SUPREME COURT OF QUEENSLAND

CITATION:	*National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219
PARTIES:	**NATIONAL MANAGEMENT GROUP PTY LTD** **ACN 150 878 158** (applicant) **v** **BIRIEL INDUSTRIES PTY LTD TRADING AS MASTER STEEL** **ACN 625 309 793** (first respondent) **DESMOND DOWLING ADJUDICATOR NO. J1211570** (second respondent) **THE ADJUDICATION REGISTRAR, QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (third respondent)
FILE NO:	SC No 3414 of 2019
DIVISION:	Civil
PROCEEDING:	Originating Application
DELIVERED ON:	9 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2019
JUDGE:	Wilson J
ORDERS:	**The orders of the Court are:** **1. In respect of Adjudication Application No. 00477012 (the Lucky Squire application), I declare that:** **a. the decision of the second respondent dated 7 March 2019 in relation to Adjudication Application No. 00477012 (the Lucky Squire application) is void.** **b. the first respondent is permanently restrained from taking any further step to enforce the Adjudication Decision in relation to Adjudication Application No. 00477012 (the Lucky Squire application).** **c. any adjudication certificates given by the third respondent based upon the Adjudication Decisions in relation to Adjudication Application No. 00477012 (the Lucky Squire application) are declared**

void.

2. **In respect of Adjudication Application No. 00477005 (the Harbour Town application):**
    a. **the application for a declaration pursuant to section 10 of the *Civil Proceedings Act* 2011 (Qld) or alternatively in the inherent jurisdiction of the Court that the decision of the second respondent dated 7 March 2019 in relation to Adjudication Application No. 00477005 (the Harbour Town application) is void or liable to be set aside for want of jurisdiction is dismissed.**
3. **The question of costs is adjourned to a date to be fixed.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the applicant seeks to set aside two adjudication decisions made under the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) ("the Act") on the basis of jurisdictional error – where, for one of the adjudication decisions, there were two payment claims issued with the same reference date – whether there was a valid payment claim – whether the adjudicator had jurisdiction to determine that adjudication application

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – whether the adjudication applications were served in accordance with section 79(3) of the Act – whether, in any event, substantial compliance with section 79(3) of the Act would satisfy the service requirement

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – whether an adjudication application document referring to the project name, the reference date and the amount due is enough to identify the payment claim pursuant to section 79(2)(c) of the Act

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the applicant submits that the adjudicator failed to provide the applicant with natural justice by refusing to accept submissions about jurisdiction – whether there was any practical injustice or substantial breach of natural justice that warrants setting aside the adjudicator's determination

Building Industry Fairness (Security of Payment) Act 2017 (Qld) ss 67, 75, 76, 77, 78, 79, 82(2), 84(2), 210
Building and Construction Industry Payments Act 2004 (Qld)

ss 20A, 21(5)

Brodyn Pty Ltd (t/a Time Cost & Quality) v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393, cited
Douglas Aerospace v Indistri Engineering Albury [2014] NSWSC 1445, followed
Falgat Constructions Pty Ltd v Equity Australia Corporation Ltd [2006] NSWCA 259, cited
J J Richards & Sons Pty Ltd v Ipswich City Council (1995) 86 LGERA 417, cited
John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors [2009] QSC 205, cited
Low v MCC Pty Ltd; MCC Pty Ltd v Low [2018] QSC 006, cited
Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QSC 91, distinguished
QC Communications NSW Pty Ltd v CivComm Pty Ltd [2016] NSWSC 1095, cited
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340, applied
Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC 941, cited
Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd [2018] QSC 065, cited

COUNSEL:	M Steele for the applicant F Chen for the first respondent No appearance for the second respondent No appearance for the third respondent
SOLICITORS:	McLaughlins Lawyers for the applicant Colin Biggers & Paisley Lawyers for the first respondent No appearance for the second respondent No appearance for the third respondent

Introduction

[1] This is an application to set aside two purported adjudication decisions, made on 7 March 2019 by the second respondent, on the basis of jurisdictional error. The applicant seeks:

1. A declaration pursuant to section 10 of the *Civil Proceedings Act 2011* or alternatively in the inherent jurisdiction of the Court that the following decisions of the second respondent ("the Adjudication Decisions") purportedly given under the *Building Industry Fairness (Security of Payment) Act 2017* are void or liable to be set aside for want of jurisdiction:

    a. the decision of the Second Respondent dated 7 March 2019 in relation to Adjudication Application No. 00477012.

b. the decision of the Second Respondent dated 7 March 2019 in relation to Adjudication Application No. 00477005.

2. An injunction permanently restraining the First Respondent from taking any further step to enforce the Adjudication Decisions.

3. A declaration that any adjudication certificates given by the Third Respondent based upon the Adjudication Decisions are void.

[2] The first respondent submits that the application should be dismissed because:

1. in relation to the decision 477012 (Lucky Squire Decision), the payment claim dated 31 December 2018 was issue pursuant to the Act and was a valid payment claim under s 75 of the Act;

2. in relation to both Adjudication Decisions, the first respondent properly served the applicant with a copy of the adjudication application and complied with s 79(3) of the Act;

3. in both matters, the second respondent considered the jurisdictional issue as to service in his Adjudication Decisions; and

4. if the adjudicator did err (which is denied) this error would not be a jurisdictional error sufficient to invalidate the decision.

[3] The second respondent was the adjudicator in relation to this matter.

[4] The second and third respondents submit to the orders of the Court, save as to costs.

Background

Payment claims

[5] The applicant and the first respondent were parties to an agreement, made on, or about, 25 September 2018, for the fabrication, supply and installation by the first respondent (as subcontractor) of structural steel in relation to projects where the applicant was principal contractor ("the Contract").

[6] The applicant engaged the first respondent to provide structural steel on two projects:

1. Lucky Squire at the Oracle building at Broadbeach on the Gold Coast ("the Lucky Squire project"); and

2. Harbour Town at Biggera Waters on the Gold Coast ("the Harbour Town project").

[7] On 17 December 2018 the first respondent issued the following payment claims ("the first payment claims") on the applicant, in respect of the Lucky Squire development:

1. INV-0134 in the amount of $33,388.60;

2. INV-0137 in the amount of $109,891.77.

[8] On 31 December 2018 the first respondent issued payment claims ("the second payment claims") on the applicant in respect of each project:

1. in respect of Lucky Squire: INV-0137 in the amount of $109,891.77;

2. in respect of Harbour Town: INV-0136 in the amount of $26,702.76.

[9] It is these second payment claims that were sent by the first respondent for adjudication and subject to this application.

Claiming progress payments

[10] Chapter 3, Part 3 of the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) ("the Act") sets out the provisions in relation to claiming progress payments:

> "**75 Making payment claim**
>
> (1) A person (the ***claimant***) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the ***respondent***) who, under the relevant construction contract, is or may be liable to make the payment.
>
> (2) Unless the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
>
> (a) the period, if any, worked out under the construction contract;
>
> (b) the period of 6 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.
>
> (3) If the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
>
> (a) the period, if any, worked out under the relevant construction contract;
>
> (b) 28 days after the end of the last defects liability period for the construction contract;
>
> (c) 6 months after the completion of all construction work to be carried out under the construction contract;
>
> (d) 6 months after the complete supply of related goods and services to be supplied under the construction contract.
>
> (4) The claimant can not make more than 1 payment claim for each reference date under the construction contract.

(5) A payment claim may include an amount that was included in a previous payment claim.

(6) In this section—

final payment means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.

76 Responding to payment claim

(1) If given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule within whichever of the following periods ends first—

(a) the period, if any, within which the respondent must give the payment schedule under the relevant construction contract;

(b) 15 business days after the payment claim is given to the respondent.

Maximum penalty—100 penalty units.

Note—

A failure to give a payment schedule as required under this section is also grounds for taking disciplinary action under the *Queensland Building and Construction Commission Act 1991*.

(2) However, the respondent is not required to give the claimant the payment schedule if the amount claimed in the payment claim is paid in full on or before the due date for the progress payment to which the payment claim relates."

[11] The applicant did not provide a payment schedule pursuant to section 76 of the Act. The consequences of failing to give a payment schedule and of failing to pay the claimant are set out in sections 77 and 78 of the Act.

"**77 Consequences of failing to give payment schedule**

(1) This section applies if a respondent given a payment claim does not respond to the claim by giving the claimant a payment schedule as required under section 76.

(2) The respondent is liable to pay the amount claimed under the payment claim to the claimant on the due date for the progress payment to which the payment claim relates.

78 Consequences of failing to pay claimant

(1) This section applies if a respondent given a payment claim for a progress payment does not pay the amount owed to the claimant in full on or before the due date for the progress payment.

(2) The claimant may either—

(a) recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant, in a court of competent jurisdiction; or

(b) apply for adjudication of the payment claim under part 4.

(3) In addition to the action mentioned in subsection (2), the claimant may give the respondent written notice of the claimant's intention to suspend carrying out construction work, or supplying related goods and services, under the relevant construction contract under section 98.

(4) The notice to suspend work must state that it is made under this Act.

(5) In this section—

amount owed, to a claimant for a payment claim, means—

(a) if the respondent did not respond to the payment claim with a payment schedule as required under section 76—the amount claimed under the payment claim; or

(b) if the respondent did respond to the payment claim with a payment schedule as required to do so under section 76—the amount proposed to be paid under the payment schedule."

Adjudication applications

[12] The first respondent applied for adjudication of the payment claim under Part 4 of the Act.

[13] On 6 February 2019 the first respondent lodged adjudication applications in respect of:

1. the Lucky Squire project in the amount of $109,891.77;

2. the Harbour Town project in the amount of $26,702.76.

[14] This application for adjudication was made pursuant to section 79 of the Act:

"**79 Application for adjudication**

(1) A claimant may apply to the registrar for adjudication of a payment claim (an adjudication application) if—

(a) the claimant is entitled to apply for adjudication under section 78(2)(b) because of a failure by the respondent to pay an amount owed to the claimant by the due date for the payment; or

(b) the amount stated in the payment schedule, given in response to the payment claim, is less than the amount stated in the payment claim.

(2) An adjudication application—

(a) must be in the approved form; and

(b) must be made within—

(i) for an application relating to a failure to give a payment schedule and pay the full amount stated in the payment claim—30 business days after the later of the following days—

(A) the day of the due date for the progress payment to which the claim relates;

(B) the last day the respondent could have given the payment schedule under section 76; or

(ii) for an application relating to a failure to pay the full amount stated in the payment schedule—20 business days after the due date for the progress payment to which the claim relates; or

(iii) for an application relating to the amount stated in the payment schedule being less than the amount stated in the payment claim—30 business days after the claimant receives the payment schedule; and

(c) must identify the payment claim and the payment schedule, if any, to which it relates; and

(d) must be accompanied by the fee prescribed by regulation for the application; and

(e) may include the submissions relevant to the application the claimant chooses to include.

(3) A copy of an adjudication application must be given to the respondent.

(4) The registrar must, within 4 business days after the application is received, refer the application to a person eligible to be an adjudicator under section 80."

[15] Relevantly, for this matter, section 79 of the Act states that:

1. an adjudication application must identify the payment claim to which it relates;[1] and

2. a copy of the adjudication must be given to the respondent (the applicant in this matter).[2]

[16] It is noted that section 82(2) of the Act stipulates that if the respondent failed to give the claimant a payment schedule as required under section 76 of the Act, then the respondent must not give an adjudication response.[3]

Material was sent to the applicant

[17] On 7 February 2019 the applicant received two letters from the Queensland Building and Construction Commission ("QBCC"), one advising that an adjudication application had been received from the first respondent in relation to the project at "3 ORACLE BVD BROADBEACH QLD 4218" (being the Lucky Squire project), and one advising that an adjudication application had been received from the first respondent in relation to the project at "147 BRISBANE ROAD BIGGERA WATERS QLD 4216" (being the Harbour Town project).

[18] Both letters annexed a "Respondent Contact Details Form" which contained the name of the claimant (being the first respondent) and the application number of each.

[19] These contact detail forms were filled out by Ms Chantal Horton at the applicant's office. Ms Horton is the executive assistant to Ms Vicki Tod who is the Chief Executive Officer of the applicant. Ms Tod then signed the forms and sent them by email to QBCC.

[20] Mr Gabriel Dio, the Managing Director of the first respondent, states that on 7 February 2019 he caused duplicate copies of each of the adjudication applications to be placed in an envelope addressed and posted to the applicant.

[21] The applicant states that on 8 February 2019 (the day after being made aware of the first respondent filing application adjudication forms with the QBCC), they received two envelopes containing bundles of documents. Ms Tod opened the envelopes which she states did not contain any cover letter, or index of documents or identifying factor of who the envelope was actually from. The applicant states that in each matter a bundle of documents was sent:

1. by parcel post (not by registered post);

---

1 *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) s 79(2)(c).
2 *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) s 79(3).
3 *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) s 82(2).

2. to a PO Box (not the applicant's registered address, or the principal place of business, or the address notified in the contract);

3. did not contain all of the pages of the application; and

4. did not explain what the documents purported to be.

[22] The applicant submits these bundles of documents, sent to the applicant in this way, do not satisfy section 79(3) whereby the first respondent must give a copy of the adjudication application to the applicant.

[23] Further, the applicant submits that, contrary to section 79(2)(c) of the Act, the material did not identify the payment claim to which it relates.

[24] On 12 February 2019 the applicant received letters from the second respondent's agent in relation to each matter, notifying the applicant that the second respondent had been appointed to adjudicate the matters.

[25] The letters from the second respondent's agent makes it clear that there are onerous responsibilities on the parties and referred to the entitlement to lodge an application response and timeframe for lodging an adjudication response. However, this correspondence sets out that no advice would be given on the actual due dates by which adjudication responses must be given and legal advice should be sought. This letter makes it clear:

> "You should have already received a copy of the adjudication application directly from the claimant. If not, please promptly advise us in writing."

[26] The correspondence attaches the Contract and Project Details and the Payment Claim Details.

[27] The applicant submits that these letters from the second respondent did not identify the payment claims alleged to be relied on, except for some particulars set out in the schedule in each case, relating to "Payment Claim Details".

[28] In relation to the Payment Claim Details the applicant highlights that:

1. no indication was given in either matter about the alleged invoice number;

2. in each case the date of the actual alleged payment claim was not identified, except by reference to "Date Payment Claim given to Respondent", which in each case was said to be 7 January 2019, and not 31 December 2018 (the date on INV-0137 (the second version) and INV-0136 (the second version));

3. in relation to the Lucky Squire project stated that the "payment claim due date" was 25 February 2019 (as opposed to the date on INV-0137, which stated 7 January 2019 as the date for payment); and

4. in relation to Harbour Town project stated that the "payment claim due date" was 25 January 2019 (as opposed to the date given on INV-0136, 7 January 2019).

[29] The applicant submits that the material provided by the first respondent, or the details set out in the letters from the second respondent, did not enable the applicant properly to identify, for either matter, what alleged payment claim was relied on.

The applicant informs the second respondent that it had not been served with copies of the applications

[30] Despite being told by the second respondent's agent on 12 February 2019 to promptly advise if they have not received an adjudication application, the applicant waited another 10 days before doing so.

[31] On 22 February 2019 the applicant sent a letter to the second respondent stating that the applicant had not been served with copies of the applications in either matter, and was unable to prepare a response. This letter states that the "information received in the mail from the Claimant is attached, which seems to be the supporting documents, without the Application attached". The letter was not received by the second respondent's agent until 1 March 2019 and it appears that the supporting documents were not attached to this letter.

[32] On 4 March 2019 the second respondent's agent wrote to the applicant and the first respondent asking the first respondent to confirm how the applications were served.

[33] On 5 March 2019 the first respondent wrote to the applicant and the second respondent stating that the applications had been "delivered via standard post". The Australia Post receipts attached to the letters from the first respondent each refer to the documents being sent by parcel post, not by registered mail, and each states "Extra Cover Not Purchased".

[34] On 6 March 2019 the applicant wrote an email to the second respondent repeating that it had not been served with copies of the applications in each matter. The applicant attached the documents they say they did receive.

[35] The second respondent did not ask for any further submissions about service.

[36] On 7 March 2019 the second respondent made his decision in each matter.

The second respondent's decision

[37] In the Lucky Squire decision, the second respondent refers to the applicant's letter dated 22 February 2019 (which he says was received on 1 March 2019) as follows:

> "However, the respondent has stated in its letter received on 1 March 2019, that it did not receive the full Application on this day [7 February 2019]. While I address the timing of the purported Adjudication Response below, the Act permits any such response from the Respondent to the Application within certain timelines. For clarity, the purported Adjudication Response was due on 21 February 2019. The Respondent did not provide any such response and as such and as I am bound by the provisions of the Act, I

> cannot take into consideration any material received from the Respondent after this date."

[38] The applicants submit the letter from the applicant dated 22 February 2019 was not a purported adjudication response. Rather, it was a submission to the second respondent about his lack of jurisdiction.

[39] The second respondent made the same comment in relation to the "Harbour Town" decision.

[40] At paragraph 79 of the decision relating to Lucky Squire (also paragraph 79 for the "Harbour Town" matter), the second respondent stated:

> "Section 83 of the Act prescribes the timelines with which the Respondent has 'an opportunity to be heard'. The Respondent was made aware on the 7 February 2019 and 12 February 2019 (Notification of Acceptance of the Adjudicator) that the Adjudication Application was lodged with the QBCC regarding work performed by the Claimant. If the Respondent considered it wasn't 'informed of the case against them' on these dates, it should have notified the Adjudicator of this fact prior to 21 February 2019 (purported Adjudication Response date) to seek clarity."

[41] The applicant submits that the second respondent (wrongly, in the applicant's submission) determined that there was a restriction on the applicant's right to raise a jurisdictional question. The applicant submits that the second respondent wrongly focussed on whether the applicant was able to (or allowed to) persuade him that jurisdiction did not arise.

[42] The correct question, the applicant submits, which the second respondent did not properly address, was whether jurisdiction arose at all.

The applicant's contentions

[43] The applicant submits that:

1. in relation to the Lucky Squire decision, there was no valid payment claim, so that jurisdiction did not arise (issue 1);

2. in relation to both decisions:

   a. service of the adjudication application is necessary to confer jurisdiction upon an adjudicator (issue 2);

   b. the first respondent did not serve the applicant with copies of the adjudication application, as required by section 79(3) of the Act (issue 3);

   c. the adjudication application did not identify the payment claim (issue 4); and

   d. the second respondent did not make a proper determination about whether he had jurisdiction, as required by section 84(2)(a)(i) (issue 5).

Issue 1: No valid payment claim for Lucky Squire

The applicant's contentions

[44] Section 75(4) of the Act provides that a claimant cannot make more than one payment claim for each reference date under the construction contract.

[45] The term "reference date" is defined pursuant to section 67 of the Act as:

> "**67 Meaning of *reference date***
>
> (1) A ***reference date***, for a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out, or related goods and services supplied, under the contract; or
>
> (b) if the contract does not provide for the matter—
>
> (i) the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later month.
>
> (2) However, if a construction contract is terminated and the contract does not provide for, or purports to prevent, a reference date surviving beyond termination, the final reference date for the contract is the date the contract is terminated."

[46] In this case, the contract does not provide for the matter, so section 67(1)(b) applies, ie:

> "(i) the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later month."

[47] In *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* ("*Southern Han Breakfast*"),[4] the High Court confirmed that where one payment claim has already been made in relation to a particular reference date, any later payment claim purportedly made in respect of the same reference date is not valid.[5] The High Court also stated that a valid payment claim is a necessary prerequisite to an adjudication application.[6]

---

4 (2016) 260 CLR 340.

5 *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340 at [62].

6 *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340 at [61], see also *Low v MCC Pty Ltd; MCC Pty Ltd v Low* [2018] QSC 006 at [11]; *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 065 at [54]

[48] In this case, the first respondent issued two purported payment claims in respect of the Lucky Squire project on 17 December 2018, INV-0134 and INV-0137.

[49] On 31 December 2018, INV-0137 was again issued in respect of the Lucky Squire project.

[50] The applicant submits that:

1. there was at least one other payment claim, INV-0134, issued in respect of the same reference date, 31 December 2018, as INV-0137 (dated 31 December 2018) apparently relied;

2. by reason of section 75(4) of the Act, because the payment claim INV-0134 had already been issued, the first respondent was not permitted to make another payment claim; and

3. that means that the second invoice, INV-0137, cannot be a valid payment claim within the meaning of the Act, because it purports to rely on the same reference date as the payment claim already made (INV-0134).

[51] For that reason, the applicant submits that the second respondent did not have jurisdiction to determine the adjudication application in respect of the Lucky Squire development.

The first respondent's contentions

[52] The first respondent accepts that two purported payment claims in respect of the Lucky Squire development were issued on 17 December 2019, being INV-0134 and INV-0137.

[53] The first respondent submits that the invoices served on the applicant on 17 December 2018 were incorrectly issued pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) ("the repealed Act") which was repealed on 14 December 2018. The Act commenced on 17 December 2018.

[54] Therefore, the first respondent submits that it later correctly issued a valid payment claim, which stated that it was issued under the Act.

[55] On that basis, the first respondent submits multiple payment claims for the same reference dates were not issued, as the invoices served on 17 December 2018 were incorrectly issued pursuant to the repealed Act.

[56] Accordingly, the first respondent submits that no jurisdictional error has occurred and the adjudicator's decision does not offend the High Court's unanimous decision in *Southern Han Breakfast* or section 73 of the Act.

Determination

[57] I accept the applicant's submissions and in relation to the Lucky Squire development the first respondent issued two payment claims with the same reference date.

[58] The first respondent relies on different badging contained in the invoices as to which Act applies to the invoice.

[59] Both INV-0134 and INV-0137 issued on 17 December 2018 are in the same terms:

> "*This payment claim is made pursuant to the Building and Constructions Industry Payments Act 2004 (QLD)*".

[60] The later INV-0137 is badged with the following statement:

> "*This payment claim is made pursuant to Building Industry Fairness (Security of Payment) Act 2017*".

[61] The badging of the invoices as to what legislation the invoice was issued under is irrelevant. If an invoice was issued at a date when the Act applied, then it is immaterial that the invoice includes a statement that it was issued under a repealed Act.

[62] Section 210 of the Act reinforces such a view:

> "**210 References to repealed Act**
>
> A reference in an Act or document to the repealed Act may, if the context permits, be taken to be a reference to this Act."

[63] All invoices were issued at a time when the Act applied.

[64] The first respondent's counsel made the following submissions:[7]

> "HER HONOUR: Tell me, Ms Chen, though. An invoice – okay. The Act comes in force on the 17th, the day that the invoice was issued. So, therefore, does it matter whether it's badged with, 'This was issued according to this Act or that Act.' If it's issued on that date, then isn't it, therefore, that the latter Act applies?
>
> MS CHEN: Correct.
>
> HER HONOUR: So, therefore, why did you have to give another one – give another?
>
> MS CHEN: The highest I can put it is your Honour was taken to the document from the QBCC that considered the voiding of previous payment claims.
>
> HER HONOUR: Yes, yes, yes. Now, that was the document that you sent to the QBCC.
>
> MS CHEN: Correct.

---

7 Transcript of the hearing on 29 May 2019, p 69, line 4 to p 70, line 45.

HER HONOUR: But there is no evidence I've got that that or any of that information was void. I've just got nothing of that. So

MS CHEN: No.

HER HONOUR: But my point is this. I'll just get it right. If I can go to page 35

MS CHEN: Yes.

HER HONOUR: that is the one that's issued on 17th of December 2018

MS CHEN: Yes.

HER HONOUR: for the 31st.

MS CHEN: Yes.

HER HONOUR: Okay. Now, if we go – we do know that the Act came into being or came into application on the 17th of December.

MS CHEN: Yes.

HER HONOUR: Okay. The Act that we're looking under.

MS CHEN: That's correct.

HER HONOUR: Now, so this was an invoice that was issued on the 17th of December, so, therefore, the Building Industry Fairness (Security of Payment) should apply.

MS CHEN: Correct.

HER HONOUR: Does it make – my question is does it make any difference the fact that you've got a line in this invoice saying that the claim is made pursuant to the Building and Construction Industry Payments Act? Because surely if it's issued under the 17th of December, does it matter that you've got a statement there that it was made in accordance with the previous Act?

MS CHEN: The highest we can put it is that it was misleading to have it stated that it was

HER HONOUR: Yes.

MS CHEN: under the incorrect Act. And so a correction was made, that is, to issue the

HER HONOUR: But there is no requirement, is there, that the invoices have to show what Act it's made under?

MS CHEN: No. It was – under the previous Act it was required. But under the BIF Act it doesn't require that.

HER HONOUR: Okay. So if a person got this, even with the wrong badging – let's call it that – at the end, then it would still be an invoice that – where the latter Act applies, wouldn't it?

MS CHEN: It would satisfy the requirements under the BIF Act. That's correct.

HER HONOUR: And if that's the case, then you have issued a second one, haven't you?

MS CHEN: That's correct.

HER HONOUR: And that's a problem for you, isn't it, Ms Chen?

MS CHEN: It is. In relation to – again, that's as high as I can put it, and that's in relation to Lucky Squire.

HER HONOUR: Okay.

MS CHEN: That issue doesn't arise in the Harbour Town determination."

[65] The second respondent made a decision in relation to INV-0137.

[66] However, INV-0137 cannot be a valid payment claim within the meaning of the Act, because it purports to rely on the same reference date as the payment claims already made (INV-0134).

[67] A valid payment claim is a necessary prerequisite to an adjudication application.[8]

[68] Accordingly, the second respondent did not have jurisdiction to determine the adjudication in respect of the Lucky Squire development.

[69] In respect of Adjudication Application No. 00477012 (the Lucky Squire application), I declare that:

1. The decision of the second respondent dated 7 March 2019 in relation to Adjudication Application No. 00477012 (the Lucky Squire application) is declared void.

2. The first respondent is permanently restrained from taking any further step to enforce the Adjudication Decision in relation to Adjudication Application No. 00477012 (the Lucky Squire application).

3. Any adjudication certificates given by the third respondent based upon the Adjudication Decisions in relation to Adjudication Application No. 00477012 (the Lucky Squire application) are declared void.

---

[8] *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* at [61]; see also *Low v MCC Pty Ltd; MCC Pty Ltd v Low* [2018] QSC 006 at [11]; *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 065 at [54]

Issue 2: Service is necessary to confer jurisdiction upon an adjudicator

[70] Section 79(3) of the Act is in mandatory terms, i.e. a copy of an adjudication application must be given to the respondent.

[71] There are competing views expressed in a number of cases as to whether service of an adjudication application is necessary to confer jurisdiction upon an adjudicator.

[72] The "basic and essential requirements" to be met for the existence of a valid adjudication determination, as set out in the decision of Hodgson JA in *Brodyn Pty Ltd (t/a Time Cost & Quality) v Davenport*,[9] appear to include the following:

1. the existence of a construction contract between the claimant and the respondent, to which the Act applies;

2. the service by the claimant on the respondent of a payment claim;

3. the making of an adjudication application by the claimant to an authorised nominating authority;

4. the reference of the application to an eligible adjudicator, who accepts the application; and

5. the determination by the adjudicator of this application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the issue of a determination in writing.

[73] It is noted that Hodgson JA states that the basic requirements as set out may not be exhaustive.[10]

[74] In *Douglas Aerospace v Indistri Engineering Albury*[11]("*Douglas Aerospace*"), it was submitted that jurisdictional error occurred because no adjudication application had been served, as required by section 17(5) of the *Building and Construction Industry Security of Payment Act* 1999 (NSW). McDougall J in *Douglas Aerospace* observed the following:

> "[73] There may be a question as to whether s 17(5) should be regarded as jurisdictional. It was not identified as a 'basic and essential' condition of validity in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. It was not identified as a jurisdictional prerequisite in [*Chase Oyster Bay v Hamo* (2010) 78 NSWLR 393]. I was not referred to any decision which holds that compliance with s 17(5) is jurisdictional.
>
> [74] It could be argued that the role of s 17(5) is to ensure that a respondent is given a degree of procedural fairness by being served with the payment claim. If that is the limit of the function of the subsection then, in circumstances where the respondent cannot lodge an

---

9 (2004) 61 NSWLR 421; [2004] NSWCA 394 at [53] per Hodgson JA.

10 *Brodyn Pty Ltd (t/a Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [55] per Hodgson JA.

11 [2014] NSWSC 1445 at [73]-[74] per McDougall J.

> adjudication response and thus in effect cannot be heard (see s 20(2A), (2B)), it may be wondered whether there is any reason, on the proper construction of the statute, to hold that the requirements of s 17(5) are jurisdictional."

[75] However, McDougall J stated it was not necessary to "pursue this fascinating debate" as the evidence was that a copy of the adjudication application was served by facsimile.[12]

[76] In *QC Communications NSW Pty Ltd v CivComm Pty Ltd*,[13] it was held that a failure to serve supporting material to the adjudicator did not go to the jurisdiction of the adjudicator.

[77] Notwithstanding these cases, in my view, service of the adjudication application is required before an adjudication is validly undertaken.

[78] In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*,[14] the New South Wales Court of Appeal held that the requirement in section 17(2)(a) of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) that notice be given of an intention to apply for adjudication (similar to the former section 20A in the repealed Act) was an essential condition for a valid adjudication application.[15] In that case, Spigelman CJ referred to the use of mandatory language, such as "must",[16] and stated:[17]

> "There are a number of cases in which the absence of an element required to be present in the application which initiates a decision-making process has been held to be jurisdictional."

[79] Recently, Ryan J concluded in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor*[18] ("*Niclin*") that service of an adjudication application pursuant to section 21(5) of the repealed Act (similar to section 79(3) of the current Act) was required before an adjudication may be validly taken.[19] In that case, Ryan J summarised the purpose of the scheme and the fundamental importance of service of the adjudication application to that scheme:

> "If there is no service of the adjudication application form, then the adjudicator has no timeframe for his or her decision making in the context of legislation which demands speedy determinations.
>
> From the point of view of the parties, and in particular the respondent, in the absence of service there is a risk that the Adjudicator will determine the application in the absence of an adjudication response it intended to make.

---

12 [2014] NSWSC 1445 at [75] per McDougall J.
13 [2016] NSWSC 1095 at [28]-[29] per Ball J.
14 (2010) 78 NSWLR 393.
15 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [96] per Basten JA, agreeing with Spigelman CJ and McDougall J.
16 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [48] per Spigelman CJ.
17 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [45] per Spigelman CJ.
18 [2019] QSC 91.
19 *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91, p 16, line 33-34 per Ryan J.

> From the point of view of inconvenience, if the decision were held to be invalid because of the lack of service, inconvenience arises if an adjudication is made on less than all of the necessary information.
>
> I did not find it an easy task at all to discern the intention of the legislation, but it seems to me that in the context of a scheme designed to achieve the speedy and expeditious resolution of disputes, time limits are critical.
>
> Section 21(5) provides notice to a respondent and a reference point for critical time limits. Notice is already provided for by virtue of the requirement for an adjudicator to inform the parties of his or her acceptance of an adjudication.
>
> The High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 observed that the legislation created a unique form for the adjudication of disputes over the amount due for payment via a scheme which, as Basten JA observed in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 344 ALR 355 at [59], was coherent, expeditious and self-contained. The intended result is that each party knows precisely where they stand at any point in time. While the scheme is for the benefit of claimants, it seems to me that in the absence of service, the respondent does not know precisely where it stands. In those circumstances, I find that service under section 21(5) is required before an adjudication may be validly undertaken."

[80] The Act mandates that the adjudication application must be given to the respondent. Once the application is given to the respondent then time frames are initiated for the adjudicator to give his or her response.[20]

[81] As Spigelman CJ stated in *Chase Oyster Bar*:[21]

> "This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value."

[82] Even though in this case the applicant was precluded from making an adjudication response to the adjudication application, in my view, this does not mean that the applicant is precluded from making submissions as to any jurisdictional issues that may arise. This could only occur if the adjudication application was served on second respondent as mandated by the Act.

[83] I agree with Ryan J in *Niclin* that in the absence of service, the respondent does not know precisely where it stands. In those circumstances, I find that the respondent to an adjudication application must be given the application (as per section 79(3) of the Act) before an adjudication may be validly undertaken.

Issue 3: Was the adjudication application given to the applicant?

---

20 *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) ss 82, 83, 84 and 85.

21 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [47] per Spigelman CJ.

The applicant's contentions

[84] The applicant submits that I would accept the evidence of Ms Tod and Ms Horton that the purported adjudication applications were not served on the applicant.

[85] Further, the applicant submits that the documents which were in fact provided were not such that the applicant was able to make any proper use of them as they were not in any intelligible order, and did not disclose the matters which the applicant would require in order to make any meaningful response.

[86] The applicant submits that I would prefer the applicant's evidence about service over that of the first respondent. The applicant submits that Ms Tod and Ms Horton give consistent and credible evidence.

[87] The applicant submits that the evidence on behalf of the first respondent is not credible. For example, the documentary evidence establishes that the envelopes sent to the applicant were sent by "parcel post". However, the first respondent contends that the documents were sent by registered post and the documentary evidence is contrary to that contention.

[88] The documents were sent to a PO Box and, the applicant submits that, this does not comply with the requirements of the Agreement, or with section 39 of the *Acts Interpretation Act* 1954 (Qld) or with section 102 of the Act and nothing in the Agreement, or the relevant legislation, allowed service by delivery to a PO Box.

[89] The applicant submits that there is no reason for the applicant to have maintained consistently, in correspondence with the second respondent that it was not served with the applications if in fact it had been.

[90] The applicant submits that if the applicant had been served with the applications it would have responded to them. Rather, it indicated on two separate occasions that it was not able to. That is not merely an oversight by the applicant. Rather, the applicant submits it was a decision of the applicant that it could not properly respond.

The first respondent's contention

[91] The first respondent submits that the applicant was served with the adjudication application documents and therefore the service was effected on 8 February 2019.[22]

[92] The first respondent submits that I would prefer the evidence of Mr Dio:

1. who states he caused the duplicate copy of the adjudication applications to be placed in an envelope addressed to the applicant and posted;

2. as it is shown that their office has a procedure for outgoing mail and that this procedure was followed in this case;

3. as there is no reason for Mr Dio to purposefully not include the entire adjudication applications and supporting documents as it is the way to ensure payment claims are paid in a timely manner.

---

[22] Submissions on behalf of the first respondent filed 17 May 2019, p 6, [34].

[93] The first respondent submits that Ms Tod's evidence that "it was unclear to me why the bundle of documents had been sent to us and who had sent them" is implausible given that:

1. she had received two letters from QBCC about the adjudication applications the day before;

2. the bundle annexed to her affidavit clearly identify the contract between the applicant and first respondent, invoices and emails in relation to work done on the two projects; and

3. pages of the adjudication applications refer to the relevant payment claims, such as the one made on 7 January 2019 for an amount of $109,891.77. Moreover, the declaration by Gabriel Dio as to the adjudication application page was also included.

[94] The first respondent further submits that Ms Tod's evidence is directly inconsistent with other evidence relied upon by the applicant, being the affidavit of Ms Horton, who is Ms Tod's assistant.

[95] Ms Horton states that when Ms Tod gave her the documents, Ms Tod said "I want you [sic] create files for these documents and keep the envelopes - we have a QBCC matter with this company". The first respondent submits that such a comment by Ms Tod indicates that she was well aware that these documents were in relation to the adjudication applications.

[96] The first respondent notes that the applicant's first complaint about not receiving the adjudication applications was on 22 February 2019, which was the day after the adjudicator was able to receive an adjudication response or other materials.

Discussion - service

[97] I have already determined the second respondent did not have jurisdiction to determine the adjudication in respect of the Lucky Squire project, accordingly the service issue only concerns the Harbour Town adjudication application. However, I note that, my finding that the applicant was served with the adjudication application is equally applicable to the Lucky Squire project.

[98] The applicant bears the onus of proving that it was not served with the adjudication application.

[99] Mr Dio, the first respondent's Managing Director, states in his affidavit that:

> "6. On 7 February 2019, I caused two copies of the Adjudication Applications to be printed, in order to:
>
> (a) keep one copy for the First Respondent's records; and
>
> (b) send the other copy to the Applicant by way of post.
>
> This is the standard practice of the office of the First Respondent in keeping records of outgoing mail.

> 7. For the first copy of each of the Adjudication Applications, I took the copy that was to be kept for the First Respondent's records, and stamped and dated the first page of each of the Adjudication Applications. Each page of the Adjudication Applications was then signed by Bianca Dio, a Secretary in the employ of the First Respondent, as a means of satisfying ourselves that each page of the Adjudication Applications was correct and included in the copies I had produced. Exhibited to this affidavit and marked 'GD-05' and 'GD-06' are copies of the First Respondent's office copy to the Adjudication Applications, which are stamped, dated and signed as I have described.
>
> 8. I then caused the duplicate copy of each of the Adjudication Applications to be placed in an envelope addressed to the Applicant and posted."

[100] Mr Dio states he watched whilst the first respondent's secretary, Bianca Dio, put an exact copy of the seven pages of the adjudication application into an envelope.[23] He later stated under cross-examination that the accompanying documents were also put in the envelope.[24] He rejects any assertion that he did not supervise what was in fact sent to the applicant.[25]

[101] I found Mr Dio a credible witness.

[102] Mr Dio advised the second respondent's agent that the adjudication application was delivered by standard post. I note that the Australia Post receipts attached to the letters from the first respondent each refer to the documents being sent by parcel post, not by registered mail and each states "extra cover not purchased". In the circumstances of this case, where the applicant receives a bundle of material from the second respondent, I place little significance on these differences. I do not regard such differences as affecting Mr Dio's credibility. I note that Mr Dio was not cross-examined about these differences.

[103] Also, in this case, the fact that this material was sent to the PO Box and not the registered office is immaterial, as the applicant accepts it received a bundle of the material. As Hodgson JA stated in *Falgat Constructions Pty Ltd v Equity Australia Corporation Ltd* [2006] NSWCA 259 at [58]:

> "In the first place, in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see *Howship Holdings Pty Limited v Leslie* (1996) 41 NSWLR 542; *Mohamed v Farah* [2004] NSWSC 482 at [42]-[44]. In such a case, there has been service, provision and receipt.'"

---

23 Transcript of the hearing on 29 May 2019, p 55, line 30-45 (cross-examination of Gabriel Dio).
24 Transcript of the hearing on 29 May 2019, p 56, line 40 (cross-examination of Gabriel Dio).
25 Transcript of the hearing on 29 May 2019, p 56, line 37-38 (cross-examination of Gabriel Dio).

[104] In *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095, Ball J stated:

> "[27] A document will be served in accordance with the requirements of the SOP Act [*Building and Construction Industry Payments Act 2004* (NSW)] if it actually comes to the attention of the person to be served. It is not necessary that it be served in accordance with s 31 [equivalent to s 102 of the Act]. As Hodgson JA stated in *Falgat Constructions Pty Ltd v Equity Australia Corporation Ltd* [2006] NSWCA 259 at [58]:
>
> > In the first place, in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see *Howship Holdings Pty Limited v Leslie* (1996) 41 NSWLR 542; *Mohamed v Farah* [2004] NSWSC 482 at [42]-[44]. In such a case, there has been service, provision and receipt."

[105] If I accept Mr Dio's evidence, then all seven pages of the adjudication application were in this bundle that was received by the applicant.

[106] If I accept the applicant's evidence, then six of the seven pages were received by the applicant and the issue of substantial compliance is raised.

[107] The applicant states that it was provided a bundle of documents which had not been stapled or bound or bulldog clipped. Both Ms Tod who opened the envelopes and Ms Horton, the applicant's employee who filed the documents, states that some of the pages were upside down and back to front with no general order to the documents.

[108] It is noted that Exhibits 1 and 2 are the original documents and there are some documents which are printed double-sided and some which are upside down. It appears some annotations on the documents, staple indentations and hole punches have occurred since the documents were sent to the applicant.

[109] On 7 February 2019, Ms Tod knew that the first respondent had filed adjudication applications in relation to both projects.

[110] A day later, on 8 February 2019, Ms Tod states she received two bundles of documents without a covering letter or index of documents in either envelope and no identifying factor of who the envelope was actually from.

[111] Ms Tod states in her affidavit, that she looked through each page of the bundle of documents contained in the envelopes and whilst she knew that an adjudication application had been filed as a result of receiving the letter from the QBCC concerning the lodgement of an adjudication application, it was unclear to her why the bundle of documents had been sent to them and who had sent them.

[112] However, it is noted that she must have realised that they were from the first respondent by 22 February 2019, as on this date she wrote to the first respondent's agent stating that "information received in the mail from the Claimant is attached …".

[113] Ms Tod noticed that the documents included in the bundle of documents included the Agreement, various other emails and quotes in relation to the Agreement. However, she states, in her affidavit, that on 8 February, when reviewing the bundles of documents, it was not clear to her that there were any adjudication application forms in the bundle of documents.

[114] Ms Tod gave evidence that she read and went through the documents but did not read every single word. She understood that the bundles of documents included the agreement with the first respondent in relation to construction work, and that was related to the QBCC notice that she received the day before.

[115] However, despite receiving the adjudication notification the day before, she states that she did not understand that these documents related to the adjudication application:[26]

> "You'll see on page 119 that's a declaration made by Gabriel [Dio]? Yes.
>
> You know that Gabriel [Dio] is – works for the manager of Biriel Industries? Yes.
>
> And that it states:
>
> > *Hereby apply for adjudication under the Building Industry Fairness Act.*
>
> That's what that says? Yes.
>
> So you would accept that had you read this document properly on the 8th of February, you would have been aware that Biriel Industries was making an adjudication application against National Management Group? Yes.
>
> And that you weren't aware that this bundle of documents related to an adjudication application because you didn't read the documents carefully? No".

[116] This evidence was in relation the Lucky Squire project however her approach to these documents is similar for the Harbour Town project:

> "If you turn to page 172. So the very next page is a declaration. You can see that's written in the last paragraph on that page or the last portion of writing. It says 'declaration' and it says:
>
> *I, Gabriel [Paulo] [Ragudo] [Dio], the claimant, hereby apply for adjudication under the Building Industry Fairness Act.*
>
> ? Yes.

---

[26] Transcript of the hearing on 29 May 2019, p 30, line 35 to p 31, line 5 (cross-examination of Vicki Tod).

> Did you read that document on the 8th of February? I read through it. Not every single word.
>
> But that document clearly says that it relates to an adjudication application brought by Biriel Industries; isn't that correct? Yes.
>
> So you understood that in this bundle of documents there were adjudication application documents in it? No.
>
> Well, you just said that you read that document, you identified that it was in relation to a declaration for Gabriel, who you understand works for Biriel Industries, applying for adjudication.
>
> ...
>
> So you accept that that's what that page says? Yes.
>
> You read that page on the 8th of February? Not every single word of it, no. But I read through it.
>
> Did you understand that this was a declaration for the application of an adjudication? That's what it says, yes.
>
> But did you understand that on the 8th of February? Yes.
>
> So you understood that this page relates to an adjudication application? Yes.
>
> Your evidence is that it was incomplete – that adjudication application was incomplete in the bundle? Yes.
>
> That's correct? You did not contact Biriel Industries on the 8th of February complaining that the application was incomplete, did you? No."[27]

[117] Ms Tod, on 8 February 2019, was also aware that the Harbour Town invoice 137 was outstanding.

[118] Ms Tod gave the documents to Ms Horton to file. Ms Horton did not see Ms Tod open the envelopes, and accepted that she could not be 100 per cent sure that the documents handed to her were the documents that came out of the envelope.

[119] Ms Horton states that Ms Tod told her that "I want you to create the files for these documents and keep the envelopes – we have a QBCC matter with this company".

[120] Ms Tod in her affidavit makes no reference to any QBCC matter when providing the documents to Ms Horton, rather she states that she said words to the effect to Ms Horton, "keep the envelopes as I am unsure what they relate to".

[121] However, at the trial, Ms Tod accepts that in her conversation with Ms Horton she may have made reference to the fact that there was a QBCC matter:[28]

---

27 Transcript of the hearing on 29 May 2019, p 34, line 14 to p 35, line 15 (cross-examination of Vicki Tod).

28 Transcript of the hearing on 29 May 2019, p 47, line 45 to p 48, line 8.

> "No. And so when you handed this bundle of documents to Chantelle [Horton], you understood that the documents were in relation to the adjudication application? Not entirely, no, because there was a – a dispute in general at hand.
>
> You, in fact, told Ms Chantelle that it was in relation to a QBCC matter with this company; isn't that correct? I can't recall the exact wording.
>
> Did you mention that it was in relation to a QBCC matter? I think I made reference to the fact there was a QBCC matter.
>
> And that was in reference to the QBCC notification you received the day before on the 7th of February in relation to the adjudication application? Yes."

[122] The applicant's counsel characterised such evidence as unsurprising:[29]

> "But, in my respectful submission, that's neither here nor there because Ms Tod says that she could identify that the documents related to that company. So it's not surprising that when handing them over to Ms Horton she would say, 'These documents relate to a particular company. Keep them because there is an adjudication application in relation to that company.' That's a different thing, with respect, your Honour, than an acknowledgement by her or an understanding by her that they were, in fact, the adjudication application."

[123] However, such a submission downplays the fact that Ms Tod did not provide this evidence in her affidavit; any reference by Ms Tod, linking the bundles of documents with a QBCC notification, was only revealed in cross-examination. In my view, Ms Tod was not forthright in relation to this issue in her affidavit.

[124] On 12 February 2019, four days after receiving the bundle of documents, the applicant received two letters from the second respondent's agent notifying the applicant that the second respondent had been appointed as the adjudicator for both adjudication applications.

[125] In relation to the Harbour Town project, the letter attaches various documents including:

1. the respondent details (included at page 181 of the bundle of documents Ms Tod states she received four days earlier); and

2. the contract and project details including the name of the project (Harbour Town Information Kiosk), the reference date (31 December 2018) and the total amount claimed ($26,702.76) (included at page 182 in the bundle of documents Ms Tod states she received four days earlier).

[126] Ms Tod acknowledged in cross-examination that she understood that there were outstanding payment claims for the Harbour Town project and that she read page 181 of the bundle on 8 February 2019; she was not asked directly if she read page 182 of the bundle.

---

[29] Transcript of the hearing on 29 May 2019, p 99, line 1-7.

[127] This letter by the second respondent's agent makes it very clear that the applicant should have received the adjudication application, and if it had not then to contact the second respondent's agent promptly.

[128] Ms Tod acknowledges that the applicant did not complain immediately about not receiving the adjudication application upon receiving this letter. The applicant waited another 10 days before advising that they had not received the adjudication applications.

[129] On 20 February 2019, Ms Horton told Ms Tod that the adjudication application forms had not been given to them.

[130] On 22 February 2019, Ms Tod wrote to the second respondent's agent advising they had not been served with copies of the applications in either matter. The letter attached the information received in the mail which the applicant described in the letter as the "supporting documents, without the Application enclosed." The letter was not received by the second respondent's agent until 1 March 2019 and it appears that the supporting documents were not attached to the applicant's letter.

[131] On 4 March 2019 the second respondent's agent wrote to the applicant and the first respondent asking the first respondent to confirm how the applications were served.

[132] On 5 March 2019 the first respondent wrote to the applicant and the second respondent stating that the applications had been "delivered via standard post".

[133] On 6 March 2019, Ms Horton wrote to the second respondent's agent again stating that the applicant had not received the adjudication application:

> "National Management Group ("the Respondent") once again raises the non receipt of the Claimants Application. It was not served on the Respondent, as raised on 22nd February 2019. The only information received in the envelope was photocopies as per attached for both matter mentioned above."

[134] On 7 March 2019 the second respondent made his adjudication decisions.

[135] On 22 March 2019, after the second respondent made his decisions, Ms Tod states she "carefully reviewed the bundle of documents" and noticed various pages of the adjudication application were in fact scattered throughout the bundle of documents:[30]

> "With respect to the Harbour Town Adjudication Application, on or about 22 March 2019, I first noticed that the Applicant only received 6 pages of the adjudication application form (plus supporting documents). The application form documents were scattered throughout the bundle rather than stapled or at least together at the front or rear end of the bundle."[31]

[136] In relation to the Harbour Town project, Ms Tod states that there were six out of the seven pages of the adjudication application included in the bundle. The missing page was not vital. These pages were found at pages 171, 172, 181, 182, 195 and 196 of the

---

30 Affidavit of Vicki Tod filed 26 April 2019, p 8, [41].
31 Affidavit of Vicki Tod filed 26 April 2019, p 8, [43].

bundle Ms Tod states she received. As previously noted, Ms Tod acknowledges that she read page 181 of this bundle on the date of receipt.

[137] Ms Tod states:[32]

> "If you turn to paragraph 41 of your affidavit, you note there that on the 22nd of March 2019 you carefully reviewed the bundle of documents. Is that correct? Yes.
>
> And that it was at that time that you identified adjudication application forms and documents in the bundle of documents? Yes.
>
> Had you carefully reviewed the bundle of documents on the 8th of February 2019, you, in fact, would have identified the various pages of the adjudication application in that bundle of documents. Isn't that correct? Sorry, the pages that were in the bundle?
>
> Yes? Yes.
>
> You would have identified them had you carefully reviewed the bundle on the 8th of February 2019? If I read it word for word? Is that what you're saying?
>
> Well, you said on the 22nd of March 2019 that you carefully reviewed the bundle of documents, and it was at that time you identified adjudication application documents; that's correct? Yes.
>
> Your evidence was that on the 8th of February 2019, you did not identify adjudication application pages? It wasn't clear.
>
> So I'd suggest to you that had you carefully reviewed the bundle of documents on the 8th of February 2019, you would have been aware of the application – adjudication application documents in the bundle? No, because it wasn't all there.
>
> But you would have ? There was reference to it, yes.
>
> You would have identified the document – the pages in the bundle on the 8th of February 2019? Yes.
>
> And that would have been the case for the Lucky Squire application adjudication documents as well. You would have been able to identify the four pages of the form had you carefully reviewed the bundle on the 8th of February 2019? Yes."

Determination - service

[138] I found Mr Dio to be a credible witness.

---

32 Transcript of the hearing on 29 May 2019, p 48, line 10-44 (cross-examination of Vicki Tod).

[139] I accept that Mr Dio observed his secretary put the documents in the envelope, and address the envelope to the applicant's PO Box.

[140] The applicant states the there was "general lack of scrupulousness" and "lack of care" by the first respondent in the sending of the adjudication application and the bundle of documents to the applicant.

[141] The applicant states that Mr Dio changed his evidence or enlarged upon his evidence as to what was placed in the envelopes:[33]

> "MR STEELE: There's some. Yes, your Honour. There's some, but what it also shows is that there's no record of any other documents which were sent, no record of what the other documents in support were. So if there was that level of care taken, one would expect that that kind of record would exist, but it doesn't in this case. It was only when I put those questions to him about the adjudication application itself referring to attached submissions that the evidence of Mr [Dio] appeared to change from his earlier evidence which is that he had seen seven pages sealed up in the envelope.
>
> HER HONOUR: Well, is it just because that has been the focus of the dispute, whether those seven pages were given or not? There's never been, really, a focus of dispute whether the other pages were given.
>
> MR STEELE: Your Honour may find that, but, in my submission, I was careful to ask him the particular questions and he agreed with them and then he changed his evidence or he enlarged upon his evidence."

[142] This is an inconsistency which the applicant seizes upon; an inconsistency that, in the scheme of how this trial was conducted and the focus of the dispute between the parties, I do not place much weight on.

[143] The applicant submits that there is no documentary evidence of what accompanying material was sent.

[144] The applicant, submits that in all of the circumstances, the better inference to draw is:[34]

> "…. that Mr [Dio] instructed somebody, probably Ms Bianca [Dio], to send some documents. That was done haphazardly, in a way that wasn't supervised, and then they were received in, essentially, the way that was set out by Ms Tod and Ms [Horton]."

[145] I do not accept that the first respondent acted with any lack of care in relation to sending the adjudication application documents. To the contrary, I find otherwise. The first respondent had a system in place to record outgoing mail. It is not contested by the applicant that Mr Dio stamped and dated a copy of the adjudication application documents and kept this copy for the first respondent's records.[35]

---

33 Transcript of the hearing on 29 May 2019, p 103, line 30-40.
34 Transcript of the hearing on 29 May 2019, p 100, line 20-23.
35 Transcript of the hearing on 29 May 2019, p 103, line 13-14.

[146] Whilst there is no record before the court as what accompanying documents were sent to the applicants, I do not find that detrimental to Mr Dio's credibility. The focus of this trial has always been on the service of the adjudication application documents. Mr Dio is clear as to this issue; he saw the adjudication applications placed in an envelope addressed to the applicant.[36]

[147] I accept Mr Dio's evidence that he observed the adjudication application being placed into the envelope. The adjudication application (along with the submissions) was sent to the applicant's PO Box and then opened by Ms Tod.

[148] The effect of Ms Tod's affidavit was that she opened an envelope and found a bundle of documents and it was not clear to her:

1. why the bundle of documents and had been sent to the applicant and who had sent them; and

2. that there were any adjudication application forms in the bundle of documents.

[149] I did not find Ms Tod a convincing or a credible witness in relation to these important issues.

[150] Ms Tod states that she read the documents, however, not every single word. There were clearly adjudication application documents in this material. Ms Tod should have realised that they were adjudication application documents. This is especially so, since the day before, she was aware that adjudication applications had been filed in relation to the Lucky Squire project and the Harbour Town project. Indeed, under cross examination, Ms Tod states:[37]

> "Did you understand that this was a declaration for the application of an adjudication? That's what it says, yes.
>
> But did you understand that on the 8th of February? Yes.
>
> So you understood that this page relates to an adjudication application? Yes.
>
> Your evidence is that it was incomplete – that adjudication application was incomplete in the bundle? Yes."

[151] Taking into account all of the evidence, I do not accept Ms Tod's affidavit where she states that it was not clear from the material that there were any adjudication application forms in the bundle of documents. It is noted that when Ms Tod reviewed the documents again on 22 March 2019, she noticed the adjudication application documents were in the bundle.

[152] Further, I regard Ms Tod's evidence in her affidavit that "it was unclear to me why the bundle of documents had been sent to us and who had sent them" as implausible given that:

---

36 Transcript of the hearing on 29 May 2019, p 55, line 30-45 (cross-examination of Gabriel Dio).

37 Transcript of the hearing on 29 May 2019, p 35, line 5-12 (cross-examination of Vicki Tod).

1. she had received a letter from QBCC about the adjudication application the day before receiving the bundle;

2. the bundle annexed to her affidavit clearly identify documents between the applicant and first respondent in relation to work done on the Harbour Town project;

3. she understood that the declaration by Gabriel Dio as to the adjudication application page related to an adjudication application; and

4. when handing the documents to Ms Horton she accepts that she may have made reference that these documents related to a QBCC matter (and that was in reference to the QBCC notification she received on 7 February 2019 in relation to the adjudication applications).[38]

[153] Taking into account all of the evidence I do not accept Ms Tod's affidavit where she states that after opening the envelope it was unclear why the bundle of documents had been sent to the applicant and who had sent the documents. In my view, this part of Ms Tod's affidavit is not forthright.

[154] After considering the evidence, I prefer Mr Dio's evidence over Ms Tod's evidence.

[155] I have concerns about the credibility of Ms Tod's evidence. I do not have the same concerns with Mr Dio. The applicant has not satisfied me that the documents were not sent in accordance with Mr Dio's evidence.

[156] I find that a copy of the Harbour Town adjudication application was given to the applicant.

[157] In any event, even on the applicant's evidence, I find that there has been substantial compliance.

[158] The applicant accepts that in the bundle of documents was six out of the seven pages of the adjudication application; the missing page was not vital. However, the applicant states that these adjudication application documents were scattered throughout the bundle of documents provided to the applicant. It is clear from Ms Tod's evidence that she read some of these documents.

[159] The applicant accepts that if I find substantial compliance then that would be enough to satisfy section 79(2)(c) of the Act, i.e. sufficient information to enable the applicant to consider the adjudication application properly.[39]

[160] The applicant submits:[40]

> "That's what your Honour's faced with here. Was this higgledy-piggledy – if your Honour finds that that's what happened, was this higgledy-piggledy

---

38 It is noted that her affidavit Ms Tod just states she gave the documents and envelopes to Ms Horton and said words to the effect "keep the envelopes as I am unsure what they relate to".

39 *JJ Richards & Sons Pty Ltd v Ipswich City Council* (1995) 86 LGERA 417 at 419 per Thomas J citing *McRae v Coulton* (1986) 7 NSWLR 644 at 661-662; transcript of the hearing on 29 May 2019, p 108, line 28-34.

40 Transcript of the hearing on 29 May 2019, p 108, line 35-40.

> placement of some pages here within many dozens of pages sufficient to enable the applicant to understand what, in fact, was being determined or required of it. That's in the face of uncontested – well, I understand it to be uncontested – evidence that there was no covering letter or anything such as that included."

[161] Even on the applicant's case, I find that the applicant had sufficient information to consider the adjudication applications; a copy of the adjudication application was given to the applicant, minus an immaterial page. I find that, in all of the circumstances, even on the applicant's case, "this higgledy-piggledy placement of some pages here within many dozens of pages sufficient to enable the applicant to understand what, in fact, was being determined or required of it."

[162] The applicant's counsel states it may be that I find that it was an imprudent and less than a careful approach to the documents that were received by the applicant. I do.

[163] Even on Ms Tod's evidence, the applicants received six of the seven pages of the adjudication application for the Harbour Town project in a bundle of documents. The applicant accepts that the missing page was not vital. Ms Tod knew on 8 February 2019, when receiving and reading these documents, that the day previously an adjudication application had been filed in relation to the Lucky Squire project and the Harbour Town project.

[164] Four days later, the second respondent's agent advises the applicant that they should have received the adjudication application and, if it had not then to contact the second respondent's agent promptly. The applicant waited 10 days before sending correspondence to the second respondent's agent advising that it had not received the adjudication application.

[165] Ms Tod upon reviewing the bundle of documents again on 22 March 2019 noticed that there were six of the seven adjudication application documents for the Harbour Town project in the bundle.

[166] In all of the circumstances, even on the applicant's evidence, I find that there has been substantial compliance.

Issue 4: No valid payment claim for Harbour Town

[167] Section 79(2)(c) states that the adjudication application must identify the payment claim to which it relates.

[168] In relation to both claims, Lucky Squire and Harbour Town, the applicant submits that contrary to section 79 of the Act the adjudication application does not identify the payment claim because in the material where it sets out the payment claim details, the dates are wrong, and it is impossible to tell from those which particular invoice is referred to.[41]

[169] Only the Harbour Town adjudication application needs to be considered because I have already determined that the Lucky Squire payment claim is invalid because it purports to rely on the same reference date.

---

41 Transcript of the hearing on 29 May 2019, p 76, line 21-26.

[170] The first Harbour Town invoice, issued on 25 November 2018 is set out in Annexure A.

[171] The second Harbour Town invoice, issued on 31 December 2018, is set out in Annexure B;[42]only the date, due date and the legislation the payment claim is made under is different from the first invoice.

[172] The Harbour Town payment claim (contained in the adjudication application at page 182[43] and later provided to the applicant by the second respondent on 12 February 2019[44]) is set out in Annexure C.

[173] The applicant points to the failure of the adjudication application to identify an invoice number, or a date which could actually attach to one of the invoices said to be relied upon. Different payment due dates to those in the alleged invoices are also set out in the payment claim.

[174] The applicants states:[45]

> "You could try to take an educated guess at which of the many invoices issued it related to. So what we know about Harbour Town is that there are two identical invoices, 0136, except that one is issued on 25 November and one is issued on 31 December. And we know that they're for the same amount. So we know there's that. So my client could attempt to determine it's this one or it's that one. Now, one thing that helps them to determine it's the later one is that the reference date is said to be the 31st of December, and nothing else in that adjudication application, in that part of the adjudication application, assists them with determining which of those two invoices it is.
>
> And we say the Act says that the adjudication application must identify the payment claim to which it relates, and it just doesn't do it. There's some guesswork which you can try to deduce which one it may be. But that's as far as it goes. But that's the gist of the submission."

[175] The applicant highlights Mr Dio's evidence where he thought that both the Lucky Squire and the Harbour Town invoices were in fact given to the applicant on 19 December 2019, thus pre-dating the date of the invoice, as another complicating factor.

[176] Accordingly, the applicant submits that there was a failure to meaningfully identify the relevant payment claim.

[177] It is noted that Ms Tod appreciated on 8 February 2019 that there was an outstanding payment claim for the Harbour Town project:[46]

> "On page 182 it notes that the contract and project details are for Harbour Town information kiosk? Yes.

---

42 Affidavit of Paul Kieran Coughlan filed 26 April 2019, p 5, [24], PKC-1, p 41.
43 Affidavit of Vicki Tod filed 26 April 2019, VT-1, p 182.
44 Affidavit of Vicki Tod filed 26 April 2019, VT-1, p 229.
45 Transcript of hearing on 29 May 2019, p 79, line 25-38.
46 Transcript of the hearing on 29 May 2019, p 36, line 14 to 38 (cross-examination of Vicki Tod).

> You understood that there were outstanding payment claims for that project? Yes.
>
> That they were outstanding to Biriel Industries? Yes.
>
> And that it identifies that the date the payment claim was given to National Management Group was the 7th of January 2019? Yes.
>
> You, in fact, received a payment claim on the 7th of January 2019, didn't you? Yes.
>
> […] from Biriel. And it was for the amount of $26,702? On my recollection, it was approximately that amount, yes.
>
> But you did receive payment claims on the 7th of January 2019? Yes.
>
> If you then turn to page 191, you'll note that that is a notice of suspension of works? Yes.
>
> […] for invoices 0136[47] and invoice 0137? Yes.
>
> You're aware – you were aware that date that those two payment claims were outstanding? At that date, yes."

Determination

[178] In my view, the applicant was provided with the Harbour Town adjudication application which identified the payment claim.

[179] There are a number of matters, as identified by the applicant, which are incorrect on the adjudication application document.

[180] However, importantly, the adjudication application document refers to the project name, the reference date and the amount due. In my view, such information is sufficient to identify the payment claim pursuant to section 79(2)(c) of the Act.

Issue 5: Refusal to allow submission about jurisdiction

Applicant's contentions

[181] The applicant submits that the second respondent failed to provide the applicant with natural justice by refusing to accept submissions about jurisdiction.

[182] Section 84(2) of the Act states:

> "**84 Adjudication procedures**
>
> (1) Subject to the time requirements under section 85, an adjudicator must decide the following as quickly as possible—
>
> (a) an adjudication application;

---

47 Invoice 136 relates to the Harbour Town project.

(b) applications for extensions of time under section 83.

(2) For a proceeding conducted to decide an adjudication application, an adjudicator—

(a) must decide—

(i) whether he or she has jurisdiction to adjudicate the application; and

...".

[183] Accordingly, the applicant submits that a party has an entitlement to make a submission about jurisdiction. As Applegarth J said in *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* ("*John Holland*"):[48]

> "The subject of a decision is entitled to have his or her mind directed to 'the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it'."

[184] The applicant submits that in this case, the second respondent explicitly invited submissions about service (and therefore, about jurisdiction), however, when those submissions were received, the second respondent refused to consider them.

[185] It could not be consistent, in the applicant's submission, with the requirement of an adjudicator to determine his or her jurisdiction, to refuse to allow a party to make a submission about that jurisdiction.

[186] Section 82(2) of the Act states that a respondent to an adjudication application must not give an adjudication response if the respondent failed to give the claimant a payment schedule as required under section 76 of the Act.

[187] In this case, the applicant did not give a payment schedule so was thus prohibited from giving an adjudication response.

[188] However, the applicant submits that nothing in section 82 of the Act prevents a party from making submissions directed to the adjudicator's actual jurisdiction, or which imposes any time limit on such submissions.

[189] In this case, the applicant made submissions about service and the applicant submits that the second respondent was required, in order to give natural justice to the applicant, to consider those submissions.

[190] The applicant submits that the second respondent refused to consider the applicant's submissions about jurisdiction. The second respondent's decision states:

> "However, the Respondent has stated in its letter received on 1 March 2019, that it did not receive the full Application on this day [7 February 2019]. While I address the timing of the purported Adjudication Response below, the Act permits any such response from the Respondent to the Application

---

48 [2009] QSC 205 at [50] per Applegarth J.

> within certain timelines. For clarity the purported Adjudication Response was due on 21 February 2019. The Respondent did not provide any such response and as such and as I am bound by the provisions of the Act, I cannot take into consideration any material received from the Respondent after this date.[49]
>
> ...
>
> Section 83 of the Act prescribes the timelines with which the Respondent has 'an opportunity to be heard'. The Respondent was made aware on the 7 February 2019 and 12 February 2019 (Notification of Acceptance of the Adjudicator) that the Adjudication Application was lodged with the QBCC regarding work performed by the Claimant. If the Respondent considered it wasn't 'informed of the case against them' on these dates, it should have notified the Adjudicator of this fact prior to 21 February 2019 (purported Adjudication Response date) to seek clarity."[50]

[191] The applicant submits that the second respondent simply failed to consider the submissions of the applicant about jurisdiction.

[192] Further, the second respondent wrongly characterised such submissions as part of the "adjudication response". In doing so, the applicant submits, the second respondent deprived the applicant of a meaningful opportunity to persuade the second respondent that he should not exercise his jurisdiction; he simply failed to consider (in any meaningful way) the question at all.

The first respondent's submissions

[193] The applicant's first complaint about not receiving the Adjudication Applications and not being able to prepare a response was only made on 22 February 2019. The first respondent submits that the applicant was given the opportunity to make submissions in relation to jurisdiction as:

1. on 4 March 2019, the second respondent wrote to the applicant and the first respondent asking the first respondent to indicate how the applications were served;

2. on 5 March 2019, the first respondent wrote to the applicant and the second respondent stating that the applications was delivered via standard post to the applicant's PO Box address; and

3. on 6 March 2019, the applicant wrote an email to the second respondent repeating that it had not been served with copies of the applications in each matter.

[194] The first respondent submits that the applicant was aware of the adjudication applications as at 7 February 2019, and at that time did not provide any submissions as to jurisdictional issues. It was not until after the adjudication response date of 21 February 2019 had elapsed, did the applicant send a letter dated 22 February 2019. The first respondent submits that the adjudicator considered the applicant's allegation that it

---

49 Adjudication decision: 477005, Affidavit of Vicki Tod filed 26 April 2019, VT1-1, p 279-280, [74(d)].

50 Adjudication decision: 477005, Affidavit of Vicki Tod filed 26 April 2019, VT1-1, p 279-280, [79].

did not receive the whole adjudication application and was satisfied that the adjudication application had been served on the applicant.

Determination

[195] The second respondent, after considering matters, determined the adjudication application to be a valid one in accordance with the Act.

[196] The applicant informed the second respondent that they had not been given the adjudication application and the second respondent engaged with this issue and sought submissions from both parties regarding service. The second respondent's decision sets out the chronology of events:[51]

> "50. The Respondent issued a letter, dated 22 February 2019, but received by my agent Adjudicate Today and subsequently myself on 1 March 2019. I note this letter was received past the date on which the Respondent was due to provide a response (if any) in accordance with section 82 of the Act.
>
> 51. In the letter, the Respondent states that it was not served a complete copy of the Adjudication Application, but was only served the supporting documents, not the Application itself. The Respondent states in the letter that what was received from the Claimant is attached. However, and after confirming with my agent, nothing was attached to this letter.
>
> 52. Regardless, and for the benefit of the parties, I issued a request for further submissions on 4 March 2019. The purpose of the RFFS 1 was to seek confirmation from the Claimant as to the date and method of service of the Adjudication Application on the Respondent. This confirmation was required to be supported by objective evidence.
>
> 53. I stated in the RFFS 1 that the Claimant needs to make its submission by 4pm on 5 March 2019.
>
> 54. The Claimant provided its submission within the timelines stated in the RFFS 1. The Claimant stated that the Adjudication Application along with supporting documents was delivered to the Respondent's PO Box address on 7 February 2019.
>
> 55. The Claimant submits evidence in the form of an Australia Post receipt with tracking number along with a document transmittal form detailing the delivery of the Adjudication Application and supporting documents, stamped by Australia Post at its Ashmore City depot, dated 7 February 2019. Ashmore City Post Office is the nominated PO Box postal address of the Respondent.
>
> 56. The Respondent provided its submissions to RFFS 1 within the time limits specified in the RFFS 1. The Respondent raises the allegation that the Claimant only served on the Respondent the supporting documents to the Application and not the Application itself on 7 February 2019. The Respondent attaches what was allegedly contained within the envelope

---

[51] Affidavit of Vicki Tod filed 26 April 2019, VT-1, p 277, [50]-[60].

> received from the Claimant, dated 7 February 2019. This attachment includes the supporting documentation to the Adjudication Application, but not the Application itself.
>
> 57. The Respondent states that the issue regarding the alleged non receipt of the Adjudication Application was raised on 22 February 2019 with the Adjudicator. This is a false statement. The Adjudicator as well as the Adjudicator's agent became aware of the Respondent's position regarding this matter on 1 March 2019, upon receipt of the Respondent's letter.
>
> 58. The Respondent also provides the following comment in its submission to RFFS 1. *'Procedural fairness usually involves two requirements, the fair hearing rule and the rule against bias. The hearing rule requires the Respondent to be informed of the case against them and provide them with an opportunity to be heard. The extent of the obligation on the decision maker depends on the relevant statutory framework and on what is fair in all circumstances'.*
>
> 59. I will provide a response to this comment in the Adjudication Response section.
>
> 60. I confirm that at all times, I communicated with both the Claimant and Respondent via my agent and all responses were shared with the corresponding other party."

[197] The applicant's submission made on 6 March 2019 stated that it had not been served with the adjudication application and was unable to respond due to no application being received. The applicant emphasised the need for procedural fairness and for the applicant to be informed of the case against them. The applicant attached the documents that it had received.

[198] The applicant submits that the second respondent was required, in order to give natural justice to the applicant, to consider those submissions. I agree.

[199] The second respondent, in his decision, acknowledged that the adjudication application must be given to the applicant and responded to the applicant's claim that "it did not receive a full copy of the Application, but only the supporting documents and not the Application itself":[52]

> "A copy of the Adjudication Application must be given to the Respondent. The Respondent has provided written advice dated 1 March 2019 that the Respondent did not receive a full copy of the Application, but only the supporting documents and not the Application itself. I provide the following response to this:
>
> a. The electronic copy of the Adjudication Application states that the Application was given to the Respondent on 7 February 2019.
>
> b. The Claimant, as part of the supporting documentation to the Application provides an e-mail to the Registrar, dated 7 February

[52] Adjudication decision: 477005, Affidavit of Vicki Tod filed 26 April 2019, VT1-1, p 279-280, [74].

> 2019, 12.34 pm that it has provided a copy of the Application to the Respondent on 7 February 2019. It relies upon a document transmittal, attached to the Application as proof of this correspondence where Australia Post has stamped the transmittal as received on 7 February 2019 at its Ashmore City postal depot. The postal address of the Respondent is identified as PO Box 1014, Ashmore City throughout various documents within the Application.
>
> c. Further there is an Australia Post receipt with tracking number attached to the Application. I entered this tracking number into the Australia Post website and found the delivery address to be Ashmore City, the suburb identified as the postal address of the Respondent. I therefore find that there is sufficient evidence to support that the Respondent received the Application on 7 February 2019.
>
> d. However, the Respondent has stated in its letter received on 1 March 2019, that it did not receive the full Application on this day. While I address the timing of the purported Adjudication Response below, the Act permits any such response from the Respondent to the Application within certain timelines. For clarity, the purported Adjudication response was due 21 February 2019. The Respondent did not provide any such response and as such and as I am bound by the provisions of the Act, I cannot take into consideration any material received from the Respondent after this date. Section 88 (3) (a) describes this. Regardless, the Respondent has relinquished its rights in providing any such Adjudication Response due to the fact it did not issue a payment schedule in response to the Claimant's payment claim. As such, I am unable to consider the letter received 1 March 2019 from the Respondent into consideration regarding my final decision.
>
> e. I can only rely upon the reasoning and evidence detailed in para (b) and (c) above and find the Application satisfies the requirements of section 79 (3) of the Act.
>
> f. The Registrar has satisfied the terms of section 79 (4) of the Act and referred the Application within 4 business days to the Adjudicator."

[200] Even though the applicant was not allowed to make an adjudication response, this did not preclude the applicant from being entitled to make submissions about jurisdictional issues. In this case, the applicant raised a jurisdictional issue about not being given the adjudication application. The adjudicator, in error refused to consider these submissions.

[201] However, in *John Holland*,[53] it was stated that not all breaches of natural justice will result in an adjudicator's determination being voided, as:

> "The adjective 'substantial' has been used in the relevant authorities to capture the principle that the opportunity denied was material, namely that the matter about which the adjudicator did not provide an opportunity to be

---

53 [2009] QSC 205 at [40] per Applegarth J (citations omitted).

> heard was a point upon which the adjudicator based his or her decision and was significant to the actual determination. In addition, the Court's concern is with the practical effect of the alleged denial of natural justice. Reference to the High Court's decisions in *Stead v State Government Insurance Commission* and *Ex parte Aala* supports the proposition that even if the Court is satisfied that there has been a denial of natural justice, relief may be denied if it can be shown that compliance with the requirements of natural justice could have made no difference to the outcome. It is probably sufficient in this regard for the applicant for relief to show that there were substantial submissions that, as a matter of reality and not mere speculation, might have persuaded the adjudicator to change his or her mind."

[202] Furthermore, Hammerschlag J stated in *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*[54] that, in considering whether there was a breach of an essential condition for validity of a determination, the Court should look at "the nature, gravity and effect of the errors, if any, made by the adjudicator". His Honour said "[t]he required exercise is to determine whether what occurred worked "practical injustice" on the plaintiff sufficient to vitiate the adjudication".[55]

[203] In this case, the applicant stated in correspondence (received by the second respondent on 1 March 2019) that the first respondent had not been served with a copy of the adjudication application and therefore was unable to prepare a response. On 6 March 2019, the applicant stated:[56]

> "Dear Sir/Madam
>
> We are in receipt of the Adjudicators correspondence of requested extension of time of 5 days to make adjudication decision.
>
> National Management Group ('the Respondent') once again raises the non receipt of the Claimants Application. It was not served on the Respondent, as raised on 22nd February 2019. The only information received in the envelope was photocopies as per attached for both matter mentioned above.
>
> The Respondent is unable to address or respond to any Claims that the Claimant has, due to no application being received outlining concerns.
>
> 'Procedural fairness usually involves two requirements, the fair hearing rule and the rule against bias. The hearing rule requires a Respondent to be informed of the case against them and provide them with an opportunity to be heard. The extent of the obligation on the decision-maker depends on the relevant statutory framework and on what is fair in all the circumstances'
>
> We look forward to your response."

---

54 [2007] NSWSC 941 at [33] per Hammerschlag J.

55 [2007] NSWSC 941 at [34] per Hammerschlag J citing *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 at 13-14 per Gleeson CJ.

56 Affidavit of Vicki Tod filed 26 April 2019, VT-1, p 254.

[204] Even when service had been properly effected, the applicant submits, that they were still entitled to have made submissions to the adjudicator about jurisdiction, and for those submissions to have been considered. I agree.

[205] The applicant submits that there is at least a prospect that such submissions may have been successful, and that the second respondent may have decided he did not have jurisdiction. The applicant submits that by refusing even to consider the applicant's submissions on the question, the second respondent deprived the applicant of that real chance. However, I do not accept such a submission.

[206] In my view, the applicant has not shown that there were substantial submissions that, as a matter of reality and not speculation,[57] might have persuaded the adjudicator to change his mind, in circumstances where:

1. the applicant had provided the adjudicator with the material it had been given (which included six of the seven pages of the Harbour Town project); and

2. this submission was made in the face of credible evidence from the first respondent that service had been effected, which was considered by the adjudicator.

[207] Therefore, I accept, that even if the second respondent had considered the submission made by the applicant, then there would have been no difference to the outcome.

[208] There has been no practical injustice or substantial breach of natural justice that warrants setting aside the second respondent's determination in relation to the Harbour Town matter.

Orders

[209] In respect of Adjudication Application No. 00477012 (the Lucky Squire application):

1. I declare that:

   a. the decision of the second respondent dated 7 March 2019 in relation to Adjudication Application No. 00477012 (the Lucky Squire application) is void.

   b. the first respondent is permanently restrained from taking any further step to enforce the Adjudication Decision in relation to Adjudication Application No. 00477012 (the Lucky Squire application).

   c. any adjudication certificates given by the third respondent based upon the Adjudication Decisions in relation to Adjudication Application No. 00477012 (the Lucky Squire application) are void.

[210] In respect of Adjudication Application No. 00477005 (the Harbour Town application):

1. The application for a declaration pursuant to section 10 of the *Civil Proceedings Act* 2011 (Qld) or alternatively in the inherent jurisdiction of the Court that the

---

57 [2009] QSC 205 at [40] per Applegarth J (citations omitted).

decision of the second respondent dated 7 March 2019 in relation to Adjudication Application No. 00477005 (the Harbour Town application) is void or liable to be set aside for want of jurisdiction is dismissed.

[211] I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions on the question of costs. I encourage the parties to agree on a timetable for the exchange of written submissions and, if it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing. In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

Annexure A

...

TAX INVOICE
NATIONAL MANAGEMENT GROUP PTY LTD
U 12 7 Activity Cres
MOLENDINAR QLD 4214
AUSTRALIA
ABN: 14 122 464 781

		INVOICE NO.	**DATE**
		INV-0136	25 Nov 2018
		REFERENCE	**DUE DATE**
		HT KIOSK	09 Dec 2018

DESCRIPTION	**QUANTITY**	**UNIT PRICE**	**AMOUNT AUD**
15 Nov 2018 Harbour Town Information Kiosk • Completion of fabrication as per PO 23322	1.00	22,367.24	22,367.24
25 Nov 2018 Harbour Town Information Kiosk • Installation of Structural Steel • Completed on 24/11/2018	1.0	1,908.00	1,908.00
		SUBTOTAL	24,275.24
		Total GST 10%	2,427.52
		INVOICE TOTAL AUD	26,702.76
		TOTAL NET PAYMENTS AUD	0.00
		AMOUND DUE AUD	26,702.76

...

This payment claim is made pursuant to the Building and Construction Industry Payments Act 2004 (QLD).

...

Annexure B

...

TAX INVOICE
NATIONAL MANAGEMENT GROUP PTY LTD
U 12 7 Activity Cres
MOLENDINAR QLD 4214
AUSTRALIA
ABN: 14 122 464 781

INVOICE NO.	**DATE**
INV-0136	31 Dec 2018
REFERENCE	**DUE DATE**
HT KIOSK	07 Jan 2019

DESCRIPTION	**QUANTITY**	**UNIT PRICE**	**AMOUNT AUD**
15 Nov 2018 Harbour Town Information Kiosk • Completion of fabrication as per PO 23322	1.00	22,367.24	22,367.24
25 Nov 2018 Harbour Town Information Kiosk • Installation of Structural Steel • Completed on 24/11/2018	1.0	1,908.00	1,908.00
		SUBTOTAL	24,275.24
		Total GST 10%	2,427.52
		INVOICE TOTAL AUD	26,702.76
		TOTAL NET PAYMENTS AUD	0.00
		AMOUND DUE AUD	26,702.76

...

This payment claim is made pursuant to the Building Industry Fairness (Security of Payment) Act 2017.

...

Annexure C

Contact and Project Details	
Project Name	Harbour Town Information Kiosk
Project Address	147 BRISBANE RD BIGGERA WATERS QLD 4216
Project Type	Commercial Office or Shop
Date Contract/Arrangement Formed	04 Oct 2018
Reference Date	31 Dec 2018

Payment Claim Details	
Date Payment Claim given to Respondent	07 Jan 2019
Payment Claim Due Date	25 Jan 2019
Payment Claim Amount (MUST be exc. GST)	$ 24,275.24
GST Added To The Payment Claim Amount	✓ Yes (Inc GST) No
Amount Of GST Claimed	$ 2,427.52
Total Claimed Amount	$ 26,702.76