SUPREME COURT OF QUEENSLAND

CITATION:	*Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QCA 177
PARTIES:	**NICLIN CONSTRUCTIONS PTY LTD** ACN 614 074 065 (appellant) **v** **SHA PREMIER CONSTRUCTIONS PTY LTD** **ACN 056 777 318** **(first respondent)** **CHRISTOPHER TAYLOR** **Adjudicator No. 1023553** **(second respondent)**
FILE NO/S:	Appeal No 2759 of 2019 SC No 786 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 91 (Ryan J)
DELIVERED ON:	6 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2019
JUDGES:	Gotterson and Philippides JJA and Applegarth J
ORDERS:	**1. The appeal be dismissed.** **2. The appellant pay the first respondent's costs of and incidental to the appeal, including the applications to adduce further evidence relevant to the question of remitter.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – OTHER MATTERS – where the appellant failed to serve the respondent with its adjudication applications until 12 business days after the applications were lodged – where the adjudicator concluded he did not have jurisdiction to decide the applications because there had not been effective service in accordance with s 21(5) of the *Building and Construction Industry Payments Act* 2004 (Qld) – where the appellant sought a declaration that the decisions of the adjudicator were void – where the primary judge found that compliance with s 21(5) is required for a valid adjudication decision – where

s 21(5) contains no express timeframe for service – where the primary judge applied s 38(4) of the *Acts Interpretation Act* 1954 (Qld) and found service must occur "as soon as possible" after lodging an application – where the appellant submits that the primary judge erred in in applying s 38(4) and in finding that 12 business days was not as soon as possible – whether service of an adjudication application as soon as possible after it is made is necessary to confer jurisdiction on an adjudicator – whether service of an adjudicator's application twelve business days after the adjudication application was "as soon as possible"

Acts Interpretation Act 1954 (Qld), s 38(4)
Building and Construction Industry Payments Act 2004 (Qld), s 21(5), s 21(6)

Attorney-General (Qld) v Australian Industrial Relations Commission (2002) 213 CLR 485; [2002] HCA 42, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, cited
R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397, cited

COUNSEL: S B Whitten with C H Matthews for the appellant
M H Hindman QC, with H Clift, for the first respondent
No appearance for the second respondent

SOLICITORS: CDI Lawyers for the appellant
Thomson Geer for the first respondent
No appearance for the second respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by Applegarth J for the reasons given by his Honour.

[3] **APPLEGARTH J:** The issue in this appeal is whether an adjudicator under the *Building and Construction Industry Payments Act* 2004 (Qld) and the primary judge were correct to conclude that the appellant did not serve certain adjudication applications, as required by s 21(5) of the Act, with the consequence that the adjudicator did not have jurisdiction to decide the adjudication applications. That general issue involves a question of statutory construction and also a question of fact.

1. Does s 38(4) of the *Acts Interpretation Act* 1954 (Qld) ("*AIA*") apply to s 21(5) of the Act so that the applicant was required to serve the adjudication application "as soon as possible"?

2. If so, was service on 14 December 2018 "as soon as possible" after the applications were lodged on 28 November 2018?

Both questions arise in the context of legislation which provides for the expeditious resolution of disputes over payments.

Background

[4] The appellant (Niclin) was engaged by the respondent (SHA) to design and construct four petrol stations at Nanango, Tinana, Charleville and Southbrook. On 6 November 2017 the appellant and respondent entered into three construction contracts for petrol stations to be built at Nanango, Tinana and Charleville. The Southbrook contract was entered into on 15 January 2018. On 28 November 2018, after payment claims and payment schedules were delivered under each of the four contracts, Niclin lodged four separate adjudication applications with the Queensland Building and Construction Commission. A copy of an adjudication application *must* be in the approved form and *may* contain the submissions relevant to the application the claimant chooses to include.[1]

[5] Section 21(5) of the Act states:

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

Niclin did not serve the adjudication applications shortly after it lodged them. Instead, on the same day as it lodged the adjudications applications, its solicitors delivered to the solicitors for SHA 10 lever arch folders of documents in support of its applications. Due to a mistake, the adjudication application in the approved form for each application was not included in the material that was served upon SHA's solicitors.

[6] The QBCC, as registrar, referred the applications, as soon as practicable, to the second respondent to be an adjudicator. On 4 December 2018 the adjudicator emailed the solicitors for each of the parties with a notice confirming that he had accepted the adjudication applications. In his letters dated 4 December 2018 the adjudicator requested Niclin to provide him by return email correspondence "evidence of service on the Respondent of the Adjudication Applications for each claim." Niclin did not do so.

[7] In its 13 December 2018 adjudication responses for the Nanango, Tinana and Charleville matters,[2] SHA submitted, among other things, that each of the three adjudication applications was invalid because SHA had not been served with a copy of the adjudication application, particularly the application for adjudication in the approved form. This was the first time that Niclin or its solicitors realised that the approved form in relation to the Nanango, Tinana and Charleville adjudication applications had not been served on SHA. On 14 December 2018 it served on SHA a copy of the application in the approved form for the Nanango, Tinana and Charleville adjudication applications.

[8] On 18 January 2019, after seeking and obtaining further submissions from Niclin and SHA about the operation of s 21(5) and whether the adjudication applications had been validly served, the adjudicator concluded that there had not been effective service of the Nanango, Tinana and Charleville adjudication applications under s 21(5). In essence, he concluded that service of an adjudication application on a respondent is an essential preliminary to the decision-making process for which

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1 The Act, s 21(3).

2 For reasons which are not presently important the Southbrook contract claim and the adjudication process in respect of it proceeded differently to the three other adjudication applications. However, a similar service issue arises in that case.

the Act provides. It triggers, and sets the time limit for, the respondent to give an adjudication response. The adjudicator concluded that the applications were not served on SHA within the time stated in s 38(4) of the *AIA*. The subsequent service of those applications on SHA on 14 December 2018 did not cure the defective service. Because the adjudication applications had not been served, as required by s 21(5), the adjudicator concluded that he was not seized of jurisdiction to decide any of the three adjudication applications.

The proceeding in the Trial Division

[9] Niclin filed an originating application in the Supreme Court seeking, among other things, a declaration that the decisions of the adjudicator dated 18 January 2019 were void, and consequential orders for the adjudication applications to be remitted. The originating application sought a declaration that, on the proper construction of s 21(5) of the Act, the three applications and also the Southbrook adjudication application had been validly served on the second respondent. Little need be said about the Southbrook application since the point of statutory construction is the same. As to the facts, SHA delivered an adjudication response in respect of the Southbrook adjudication application on 22 January 2019. On 24 January 2019 Niclin's solicitors served SHA's solicitors with a copy of the approved form filed with the QBCC on 28 November 2018 in respect of the Southbrook adjudication application.

[10] The originating application was set down for a final hearing on 11 February 2019 and leave was granted to amend it. The primary judge heard substantial arguments on 11 February 2019 and, with commendable dispatch, delivered her judgment on 18 February 2019.[3] In short, the primary judge decided that compliance with s 21(5) is required for a valid adjudication decision, and that compliance with s 21(5) requires service of the adjudication application upon the respondent "as soon as possible" after the application is lodged with the Registrar.

[11] On the point of statutory construction as to the time required for service, Niclin submitted to the primary judge that no time limit is provided in s 25(2) when a time limit could have easily been provided. Reliance on the *AIA* was submitted to not sit within the context of the time frames which are expressed in the Act in relation to other procedural steps. The primary judge rejected this argument and concluded that, in circumstances in which s 25(2) did not provide a time frame for service, it was appropriate to rely upon the time frame provided by the *AIA*, bearing in mind the nature and purpose of the legislation. As a result, service was to be as soon as possible after the application was made, and that had not occurred in this case.

[12] The primary judge also gave detailed consideration to the consequence of a failure to effect service, as required under s 21(5), on the jurisdiction of the adjudicator to decide the adjudication applications. Because of the issues which were argued in the appeal, it is unnecessary to detail her Honour's reasoning. In short, and in the context of an Act which requires compliance with tight time frames, service of the adjudication application, irrespective of its content, was said to provide a reference point for the calculation of time requirements for an adjudication. It was an important requirement in the context of the scheme. The primary judge cited a leading authority to the effect that the Act gives valuable rights to builders. Those

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3 *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91.

rights depend on strict observance of the Act's specifications of time and other requirements.[4]

[13] Her Honour considered the statutory scheme and relevant authorities and concluded in respect of the legislative scheme:

> "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."[5]

[14] Having concluded that the *AIA* applied so as to require service "as soon as possible" after the application was made, the primary judge noted that the requirement of "as soon as possible" contains some flexibility. However, in the context of a statutory scheme that imposes "brutally fast time frames" and in the circumstances of this case, service within 12 business days was not "as soon as possible" after the adjudication application was lodged. The primary judge concluded that the adjudicator correctly decided the matter of his jurisdiction, and dismissed Niclin's application.

The appeal

[15] Niclin in its notice of appeal contends that the learned primary judge erred in finding that:

1. s 21(5) requires service of the adjudication application upon the respondent as soon as possible after the application is lodged with the Registrar;
2. service was not effected in accordance with the Act;
3. the service effected by the applicant resulted in the adjudication application being rendered invalid;
4. the adjudicator correctly decided the matter of his jurisdiction.

The third ground might have been interpreted as challenging the learned primary judge's conclusion that "service under section 21(5) is required before an adjudication may be validly undertaken".[6] However, Niclin's submissions clarify that it does not cavil with that finding. Its submissions continue:

> "In fact, it is solely the act of service which triggers the time frame for commencement of the adjudication process. Absent service, the statutory time frame for each further step in the process does not begin".

[16] Niclin's appeal submissions are in two parts. The first contends that the primary judge erred in applying s 38(4) of the *AIA*. The absence of an express time frame in s 21(5) is submitted to strongly indicate an intention that the time provided for in s 38(4) not apply. Next, in circumstances in which s 21(5) is silent as to a time limit, and Parliament could have imposed an express time frame on service, the Parliament is said to have left it open to an applicant to decide when to effect service of the adjudication application on the respondent. Because the time frames

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4 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 437 [209] per McDougall J ("*Chase Oyster Bar*").

5 *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91 at p 16 ll 30-34.

6 At p 16 l 34.

for the other actors (the respondent and the adjudicator) to take steps do not begin until service is properly effected, Niclin argues that an applicant will only have itself to blame if the adjudication of its application is delayed. According to Niclin, an applicant which has been forced to lodge an application will not be expected to "delay inordinately because it suffers from being out of the funds for the claim for which it seeks an adjudication decision". The application of s 38(4) of the *AIA* is submitted to be inconsistent with the purpose of the Act. In the result, the primary judge is said to have erred in concluding that, as a matter of statutory interpretation, the service required by s 21(5) must be "as soon as possible".

[17] Niclin's second argument challenges the finding of fact that the adjudication application was not served "as soon as possible". A lapse of 12 days between the service of the balance of the application and the actual application is submitted to have been "as soon as possible", particularly where SHA did not seek to make further substantive submissions about the merits of the adjudication application after receipt of the copy of the application.

The absence of an express time frame in s 21(5)

[18] The absence of an express time frame on service in s 21(5) does not, in itself, indicate an intention to displace the time frame stated in s 38(4) of the *AIA*. Instead, the absence of an express period for service in s 21(5) means that s 38(4) applies, unless a contrary intention appears in the Act.[7] In *Attorney-General (Qld) v Australian Industrial Relations Commission*[8], Gleeson CJ stated:

> "Acts of Parliament are drafted, and are intended to be read and understood, in the light of the *Acts Interpretation Act*. A particular Act, and the *Acts Interpretation Act*, do not compete for attention, or rank in any order of priority. They work together. The meaning of the particular Act is to be understood in the light of the interpretation legislation. The scheme of that legislation is to state general principles that apply unless a contrary intention is manifested in a particular Act."

[19] The issue, then, is whether the Act as a whole or its specific terms manifest an intention that s 38(4) of the *AIA* should not apply, so as to leave the timing of service of an adjudication application a matter entirely for the claimant to decide. Niclin points to two matters: the purpose of the Act, and the presence of other time frames.

The purpose of the Act

[20] The Act seeks to preserve cash flow to a builder and alters the incidence of the risk of insolvency during the life of a construction contract.[9] The purpose of the Act is to benefit builders and contractors in the form of a statutory right to progress payments and an expeditious process for the making of claims and the referral of a disputed claim to adjudication.[10] Niclin contends that one of the benefits conferred by the Act upon a builder or subcontractor is the right to choose whether to serve the adjudication application lodged by it, and when to do so, thereby determining

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7 *AIA*, s 4.
8 (2002) 213 CLR 485 at 492-3 [8].
9 *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at 401 [40].
10 The Act, ss 7, 8.

the time within which a respondent may (if it wishes to do so) serve an adjudication response and, consequently, the time within which the adjudicator is required to deliver an adjudication decision.

[21] The comparable New South Wales legislation was described by McDougall J in *Chase Oyster Bar*[11]:

> "It provides extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses. It provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents…"

McDougall J observed that the legislation 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 legislation:

> "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."[12]

In a context in which a builder or subcontractor is given benefits by statute, there is no compelling reason why a "condition of the gift"[13] should not be the expeditious service of an adjudication application on the respondent.

[22] In the context of an Act with tight time frames, it is not apparent why the legislature would allow a claimant to take as long as it liked to serve an adjudication application which it had lodged, and to thereby trigger the timing of an adjudication response, leaving the respondent and the adjudicator in a state of suspense and uncertainty as to whether and when the adjudication process, initiated by the lodgement of the application with the registrar and the adjudicator's acceptance of appointment, will proceed. In the context of an Act which is concerned with cash flow in the building industry, such a state of uncertainty on the part of the respondent as to whether it should retain money to meet an adjudication decision which may never eventuate, or be delayed by the late service of the adjudication application upon it, seems inconsistent with the purpose of the Act. As Spigelman CJ observed in *Chase Oyster Bar*, the Act's provisions seek to ensure the expeditious resolution of any dispute with respect to payments in the building industry and it is:

> "commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value".[14]

[23] Niclin seeks to counter these points by submitting that, in reality, a building contractor that has lodged an adjudication application is unlikely to delay inordinately the service of the application because it suffers from being out of the funds in respect of which it seeks an adjudication decision. Nevertheless, Niclin is forced to argue that, as a matter of construction, the Act permits such a contractor to delay service of the adjudication application for as long as it likes.

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11 (2010) 78 NSWLR 393 at 437 [208].
12 At 437 [209].
13 At 441 [228] citing *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 277.
14 At 406 [47].

[24] The issue of interpretation may be framed as follows: why would the Parliament intend to allow *any* claimant to inordinately delay an adjudication process when the legislation is designed to ensure the expeditious resolution of a dispute about payment? The Parliament is likely to have intended a time for service consistent with the expeditious determination of an adjudication application which has been lodged with the registrar and referred to an adjudicator who has accepted the appointment.[15]

The presence of express time frames

[25] Niclin submits that, in the context of many time frames being expressed in the Act for various steps, the absence of any specific time frame for service of the adjudication application "strongly indicates a deliberate act by Parliament *not* to impose any time frame on an applicant to serve the application".

[26] One, however, is not concerned with an explanation for the absence of an express time requirement in s 21(5). The absence of an express time requirement presumptively calls for the application of the time requirement in s 38(4) of the *AIA*. Therefore, what must be explained by Niclin is why the (presumed) presence in s 21(5) of a time requirement to act "as soon as possible" is inconsistent with the Act, which includes a variety of time requirements imposed upon a claimant, a respondent, the registrar and an adjudicator. As discussed, the purpose of the Act does not support the submission that the requirement to serve an adjudication application upon a respondent should be subject to no time limit at all.

[27] The Act contains a number of time limits, many expressed in terms of days. Their presence raises the question of why the Parliament did not impose a similar, fixed period of say two or three days for service. Did it do so in order to have the demanding, but flexible, requirement to serve "as soon as possible" apply in the absence of such an inflexible period?

[28] The Act imposes time limits upon the service of a payment claim, a payment schedule, the making of an adjudication application and an adjudication response, and for the adjudicator to make a decision. A party that wishes to engage in the adjudication process is expected to meet these abbreviated time frames. It must arrange its affairs to meet those requirements. The provisions which fix a time limit in terms of days enable parties to plan, and for each party to know where it stands at any point in time (subject to potential factual disputes over whether service was effected within the time required).

[29] The Parliament might have imposed a time limit of say two or three days within which the claimant was required to serve an adjudication application upon a respondent. However, such an inflexible requirement would have no regard to circumstances which might make it impossible for a claimant to effect service within that specific time frame. For example, the remoteness of the respondent or problems in effecting service on a respondent who avoids service may make it practically impossible for the applicant to serve the adjudication application within two or three days. It would be inconsistent with the purpose of the Act in giving valuable commercial rights to builders and subcontractors if, through no fault of the claimant, it was not possible to effect service within a fixed period of say two days. A longer fixed period of say seven days may, however, be unnecessary in the vast majority of cases where it is possible to serve the adjudication application much

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15 The Act, ss 21(6), 23.

sooner, and thereby trigger the time period under s 24A by which the respondent must give the adjudicator the adjudication response.

[30] A requirement to serve the adjudication application "as soon as possible" imposes a demanding time frame, but one which has regard to relevant circumstances. In many cases service on the day or the day after the adjudication application is lodged will be possible, and therefore required. In some cases it will not be possible.

[31] A requirement to serve the adjudication application as soon as possible is more consistent with the purpose of the Act in ensuring the expeditious resolution of any dispute than a construction of s 21(5) which would allow a claimant to take as long as it chooses to serve an adjudication application upon a respondent. A requirement to serve "as soon as possible" permits regard to be had to the exigencies of service in a particular case. It avoids a builder or subcontractor being deprived of the benefit of the expedited adjudication process the Act provides in circumstances in which it would not be possible to serve the adjudication application within a short, fixed period of days. A time requirement in s 21(5) which allows some flexibility having regard to the circumstances surrounding service[16] is not inconsistent with time limits which are fixed in terms of days in other sections of the Act.

[32] Further, the presence by virtue of s 38(4) of the *AIA* of a requirement to serve an adjudication application "as soon as possible" is not inconsistent with the time requirement in s 21(6) by which the registrar must refer the application "as soon as practicable" to a person eligible to be an adjudicator. Subsections 21(5) and 21(6) concern different parties. Each has a different purpose. Neither states a term of days. The existence of a time requirement in s 21(6) which differs from the (presumed) time requirement in s 21(5) is consistent with the Parliament not intending to displace the time requirement which operates by virtue of s 38(4) of the *AIA* in s 21(5), but to displace it in s 21(6).

The potential for factual disputes

[33] Niclin points to the potential for factual disputes over whether an adjudication application has been served as soon as possible as a reason why the Parliament might have intended that such a presumed requirement should not apply. However, disputes over the fact of service or when service was effected (either in fact or in accordance with provisions which deem service to have occurred at a certain time) arise from time to time in the context of any legislative provision which requires service by a stated time, including the time requirements in the Act which are expressed in terms of days. These kinds of disputes are capable of resolution by an adjudicator. They are not necessarily complex. The question of whether an application was served "as soon as possible" is a question of fact. The potential for disputes over effective service is not a sufficient reason to conclude that the Parliament intended to displace the presumptive time requirement set by s 38(4) of the *AIA*, and to allow an unlimited time within which a claimant might serve on a respondent an adjudication application which it had lodged with the registrar.

Is a requirement to serve "as soon as possible" inconsistent with the purpose of the Act or its terms?

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16 Which would include a provision in the construction contract as to service of any such document: the Act, s 103(1).

[34] The application of s 38(4) of the *AIA* creates a strict time for service, which still allows the exigencies of service confronting a claimant in the circumstances of a particular case to be considered. These include the location of the respondent, the availability of modes of service provided for under the construction contract,[17] the provisions of s 39 of the *AIA* and the provisions of any other law about the service of notices.[18]

[35] The interpretation which best achieves the purpose of the Act is one which imposes a strict time for service, rather than one which imposes no time for service at all.

[36] A requirement to serve an adjudication application upon the respondent "as soon as possible" is not inconsistent with the Act's purpose or its terms. It is consistent with the Act's purpose of ensuring the expeditious resolution of disputes. The interpretation contended for by Niclin, which would allow a claimant to take as long as it likes to serve an adjudication application after lodgement, is unlikely to have been intended by Parliament, so as to displace the presumed application of s 38(4) of the *AIA*. The Parliament is unlikely to have intended to allow a claimant to delay the progress of an adjudication application for as long as it chooses, leaving the respondent and the adjudicator in a state of uncertainty about when the adjudication process will conclude. Such uncertainty would affect decisions by a respondent about cash flow, including whether it was necessary to retain a sum to meet a possible adjudication decision at some uncertain, future date. The existence of a requirement to serve an adjudication application "as soon as possible" advances the Act's purposes. It is an understandable condition on a claimant's right to engage an adjudication process which exists for the expeditious resolution of disputes.

[37] The primary judge was correct to conclude that the Act, by virtue of s 38(4) of the *AIA*, requires service of an adjudication application upon a respondent "as soon as possible" after the application is lodged with the registrar.

Was service on 14 December 2018 "as soon as possible" after the applications were lodged on 28 November 2018?

[38] Niclin served a copy of the adjudication application, being the approved form lodged by it, 12 business days after the application was lodged. Niclin challenges the primary judge's finding that in the circumstances of this case, and in the context of the Act, service within 12 business days was not "as soon as possible" after the adjudication application was made. In support of its argument it points to a number of facts including that:

- there is no prohibition on service of an adjudication application and material in support of it in two stages;
- it served the material in support on 28 November 2018, the same day as it lodged the application;
- after SHA was served with a copy of the application on 14 December 2018 (the day after it provided its adjudication response), SHA did not seek to make further substantive submissions about the merits of the application.

[39] Niclin accepts that the issue of whether an application was served "as soon as possible" is a question of fact, and submits that questions of degree may arise. It

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17 The Act, s 103(1).
18 The Act, s 103(2).

cites in that regard *R v Shea*[19] where the expression "as soon as possible" was considered in a different statutory context, namely an appeal by the Crown against the stay of a criminal proceeding. In response, Mr Clift of counsel, who argued this part of the appeal on behalf of SHA, pointed to the more analogous statutory context of an implied requirement for the giving of a notice under the *Subcontractors' Charges Act* 1974 (Qld) by a subcontractor with "all convenient speed". Thomas J (as his Honour then was) stated that it is a question of fact whether the notice has been given with all convenient speed, but a normal starting point is that "it should be done with a sense of commercial urgency."[20]

[40] Niclin's submissions on appeal do not engage with the matters relied upon by the primary judge in deciding the question of fact or SHA's appeal submissions on that question. These include:

- the question of whether service was "as soon as possible" arises in the context of an Act providing for expeditious resolution of adjudication applications;
- the approved form alerted Niclin to the need to serve the application after it was lodged with the registrar, and that proof of service should be provided to the adjudicator;
- the adjudication applications were promptly referred to the adjudicator who, having notified acceptance of the appointment, requested in his notice dated 4 December 2018 proof of service of the applications on the respondent;
- Niclin, through its solicitors, did not respond to that request;
- the requirement to serve SHA was not onerous, as demonstrated by Niclin's ability to serve the material in support of its application upon SHA's solicitors (who had instructions to accept service) on the same day as the adjudication application was lodged.

[41] In the circumstances of this case, in which SHA was legally represented and gave instructions to accept service, it was possible to serve the adjudication application the same day as it was lodged. Naturally, in other cases it may take longer.

[42] The factual question of whether service 12 business days after the adjudication application was lodged was "as soon as possible" is not to be confused with the question of whether Niclin acted promptly on and after 13 December 2018, when it realised that a mistake had been made, by effecting service of a copy of the adjudication application on 14 December 2018. The issue is not whether it took steps to "cure" the omission to serve "as soon as possible".

[43] The factual question decided by the primary judge was not concerned with the exercise of a discretion to extend time for compliance, including explanations for the delay and the existence or absence of any prejudice on the part of SHA because the adjudication application (as distinct from the substantial material in support of it) was not served as soon as possible.

[44] The primary judge did not err in concluding, in the context of an Act which seeks to ensure the expeditious determination of adjudication applications, and in the

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19 [2010] QCA 339.

20 *Ex parte Austco Pty Ltd* [1985] 2 Qd R 1 at 4.

circumstances of this case, that service 12 business days after the adjudication application was lodged was not "as soon as possible".

The question of jurisdiction

[45] As noted, Niclin does not cavil with the primary judge's finding that service under s 21(5) of the Act was required before an adjudication application may be validly undertaken. This makes it unnecessary to review that finding.

[46] Some parts of Niclin's submissions might, in isolation, have suggested that it resiled from that position. However, Niclin's argument was to the effect that on a proper construction of the Act, it was not required to serve the adjudication application as soon as possible (or indeed at any time) and so a failure to serve the adjudication application did not render the adjudication application invalid or deprive the adjudicator of jurisdiction. The issue of statutory interpretation has been resolved against Niclin.

[47] The Act requires service of a copy of an adjudication upon a respondent. The timing of the adjudication response (and therefore the process of adjudication) depends on the receipt by a respondent of a copy of the adjudication application.[21] In the light of the concession made by Niclin about the primary judge's finding on jurisdiction in the absence of effective service, it is unnecessary to dwell upon any subtle difference between being served with a copy of an adjudication application and receiving it. The consequence is the same for the jurisdiction of the adjudicator to decide the application.

Conclusion and orders

[48] The primary judge did not err in concluding that a requirement to serve "as soon as possible" applied and that, as a matter of fact, Niclin did not comply with it. Consistent with Niclin's acceptance of the primary judge's finding that service under s 21(5) is required before an adjudication may be validly undertaken, the primary judge was correct to conclude that, in the absence of effective service, the adjudicator did not have jurisdiction to determine the adjudication applications.

[49] Because the appeal should be dismissed, no occasion arises to consider the issue of remitter. I would order:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of and incidental to the appeal, including the applications to adduce further evidence relevant to the question of remitter.

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21 The Act, s 24A.