasized in par[32].

[38] He noted that it was implicit in King CJ's construction in par[32]that a lienee was under no time restriction within which to serve a notice of demand under s 10(2)(a), so as to create the necessary dueness for the purposes of s 10(1). As to that suggested lack of any time limit on taking action under s 10(2)(a) to trigger the process of lien registration and enforcement, he submitted that the Act elevated a lienee, simply an unsecured creditor, to a special position of preference; the quid pro quo was that it also contemplated that he would take timely steps to register and

enforce his lien, once it came into existence under s 5. On Mr Gee's construction, 28 days from 'birth' of the lien under s5 was allowed. He submitted that if the lienee were not required to take timely steps after the 'birth' of his lien, the owner would have no timely means of testing the validity of the lien, or clearing it off his title by depositing money under s 16.

As to this submission, I note that s32 of the Act enables the owner to take action *at any time* if he claims that he has been "prejudicially affected by a claim, lien, or charge, or by registration under [the] Act". Mr Gee noted that all the modern authorities considered that a lien came into existence pursuant to s 5, *before* it was registered; I agree - see, for example, pars [17] and [32]. He submitted that s 10 carefully distinguished between a contract price having "become due" in s 10(1), and its "being payable" or having "become payable"; and that for the price to have "become due" connoted only that the monies were owing, under the contractual arrangements. I accept the first point but I do not consider that it necessarily assists Mr Gee's argument; as to the second – which really restates his first submission in par [36] - I consider (as indicated in par [36]) that the "being payable" precondition in s 10(2)(a) suggests that "become due" in s 10(1) connotes *not only* that the monies 'due' are owing under the contract, *but further* that they are also payable under it.

[39] The effect of s 10(4) is a live issue in proceedings No. 136 of 1997; see par [6]. Mr Gee submitted that s 10(4) was subordinate to the 'fundamental

structure' of s 10, which required registration of the lien under s 10(1) if it were to be 'available'. Registration under s 10(1) had to be effected within 28 days of the dueness of the price (in the sense of 'dueness' he had outlined in par[36]), not of its payability; he noted by way of contrast that action under s 10(4) turned on the 'payability' of the price. I noted in par[36] that the fact that s 10(2)(a) required payability as a condition precedent to its use in determining when the price "becomes due" in terms of s 10(1), is a matter which militates against Mr Gee's submission that 'dueness' is used in its ordinary sense in s 10(1).

He submitted that s 10(4) had only a limited role in the Act, namely to enable a lienee who contemplated making a demand under s 10(2)(a) *immediately* to register his lien without waiting for the 7 days prescribed by s 10(2)(a) to commence or elapse. He submitted that such a registration did *not* attract availability to the lien; that quality was a creature exclusively of s 10(1). Section 10(4) did *not* provide a path to availability (in the sense of enforceability) of the lien, separate from s 10(1) and unfettered by the 28-day time limit in that provision. In this last respect Mr Gee's submission was not in accord with views as to s 10(4) expressed in some of the Territory cases – see pars[17], [20] and [21] – and accorded with the approach to s 10(4) in the South Australian cases – see pars[29], [30] and [32].

[40] Mr Gee rightly conceded that the requirement in s 10(2)(a) that the price be already "payable", presented problems for his submission that its function

was to provide for a "notional dueness", in the sense he attributed to 'dueness' in s 10(1) in par[36] – its ordinary sense, as in s 5. In my opinion it is clear that if a price is "payable" it must also be "due", in the ordinary sense of that word; see pars [15] and [28]. To my mind the requirement in s 10(2)(a) that the price be then "payable" presents an insuperable obstacle to Mr Gee's submission as to the function of s10(2)(a). The 'payable' requirement in s10(2)(a) requires that the price be *already* due (in the ordinary sense of 'dueness') *before* s 10(2)(a) can be utilized, yet Mr Gee's submission is that s.10(2)(a) is used to determine that the price has "become due" (in the ordinary sense of 'dueness') for the purposes of s 10(1). That cannot be right. I consider that the requirement of payability in s 10(2)(a) strongly favours a construction that in the phrase "shall for the purposes of this section have become due" in s 10(1) (followed by the deeming provision in s 10(2)) the legislature treated "due" in s10(1)as having a meaning "for the purposes of" s 10 other than the ordinary meaning it bears in s 5.

[41] In a linked submission, Mr Gee submitted that the word "deemed" in s 10(2) is used to create a "fictional dueness" in the ordinary sense he attributed to 'due' in par[36]. I consider that there is no scope for such a construction of "deemed", again because a price which is "payable" as required by s 10(2)(a) must in reality already be due, in the ordinary sense of 'due'; see par[40]. In my opinion, the word "deemed" in s 10(2) in its context is equivalent to the word "adjudged". It does not create a statutory fiction of the type discussed, for example, in *Loizos v Carlton United Breweries Ltd*

(1993-94) 94 NTR 31 at 32-3. It extends the denotation of "become due" in s10(1) to what those words would not in ordinary parlance denote; it infuses "become due" in s 10(1) with meaning, by designating what that term there comprehends. I consider that "deemed" is used in s 10(2)(a) in an *exhaustive*, rather than an inclusive, sense; adapting the words of Cave J (as he then was) in *The Queen v The County Council of Norfolk* (1891) 60 L.J.Q.B. 379 at 381, it points to an intention in the legislature to confine "become due" in s 10(1) to what it specifies in s 10(2), and not to go beyond that. See generally on 'deeming' *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696, per Griffith CJ; *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1969-70) 122 CLR 49 at 65-7, per Windeyer J; and *Rowe v Hughes* [1974] VR 60 at 68.

The submissions of the plaintiff Henry Walker Contracting Pty Ltd

[42] The major submissions of Mr Maurice QC, of senior counsel for this plaintiff, were as follows. The meaning of s 10(1) and s 10(2) was clear; it was ascertainable simply from the words of those provisions, which were used in their natural and ordinary meaning, a usage which did not lead to any manifest absurdity. I note that many judges have not found the language of the Act to be so clear. See Brennan CJ's reference to its "extreme difficulties of interpretation" in par [31]. In *Parob Pty Ltd* (supra) the learned judge referred to "a chorus of judicial protest about the ambiguities and uncertainties attending many aspects" of the Act, which he characterized as a "thoroughly discredited piece of legislation". In *Pipeline*

Properties Pty Ltd (supra) I referred to the Act's "fuliginous obscurity". In *Marriott Industries Pty Ltd* (supra) Olsson J noted that the Act "has become notorious for its difficulties of rational construction". In his judgment of 26 November 1998 leading to these proceedings Angel J referred to "the enigmatic language of the Act", and "the muddy state of the authorities"; and in his judgment of 4 February 1999 Bailey J referred to "the obscure and unsatisfactory nature of the antiquated" Act. That is a small sample of adverse judicial comment on the Act's Delphic drafting.

[43] Mr Maurice submitted that s 10(1) stipulated that a lien was not "available" until it had been registered; this had to be effected in a timely way. Section 10(2) determined this timeliness, by fixing the date from which the 28-days limit for registration under s 10(1) commenced, by determining when the "contract price shall for the purposes of this section have become due". "Become due" in s 10(1) was determined solely by s 10(2), and thus in s 10(1) it was an artificial and technical concept. Sections 10(1) and 10(2) were interdependent in that sense; this was made clear by the use of the words "for the purposes of this section" in both provisions. The *only* purpose of specifying a commencing time in 10(1) via 10(2), however, was to fix the outer time limit within which the lien had to be registered. Section 10(1), in providing for the commencement of that time-limit, expressly contemplates that the "lien has arisen" with respect to the contract price. That is clearly a reference to s 5. Thus s 10(1) proceeds on the basis that the contract price has *already* "accrued due" in terms of s 5, when

setting out a formula to determine the commencement of the 28-days time limit. It follows that since s 10(2) determines the time of commencement of the 28-days limit "for the purposes of" s 10(1), in terms that require the price already to have been "payable" (and hence 'due' in its s5 ordinary sense), the 28 days could *not* begin to run from the *earlier* date when the contract price had "accrued due" pursuant to s 5. Once s 10(2) is treated as fixing the commencement of the s 10(1) time limit for registration, to construe "become due" in s 10(1) as equivalent to "accrued due" in s 5 is not possible. I consider that this line of reasoning is compelling.

[44] Mr Maurice submitted that the 28-days grace in s 10(1) for the lienee to register his lien, commencing 7 days after a s 10(2)(a) demand, had not been shown to cause any great inconvenience in practice. This was in contrast to what would be the practical effect if the construction advanced by the defendant in par[34] obtained. That would require any prudent unpaid contractor or subcontractor first to register his lien within 28 days of each instalment of the contract price accruing due under s 5, and then to issue a court writ to enforce it within 14 days of such registration. I accept that submission, and consider that such a nonsensical procedure could never have been intended by the legislature. As Jordan CJ said in *Hall v Jones* (1942) 42 SR (NSW) 203 at 208, a court should assume that the legislature "intended to enact sense and not nonsense". The consequences of giving a particular meaning to a provision in an Act are taken into account when interpreting it; see *Cooper Brookes (Wollongong) Pty Ltd v F.C.T.* (1981) 35

ALR 151 at 169-170, per Mason and Wilson JJ. This consequence militates against the construction of "become due" advanced by Mr Gee. Mr Maurice noted that on the defendant's construction of "become due" in s 10(1), s 10(2) served no useful purpose; I accept that. He also submitted that the only function of s 5 was to bring the lien into *existence*; I accept that.

[45] Mr Maurice pointed out a further practical consequence of the defendant's construction of s10. A contract price which had "accrued due" in terms of s 5, might often not be "payable" for more than 28 days thereafter. In such a case, if the 28 days for registration were to commence from the date on which the contract price had "accrued due", as the defendant contended, that time would have expired *before* a lienee could lawfully register his lease under s 10(4), or issue a demand under s 10(2)(a), since each of those provisions required that the contract price first be "payable", in the sense used by King CJ in par [28]. That is to say, in such a case, on the defendant's construction of s 10, the lienee could *never* register his lien within time. I consider that this obvious practical consequence of the defendant's construction is one the legislature could never have intended to occur. It also militates against the defendant's construction of "become due".

[46] Mr Maurice submitted that s 10(4) was unnecessary, in the scheme of s 10(1) and (2). Its function was to enable a lien to be registered after the contract price had "become payable" (and hence after it had also 'accrued due' in terms of s 5), even though no s 10(2)(a) demand had been made.

When the lienee adopted this course, the lien became immediately "available" in terms of s 10(1), following its registration, *because 'availability' under s 10(1) turned only on the fact of registration;* cf the approach of the defendant on this point in par [39], and of Jovista Pty Ltd in par [50]. For this reason, after registration had been effected under s 10(4), there was no need - and no requirement - that a demand under s 10(2)(a) then be made, before the lien became 'available' under s 10(1). It was *already* 'available'.

It can be seen that Mr Maurice agreed in this last respect with Mr Gee's third submission, in par[37]; the submission also accords with the approach in pars [17], [20] and [21]. It will be recalled that he had submitted that the commencing date for the s 10(1) time-limit could *only* be determined pursuant to s 10(2); see par[43]. He now submitted that a registration pursuant to s 10(4) would *necessarily* have been effected before the 28-days time limit in s 10(1) would have expired, had the s 10(2) procedure been adopted. That is to say, a registration under s 10(4) would *always* be within the s 10(1) time limit for registration; a s 10(4) registration must always occur "before the expiration" of the time limit, as required by s 10(1).

That appears to be correct, accepting the notional element involved : absent a s 10(2)(a) notice or a s 10(2)(b) event, there is no *actual* commencing date for the 28-days time limit for registration in s 10(1) (on Mr Maurice's approach in par [43]), and hence no *actual* period of time within which s 10(1) requires registration. It is implicit in the present submission as to

s10(4) that ss 10(1) and 10(2) do *not* require that the process which they spell out in detail, designed to determine the commencement of the 28-day period which s 10(1) specifies, actually be carried out, before a lien becomes 'available'. Mr Maurice rightly conceded that on this construction of s 10(4), s 10(2)(a) served no useful purpose.

[47] I note that this approach to the function and effect of s 10(4) follows that spelled out in some of the Territory cases, in pars[17], [20] and [21]. It does not accord with the current South Australian view, expressed in pars[30] and [32], to the effect that before a lien can be "available" following registration, the contract price must *also* have "become due", via the deeming provision in s 10(2). I note that in *Pitt Ltd* (supra) at 521 and 534, Richards J appeared to take the same approach to s 10(4) as that advanced by Mr Maurice. Mr Maurice conceded that the reference to s 10(2)(a) in s 10(4) might suggest, implicitly, that s 10(4) contemplated that a s 10(2)(a) demand must issue, following registration under s 10(4).

The submissions of the plaintiff Jovista Pty Ltd

[48] Mr Collins QC of senior counsel for this plaintiff submitted generally that the Act made it clear that the mere fact that a contract price was not paid on the day on which it was payable, did *not* permit the lienee immediately to enforce his lien. Rather, the Act contemplated that a lien was not enforceable unless notice was first given. The rationale for this was that by creating the statutory lien the Act elevated the right in personam of an

unpaid contractor or sub-contractor to a security right, and required as a quid pro quo of that elevation that notice be given.

[49] Mr Collin's approach was broadly that adopted by King CJ in par [32]. He submitted that, setting aside s10(4), the Act contemplated the existence of 3 steps in a time continuum, and its provisions proceeded upon that basis; I note the similar reference to 'sequence' by Bright J in *Albert del Fabbro Pty Ltd* (supra) at 284. First, in time, the lien for the contract price arises under s5, so far as it has then "accrued due". Second, the price which has "accrued due", becomes "payable". These first and second steps could be coterminous; that depends on the particular contractual provisions. In s 10 "payable" is used in the sense of "presently payable"; I agree. He submitted that 'payability' in this sense is a precondition to availability of the lien in terms of s 10(1), unless a s 10(2)(b) event occurs – in which event registration must be effected within 28 days from that event.

He submitted that apart from a s 10(2)(b) situation, the lienee is under no compulsion as to the time within which he must register his lien (to enforce it, to obtain the price presently payable to him). He may choose to register under s10(4) immediately the price becomes payable, to avoid the risks referred to in par[17]; he may choose to issue a demand under s 10(2)(a). I note that, on this approach to the construction of ss5 and 10, the lienee may choose to do nothing at all, and his lien (which has arisen under s 5) would remain unaffected by his inaction.

He submitted that bearing in mind the need for notice to be given before enforcement (as per par [48]), the Act required that this (presently payable) contract price "become due" in s 10(1) before the lien could be registered. The Act then proceeded "for the purposes of" s 10, to spell out in s 10(2) what "become due" means, the third and final step in the time continuum leading to lien enforcement. The word "deemed" as used in s 10(2) emphasizes that "become due" in s 10(1) is used in a special sense "for the purposes of" that provision. Once the price has "become due" in this special sense, the lienee has to register his lien within 28 days, and enforce it within 14 days of registration if it is not to cease. As I have already sufficiently indicated, I am persuaded that this is the proper construction of ss 10(1) and 10(2); see also pars [55] – [57].

[50] Mr Collins submitted that the sole purpose of registration under s 10(4) served a purpose ancillary to that of s 10(1) and 10(2): to enable speedy registration, so as to secure the priority which s 9 gave to a registered lien. Section 10(4) was not concerned with the *availability* of the lien; that was provided for in s 10(1), and could *only* be triggered by action under s 10(2). The practical result was that a lienee who had registered his lien under s 10(4), had of necessity to make a prompt s 10(2)(a) demand to avoid cessation of the lien. The practical effect of this construction of ss.10(4) was to reduce the 14-day period in s 15 to 7 days (or less). I note, for example, that if the lienee did not make a s 10(2)(a) demand until 8 days had elapsed after his s 10(4) registration, the further 7 days which s 10(2)(a)

required then to elapse would mean that he could not take enforcement action within *14* days of the registration, as required by s 15, and his lien would then cease. It will be noted that this construction of s 10(4) differs markedly from that of Mr Maurice in par[46]. Mr Collins submitted that the concluding words in s 10(4) – "although the 7 days mentioned in subsection (2) shall not have commenced to have run" – expressly recognised the central importance of the notice under s 10(2)(a) for the purpose of fixing the commencement of the 28-day time limit in s 10(1), and hence (on his approach) for determining the availability and enforceability of the lien.

[51] Against the background of these submissions, Mr Collins submitted that the concept of "become due" was the mainspring of s 10(1), including the availability of the lien provided for therein. It can be seen that the construction of s 10 advanced by Mr Collins accords generally with that of King CJ in par[32].

[52] Mr Collins submitted that even if the Court did not favour this construction, in the interests of comity it should now adopt it, to maintain uniformity with the construction of the Act in South Australia in *Marriott Industries Pty Ltd* (supra) and *Longreef Pty Ltd* (supra).

[53] He submitted that the defendant's construction meant that many words in s 10 could not be assigned a meaning. Further, in effect, that construction not only equated "become due" in s 10(1) with "accrued due" in s 5, but also with "become payable" in s 10(4).

[54] He submitted that this plaintiff's liens were validly registered and available, because the 28-day period in s 10(1) begins to run *only* after the contract price has "become due" under s 10(1), via s 10(2). On the assumed facts in par[5] the price had "accrued due" and become payable on 9 June; a s 10(2)(a) demand was then made on 9 June; the "accrued due" price had accordingly "become due" 7 days later on 16 June, for the purposes of s 10(1); and on 11 June registration of the lien had been effected under s 10(4), before the 28 days time limit commencing 16 June expired on 14 July. The fact that under the contractual arrangements, the price was due and payable by the contractors more than 28 days *before* the registration on 11 June, was simply irrelevant. Accordingly, he submitted that Questions (1) – (2) in par [6] should be answered: (1) 'No'; and (2) 'Provided notice was given in accordance with s 10(2) of the Act, yes'. Mr Collins did not address Question (3).

Conclusions on Questions (1)-(3) in par [6]

[55] The various submissions show that what is in issue is the construction of provisions in the Act which are susceptible of more than one meaning. No construction of s 10 is wholly satisfactory. It will always be possible to say: "If construction X is adopted, section Y has no work to do". So it is for example, with s10(2)(a), if the construction of s 10(4) in par [46] is adopted; cf. pars [28] and [29]. In general, a statute should be so interpreted as to give all its provisions some meaning and effect. Nevertheless, this may on occasion be impossible; this is one of those occasions. The duty of the

Court in such circumstances is to give the Act the construction, fairly open, which produces the more reasonable result; that is, the construction which "produces the greatest harmony and the least inconsistency" as Cooper CJ put it in *Australian Alliance Assurance Co Ltd v Attorney-General (Q'ld)* [1916] St R Qd 135 at 161.

[56] I adopt that approach. I have already sufficiently indicated when going through the submissions, the general view I take. I consider that the better construction of s10 is that favoured by King CJ in *Longreef Pty Ltd* (supra), set out in par[32]. I think that this construction best expounds the Act according to the intent of the legislature, best promotes the underlying purpose of s 10, and results in a fairer and more convenient operation of the Act as a whole, bearing in mind its general object and purpose. There is nothing novel about this construction; it was tersely and accurately stated by Way CJ 90 years ago in *Giles v Jacob*; see par [27].

[57] As to Mr Collins' point on comity, in par[52], I consider that it is generally desirable that there be conformity in the construction of an Act which is in identical terms in both the Territory and South Australia; see *Camden Park Estate Pty Ltd v O'Toole* (1969) 72 SR (NSW) 188 at 190. However, on the approach I take, that aspect does not arise. I consider, with respect, that the construction of ss 10(1) and (2) favoured in *Wyara Pty Ltd* (supra), by the majority in *Leichhardt Development Co Ltd* (supra), and in *Malady Enterprises Pty Ltd* (supra), is erroneous; so is the limited construction of s 10(1) in *Parob Pty Ltd* (supra); and so also is the construction of s 10(4) in

Parob Pty Ltd (supra), in *Pipelines Pty Ltd* (supra) and, on appeal, by the majority in *Leichhardt Development Co Ltd* (supra). I would answer Questions (1) – (3) in par[6]: (1) 'No'; (2) 'Not applicable, but clearly the answer to the substantive question is 'Yes'; (3) 'This question does not require answer'. I deal next with Question (4), in pars [58] to [66].

Question (4) in par [6]

The defendant's submissions

[58] Mr Gee submitted that neither the *Mining Act* nor the *Mt Todd Project Agreement Ratification Act* 1993 (herein "the Ratification Act") expressly provided that a Mineral Lease involved the grant of an 'estate or interest in land'. I accept that. I note that the Ratification Act was a special Act which ratified an Agreement between the Territory and a company for the development of the mine on ML1070.

[59] He submitted that exclusive possession of the land was a characteristic of a proprietary right, citing *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 344, per Mason J. I note that his Honour said that the issue did not take "the applicants very far, even if it be the case that exclusive possession is *very often* a characteristic of a proprietary right." Mr Gee submitted that neither ML1070, nor the *Mining Act*, nor the Ratification Act gave the defendant exclusive possession of the land the subject of ML1070. He submitted that the decision in *Thiess Contractors Pty Ltd v White Range Gold NL* (1991) NTJ 1013 was distinguishable, on this point. I note that that case involved applications to enforce liens over

two Mineral Leases. Martin CJ held that no monies had "accrued due" within the meaning of s 5 of the Act, and that that was "enough to dispose of the applications". However, his Honour went on to consider other points which had been argued, including whether a Mineral Lease under the *Mining Act* conferred an estate or interest in land. He considered at 1034 that "it clearly does", noting the description and incidents of such Leases.
His Honour appears to have treated the fact that no other mining tenements could be granted over the land the subject of the Mineral Leases, as vesting in the lessee "exclusive possession of the land … by virtue of the statute", subject to the provisions in the Leases. Whether that be so or not, I do not consider that a right to exclusive possession is one of the essential characteristics of a proprietary right in land; see par [60].

[60] Mr Gee noted that clause 7 of the Agreement ratified by the Ratification Act preserved the power of the Territory under the *Lands Acquisition Act* compulsorily to acquire the land the subject of ML1070. He submitted that the preservation of this power caused ML1070 to lose its "degree of permanence or stability". This phrase has significance in terms of Lord Wilberforce's classic description of the four essential characteristics of a proprietary right, in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-8:

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be *definable, identifiable by third parties, capable* in its nature *of assumption by third parties,* and have *some degree of permanence or stability."* (emphasis added)

I do not consider that the reservation by the Territory of its statutory power of eminent domain has the effect for which Mr Gee contends, any more than it can, for example, affect the "degree of permanence or stability" of an estate in fee simple in land. I note further that Clause 7(2) of the statutorily-ratified Agreement provides that apart from specified public purposes set out in Clause 7(1), any compulsory acquisition for other public purposes can only be effected by the Territory with the written consent of the company, though the consent is not unreasonably to be withheld. This puts the Lessee in a somewhat stronger position as regards the Territory's power of eminent domain than that of the ordinary person holding, for example, a fee simple in land in the Territory.

[61] Mr Gee submitted that ML1070 was different from the usual mineral leases granted under the *Mining Act*. The Minister's only function was to receive the rent. The fee simple in the land was vested in the Jawoyn Association Aboriginal Corporation or its nominee, so all that the Minister could do under the Lease was to sell the minerals in the land. I consider that examination of the Agreement, the Ratification Act and the *Mining Act* under which ML1070 was granted, show that there is no substance in this submission.

The submissions for the plaintiff Henry Walker Contracting Pty Ltd

[62] Mr Maurice submitted as follows. ML1070 had a term of many years; the Lessee had extensive rights under the *Mining Act*, including the power to assign with the Minister's consent, under s 173. The Mining Lease was in

its legal nature a species of profit á prendre, in the sense that it conferred on the Lessee a right to enter another's land to take some portion of the soil. Mr Maurice submitted that a profit á prendre was unquestionably an 'interest in land'; he relied on *R v Toohey; ex p. Meneling Station Pty Ltd* (supra) at 341-4 per Mason J and at 351-4 per Wilson J. He also relied on the views of Aickin J on this point in *Stow v Mineral Holdings (Aust) Pty Ltd* (1977) 51 ALJR 672 at 674:

> "In my opinion *the ordinary meaning* of the compound expression *'estate or interest in land' is an estate or interest of a proprietary nature* in the land. *This would include* legal and equitable estates and interests, for example, a freehold or a leasehold estate, or incorporeal interests such as easements, *profits á prendre*, all such interests being held by persons in their individual capacity." (emphasis added)

I accept that a profit á prendre constitutes an "estate or interest in land" for the purposes of s 5 of the Act.

The submissions for the plaintiff Jovista Pty Ltd

[63] Mr Collins submitted as follows. The defendant was an 'occupier' of the land under ML1070, for the purposes of s 5 of the Act; I note that that is accepted. The authorities showed that the ordinary meaning of "estate or interest in land" was an estate or interest of a proprietary nature in the land; I accept that – see par[62]. Accordingly, the question was whether the Lessee's right to occupy the land was a mere personal right, or arose because it had a proprietary right in the land. I accept that approach. Mr Collins referred to the essentials of a proprietary right as set out by Lord

Wilberforce in par [60]; he posed as the ultimate question for answer whether the defendant's rights under its Lease under the *Mining Act*, taken as a whole, are of a proprietary nature. He then referred to the extensive rights spelled out in ss 60-69 of the *Mining Act*, dealing with the grant of Mineral Leases. These include provision for the term not to exceed 25 years; and extensive rights of user (granted in the Lease), as set out in ss 54(1), 60(1)(a)-(g), and in the other provisions of s 60. I note that the nature of many of the rights of user granted under the Mining Act is such as necessarily to imply a right in the Lessee to exclusive possession of parts of the lease area. Section 61(3) provides for renewal of a Lease for up to 25 years, provided the lessee has complied with the provisions of the Act and the conditions of his Lease. In this case, ML1070 is for a term of 25 years, with a right to renew for a further term of 25 years; see Clause 4(6) of the statutorily-ratified Agreement. The long term nature of the rights granted is emphasized by Clause 8 of ML1070; the Lease cannot be cancelled; it may be forfeited only in the limited circumstances set out in s 171 of the *Mining Act*. No other mining tenements may be granted over the Lease area; see s 161 of the *Mining Act*.

[64] Mr Collins supported Mr Maurice's submission that the totality of the Lessee's legal rights in the land amounted to its having a profit á prendre in the land; he cited in support *In re Caveat of Gamboola Cabonne Phosphates Ltd* (1919) 19 SR (NSW) 227 at 229-230, where an exclusive right to mine, with other important rights of user, was held to confer an estate or interest

in the land; *Ex p. Henry; re Commissioner of Stamp Duties (NSW)* [1963] NSWR 1079 at 1084-5, affirmed at (1963) 114 CLR 322 at 333, 337-8; *Mills v Stokman* (1966) 116 CLR 61 at 71-2, 75, 77 and 79; and *Unimin Pty Ltd v The Commonwealth* (1974) 22 FLR 299 at 306, 308.

[65] In terms of Lord Wilberforce's analysis at par [60], he submitted that the lessee had assignable rights of a nature which gave them a considerable 'degree of stability or permanence'. See generally s 173 of the *Mining Act*, providing for dealing with the Mineral Lease.

Conclusions on Question (4) in par[6]

[66] As to Question (4) it is sufficient to say that I consider that the submissions of Mr Maurice and Mr Collins are persuasive and must be upheld; they point overwhelmingly to the Lessee of ML1070 having a proprietary interest in the land the subject of that Mineral Lease, and hence as having an "estate or an interest in land" for the purpose of s 5 of the Act. Accordingly, I would answer Question (4) in par[6]: 'Yes'.

MILDREN J:

[67] I have had the advantage of reading a draft of the judgment of Kearney J with which I generally agree. However I wish to add a few short observations.

[68] First, I note that the majority judgment in *Longreef Pty Ltd v Leighton Contractors (South Australia) Pty Ltd* (1991) 160 LSJS 270 was delivered

by Olsson J with whom Mohr J agreed. I see no point of difference between the majority judgment and that of King CJ on the question of the construction to be given to the Act. With one minor reservation, I consider that the passage in the judgment of King CJ set out in para 32 of Kearney J's judgment most clearly sets out in a short and simple way what is the true construction to be given to ss 5 and 10 of the *Workmen's Liens Act*.

[69] The reservation I have is the view of King CJ that the writ to enforce a lien registered pursuant to s10(4) cannot be validly issued until the seven days has run. His Honour's view seems to be based on the consideration that until the lien is available under s10(1) by both registration and the giving of a valid notice under s10(2), the lien is not enforceable, and therefore any action brought before the seven days has run would be premature: see *Marriot Enterprises Pty Ltd v Mercantile Credits Limited; Maesbury Plumbers Pty Ltd (Intervenor)* (1991) 160 LSJS 288, at 293. The consequence of this line of reasoning is to create another trap for the unwary which serves no useful purpose. As that point does not arise for determination in this case and was not commented upon by Olsson J in either *Marriott's* case or *Longreef's* case, I would prefer to reserve that question for another day.

[70] There is one other matter I feel I should mention. In relation to s10(4), the same Court in *Marriott's* case (supra) held that the purpose of s10(4) was to permit provisional registration of the notice of lien prior to the issue of a formal notice of demand, so as to give notice of the claim and to protect the

position of the lienor during the seven day period envisaged by s10(4): (see Olsson J at 310). King CJ expressed it thus, (at 160):

> 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 s12. It is true, as Zelling J pointed out in the *Del Fabro* case at p 138, 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 s10.

Except in one respect I agree with these observations; it must be remembered that this Act may apply to both registered as well as unregistered land. This supports the conclusions reached above. However, I do not necessarily accept King CJ's observation that such a lien does not operate as a caveat under s12. That point is not touched on by Olsson J, and does not have to be resolved in this case. I would prefer to leave that question for another day also.

[71] As to the question of whether or not the mining lease is an estate or interest in land, the definition of "estate" in s29 of the *Interpretation Act* supports the conclusion that a *profit á prendre* is an estate in land within the meaning of the *Workmen's Liens Act*. That definition provides that "'estate' includes any estate or interest, charge, right, title, claim, demand, lien or encumbrance at law or in equity". I agree that a *profit á prendre* is also an interest in land: *R v Toohey; ex p. Meneling Station Pty Ltd* (1982) 158 CLR

327 at 341 – 344; 351 – 354; *Stow v Mineral Holdings (Aust) Pty Ltd* (1997) 51 ALJR 672 at 674. In my opinion the mining lease is clearly a *profit á prendre*, and an estate and interest in land, and that this is so irrespective of whether or not the lessee has exclusive occupation of the land for the reasons given by Kearney J.

[72] I would answer the questions in the manner proposed by Kearney J.

THOMAS J:

[73] I have read in draft the opinion prepared by Kearney J. I agree with his Honour's proposed answers to the questions referred to this Court, and with his reasons.

BAILEY J:

[74] I am in complete agreement with Kearney J's analysis of the issues and proposed answers to the questions under reference.

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