SUPREME COURT OF QUEENSLAND

CITATION:	*St Hilliers Property Pty Ltd v Pronto Solar Innovations Pty Ltd* [2018] QSC 164
PARTIES:	**ST HILLIERS PROPERTY PTY LTD** **ACN 082 729 039** (applicant) **v** **PRONTO SOLAR INNOVATIONS PTY LTD** **ACN 617 601 340** (respondent) and **ST HILLIERS PROPERTY PTY LTD** **ACN 082 729 039** (applicant) **v** **PRONTO PROJECTS PTY LTD** **ACN 606 221 363** (respondent)
FILE NO:	BS 339 of 2018 BS 341 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	27 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	25 January 2018
JUDGE:	Daubney J
ORDERS:	**In Proceeding BS 339 of 2018:** **1. Pursuant to s 21 of the *Subcontractors' Charges Act* 1974 (Qld), the charge claimed by the respondent in its notice of claim of charge Form 1 dated 20 December 2017 directed to Bouygues Construction Australia Pty Ltd, ACN 144 013 801 as employer is**

cancelled.

2. **It is declared that the payment claim issued by the respondent to the applicant on or about 18 December 2017 with a reference date of 31 December 2017 for a sum of $949,197.98 is invalid and of no effect under the *Building Construction Industry Payments Act* 2004 (Qld).**

3. **The respondent pay the applicant's standard costs of and incidental to the application.**

In Proceeding BS 341 of 2018:

1. **Pursuant to s 21 of the *Subcontractors' Charges Act* 1974 (Qld), the charge claimed by the respondent in its notice of claim of charge Form 1 dated 20 December 2017 directed to Bouygues Construction Australia Pty Ltd, ACN 144 013 801 as employer is cancelled.**

2. **It is declared that the payment claim issued by the respondent to the applicant on or about 18 December 2017 with a reference date of 31 December 2017 for a sum of $1,412,504.29 is invalid and of no effect under the *Building Construction Industry Payments Act* 2004 (Qld).**

3. **The respondent pay the applicant's standard costs of and incidental to the application.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – SUBCONTRACTORS CHARGES ACT (QLD) – where respondent, an unlicensed subcontractor, made a payment claim under s 17 *Building and Construction Industry Payments Act* 2004 (Qld), a Form 1 Notice of Claim of Charge and Form 2 Notice to Contractor under the *Subcontractors Charges Act* 1974 (Qld) – whether a licence was required to perform the works under the subcontract – where applicant advised respondents they did not require a licence – whether the applicant is estopped from relying on s 42 *Queensland Building and Construction Commission Act* 1991 (Qld) to dispute payment claims

Building and Construction Industry Payments Act 2004 (Qld) s 10, s 12, s 17, sch 2
Subcontractors' Charges Act 1974 (Qld) s 5, s 10, s 21
Queensland Building and Construction Commission Act 1991 (Qld) s 30, s 42, sch 2
Queensland Building and Construction Commission

Regulation 2003 (Qld) s 5, s14, sch 1AA, sch 2

Cant Contracting Pty Ltd v Casella [2007] 2 Qd R 13
Concept Constructions (Qld) Pty Ltd v Asphalt Pavements Pty Ltd (in liquidation) [2000] QSC 269
Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd [2005] 1 Qd R 610
Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liquidation) & Anor [1999] QCA 306
Ooralea Developments Pty Ltd v Civil Contractors (Australia) Pty Ltd [2015] 1 Qd R 311
Re Northbuild Constructions Pty Ltd [1998] QSC 196
Re Northbuild Constructions Pty Ltd [2000] 2 Qd R 600

COUNSEL:	M C Long for the applicant B Vass for the first and second respondent
SOLICITORS:	Tress Cox Lawyers for the Applicant Radcliff Taylor Lawyers for the First and Second Respondent

[1] The applicant, St Hilliers Property Pty Ltd ("St Hilliers") is a licensed builder and is a contractor to Bouygues Construction Australia Pty Ltd ("Bouygues"), which is the head contractor for the construction of certain solar farms situated in central Queensland ("Queensland Solar Farms").

[2] St Hilliers, in turn, entered into separate written subcontracts with each of the respondents, Pronto Solar Innovations Pty Ltd ("Solar") and Pronto Projects Pty Ltd ("Projects").

[3] Under each of the Solar subcontract and the Projects subcontract, it was provided that:

> "The Works comprise the design, fabrication, supply, installation, integration, commissioning and certification of the Piling and Predrilling package in accordance with the Subcontract Conditions, Subcontract Documents, Relevant Standards to the Project."[1]

Each subcontract also provided that the scope of works included:

(a) Pile driving;

(b) Pre-drilling; and

(c) Refused pile remediation.

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[1] See scope of works in Schedule A to each subcontract.

[4] Neither Solar nor Projects holds any form of licence to perform any building work under the *Queensland Building and Construction Commission Act* 1991 ("the *QBCCA*").

[5] On 19 December 2017, each of Solar and Projects served payment claims under its subcontract on St Hilliers. Each payment claim purported to be made under s 17 of the *Building and Construction Industry Payments Act* 2004 ("the *BCIPA*").

[6] On 20 December 2017, each of Solar and Projects served on St Hilliers a Form 1 Notice of Claim of Charge and a Form 2 Notice to Contractor under the *Subcontractors' Charges Act* 1974 ("the *SCA*"). Each Form 1 attached a copy of the respective payment claim served on 19 December 2017 and claimed the same amount under the same descriptions. It is sufficient to refer to the Form 1 served by Solar in which the "Particulars of Claim" were specified as:

> "Piling and ancillary works performed, and delay costs incurred, pursuant to a subcontract between the Claimant and the Contractor dated 26 September 2017 as set out and particularised in the **attached** payment claim dated 18 December 2017 in the sum of **$949,197.98** (excluding GST)."

[7] Mr Sam Rutherford, the National Commercial Manager for St Hilliers, described the subject matter of the respective claims as follows:

(a) In the claim by Solar he said[2]:

> "16. The work for which payment is sought in both the Solar Payment Claim and the Solar Form 1 are summarised as follows:-
>
> (a) Milestone payments for mobilisation of piling machinery for driving of piles, in the amount of $123,207.50;
>
> (b) Progressive payments for direct driving of piles into the ground, mobilisation and demobilisation of machinery for piling, tooling and laser setout, maintenance and repair of piles and cutting of piles to the correct height including punching, galvanising and Quality Assurance, in the amount of $460,804.72.
>
> (**together the piling works)**
>
> (c) A claim for delay and disruption purportedly caused on site by civil construction, surveying of the pile locations, tracking of machines and other delays between July and November 2017, in the amount of $365,185.76."

(b) For the claim by Projects[3]:

> "16. The work for which payment is sought in both the Projects Payment Claim and the Projects Form 1 are summarised as follows:

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2 Affidavit of Rutherford sworn 9 January 2018.
3 Affidavit of Rutherford in BS 341/18 sworn 9 January 2018.

(a) Milestone payments for mobilisation of piling machinery for driving of piles in the amount of $123.207.50;

(b) Progressive payments for direct driving of piles into the ground, pre-drilling of holes for piles to be driven into, mobilisation and demobilisation of machinery for piling, tooling and laser setout, maintenance and repair of piles and cutting of piles to the correct height, in the amount of $754,111.03.

(together the piling works)

(c) Progressive payments for installation of trackers on top of the piles and installation of solar modules (**tracker works**) in the amount of $170,000.00. I am aware from my experience during the Collinsville Solar Farm project that trackers are metal supports which are fastened to the piles via the holes punched into the piles. Solar modules are then placed on top of the trackers. Connection of electrical wiring of the solar panels and installation of the panels is performed by a separate subcontractor.

(d) A claim for delay and disruption purportedly caused on site by civil construction, surveying of the pile locations, tracking of machines and other delays between July and November 2017, in the amount of $365,185.76."

[8] On 10 January 2018, Bouygues issued a payment certificate showing an amount payable by Bouygues to St Hilliers of some $1.8 million on 17 January 2018.

[9] On 15 January 2018, each of Solar and Projects partially withdrew its Notice of Claim of Charge by the amount of $365,185.76, being the amount of the delay and disruption claim. The remaining claims are for $1,047,318.53 (excluding GST) by Projects and $584,012.22 (excluding GST) by Solar ("the remaining claims").

[10] On 22 January 2018, Solar and Projects filed a claim and statement of claim in this Court seeking, *inter alia*:

(a) orders for payment of the remaining claims:

- as a debt due and owing by St Hilliers;
- alternatively, as damages for misleading or deceptive conduct;
- further alternatively, "on the basis of estoppel";

(b) declarations that Solar and Projects are entitled to be paid the remaining claims from funds retained by Bouygues.

[11] The present applications are the separate proceedings which St Hilliers has commenced against Solar (BS 339 of 2018) and Projects (BS 341 of 2018) seeking cancellation of

the claims of charge under s 21 of the *SCA* and declarations that the claims under the *BCIPA* are invalid.

[12] Given the commonality of the issues, it is convenient to deal with both matters in this judgment.

[13] The arguments advanced by St Hilliers can be summarised as follows:

(a) Each of the subcontracts with Solar and Projects was for the performance of "building work" within the meaning of that term in the *QBCCA*. Neither Solar nor Projects held any licences to perform any building work under the *QBCCA*, and accordingly by s 42 of the *QBCCA*, they are "not entitled to any monetary or other consideration" for carrying out unlicensed building work under the subcontracts;

(b) As Solar and Projects carried out building work in contravention of s 42, and are thereby not entitled to any monetary or other consideration for doing so under the subcontracts, there are no payments due which could be secured by a charge under the *SCA*;

(c) The claims made by each of Solar and Pronto under the *BCIPA* are not validly made because the *BCIPA* does not apply to unlicensed contractors.

[14] For each of Solar and Projects it was submitted that:

(a) there was no evidence suggesting that St Hilliers was prejudicially affected by the charges under the SCA;

(b) neither Solar nor Projects needed a licence under the *QBCCA* to perform the works under the subcontract;

(c) St Hilliers is estopped from relying on s 42 of the *QBCCA* to avoid paying each of Solar and Projects the amount claimed in the charge;

(d) each of Solar and Projects was entitled to issue its payment claim under ss 12 and 17 of the *BCIPA*; and

(e) St Hilliers is estopped from relying on s 42 of the *QBCCA* to argue that Solar and Projects were not entitled to issue their payment claims.

"Building work" under the QBCCA

[15] As already noted, neither Solar nor Projects held a licence under the *QBCCA*. If the work which is the subject of their claims was "building work" for the purposes of the *QBCCA*, then s 42 is engaged. That section provides:

> "**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.

Maximum penalty –

(a) for a first offence – 250 penalty units; or

(b) for a second offence – 300 penalty units; or

(c) for a third or later offence, or if the building work carried out is tier 1 defective work – 350 penalty units or 1 year's imprisonment.

(2) An individual who contravenes subsection (1) and is liable to a maximum penalty of 350 penalty units or 1 year's imprisonment, commits a crime.

(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.

(4) A person is not stopped under subsection (3) from claiming reasonable remuneration for carrying out building work, but only if the amount claimed –

(a) is not more than the amount paid by the person in supplying materials and labour for carrying out the building work; and

(b) does not include allowance for any of the following –

(i) the supply of the person's own labour;

(ii) the making of a profit by the person for carrying out the building work;

(iii) costs incurred by the person in supplying materials and labour if, in the circumstances, the costs were not reasonably incurred; and

(c) is not more than any amount agreed to or purportedly agreed to, as the price for carrying out the building work; and

(d) does not include any amount paid by the person that may fairly be characterised as being, in substance, an amount paid for the person's own direct or indirect benefit."

[16] The term "building work" is defined in Schedule 2 to the *QBCCA* as follows:

"***building work*** means –

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

(b) the renovation, alteration, extension, improvement or repair of a building; or

(c) the provision of lighting, heating, ventilation, airconditioning, water supply, sewerage or drainage in connection with a building; or

(e) any site work (including the construction of retaining structures) related to work of a kind referred to above; or

(f) the preparation of plans or specifications for the performance of building work; or

(fa) contract administration carried out by a person in relation to the construction of a building designed by the person; or

(g) fire protection work; or

(h) carrying out site testing and classification in preparation for the erection or construction of a building on the site; or

(i) carrying out a completed building inspection; or

(j) the inspection or investigation of a building, and the provision of advice or a report, for the following –

(i) termite management systems for the building;

(ii) termite infestation in the building;

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

[17] By the Schedule 2 definition of "building", that word "generally, includes any fixed structure". The definition provides examples of a fixed structure, namely "a fence other than a temporary fence", "a water tank connected to the stormwater system for a building", and "an in-ground swimming pool or an above-ground pool fixed to the ground".

[18] In *Ooralea Developments Pty Ltd v Civil Contractors (Australia) Pty Ltd,*[4] I had occasion to examine this definition of "building".[5] I said:[6]

"[27] The *QBSA Act* definition of 'building' clearly goes beyond the traditionally understood meaning of that word as being, in effect, a structure with walls and a roof.[7] The definition is extended to include 'any fixed structure'. That the meaning of 'building' is so

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4 [2015] 1 Qd R 311.

5 Which then appeared in the *Queensland Building Services Authority Act* 1991.

6 At [27] – [34].

7 For example, in *Hilderbrandt v Stephen* [1964] NSWR 740, Jacobs J, at 740, said that the word 'building' popularly refers to a house, but the ordinary meaning of the word involves at least the concept of a structure with a roof and a support for that roof.

extended is put beyond doubt by the 'examples of a fixed structure', which include structures which never would have qualified as 'buildings' under the traditional meaning of the word.

[28] The extended definition, however, begs the question as to what is a 'fixed structure'. The term 'fixed' is easily understood. A structure is 'fixed' if it is attached such as to become part of the land – *quicquid plantatur solo, solo cedit*. It is not necessary for present purposes to essay the tests for the doctrine of fixtures.[8]

[29] Clearly enough, every building is a structure, but not every structure is a building (in the traditional sense of the word). In *Mills & Rockleys Ltd v Leicester City Council*[9], Lord Goddard CJ said:[10]

> '"Structure" means something which is constructed. It is not everything which is "constructed" that would ordinarily be called a building, but every building is a structure.'

[30] The Macquarie Dictionary relevantly defines the noun 'structure' to mean '2. Something built or constructed; a building, bridge, dam, frame work etc. … 4. Anything composed of parts arranged together in some way; an organisation.'

[31] A 'structure' need not even be something in the nature of a building (in its traditional sense). So, for example, in *Black v Shaw & Official Assignee*,[11] Denniston J had to construe a statute in which 'work' was defined to mean, in effect, skilled or unskilled work or labour in connection with, inter alia, 'the construction, decoration, alteration, or repair of any building or other structure upon land'. The question for the Court was whether the formation, metalling and construction of a road fell within this definition. His Lordship said:[12]

> 'Can a road be called a "structure" upon land? A structure has been defined, in its most general terms, as a "construction of related parts". That would justify the description of a road unless such a meaning was inconsistent with the context. A road may fairly be described as constructed. We say "the Romans constructed roads in Rome which are still in use". If the "structure" in the section is to be read as *ejusdem generis* with "building" it would hardly cover a road, but I do not feel bound so to hold it. I think, therefore, I am justified in holding a road to be the construction of a structure upon land.'

[32] I will return to the topic of 'roads' shortly.

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8 It is sufficient to refer to respected texts, such as Butt "Land Law" (6th ed), 3.03 ff.
9 [1946] 1 All ER 424.
10 Ibid, 427.
11 (1914) 33 NZLR 194.
12 Ibid, 196.

> [33] The Contract in this case expressly provided that the works consisted of, inter alia, 'the construction of … stormwater drainage, sewer and water reticulation …'. For my part, I see no reason why each of these objects, when constructed and attached to the ground so as to be regarded in law as 'fixed', ought not be regarded as 'fixed structures' and therefore within the *QBSA Act* definition of the word 'building'. A structure does not have to resemble in any way a building (in the traditional sense). The question is whether the object has been constructed. As Gibbs J (as he then was) said in *R v Rose*:[13]
>
> > 'The word "structure" in its most natural and ordinary meaning is a building, but the word is capable of having the wider meaning of anything constructed out of material parts, and in that sense undoubtedly will include a machine and a caravan.'
>
> [34] That this is the correct approach is confirmed by the examples given in the *QBSA Act* definition of 'building', none of which could be said to even vaguely resemble a building (in the traditional sense)."

[19] The same considerations apply in the present case.

[20] As was pointed out by counsel for the respondents, the *Queensland Building and Construction Commission Regulation* 2003 ("the Regulation") excludes, by the operation of s 5 and Schedule 1AA, a wide variety of categories of work from the ambit of "building work". These excluded categories include work for a farm building or farm fence, work valued at $3,300 or less, work performed by specified professionals or entities, work on specific types of projects (such as water reticulation systems, busways, roads and tunnels), work in specific industries (such as construction work in mining) and specific types of work (including installation of manufacturing equipment and installation of solar hot water systems). However, without reciting in detail the 53 categories of work identified in Schedule 1AA as being excluded from "building work", it is sufficient to say that the piling works identified in the respective scopes of works in the subcontracts clearly did not fall within any of the excluded categories. Contrary to the respondents' submissions that it "is arguable that the work done by the respondent on the solar farms falls within, or is analogous to, one or more of the criteria in Schedule 1AA"[14], the relevant question is whether the works the subject of the subcontracts actually (and not by analogy) fell within the ambit of any of the specific excluded categories of work in Schedule 1AA. In this case, the piling works do not fall within any of those categories, and is therefore not excluded from the ambit of "building work".

[21] Indeed, far from being excluded, the legislation specifically provides for licences for work of this sort. Section 30 of the *QBCCA* permits the issuing of "contractors' licences" for all or various classes of building work. By s 14 of the Regulation, contractors' licences are divided into the classes specified in Schedule 2 to the Regulation. Part 32 of Schedule 2 to the Regulation provides the class of licence:

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[13] [1965] QWN 42, 43.

[14] Respondents' submissions, para 19.

"Foundation work (piling and anchors)". The scope of work encompassed under that class is:

> "**2 Scope of work**
>
> (1) Excavate and install support.
>
> (2) Construct underpinning.
>
> (3) Concreting for foundation work, including install formwork, reinforcement and concrete.
>
> (4) Install piling including driven piles, cast-in piles, groutcrete piles, compressed piles, bored cast-in place piles and screw piles.
>
> (5) Dewater site including sump and permanent dewatering systems.
>
> (6) Incidental work of another class."

[22] It is quite clear that the Queensland Solar Farms project involved the construction of objects which were fixed to the ground, i.e. involved the erection or construction of "buildings" (as defined). The scopes of works under the subcontracts were specifically for the piling foundations of the "buildings" constituting the structures of the solar farms, and was thereby work in the construction of those "buildings". The work under each subcontract was therefore "building work". Alternatively, at the very least, the piling works under the subcontracts constituted site works related to the construction of the buildings in the solar farm project, and thereby fell within the definition of "building work". This, as counsel for the applicants submitted, is an unsurprising result, given that there is a specific class of contractors' licence for precisely this type of work.

[23] It follows that the prohibition in s 42(1) applies to each of Solar and Projects in respect of the works performed under the subcontracts. Accordingly, by the application of s 42(3), neither Solar nor Projects is entitled to any monetary or other consideration. This does not exclude Solar and Projects from making claim for "reasonable remuneration" in accordance with s 42(4), but it certainly means that neither is entitled to claim for payments said to be due under their respective subcontracts.

***BCIPA* payment claims**

[24] It was not in issue either that the work under the subcontracts was "construction work" as defined in s 10 of the *BCIPA* or that each subcontract was a "construction contract" as defined in Schedule 2 of the *BCIPA*. Indeed, those were necessary premises on which the payment claims submitted by each of Solar and Projects on 19 December 2017 must have been based.

[25] The *BCIPA* relevantly provides:

> "**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.
>
> …
>
> **17 Payment claims**
>
> (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the ***respondent***)"

[26] Each of the payment claims in this case was purportedly made under s 17(1). It was submitted for the respondents that s 42 of the *QBCCA* has no application in this case, where the work was admittedly done and claimed for under a "construction contract". But, as Williams JA said, in relation to the cognate equivalent of s 42 under the *Queensland Building Services Authority Act* 1991, in *Cant Contracting Pty Ltd v Casella*:[15]

> "Because s 42(3) … provides that an unlicensed contractor 'is not entitled to any monetary or other consideration' for doing work pursuant to the contract, such a contractor cannot be said to have an entitlement to progress payments pursuant to ss 7, 12 and 17 of the [*BCIPA*]."[16]

The subcontractors' charges

[27] Section 5 of the *SCA* relevantly provides:

> "**5 Charges in favour of subcontractors**
>
> (1) If an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor is entitled to –
>
> (a) a charge on the money payable to the contractor or a superior contractor under the contractor's, or superior contractor's, contract or subcontract; and
>
> (b) subject to subsection (4), a charge on any security for the contractor's, or superior contractor's, contract or subcontract.
>
> (2) The charge of a subcontractor secures payment in accordance with the subcontract of all money that is payable or is to become

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[15] [2007] 2 Qd R 13 at [30].
[16] See also Jerrard J at [44] and McMurdo J at [61].

payable to the subcontractor for work done by the subcontractor under the subcontract.

…

(6) Money that is or is to become payable to a subcontractor for work done by the subcontractor under a subcontract, and the payment of which is secured under subsection (2) –

(a) includes money the payment of which is governed by a provision of the subcontract still to be complied with, including for example the following –

(i) a provision establishing a procedure for the certification of the amount, quality or value of work that has been performed;

(ii) a provision establishing a procedure for the resolution of a dispute about the amount, quality or value of work that has been performed; and

(b) does not include the following –

(i) damages for breach of contract or in tort;

(ii) an amount payable on the basis of an extra-contractual remedy, including, for example, as reasonable compensation for work done;

(iii) damages or other relief under another Act or an Act of another State or the Commonwealth, including damages or other relief under the *Competition and Consumer Act 2010* (Cwlth)."

[28] It is to be noted that, by s 5(2), the charge "secures payment in accordance with the subcontract of all money that is payable … for work done by the subcontractor under the subcontract".

[29] Section 10 makes provision for subcontractors who intend to claim a charge to give notices of such claim, as was done in this case.

[30] Section 21 of the *SCA* provides:

"**21 Application to court by person prejudicially affected**

(1) A person who alleges that the person is prejudicially affected by a claim of charge under this Act may at any time make application to the court for an order –

(a) that the claim be cancelled; or

(b) that the effect of the claim be modified.

(2) The court must hear and determine summarily an application made pursuant to this section and may make such order as it thinks fit.

(3) Without limiting the circumstances in which a person may be prejudicially affected for subsection (1), a person (the ***affected person***) is taken to be prejudicially affected by the claim of charge of a subcontractor (the ***claiming subcontractor***) if –

(a) because of the claim of charge –

(i) the payment of any amount to which the affected person is entitled is delayed or otherwise affected; or

(ii) the release of a security for a contract or subcontract given by or for the affected person is delayed or otherwise affected; and

(b) the affected person is a superior contractor in relation to the claiming subcontractor; and

(c) the affected person has already paid, to a person who is a contractor or superior contractor in relation to the claiming subcontractor, an amount for work the subject of the claim of charge."

[31] Counsel for the respondents submitted to the effect that the present applications by St Hilliers under s 21 failed *in limine* because there was nothing in the applicant's material to raise or support an allegation that St Hilliers is prejudicially affected by the respondents' claims of charges. That submission cannot be accepted. The respondents' claims of charges are all that are standing between the applicant and a large sum of money which Bouygues is constrained from paying over because of the respondents' claimed charges. The prejudicial affect on the applicant is self-evident. In any event, s 21(3)(a)(i) is applicable here – payment of money to St Hilliers is being delayed because of the claims of charge, and St Hilliers is therefore taken to be prejudicially affected.

[32] In each of the present applications under s 21, the onus is on the applicant to satisfy the Court that Solar and Projects respectively had "no arguable or fairly arguable case" in support of the claimed charges; that the basis of the claimed charges was "untenable".[17]

[33] The ambit of the security provided by a charge under the *SCA* is delineated by s 5(2). By the operation of s 42(3) of the *QBCCA*, both Solar and Projects are disentitled from being paid monetary or other consideration for work done under the

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[17] *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* [2005] 1 Qd R 610, per Jerrard J at [6], McMurdo P and Mullins J agreeing.

subcontracts. In those circumstances, there could be no payment in accordance with each subcontract which a charge under the *SCA* could secure.[18]

The estoppel claims

[34] Mr Ronnie Conquest, who describes himself as the "Special Projects Officer" for each of Solar and Projects, has filed an affidavit in each application in which he says:

(a) On 19 May 2017 he attended a meeting with a number of officers of St Hilliers, including Mr James Hawkins, who is the St Hilliers senior project manager;

(b) Mr Hawkins asked if the respondents were "QBCC licensed" and Mr Conquest answered that they were not;

(c) Mr Hawkins responded with words to the effect: "That's okay the respondent company won't need a QBCC licence, it will be working under our licence and we will be signing off on the finished works."

(d) On 19 July 2017, Mr Conquest attended a meeting onsite with several of St Hilliers officers, including Mr Damian Fantozzi (St Hilliers' project manager) who said words to the effect that the respondents did not need a QBCC licence because they would be working under the St Hilliers licence;

(e) At no time prior to early January 2018 was Mr Conquest or any other of the respondents' officers told that there would be any issue with, or objection taken, on the fact that the respondents did not hold QBCC licences.

[35] Both Solar and Projects argue that, from this evidence, it is at least arguable that St Hilliers might be estopped from relying on s 42 of the *QBCCA*. In seeking to avoid a summary determination on the present applications, reliance was placed on the judgment at first instance of Shephardson J in *Re Northbuild Constructions Pty Ltd*[19] in which, on the evidence before him, his Honour considered there to be a "prima facie case of unconscientious conduct" by the applicant contractor against its subcontractor, and concluded that, because that subcontractor's claim of estoppel could only be fully investigated and adjudicated on at trial, cancellation of the subcontractor's charge in a summary way was not appropriate.

[36] Reference was also made to *Concept Constructions (Qld) Pty Ltd v Asphalt Pavements Pty Ltd (in liquidation),*[20] which was another application for cancellation of a subcontractor's charge. In that case, there was no question of an estoppel. Rather, there was demonstrably a factual issue as to whether there were any amounts payable or to become payable under the relevant subcontract which could be secured by a charge. Given that the material raised factual issues, for which a trial was necessary, Williams J (as he then was) considered that the issues about whether the subcontractor had a valid charge could not be resolved summarily.

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[18] *Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liquidation) & Anor* [1999] QCA 306, per de Jersey CJ and Davies JA at [12].
[19] [1998] QSC 196.
[20] [2000] QSC 269.

[37] Counsel for the respondents submitted that the question whether the conduct of the St Hilliers officers amounted to conduct which would give rise to an estoppel required a factual investigation at trial and that, consistent with the authorities to which I have just referred, there should not be a summary determination to cancel the claimed charges.

[38] However, even if one accepts for present purposes the facts deposed to by Mr Conquest, the potential estoppels claimed by the respondents are not available to oust the operation of s 42. So much is clear from *Multiplex Constructions Pty Ltd v Rapid Contracting Pty Ltd (in liquidation) & Anor*.[21] That was also a case of building work having been undertaken by an unlicensed subcontractor, who then asserted a charge under the SCA. In an application to cancel the charge, it was held that the particular work in that case was "building work" which was carried out in contravention of s 42, that the subcontractor was not entitled to any monetary or other consideration, and there was therefore no payment under the subcontract which a charge could secure. After making those findings, de Jersey CJ and Davies JA then said:

> "13 It was contended for the respondent below, on two further bases, that there was, arguably, such a payment. The first of these was on the basis of a quantum meruit; the second on the basis of estoppel. It is not entirely clear that either of these was pursued before this Court. However because neither was expressly abandoned they should be dealt with.
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> 14 There are two reasons why the first basis must fail. The first is that the decision of this Court in *Zullo Enterprises Pty Ltd & Ors v Sutton* (CA No 8045 of 1998, 15 December 1998) held that s 42(3) precludes a restitutionary claim. The second, in our view, is that a restitutionary claim is not one which comes within s 5(2) of the *Subcontractors' Charges Act* which, in terms, appears to be limited to securing payment of monies payable in accordance with a contract for work done under it; in other words a contractual claim.
>
> 15 Both reasons apply equally to the contention founded on estoppel. Moreover the respondent could not point to any conduct of the appellant which may have played a part in the adoption of, or persistence in, any assumption by the respondent that it did not require a licence. Nor could it point to any duty upon the appellant to give any advice to the respondent in respect of a licence. For all of those reasons this contention must also fail."

[39] Reliance on the first instance decision in *Re Northbuild Construction Pty Ltd* was, with respect, misplaced. An appeal against that judgment was allowed by the Court of Appeal in *Re Northbuild Construction Pty Ltd*.[22] Davies JA and Wilson J noted[23] that the subcontractor in that case had made three arguments which were accepted by the judge at first instance, the third of which was that the subcontractor could succeed on an

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[21] [1999] QCA 306.
[22] [2000] 2 Qd R 600.
[23] At [6].

estoppel claim, or at least that it was not abundantly clear that it could not, and this did not come within s 42(3). Their Honours continued:

> "[7] The third of these was no longer relied on by the respondent in this Court as a basis for sustaining the judgment below and the respondent also conceded that it was precluded from arguing successfully in this Court that it could succeed on the basis of a quantum meruit because of the decision of this Court in *Sutton v. Zullo Enterprises Pty Ltd*[24] which held that s. 42(3) precludes a restitutionary claim. However, it did not abandon its contention in this respect in the event that this matter might go beyond this Court. We should add, however, that there is an additional problem that such a claim is not a claim which comes within s. 5(2) of the *Subcontractors' Charges Act* which, in terms, appears to be limited to securing payment of monies payable in accordance with a contract for work done under it."

[40] Accordingly, I would hold in the present case that the asserted estoppels, or potential for asserted estoppels, to prevent St Hilliers from relying on s 42 of the *QBCCA* are not available.

Conclusion

[41] For the reasons I have given, therefore, my conclusions are as follows:

(a) Each of the subcontracts with Solar and Projects was for the performance of "building work" within the meaning of that term in the *QBCCA*;

(b) By reason of the operation of s 42 of the *QBCCA*, both Solar and Projects are not entitled to any monetary or other consideration for carrying out that building work under the subcontracts in circumstances where neither Solar nor Projects held licences to perform building work;

(c) Accordingly, there are no payments due under either subcontract which could be secured by a charge under the *SCA*;

(d) The payment claims made by Solar and Projects purportedly under the *BCIPA* are not valid payment claims;

(e) The respondents cannot raise an estoppel to prevent the applicant from relying on s 42 of the *QBCCA*;

(f) It is appropriate for each of the subcontractors' charges to be summarily cancelled pursuant to s 21 of the *SCA*.

[42] Apart from seeking orders for the cancellation of the charges, St Hilliers has sought declarations as to the validity of the respondents' payment claims. As counsel for the applicant submitted, cancellation of the subcontractors' charges would not, of itself, preclude the respondents from seeking to persist with further action in reliance on the

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[24] [2000] 2 Qd R 196.

payment claims. For the reasons I have given above, however, those payment claims are invalid. To avoid any further unfortunate consequences should the respondents seek to persist in maintaining reliance on those payment claims, it seems to me to be appropriate to clarify the situation by making the declarations sought.

[43] Finally, there is no reason why costs should not follow the event on each of these applications. The respondents engaged fully in the argument, and have unsuccessfully resisted the applications.

[44] There will be the following orders:

In Proceeding BS 339 of 2018:

1. Pursuant to s 21 of the *Subcontractors' Charges Act* 1974 (Qld), the charge claimed by the respondent in its notice of claim of charge Form 1 dated 20 December 2017 directed to Bouygues Construction Australia Pty Ltd, ACN 144 013 801 as employer is cancelled.

2. It is declared that the payment claim issued by the respondent to the applicant on or about 18 December 2017 with a reference date of 31 December 2017 for a sum of $949,197.98 is invalid and of no effect under the *Building Construction Industry Payments Act* 2004 (Qld).

3. The respondent pay the applicant's standard costs of and incidental to the application.

In Proceeding BS 341 of 2018:

1. Pursuant to s 21 of the *Subcontractors' Charges Act* 1974 (Qld), the charge claimed by the respondent in its notice of claim of charge Form 1 dated 20 December 2017 directed to Bouygues Construction Australia Pty Ltd, ACN 144 013 801 as employer is cancelled.

2. It is declared that the payment claim issued by the respondent to the applicant on or about 18 December 2017 with a reference date of 31 December 2017 for a sum of $1,412,504.29 is invalid and of no effect under the *Building Construction Industry Payments Act* 2004 (Qld).

3. The respondent pay the applicant's standard costs of and incidental to the application.