SUPREME COURT OF QUEENSLAND

CITATION:	*Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd & ors* [2012] QSC 388
PARTIES:	**CAPRICORN QUARRIES PTY LTD ACN 121 722 781** (applicant) **v** **INLINE COMMUNICATION CONSTRUCTION PTY LTD ACN 090 583 869** (first respondent) and **PHILIP DAVENPORT** (second respondent) and **ADJUDICATE TODAY PTY LTD ACN 109 605 021** (third respondent)
FILE NO/S:	BS 10771/12
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	7 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2012
JUDGE:	Jackson J
ORDER:	**1. It is declared that the adjudicator's decision is void.** **2. It is ordered that the first respondent pay the applicant's costs of the application to be assessed.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERINNG AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS –where the first respondent claims it is entitled to progress payments – where the first respondent contracted with the applicant, a quarry operator, for the processing of quarry materials – where the first respondent used its own plant to process materials - whether road building materials are capable of constituting related goods and services – whether the work performed by the claimant was "construction work" or the supply of "related goods and services" under a "construction

contract" entitling it to progress payments

Acts Interpretation Act 1954 (Qld), s 14A
Building and Construction Industry Payments Act 2004 (Qld), s 10, s 11, s 12, s 13, s 17, s 18, s19, s 21, s 22, s 23, s 26, s 29, s 30, s31
Building and Construction Industry Security of Payment Act 1999 (NSW)
Building and Construction Industry Security of Payment Act 2002 (Vic)
Building and Construction Industry Security of Payment Act 2009 (SA)
Building and Construction Industry Security of Payment Act 2009 (Tas)
Building and Construction Industry (Security of Payment Act) 2009 (ACT)
Construction Contracts Act 2004 (WA)
Construction Contracts (Security of Payments) Act (NT)
Trade Practices Act 1974 (Cth), Part 5
Subcontractors' Charges Act 1974 (Qld)
Contractors' and Workmen's Lien Acts 1906–1921 (Qld)

Allianz Australia Insurance Limited v GSF Australia Pty Ltd (2005) 221 CLR 568, cited
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27, cited
Australian Securities Commission v Marlborough Gold Mines Limited (1993) 177 CLR 485, considered
Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421, referred
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, cited
Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd [2012] NSWCA 31, considered
HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd trading as Domus Homes [2012] HCASL 156, referred
John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd [2010] QSC 159, cited
K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & anor [2011] NTCA 1, cited
Khoury v Government Insurance Office (NSW) (1984) 165 CLR 622, considered
Lumbers v W Cook Builders Pty Ltd (in liquidation) (2008) 232 CLR 635, referred
Minister for Multicultural Affairs v Singh (2000) 98 FCR 469, referred
Qantas Airways Ltd v Aravco Ltd (1996) 185 CLR 43, referred
Re Leighton Contractors Pty Ltd [1985] 2 Qd R 377, referred
Steele v Tardiani (1946) 72 CLR 386, referred
Stumann v Spansteel Engineering Pty Ltd [1986] 2 Qd R 471, considered

Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor [2011] QSC 345 at [73], considered
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor [2012] QCA 276, referred
Victims Compensation Fund Corp v Brown (2002) 54 NSWLR 668, referred

COUNSEL: P L O'Shea SC for the applicant

A W Duffy for the first respondent

SOLICITORS: Cooper Grace Ward for the applicant

Flehr Law for the first respondent

[1] **Jackson J**: Yet another challenge is made to the validity of an adjudicator's decision purportedly made under s 26 of the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIPA"). The ground is that under the relevant contract the claimant for a payment claim did not "undertake to carry out construction work", nor did it undertake to "supply related goods and services", nor was the contract a "construction contract".

Facts

[2] For the most part, the facts are not in dispute. The respondent to the application in this Court ("Inline") supplied services to the applicant ("Capricorn"), using its own plant to do so. The services would have been described as work and labour done in a common law pleading,[1] under a contract for the provision of "contract crushing" for the price of $7.50 per tonne of material, plus GST. The contract was partly evidenced by a written quotation and a written response to the quotation.[2] The latter was not, in terms, an acceptance of the quotation, because it varied the quotation's proposed terms of payment. The response also referred to a conversation between representatives of the parties.

[3] The work comprised the operation by Inline of plant comprising a crusher and screens, which Inline supplied, in a quarry owned and operated by Capricorn.

[4] Rock was blasted at or from the quarry face. The loosened material was picked up and transported by excavators for approximately 100 metres, then dumped at or near Inline's plant.

[5] The material was fed into the plant and then processed by Inline. The material was weighed at or near the point of being fed into the plant before processing. The process of crushing and screening varied according to the required product specification, based on parameters as to size and composition. The specifications were apt to produce materials adapted for use as road making or drainage works.[3]

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1 For example, *Steele v Tardiani* (1946) 72 CLR 386. And see *Lumbers v W Cook Builders Pty Ltd (in liquidation)* (2008) 232 CLR 635 at [79]-[80]

2 Although almost four months later in circumstances where work had commenced the month after the written quote

3 Relevant descriptions included road base and gabion.

[6] After processing, the relevant product was moved by Capricorn to one of a number of stockpiles within the quarry, according to the product's specification. Product is stored in stockpiles by Capricorn to meet customers' needs as and when required.

[7] Capricorn supplied the finished products to customers who used them as they required.

[8] The period of the work came to an end on 12 August 2012.

[9] On 16 August 2012, Inline's solicitor purported to serve a payment claim under BCIPA relating to 11 invoices. The invoices were dated over a period between 4 June 2012 and 13 August 2012. The total amount of the invoices was $395,529.74.

[10] The work was described as "contract crushing quarry" on all but one of the invoices. Each of those invoices identified the product or products for the invoice. The exception was invoice 288 which was for the supply of an excavator for the period of a week.

[11] Capricorn did not serve a payment schedule.

[12] On or about 5 September 2012, Inline's solicitor threatened to start a proceeding in the District Court of Queensland under s 19(4) of BCIPA, and to serve a statutory demand under the *Corporations Act* 2001 (Cth) for the full amount.

[13] On 13 September 2012, Capricorn's solicitors wrote to Inline's solicitors contending that the contract was not a "construction contract". They also denied Capricorn's liability to pay amounts claimed in some of the invoices and the timing of the obligation to pay other amounts under the contract. As well, they contended that some of the product was out of specification.

[14] On 14 September 2012, Capricorn's solicitors wrote again, accepting Capricorn's liability for one more of the invoices.

[15] On 26 September 2012, Inline's solicitor purported to give notice under s 21(2) of BCIPA of Inline's intention to apply for adjudication of the payment claim.

[16] Capricorn again did not serve a payment schedule.

[17] On 18 or 22 October 2012, Inline applied for an adjudication. By that time, the claimed amount was reduced, by payments, to $123,925.99 plus interest on amounts until they were paid.

[18] On 26 October 2012, the second respondent accepted appointment as adjudicator for the adjudication.

[19] On 6 November 2012, the second respondent purported to give an adjudicator's decision. The adjudicated amount was $395,529.74. The due date for payment was 31 August 2012.

Scheme of relevant provisions

[20] Before focussing upon the particularly relevant provisions, it is appropriate to describe the statutory scheme in general, as it might apply to the facts outlined above.

[21] It is only "under a construction contract" where a person "has undertaken to carry out construction work, or supply related goods and services under the contract" that a person is "entitled to a progress payment".[4]

[22] The amount of the progress payment to which the person is entitled "in relation to a construction contract" is, if the contract does not provide for the matter, "the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person under the contract".[5]

[23] Part 3 of BCIPA provides for the procedures for obtaining progress payments, starting with a payment claim by the claimant,[6] to which the respondent may reply by serving a payment schedule, when no time is provided by the contract, within 10 days after the payment claim is served.[7]

[24] If the respondent does not serve a payment schedule, the respondent becomes liable to pay the claimed amount on the due date for the progress claim to which the payment claim relates.[8]

[25] Where a respondent becomes liable to pay the claimed amount because it failed to serve a payment schedule, but fails to pay the amount on or before the due date, the claimant has the option of proceeding in a court of competent jurisdiction to recover the amount of the payment claim as a debt, or to make an adjudication application.[9]

[26] Where a claimant seeks to bring an adjudication application in such circumstances, the claimant must give the respondent notice of intention to apply for adjudication of the payment claim within 20 business days immediately following the due date for payment.[10] Such notice must state that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the notice.[11]

[27] A person may be an adjudicator "in relation to a construction contract" if registered as such.[12] Once an adjudicator accepts an adjudication application, the adjudicator is taken to have been appointed to decide the application.[13] A respondent may only give an adjudication response to an adjudication application to the adjudicator if the respondent has served a payment schedule within the time specified under a relevant section.[14]

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4 Section 12 BCIPA
5 Section 13 BCIPA
6 Section 17 BCIPA
7 Section 18 BCIPA
8 Section 18(5) BCIPA
9 Section 19(2) BCIPA
10 Section 21(2)(a) BCIPA
11 Section 21(2)(b) BCIPA
12 Section 22(1) BCIPA
13 Section 23(2) BCIPA
14 Section 23(3) BCIPA

[28] The adjudicator is to decide the "amount of the progress claim, if any, to be paid by the respondent to the claimant" and in deciding the adjudication application "is to consider the following matters only":

> "(a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
>
> (b) the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
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> (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

[29] If an adjudicator decides that the respondent is required to pay an adjudicated amount the respondent must pay the amount to the claimant on or before the relevant date.[15]

[30] If the respondent fails to pay, the claimant may ask the nominating authority to provide an adjudication certificate.[16] An adjudication certificate may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction.[17]

Was the contract a construction contract or was there an undertaking to supply related goods and services or to carry out construction work?

[31] The founding concepts of the scheme as summarised above are "construction contract", "construction work" and "related goods and services". The relevant parts of those definitions and s 12 of BCIPA are set out below:

> "**10 Meaning of *construction work***
>
> (1) ***Construction work*** means any of the following work -
>
> (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;

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15 Section 29(1) BCIPA
16 Section 30(1)(a) BCIPA
17 Section 31(1) of BCIPA

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours,

…

(e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including –

(i) site clearance, earthmoving, excavation, tunnelling and boring; and
(ii) the laying of foundations; and
(iii) the erection, maintenance or dismantling of scaffolding; and
(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
(v) site restoration, landscaping and the provision of roadways and other access works;

…

11 Meaning of *related goods and services*

(1) ***Related goods and services***, in relation to construction work, means any of the following –

(a) goods of the following kind –

(i) materials and components to form part of any building, structure or work arising from construction work;
(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind –

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services relating to construction work;
(iii) building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;
(iv) soil testing services relating to construction work;

(c) goods and services, in relation to construction work, of a kind prescribed under a regulation for this subsection.

> (2) In this Act, a reference to related goods and services includes a reference to related goods or services.
>
> **12 Rights to progress payments**
>
> From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."

[32] It is not disputed that if the contract between the parties was not a "construction contract" or if Inline had not "undertaken to carry out construction work or supply replated goods and services, under the contract", the adjudicator's decision is void.[18]

[33] Capricorn's primary contention was that the contract was not a "construction contract", because under the contract Inline did not undertake to supply related goods and services to Capricorn. That was because:

(a) the products were not goods of the kind described as "materials… to form part of any building structure or work arising from construction work" within the meaning of s 11(1)(a)(i); and

(b) the products were not of the kind described as "materials… for use in connection with the carrying out of construction work" within the meaning of s 11(1)(a)(ii);

(c) alternatively to (a) and (b), the products were not goods Inline undertook to supply – Inline provided services processing Capricorn's feed rock material; and

(d) the plant was not goods of the kind described as "plant… for use in connection with the carrying out of construction work" within the meaning of s 11(1)(a)(ii).[19]

[34] Inline disputed each of these points. As well, against the possibility that the products were not goods Inline undertook to supply by the contract, Inline submitted that the work constituted "construction work" because it was an "operation that forms an integral part of, or is preparatory to… work of the kind referred to in paragraph (b)" of the definition of "construction work", being "the construction… of any works forming, or to form, part of land, including… roadworks…", within the meaning of paragraph (e) of the definition of "construction work".

Principles and context

[35] Both the requirements of s 14A of the *Acts Interpretation Act* 1954 (Qld) and those of the modern approach in the common law of statutory interpretation mandate that

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18 *Brodyn PtyLtd v Davenport* (2004) 61 NSWLR 421 at [52] – [53]

19 Capricorn also made submissions directed to excluding the application of s 11(1)(b) but Inline did not rely on that paragraph

regard should be had to relevant purpose and context in deciding the questions of construction of ss 11(a)(i), 11(a)(ii),10(1)(e) and 12.

[36] Section 14A requires that the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. Under s 7 of BCIPA, the object of the Act is to ensure that a person is entitled to receive and recover progress payments if the person undertakes to carry out construction work or undertakes to supply related goods under a construction contract. However, the very questions which are raised in the present case are whether there is a construction contract or any undertaking to supply related goods or carry out construction work according to the detailed statutory definitions. The object of the Act operates at a level of abstraction which does not assist in the interpretation of the particular provisions in question.

[37] As to the modern approach, it is worth repeating a well known passage from the High Court of Australia:

> "Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd,* if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."[20]

[38] It is relevant context that BCIPA closely follows the model of its NSW predecessor, the *Building and Construction Industry Security of Payment Act* 1999 (NSW). There are now comparators in legislation in all Australian States and mainland Territories,[21] with two exceptions.[22] BCIPA and its interstate and Territory comparators have been considered often. However, the questions raised here have not previously arisen. There are only a couple of sufficiently relevant references.

[39] In *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd*[23] Bathurst CJ said in the Court of Appeal of New South Wales:

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20 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408

21 *Building and Construction Industry Security of Payment Act* 1999 (NSW); *Building and Construction Industry Security of Payment Act* 2002 (Vic); *Building and Construction Industry Security of Payment Act* 2009 (SA); *Building and Construction Industry Security of Payment Act* 2009 (Tas); *Building and Construction Industry (Security of Payment Act)* 2009 (ACT).

22 Compare *Construction Contracts Act* 2004 (WA) and *Construction Contracts (Security of Payments) Act* (NT)

23 [2012] NSWCA 31; special leave to appeal was refused, in *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd trading as Domus Homes* [2012] HCASL 156

> "Further, once the contractual obligations in question are identified, it is necessary to determine whether these obligations fall within the words of the statute. That requires a focus on the words used by the legislature: see *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at [31]–[33]. The meaning of the text may require consideration of the context which includes the general policy and purpose of the provision: see *Alcan (NT) Alumina Pty Ltd v Cmr of Territory Revenue* [2009] HCA 41 ; (2009) 239 CLR 27 at [47] and the cases cited in that paragraph; *Wilson v State Rail Authority (NSW)* [2010] NSWCA 198.
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> In the present case, the legislation in question is remedial legislation. In these circumstances the words in the definition of related goods and services in s 6 of the Act should be given a liberal interpretation, within the confines of the actual language employed and what is fairly open on the words used: *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638. In *IW v The City of Perth* [1997] HCA 30 ; (1997) 191 CLR 1 at 12, Brennan CJ and McHugh J put the position in the following terms (citations omitted):
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>> … beneficial and remedial legislation, like the Act, is to be given a liberal construction. It is to be given "a fair, large at [sic] liberal" interpretation rather than one which is "literal or technical". Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.
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> See also Gummow J at 39."

[40] I confess to some discomfort in applying the "remedial legislation" approach to questions of the kind presented for decision in this case. In *Khoury*, the provision to be interpreted empowered a court to excuse an insured's failure to observe a term or condition of the policy where the insurer was not prejudiced. In *IW*, the provisions to be interpreted constituted human rights legislation, specifically anti-discrimination provisions, which prohibited discrimination on the ground of impairment. Application of the "remedial legislation" approach from those cases to the interpretation of the relevant definitions in BCIPA is by no means obvious to me. Nevertheless, there is authority supporting its application in the context of consumer protection legislation, such as Part V of the *Trade Practices Act* 1974 (Cth).[24]

[41] My discomfort is sourced in two considerations. First, BCIPA is essentially commercial in its object. Although the NSW and other comparator Acts use "Security of Payment" in their titles, that is something of a misnomer. The essential operative effect of BCIPA is that it confers a statutory right to a provisional progress payment upon a claimant who qualifies for that right, with provisions to

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24 *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43 at 60

speedily value and establish the right without curial proceedings and to vindicate the established right by enforcing it as a court judgment. Commercially, that outcome has an important cash-flow effect. Secondly, although a payment made under the statutory regime is provisional and does not finally settle the rights of the parties as to the amount paid under the contract or arrangement, the risk of insolvency over that amount on any final resolution of a dispute is transferred from the claimant to the respondent. It is also significant that the reallocation of rights and commercial risks effected by BCIPA operates in a way that restricts the parties' freedom of contract otherwise. In this general way, BCIPA restricts the rights and immunities of a respondent to a claim for a progress payment under a construction contract and confers benefits upon the claimant.

[42] Secondly, BCIPA is by no means the first legislation either in this State or elsewhere which has sought to protect the rights of those who undertake contracts for work and labour done in the context of the building or construction industry. It is not necessary for present purposes to do more than to refer to the earlier Queensland legislation, the *Subcontractors' Charges Act* 1974 (Qld).[25] The operation of that Act differed significantly from BCIPA, through the creation of a statutory charge in favour of the subcontractor upon money payable to the contractor or any superior contractor under their upstream contracts. However, it had a number of features in common with BCIPA, including that the rights conferred on a subcontractor were intended to benefit and protect their entitlement to payment under the subcontract and to alter the subcontractor's risk of insolvency of the contractor. In that general way, the statute also restricted the contractor's and any superior contractor's and the employer's freedoms of contract and their relative risks of solvency vis a vis the contractor.

[43] For present purposes, there were a couple of other relevant features of the *Subcontractors' Charges Act* 1974. A similarity to BCIPA was that a right to obtain a charge was conferred on a subcontractor by reference to the existence of a contract for the performance of "work", which was the subject of a detailed statutory definition containing reference to the construction of buildings or other structures upon land and which included the supply of materials used or brought on premises to be used in connection with other work as well as specific exclusions. There were many cases which were concerned with the interpretation of the legislation,[26] including cases where the extent of its operation in relation to contracts for particular work had to be decided.

[44] As may be expected in the context of disputes about the meaning of broad, and sometimes intractable, statutory language defining the operation of an Act which has significant financial impacts for the parties, the argument was more than once deployed that the Act, being remedial, should be construed broadly. In *Stumann v Spansteel Engineering Pty Ltd*,[27] de Jersey J (as his Honour then was) said in the Full Court of the Supreme Court of Queensland:

> "It remains to mention the appellant's argument that the Act, being remedial, should be construed beneficially to the sub-contractor. Views within the Court have differed as to whether that is so: cf. *Ex*

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25 Which itself repealed and replaced the *Contractors' and Workmen's Lien Acts* 1906–1921 (Qld)

26 See, for examples, Pyman, *Annotated Subcontractors' Charges Act,* 3 ed, at pp 4-15

27 [1986] 2 Qd R 471 at 477

> *parte Peter Fardoulys Pty. Ltd.* [1983] 1 Qd.R. 345, 348 and *Ex parte Pavex Constructions* [1979] Qd.R. 318, 327. The question arising in this case is resolved by adopting a natural construction of the Act. It must be remembered, however, that the Act confers special rights and privileges, the enforcement of which depends on strict compliance with its terms; where the requirements of the Act are not complied with, the Court has no jurisdiction to enforce them: re *Queensland Tiling Service Pty. Ltd.* [1962] Q.W.N. 46."

[45] Having regard to the context as discussed, in my view, a "natural" construction of the relevant definitions of BCIPA in this case is to be preferred to an approach which seeks to extend the operation of BCIPA by a "liberal interpretation" to be engaged in with the purpose of increasing the width of the class of persons who are entitled to the benefit of a payment claim and correspondingly increasing the width of the class of persons who are subject to BCIPA's restriction and obligations.

[46] The language chosen by Parliament to define "construction contract", "construction work" and "related goods and services" has no purpose other than to draw the line between who is in and who is out of those classes. There seems to be little logic in seeking to stretch that language either way. In saying this, I take a "natural" construction to be that arrived at by the usual process of the application of the common law of statutory interpretation, as affected by statute, but without a presumptive approach.[28]

[47] In coming to that view I have not overlooked the principle of *Australian Securities Commission v Marlborough Gold Mines Limited*.[29] Despite the circumstance that BCIPA closely follows the NSW comparable Act in many provisions, BCIPA is "not a Commonwealth law or part of national uniform legislation".[30]

[48] In the New South Wales Parliament, in the second reading speech for what became the NSW Act (Hansard, Assembly, September 1999, p 104) the relevant minister said:

> "With certain exceptions, the bill benefits anyone who is party to a construction contract, whether written or oral. Construction contracts include contracts for the supply of related goods and services, such as the provision of architectural, engineering and surveying services, the supply of building materials or components to form part of a building or structure, and the supply or hire of plant or materials for use in construction work. Builders are also able to use the legislation in relation to obtaining payments from their clients."

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28 See also the reasoning of Spigelman CJ (in dissent) in *Victims Compensation Fund Corp v Brown* (2002) 54 NSWLR 668 at 671-672. And for a trenchant criticism of the role of the "remedial statute" approach within the canons of construction, see Eskridge, Frickey & Garrett, *Legislation and Statutory Interpretation*, 2 ed, at 343-348. It is noteworthy that the approach does not receive detailed consideration in the more recent leading UK works on statutory interpretation: for example, Bennion, *Bennion on Statutory Interpretation*, 5 ed, at s 182; Greenberg, *Craies on Legislation,* 9 ed, at Ch 20; cf Pearce & Geddes, *Statutory Interpretation in Australia*, 7 ed, at [9.2] – [9.5]

29 (1993) 177 CLR 485

30 *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159 at [34]-[35]. There are differences among the Acts that follow that NSW model and the Western Australian and Northern Territory Acts follow a different model: *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & anor* [2011] NTCA 1 at [4]-[5] and [8]

[49] In *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor*,[31] Fryberg J said about s 11(1)(a)(ii):

> "In my judgment, 'for use in connection with' is not satisfied simply by proving that the plant or materials supplied were used in connection with the carrying out of construction work…. 'For' is a word of wide denotation. In the present context it carries a purposive meaning. It suggests that the phrase must be satisfied at the outset of the transaction, before the plant or materials are used. Evidence of the use to which the plant or materials were put may support an inference as to the purpose for which they were at that time to be used…
>
> That conclusion is supported by the manner in which 'related goods and services' is used in the Act. The most important use is in the definition of construction contract, a definition which relevantly refers to a 'contract, agreement or other arrangement'. As noted above, in most other contexts in which the expression is used it is to refer to related goods and services supplied under a construction contract. That suggests that the contract or arrangement will supply an important part of the evidence by which the proposed use of the plant or material is to be identified. The use must be able to be identified at the time of the contract or arrangement…"

[50] In my view, Capricorn's submissions must be accepted and Inline's submissions must be rejected, for the following reasons.

Materials… to form part of any… structure or work

[51] The starting point is that it was not suggested that Capricorn itself was engaged in construction work. It carried on business as the operator of a quarry and supplier of quarry products to customers.

[52] Secondly, the crushing and screening services supplied by Inline were carried out by it at Capricorn's premises upon Capricorn's rock or quarry materials. The obligation of Inline was to process the materials so as to bring them into specifications of indentified kinds, as required, so that the materials could be deployed by Capricorn in its business of supplying those materials to its customers.

[53] Thirdly, Inline's plant was brought to the quarry and used by it there to process Capricorn's rock and quarry materials. There is no suggestion that the plant was hired by Capricorn as such or was otherwise made available to or possessed by Capricorn. No payment was to be made for the supply of the plant as such – payment depended on the processing of rock by reference to input weight.[32]

[54] It may be accepted that Capricorn's business was largely one to supply materials to customers for use by those customers in road works. Inline contends that it was a supplier to Capricorn who was itself a supplier of materials to customers who were carrying out construction work. Although I will have to return to that question, let

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[31] [2011] QSC 345 at [73]; affirmed in [2012] QCA 276

[32] There was agreement to pay for the transport costs of moving the plant to and from Capricorn's quarry and for some maintenance costs

the assumption be made for analysis at this point that Inline's supply was of the product materials rather than a supply of services.

[55] Thus, Inline submits that the products which it processed were materials to form part of road works and that some unidentified particular road or structure constituted a relevant structure or work arising from construction work. Capricorn responds that it is not sufficient that the particular goods or most or some of them in fact would have been used in connection with the carrying out of construction work. What is required is that Inline undertook to supply for the purpose that the products would be used to form part of some identifiable structure or works.

[56] The existence of a chain of supplies creates possible questions as to the operation of s 11(1)(a)(i) and (ii). In the text of subparagraph (i), part of the answer lies in the requirement that the materials must be "to form part of" a relevant "building, structure or work". Thus, if the things undertaken to be supplied constitute materials which, as supplied, are capable of forming part of a building, structure or work, they are capable of constituting related goods. That would not be the case where, as supplied, the things are not yet in a state of production which is capable of forming part of the building structure or work.

[57] In a case where the things comprising the relevant materials are so capable, there is still a question whether each of a succession or string of supplies will meet the requirements of s 11(1)(a)(i). Part of the definitional requirement is that the things are "to" form part of any building, structure or work. The operation of subparagraph (i) will be affected by whether, in context, "to" is satisfied by the fact that the things are of a kind which either can be used only or most likely by incorporation into a building, structure or work. If that operation lies within the reach of the definition of "related goods and services",[33] the manufacturer of building products who supplies them over a period to a wholesaler under an arrangement and the wholesaler who supplies building products over a period to a retailer under an arrangement will be entitled to a payment claim, without any contract or arrangement for construction work being in sight. The text of BCIPA does not assist greatly in the resolution of the question of that seemingly counter-intuitive, but possible, operation.

[58] Although the context may require another meaning to be adopted, the appropriate construction of a definition begins with the insertion of the definition into the text to be construed.[34] Here, the definition of "related goods and services" should be inserted into the relevant text in the definition of "construction contract" and the text of s 12 which confers the right to a progress payment. That is the precise text to be construed. It assists, in my view, to begin with s 12.

[59] Thus, s 12 is engaged where a "person has undertaken to… supply [goods of the following kind – materials… to form part of any building, structure or work arising from construction work] under" a contract, agreement or other arrangement under which one party undertakes to supply such goods to another party.

[60] As a matter of ordinary meaning of that text, "to form" denotes that the materials are to be incorporated in any building, structure or work at some time after the

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[33] Which includes a reference to related goods or services: s 11(2)

[34] *Allianz Australia Insurance Limited v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [12]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [40]

supplier undertakes to supply the goods. However, as between the parties to the contract, agreement or other arrangement, the supply is to be for that purpose when the undertaking is made. In my view, that requirement is not satisfied where, as between those parties, the supply is for the purpose of the acquirer re-supplying the goods in unchanged form in the course of the acquirer's business of supply of such goods.

[61] This operation is at least consistent with s 14(3), which restricts the valuation of materials and components that are to form any part of any building, structure or work to those that "have become or, on payment, will become the property of the party or other person for whom construction work is being carried out", where the contract does not provide for the matter.

Undertake to… supply...

[62] As previously mentioned, Capricorn's second contention is that, in any event, the undertaking to supply under the contract in the present case was not an undertaking to supply goods within the meaning of either s 12 or the definition of "construction contract", for the reason that Inline processed Capricorn's rocks and materials in Capricorn's quarry.

[63] There is no general definition of "supply" in BCIPA, or a particular definition of supply in relation to goods comprising materials and components to form part of any building, structure or work under s 11(1)(a)(i). In contrast, the meaning of supply in relation to plant or materials supplied for use in connection with the carrying out of construction work under s 11(1)(a)(ii) is affected by the provision that such plant or materials are related goods and services "whether supplied by sale, hire or otherwise".

[64] A supply of goods by way of sale and a supply by way of hire have in common that legal possession of the thing supplied is transferred to the acquirer. Sale also involves the transfer of property in the goods. However, a supply by way of hire or which does not transfer property in the things supplied to the acquirer would not be consistent with the purposive requirement in s 11(1)(a)(i) that the materials or components are "to form part of" the relevant building structure or work. In my view, having regard to that requirement, the supplies to which s 11(1)(a)(i) is directed must be supplies consistent with that purposive requirement.

[65] In that context, there is no reason to construe "supply" in s 12 or the definition of "construction contract" as including work and labour done on another's goods for the purpose of processing those goods into a form suitable for sale in the owner's business.

[66] In my view, therefore, the work undertaken by Inline under the contract was not the supply of related goods under s 12 and the definition of "construction contract" because Inline only undertook to process Capricorn's materials.

Undertake to supply… materials… for use in connection with the carrying out of construction work

[67] Inline alternatively relied on s 11(1)(a)(ii) on the footing that the products were materials undertaken to be supplied (otherwise than by sale or hire) by Inline to

Capricorn for use in connection with the carrying out of construction works by customers of Capricorn.

[68] Where a person undertakes to carry out "construction work" under a contract, the contract is a "construction contract" as defined. That is not within the operation of s 11(1)(a)(ii). Subparagraph (ii) is engaged where the undertaking is the supply of plant or materials which are "for use" by the person or another "in connection with the carrying out of construction work". The reach of subparagraph (ii) is to be construed in the context that it operates as part of the definition of "related goods and services" and alongside the other aspects of that definition and the definition of "construction work".

[69] In this part of the case, the relevant undertaking as to supply by Inline to Capricorn. is not for use by Inline or Capricorn in carrying out construction work. Inline relies on a less direct connection as satisfying the requirement that the supply is "for use in connection with the carrying out of construction work". The relevant use is not identified at the time of the making of the contract between Inline and Capricorn, except in the sense that customers of Capricorn may be expected to purchase the products from Capricorn, as quarry operator, for use in road works being carried out by those customers.

[70] The phrase "in connection with" is an expression of wide meaning. So much so, that it is regularly said that its meaning in a statute depends on the context in which it is used.[35] In my view, the context in which it is used in s 11(1)(a)(ii) is not such that subparagraph (ii) picks up, as related goods, the work to be carried out by Inline in the circumstances of this case as a supply of materials for use in connection with the carrying out of construction work.

Plant… for use in connection with the carrying out of construction work

[71] Next, Inline relied on the supply of the plant under the contract as a supply of related goods within the meaning of s 11(1)(a)(ii). However, in my view, that subparagraph does not apply, for more than one reason. Inline did not undertake to supply the plant for payment. It undertook to process rock at Capricorn's quarry for payment by reference to the weight of the rock to be processed, using Inline's plant.

[72] Secondly, Inline's undertaking to provide the plant to Capricorn was not "for use in connection with the carrying out of construction work". The plant provided by Inline was for use in processing the materials themselves. If neither Inline nor Capricorn was carrying out construction work, Inline's use of the plant could not be "in connection with the carrying out of construction work" unless the carrying out of such work by some customer of Capricorn using the products was a sufficient connection.

[73] In my view it was not. The connection required is one between the use of the plant "supplied" and carrying out construction work. There is no connection on the facts here other than that the plant provided is for use to process a product and the product can be used in carrying out future construction works. That is not enough to constitute the provision of the plant a supply for use in connection with the carrying out of any construction work.

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[35] *Minister for Multicultural Affairs v Singh* (2000) 98 FCR 469 at 477. For a more informative example in this context, see *Re Leighton Contractors Pty Ltd* [1985] 2 Qd R 377 at 380

Operation that forms an integral part of, or is preparatory to… the construction… of structures… or the construction of any works forming… part of land

[74] Inline's last submission was that the work it undertook to carry out was "construction work" under s 10(1)(e) of BCPA, as an operation that forms an integral part of, or is preparatory to the construction of structures forming part of land, being road works carried out by Capricorn's customers.

[75] In my view, similar reasoning to that which repelled the contentions that the contract was a "construction contract" because Inline had undertaken to supply related goods and services has the effect that s 12 does not apply and the contract is not a "construction contract" because Inline did not undertake to carry out "construction work" within the meaning of paragraph (e) of the definition of "construction work".

[76] Inline did not undertake to carry out an operation that forms an integral part of any work of construction of structures or construction of works forming part of land. If the off-site processing of materials adapted for a use which will form part of a structure or such works, but without any particular construction work in view, were an operation of that kind, then paragraph (e) would subsume and operate outside the restrictions provided for in the definition of related goods and services previously discussed. The context of s 11 means that such a suggested construction of s 10(1)(e) must be viewed with caution.

[77] As well, s 10(1)(e)(iv) expressly includes prefabrication of components to form part of any structure or works, whether or not carried out off-site, as construction work under paragraph (e). That indicates that, otherwise, the ordinary or contextual meaning of an "operation that forms an integral part of or is preparatory to" the construction of structures or works forming part of land would or may not extend to an off-site operation of prefabrication of components.[36] There is no apparent reason why an off-site processing of materials to produce materials capable of constituting related goods and services should be viewed differently.

[78] The connection required by "an integral part of the construction of structures or… any works" is directed to the actual construction of the structure or works. The operation in question must be "an integral part of" that. In my view, Inline's work was clearly not that in relation to the carrying out of road works by Capricorn's customers.

[79] Nor did Inline undertake an operation that was "preparatory to" the construction of any structures or works of that kind, except in the sense that the processing of things and the production of road making materials precedes the carrying out of work of road making, as the construction of a structure or works forming part of land using those materials.

[80] That does not make Inline's operation of processing rocks into the materials in Capricorn's quarry, an "operation that… is preparatory to" the actual construction

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[36] Recognising that, once fabricated, the components would be capable of constituting related goods and services within the meaning of s 11(1)(a)(i) of BCIPA, if they were undertaken to be supplied to form part of any building, structure or work

of the structures or works carried out by Capricorn's customers using those materials.

Invoice 288

[81] Having regard to the conclusions I have reached on the points discussed above, it is not necessary to consider Capricorn's separate argument as to the operation of BCIPA in relation to invoice 288.

Disposition

[82] On the basis of the foregoing reasons, Capricorn is entitled to and a declaration should be made that the adjudicator's decision is void.

[83] Costs should follow the event. An order should be made that Inline pay Capricorn's costs of the application to be assessed.