ORDER:

1. There will be a declaration that the adjudication made by the second respondent dated 23 August 2013 is void;

2. I will hear the parties as to any further orders and as to costs.

CATCHWORDS: CONTRACT – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – where the applicant, as principal, entered into a contract with the first respondent, as contractor, for the performance of certain works in connection with a subdivisional development – where there was a dispute as to the amount of a payment claim owed by the applicant to the respondent under the Building and Construction Industry Payments Act 2004 (Qld) (“BCIPA”) – where there was an adjudication which determined the amount to be paid by the applicant to the respondent - where the applicant applied for a declaration that the adjudicator’s decision is void and an injunction to restrain the respondent from enforcing the
adjudicator’s decision – whether the declaration voiding the adjudicator’s decision should be made – whether the injunction should be granted.

*Building and Construction Industry Payments Act 2004 (Qld), ss 7, 12, 17, 18*
*Land Act 1994 (Qld), ss 93, 94, 95, 362(1)*
*Land Title Act 1994 (Qld), ss 50, 51, 54(1)*
*Queensland Building Services Authority Act 1991 (Qld), s 42(3), Schedule 2*
*Queensland Building Services Authority Regulation 1991 (Qld), s 5*

*Attorney-General (NSW) v Brewery Employees Union of New South Wales (1908) 6 CLR 469*
*Black v Shaw & Official Assignee (1914) 33 NZLR 194,* considered.
*Cant Contracting Pty Ltd v Casella [2007] 2 Qd R 13,* considered.
*Mills & Rockleys Ltd v Leicester City Council [1946] 1 All ER 424.*
*R v Rose [1965] QWN 42,* considered.
*Watpac Construction (Qld) Pty Ltd v KLM Group Ltd & Ors [2013] QSC 236,* considered.

**COUNSEL:** D Savage QC and D O’Brien for the applicant
P Dunning QC and R Haddrick for the first respondent

**SOLICITORS:** QBM Lawyers for the applicant
HWL Ebsworth for the first respondent
No appearance for the second respondent

[1] On 4 October 2012, the applicant, Ooralea Developments Pty Ltd (“Ooralea”), as “the Principal”, entered into a contract (“the Contract”) with the first respondent, Civil Contractors (Aust) Pty Ltd (“Civil”), as “the Contractor”, for the performance of certain works in connection with a subdivisional development called “The Waters at Ooralea – Stage 2”. The Contract’s instrument of agreement specified that the following documents would comprise the Contract:

“Tender, dated 31 August 2012

Letter of Acceptance of Tender, dated 24 September 2012

AS4000:1997 General Conditions of Contract and Annexures

Specification No. MCOU002.01 Rev A

Drawing No’s: YC0306-C2-100 to 104, 200 to 204, 300 to 325, 401 to 411, 500 to 507, 600 to 601, YC0306-SK-001 to 002, 17, 20 to 23.

Other documents:
Shall together comprise the Contract between the parties AND if the Contractor or the Principal is two (2) or more persons then they shall be bound jointly and severally.”

[2] The specification provided, inter alia, as follows:

“1 LOCATION AND DESCRIPTION OF PROJECT (AUSSPEC C101.01)

The works comprise the construction of civil subdivisional works for Stage 2 of The Waters at Ooralea, Temples Lane, Bakers Creek. The works consist of the construction of earthworks, roadworks, stormwater drainage, sewer and water reticulation and electrical and telecommunications ducting for the new allotments.

The works are to be constructed on Lot 29 on SP185796, Parish of Howard in the County of Carlise.

Access to the subdivision is via Montgomery Street.

2 EXTENT OF WORK (AUSSPECT C101.02)

Works under this contract comprise the supply of all labour, materials and plant to construct the works. It includes, but is not limited to the following items of construction, which shall be carried out in their entirety, in strict accordance with and to the true intent and purpose of the Conditions of Contract, the Technical Specifications and under the supervision of the Superintendent:

2.1 General

- Provision for control, protection and safety of traffic during construction including notifications to and obtaining approvals from Authorities;
- Notification of all appropriate property owners adjoining or affected by the Works;
- Setting out the Works;
- Erosion and sedimentation control of the Works, including stockpile areas;
- Site clearing and grubbing, topsoil to stockpile;
- Earthworks to allotments and future stages;
- Site regrading; and
- Topsoil spreading and revegetation to disturbed areas outside of allotments and to grassed outlet drains.

2.2 Roadworks
• Earthworks, including excavation and embankment construction;
• Stormwater drainage, including kerb and gutter, pipes and pits;
• Subsurface drainage;
• Pavement, consisting of unbound granular subbase and base and asphaltic concrete wearing surface; and
• Signposting and line marking, where required.

2.3 Provision of Services

• Water supply reticulation;
• Sewerage reticulation;
• Conduits as necessary for installation of electricity and telecommunications by others; and
• Street light pole footings.

2.4 Work by Others

• Provision of electricity and telecommunications services to the subdivision will be undertaken by a separate Electrical Contractor;
• The excluded work will be the responsibility of the Principal and Electrical Contractor. Attention is drawn to the Conditions of Contract regarding the obligation of the Contractor to coordinate the works with any simultaneous and/or adjacent work by others. The Contractor shall liaise with these other Contractors, to avoid delays, disruption and possible conflict; and
• Concrete paved footpaths, turfing and landscaping."

[3] On 2 July 2013, Civil served a payment claim, purportedly pursuant to the Building and Construction Industry Payments Act 2004 (“BCIPA”), on Ooralea. The amount claimed was $1,677,916.47 (inclusive of GST) and was calculated on the basis of a reference date of 30 June 2013.

[4] On 16 July 2013, Ooralea delivered a payment schedule, in accordance with s 18 of BCIPA. The amount allowed in the payment schedule was $153,386.66.

[5] On 30 July 2013, Civil lodged an adjudication application pursuant to s 21 of BCIPA with the relevant nominating authority, and the second respondent was appointed adjudicator.¹

[6] On 6 August 2013, Ooralea delivered its adjudication response. Submissions were subsequently delivered, including in response to a request by the adjudicator.

¹ As is conventional, the second respondent did not appear on this hearing, and will abide the court’s determination.
On 27 August 2013, the adjudicator’s decision dated 23 August 2013 was released to the parties. That decision was, relevantly, that the amount of the progress payment to be paid by Ooralea to Civil is $969,836.23 (inclusive of GST) and that the date on which any amount became payable was 30 July 2013.

In the course of his decision, the adjudicator rejected two objections which Ooralea had made, challenging the adjudicator’s jurisdiction.

Ooralea has now applied for:

(a) a declaration that the adjudicator’s decision made under BCIPA is void, and
(b) an injunction to restrain Civil from taking any step to enforce the adjudicator’s decision.

Ooralea contends that the adjudicator wrongly rejected the two jurisdiction arguments, and submitted:

(a) the work the subject of the contract was “building work” for the purposes of the Queensland Building Services Authority Act 1991 (“QBSA Act”), that Civil did not hold a licence under the QBSA Act to perform that work, that Civil therefore had no entitlement to payment for that work and could not have an entitlement to progress payments under BCIPA, and accordingly the adjudicator had no jurisdiction to award an amount based on a payment claim;

(b) there was no “reference date” for which a valid payment claim could be made.

The adjudicator’s decision

As to the first argument, the adjudicator noted the submission by Ooralea that Civil “has no entitlement to submit a payment claim under [BCIPA] because [Civil] does not have the required licences under the [QBSA Act]”.

The adjudicator then referred to the definitions of “building” and “building work” in the QBSA Act and the provisions of the Queensland Building Services Authority Regulation 2003 (“QBSA Regulation”) which prescribe that which is not “building work”. He then referred to the various categories of work under the Contract and summarised the parties’ competing submissions.

In respect of the sewerage, stormwater and water pipe works under the Contract, the adjudicator said:

“18. In his further submissions the respondent proposes that the sewerage, stormwater and water pipe networks are fixed structures and so a building within the meaning of the QBSA Act. Subparagraph (c) of the definition of Building Work refers to the ‘provision of ...... water supply, sewerage or drainage in connection with a building’. If the water supply, sewerage or drainage met the definition of a ‘building’ then subparagraph (c) would be redundant. The definition of a ‘fixed structure’ is not as broad as the respondent submits and does not

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2 Decision, para 12.
extend to the water, sewer or drainage systems. Water, sewer or drainage systems do not fall within the definition of building work where there is no building.”

[14] The adjudicator further said³ that “the site works in subparagraph (e) [of the definition of ‘building work’ in the QBSA Act] is ‘building work’ when related to other items that are ‘building work’”, that “the site testing work in subparagraph (h) [of the definition of ‘building work’ in the QBSA Act] is building works when carried out for the preparation or construction of a building”, and that “where there is no building there is no building work”. The adjudicator concluded on this point:

“22. There remains no building within the meaning of the Act identified by the respondent and so no building work and therefore no requirement for a QBSA licence.”

[15] Further, the adjudicator rejected Ooralea’s submission that the road works which Civil performed were not excluded from the ambit of “building work” by reason of the QBSA Regulation. After referring to the regulation which, relevantly, defined “road” to mean an area of land “dedicated, notified or declared to be a road for public use”, the adjudicator said:

“25. The works are residential subdivision works and the works would have been notified (by the development approval) to be for public use. The road (and inclusions in paragraph (b)) within the scope would be excluded by virtue of 5(l)(i) of the regulations.”

[16] In relation to the reference date argument, the adjudicator noted Ooralea’s submission that the payment claim was not valid under BCIPA because it was premature – the “reference date” for the works referred to in the payment claim did not arise until 31 July 2013.

[17] The adjudicator referred to s 12 of BCIPA and the definition of “reference date” in that legislation. He then noted the following relevant provisions of the contract:

(a) Clause 37.1:

“Progress Claims

The contractor shall claim payment progressively in accordance with item 28.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to provisions of the contract.”

(b) Item 28(a) “Times for progress claims”:

“Last day of each month for WUC done to the last day of each previous month”

³ Decision, paras 19 and 21.
The adjudicator stated that Ooralea’s position was that “the reference date of 30 June can only include works that have been carried out prior to 31 May 2013” and that works “carried out to 30 June 2013 can be claimed in a payment claim after 31 July 2013”. The adjudicator then concluded:

“34. The contract allows a payment claim to be made on the last day of each month. The works to be included are the works completed to the last day in each previous month. The work to be included in the progress claim under the contract is the work in each month previous to the date of submission of the progress claim. If the date for a progress claim is 30 June then the previous month’s work is work from 29 May to 29 June.

35. The Act states that ‘From each reference date under a construction contract, a person is entitled to a progress payment ....’. The reference date is the last date of each month and each payment claim should be submitted from that date.

36. The reference date under the Act is the 30 June and the works up to 30 June are to be included in the payment claim.”

The present application

On the present application, Ooralea argued that the adjudicator erred in respect of both of these arguments, and that consequently the decision is infected by jurisdictional error and therefore void.

Civil contended that neither of these matters constituted, or gave rise to, jurisdictional error on the part of the adjudicator, and that accordingly there were no grounds for declaring the decision void and no basis for injunctive relief.

The unlicensed building work argument

Ooralea’s argument was founded on the contention that if the work performed under the contract was “building work”, as that term is defined in the QBSA Act, for which a licence was required, then Civil, not holding such a licence, was not entitled to issue or recover on a payment claim issued under BCIPA.

Section 42(3) of the QBSA Act relevantly provides that a person who carries out building work without holding the appropriate licence “is not entitled to any monetary or other consideration for doing so”. In Cant Contracting Pty Ltd v Casella it was held that, because s 42(3) of the QBSA Act provided that an unlicensed contractor was not entitled to any monetary or other consideration for doing work pursuant to the contract, such a contractor could not be said to have an entitlement to progress payments pursuant to ss 7, 12 and 17 of BCIPA.

The work under the Contract between Ooralea and Civil was as described in the specification, set out above. The central question is whether that work was “building work” under the QBSA Act. There was no issue that Civil did not have a licence under the QBSA Act for any of that work. If it was “building work” and Civil did not have the requisite licence, then, on the authority of Cant Contracting v Casella, Civil had no entitlement to progress payments under BCIPA.

The terms “building” and “building work” are defined in the Schedule 2 dictionary to the QBSA Act:

“building includes any fixed structure.

Examples of a fixed structure –

- a fence other than a temporary fence
- a water tank connected to the stormwater system for a building
- an inground swimming pool or an aboveground pool fixed to the ground

... 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.”

Section 5 of the QBSA Regulation excludes particular work from being “building work”. It relevantly provides:

“5 Work that is not building work
(1) For the Act, schedule 2, definition building work, the following work is not building work -

....

(k) construction, extension, repair or replacement of a water reticulation system, sewerage system or stormwater drain, outside the boundaries of private property;

(l) construction, maintenance or repair of –

(i) a busway or road; or

(ii) a tunnel for a busway or road;

(m) construction, maintenance or repair of a bridge, other than a bridge on private property;

... 

(zb) work consisting of earthmoving and excavating;

(zg) laying of asphalt or bitumen;

...

(5) In this section -

...

road –

(a) means an area of land, whether surveyed or unsurveyed -

(i) dedicated, notified or declared to be a road for public use; or

(ii) taken under an Act, for the purpose of a road for public use; and

(b) includes -

(i) a street, esplanade, highway, pathway, thoroughfare, toll road, track or stock route; and

(ii) a causeway or culvert in, on, or under a road that is associated with the road; and

(iii) a structure in, or, or under a road that is associated with the road.”

[26] It is necessary to examine each of these provisions in turn.

[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
The definition is extended to include “any fixed structure”. That the meaning of “building” is so 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.

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.

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*, Lord Goddard CJ said:

> “‘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.”

The Macquarie Dictionary relevantly defines the noun “structure” to mean

> “2. Something built or constructed; a building, bridge, dam, framework etc. ...

> 4. Anything composed of parts arranged together in some way; an organisation.”

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*, 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:

> “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.”

I will return to the topic of “roads” shortly.

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

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5 For example, in *Hilderbrandt v Stephen* [1964] NSWJR 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.

6 It is sufficient to refer to respected texts, such as Butt “Land Law” (6 Ed) at 3.03 ff.

7 [1946] 1 All ER 424.

8 At 427.

9 (1914) 33 NZLR 194.

10 At 196.
structures” and therefore within the *QBWA 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*:11

“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 *QBWA Act* definition of “building”, none of which could be said to even vaguely resemble a building (in the traditional sense).

[35] In respect of stormwater drainage, sewer and water reticulation, the adjudicator fastened on subparagraph (c) of the definition of “building work” and expressed the view that if water supply, sewerage or drainage fell within the definition of “building” then subparagraph (c) would be redundant. Subparagraph (c), however, is not concerned with the construction of a “building”, which is covered by subparagraph (a), but with the provision of the specified services to a building (in its extended meaning under the *QBWA Act*).

[36] In my respectful view, the adjudicator erred in construing the legislation to hold, as he clearly did, that water, sewer and drainage systems are not “building work where there is no building”.

[37] Once one accepts that the construction of, for example, water reticulation works results in a fixed structure which falls within the definition of “building”, it is equally clear that site work related to that construction is also “building work” under subparagraph (e) of the definition of that term in the *QBWA Act*.

[38] There is a further consideration. Section 5 of the *QBWA Regulation* expressly prescribes particular work which is not “building work” under the *QBWA Act*. One of the works which is not “building work” is, by s 5(1)(k), “construction ... of a water reticulation system, sewerage system or stormwater drain outside the boundaries of private property”.

[39] The necessary correlative of this express prescription is that the legislation is understood to mean, and the Legislature must have understood the legislation to mean, that the construction of a water reticulation system, sewerage system or stormwater drain would otherwise fall within the definition of “building work” under the *QBWA Act*, and that this prescription was necessary to exclude that work from the ambit of the definition in circumstances where that work is performed outside the boundaries of private property.

[40] A road, as I have already noted, is a fixed structure, and the construction of a road clearly falls within subparagraph (a) of the definition of “building work” under the *QBWA Act*. That is subject to s 5(1)(l)(i) of the *QBWA Regulation*, which relevantly provides that construction of a road is not “building work”. The word “road” in that section of the *QBWA Regulation*, however, has a specific definition set out in s 5(5).

11 [1965] QWN 42 at 43.
Relevantly, “road” for the purposes of s 5 means “an area of land, whether surveyed or unsurveyed ... dedicated, notified or declared to be a road for public use”.

The road in the present case was being constructed on private property (albeit property for which a subdivision approval had issued by the local authority). The adjudicator’s reason for deciding that this road was for public use and thereby excluded from the ambit of “building work” was that “the works would have been notified (by the development approval)”.

It is clear from the way in which the adjudicator expressed himself that this reasoning was based on the adjudicator’s assumptions with respect to the effect of a development approval and the process leading up to the granting of a development approval. The basis for those assumptions was not apparent.

But even more fundamentally, I consider that the adjudicator misinterpreted the definition of “road” in s 5 of the QBSA Regulation.

Section 5 of the QBSA Regulation has the effect of excluding road construction works from the ambit of “building work” under the QBSA Act if the work is on land “dedicated, notified or declared to be a road for public use”. In my view, the words “dedicated”, “notified” and “declared” are terms of art in connection with the creation of roads, and ought be understood according to their received meanings. It is, I think, no accident that the definition of “road” in s 5 of the QBSA Regulation is identical to the definition of “road” in s 93 of the Land Act 1994. That section defines the meaning of the term “road” for the purposes of Chapter 3 Part 2 of the Land Act. There are specific provisions of the Land Act which regulate the dedication of roads – see, for example, s 94. The legislation also makes provision for the relevant Minister to make declarations with respect to roads – see, for example, s 96(3). Section 95 of the Land Act provides to the effect that the land in all roads dedicated and opened for public use under repealed Land Act legislation remain vested in the State. The concepts of dedication, notification and declaration in connection with the creation of roads were expressly taken up by s 362(1) of the Land Act 1962 (as amended), which provided:

“The Minister, with the approval of the Governor in Council, may by notification published in the Gazette, declare any Crown land open as a road for public use and such land shall thereby be dedicated as a road accordingly.” (emphasis added)

It is also notable that the Land Title Act 1994 makes express provision for the dedication of land to public use, including roads, in the registration of plans of subdivision – see particularly ss 50 and 51. Section 54(1) of the Land Title Act, moreover, expressly provides that: “The registered owner of a lot may dedicate the lot as a road for public use by the registration of a dedication notice.”

In Attorney-General (NSW) v Brewery Employees Union of New South Wales, O’Connor J said:

“Where words have been used which have acquired a legal meaning it will be taken, prima facie, that the legislature has intended to use them with that
meaning unless a contrary intention clearly appears from the context. To use the words of Denman J in *R v Slator* (1881) 8 QBD 267 at 272: ‘But it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well known legal term’.

[47] In my view, the phrase “dedicated, notified or declared to be a road for public use” is clearly a reference to the mechanisms for the creation of roads for public use pursuant to the legislative provisions to which I have referred. The adjudicator was, with respect, in error in his construction of s 5 of the *QBSA Regulation*.

[48] It follows that the road in this particular case, not being one which had been “dedicated, notified or declared to be a road for public use”, was not one to which the exclusion in s 5 of the *QBSA Regulation* attached. Consequently, the work of construction of the road in this particular case was “building work” for the purposes of the *QBSA Act*.

[49] For these reasons, it is my conclusion that the adjudicator erred in finding that the work under the Contract was not “building work” within the meaning of that term in the *QBSA Act*. On the contrary, for the reasons I have set out above, the work was “building work” for which a licence under the *QBSA Act* was required for Civil to claim an entitlement to progress payments. It necessarily follows from that conclusion that the adjudicator did not have jurisdiction to make an award based on Civil’s payment claims under *BCIPA*.

[50] On that basis alone the adjudicator’s decision must be declared void.

**The reference date argument**

[51] I have set out above the relevant contractual terms and the adjudicator’s reasoning with respect to the reference date. In my respectful view, the adjudicator’s interpretation of the contractual terms was erroneous. Item 28(a) prescribed the time for progress claims as the “last day of each month for [work] done to the last day of each previous month”. That means, clearly enough, that for a progress claim made on the last day of June, the relevant work is that done to the last day of the month previous to June, i.e. May. The adjudicator’s reasoning that “if the date for a progress claim is 30 June then the previous month’s work is work from 29 May to 29 June” is fallacious – this does not represent the work done “to the last day of [the] previous month”, as is required by Item 28(a), but represents a month’s worth of work immediately prior to the date of the progress claim.

[52] The fact that an adjudicator errs in calculation of an amount to be awarded under an adjudication by reason of a misinterpretation of the contractual provisions does not necessarily mean that the adjudicator has committed a jurisdictional error. The relevant authorities on this proposition were recently collated by P McMurdo J in *Watpac Construction (Qld) Pty Ltd v KLM Group Ltd & Ors*:

> “[21] The effect of Watpac’s argument is that because KLM was entitled to a payment only according to its contract with Watpac, the adjudicator’s power was limited to a decision which applied the contract according to its correct interpretation. So if the adjudicator incorrectly identified the

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14 [2013] QSC 236.
terms of the contract or their effect, he would exceed his jurisdiction. Because the adjudicator’s powers are limited to the contract upon its correct interpretation, an error in interpreting the contract would involve a misapprehension of the limits of that jurisdiction.

[22] In Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd, Hodgson JA said (of the equivalent statute in New South Wales):³⁵

‘The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator’s ability, of the amount that is properly payable. … The adjudicator’s duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim.’

(emphases added)

[23] Similarly, in Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd, McDougall J said:³⁶

‘In determining the amount of a progress payment, adjudicators are required to consider, among other things, the provisions of the construction contract under which the claimed entitlement arises. … [T]hey are required to do so so they can work out ‘the amount calculated in accordance with the terms of’ that contract. In other words, their task requires them to identify the contractual provisions that are relevant to quantification of the amount of a progress payment, to decide (where there is a contest) the proper construction of those provisions and to apply them to the facts of the particular dispute. As Palmer J said in Multiplex at [58]:

“… If determination of a disputed progress claim depends upon resolution of a question as to what are the relevant terms of a contract, it must necessarily be implicit in the jurisdiction conferred on the adjudicator by the Act that he or she have jurisdiction to decide that question.” ’

[24] These New South Wales cases were applied by Applegarth J in BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd in stating, correctly in my respectful view, that:³⁷

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³⁵ (2005) 63 NSWLR 385 at 399 [52] (Basten and Ipp JJA agreeing).
³⁷ [2012] QSC 346 at [8].
‘An adjudicator who misconstrues or misapplies a relevant contractual provision and, as a result, does not correctly decide the amount of the progress payment, if any, to be paid to the claimant does not, for that reason alone, make a jurisdictional error.’

[53] In the present case, the adjudicator’s misinterpretation of the terms of the Contract led to an error in the calculation of the amount which would have been payable. It was not, however, a jurisdictional error.

Conclusion

[54] In this case, the contracted works fell within the meaning of “building work” in the QBSA Act. Civil did not have the requisite licence under the QBSA Act, and accordingly had no entitlement to progress payments under BCIPA. The adjudicator committed jurisdictional error in determining the adjudication. The adjudication should be declared void.

[55] There will be a declaration that the adjudication made by the second respondent dated 23 August 2013 is void.

[56] I will hear the parties as to any further orders and as to costs.