SUPREME COURT OF QUEENSLAND

CITATION:	*Nebmas P/L v Sub Divide P/L & Ors* [2009] QSC 92
PARTIES:	**NEBMAS PTY LIMITED ACN 109 907 646** (Applicant) **v** **SUB DIVIDE PTY LIMITED ACN 107 980 503** (First Respondent) **ADJUDICATE TODAY PTY LIMITED ACN 109 605 021** (Second Respondent) **CALLUM CAMPBELL** (Third Respondent)
FILE NO/S:	BS 3991/09
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 May 2009
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2009
JUDGE:	McMurdo J
ORDER:	**1. The originating application is dismissed.** **2. The interlocutory injunction restraining the first respondent from filing the adjudicator's certificate is discharged.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SETTLEMENT OF DISPUTES – where a condition in the Tender Document is inconsistent with a condition in the general contract – whether condition in the Tender Document prevails STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PERMISSIVE, DIRECTORY AND MANDATORY POWERS – where s 21(2) of the *Building and Construction Industry Payments Act 2004* (Qld) states

that an adjudication application "can not be made" unless the claimant gives the respondent a notice within a specified time – whether notice outside of time renders adjudication void

Building and Construction Industry Payments Act 2004 (Qld), s 21(2)

Building and Construction Industry Security of Payment Act 1999 (NSW), s 17(2)

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229

JAR Developments Pty Ltd v Castleplex Pty Ltd [2007] NSWSC 737

Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd [2007] NSWSC 554

Multipower v S & H Electrics [2006] NSWSC 75

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

COUNSEL: C Wilson for the applicant

L Bowden for the first respondent

SOLICITORS: McCullough Robertson for the applicant

No appearance for the first respondent

[1] The applicant is a contractor undertaking building work for the Ipswich City Council. The first respondent was its subcontractor. It made a claim against the applicant for payment under the *Building and Construction Industry Payments Act 2004* (Qld) ("the Act"). Subsequently it made an adjudication application which the second respondent referred to the third respondent as the adjudicator. The adjudicator upheld the first respondent's case. The adjudicated amount was $195,877.88.

[2] The applicant seeks a declaration that the decision is void. Its case is that the claimant (the first respondent) did not give the notice required by s 21(2)(a) of the Act within the period prescribed by that provision. Accordingly, it argues, the adjudication application was of no effect and nor is the adjudicator's decision.

[3] In essence there are two questions here. The first is whether it is demonstrated that the notice purportedly given under s 21(2)(a) was given out of time. The adjudicator held that it was given within time. The second is whether the decision is void if the notice was given out of time.

[4] Section 21 provides for the making of an adjudication application. Relevantly it is in these terms:

"**21 Adjudication application**

> (1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if –
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> (a) the respondent serves a payment schedule under division 1 but –
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> (i) the scheduled amount stated in the payment schedule is less than the claimed amount stated in the payment claim; or
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> (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or
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> (b) the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
>
> (2) An adjudication application to which subsection 1(b) applies can not be made unless –
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> (a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
>
> (b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant's notice."

[5] In this case the present applicant failed to serve a payment schedule on the claimant (the first respondent here) under division 1 and failed to pay the whole or any part of the claimed amount, so that it was a case to which s 21(1)(b) applied. That engaged s 21(2)(a), by which an adjudication application could not be made unless the claimant, within 20 business days immediately following the due date for payment, gave notice of its intention to apply for adjudication of the claim. So much was and is common ground. But the first question concerns what was the "due date for payment".

[6] At this point it is necessary to go to the parties' contract. On 11 April 2008 the first respondent delivered a tender. One condition of its tender was as follows:

> "2. SUBDIVIDE reserves the right to claim progressive payments during construction, and the terms of payment are payment within 14 days of making a progressive or final claim for payment. The time shall be calculated from the

> date of pay claim, which shall be made on the 14th and 28th of every month."

[7] The parties signed a form of agreement on 6 May 2008. On the page which identified the parties and contained the respective signatures, it was agreed that certain documents said to have been annexed, together with certain other documents such as specified drawings, should together comprise the contract. One of the documents said to have been annexed was the tender of 11 April 2008. The apparent intention of the parties was to incorporate its terms, including that which I have set out.

[8] Within the general conditions of contract, they agreed that the standard general conditions within AS2124-1992 should:

> "except in so far as they are qualified or amended the following amendments and by the Tender Documents, apply to and form part of the contract."

There was a further document signed by the parties described as "Annexure to the Australian Standard General Conditions of Contract" in which, alongside "Times for payment claims (cl 42.1)", the parties inserted "14th & 28 calendar month 14 days payment". It appears to be common ground that the general conditions according to the Australian standard provided, by cl 42.1, that within 14 days after receipt of a claim for payment, the superintendent should issue a payment certificate and that payment should be made within 28 days after receipt by the superintendent of a claim for payment or within 14 days of issue of the superintendent's payment certificate, whichever was the earlier.

[9] For the first respondent, it is argued that the effect of cl 42.1 from the standard conditions was that payment was to be made 14 days from a superintendent's certificate. It argues that this was consistent with the terms and conditions of its tender and with the insertion of the words "14 days payment".

[10] The applicant's argument is that the parties agreed to override cl 42.1 by agreeing that a progress payment was to be made within 14 days of the progress claim. That was certainly the unambiguous effect of the second of the conditions of tender which I have set out above. And by expressly incorporating the tender as a contract document, the parties, in my view, agreed to include that condition. In turn that is consistent with what was inserted against "times for payment claims". The reference there to "the 14th and 28 calendar month" was clearly intended to repeat what was in the condition of tender, as was the reference to "14 days payment". The condition of tender is inconsistent with clause 42.1 because that requires payment to be made no earlier than 14 days from a payment certificate as issued by the superintendent.

[11] The result is that the parties agreed that progress payments would be made within 14 days of the relevant progress claim.

[12] As appears to be common ground, the applicant terminated the contract on 4 July 2008. The first respondent made the relevant progress claim by a letter dated 21 December 2008 which was received by the applicant on or about 23 December 2008. It was described as a progress claim and made under the Act. The applicant did not pay the claim and nor did it deliver a payment schedule. By a

letter dated 10 February 2009, received by the applicant on 12 February 2009, the first respondent advised that it intended to apply for adjudication of the claim dated 21 December 2008. That notice was in all respects according to s 21(2) save for the issue of whether it was given within 20 business days immediately following the due date for payment.

[13] That issue was considered by the adjudicator. In his view, the case was within s 15(1)(b) of the Act, apparently because he thought that "the contract does not contain a provision about the matter [of when a progress payment becomes payable]". As I have held, in fact the contract did contain such a provision. Therefore s 15(1)(a) would appear to apply with the result that by s 15, the progress payment was payable on the date agreed within the contract.

[14] The adjudicator appears to have thought that s 15(1)(b) applied because the contract had been terminated by the time the progress claim was made. As is now conceded for the first respondent, the adjudicator's reasoning appears to be that which was rejected under the equivalent statute in New South Wales in *Brodyn Pty Ltd v Davenport*,[1] where it was held that the termination of the contract did not matter in the operation of (the equivalent of) s 15 of the Act so that the date for payment was according to the contract and not according to s 15(1)(b).

[15] On the basis that the payment claim was received on 23 December 2008, the due date for payment was 6 January 2009. The notice under s 21(2)(a) was required within 20 business days following 6 January 2009. Allowing for one public holiday, the result was that the notice had to be given on or before 4 February 2009. As I have said it was dated 10 February 2009 and received on 12 February 2009.

[16] According to the contract, progress claims were to be made only on the 14th and 28th days of a month. Arguably a claim made on 23 December 2008 could be regarded as not payable until 14 days from 28 December 2008. However, that does not matter in the present case because the addition of those five days would take the period for the s 21(2) notice only to 9 February 2009, still one day short of its date.

[17] Accordingly, it is now demonstrated that the notice was given out of time.

[18] In consequence, the applicant argues the adjudication application was one which could not be made, according to the language of s 21(2), and accordingly, neither the adjudication application nor the adjudication itself was of any legal effect. The argument has the apparent support of the judgment of Bergin J (as she then was) in *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd*.[2] In discussing the equivalent provision in New South Wales[3] it was held that an adjudication application was a nullity by reason of the complainant's failure to comply with the "mandatory condition" that this notice be given within time.

[19] Counsel for the first respondent argues that the provision of the notice is not a pre-condition to a valid adjudication. He cited *Brodyn Pty Ltd v Davenport*, *Multipower v S & H Electrics*[4] and *JAR Developments Pty Ltd v Castleplex Pty Ltd*.[5]

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1 (2004) 61 NSWLR 421.
2 [2007] NSWSC 554.
3 *Building and Construction Industry Security of Payment Act 1999* (NSW) s 17(2).
4 [2006] NSWSC 757.
5 [2007] NSWSC 737.

[20] In *Brodyn*, Hodgson JA listed five "basic and essential requirements" for a valid determination, which he compared with certain "more detailed requirements" of the legislation which were not essential.[6] However, this particular requirement, that which is within s 21(2) of the Queensland statute, was not referred to in either category. Hodgson JA noted that his list of the basic and essential requirements might not have been exhaustive.[7] Hodgson JA said:[8]

> "The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.
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> In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination."

[21] Neither *Multipower* nor *JAR Developments Pty Ltd* concerned the effect of a failure to give the notice required by the New South Wales equivalent of s 21(2). In each case the question was whether the making of the adjudication application out of time had the result that the adjudication was void. In the latter case, Rein AJ distinguished *Kell & Rigby* on the basis that the failure to meet a time limit imposed by the Act was established "at the adjudication". In the present case, as discussed, the adjudicator decided that the notice was within time.

[22] In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*,[9] Basten JA discussed the effect of non-compliance with the equivalent of s 17 of the Act, which refers to payment claims. He held that it was not possible to construe the equivalent of s 17(2) as doing otherwise than imposing mandatory requirements with respect to the making of payment claims but that it did not follow that the court should set aside a determination in circumstances where, in its view, the claim does not satisfy those requirements. Basten JA said:[10]

> "44. Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather

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6 (2004) 61 NSWLR 421, 441.
7 (2004) 61 NSWLR 421, 442.
8 (2004) 61 NSWLR 421, 441.
9 [2005] NSWCA 229.
10 [2005] NSWCA 229 at [44]-[47].

than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 72 (Spigelman CJ).

45 In the present case, three factors militate in favour of treating elements identified in s 13(2) as properly dependent upon the satisfaction or opinion of the adjudicator. First, what is or may be a sufficient identification of matters for the purposes of a claim falls within the special experience which a qualified adjudicator is intended to bring to the task and is one which may well require evaluative judgment. Secondly, the requirement relates to a procedural step in the claim process, rather than some external criterion. Thirdly, the overall purpose of the Act, as reflected in its objects and procedures, is to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law.

46 In my view the omission of reference to s 13(2) in the list of mandatory requirements identified in *Brodyn*, should be understood as giving effect to these principles.

47 It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133], was to the following effect:

> "If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide."

> Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that is must be undertaken in good faith, but that is not a sufficient condition of validity."

[23] Much of that reasoning applies to the present question. This requirement of s 21(2) "relates to a procedural step in the claim process, rather than some external criterion". And the overall purpose of this legislation would appear to be better served by permitting an adjudicator to decide what will usually be the factual question of whether the required step has been taken. In some cases (although not in the present one) that factual issue might involve the use of the adjudicator's specialist knowledge.

[24] As that judgment makes clear, the conclusion in *Kell & Rigby*, that the requirement for a notice under s 21(2) is mandatory, does not answer the present question, which is whether the adjudication is void where the adjudicator has decided, albeit wrongly, that there had been compliance with that provision. The judgment of Hodgson JA in *Brodyn* indicates that this requirement for a notice under s 21(2) is not an essential requirement, in the sense that it was an essential precondition of the existence of an adjudicator's determination. With regard to the purpose of this legislation, there is no reason why this requirement within s 21(2) should be an essential requirement although, for example, the time limit within s 21(3) should not be essential: cf *Project Blue Sky Inc v Australian Broadcasting Authority*.[11] Of course s 21(2) provides that an adjudication application "can not be made" unless there is such a notice and these precise words are not replicated in s 21(3). Nevertheless, s 21(3) provides that an adjudication application "must be made" within the times there set out. In each case the words are "emphatic",[12] and in my view there is no basis for distinguishing between the two provisions on the basis of this difference in words.

[25] Accordingly, the fact, as I have found, that there was non-compliance with s 21(2) does not have the result for which the present applicant contends. The declaratory relief which it seeks must be refused. It also follows that the interlocutory injunction restraining the first respondent from filing the adjudicator's certificate should be discharged.

[26] I will hear the parties as to costs.

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11 (1998) 194 CLR 355, 390-1.

12 *Z v New South Wales Crimes Commission* (2007) 233 ALR 17, 20 cited in *Kell & Rigby* at [15].