SUPREME COURT OF QUEENSLAND

CITATION:	*Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91
PARTIES:	**NICLIN CONSTRUCTIONS PTY LTD** (applicant) **v** **SHA PREMIER CONSTRUCTIONS PTY LTD** (first respondent) **CHRISTOPHER TAYLOR** (second respondent)
FILE NO/S:	BS No 786 of 19
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 February 2019 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2019
JUDGE:	Ryan J
ORDER:	**1. The application is dismissed.** **2. The Applicant must pay the Respondent's costs of the application on a standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the applicant submits that the adjudicator's decision is void for jurisdictional error – Whether service of an adjudication application as soon as possible after it is made is necessary to confer jurisdiction on an adjudicator *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394. *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190. *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor* [2014] QSC 30. *Douglas Aerospace v Indistri Engineering Albury* [2014] NSWSC 1445. *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor* [2011] QSC 327. *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294. *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC

194.
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.
QC Communications NSW Pty Ltd v CivComm Pty Ltd [2016] NSWSC 1095.
Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) (2016) 344 ALR 355

COUNSEL:	K E Downes QC and SB Whitten for the Applicant M H Hindman QC and H Clift for the Respondent
SOLICITORS:	CDI Lawyers for the Applicant Thomson Geer for the Respondent

HER HONOUR: I will state at the outset that I found this matter very difficult; however, for the reasons which follow, I have determined that compliance with section 21(5) is required for a valid adjudication decision and that compliance with section 21(5) requires service of the adjudication application upon the respondent as soon as possible after the application is lodged with the registrar.

While there is some flexibility in the requirement of "as soon as possible", in my view, in the context of an Act which imposes brutally fast timeframes, service 12 business days after the lodging of an adjudication application is not as soon as possible.

It follows that I am not of the view that the adjudicator has erred in declining jurisdiction in the three standard claims referred to him.

I will now state my reasons and arrange for copies of them to be distributed to the parties as soon as I have revised them. That should be in a matter of days in case you, Ms Downes, want to take the matter further. Thank you.

By way of background – and I should say this will take me about 40 to 50 minutes, so if senior counsel wish to leave it to your juniors to sit through, you are certainly welcome to. I will leave that up to you.

MS HINDMAN: Could I – would you mind if I took you up on that?

HER HONOUR: No. No. No, I - - -

MS HINDMAN: Thank you very much.

HER HONOUR: I made the offer for that reason.

MS DOWNES: Your Honour, may I be excused as well.

HER HONOUR: Yes, certainly. What I will do even though these are ex tempore reasons, I will build some headings in, and – and that should add to ease of understanding. So the first heading is background.

Background

In this matter, the applicant seeks orders in relation to four adjudication applications made by it in accordance with the *Building and Construction Industry Payments Act* 2004 Queensland (***Payments Act***).

Three of the four applications were the subject of a decision by the adjudicator on 18 January 2019. The adjudicator decided that he did not have jurisdiction to determine the three standard claims because the applications had not been served upon the respondent as required by the *Payments Act*. The applicant seeks orders that these three decisions be declared void on the basis that the adjudicator did have jurisdiction to determine the adjudication applications.

The fourth application has not yet been the subject of a decision by the adjudicator, but his decision is pending. The same argument about jurisdiction has been raised, and there is a reasonable apprehension that the same decision will be reached by the adjudicator about his jurisdiction.

If the applicant is successful in its application, it also seeks an order that its three adjudication applications, which have yet to be considered on their merits, be remitted to the adjudicator to perform the duty required of him under the *Payments Act*.

With respect to the fourth and pending adjudication application, known as the Southbrook adjudication, the applicant's reply submissions are due to be delivered by 27 February 2019 and the adjudicator is required to deliver his decision within 15 business days after that.

It seemed to me that the most efficient way to deal with this matter was for me to deliver reasons ex tempore about the jurisdiction point only, before the time arises for the applicant to file submissions in reply.

Facts

The facts of the matter briefly are these. Niclin and SHA entered into contracts for the construction of petrol stations at Nanango, Tinana and Charleville on about 6 November 2017. They entered into a contract for the construction of a petrol station at Southbrook on about 15 January 2018.

Construction of the four petrol stations is complete. The defects liability period under each of the contracts has commenced and not yet elapsed.

Progress claims were served by Niclin upon SHA on about 31 October 2008 with respect to each project. The Nanango, Tinana and Charleville claims are standard claims under the *Payments Act*. The Southbrook claim is a complex claim which attracts a procedure slightly different from the one in place for standard claims, although the service issue in each case is identical.

On 14 November 2018, SHA served payment schedules in response to each of the progress claims. On 28 November 2018, Niclin lodged adjudication applications with the QBCC with respect to each progress claim under the construction contracts. On the same day, it served upon SHA, by delivering documents to Thomson Geer, submissions in support of its adjudication applications but not the adjudication application document itself. In other words, the documents served upon SHA, while dealing in detail with the substance of the adjudication application and the basis for it, did not include the approved form for an adjudication application in each case. What was served was content which was not essential to a valid adjudication application.

In his affidavit, Mr Alexander Tuhtan, a solicitor employed by CDI with carriage of this matter on behalf of the applicant, subject to the supervision of his principal,

explains, in effect, that CDI mistakenly failed to serve the adjudication application approved forms upon the respondent's solicitors. There was nothing deliberate about CDI's omitting to do so, and it is not suggested otherwise.

In its adjudication responses to the three standard claims dated 13 December 2018, the respondent raised the service point. SHA submitted to the adjudicator and to this Court that it was, in effect, fatal that Niclin had not served the respondent with the application for adjudication forms. Service was a mandatory requirement. The relevant section, section 21(5), used the word "must":

> *A copy of the adjudication application must be served on the respondent.*

In the absence of service of the adjudication application in the approved form, the adjudicator lacked jurisdiction and service after being notified that there had not been service could not save the adjudicator's jurisdiction because it was, in effect, out of time, the forms not having been served as soon as possible after lodgement of the application as required by the *Acts Interpretation Act* 1954 Queensland (***Acts Interpretation Act***).

The respondent made the same point in its response to the complex claim which it delivered on 22 January 2018.

I note that, having received information in the adjudication response to the standard claims that the adjudication application approved forms had not been served in respect of them, it is surprising that the applicant did not check the position in respect of the adjudication of the fourth and complex claim.

Having been informed by the respondent about its failure to serve the approved forms as required, Niclin served the forms on the respondent in the case of the Nanango, Tinana and Charleville projects on 14 December 2018. It served the form in the case of the Southbrook project on the respondent on 24 January 2018.

Also, on 14 December 2018, the applicant wrote to the adjudicator complaining that new reasons had been included in the respondent's adjudication response and responding – using careful language – to the assertion that the adjudication application had not been properly served on the respondent.

In effect, the applicant said that a complete copy of the adjudication applications as required by section 21(5) had been served on the respondent and respectfully requested the adjudicator to call for additional submissions on that point which he did.

With respect to the adjudication applications concerning Nanango, Tinana and Charleville, the adjudicator released his decision to the parties on 18 January 2019. He determined that he had no jurisdiction to decide the applications. He found at [85]:

> *Accordingly, in my opinion, the requisite approved form was required to have been served on SHA as part of each respective adjudication application in satisfaction of section 21(5). Given that it was not, as I have already explained earlier in these reasons, my jurisdiction to decide the applications has not arisen, save only my jurisdiction to decide jurisdiction as granted to me under section 25(3)(a) of the Payments Act.*

The adjudicator also found that the defective service was not capable of remedy after the point in time at which the respondent served its response to the application, in effect, because it had not been served as soon as possible as required by the *Acts Interpretation Act*.

In Mr Tuhtan's affidavit, he says that neither the first respondent nor its solicitors advised the applicant or its solicitors that the approved application forms for the standard claims had not been served until 13 November 2018. It was not, of course, for the respondent's solicitors to ensure that the applicant complied with the requirements of the *Payments Act* in making its adjudication applications.

Observations about the approved form

The Approved Form itself states under the heading "Compliance with Requirements" on its covering page the following:

> *Applicants should take care to comply with the procedural requirements of the BCIPA such as acting within prescribed time limits, correct service of documents and proof of service of documents. Adjudication applications may fail on technical grounds if procedural requirements are not met. This form should be completed with reference to the BCIPA. Information about the BCIPA is also available on the QBCC website.*

Over the page, under the heading "Completing this Form", this paragraph appears:

> *You are to serve a full copy of this application and submissions on the respondent after it is lodged with the registry. Proof of service of the application and all submissions on the respondent should be provided to the adjudicator.*

The forms in the present case state, at paragraph 9 (which is the place in the form at which the date for service of the application is to be stated) the date on which the adjudication application was lodged, that is, 28 November 2018. Filling out the form in that way suggested to the relevant registrar that the form had been served, or perhaps would be served, on 28 November 2018.

The form also contains a declaration of sorts by the claimant or the claimant's agent on page 6.

In the declaration, the claimant or their agent agrees, among other things, that they are required to give a complete copy of the adjudication application to the respondent

in accordance with the *Payments Act* after they lodge the application; the claimant agrees to give the adjudicator proof that the claimant has given a copy of the adjudication application and all submissions to the respondent; if the application is not served on the respondent on the same day the application is made, the claimant agrees to notify the adjudicator of the date of service upon the respondent and to provide evidence of service.

The wording of the declaration will accommodate service of a copy of the application before or after its lodgement.

Nothing in the evidence before me suggests that the adjudicator was given notice of the date of service at least of the submissions upon the respondent.

Other Matter

Further still, in a letter headed "Adjudicator's Notice of Acceptance", dated 4 December 2018, and under a subheading "Service of Adjudication Application", the adjudicator asked the claimant Niclin to provide to him by return email evidence of service upon the respondents of each claim.

I note that that request, which was made, as I said, on 4 December 2018, did not prompt the applicant to double-check that it had served the approved forms, and while, of course, the applicant could not provide evidence of service of the adjudication application approved forms, there was no evidence before me that it responded in any way to the adjudicator's request.

I pause there to respond to an argument made about the parts of the form that were to be filled in by registry staff and which would not therefore be on the adjudication form as prepared by the applicant.

The section requires that a copy of the adjudication application be served upon the respondent. The approved form requires the applicant to state the date upon which it has served the form or will serve the form upon the respondent; thus, it anticipates service before the application is made to the registrar. It follows that the copy which may be served upon the respondent need not bear the details as filled out by the registry staff. Indeed, in my view, those details do not form part of the adjudication application at all.

Questions for the Court

The relevant questions for the Court are whether the failure on Niclin's part to serve the adjudication application form upon SHA at the same time as it filed the submissions in support of it was fatal, in the sense that the adjudicator had no jurisdiction to hear the adjudication in those circumstances.

Breaking that question down, the Court is required to decide whether service of an adjudication application form upon a respondent is necessary to confer jurisdiction upon an adjudicator, and if it is, the time within which such service is to be made;

and whether, in the present case, service upon the respondent well after service of the submissions was sufficient service such as to confer jurisdiction.

The *Payments Act*

I will not rehearse the operation of the provisions of the *Payments Act* in these reasons.

It will be appreciated by the parties that section 21(3) identifies the requirements of an adjudication application, that is, what it must look like, what it must contain and when it must be made to be valid.

The adjudication application form must identify the payment claim and payment schedule to which it relates.

I note that the approved form requires those documents be attached to it for filing with the registrar and ultimate delivery to an adjudicator. Thus, their inclusion is essential for a valid adjudication application.

Submissions in support of the claim are not essential to the validity of the adjudication application document, but may be included.

Section 21(5) provides that a copy of an adjudication application must be served on the respondent, and it is that document with its attachments which is referred to the adjudicator for his or her decision.

Service is not essential to the validity of an adjudication application *document* in the same way as, for example, its being made to the registrar is, but the date of service or the act of service, per se, provides the starting point for the calculation of the 10 business days within which the respondent has to reply, if it wishes to, to an adjudication application. And it provides, in turn, the starting point for the calculation of the timeframe within which the adjudicator is to make his or her decision.

Is service an essential pre-condition to jurisdiction?

The applicant argued, referring to the decision of Justice Hodgson in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394, that service of the adjudication application upon the respondent was not an essential condition or pre-condition to a valid adjudication.

The applicant submitted that service did no more than affect the time within which a respondent might serve an adjudication response to an adjudication application, and it also was likely intended to ensure that the respondent was afforded natural justice in the adjudicator's determination of the application.

The applicant also relied upon cases from New South Wales to the effect that it was doubted that service was required as a precondition to jurisdiction. Those cases were

Douglas Aerospace v Indistri Engineering Albury [2014] NSWSC 1445 and *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095.

In *Douglas*, it was argued that an adjudication application had not been served upon the respondent to it. That was not accepted by the trial judge. The adjudication application had been sent by fax on 5 March 2014 and the trial judge accepted that it had been received by the respondent to the application.

Thus, the requirements of the equivalent of section 21(5) had not, in fact, been infringed, and it was in that context that Justice McDougall referred to – and I am not sure if his Honour meant it sarcastically or not – the fascinating debate about whether compliance with the service requirement was jurisdictional:

> *There may be a question as to whether s 17(5) should be regarded as jurisdictional. It was not identified as a "basic and essential" condition of validity in Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421. It was not identified as a jurisdictional prerequisite in Chase Oyster Bar. I was not referred to any decision which holds that compliance with s 17(5) is jurisdictional.*
>
> *It could be argued that the role of s 17(5) is to ensure that the respondent is given a degree of procedural fairness by being served with the payment claim. If that is the limit of the function of the subsection then, in circumstances where the respondent cannot lodge an adjudication response and thus in effect cannot be heard (see s 20(2A), (2B)), it may be wondered whether there is any reason, on the proper construction of the statute, to hold that the requirements of s 17(5) are jurisdictional.*
>
> *However, it is not necessary to pursue that fascinating debate. The evidence for the first defendant is that a copy of the adjudication application was served by fax (again, to the number mentioned above) at 15:23 on 5March 2014. In this case, there can be no doubt that it was received. Mr Clarke replied on 24 March 2014. He sent an email both to Mr Robinson and to Mr Robinson's lawyers which attached, among other things:*
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> *Letter in response to letter received on 5 March 2014.*

His Honour then observed that it was not necessary to pursue that fascinating debate. A copy of the adjudication application had been served by fax, and there was no doubt that it was received.

In *QC Communications*, Justice Ball agreed with Justice McDougall; although the issue was not directly raised in that case either. The application in that case had been served, but its attachments had not been:

> *For the reasons suggested by McDougall J, I doubt that the failure to serve an adjudication application goes to the Adjudicator's jurisdiction. In any event, in this case, the application was served, although it appears that the supporting material was not. In my opinion, the failure to serve supporting material does not go to the jurisdiction of the Adjudicator. There is nothing in the SOP Act which requires an applicant to supply supporting material to the Adjudicator. Consequently, it is difficult to see how the failure to serve supporting material could deprive an*

> *adjudicator of jurisdiction. Of course, if supporting material is provided to the Adjudicator and not served, the effect may be to deny the person on whom they were not served natural justice. But whether the practical effect of the failure to serve supporting material is to deny a party natural justice in a way that would attract the intervention of the court depends on the particular facts of the case.*

The applicant also referred to a decision of Justice McMurdo, as his Honour then was, in *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor* [2011] QSC 327 to make the point that the service issue was one involving natural justice, not jurisdiction.

In that case, a letter had been sent to the adjudicator which had not been sent to the respondent. The respondent argued that it had been denied procedural fairness because without the letter, it couldn't and didn't respond to it. There was no real possibility that including the letter would have caused the respondent to reply any differently to the adjudication application, and the question for his Honour was, in my view, whether the decision was void because the respondent had been deprived of natural justice, not so much whether failing to serve the respondent with the letter deprived the adjudicator of jurisdiction:

> *Accordingly, the omission of the missing letter had no practical consequence for the adjudication response. In this case it can be said that a denial of natural justice, by the respondent being deprived of an opportunity to address a piece of the evidence presented to the adjudicator, could not possibly have produced a different result. In these circumstances, it is said that a denial of natural justice still renders a decision void but that, as a matter of discretion, relief might be declined: see, in particular in relation to the New South Wales equivalent of this Act, Fifty Property Investments Pty Ltd v O'Mara. Similarly in this Court, Applegarth J said in John Holland Pty Ltd v TAC Pacific Pty Ltd:*
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> > *"In addition, the Court's concern is with the practical effect of the alleged denial of natural justice. Reference to the High Court's decisions in Stead v State Government Insurance Commission and Ex parte Aala supports the proposition that even if the Court is satisfied that there has been a denial of natural justice, relief may be denied if it can be shown that compliance with the requirements of natural justice could have made no difference to the outcome."*
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> *In Re Refugee Review Tribunal; ex parte Aala, Kirby J said that relief would be withheld only where an affirmative conclusion is reached that compliance with the requirements of procedural fairness could have made no difference to the result, and that such an outcome will be a rarity. In Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd, McDougall J noted that in Brodyn Pty Ltd v Davenport, Hodgson JA had said that an essential condition of a valid adjudication was the absence of a "...substantial denial of the measure of natural justice that the Act requires to be given". McDougall J referred also to Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam, where Gleeson CJ had said that procedural fairness was not abstract but practical and that "[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice". Accordingly, McDougall J said, there must be a "material" denial of natural justice, requiring some analysis of the importance or*

otherwise of the relevant subject matter and, in particular, its significance to the actual determination.

The applicant urged me to take a similar approach and to consider whether there had been any denial of natural justice to the respondent in this case in its not having been served the adjudication application form until after it had made its submissions in response.

It argued that the failure to serve before that point in time had no practical consequences and, therefore, the adjudication could have proceeded to a valid decision. The adjudicator ought not to have decided that he had no jurisdiction.

The respondent relied on the use of the word "must" in section 21(5) to argue that service was essential to the adjudicator's jurisdiction. It was submitted that the use of that word indicated that service was an essential precondition for the existence of an adjudicator's determination.

It also drew upon the approach of Justice Hodgson in *Brodyn* and the mandatory and directory distinction made by his Honour in that case. In that context, I considered the later case of *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 which considered *Brodyn*. In *Chase*, one of the questions for the Court of Appeal of New South Wales was whether the adjudicator's determination that he could hear and determine a certain adjudication application should be set aside or quashed for jurisdictional error in circumstances where the adjudicator had incorrectly concluded that a notice had been served within certain prescribed time limits.

Chase concerned the failure of the claimant to notify the respondent that it intended to apply for an adjudication of the payment claim within the time limits prescribed by section 17(2) of the New South Wales Act, which is similar to section 21(2) of the Queensland Act, and that's a section which applies where a respondent has failed to serve a payment schedule.

In *Brodyn*, it was arguably suggested, in effect, in obiter remarks, that that subsection was one of the detailed requirements of the Act, non-compliance with which might not bring about jurisdictional error. Ultimately, the Court in *Chase* concluded that the requirement of notice within a certain period of time to apply for adjudication was a jurisdictional requirement.

The Chief Justice, at 46, referred to the precise sequence of time stipulations, required by the legislation, for service of a payment claim; service of a payment schedule; recovery of unpaid money by the claimant; the making of an adjudication application when a payment schedule indicated that less than the amount claimed would be paid; the making of an adjudication application where the amount accepted to be owing was not paid; notice of an intention to apply for adjudication upon a respondent which failed to provide a payment schedule and the time for allowing the provision of a payment schedule; the making of an adjudication application after giving that notice; the referral of the adjudication application to an adjudicator, that is, "as soon as practicable"; the provision of an adjudication response; the time

allowed for the adjudication determination; payment of the adjudicated amount and suspension of work by the claimant.

His Honour said at 47:

> *This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point in time. Such certainty is of considerable commercial value.*

His Honour found nothing in the legislation which suggested that Parliament intended the timeframes to be flexible; although, at 48, his Honour noted the sections which allowed the parties to agree on an extension and provisions which could be varied downwards by contract.

It was argued for the claimant respondent in that case that the essential element or aspect of section 17(2) was the requirement of notice and that the additional element that notice be given within 20 days after the due date for payment was not essential. The Chief Justice thought there might have been some force in that submission were it not for the detailed sequence of the express provisions for time which his Honour had set out. Also, the Chief Justice made the following, often quoted, observation that:

> *As Hodgson JA recognised in Brodyn, the purpose of the legislative scheme [was] best served by restricting the scope of intervention by the Courts.*

His Honour continued at 55:

> *I do not believe that there will be frequent occasion for such interference – perhaps after a transitional period – once it is realised in the building industry that punctilious compliance with each specific time limit is required if a builder is to have the benefit of the scheme established by the Act.*

Justice McDougall explained, at 218, that he reached the conclusion that the time limit was jurisdictional, having regard to the following considerations, and there are four dot points:

- First, satisfaction of the condition was a matter peculiarly within the control of the claimant and was not onerous;
- Second, there was nothing difficult or requiring an adjudicator's expertise in determining whether notice had been given within the required time period;
- Third, there was inconvenience to a respondent in being subjected to an adjudication application in circumstances where its making was forbidden by the legislation;
- And, fourth, the right to the claimed amount was preserved.

Justice Basten agreed with the Chief Justice and Justice McDougall and observed that the language of the provision "cannot be made" was intractable and that neither the structure nor purpose of the Act suggested a different conclusion.

I note that section 21(5) does not use the language of "cannot be made".

I was referred by the respondent to the decision of *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194 in which Justice Hammerschlag held that service of an adjudication application was an essential preliminary to the decision-making process for which the Act provided. His Honour noted that such service triggered the entitlement of a respondent to serve its adjudication response and the time limits for such a response.

In that case, service had been by way of the provision of a USB which did not contain the same copy of the adjudication application as that provided to the adjudicator.

The adjudicator in that case would not look at the adjudication response because he considered that it had been provided out of time, calculating time by reference to the delivery of the USB stick to the respondent.

His Honour concluded that the delivery alone of the USB stick was not service of a copy in writing for the purposes of section 17(5). The respondent's adjudication response was, therefore, within time and the adjudicator ought to have regarded it.

His Honour said at 82:

> *This is an instance when non-compliance may be both jurisdictional error and a denial of procedural fairness. However, there was, in any event, a sufficient denial of procedural fairness which the section requires be afforded a respondent to warrant quashing the adjudication application.*

Although as I understand his Honour's decision, his comments about service as a jurisdictional requirement were obiter, his Honour's views were plain.

I note, however, that his Honour was not referred to *Douglas* or *QC Communications*, in which case, the contrary view was intimated, but not essential to the Court's decision.

Consideration

I have considered *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 and the Court's duty to give the words of a statutory provision the meaning that the legislation is taken to have intended them to mean.

I see the questions facing me as ones to be determined on the basis of the principles in *Project Blue Sky* against the fact of conflicting obiter from interstate, and also drawing assistance from the approach in *Chase* and *Ian Street Developer Pty Ltd v*

Arrow International Pty Ltd [2018] VSCA 294; although, I note that that later case was provided to me for a different reason.

I need, therefore, to consider the function of the service requirement in section 21(5) in the context of the Queensland Act and the consequences for the parties of a conclusion that, in the absence of service of the adjudication application form upon a respondent or, at least, service as soon as possible of that form, the adjudicator did not have jurisdiction to determine the dispute.

In other words, I have to consider whether I can discern a legislative purpose for rendering invalid an adjudication where there has not been compliance with section 21(5), having regard to the language of the statute, its subject matter and objects and the consequences for the parties of holding void every act done in breach of the condition as guided by the plurality in *Project Blue Sky* at paragraphs 91 and 93.

One obvious purpose of section 21(5) is to provide the respondent with notice of the content of the adjudication application, so that it may, if it chooses to, provide an adjudication response. Its other purpose is as a reference point for the timeframes for provision of the adjudication response.

An adjudication application in proper form will include the payment claim and the payment schedule. In other words, the application which the registrar must refer to the adjudicator contains that information, and it will also include the claimant's additional submissions, if any.

What the adjudicator will not have at the point of referral is an adjudication response from the respondent. The adjudicator is not required to ask the respondent for an adjudication response. The only way in which he or she will know if one is coming or not is, in effect, to wait until the expiration of the relevant periods set out in section 24A.

Without information from the claimant or, perhaps, the respondent, about the date upon which a copy of the adjudication application was served, the adjudicator has no way of knowing when he or she has all the material required for the adjudication.

In other words, the adjudicator needs to know when 10 business days from the receipt by the respondent or the adjudication application falls.

I note that section 24A speaks of 10 business days after receipt, rather than 10 business days after service, but I do not consider that difference between the language to be relevant in this case. The approved form of adjudication application facilitates the provision of this information, that is, the date of service to the adjudicator in several ways, including by requiring completion of section 9 and by securing an agreement from the claimant that it will provide proof to the adjudicator of service of the application upon the respondent.

That no such proof was provided is apparent from the notice of adjudication sent to the parties.

That point, the absence of proof of service, is not taken here. Rather, the point is that there was no service of the essential part of the adjudication application; that is, no service of the approved form on 28 November 2018.

Where there has been notification by the Adjudicator to the parties of his or her acceptance of the adjudication before there has been service, time does not run against the respondent until the adjudication application form has been served.

If I ask myself what is the importance of the requirement in question as part of the legislative scheme, the answer seems to me to be this: that the requirement of service, in combination with the temporal requirements of section 24A, and the content requirements of section 24, is intended to ensure that the Adjudicator has available for their consideration all that they are asked to consider in deciding the adjudication within a timeframe consistent with the timeframe within which the Adjudicator is to deliver their decision.

The time requirements for adjudication proceedings are set out in section 25A. The Adjudicator must make a decision before the deadline, but not before the end of the minimum consideration period. The minimum consideration period for a standard claim is the period within which a respondent may give an adjudication response under section 24A. The effect of that section is to ensure, it seems to me, that an adjudicator does not make a decision upon an adjudication until he or she has everything necessary for such a decision.

The deadline in section 25A is 10 days from receipt of the adjudication response, or the last day on which the respondent could have given an adjudication response.

So, in the context of an Act which requires compliance with tight timeframes, service of the adjudication application, irrespective of its content, provides a reference point for the calculation of time requirements for an adjudication. It is in my view an important requirement in the context of the scheme.

The statute provides for extremely abbreviated timeframes for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses. It provides for very limited time for an adjudicator to make a decision.

I found the following statement in *Chase* at 209 persuasive:

> *The Security of Payments Act gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the Security of Payments Act lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.*

As to the consequence of noncompliance for those affected by it, I note that the wording and requirements of the approved form attempt to give the Adjudicator

certainty when it comes to his or her task, and in particular, certainty about when it is that he or she may be confident that he or she has all of the material they need for an adjudication decision.

If there is no service of the adjudication application form, then the adjudicator has no timeframe for his or her decision making in the context of legislation which demands speedy determinations.

From the point of view of the parties, and in particular the respondent, in the absence of service there is a risk that the Adjudicator will determine the application in the absence of an adjudication response it intended to make.

From the point of view of inconvenience, if the decision were held to be invalid because of the lack of service, inconvenience arises if an adjudication is made on less than all of the necessary information.

I did not find it an easy task at all to discern the intention of the legislation, but it seems to me that in the context of a scheme designed to achieve the speedy and expeditious resolution of disputes, time limits are critical.

Section 21(5) provides notice to a respondent and a reference point for critical time limits. Notice is already provided for by virtue of the requirement for an adjudicator to inform the parties of his or her acceptance of an adjudication.

The High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 observed that the legislation created a unique form for the adjudication of disputes over the amount due for payment via a scheme which, as Basten JA observed in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 344 ALR 355 at [59], was coherent, expeditious and self-contained. The intended result is that each party knows precisely where they stand at any point in time. While the scheme is for the benefit of claimants, it seems to me that in the absence of service, the respondent does not know precisely where it stands. In those circumstances, I find that service under section 21(5) is required before an adjudication may be validly undertaken.

That is, of course, not the end of this matter. The Applicant then makes the point that it did serve the adjudication application, albeit belatedly. If service was essential for jurisdiction, service had been achieved. It was argued that the Adjudicator erred in concluding that the application form had to be served with the other documents, so as to enliven his jurisdiction. The Applicant submitted that there could be in effect two step service of the adjudication application and the submissions in support of it.

The Applicant relied upon *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor* [2014] QSC 30, a decision of Justice McMurdo in 2013, in which the adjudication application and documents in support of it were served days apart. In the face of an adjudication application in favour of Basetec, Conveyor & General Engineering argued that the adjudication application had not been duly

served, so the adjudicator was without jurisdiction. Alternatively, it had been denied procedural fairness.

In that case, the adjudication applications had been served by email, and Dropbox links had been attached, which the respondent did not open. The question for his Honour was whether the use of the Dropbox facility facilitated due service because the documents it contained were not repeated in the email or its attachments, the adjudication applications.

His Honour concluded that because some of the documents comprising the adjudication application were not themselves in the email, the application had not been duly served and only part of it was sent to the respondent. Identifying that some of its documents were in a Dropbox file did not amount to sending that material to the respondent.

His Honour found that there had not been proper service. His Honour found that at best there had been for the claimant, service on the day upon which the respondent became aware of the contents of the Dropbox folder. It followed that the Adjudicator in that matter was incorrect in holding that the Respondent was out of time to submit a response. It was argued that the Adjudicator did not have jurisdiction because he refused to permit an adjudication response, and it was argued in the alternative that the Respondent had been denied natural justice.

His Honour found that it could not be said that the Respondent's evidence and submissions would not have made a difference to the adjudicator. The adjudication was declared to be of no effect. His Honour did not consider whether in fact service deprived the adjudicator of jurisdiction, he dealt with the matter on natural justice grounds.

The Applicant makes the point that no issue was taken in that case, that service of the balance of the application 10 days after it was made deprived the Adjudicator of jurisdiction, but the approved form, the essential part of the adjudication application, had been served when the application was made, and that is not the case here.

As to the time required for service, the Applicant argues that no time limit is provided for in the legislation when a time limit could have easily been provided.

The Applicant argues that the argument that draws on the *Acts Interpretation Act*, that the application be served as soon as possible:

> *Does not sit within the context of the timeframes which are expressed in the Payments Act in relation to other procedural steps.*

The *Payments Act* certainly does not anticipate service in two steps, but the matter in issue is whether service of the adjudication application in the approved form after service of submissions in support of the adjudication application, and after there has been a response filed and served, was sufficient to establish the Adjudicator's jurisdiction.

The approved form plainly contemplates something close to contemporaneous service of the application upon the Respondent with the making of the application to the Registrar. However, the *Payments Act* provides no timeframe for it. In those circumstances, I consider it appropriate to rely upon the timeframe provided by the *Acts Interpretation Act*, and bearing in mind the nature and purpose of the legislation, service was to be as soon as possible after the application was made. It cannot be said that that has occurred in this case.

The approved form of adjudication application, dated 28 November 2018, prompted the complainant to serve.

The adjudicator's notice, dated 4 December 2018, sought proof of service from the claimant.

The service requirement was not an onerous one, and it was totally within the claimant's control.

I am conscious that what has occurred was an oversight, and that there is an argument that, in real terms, the Respondent has suffered no prejudice or no real prejudice, but service within 12 business days when near contemporaneous service is contemplated within a scheme that imposes brutally fast timeframes, does not allow the expeditious consideration of adjudication applications, which is what is intended by the *Payments Act*.

It follows that I am of the view that the Adjudicator correctly decided the matter of his jurisdiction.

…

HER HONOUR: On that question of costs, whether or not this letter invites complete capitulation, and whether or not that is relevant in this context, having regard to the fact that I did consider the matter difficult, and not something that could simply be resolved on the strength of the mandatory language used in section 21(5), I am not prepared to order costs from 1 February 2019 on an indemnity basis.

So, with respect to costs, they follow the event, and I order that the applicant pay the Respondent's costs on the standard basis. Thank you.
