SUPREME COURT OF QUEENSLAND

CITATION:	*De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd; Traffic Technologies Traffic Hire Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279
PARTIES:	**DE NEEFE SIGNS PTY LTD ACN 115 924 939** (applicant) v **BUILD1 (QLD) PTY LTD ACN 110 000 130** (respondent) **TRAFFIC TECHNOLOGIES TRAFFIC HIRE PTY LTD ACN 116 510 000** (applicant) v **BUILD1 (QLD) PTY LTD ACN 110 000 130** (respondent)
FILE NO/S:	BS 5714 of 2010 BS 5716 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2010
JUDGE:	Fryberg J
ORDERS:	**In each matter:** **1. Application dismissed.** **2. Discharge the interlocutory injunction ordered by this Court on 3 June 2010.** **3. The applicant pay the respondent's costs to be assessed.**
CATCHWORDS:	Contracts – Building, engineering and related contracts – Remuneration – Statutory regulation of entitlement to and recovery of progress payments – Adjudication of payment claims – Validity of adjudication application and decision – Validity of payment claim

Contracts – Building, engineering and related contracts – Remuneration – Statutory regulation of entitlement to and recovery of progress payments – Payment claims – What constitutes valid payment claim – *Building and Construction Industry Payments Act 2004* (Qld), s 17

Procedure – Courts and judges generally – Courts – Attempt to oust jurisdiction of court – By statute – Implied ouster – Exclusivity of jurisdiction of statutory adjudicator

Statutes – Acts of Parliament – Interpretation – Particular words and phrases – Generally – "structure" – *Queensland Building Services Authority Act 1991* (Qld) and *Queensland Building Services Authority Regulation 2003* (Qld), s 5

Building and Construction Industry Payments Act 2004 (Qld), s 12, s 15, s 16, s 17, s 21, s 25, s 26, sch 2
Judicial Review Act 1991 (Qld), pt 3, pt 5, s 18(2)(b), s 41(1), sch 1 pt 2
Queensland Building Services Authority Act 1991 (Qld), s 67AAA, s 67U, s 67W
Queensland Building Services Authority Regulation 2003 (Qld), s 5

Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] 2 Qd R 495; [2008] QCA 213, cited
Bloomer Constructions (Qld) Pty Ltd v O'Sullivan [2009] QSC 220, cited
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, considered
Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229, cited
Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228, cited
Downer Construction (Australia) Pty Ltd v Energy Australia (2007) 69 NSWLR 72; [2007] NSWCA 49, cited
F K Gardner & Sons Pty Ltd v Dimin Pty Ltd [2007] 1 Qd R 10; [2006] QSC 243, cited
Gisley Investments Pty Ltd v Williams [2010] QSC 178, cited
Grocon Constructors v Planit Cocciardi Joint Venture (No. 2) [2009] VSC 426, compared
Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting [2010] QSC 156, compared
Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd [2009] VSC 156, cited
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83, cited
Jemzone Pty Ltd v Trytan Pty Ltd (2002) 42 ACSR 42;

[2002] NSWSC 395, cited
Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd [2007] NSWSC 554, cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1, cited
Liversidge v Anderson [1942] AC 206; [1941] 3 All ER 338, cited
Nebmas Pty Ltd v Sub Divide Pty Ltd [2009] QSC 92, cited
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liq) (2005) 64 NSWLR 462; [2005] NSWCA 409, cited
Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd [2009] QSC 376, cited
Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd [2009] NSWCA 157, cited
Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266, cited
Walton Construction (Qld) Pty Ltd v Salce [2008] QSC 235, cited

COUNSEL: In each matter, P Dunning SC with D D Keane for the applicant
In each matter, D Savage SC with I Erskine for the respondent

SOLICITORS: In each matter, McCullough Robertson acting as Town Agent for Middletons, for the applicant
In each matter, Carl Blumen Solicitors for the respondent

[1] **FRYBERG J:** Each of the applicants in the two originating applications before me is a subsidiary of the same holding company, and is a manufacturer of signage products. Each is a subcontractor engaged in relation to the construction of roadworks. Each engaged the respondent, Build1, a builder, as a subcontractor, in one case pursuant to two separate subcontracts and in the other pursuant to five separate subcontracts. The terms of the subcontracts were not materially different. Build1 made claims against each applicant for its work. The issues which arise on those claims are identical in each application. The parties agreed that I hear the applications together and that the outcome on one contract would determine the outcome on the others.

Facts giving rise to the applications

[2] I shall take the facts from the first subcontract included in application 5714/10, the application of De Neefe Signs Pty Ltd. This, like the other De Neefe subcontract and two of the Traffic Technologies Traffic Hire Pty Ltd subcontracts, related to the North-South Bypass Tunnel.

[3] The various subcontracts required Build1 to install permanent directional signs including gantries in various zones of the project and elsewhere.[1] Payment terms set out in cl 4 of the contract for zone three, made on 5 June 2009, are typical:

> "**4. Payment Terms**
>
> 4.1 Payment will be made to the Sub Contractor within 45 days of the end of the month in which the Tax Invoice is submitted and approved.
>
> 4.2 Tax invoices are to be submitted by 22nd of each month. Tax Invoices received after this date will be processed in the following month."

[4] On 22 March 2010 Build1 delivered a document entitled "Payment Claim" to De Neefe. It covered the period up to 19 March 2010. At the bottom it was endorsed, "This Payment Claim is made under the Building and Construction Industry Payments Act 2004 Qld". De Neefe did not issue a payment schedule in response. On 12 April Build1 delivered a document entitled "Notice under section 21(2) of the Building and Construction Industry Payments Act 2004 (Queensland)". That notice asserted that De Neefe had failed to provide a payment schedule within the time allowed and had therefore become liable to pay the whole amount of the claim on the due date. It asserted that the whole amount had not been paid. It advised that Build1 had elected to apply for adjudication of the claim; that De Neefe had five business days in which to serve a payment schedule or pay the claim in full; and that if it failed to pay the whole amount Build1 would proceed to adjudication.

[5] De Neefe responded to that document in a letter from its solicitors to the solicitor for Build1. It asserted that the document was not a valid notice under s 21(2) of the *Building and Construction Industry Payments Act 2004* (Qld) ("the Act") because it was premature: the Act required a notice to be given within 20 business days immediately following the due date for payment, and under cl 4.1 of the contract, that date was after 12 April 2010. In the alternative it asserted that the notice was invalid because it referred to the amended payment claim, not that dated 22 March.

[6] Build1 applied for adjudication under the Act on 30 April 2010. An adjudicator, Mr Pettersson, was duly nominated and on 12 May De Neefe gave him a document purporting to be an adjudication response under the Act. Both parties subsequently delivered unsolicited submissions to the adjudicator. He decided the application on 26 May. He held (among other things) that the payment claim was issued in accordance with the requirements of the contract and that Build1's notice under s 21(2) was valid; and he allowed the full sum claimed.

De Neefe's submissions

[7] De Neefe now seeks declarations that the payment claim was not valid and that the adjudication based on it was void (ie a nullity) and an injunction preventing Build1 from relying on the adjudication for any purpose. It submitted that there were two foundations for this relief: the claim was delivered before the due date for payment;

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[1] The North-South Bypass Tunnel (four subcontracts), the Mudgeeraba Interchange Exit 79, the Hale Street Link and the Bribie Island Interchange.

and the alleged s 21(2) notice of 12 April was not given within the period specified for it under that section.[2]

[8] The submission was somewhat elliptical. Expressed sequentially, the argument as I understand it was this. The power conferred on an adjudicator under ss 25 and 26 of the Act is to decide an adjudication application. If an adjudication application is not a valid adjudication application, the statutory power to decide under those sections is not engaged and the decision is a nullity. The adjudication application in the present case was not valid for two reasons.

[9] The first reason was this. Under s 21 an adjudication application must seek adjudication of a payment claim within the meaning of the Act. The adjudication application in this case did not do that because an essential precondition to the existence of a valid application was the existence of a valid payment claim; or, putting it another way, the application was not an adjudication application within the meaning of the Act because there was no valid payment claim giving rise to it. The purported payment claim here was not valid because an essential precondition to the existence of a valid payment claim was unsatisfied; or, putting it another way, the claim was not one within the meaning of the Act. Under sch 2 of the Act, "payment claim" means a claim referred to in s 17. The purported claim in the present case was not one referred to in s 17 for two reasons:

a. Section 17(2)(b) requires a claim to state the amount of the progress payment that the claimant claims to be "payable" (which it calls "the claimed amount"). "Payable" in this context means due and payable. Section 15 prescribes the due date for payment and in this case the due date had not arrived; so nothing could lawfully be claimed to be payable under s 17(2)(b).

b. Section 17(4) requires a claim to be served within the later of two stated periods, and this was not done.

Alternatively expressed, by reason of those matters an essential precondition for the existence of a valid claim was unfulfilled.

[10] The second reason was this. The only right to make an adjudication application is in accordance with s 21 of the Act. It is conceded in these proceedings that s 21(1)(a) does not apply because no payment schedule was ever served. The case falls under s 21(1)(b), which means that an adjudication application is prohibited under s 21(2) unless the terms of that subsection are complied with. Paragraph (a) of that subsection obliges the claimant to give the statutory notice within 20 business days immediately following the due date for payment. The due date for payment is determined by s 15. Section 15(1)(a) applied to the case because the contract contained a provision, cl 4.1, that was not void under s 16 nor under the *Queensland Building Services Authority Act 1991* (Qld) ("*QBSAA*"), ss 67U or 67W; and it made the amount payable on the day on which it became payable under that clause. That day was 45 days after 31 March 2010, so the adjudication application was made before the statutory period of 20 business days commenced to run. Consequently it was prohibited by s 21(2). An adjudication decision founded upon it was therefore void.

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[2] In the interests of readability I have set out the relevant sections in an annexure to these reasons for judgment instead of in the body of the text.

[11] Build1 raised a preliminary argument that this Court had no jurisdiction to determine the validity of a payment claim, arguing that the scheme of the legislation is to commit that issue to the determination of the adjudicator. I ruled against that submission on the basis that the jurisdiction of this Court to supervise statutory offices and tribunals has not been ousted by the Act. It is most unlikely that the legislature would have intended that adjudicators should be able conclusively to define the scope of their own jurisdiction. Indeed any attempt by the legislature to oust the supervisory jurisdiction of this Court might encounter constitutional difficulties.[3]

[12] Build1 also submitted that the Court lacked jurisdiction because decisions by adjudicators had been excluded from the scope of the *Judicial Review Act 1991* (Qld).[4] It relied on a number of New South Wales cases in support of the submission that, even if the exclusion was limited to pt 3 of that Act, relief in the nature of a prerogative writ under pt 5 was not available. De Neefe avoided that argument by disclaiming reliance on any part of the *Judicial Review Act.* Its application is simply for declarations and an injunction. It is entitled to proceed in this manner:

> "52 However, it is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari."[5]

I ruled that the Court had jurisdiction and heard the application.

[13] It is unnecessary to consider in any detail the competing dicta expressed in the Court of Appeal by Chesterman J[6] and Fraser JA[7] respectively on the question of whether adjudications are reviewable under pt 5 of the *Judicial Review Act*.[8] I note however that if the latter view is correct, it follows that s 41(1) of the *Judicial*

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3 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; and cf *Grocon Constructors v Planit Cocciardi Joint Venture (No. 2)* [2009] VSC 426; *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting* [2010] QSC 156.

4 Section 18(2)(b) and sch 1 pt 2.

5 *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at p 441; see also *Walton Construction (Qld) Pty Ltd v Salce* [2008] QSC 235. Neither party challenged the correctness of *Brodyn* in this case, although I acknowledge that it has been the subject of a good deal of discussion in other states: *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liq)* (2005) 64 NSWLR 462; *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72 at pp 97-8; *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157; *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156.

6 *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83.

7 *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495.

8 See also *Bloomer Constructions (Qld) Pty Ltd v O'Sullivan* [2009] QSC 220 and the cases there cited.

Review Act has no application to adjudication decisions. Consequently there would be no obstacle to an application for a writ of mandamus, prohibition or certiorari. Perhaps a trial judge confronted with an application for an order nisi for certiorari should follow the old practice and give directions for it to be returnable before the court *en banc*, ie the Court of Appeal.

[14] De Neefe submitted that the statutory regime demanded strict compliance with the requirements of the Act.[9] I proceed on the assumption that this submission is correct.

Validity of the payment claim: the claimed amount

[15] A number of questions arise in relation to this aspect of De Neefe's submissions. It is unnecessary to answer all of them.

The meaning of "payable"

[16] I am not persuaded that "payable" in s 17 means "due and payable". Such a construction would make little sense. It would mean that a claim could not be lodged, at least in ordinary cases, until after the date for payment of the amount in the claim had passed. I note that Parliament used "payable" in place of "due", the term used in the New South Wales analogue. On the alternative construction it would be immaterial that the due date for payment had not arrived when the payment claim was made; the claim would set out the amount payable. However I note that this construction would not apply to "payable" in s 15.[10] It is unnecessary to reach a final decision on this point.

"Claims to be payable"

[17] Build1 submitted that the requirement under s 17(2)(b) for a valid payment claim was that it state the amount which Build1 *claimed* to be payable; it was not necessary to show the correctness of the claim as a jurisdictional fact/precondition to validity/essential element of a claim. It argued that it was for the adjudicator to determine the correctness of the amount of the claim if the amount remained unpaid.[11]

[18] In my judgment that construction of s 17(2)(b) is correct. It is not a requirement of s 17 that the payment claim correctly state the amount payable. It is sufficient to state the amount which the claimant *claims* to be payable. That is consistent with the obligation of an adjudicator under the Act: he is to decide the amount to be paid to the claimant, considering the provisions of the *QBSAA*.[12] I find that the payment claim complied with the requirements of s 17(2).

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9 *F K Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10; *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266; *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395.

10 And contrast the language of s 12: "From each reference date … a person is *entitled* to a progress payment …" (emphasis added).

11 Section 26(1)(a).

12 Section 26(2)(a).

Other issue

[19] Build1 also submitted that even if "payable" meant "due and payable", the amount in the payment claim *was* due and payable on the date of the claim. It argued that the payment became due 10 business days after the payment claim was made under s 15(1)(b) of the Act. De Neefe submitted that this argument was wrong, relying on cl 4.1 of the contract. It submitted that this was a provision about when a progress payment becomes payable and that the case fell under s 15(1)(a) of the Act. Build1 submitted that cl 4.1 was void under s 67W of the *QBSAA*, with the consequence that the case fell under s 15(1)(b). On the facts, 10 business days had elapsed, so payment was due.

[20] Having regard to my earlier finding, it is unnecessary to determine the validity of cl 4.1 at this point.[13]

Validity of the payment claim: service of the claim

[21] De Neefe submitted (perhaps somewhat faintly) that the payment claim was not valid because it had not been served within the period specified in s 17(4)(a) of the Act. That argument raises (among other things) the question of whether cl 4.2 provides for the working out of a period for service of a payment claim. At first glance the terms of the clause are not apt to achieve that result. The requirements for a valid tax invoice are set out in ss 29-70 and 48-57 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). They are quite different from those for a payment claim under the Act. A subcontractor might choose to satisfy the requirements of both Acts in the one document, but is under no obligation to do so. It also raises the question why the time for service should be calculated under para (a) of s 17(4) rather than under para (b). The subsection provides that the claim may be served only within the later of the two periods specified. In the circumstances of the present case, the period under para (b) would finish after that under para (a). It would be necessary to consider whether "later" is to be measured by the end of the period rather than by the commencement of it and if the latter, to examine the facts to ascertain when each period commenced. These issues were not addressed in argument.

[22] It is unnecessary to decide those questions because in my judgment, even if the claim was not served in accordance with s 17(4), it did not cease to be one "referred to in section 17" merely because of that non-compliance. On the contrary, that subsection presupposes the existence of a payment claim and provides for its service. That is not to say that a claimant may ignore the subsection. The consequences of doing so are not presently material. What matters is that compliance is not a condition precedent to the existence of, nor an essential element of a valid payment claim.[14]

[23] It follows that the payment claim was valid and the first declaration sought should be refused. Also, the adjudication decision cannot be impugned on the basis of invalidity of the payment claim.[15]

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13 It is considered in a different context below, paras [27] ff.

14 Compare the decision of Douglas J in relation to the validity of a payment schedule not served in accordance with the Act in *Gisley Investments Pty Ltd v Williams* [2010] QSC 178.

15 *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2009] QSC 376.

Validity of the adjudication claim

[24] De Neefe's submission is summarised above.[16]

"*The day on which the payment becomes payable"*

[25] The first difficulty with that submission is that cl 4.1 does not make provision for a *day* on which payment is to be made, as s 15(1)(a) envisages the contractual provision to do. It simply provides that payment will be made "within" 45 days of the end of the month in which the tax invoice is submitted and approved. Under cl 4.2 tax invoices are to be submitted by the 22nd of each month but there is no express provision covering who is to approve them or what period is allowed for that process. It may be that one would imply that a decision must be made by De Neefe before the end of the month of submission. Even so, payment is to be made within 45 days from the end of the month, which must mean that it may be made on any of those 45 days.

[26] Whether this is sufficient to take cl 4.1 outside the description "a provision about the matter" was not the subject of submissions by counsel, so I shall not pursue the question. On the strict construction approach urged by De Neefe, it probably would suffice for that purpose. However I shall assume, in accordance with De Neefe's submission on the present point, that the earliest date for payment under the clause was 14 May 2010.

Time for giving the s 21(2) notice: validity of cl 4.1

[27] As noted above,[17] Build1 submitted that cl 4.1 was void under s 67W of the *QBSAA*. If that submission is correct, the case falls under s 15(1)(b) of the Act, with the consequence that the progress payment was (due and) payable from 5 April. The s 21(2) notice was given on 12 April, within the statutory period.

[28] Section 67W provides:

> "**67W Void payment provision in commercial building contract**
>
> A provision in a commercial building contract is void to the extent it provides for payment of a progress payment by a contracting party to a contracted party later than 15 business days after submission of a payment claim."

The contract between the parties was a "commercial building contract" as defined in *QBSAA* if (and only if), among other requirements, it was a building contract as therein defined. Relevantly, it was such a building contract if it was a contract for carrying out building work as defined. By a combination of definitions, building work means (among other things) the construction of a fixed structure (which the work the subject of the subcontract was), but the term does not include work of a kind excluded by regulation from the definition. De Neefe submitted that the work was of such a kind.

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16 Paragraph [10].

17 Paragraph [19].

[29] Regulation 5 of the *Queensland Building Services Authority Regulation 2003* provides (as far as is relevant[18]):

> "**5 Work that is not building work**
>
> (1) For the Act, schedule 2, definition *building work*, the following work is not building work—
>
> …
>
> (l) construction, maintenance or repair of—
>
> (i) a busway or road; or
>
> (ii) a tunnel for a busway or road;
>
> …
>
> (u) construction, maintenance or repair of a sign that does not have a supporting structure;
>
> *Example—*
>
> a sign that consists of only a flat sheet of acrylic resin, fabric, metal or wood
>
> (v) construction, maintenance or repair of a supporting structure for a sign if—
>
> (i) the value of building work for the supporting structure is less than $5000; or
>
> (ii) the top of the sign or supporting structure, whichever is higher, is less than 3m above the surface immediately below the sign or structure, including, for example, the ground, or a road or path on which an individual may travel, whether in a vehicle, while walking, or in any other way;
>
> …
>
> (3) A *supporting structure* for a sign is a structure the main purpose of which is to display the sign.
>
> (4) Without limiting subsection (3), a *supporting structure* for a sign includes any structure that is attached to or suspended from a building to allow the sign to be displayed, including, for example, a sign case or other box-type structure, but does not include the building.
>
> (5) In this section—
>
> …
>
> *road*—
>
> (a) means an area of land, whether surveyed or unsurveyed—
>
> (i) dedicated, notified or declared to be a road for public use; or
>
> (ii) taken under an Act, for the purpose of a road for public use; and
>
> (b) includes—
>
> (i) a street, esplanade, highway, pathway, thoroughfare, toll road, track or stock route; and
>
> (ii) a causeway or culvert in, on, or under a road that is associated with the road; and

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[18] De Neefe expressly abandoned reliance on s 5(1)(v), but the paragraph is relevant to the construction of para (u).

> (iii) a structure in, on, or under a road that is associated with the road."

[30] I shall assume that the work under all of the subcontracts related to signs that did have supporting structures, with the consequence that none of it was excluded from the definition of building work by s 5(1)(u). Mr Savage SC so stated in his supplementary written submissions, with references to the evidence,[19] and this was not challenged by Mr Dunning SC in reply.

[31] De Neefe submitted that the work was not building work because of s 5(1)(l), on the ground that it satisfied the exclusionary requirements of a tunnel for a road. In my judgment that submission fails. A sign in a tunnel is not itself a tunnel. The regulation clearly uses words with some precision. It deals separately with sirens and it has considered separately the position of structures associated with the road. There is no reason to assume that "tunnel" is intended to include structures associated with the tunnel.

[32] De Neefe further submitted, relying on s 5(5)(b)(iii)

> "that the signs were structures on or associated with the road pursuant to the Regulations. In particular the signs are traffic signs for the road and the tunnel."

[33] When a person refers to a sign in ordinary usage, "sign" is understood to include not only the face which imparts information but also the whole of the structure of the sign, including the supporting structure. It seems to be otherwise in the regulation. Paragraphs (u) and (v) draw a distinction between a sign and the supporting structure for a sign. At least in theory this could produce peculiar results: low or cheap supporting structures could be excluded from the definition while the signs on them were not. It is reasonable to suppose that the amounts at stake would mean that this would not be a problem in practice.

[34] De Neefe's submission just quoted does not use "signs" in the statutory sense. Consequently it fails to address the question relevant to the applicability of the regulation. The signs (in the statutory sense) had supporting structures and are not excluded from the definition by para (u). The correct question is whether the supporting structures for the signs were structures within the meaning of "structure" in s 5(5)(b)(iii).

[35] Regulation 5 deals with supporting structures in para (1)(v). That paragraph envisages a situation where a supporting structure may be immediately above a road. "Road" includes the whole of the declared road area. In other words, the paragraph envisages a situation where supporting structures are on roads and excludes them from the definition of building work only in certain circumstances. For that reason it is unlikely that the much wider word "structure" in s 5(5)(b)(iii) was intended to include a supporting structure for a sign. There remains work for that word to do notwithstanding the exclusion from its ambit of supporting structures for signs. I conclude that the work done by Build1 was not excluded from the definition of "building work" in *QBSAA*.

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[19] Footnote 43 and sch A.

[36] It is therefore not necessary to decide whether a contract to carry out work part of which is excluded and part of which (the signs themselves) is not excluded from the definition is a building contract within the meaning of s 67AAA of *QBSAA*.

[37] It follows that to the extent that it provides for payment of a payment claim later than 15 days after its submission, cl 4.1 of the subcontract is void.

[38] The case therefore falls under para (b) and not under para (a) of s 15(1). The progress payment was payable 10 business days after the payment claim was made, ie on 5 April 2010. The notice under s 21(2) given on 12 April was within the period of 20 business days immediately following the due date for payment prescribed by s 21(2)(a). The adjudication application was not prohibited by that provision.

Non-compliance with s 21(2)

[39] Build1 submitted that in any event, the adjudication was not invalidated because the notice under s 21(2) was given out of time. It supported that submission with the decision in *Nebmas Pty Lty v Sub Divide Pty Ltd*.[20]

[40] I have already held that failure to serve a payment claim within the period prescribed by s 17(4) does not mean that the claim is not one answering the description "payment claim" in s 17(1). However s 17 contains no provision equivalent to s 21(2).[21] The latter does not simply mandate a time for service of an adjudication application; it provides that no such application can legally be made in specified circumstances. The task of an adjudicator is to decide an adjudication application.[22] How can it be that a decision by an adjudicator based on an application which cannot legally be *made* could have any legal validity?

[41] In *Nebmas* McMurdo J reached his decision after referring to the decisions of the New South Wales Court of Appeal in *Brodyn* and *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*.[23] His Honour cited the well-known passage from the judgment of Hodgson JA in the former case;[24] but he recognised that the requirement for compliance with s 21(2) was not referred to in that passage as being in either the category of "basic and essential requirements" for a valid determination or in the category of "more detailed requirements" compliance with which was not essential to a valid adjudication decision. I respectfully agree. For that reason, *Brodyn* does not determine the point now under consideration.

[42] His Honour based his decision on a passage in the reasons for judgment of Basten JA in the latter case. I shall not repeat it, nor shall I undertake an analysis, necessarily obiter, of it.[25] The Act and its interstate equivalents have generated

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20 [2009] QSC 92.

21 Section 21(3)(c) is the analogue of s 17(4) in relation to an adjudication application. I respectfully agree with the conclusion reached by Douglas J in *Gisley Investments Pty Ltd v Williams* [2010] QSC 178 that non-compliance with that provision does not invalidate an adjudication decision based on an improperly served adjudication application.

22 Sections 25(3), (4) and 26(2).

23 [2005] NSWCA 229.

24 (2004) 61 NSWLR 421 at p 441.

25 Note that the wording of s 13(2) of the New South Wales Act differs materially from that of s 17(2).

much discussion in judgments. Many of the statements made need to be considered in the light of the precise facts of the case. For example, statements and decisions about the reviewability of the identification of construction work in a payment claim[26] should not be generalised to apply to all elements of s 17(2), any more than should statements and decisions about any one element of s 21(3) be generalised to apply to all elements of that subsection. In construing this Act great care is needed when applying dicta from previous decisions in different circumstances.

[43] The passage from *Climatech* cited in *Nebmas* has subsequently been held to be authority for this proposition: "Whether a payment claim identifies the construction work or related goods and services to which the payment relates, as required by s 13(2) [s 17(2) in Queensland] of the Act, is generally a matter for the adjudicator to determine".[27] So interpreted, it provides no support for a conclusion that a decision by an adjudicator based on an application which cannot legally be made under s 21(2) cannot be challenged in this Court. It should be noted that Basten JA's dicta were directed toward a different section, one which set out what some judges have viewed as procedural or non-essential requirements for a payment claim, not toward a section which declared the happening of a nominated event impossible (or at least prohibited) unless certain conditions were fulfilled. Wording in this form is much more difficult to assimilate into his Honour's reasoning.

[44] I wrote above that the task of an adjudicator is to decide an adjudication application.[28] Absent an application a decision by an adjudicator has no legal force. The statutory dictionary provides for "adjudication application", "see section 21(1)". Prima facie there is an adjudication application if a claimant has applied for adjudication of the payment claim in the circumstances set out in s 21(1). I need not decide whether any of the elements of s 21(3) is essential to the existence of such an application. The question is, in cases to which it applies, does non-fulfilment of the conditions specified in s 21(2) have the consequence that no application has been made.

[45] That question must be answered by construing the opening words of the subsection. I acknowledge that they must be construed in the light of the two conditions, particularly the nature and content of those conditions. I acknowledge the force of the view that those conditions seem on their face purely procedural matters aimed at ensuring the provision of natural justice and perhaps reducing the chance that the case will actually go to adjudication. There is however no reason why Parliament should not if it so chooses make fulfilment of conditions of that nature essential to the making of an application. In my judgment, the words "an adjudication application … cannot be made" produce that result. They should be given their natural meaning. If by statute an application cannot be made, then anything purporting to be one cannot be an application. The existence of an application is a basic and essential requirement of an adjudicator's determination.[29]

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26 Difficulties arising from "identify" in s 17 may be better solved by an appropriate interpretation of that word.

27 *Perform* at para [64] (citations omitted).

28 Para [40].

29 *Brodyn* at p 441.

[46] That is the same conclusion as was reached in *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd*.[30]

[47] The effect of the contrary conclusion is the re-wording of s 21(2) to read "unless the adjudicator thinks" in place of "unless" (and it consequentially requires a change of tense in the two conditions). While the subject matter of *BCIPA* can hardly be compared with the liberty of the subject, there is powerful (albeit dissenting) authority against adopting that technique of statutory interpretation.[31]

[48] It follows that if I were wrong in my conclusion that the notice was given within the time described in s 21(2)(a), the purported adjudication application made on 30 April 2010 would be a nullity, as would the decision of that application. But I must determine this case on the basis of that conclusion.

Orders

[49] The applicants are not entitled to either of the declarations sought by them and there is no basis for granting an injunction. In each matter the orders should be:

1. Application dismissed.
2. Discharge the interlocutory injunction ordered by this Court on 3 June 2010.

I shall hear the parties on costs.

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30 [2007] NSWSC 554.

31 *Liversidge v Anderson* [1942] AC 206 at p 244 per Lord Atkin.

Annexure A

Building and Construction Industry Payments Act 2004 (Qld)

12 Rights to progress payments
From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

15 Due date for payment
(1) A progress payment under a construction contract becomes payable—
(a) if the contract contains a provision about the matter that is not void under section 16 or under the *Queensland Building Services Authority Act 1991*, section 67U or 67W—on the day on which the payment becomes payable under the provision; or
(b) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the *Queensland Building Services Authority Act 1991*, section 67U or 67W—10 business days after a payment claim for the progress payment is made under part 3.
(2) Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—
(a) the rate prescribed under the *Supreme Court Act 1995*, section 48(1) for debts under a judgement or order;
(b) the rate specified under the contract.
(3) For a construction contract to which *Queensland Building Services Authority Act 1991*, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section.

16 Effect of pay when paid provisions
(1) A pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the construction contract.
(2) In this section—
an amount owing, in relation to a construction contract, means an amount owing for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the construction contract.
pay when paid provision, of a construction contract, means a provision of the contract—
(a) that makes the liability of one party (the ***first party***) to pay an amount owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or any part of that amount; or
(b) that makes the due date for payment of an amount owing by the first party to the second party dependent on the date on which payment of the whole or any part of that amount is made to the first party by the third party; or
(c) that otherwise makes the liability to pay an amount owing, or the due date for payment of an amount owing, contingent or dependent on the operation of another contract.

17 Payment claims
(1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the

construction contract concerned, is or may be liable to make the payment (the ***respondent***).

(2) A payment claim—

(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must state the amount of the progress payment that the claimant claims to be payable (the ***claimed amount***); and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount—

(a) that the respondent is liable to pay the claimant under section 33(3); or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within the later of—

(a) the period worked out under the construction contract; or

(b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

21 Adjudication application

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if—

(a) the respondent serves a payment schedule under division 1 but—

(i) the scheduled amount stated in the payment schedule is less than the claimed amount stated in the payment claim; or

(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

(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—

(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.

(3) An adjudication application—

(a) must be in writing; and

(b) must be made to an authorised nominating authority chosen by the claimant; and

(c) must be made within the following times—

(i) for an application under subsection (1)(a)(i)—within 10 business days after the claimant receives the payment schedule;

(ii) for an application under subsection (1)(a)(ii)—within 20 business days after the due date for payment;

(iii) for an application under subsection (1)(b)—within 10 business days after the end of the 5 day period referred to in subsection (2)(b); and

(d) must identify the payment claim and the payment schedule, if any, to which it relates; and

(e) must be accompanied by the application fee, if any, decided by the authorised nominating authority; and

(f) may contain the submissions relevant to the application the claimant chooses to include.

(4) The amount of an application fee must not exceed the amount, if any, prescribed under a regulation.

(5) A copy of an adjudication application must be served on the respondent.

(6) The authorised nominating authority to which an adjudication application is made must refer the application, as soon as practicable, to a person eligible to be an adjudicator under section 22.

22 When person may be an adjudicator

(1) A person may be an adjudicator in relation to a construction contract if registered as an adjudicator under this Act.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract—

(a) if the person is a party to the contract; or

(b) in circumstances prescribed under a regulation for this section.

(3) A regulation may be made under subsection (2)(b) only to prescribe circumstances in which the appointment of an adjudicator might create a conflict of interest

25 Adjudication procedures

(1) An adjudicator must not decide an adjudication application until after the end of the period within which the respondent may give an adjudication response to the adjudicator.

(2) An adjudicator must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator.

(3) Subject to subsections (1) and (2), an adjudicator must decide an adjudication application as quickly as possible and, in any case—

(a) within 10 business days after the earlier of—

(i) the date on which the adjudicator receives the adjudication response; or

(ii) the date on which the adjudicator should have received the adjudication response; or

(b) within the further time the claimant and the respondent may agree, whether before or after the end of the 10 business days.

(4) For a proceeding conducted to decide an adjudication application, an adjudicator—

(a) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.

(6) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

26 Adjudicator's decision

(1) An adjudicator is to decide—

(a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which any amount became or becomes payable; and

(c) the rate of interest payable on any amount.

(2) In deciding an adjudication application, the adjudicator is to consider the following matters only—

(a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;

(b) the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;

(d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) The adjudicator's decision must—

(a) be in writing; and

(b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.