SUPREME COURT OF QUEENSLAND

CITATION:	*Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow & Ors* [2020] QSC 51
PARTIES:	**GALAXY DEVELOPMENTS PTY LTD** (applicant) **v** **CIVIL CONTRACTORS (AUST) PTY LTD T/A CCA WINSLOW** (first respondent) **MR THOMAS JONES** (second respondent) **ADJUDICATION REGISTRAR (QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION)** (third respondent)
FILE NO:	12292 of 2019
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2020 Final written submissions received 21 February 2020
JUDGE:	Dalton J
ORDERS AND DECLARATIONS:	**1. The purported decision of the second respondent dated 24 October 2019 is void.** **2. The second respondent is not entitled to be paid any fees or expenses for or in relation to the adjudication which is the subject of this proceeding.** **3. The second respondent is to refund to the first respondent all monies paid to him by the first respondent in connection with the adjudication which is the subject of this proceeding.**
COUNSEL:	L Campbell for the applicant P Dunning QC and R De Luchi for the respondents
SOLICITORS:	Thomson Geer for the applicant HWL Ebsworth for the respondents

[1] On 29 October 2019 the second respondent purported to deliver an adjudication decision pursuant to the *Building Industry Fairness (Security of Payment) Act 2017*

(BIFA). The decision was made on a disputed progress payment claim, and the second respondent decided that the applicant was required to pay the sum of around $1.3 million to the first respondent (CCA). The applicant land owner brings this application to have the second respondent's decision declared void either because: (1) the building contract under which CCA claimed to be paid was void because CCA was not appropriately licensed, or (2) because the second respondent's decision was delivered after the maximum period prescribed by the BIFA for its delivery. It is convenient to deal with the second point first.

Time for Delivery of Adjudication Decision

[2] The relevant provisions are found in Chapter 3 Parts 3 and 4 of the BIFA.

[3] Part 3 deals with making a payment claim. Here CCA made a payment claim within the meaning of s 75(1) of BIFA. Section 75(2) applied, "… the claim must be given before …". The claim was given in time. I note the mandatory language at s 75(2), and note that it is in contrast to the permissive language at ss 75(1) and 75(5).

[4] Because the payment claim was made, the applicant had an obligation to respond to it pursuant to s 76(1), "… a respondent must respond to the payment claim by giving the claimant a payment schedule within …". The payment schedule was given within time. I note the mandatory language of s 76(1). Further, I note the consequence of failing to give a "payment schedule as required under section 76". I note that s 77(2) fixes the date for payment "on the due date for the progress payment to which the payment claim relates." Further, s 78(1) is concerned with the situation which arises if a respondent does not pay a claimant in full, "on or before the due date for the progress payment." The consequences are that the claimant can recover the amount as a debt, and give notice of intention to suspend work.

[5] Chapter 3 Part 4 deals with adjudication of disputed progress payments. The first section in Part 4, s 79(1), gives the claimant the right to apply for an adjudication. The permissory language, "may apply" is in contrast to the obligatory language of s 79(2), which provides that the application for an adjudication must be in the approved form and must be made within a specified time limit. As well, it must identify the payment claim; must be accompanied by the fee, and may include submissions which "the claimant chooses to include". At s 79(3) it is provided that the adjudication application must be given to the respondent and that the registrar must refer the application to an adjudicator within four business days. That is, the use of the words "may" and "must" in the various subsections of s 79 is very particular.

[6] The same distinction in language is evident at s 81. The adjudicator must accept or reject the referral within four business days. The adjudicator may accept the referral in writing to the claimant, the respondent and the registrar, and may reject the referral by notifying the registrar.

[7] There are two points of substance about s 79(4) and s 81(1). First, the mandatory language "must" is used to create obligations on the part of the registrar and the adjudicator. That is, it is not just the parties whose conduct is regulated by

mandatory language. Second, the purpose of the mandatory language when it is used is to ensure prompt action to deal with the appointment of an adjudicator.

[8] Section 82 also shows particular and nuanced language choice so far as the words "may" and "must" are concerned. So does s 83. The point of substance to note about s 83 is that the mandatory language is used in provisions which ensure that the respondent to the payment claim provides the adjudication response promptly. The section provides considerable detail as to this – see subsections (1), (2), (3) and (4). In my view this emphasises the importance of a prompt response and the importance of the parties, and the adjudicator, knowing exactly where the timetable for the adjudication stands.

[9] Then follow sections 84, 85 and 86 of the BIFA, all of which are central to the applicant's point. Section 84(1) provides:

> "Subject to the time requirements under section 85, an adjudicator must decide the following as quickly as possible—
>
> (a) an adjudication application;
>
> (b) applications for extensions of time under section 83."

[10] Section 85(1) provides:

> "Subject to section 86, an adjudicator must decide an adjudication application no later than—
>
> (a) for a standard payment claim—10 business days after the response date; or
>
> (b) for a complex payment claim—15 business days after the response date."

[11] Section 86 provides:

> "**86 Extending time for deciding adjudication application**
>
> (1) The claimant and respondent for an adjudication application may, before or after the end of the maximum period for deciding the application under section 85(1), agree in writing that the adjudicator has additional time to decide the application.
>
> (2) Despite section 85(1), an adjudicator may decide an adjudication application within a longer period if—
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> (a) the claimant and respondent have informed the adjudicator that they have agreed under subsection (1) that the adjudicator has additional time to decide the application; or
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> (b) the application relates to a complex payment claim and, in the opinion of the adjudicator, the claimant and respondent have failed to reach an agreement mentioned in subsection (1).

(3) The ***longer period*** is—

(a) if subsection (2)(a) applies—the additional time agreed to by the claimant and respondent under subsection (1); or

(b) if subsection (2)(b) applies—5 business days after the time the adjudicator would otherwise have to decide the application under section 85(1)."

[12] Section 88(3)(a) provides that an adjudicator "must not" consider an adjudication response, "that was not given to the adjudicator within the time required under section 83".

[13] Section 91 provides that, "As soon as practicable after being given a copy of a decision by an adjudicator, but no later than 5 business days after being given the decision, the registrar must give the claimant a certificate (an ***adjudication certificate***) of the decision …".

[14] Section 90 provides that a respondent must pay an amount found owing by an adjudicator within five days.

[15] Section 92 provides that if the respondent fails to pay the adjudicated amount within the time fixed by s 90, the claimant may give the respondent written notice of an intention to suspend works.

[16] The provision at s 94 of the BIFA is important to the applicant's case. That section provides as follows:

"**94 Claimant may make new application in certain circumstances**

(1) Subsection (2) applies if an adjudicator, who accepts a referral to decide an adjudication application (the ***original application***), does not decide the application within the period required under section 85.

(2) The claimant may do either of the following within 5 business days after the period mentioned in subsection (1)—

(a) request the registrar refer the original application to another adjudicator; or

(b) make a new adjudication application (the ***new application***) under section 79.

(3) If the claimant requests the registrar refer the original application to another adjudicator—

(a) the registrar must refer the application to another adjudicator within 4 business days after the request is made; and

(b) no fee is payable for referring the original application to another adjudicator.

(4) Also, if another adjudicator accepts the referral, this division applies for the original application with the following changes—

…

(5) This division applies to the new application in the same way it applies to any other adjudication application made under section 79.

…"

[17] Section 95 provides that an adjudicator is entitled to be paid. However, that section includes the following subsections:

"(6) An adjudicator is not entitled to be paid any fees or expenses for adjudicating an adjudication application if the adjudicator fails to make a decision on the application.

(7) An adjudicator does not fail to make a decision only because—

(a) the adjudication application is withdrawn; or

(b) the adjudicator decided he or she did not have jurisdiction to adjudicate the application; or

(c) the adjudicator decided the application was frivolous or vexatious; or

(d) the adjudicator refuses to communicate the adjudicator's decision on an adjudication application until the adjudicator's fees and expenses are paid.

(8) Also, if a court finds that the adjudicator's decision is void and unenforceable, the adjudicator is still entitled to be paid any fees or expenses for adjudicating the application if the adjudicator acted in good faith in adjudicating the application.

…"

[18] Lastly in relation to the provisions of the BIFA bearing on this, the first respondent drew my attention to s 97 which provides:

"**97 Withdrawing from adjudication**

(1) An adjudication application—

(a) is withdrawn if the claimant has given a written notice of discontinuation to the adjudicator and respondent; or

(b) is taken to have been withdrawn if the respondent has, before an adjudicator has decided the application, paid the claimant the amount stated in the payment claim the subject of the adjudication application.

Note—

> Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application, see section 95.
>
> (2) If subsection (1)(b) applies, the claimant must as soon as practicable inform the adjudicator that the adjudication application has been withdrawn because of payment."

[19] In this case in my opinion the adjudicator did not deliver his decision by the extended time limited by statute. The first respondent did not contend otherwise.[1] The applicant contended that therefore the purported decision delivered late was void. That is, the applicant contended the adjudicator only had jurisdiction to deliver a decision within the time limited by the BIFA. It contended that a legislative purpose of the BIFA was to invalidate any decision which was delivered after the statutory time. It accepted that my approach to this question of statutory construction was as explained by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*[2] and in particular acknowledged that the finding of such a purpose "often reflects a contestable judgment" – [91].

[20] The relevant question here becomes whether or not the BIFA should be construed as showing a legislative purpose that an adjudicator's decision delivered outside the maximum time prescribed by the statute is void. In my view it should be so construed, and I now explain why.

[21] So far as textual considerations in the BIFA are concerned, naturally the applicant relied upon the mandatory language at s 85(1). Further, reliance was placed on the deliberate and discerning use of mandatory (must) and permissive (may) language throughout Parts 3 and 4 of Chapter 3 of the BIFA, as outlined at [3]-[16] above.[3]

[22] Certainly it is important that the BIFA uses mandatory or imperative language in s 85(1). Further, I think it is plain that the mandatory language was carefully chosen. The draftsman was using the language with particularity and precision: mandatory language is used to impose time limits, and permissory language is used where the subject of the provision does in substance have a choice or election as to how, or whether, to exercise rights.

[23] I now turn from the language used to the substance of the provisions in the BIFA. Section 86, and in particular the specificity with which the legislature has provided

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1 There was no factual basis for the first respondent to do so. The decision was delivered four days after the time fixed by an extension in accordance with s 86(2)(a) of the BIFA. During the hearing I did explore with counsel for the applicant whether s 86(2)(b) could apply, although it was not argued on behalf of the first respondent. I am convinced s 86(2)(b) could not apply. Factually, the claimant and respondent did reach an agreement pursuant to s 86(2)(a); the adjudicator did not deliver a decision within that time. While there was no further agreement between the claimant and respondent, it could not be said that they "failed to reach an agreement" within the meaning of s 86(2)(b). They never tried to make any further agreement. It is evident that the words "failed to reached an agreement" in s 86(2)(b) must mean something more than "have not reached an agreement" because if s 86(2)(b) applies, it extends the adjudicator's time for delivery of decision by five business days – s 86(3)(b). This is the same time as the right given by s 94(2) to a claimant in circumstances where an adjudicator does not deliver a decision within the statutory time for decision. If s 86(2)(b) simply meant "have not reached an agreement", it would render the s 94(2) right entirely nugatory.

2 (1998) 194 CLR 355.

3 cf *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 404.

for extending the time in which an adjudicator may deliver a decision, is an indication that the time limits are very important. This tends to support the applicant's argument.

[24] Secondly, s 94(2) of the BIFA supports the applicant's argument. If the adjudicator does not deliver a decision within the time limited by the BIFA, the claimant has a right to another adjudication, but that right must be exercised "within 5 business days after the period mentioned in subsection (1)". This must mean five business days after the date fixed for the original adjudicator to deliver his or her decision. That is a very short timeframe.

(a) It does not contemplate the parties waiting a short time; in effect giving the adjudicator a period of grace, to see whether the adjudicator nearly complies with the time limited by statute for deciding.

(b) It contemplates that a claimant might immediately exercise its right to start a new adjudication which would be inconsistent with the original adjudication remaining on foot for some period of grace after the date for delivery of decision has passed.

(c) Interestingly, s 94(2) and (3) do not require notice to the original adjudicator that a new reference has been initiated.

[25] If an adjudicator does not deliver a decision within time, and a claimant wishes to have a new adjudication, the claimant must act quickly. If a claimant were to exercise its right under s 94(2) the day after the original adjudicator failed to deliver a decision, and later that same day the original adjudicator, without having any notice of the exercise of that right by the claimant, delivered a decision, a question would arise as to whether or not the decision delivered by the original adjudicator was binding on the parties, or whether they had become parties to a second adjudication. I think the answer must be the latter having regard to the provisions of s 94 of the BIFA. This must mean that the delivery of the late decision by the original adjudicator is of no effect.

[26] A claimant does have a right to give what s 97(1)(a) calls a written notice of discontinuation to the adjudicator. I do not think that notice under s 97(1) of the BIFA is appropriate to give to an adjudicator if a claimant is exercising its rights to start a new adjudication pursuant to s 94. If an application is withdrawn pursuant to s 97, the adjudicator must still be paid a fee. However, if an adjudicator fails to deliver a decision, s 95(6) of the BIFA provides that the adjudicator is not entitled to any fee.

[27] This legislative distinction as to the circumstances of entitlement to a fee is consistent with a more fundamental distinction between s 94 and s 97. The right given to a claimant pursuant to s 94 is consistent with the claimant recognising that the original adjudication has come to an end because no decision has been produced within the statutory time and starting a new adjudication. Section 97, on the other hand, is consistent only with there being a live or extant adjudication which the claimant chooses to bring to an end by a written notice of discontinuation. It seems fair in the first circumstance that the adjudicator is not entitled to a fee, but is entitled to be paid in the second circumstance.

[28] I was concerned about the phrase, "before or after" at s 86(1) of the BIFA. My first response to that language was that it was a fairly strong indication against the applicant's construction of the Act, for if the adjudicator could be given extra time to decide, the adjudication could not have come to an end. It is a well-known principle of law that the jurisdiction given to a statutory decision-maker cannot be extended by consent.[4] That is, if jurisdiction over topic A is given to a statutory decision-maker, the parties cannot give the decision-maker jurisdiction over topic B by agreement. While the language is not entirely tidy, having regard to all the textual and substantive indications in the BIFA (above and below), I think that s 86(1) must be regarded as the legislature expressly giving the parties power to confer additional jurisdiction on the adjudicator in circumstances where he or she would not otherwise have jurisdiction, ie, in circumstances where the original jurisdiction conferred had expired because no decision had been delivered within the statutory time.

[29] I now turn from the specific text and the specific substantive provisions which bear immediately on the point. Overall, the applicant submits, the provisions at Chapter 3 Parts 3 and 4 show that the purpose of the legislature was to achieve a rapid extra-curial determination of disputes about progress claims. The Courts have recognised that non-compliance with time limits set by mandatory language is fatal to the validity of actions to be undertaken by either claimant or respondent,[5] and it is argued that the statutory purpose in ensuring speedy resolutions of these claims must mean that the same result obtains when there is a failure to meet statutory deadlines by the adjudicator. In this latter respect, the applicant refers to the *obiter* comments of Applegarth J in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor.*[6]

[30] It was argued that an overall legislative purpose to provide commercial certainty for parties to building contracts can be discerned – see *Niclin* at [22], citing Spigelman CJ in *Chase Oyster Bar* (above). I note that similar comments were made by Basten JA in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd.*[7] He noted the "short and apparently mandatory time constraints on each stage of the process for making claims, disputing liability, applying for adjudication and for determination." Those observations were made *obiter,* but in a part of a judgment in which he was discussing the statutory purpose of an Act similar to the BIFA, namely to ensure that builders are paid in a timely way.

[31] I note also the emphasis in the BIFA on expedition, recognised at [21] and [36] of *Niclin,* and the desire for certainty as to the parties' rights at any given time, also recognised at *Niclin* at [22].

[32] I think that these more general considerations as to statutory purpose are less persuasive than the specific language and the specific substantive provisions, which I have already discussed. Nonetheless, I think there is something to be said for a consistent approach to a consistent, and particular, use of language in the statute, whether or not the obligations created rest on the claimant, the respondent or the

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4 *Page v The Central Queensland University* [2006] QCA 478, [13].

5 *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QCA 177, [21], citing *Chase Oyster Bar* (above).

6 Above, [28].

7 [2011] NSWCA 399, [8] and [10].

adjudicator. This is particularly so when, so far as time limits are concerned, the mandatory requirements are all in aid of the same statutory aim: a quick resolution of a disputed progress payment.

[33] The first respondent argued that s 86(2)(b) is a textual indication that a decision delivered after the statutory time is not void. As discussed at footnote 1 above, s 86(2)(b) could only apply where parties had tried and failed to reach an agreement on extending time for a decision. Implicit in the provision is the idea that the adjudicator is informed of this and informed of it before the time for delivery of the decision. It is the failure of the parties to reach an agreement, rather than qualitative questions about whether or not that failure to agree was the fault of one or other of the parties, or was due to unreasonableness on the part of one or other of the parties which gives the adjudicator power to extend time. In contrast to matters of fault or unreasonableness, the fact of failure to reach an agreement ought to be relatively readily ascertainable. It is true that there is no legislative obligation on the adjudicator to inform the parties that he or she has determined to allow extra time pursuant to s 86(2)(b). This could cause considerable difficulty. If an adjudicator decided to allow him or herself extended time to deliver the decision, but did not inform the parties, the claimant might activate its s 94 rights to ask for a new adjudication. Compared to the degree of certainty that is afforded to the parties by the other provisions in Parts 3 and 4 of Chapter 3 of the BIFA, this provision is relatively untidy and I do think it is a textual indication supporting the first respondent's position on this application.

[34] However, I think the support which the first respondent gains from that point is overwhelmed by the other matters which I have discussed. In short, I think the textual and substantive considerations from the legislation support the applicant's argument.

[35] I turn to the case law. There are cases dealing with similar provisions interstate which are against the applicant. The applicant argues that the interstate legislation is sufficiently different to make the reasoning and results of those cases distinguishable. I accept that argument. So far as one of those decisions is an interstate appellate authority, that means the rule that I am bound to follow it unless I consider it to be plainly wrong does not apply.

[36] I will deal first with that appellate decision. It is a decision of the Victorian Court of Appeal, *Ian Street Developer Pty Ltd v Arrow International Pty Ltd & Anor.*[8] This was the only appellate decision in this set of cases.[9] The leading judgment was written by Maxwell P. The Victorian provisions in that case were as follows:

> "**22 Adjudication procedures**
>
> (1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
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> ...

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8 [2018] VSCA 294.

9 I was referred to *Cardinal Project Services* (above), a decision of the New South Wales Court of Appeal. However, the opinions there were *obiter*; brief, and conflicting.

(3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

(a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or

(b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

…

23 Adjudicator's Determination

(1) An adjudicator is to determine –

(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 that amount became or becomes payable; and

(c) the rate of interest payable on that amount in accordance with s 12(2).

…

(2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only –

(a) the provisions of this Act and any regulations made under this Act;

(b) subject to this Act, 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 duly 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 duly 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.

(2A) In determining an adjudication application, the adjudicator must not take into account –

(a) any part of the claimed amount that is an excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

(2B) An adjudicator's determination is void –

(a) to the extent that it has been made in contravention of subsection (2);

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

…"

[37] Section 28(2) of the Victorian Statute provided that where an adjudicator failed to determine the application within the time allowed by s 22(4) (above):

"(2) … the claimant –

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 18."

[38] Maxwell P noted that the Victorian legislature had not expressed a consequence which was to result from an adjudicator's failure to deliver a decision within the statutory time. This is in contrast to s 23(2B) of the Victorian legislation in relation to other matters.

[39] I disagree with the statement at paragraph [55] of Maxwell P's judgment where he says that the absence of an express statement as to the consequences of non-compliance with s 22(4) of the Victorian statute is a neutral factor in interpreting the statute. In fact, I think the contrast between the failure to specify a consequence for breach of s 22(4) and the specification of a consequence for breach of s 23(2) is one textual indication that non-compliance with s 22(4) was not intended to lead to invalidity.

[40] However, later in his judgment, Maxwell P refers to the point about s 23(2B), and says that he thinks s 23(2B) "was intended to be an exhaustive statement of the circumstances in which non-compliance by the adjudicator with requirements governing the adjudication task will result in invalidity" – [69]. With respect, that carries the position too far. Sitting in the Applications Court one sees many and varied errors on behalf of adjudicators which result in their decisions being void. These errors are certainly not limited to the type of errors specified in s 23(2B) of the Victorian legislation. Likewise, one can imagine very many more things which an adjudicator ought not take into account than those specified at s 23(2A) of the Victorian legislation, and which if taken into account would render a decision void. Having regard to the numerous ways in which an adjudicator might act so as to render his or her decision void, and the limited number of them encompassed by the terms of s 23(2B), I cannot discern the legislative intention Maxwell P does.

[41] At [66] of Maxwell P's decision he acknowledges the imperative language used by the Victorian section, but immediately discounts it without explaining why.

[42] Next Maxwell P addresses s 28(2)(a) of the Victorian legislation. He says:

> "[71] Plainly enough, the conferral of the option to withdraw has the necessary corollary that the claimant may decide not to withdraw but instead choose to wait for the adjudicator's decision, notwithstanding the expiry of the time limit. The conferral of the option to withdraw, and the possibility of its non-exercise, would be unintelligible if — as the applicant contends — the adjudicator's jurisdiction automatically came to an end, by operation of law, at midnight on the last day of the specified time period."

[43] With respect, I agree with this textual analysis of the Victorian Act. It is in plain contrast to the language of the Queensland Act which I analyse above at [24]-[26]. I think this point of difference with the Victorian legislation is significant, and significantly in the applicant's favour. Moreover, the Queensland legislation was previously in a form very similar to the Victorian legislation.[10] The changes to the current Queensland legislation were made after all the extant interstate decisions on similar provisions, and, to some extent, I think that also supports the applicant's position.

[44] At paragraph [73]ff of his judgment Maxwell P refers to the stated object of the Victorian legislation: to "ensure" that a builder is able to recover a progress payment. He concludes that, "To hold that the expiry of the time limit terminated the adjudicator's jurisdiction would frustrate that purpose. It would potentially work great inconvenience on a claimant – and, for that matter, on a respondent." – [74]. Further, Maxwell P concluded that, "It seems highly improbable, in my view, that Parliament intended to allow the completion of the adjudication process to be frustrated – as it were, at the last minute – by reason of the adjudicator's having failed to make a decision within time." – [75].

[45] In this regard Maxwell P found support in earlier decisions made by McDougall J in New South Wales.[11] As is shown by an extract from one of these judgments which Maxwell P includes at paragraph [39] of his judgment, McDougall J's reasoning assumes that the legislative purpose would be frustrated if an adjudication allowing a claimant to be paid were delivered late and was therefore regarded as invalid:

> "[63] To my mind, it would be quite extraordinary if the legislature intended that a builder or subcontractor who had got through the various hurdles that the [NSW] Act imposes, in the path of obtaining a successful determination, up until the point of receipt of the adjudicator's reasons, should be disqualified from the benefit of a determination in its favour simply

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10 *Building & Construction Industry Payments Act 2004* (Qld) (BCIPA), s 32.

11 See paragraphs [35]-[42] of Maxwell P's judgment and the decisions of *MPM Constructions v Trepcha Constructions* [2004] NSWSC 103 and *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430.

> because the adjudicator did not comply with the statutory time limit."[12] (my underlining)

[46] This same idea (ie, that the adjudicator's decision will favour the claimant) is also bound up in the reasons Maxwell P gives and which I have extracted at [44] above. Further, it is found in his rejection of the idea that an adjudicator's decision delivered out of time was void because that would provide for commercial certainty. In this regard he said:

> "[77] Counsel for the applicant argued that considerations of commercial certainty supported the view that Parliament did intend invalidity to follow from a breach of the time limit. It would be conducive to certainty for all concerned, it was said, if it was known in advance that the adjudicator's jurisdiction would automatically lapse at the end of the statutory period. If that were not so, it was submitted, there was likely to be 'mayhem'.
>
> [78] I am not persuaded by that submission. In my opinion, the effectiveness of this scheme, and the maintenance of the confidence of participants in the building industry, would be much more detrimentally affected if an adjudicator's delay — involving no fault on the part of the claimant — operated to nullify the process of adjudication."

[47] In any given case the determination of the adjudicator might be for or against a claimant. The construction of the Act must be one which applies in every circumstance; the construction cannot change having regard to the result it will produce in a particular case. What the BIFA gives a claimant is a prompt extra-curial decision on its progress claim; not a guarantee that its progress claim will be paid. If an adjudicator fails to deliver a decision within the time limited by statute, a claimant has the right to immediately institute a second adjudication pursuant to s 94 of the BIFA. That is, the claimant is not deprived of the opportunity to obtain a prompt extra-curial decision by the failure of the original adjudicator to give a decision within the statutory time.

[48] Once these points are made clear, I cannot see any objection to taking the same approach to the mandatory language used in relation to an adjudicator's obligations under the BIFA as is taken in relation to the obligations of the claimant and the respondent. In the construction of the Act overall, the purpose is to ensure a speedy extra-curial determination and a quick decision by the adjudicator is obviously an integral part of this.

[49] I turn to the three other decisions on similar provisions; they are all from New South Wales and two are of McDougall J. The first decision of McDougall J on this topic was in *MPM Constructions Pty Ltd v Trepcha Construction Pty Ltd*.[13] He referred to *Project Blue Sky* and in particular the dicta at [97] of that case:

> "Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision

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12 *Cranbrook* (above).

13 (Above).

> should be invalid if public inconvenience would be a result of the invalidity of the act."

[50] I agree with the applicant's submission here that no questions of public inconvenience arise in this case. Nevertheless, from that departure point McDougall J went on to say:

> "… I start from the proposition that it is unlikely in this case that the legislature intended that an act done in breach of the time limit set out in s 21(3)(a) would be invalid. I say that because the consequences of invalidity seem to me to be susceptible of undermining the purpose of the legislation … That is to my view confirmed because where a determination is not made within the relevant time limit, the only relief that a claimant seems to have under the Act is that for which s 26 applies, namely, to withdraw the application and make a new application. However, by s 26(3) that course may only be taken within five business days after the claimant becomes entitled to withdraw the previous adjudication application. Relevantly for present purposes, that means that the application must have been withdrawn within five days of the expiry of the s 21(3) time period. It would be, to put it mildly, anomalous if the effect of non-compliance with the time period allowed by s 21(3) were to render any subsequent adjudication a nullity, but if because of non-compliance of s 26(3) the claimants were unable to seek adjudication of the dispute. That would not seem to me an outcome consistent with the evident objects of the legislation and, therefore, something to be avoided unless no other view is available."

[51] The first thing to note is that the New South Wales legislation which McDougall J was construing was similar to the Victorian provisions which I have outlined at [36] above. The Queensland provision is distinctly different. The second thing is that, with respect, the analysis is not entirely logical. Certainly in relation to the Queensland provision I would prefer that which I have outlined at [24]-[26] above.

[52] In *MPM,* McDougall J also relied upon the choice given to a claimant to withdraw the application if a decision was not given within time, as showing that the original adjudication must remain live or extant for otherwise, as he put it, there would be nothing to withdraw. As already discussed, the Queensland provisions contrast and, as explained above, give a strong textual indication that the opposite conclusion to that reached by McDougall J was intended.

[53] The second decision of McDougall J is *Cranbrook School v JA Bradshaw Civil Contracting*.[14] McDougall J's views in this case were *obiter.* He referred to *MPM Constructions* (above); gave the view which I have extracted at [45] above, and made a further point:

> "[64] Further, it is to be noted that the primary obligation imposed by s 21(3) 'is to determine an adjudication application as expeditiously as possible.' If the requirements of s 21(3) were jurisdictional, then an adjudicator might act outside

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14 (Above).

> jurisdiction if, for example, he or she decided within the 10 business day period but not as quickly as could have been done. That is an unlikely proposition."

[54] Quite frankly, I think the hypothetical point imagined by McDougall J is rather unlikely. In any case, in the BIFA the obligation to decide the adjudication "as quickly as possible" is contained in a separate section – s 84(1) – to the obligation to decide within a specified time limit – s 85(1). It may well be that the obligation contained at s 84(1) is not mandatory because it cannot be said to have the same "rule-like" quality that the obligation at s 85(1) has.[15] In any event, in Queensland, it is s 85 which is to prevail; the obligation in s 84 is expressly subject to that in s 85.

[55] The point under consideration here was also considered in *obiter* remarks of Hammerschlag J in *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd.*[16] Hammerschlag J remarked that, "In the absence of clearer appellate guidance to the contrary of McDougall J's holdings, I would follow His Honour. I consider his conclusion to be correct." At [61] Hammerschlag J offered, *obiter*, an additional consideration which I do not find compelling.

[56] As stated above, I conclude that the decision of the second respondent is void because it was delivered after the statutory time limit imposed by s 85(1) and s 86(2)(a).

[57] Having regard to s 95(6), I do not think the adjudicator is entitled to be paid any fees. I see the provision at s 95(8) (above). I accept that it applies here because the circumstances are within the introductory words – ie, I have found that the adjudicator's decision is void. However, I must say that the language of the remainder of that subsection is more suited to a situation where an adjudicator delivers a decision in time but the decision is void because he or she has made some other jurisdictional error, for example, taking into account an irrelevant consideration – see the repeated phrase, "adjudicating the application". However, in my view here the adjudicator cannot be said to have acted "in good faith", as required by the subsection, in relation to the very matter which rendered the purported decision void. The adjudicator was well aware of the time limit for his determining the adjudication. I accept the applicant's submission that on 28 November 2019 the second respondent represented that he had made a decision within time, namely 24 October 2019, when that was not in fact the case.

Did the First Respondent Hold the Appropriate Licence?

[58] It is strictly unnecessary for me to determine this point but, having regard to the fact that the matter was fully argued before me, I will deal with it.

[59] The *Queensland Building and Construction Commission Act 1991* (the QBCCA) provides at s 42:

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15 A similar point was posited by Riordan J in *Ian Street Developer Pty Ltd* at first instance – (2018) 54 VR 721, [95]. Again the provision which Riordan J did not consider "rule-like" is not found in the Queensland Act.

16 [2017] NSWSC 1121 at [54]ff.

"**42 Unlawful carrying out of building work**

(1) Unless exempt under schedule 1A, a person must not carry out, or undertake to carry out, building work unless the person holds a contractor's licence of the appropriate class under this Act.

…

(3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.

…"

[60] The term "building work" is defined in Schedule 2 to the QBCCA:

"***building work*** means–

(a) the erection or construction of a building; or

…

but does not include work of a kind excluded by regulation from the ambit of this definition."

[61] The term "building" is also defined in Schedule 2 as meaning, "generally, includes any fixed structure". The statute gives examples of fixed structures: "a fence other than a temporary fence; a water tank connected to the stormwater system for a building, an in-ground swimming pool or an above-ground pool fixed to the ground". Those examples show that that definition is not concerned with what a building might be in common parlance.

[62] It is not controversial between the parties that the first respondent held only one relevant licence and that is what the regulations call, "Builder restricted to structural landscaping licence".[17] The scope of work permitted by such a licence is as follows:

"**Scope of work**

(1) Prepare, fabricate and erect carports, decking, fences, gates, gazebos, ornamental structures, pergolas, ponds and water features, prefabricated sheds, including associated concrete slabs, with a floor area of not more than $10m^2$, and retaining walls and structures.

(2) Construct artificial landform structures requiring a fabricated internal structure.

(3) Prepare site, excavate, lay paving or concrete associated with landscaping.

(4) Install irrigation for landscaping works.

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17 Schedule 2 Part 10 to the *Queensland Building and Construction Commission Regulation 2018* (QBCC Regulations).

(5) Install, erect and construct playground equipment.

..."

[63] The scope of dispute between the parties was relatively limited. The parties accepted that unless the first respondent could show that its landscaping licence was an appropriate one, or show that the work it performed was exempt under a regulation, it could not recover under the contract it had with the applicant, and the adjudicator had made a jurisdictional error in thinking that it could.[18]

[64] It was only a minor part of the works promised under the contract which was contended to be outside the terms of CCA's licence. It can conveniently be called the bus stop works. The contract between the parties is found in a collection of documents which is the first exhibit to Court Document 4. The contract was for an amount of around $1.3 million. The contract was for the undertaking of civil works as part of a small subdivision situated off Foxwell Road, Coomera. The project description at p 50 of the exhibit bundle is as follows:

"**1.4 PROJECT DESCRIPTION**

This Contract includes the supply of all materials, plant and labour to construct.

The works of this Contract include without necessarily being limited to the following:

(a) Site clearing operations in accordance with current tree-clearing approval;

(b) Construction of approximately 23,500 cubic metres of bulk earthworks;

(c) Construction of approximately 180 lineal metres of roadworks (8.0m K-K) including associated stormwater drainage;

(d) Construction of approximately 250 lineal metres of road widening;

(e) Construction of approximately 230 lineal metres of potable water mains;

(f) Construction of approximately 620 lineal metres of gravity sewerage reticulation mains."

[65] It would appear that the work at cl 1.4(c) was earthworks to shape what was planned to become a new road (Galaxy Drive) within the new subdivision, and that the work at cl 1.4(d) was road widening along Foxwell Road, which existed as a sizeable bitumen road well before this subdivision came into existence.[19]

[66] As part of the road widening work at cl 1.4(d), the first respondent removed a very simple metal garden-style seat fixed to the concrete footpath next to a pole with an

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18 *Sutton v Zullo Enterprises Pty Ltd* [2000] 2 Qd R 196; *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd & Ors* [2012] QSC 158.

19 See the photographs at p 491ff of the exhibit bundle to Court Document 6.

official bus stop sign on it, on the Northern side of Foxwell Road.[20] It undertook paving work, retaining wall work and fencing (all of which work is accepted to be within its licence). It then re-fixed the simple garden seat to the new concrete paving it had created.[21]

[67] On the Southern side of Foxwell Road there was, before the subdivision, a small, very simple, prefabricated metal shelter with a metal bench seat attached to its back wall. The shelter was fixed to the concrete footpath. CCA removed this shelter and relocated it to a different place on Foxwell Road at a temporary bus stop established for use during the roadworks. The shelter was then relocated to its original position fixed to a new concrete footpath.[22] A tubular piece of metal in the shape of a "U" was fixed to the footpath beside the original shelter for use as a bike rack. It was removed and fixed to the new footpath next to the shelter in its final position. It stands about one metre high, and is about 80 centimetres long.

[68] The bus stop work was part of the contract: the bill of quantities, at item 22, under the heading, "Part C – roadworks", included, "supply all material and construct bus stop to match existing …". The bill of quantities showed that two such items were required at a cost of $18,853.90 each; a total of $37,707.80.[23]

[69] When one considers the work actually done by the first respondent, it appears to be somewhat different from that described in the bill of quantities, but neither party relied upon that. Nor did either party rely on the absurdity that, in a contract worth about $1.3 million, the bus stop works were minor both in a monetary sense, and so far as their complexity was concerned.[24]

[70] The point taken on behalf of the applicant was that the bus stop works were buildings within the QBCCA definitions; they were structures fixed to the land. Therefore, it was said, the structural landscaping licence was of an inappropriate class and the first respondent was not entitled to be paid under the contract.

[71] Having regard to the scope of works in the definition of structural landscaping licence at Schedule 2 to the QBCCA, it was accepted by the applicant that the earthworks and paving necessary to construct the areas to which the bus stop works are fixed were within the landscaping licence.

Prefabricated Sheds

[72] In my opinion, work involving the prefabricated metal shelter on the Southern side of Foxwell Road fell within the definition of work in "prefabricated sheds" at item (1) of the scope of works for the landscaping licence described in Schedule 2 Part 10 to the QBCC Regulations. Various definitions of shed in various dictionaries were referred to. I prefer that in the *Macquarie Dictionary*, 2nd revision, 1987: "A slight or rough structure built for shelter, storage, et cetera." That is a very apt description, in my opinion, of the metal structure built at the bus stop on Foxwell

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20 Page 491 of the exhibit bundle to Court Document 6.

21 Ibid.

22 Pages 492 and 493 of the exhibit bundle to Court Document 6.

23 The bill of quantities was part of the contract between the applicant and the first respondent at p 17 of exhibit bundle to Court Document 4.

24 Both parties were content to rely upon the decision of McMurdo J in *Dart Holdings* (above), that such absurdity is irrelevant in cases such as these.

Road. The shed is partly open. Its purpose is obviously to provide shelter to bus passengers.

[73] I do not accept, as was contended by the applicant, that a shed is something built only for storage. Nor do I accept that the structure built so that passengers waiting for buses are shaded from the sun and protected from rain is something called a bus stop or bus shelter, but is not a shed. Whatever terms may be used to refer to it in common parlance, in substance it is a shed. So far as the Southern bus stop is concerned, the seat for passengers to use was part of the shed structure.

[74] The words "restricted to landscaping" in the heading to Schedule 2 Part 10 of the QBCC Regulations do not restrict the type of sheds which fall within item (1) of the scope of works to sheds in domestic, rural, or aesthetic environments. In an urban environment, a shed which shelters passengers waiting for a bus is as much a part of the landscape as any other shed.

[75] For these reasons I think that work on the shed was within CCA's licence. However, this does not solve the first respondent's problems, for there remains the question of the bike rack adjacent to the shed at the Southern bus stop, and the small simple seat at the Northern bus stop. These are not sheds, but are fixed structures.

Busways

[76] Item 13 of Schedule 1 to the QBCC Regulations exempts what it calls "work on busways and tunnels" from the definition of building work. Item 13 provides:

> "**Work on busways and tunnels**
>
> (1) Construction, maintenance or repair of a busway or a tunnel for a busway.
>
> (2) In this section –
>
> ***busway*** means –
>
> (a) a route especially designed and constructed for, and dedicated to, the priority movement of buses for passenger transport purposes; or
>
> (b) places for the taking on and letting off of bus passengers using the busway; or
>
> (c) a causeway or culvert in, on, or under a busway that is associated with the busway; or
>
> (d) a structure in, on, or under a busway that is associated with the busway."

[77] I had wondered whether all the bus stop work was within this regulatory exception. The photographs at pp 491, 492, 493 and 494 of Court Document 6 show that the bitumen carriageway comprising Foxwell Road consists of one vehicle lane in either direction and that to the left of those lanes, at both bus stops, there is a dedicated part of the bitumen road, marked in yellow on the bitumen, making a safe place for the taking on and letting off of bus passengers at the bus stop, to substantially use the words of (2)(b) of the item 13 definition.

[78] However, I accept the applicant's submissions that despite the sub-paragraphing structure at (2) of item 13, it is necessary to find something which falls within the definition at (a) as a preliminary matter, and that subparagraphs (b), (c) and (d) expand that primary definition, rather than being independent parts of the definition. While there is clearly an area which satisfies paragraph 2(b) of item 13, I do not think there is, independently of that, an area which satisfies paragraph 2(a) of that item.

Roads

[79] It was argued by the first respondent that the bus stop works were all within the exception at item 14 of Schedule 1 to the QBCC Regulations. That item provides that the following work is not building work as defined:

> "**14 Work on roads and tunnels**
>
> (1) Construction, maintenance or repair of a road or a tunnel for a road.
>
> (2) In this section–
>
> …
>
> ***road***–
>
> (a) means an area of land–
>
> (i) whether surveyed or unsurveyed, dedicated, notified or declared to be a road for public use; or
>
> (ii) whether surveyed or unsurveyed, taken under an Act, for the purpose of a road for public use; or
>
> (iii) developed, or to be developed, for the public use of driving or riding of motor vehicles; 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
>
> (iii) a structure in, on, or under a road that is associated with the road; …
>
> …"

[80] The first respondent's argument involves two steps. First it is said that Foxwell Road was a road as defined. Then it is argued that the bus stop works on the footpath adjacent to Foxwell Road could be described as structures in or on Foxwell Road within the meaning of item 14(2)(b)(iii). I will deal with each of these points in turn.

The Definition of Road

[81] The definition in item 14(2)(a)(i) is almost identical to the definition of "road" in s 93 of the *Land Act 1994*. In *Ooralea Developments Pty Ltd v Civil Contractors (Australia) Pty Ltd*[25] Daubney J had this to say about the definition (similar to item 14(2)(a)(i)) in the BCIPA:

> "[44] … In my view, the words 'dedicated', 'notified' and 'declared' are terms of art in connection with the creation of roads, and ought be understood according to their received meanings. It is, I think, no accident that the definition of 'road' in s 5 of the *QBSA Regulation* is identical to the definition of 'road' in s 93 of the *Land Act* 1994. That section defines the meaning of the term 'road' for the purposes of Ch 3 Pt 2 of the *Land Act*. There are specific provisions of the *Land Act* which regulate the dedication of roads – see, for example, s 94. The legislation also makes provision for the relevant Minister to make declarations with respect to roads – see, for example, s 96(3). Section 95 of the *Land Act* provides to the effect that the land in all roads dedicated and opened for public use under repealed *Land Act* legislation remain vested in the State. The concepts of dedication, notification and declaration in connection with the creation of roads were expressly taken up by s 362(1) of the *Land Act* 1962 (as amended), which provided:
>
> > 'The Minister, with the approval of the Governor in Council, may by **notification** published in the Gazette, **declare** any Crown land open as a road for public use and such land shall thereby be **dedicated** as a road accordingly.' (emphasis added)
>
> [45] It is also notable that the *Land Title Act* 1994 makes express provision for the dedication of land to public use, including roads, in the registration of plans of subdivision – see particularly ss 50 and 51. Section 54(1) of the *Land Title Act*, moreover, expressly provides that: 'The registered owner of a lot may dedicate the lot as a road for public use by the registration of a dedication notice.'
>
> [46] In *Attorney-General (NSW) v Brewery Employees Union of New South Wales*, O'Connor J said:
>
> > 'Where words have been used which have acquired a legal meaning it will be taken, prima facie, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context. To use the words of Denman J in *R v Slator* (1881) 8 QBD 267 at 272: "But it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well known legal term".'

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25 [2015] 1 Qd R 311, [44]ff.

> [47] In my view, the phrase 'dedicated, notified or declared to be a road for public use' is clearly a reference to the mechanisms for the creation of roads for public use pursuant to the legislative provisions to which I have referred. …" (citations and footnotes omitted).

[82] With respect, I agree with these passages. However, it is important to read them in the context of the factual question which Daubney J decided in *Ooralea.* In that case the contractor claimed payment for performing roadworks on private property – [41]. The property was one for which a subdivision approval had been issued by the local authority, and the BCIPA adjudicator assumed the work carried out would one day become a small road within the subdivision. Daubney J's decision was that at the time the contract was made, the area which might in the future become a road was not yet a road as defined – it had not been dedicated, notified or declared to be a road. Therefore the equivalent provision to item 14(2)(a)(i) did not apply – [48] of *Ooralea*.

[83] After the decision in *Ooralea,* the statutory exception to building work was widened to include, "an area of land … to be developed for the public use of driving or riding motor vehicles" – see the current provision at item 14(2)(a)(iii) of the QBCC Regulations. That is, the problem which prevented the claimant in *Ooralea* recovering payment under the contract was corrected.

[84] The expanded definition added at item 14(2)(a)(iii) does not avail the first respondent here for, while the bitumened section of Foxwell Road would fall within the definition, "an area of land … developed … for the public use of driving or riding of motor vehicles", the first respondent wishes to contend that the footpath area is part of the road (what I have described as the second step of the argument at [80] above). The first respondent must therefore rely on item 14(2)(a)(i); that is, the equivalent provision to that considered in *Ooralea.*

[85] The applicant submitted that there was no evidence that Foxwell Road fell within the definition at item 14(2)(a)(i) of the schedule because there was no evidence that Foxwell Road had been dedicated, notified or declared to be a road for public use. The first respondent produced no evidence at all of the road having been formally dedicated at any time. The applicant's solicitor swore to having carried out extensive searches and not finding any evidence of any formal dedication by Gazette notice – t 1-30.

[86] The first respondent's case was that Foxwell Road was a land "… dedicated … to be a road for public use …" within the meaning of item 14(2)(a)(i). The first respondent's arguments in that regard were:

(a) Foxwell Road was "…a road which existed prior to the development and was recorded on the plan of survey as a road and used as a public road."[26]

(b) "Foxwell Road has been recorded on a registered plan of subdivision in accordance with s 50(1)(a) of the *Land Title Act 1994* (Qld). The effect of dedicating land for a road on registration of a plan is that, upon registration, the road is open for public use."[27]

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26 Written submissions, paragraph 40.

27 Written submissions, paragraph 43.

(c) Section 79(b) of the *Land Title Act* meant that because there were registered plans which showed Foxwell Road, this was conclusive evidence that it was a road as defined in the relevant item.

[87] I deal with the second of those arguments first. The significant factual distinction between this case and *Ooralea* is that *Ooralea* was concerned with a proposed new road inside a proposed new subdivision. Here, Foxwell Road is a very old road. It has been in existence since 1865 at least, see below. Foxwell Road is a long and fairly significant road. As land contiguous to it has been developed, various parts of Foxwell Road have been shown, incidentally, on registered plans of those new subdivisions. It is these plans which the first respondent relies upon as the factual basis for this argument.

[88] Clearly enough in my view, the mere incidental depiction of Foxwell Road on these plans of subdivision is insufficient to dedicate Foxwell Road as a road for public use within the meaning of s 94(4) of the *Land Act 1994* (Qld) or s 51 of the *Land Title Act.* In none of the plans was Foxwell Road shown as a new road which was part of the subdivision, and on none of the plans is the entirety of Foxwell Road shown.

[89] When I asked for authority to support the first respondent's argument, a reference to the case *Permanent Trustee Co of New South Wales Ltd v Campbelltown Municipal Council*[28] was provided. The case is not authority for the proposition advanced by the first respondent. It is a case concerning the depiction of the entirety of a new road on the plan of subdivision which created the road. The question at issue in that case was whether or not that depiction was evidence of common law dedication of the road.

[90] For these reasons I reject argument at [86](b) above.

[91] I also reject the argument at [86](c) above. Having regard to the words of s 79(b), the depiction of Foxwell Road is not deemed to be conclusive evidence of its dedication as a road within the meaning of item 14(2)(a)(i).

[92] I turn to the argument at [86](a). There is no evidence that Foxwell Road was ever notified or declared to be a road for public use under any statute, or in any formal way. I interpret the first respondent's argument to be that the road was dedicated to public use at common law and that the evidence of this is found in its depiction on Survey Plan W.31.1. , dated 25 March 1865.[29]

[93] As noted by Daubney J in [44] of the passage from *Ooralea,* above, the current *Land Act* makes provision for the dedication of roads, as did its 1962 predecessor. Again, as is noted by Daubney J in *Ooralea* above, the *Land Title Act* also makes express provision for the dedication of public roads – ss 51 and 54(1). The difficulty is that Foxwell Road is such an old road it is most unlikely to have been dedicated under any of these Acts.

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28 (1960) 105 CLR 401.

29 Affidavit Speechly filed 31 January 2020, exhibit 1. Although the writing on this plan is very small, it is possible to see Foxwell Road in the same position it is currently by comparison with portions 50, 51 and 53 on that document and SGS13 to Court Document 18. In any event, the applicant does accept that Foxwell Road is shown on this plan; see paragraphs 1 and 9 of the applicant's supplementary submissions dated 7 February 2020.

[94] Queensland became a separate colony in 1859. Clause III of the Queensland *Crown Lands (Alienation of) Act* of 17 September 1860[30] provided, "It shall be lawful for the Governor with the advice of the Executive Council by proclamation in the Gazette to declare what portions of crown lands shall be set aside as the sites of new cities towns or villages and also to declare what lands shall be reserved from sale for any public purpose …".[31] I interpret this as allowing roads to be set aside by an act of the Governor in Council. This power was continued in the Land Act of 1897.[32] That Act provided at s 19, "The Governor in Council may by proclamation set apart any Crown lands as Town Lands, or Suburban Lands, or as Township Reserves or as Reserves for public purposes". The same power was continued by the *Land Act 1910.*[33] The judgment of Drummond J in *Fourmile v Selpam Pty Ltd*[34] explains the historical practice of reserving areas for roads.

[95] Before 1860, *5 & 6 Victoria No. 36 1842* (Imp) – *An Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies* – provided for the sale of land in the Australian colonies by the Governor on behalf of the Crown, with reservations for roads – cl III. There was not any requirement to publish the reservations, for example in the Gazette. This Act remained in force until *18 and 19 Victoria No. 56 1855* (Imp), which repealed it.

[96] I have not found any legislation which governs the position between the 1855 Act of the English Parliament and the 1860 *Crown Lands (Alienation of) Act* in Queensland. Having regard to the terms of the 1855 Act, it seems to me the general law of New South Wales would have applied at that time. I work on the basis that the law was as set out in *Turner v Walsh* (below), namely that it made no specific provision for the creation of roads.

[97] Historically, dedication of a road by the owner of land was possible at common law. Both private individuals and the Crown could dedicate land as a road.[35] Dedication required that there be both an intention – whether express or implied – by the owner to dedicate the land as a public road, and an acceptance of that dedication by the public.[36] Evidence of dedication can be found in plans and maps showing an area as a road.[37] Public acceptance can be inferred from long, uninterrupted user.[38]

[98] The case of *Turner v Walsh* was an appeal from the Supreme Court of New South Wales to the Privy Council. At issue was the existence of a public road through a "plot of land purchased from the Crown under the provisions of the *Crown Lands Alienation Act*, 1861 [NSW]…" – p 639. The evidence was that:

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30 *24 Victoria, No. 15*.

31 See also cl XVI which provided for an act of the Governor in Council to close a road, and for that to be notified in the Gazette.

32 61 Victoria, No. 25.

33 See s 190-192 and cf s 196 of the *Land Act 1910.*

34 (1998) 80 FCR 151.

35 *Turner v Walsh* (1880-81) 6 App Cas 636. Section 83C, inserted in the *Local Authorities Act 1902* (Qld) in 1923, effectively abolished this ability in private persons, providing a statutory mechanism instead. Certainly by 1962 there was a statutory mechanism for dedication of land by the Crown; see s 362 of the *Land Act 1962,* at [81] above. I have not researched the situation between 1910 and 1962.

36 *Newington v Windeyer* (1985) 3 NSWLR 555, 559; *Permanent Trustee Co of New South Wales Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401, 420.

37 *Newington* (above) and the cases cited there.

38 *Newington* (above) and the cases cited there.

> "… for upwards of forty years [before the purchase] the road … had been constantly used by the public, by the police, by mail coaches, and by travellers in going up or down the Lachlan between Enabalong and Condobolin, and to numerous places, and that there was such a road to the knowledge of the Crown was amply proved by the production in evidence of the County map, which came out of the possession of the Crown, in which the road, though only specified as a track, was marked out." – p 637.

[99] The land-owner's point, rather like the point taken by the applicant here, was that notwithstanding this, "such track was never proclaimed or dedicated as a highway …" – p 637.

[100] The provisions of the *Crown Lands Alienation Act 1861* (NSW) were examined. This Act provided that the Governor in Executive Council could by notice in the Gazette, reserve or dedicate lands for any public road. A separate provision (which did not have an equivalent in the Queensland Act) provided that Crown lands could lawfully be dedicated to any public purpose under the provisions of the 1861 Act, but not otherwise. The Privy Council assumed that the effect of the two provisions combined was that, after 1861, any dedication of a road by the Crown was required to be by notice in the Gazette and not otherwise. However, on the facts of that case, there was evidence of use, as described above, for 21 years before the statute of 1861 came into operation. The Privy Council held that it was right to presume a dedication of the road by the Crown in these circumstances – p 639. On the evidence in that case, there was nothing to rebut the presumption – p 640.

[101] The Privy Council rejected the argument that *5 & 6 Victoria No. 36* (above [95]) in some way limited the power of the Crown to dedicate roads. Of that Act it was said, "These enactments leave Her Majesty's power with regard to public roads as it existed by the common law, and do not interfere with her right to dedicate lands for this purpose." – p 643.

[102] In the case before me, the 1865 plan, W.31.1, shows that Foxwell Road has been in its current position since at least 1865. Having regard to all the available evidence, on the balance of probabilities, I find that Foxwell Road is a dedicated road. I rely upon the 1865 plan. It is a surveyed plan and, importantly, a Crown plan marked as having been forwarded to the Surveyor-General's office. Foxwell Road is shown as a significant road, so long that it extends beyond the bounds of the surveyed area shown on W.31.1. It is shown to connect with other roads depicted on the plan. The road being of such length and significance, and it being in the same position as it presently is, is sufficient evidence to persuade me that it is likely to have been used as a public road at least since 1865.

[103] The size of road means that it is unlikely that it was ever dedicated by a private owner.[39] I think it more likely that it was originally surveyed and dedicated as a

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[39] Section 119 of the *Real Property Act* of 1861 dealt with dedication of private land as a road in a subdivision. Interestingly, the Acts allowing the Governor in Council to sell land in early Australia put limits on the number of acres which could be sold to one person; see, for example, cl XIII of the *Crown Lands (Alienation of) Act* of 1860 (Qld) which provided that no one should become the purchaser of more than 320 acres within the same agricultural reserve. Although, *5 & 6 Victorian No. 36*, 1842 (Imp), cl XV did envisage that blocks comprising 20,000 acres or more could be sold.

road by the Crown at common law. I think that the 1865 plan is evidence of intention to dedicate. The fact that the 1865 plan shows the road in its current position, together with the road's current use, and evidence such as that at RP167425 – registration of extra land taken in 1979 to widen Foxwell Road – is evidence of long user.

[104] If Foxwell Road were dedicated by the Crown before 1860, the Crown's power to dedicate the road falls squarely within the authority of *Turner v Walsh.* If the road was dedicated after the *Crown Lands (Alienation of) Act* of 1860 in Queensland, a question arises as to whether or not common law dedication was possible. Unlike the New South Wales Act examined in *Turner v Walsh,* the Queensland Act did not contain a provision that it contained the exclusive way in which land might be dedicated to public purposes, and I cannot see anything else in the 1860 Act which would limit or destroy the ability of the Crown to dedicate land at common law; clear words would be needed to do so.

[105] In these circumstances, while the matter is not pellucidly clear, it seems to me more likely than not that Foxwell Road is a dedicated road within the meaning of item 14(2)(a)(i) of Schedule 1 to the QBCC Regulations. I think it was likely dedicated at common law in the 1860s. It should be too obvious to need clarification, but I will note that my decision is consistent with that in *Ooralea.* The land in that case was required to be dedicated in conformity with the current statutory provisions. Here land dedicated in accordance with the law existing at the time of its dedication became a dedicated road and is within not only item 14(2)(a)(i) of Schedule 1 to the QBCC Regulations, but also within the current definitions in the *Land Act* and the *Land Title Act*.

[106] I turn to the second limb of the argument advanced on behalf of the first respondent, [80] above, that the bus stop works were in or on Foxwell Road within the meaning of item 14(2)(b)(iii) of that schedule. I am against the first respondent on this point. While someone on a footpath may in colloquial parlance be said to be in or on a road, I hesitate to embrace the notion that the words in item 14(2)(b)(iii) were used in this colloquial and slightly non-literal sense. In any case, I think the matter is put beyond doubt because the very next item in Schedule 1 to the QBCC Regulations specifically deals with footpaths:

> "**15 Work on bikeways and footpaths**
>
> (1) Construction, maintenance or repair of a bikeway or footpath or a tunnel for a bikeway or footpath.
>
> (2) In this section–
>
> …
>
> ***footpath***–
>
> (a) means a path that has as 1 of its main purposes the public use of the path by pedestrian traffic; but
>
> (b) does not include a path contained within private property."

[107] It seems to me that where Schedule 1 has made specific provision for work on roads at item 14, and work on footpaths at item 15, the word road, where used in item 14, should not be interpreted as including footpath. Unfortunately for the first respondent, while structures in, on or under a road are excluded from the definition of building works, there is no similar provision in relation to structures in, on or under footpaths.

[108] In conclusion, as to the licensing point, it seems to me that the applicant is correct in its contention that the first respondent was not licensed to perform the bus stop works.

[109] Focussing only on the licensing issues raised by this case, my conclusion is a result of stochastic and illogical provisions in the schedules to the QBCC Regulations and produces a result which, although it may be correct in law, is absurd in reality: the first respondent was licensed to demolish, move and reassemble a prefabricated bus shelter, but not licensed to carry out the same actions in relation to the much simpler structures of a freestanding bus seat and bike rack. Again, focussing only on the licensing issues, the result is not that the first respondent cannot be paid for those very small items of work, but that the first respondent cannot be paid for work under a contract worth $1.3 million. I invite the renewed attention of the Legislature to the need for establishing a rational and fair law in relation to recovery of payment under contracts to perform building works.

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