SUPREME COURT OF QUEENSLAND

CITATION:	*Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd & Ors; Jones v Galaxy Developments Pty Ltd & Ors* [2021] QCA 10
PARTIES:	**In Appeal No 4543 of 2020:** **CIVIL CONTRACTORS (AUST) PTY LTD T/A CCA WINSLOW** **ACN 169 588 194** **(appellant)** **v** **GALAXY DEVELOPMENTS PTY LTD** **ACN 607 628 919** **(first respondent)** **THOMAS JONES** **(second respondent)** **THE ADJUDICATION REGISTRAR (QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION)** **(third respondent)** **In Appeal No 4449 of 2020:** **THOMAS JONES** (appellant) **v** **GALAXY DEVELOPMENTS PTY LTD** ACN 607 628 919 (first respondent) **CIVIL CONTRACTORS (AUST) PTY LTD T/A CCA WINSLOW** ACN 169 588 194 (second respondent) **THE ADJUDICATION REGISTRAR (QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION)** (third respondent)
FILE NO/S:	Appeal No 4543 of 2020 Appeal No 4449 of 2020 SC No 12292 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 51 (Dalton J)
DELIVERED ON:	2 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2020

JUDGES: Fraser and McMurdo JJA and Jackson J

ORDERS: **In Appeal No 4543 of 2020:**

1. **Appeal dismissed.**
2. **The appellant to pay the first respondent's costs of the appeal.**

In Appeal No 4449 of 2020:

1. **Appeal dismissed.**
2. **The appellant to pay the first respondent's costs of the appeal.**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – CONSTRUCTION – GENERALLY – where an adjudicator held that Civil Contractors (Aust) Pty Ltd ("CCA") should recover an adjudicated amount of $1.4 million from Galaxy Developments Pty Ltd ("Galaxy") – where, on Galaxy's application, the primary judge held that the adjudicator's decision was delivered beyond any relevant time limit under *Building Industry Fairness (Security of Payment) Act* 2017 ("the Act"), and at least for that reason, was void – whether, upon the proper construction of the Act, the adjudicator's jurisdiction is defined by the relevant time limit, in that the adjudicator's powers cease once the time limit has passed

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – SCHEDULES – where the primary judge held that upon the proper construction of the *Queensland Building and Construction Commission Act* 1991 ("the QBCC Act") and the *Queensland Building and Construction Commission Regulation* 2018 ("the QBCC Regulation"), CCA did not hold a building licence to carry out all of the work in question, with the consequences that the building contract under which CCA claimed to be paid was void and for that reason also the adjudicator's decision was void – where CCA held a building licence in the category "Builder restricted to structural landscaping licence" – whether some of the works carried out by CCA were outside the scope of its licence

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where the primary judge found that the adjudicator could not be said to have acted in good faith, and that the adjudicator had made a misrepresentation, with the consequence that the adjudicator was not entitled to be paid any fees – whether the findings of bad faith and misrepresentation ought to have been made without providing the adjudicator with an opportunity to be heard on those subjects – whether, given

the adjudicator failed to make a decision on the application within the required time, the adjudicator is entitled to be paid any fees

Building and Construction Industry Security of Payment Act 2002 (Vic), s 22(4), s 23(2B), s 28(2)(a)
Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 85, s 86, s 94, s 95
Queensland Building and Construction Commission Act 1991 (Qld), s 42
Queensland Building and Construction Commission Regulation 2018 (Qld), sch 1

Cranbrook School v JA Bradshaw Civil Contracting [2013] NSWSC 430, considered
Ian Street Developer Pty Ltd v Arrow International Pty Ltd [2018] VSCA 294, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied

COUNSEL: P Dunning QC, with R M De Luchi, for the appellant in Appeal No 4543 of 2020 and the second respondent in Appeal No 4449 of 2020
M D Martin QC, with P Hackett, for the first respondent in Appeal No 4543 of 2020 and Appeal No 4449 of 2020
D Toomey SC, with D Hume, for the second respondent in Appeal No 4543 of 2020 and the appellant in Appeal No 4449 of 2020
No appearance for the third respondent in Appeal No 4543 of 2020 and Appeal No 4449 of 2020

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No appearance for the third respondent in Appeal No 4543 of 2020 and Appeal No 4449 of 2020

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.

[2] **McMURDO JA:** The principal issue in these appeals is the effect of an adjudicator's decision, purportedly made under the *Building Industry Fairness (Security of Payment) Act* 2017 ("the Act"), but beyond the time limit for the decision which the Act specifies. An adjudicator, Mr Jones, held that Civil Contractors (Aust) Pty Ltd ("CCA") should recover an adjudicated amount of $1.4 million from Galaxy Developments Pty Ltd ("Galaxy"). On Galaxy's

application, the primary judge held that the adjudicator's decision was delivered beyond any relevant time limit under the Act, and at least for that reason, was void.[1]

[3] The primary judge also accepted Galaxy's alternative argument, which was that upon the proper construction of the *Queensland Building and Construction Commission Act* 1991 ("the QBCC Act") and the *Queensland Building and Construction Commission Regulation* 2018 ("the QBCC Regulation"), CCA did not hold a building licence to carry out all of the work in question, with the consequences that the building contract under which CCA claimed to be paid was void, and for that reason also the adjudicator's decision was void.

[4] CCA appeals against that judgment by which a declaration was made that the decision was void, challenging each of the grounds for it. For the reasons that follow, I agree with the judge's conclusion as to the legal consequence of the lateness of the adjudicator's decision, so that CCA's appeal should be dismissed. As I will also explain, I respectfully disagree with the judge's conclusion on the other issue.

[5] The other appeal here is by the adjudicator. The primary judge declared that he was not entitled to be paid any fees or expenses for or in relation to the adjudication, and ordered him to refund to CCA all monies which had been paid to him in connection with the adjudication. For the reasons that follow, this appeal should be dismissed also.

The late decision question

[6] I will discuss first the question of whether the decision was ineffective for its lateness.

The facts

[7] In February 2018, CCA and Galaxy entered into a contract under which CCA was to perform civil works at a site in Coomera.

[8] On 1 July 2019, CCA served a payment claim for a progress payment of $1,430,070.69. On 15 July 2019, Galaxy served a payment schedule, which nominated a scheduled amount of negative $53,278.

[9] On 13 August 2019, CCA filed an adjudication application in respect of its payment claim. Galaxy requested and was granted an extension of time to deliver its adjudication response, which it filed on 18 September 2019. The adjudicator then requested additional submissions from the parties, which were duly provided.

[10] Three requests for an extension of time were made by the adjudicator for the delivery of his decision, and agreed to by the parties. The date for the decision became 18 October, then 22 October and ultimately 24 October 2019.

[11] On 24 and 25 October 2019, the adjudicator emailed versions of his decision to Adjudicate Today, the relevant registrar under the Act. On 25 October, the registrar responded by identifying some "typos" in that document. An amended version was sent by the adjudicator to the registrar later that day. On 28 October 2019, the

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1 *Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow & Ors* [2020] QSC 51 ("the primary judgment").

adjudicator was still finalising the terms of his decision, in email correspondence with the registrar, as to which party should pay the adjudicator's fees. On the same date, the registrar wrote to the parties, saying that the adjudicator's decision had been received and that the adjudicator had given instructions not to release his decision to the parties until his fees were paid.

[12] The ultimate decision of the adjudicator was delivered by him on 28 October 2019, and on 29 October, that was provided to the parties and an adjudication certificate was issued. In that decision, the "Decision Date" was specified as 24 October 2019. This was filed as a judgment in the Court on 30 October 2019, and enforcement warrants were subsequently obtained. On 22 April 2020, after the primary judgment was delivered, that money judgment and the enforcement warrants were set aside.

[13] In the proceeding before the primary judge, CCA admitted that the decision was delivered to the parties on 29 October 2019, and that this was outside the time which was required by the Act.

The Act

[14] The relevant provisions are within Chapter 3, Part 4. The provisions will be discussed in their terms at the time which is relevant to this case. And the subsequent amendments, if relevant, would not affect the reasons which follow.

[15] Section 79 provides for an application for adjudication. By s 79(2)(b), an adjudication application must be made within a specified time limit. A copy must be given to the respondent,[2] and the registrar must, within four business days after receipt of the application, refer the application to an adjudicator.

[16] By s 81, the adjudicator must, unless they have a reasonable excuse, accept or reject the referral within four business days after it is made. If the adjudicator rejects the referral, or does not accept it within the time required by s 81(1), the registrar must refer the application to another adjudicator within four business days after becoming aware of the refusal or failure.[3] On accepting a referral of an adjudication application, an adjudicator is taken to have been appointed to decide the application.[4]

[17] After being given notice of an adjudicator's acceptance of an application, the respondent may give the adjudicator a response to the application.[5] The time within which an adjudication response must be given is prescribed by s 83.

[18] Section 84(1) provides:

> "(1) Subject to the time requirements under section 85, an adjudicator must decide the following as quickly as possible—
>
> (a) an adjudication application …".

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2 s 79(3).
3 s 81(4).
4 s 81(7).
5 s 82(1).

[19] Sections 85 and 86 are critical provisions in this case and it is necessary to set them out in full:

> "**85 Time for deciding adjudication application**
>
> (1) Subject to section 86, an adjudicator must decide an adjudication application no later than—
>
> (a) for a standard payment claim—10 business days after the response date; or
>
> (b) for a complex payment claim—15 business days after the response date.
>
> (2) The *response date* is—
>
> (a) if the adjudicator is given an adjudication response under section 83—the day on which the adjudicator receives the response; or
>
> (b) otherwise—the last day on which the respondent could give the adjudicator an adjudication response under section 83.
>
> (3) An adjudicator must not decide an adjudication application before the end of the period that the respondent may give an adjudication response to the adjudicator under section 83, unless—
>
> (a) the adjudicator decides he or she does not have jurisdiction to adjudicate the application; or
>
> (b) the adjudicator decides the application is frivolous or vexatious.
>
> **86 Extending time for deciding adjudication application**
>
> (1) The claimant and respondent for an adjudication application may, before or after the end of the maximum period for deciding the application under section 85(1), agree in writing that the adjudicator has additional time to decide the application.
>
> (2) Despite section 85(1), an adjudicator may decide an adjudication application within a longer period if—
>
> (a) the claimant and respondent have informed the adjudicator that they have agreed under subsection (1) that the adjudicator has additional time to decide the application; or
>
> (b) the application relates to a complex payment claim and, in the opinion of the adjudicator, the claimant and respondent have failed to reach an agreement mentioned in subsection (1).
>
> (3) The *longer period* is—

(a) if subsection (2)(a) applies—the additional time agreed to by the claimant and respondent under subsection (1); or

(b) if subsection (2)(b) applies—5 business days after the time the adjudicator would otherwise have to decide the application under section 85(1)."

[20] Section 88(5) prescribes the content of an adjudicator's decision. It must be in writing and include the reasons for the decision (unless the parties have asked the adjudicator not to include the reasons). By s 88(6), the adjudicator must give a copy of the decision (together with the details of the fees and expenses to be paid to the adjudicator) to the registrar at the same time at which the adjudicator gives a copy of the decision to the parties.

[21] Section 89 provides for a slip rule. It enables an adjudicator to correct a clerical mistake, an error from an accidental slip or omission, a material miscalculation of figures or a material mistake in the description of a person, thing or matter mentioned in the decision, or a defect of form. The adjudicator may do so on the adjudicator's own initiative, on the application of one of the parties, or if requested to do so by the registrar.[6]

[22] By s 90, if an adjudicator decides that a respondent is required to pay an adjudicated amount, the respondent must pay the amount within the period as prescribed by that provision. By s 91(1), as soon as practicable after being given a copy of an adjudicator's decision, but no later than five business days from then, the registrar must give the claimant an adjudication certificate stating the matters there prescribed. An adjudication certificate may be filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction.[7]

[23] Another key provision is s 94, which it is necessary to set out in full:

"**94 Claimant may make new application in certain circumstances**

(1) Subsection (2) applies if an adjudicator, who accepts a referral to decide an adjudication application (the *original application*), does not decide the application within the period required under section 85.

(2) The claimant may do either of the following within 5 business days after the period mentioned in subsection (1)—

(a) request the registrar refer the original application to another adjudicator; or

(b) make a new adjudication application (the *new application*) under section 79.

(3) If the claimant requests the registrar refer the original application to another adjudicator—

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6 s 88(2), (3).

7 s 93(1).

(a) the registrar must refer the application to another adjudicator within 4 business days after the request is made; and

(b) no fee is payable for referring the original application to another adjudicator.

(4) Also, if another adjudicator accepts the referral, this division applies for the original application with the following changes—

(a) the claimant must give the adjudicator a copy of his or her submissions included in the original application within 5 business days after the adjudicator accepts the referral;

(b) the respondent must give the adjudicator a copy of his or her submissions included in an adjudication response, if any, for the original application within 5 business days after the adjudicator accepts the referral;

(c) the response date for the application under section 85(2) is the day—

(i) the adjudicator receives the copy of the submission from the respondent; or

(ii) if the respondent does not give the adjudicator the copy of the submission within the period mentioned in paragraph (b)—immediately after the end of the period;

(d) in deciding the adjudication application, the adjudicator must not consider any submissions other than—

(i) the submissions mentioned in paragraph (a) or (b); or

(ii) further written submissions asked for by the adjudicator under section 84(2)(b).

(5) This division applies to the new application in the same way it applies to any other adjudication application made under section 79.

(6) However, the claimant may, despite section 79(2)(b), make the new application within 5 business days after the claimant becomes entitled to act under subsection (2).”

[24] Section 97 provides for the withdrawal of an adjudication application. It provides:

“**97 Withdrawing from adjudication**

(1) An adjudication application—

> (a) is withdrawn if the claimant has given a written notice of discontinuation to the adjudicator and respondent; or
>
> (b) is taken to have been withdrawn if the respondent has, before an adjudicator has decided the application, paid the claimant the amount stated in the payment claim the subject of the adjudication application.
>
> *Note—*
>
> Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application, see section 95.
>
> (2) If subsection (1)(b) applies, the claimant must as soon as practicable inform the adjudicator that the adjudication application has been withdrawn because of payment."

The reasoning of the primary judge

[25] Her Honour considered it to be important that the Act used "mandatory or imperative language in s 85(1)".[8] She considered that "[t]he draftsman was using the [mandatory] language with particularity and precision: mandatory language is used to impose time limits, and permissory language is used where the subject of the provision does in substance have a choice or election as to how, or whether, to exercise rights."[9] Her Honour instanced s 86 as "an indication that the time limits are very important,"[10] and considered that s 94(2) also supported Galaxy's argument. Section 94(2), she said, did not "contemplate the parties waiting a short time; in effect giving the adjudicator a period of grace, to see whether the adjudicator nearly complies with the time limited by statute for deciding."[11] Instead, s 94(2) contemplated "that a claimant might immediately exercise its right to start a new adjudication which would be inconsistent with the original application remaining on foot for some period of grace after the date for delivery of [the] decision has passed."[12] She added that "[i]nterestingly, s 94(2) and (3) do not require notice to the original adjudicator that a new reference has been initiated."[13]

[26] Her Honour considered the judgment of the Victorian Court of Appeal in *Ian Street Developer Pty Ltd v Arrow International Pty Ltd & Anor* ("*Ian Street*").[14] The question in that case was whether, under the *Building and Construction Industry Security of Payment Act* 2002 (Vic) ("the Victorian statute"), an adjudicator's non-compliance with the time limit within which an adjudication had to be completed had the effect that the adjudication decision was void. As I will discuss, the Victorian statute is in materially different terms, and certain provisions of that Act, which are not replicated in the (Queensland) Act, were critical to that Court's

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8 Primary judgment [22].
9 Ibid.
10 Primary judgment [23].
11 Primary judgment [24].
12 Ibid.
13 Ibid.
14 [2018] VSCA 294.

conclusion that the adjudicator's decision was not void. Her Honour disagreed with much of the reasoning of Maxwell P, who gave the principal judgment.

[27] Her Honour also considered the judgments of the Supreme Court of New South Wales in *MPM Constructions Pty Ltd v Trepcha Constructions Pty Ltd*,[15] *Cranbrook School v JA Bradshaw Civil Contracting*,[16] and *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd*,[17]and disagreed with them for the same reasons.

The proper interpretation of the Act

[28] As I have said, the key provisions are s 85, s 86 and s 94. They provide a coherent scheme by which the time limits, on an adjudicator's power to decide an application, are defined.

[29] The starting point is s 85(1), by which an adjudicator must decide an adjudication application within a certain number of days after the response date.[18] Section 84(1) does provide that an adjudicator must decide an adjudication application as quickly as possible, but it imposes that obligation "subject to the time requirements under section 85". The Act expresses no consequence for an adjudicator not deciding an application as quickly as possible, whereas there are provisions which detail what might happen if the application is not decided within the relevant period which is specified in s 85(1).

[30] The requirements of s 85(1) are expressly subject to s 86. That provision is expressed in permissive terms. By s 86(2), it is provided that despite s 85(1), an adjudicator may decide an application within a "longer period" in certain circumstances. The first of those circumstances is defined in s 86(2)(a), which is that the parties have informed the adjudicator that they have agreed, under s 86(1), that *the adjudicator has additional time to decide the application*. The parties may agree that the adjudicator will have that additional time, by a written agreement made either before or after the end of the maximum period for deciding the application under s 85(1).

[31] The other circumstance is that prescribed by s 86(2)(b). It is where the application relates to a complex payment claim and, in the opinion of the adjudicator, the parties have failed to reach an agreement under sub-section (1). In a case under sub-section (2)(b), the "longer period", within which an adjudicator may decide the application, is five business days after the time the adjudicator would otherwise have to decide the application under s 85(1).

[32] The text of s 86 strongly indicates that, except in circumstances within either part of sub-section (2), an adjudicator may not decide an adjudication application beyond the maximum period for doing so under s 85(1). In a case which engages s 86(2), the time limit under s 85(1) is varied.

[33] By s 94(1), it is provided that s 94(2) applies if an adjudicator does not decide the application "within the period required under section 85". However this must be understood as the period required under s 85, except as that period is extended by

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15 [2004] NSWSC 103.
16 [2013] NSWSC 430.
17 [2017] NSWSC 1121.
18 The response date being defined by s 85(2).

the operation of s 86. Were it otherwise, s 94 would lead to some outcomes which could not have been intended. To take the case of an agreement between the parties under s 86(1), it would be curious if, having made an agreement by which the adjudicator was given additional time to decide the application, the claimant might still, within five business days after the s 85(1) date, request a reference to another adjudicator or make a new adjudication application.

[34] On one view, in a case in which a "longer period" for the decision has resulted from the operation of s 86, it might be said that, in the terms of s 94(1), there is no longer a "period required under section 85". If so, however, that would significantly affect a claimant's position, in many cases, by denying the benefit of s 94 in a way which could not have been intended.

[35] Section 94(1) must be construed as applying where the application is not decided within the period required under s 85, or where the period is varied by s 86, within that longer period. Section 94(2) enables a claimant to request another adjudicator, or to make a new adjudication application, within five business days after the period required under s 85, or where under s 86, within that longer period.

[36] Where a claimant acts under s 94(2), its action does not displace the power of the original adjudicator. Instead, a claimant acts under s 94(2) only after that power is spent. As the primary judge observed, s 94(2) and (3) do not require notice to the original adjudicator that a new reference has been initiated. The text of s 94 is therefore another strong indication of the limit of an adjudicator's power to decide the application.

[37] The issue is one of the limits of an adjudicator's power, or jurisdiction. Is an adjudicator bound by the Act to decide the application within the required time, although still empowered by the Act to decide the application outside that time? Or is the adjudicator's jurisdiction defined by the relevant time limit, in that the adjudicator's powers cease once the time limit has passed? The resolution of such a question was described in the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority*[19] as follows:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment …. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."
>
> (Footnotes omitted.)

[38] This issue of construction, of course, arises because the Act does not answer the question by a specific provision. It does not expressly provide that a decision which is given beyond the time limit will be of no legal effect. But as noted already, there are provisions which provide strong indications of the answer. The text of s 86 provides for the circumstances in which an adjudicator may decide an adjudication

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19 (1998) 194 CLR 355 at 388-9 [91].

application within a longer period. The parties may agree that the adjudicator has additional time to decide the application. This is a strong indication that absent such an agreement (where the circumstances are not within s 86(2)(b)), the adjudicator would not have additional time to decide the application. Section 86 operates by conferring a power on the adjudicator which would not otherwise exist, namely the power to decide the application beyond the time limit prescribed by s 85(1).

[39] Section 97 defines the circumstances in which an adjudication application is withdrawn, or is taken to have been withdrawn. It is withdrawn by the claimant only if the claimant has given a written notice of discontinuation to the adjudicator and the respondent. Significantly, s 94(1) makes no reference to the withdrawal of an application. It does not require an application to be withdrawn when the claimant is electing to make a new application under s 94(2)(b). This is because, where s 94(2) is engaged, there is no existing application which the adjudicator is then empowered to decide.

[40] It is then necessary to consider the judgments on similar legislation in Victoria and New South Wales, upon which the submissions for CCA heavily rely. The Victorian statute, as considered in *Ian Street*, is in many respects in substantially identical terms to the (Queensland) Act. It is in mandatory terms specifying the time within which an adjudicator should determine an application. By its s 22(4), an adjudicator is to determine an adjudication application as expeditiously as possible and in any case within a certain number of business days from the effective acceptance by the adjudicator of the application, or within any further time, not exceeding 15 business days after then, to which the claimant agrees. In that last respect, however, s 22(4A) provides that the claimant must not unreasonably withhold their agreement.

[41] Section 23(2) and (2A) of the Victorian statute prescribe the considerations which an adjudicator must and must not take into account in determining an application. An important provision is s 23(2B) which provides as follows:

> "(2B) An adjudicator's determination is void—
>
> (a) to the extent that it has been made in contravention of subsection (2);
>
> (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter."

[42] Section 28(2) of the Victorian statute is engaged where the adjudicator fails to determine the application within the time allowed by s 22(4). In that circumstance:

> "(2) … the claimant—
>
> (a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and
>
> (b) may make a new adjudication application under section 18."

[43] Maxwell P, who gave the principal judgment in *Ian Street*, noted that s 22(4) contained "words of obligation" in requiring an adjudicator to determine an

application within a certain time.[20] But in his view, there was no indication in the statute that Parliament intended non-compliance with the time limit to render the adjudicator's decision invalid, and all of the indications were to the contrary.[21] The first of those indications was in s 23(2B), which, he said, should be treated as "an exhaustive statement of the circumstances in which non-compliance by the adjudicator with requirements governing the adjudication task will result in invalidity".[22] The second was that, by s 28(2)(a), "the legislature has specifically addressed the consequences of the adjudicator's non-compliance with the adjudication time limit", and that "[f]ar from providing that non-compliance brings the adjudicator's jurisdiction to an end, or renders any subsequent decision invalid, s 28(2)(a) permits – but does not require – the claimant to withdraw the application."[23] Maxwell P said that "the necessary corollary [was] that the claimant may decide not to withdraw but instead choose to wait for the adjudicator's decision, notwithstanding the expiry of the time limit."[24]

[44] As should appear, those provisions have no equivalents in the (Queensland) Act. As I have discussed, s 94 of the Act makes no provision for the withdrawal of an adjudication application where the claimant elects to make a new application. And the Victorian statute contains no equivalent of s 86 of the Act.

[45] Maxwell P concluded that those provisions would be a sufficient basis to uphold the conclusion of the trial judge, that an adjudication decision which was made beyond the required time was not void. But he added that it was appropriate to consider the context of the legislative scheme, as one "avowedly established for the benefit of claimants."[25] In his view, if the expiry of the time limit terminated the adjudicator's jurisdiction, the purpose of the statute, namely to ensure that a person entitled to a progress payment is able to recover it, would be frustrated.[26] In that respect, Maxwell P agreed with views expressed by McDougall J in several judgments, including this passage in *Cranbrook School v JA Bradshaw Civil Contracting*:[27]

> "To my mind, it would be quite extraordinary if the legislature intended that a builder or subcontractor who had got through the various hurdles that the [NSW] Act imposes, in the path of obtaining a successful determination, up until the point of receipt of the adjudicator's reasons, should be disqualified from the benefit of a determination in its favour simply because the adjudicator did not comply with the statutory time limit."

Maxwell P was unpersuaded by a submission that "considerations of commercial certainty supported the view that Parliament did intend invalidity to follow from a breach of the time limit".[28]

[46] However, in my respectful opinion, the desirability of certainty in a commercial context has force. The Act, like the Victorian statute, has an evident purpose of

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20 [2018] VSCA 294 at [66]-[67].
21 Ibid.
22 [2018] VSCA 294 at [69].
23 [2018] VSCA 294 at [70].
24 See also *Ko v Hall & Ors* [2020] VSCA 224 at [88]-[91] per McLeish JA.
25 [2018] VSCA 294 at [72], [73].
26 [2018] VSCA 294 at [73], [74].
27 [2013] NSWSC 430 at [63].
28 [2018] VSCA 294 at [77], [78].

facilitating the recovery of progress payments. However, that purpose would not be frustrated by the construction of the Act which I accept. On that construction, there is a stronger incentive for the adjudicator to decide an application as the Act specifically requires. In cases where the adjudicator fails to decide the application within the required time, the claimant has other ways of obtaining an adjudication decision without having to start again by a new payment claim.

[47] For these reasons, the primary judge was correct to hold that the adjudicator's decision, which was admitted by CCA to have been given out of time, was of no effect.

[48] However another point, which arose in the course of argument, should be discussed. The point involves a question of whether, on the facts of this case, the decision was given within time when it was given on 29 October 2019. This involves a particular interpretation of s 86, which was raised with counsel for CCA and then adopted by them, but which, I have concluded, should not be accepted. In this case, under s 86(1) the parties agreed that the adjudicator should have additional time to decide the application. As I have discussed, ultimately that agreed time became no later than 24 October 2019. In those circumstances, was there room for the operation of s 86(2)(b), so that the adjudicator had power to decide the application up to five business days after 24 October 2019?[29]

[49] I have concluded that this result would be inconsistent with the proper interpretation of s 86. Paragraphs (a) and (b) of s 86(2) are alternatives. The circumstances which would engage (b) could not exist where (a) has been engaged. Where the parties have agreed under s 86(1), thereby engaging (a) of sub-section (2), the case could not be one where, in the opinion of the adjudicator, the parties had "failed to reach an agreement mentioned in subsection (1)". And in sub-section (3)(b), the longer period is calculated from the date when "the adjudicator would otherwise have to decide the application under section 85(1)". It is not calculated from a date which results from s 86(2)(a).

The licence issue

[50] Section 42 of the QBCC Act relevantly provides:

> "**42 Unlawful carrying out of building work**
>
> (1) Unless exempt under schedule 1A, a person must not carry out, or undertake to carry out, building work unless the person holds a contractor's licence of the appropriate class under this Act.
>
> …
>
> (3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.
>
> …"

[51] The term "building work" is defined in Schedule 2 to the QBCC Act to include the erection or construction of a "building", save for work of a kind excluded by regulation from the ambit of that definition. The word "building" is there defined to mean something which "includes any fixed structure". As the primary judge noted,

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29 This being a "complex payment claim", as defined in s 64 of the Act.

examples which the QBCC Act provides of fixed structures demonstrate that the word "building" has a wider meaning than what it might have in common parlance.[30]

[52] CCA held only one relevant licence, namely in the category "Builder restricted to structural landscaping licence".

[53] Only a small part of the works which CCA were contracted to perform were contended to be outside the terms of CCA's licence. The primary judge described them as "the bus stop works". These were works to be performed as part of the widening of Foxwell Road, within the development. The bus stop works included the removal of a metal garden-style seat, fixed to a concrete footpath next to a pole with a bus stop sign on it, and the re-fixing of that seat to new concrete paving. On the other side of Foxwell Road, a prefabricated metal shelter was to be removed and relocated to a new concrete footpath, and next to it, was to be affixed a piece of metal to be used as a bike rack.

[54] It was common ground that if any of the work which CCA contracted to perform was outside the scope of its licence, it followed that CCA had carried out building work in contravention of s 42(1) of the QBCC Act, and that subject to s 42(4), CCA was not entitled to any monetary or other consideration for doing so. If it had no contractual right to be paid for the performance of the work which it had promised to undertake, then the adjudicator had no jurisdiction to decide that CCA was entitled to a progress payment under the Act.[31]

[55] The primary judge concluded that the prefabricated metal shelter, on the southern side of Foxwell Road, fell within the scope of CCA's licence. That left for consideration the question of whether the installation of the bike rack, adjacent to that structure, and the seat to be affixed to the new concrete paving on the footpath on the opposite side of Foxwell Road, were things which could be done under CCA's licence.[32]

[56] Her Honour considered, but rejected, the possibility that these items were part of work which were exempted by Item 13 of Schedule 1 to the QBCC Regulation, namely "work on busways and tunnels". There is no challenge to her Honour's conclusion that this was not a busway.[33]

[57] Her Honour then turned to the question of whether these works were within the exclusion at Item 14 of Schedule 1 to the QBCC Regulation. Item 14 is relevantly in these terms:

> "**14 Work on roads and tunnels**
>
> (1) Construction, maintenance or repair of a road or a tunnel for a road.
>
> (2) In this section—
>
> …

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30 Primary judgment [61].

31 *Sutton v Zullo Enterprises Pty Ltd* [2000] 2 Qd R 196; *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd & Ors* [2012] QSC 158.

32 Primary judgment [75].

33 Primary judgment [78].

road–

(a) means an area of land—

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

(ii) whether surveyed or unsurveyed, taken under an Act, for the purpose of a road for public use; or

(iii) developed, or to be developed, for the public use of driving or riding of motor vehicles; and

(b) includes—

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

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

(iii) a structure in, on, or under a road that is associated with the road; …"

[58] Her Honour extensively considered whether, in the terms of Item 14(2)(a)(i), Foxwell Road was a "dedicated … road for public use", and decided that it was.[34]

[59] The question then was whether, in the terms of Item 14(2)(b)(iii), the bus stop works were, in each case, "a structure … on … a road that is associated with the road". She held that they were not, because they were not structures on a road, but were instead structures on a footpath. Her Honour reasoned as follows:

"[106] … While someone on a footpath may in colloquial parlance be said to be in or on a road, I hesitate to embrace the notion that the words in item 14(2)(b)(iii) were used in this colloquial and slightly non-literal sense. In any case, I think the matter is put beyond doubt because the very next item in Schedule 1 to the QBCC Regulations specifically deals with footpaths:

'**15 Work on bikeways and footpaths**

(1) Construction, maintenance or repair of a bikeway or footpath or a tunnel for a bikeway or footpath.

(2) In this section—

…

footpath–

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[34] Primary judgment [105].

(a) means a path that has as 1 of its main purposes the public use of the path by pedestrian traffic; but

(b) does not include a path contained within private property.'

[107] It seems to me that where Schedule 1 has made specific provision for work on roads at item 14, and work on footpaths at item 15, the word road, where used in item 14, should not be interpreted as including footpath. Unfortunately for the first respondent, while structures in, on or under a road are excluded from the definition of building works, there is no similar provision in relation to structures in, on or under footpaths."

[60] I am unable to agree with that reasoning. In my view, it is far from clear that the installation of these two items was not part of the construction of a footpath. True it is that Item 15 contains no provision in terms corresponding with Item 14(2)(b)(iii). But that is not fatal to the alternative construction of Item 15, which I prefer. In any case, these items were, in my view, structures on a road, and which were associated with a road.

[61] In Item 14, the primary meaning of "road" is expressed in paragraph (a). It is "an area of land", including an area of land dedicated, notified or declared to be a road for public use. Although her Honour did not make a specific finding on the question, the arguments in this Court appear to accept that these items were on land which was dedicated to be a road for public use. They were not on private land.

[62] In other contexts, there could be a real and important distinction between a roadway and its adjoining footpath. In this context, having regard to the definition of "road", the footpath in question was part of the area of land which was the road. Consequently, these things were within the description in Item 14(2)(b)(iii). And there is no reason to exclude them from that category because work on the footpaths is also the subject of Item 15. Whereas a road, as defined here, would include the adjoining footpath, not every footpath would be within a road. Examples of pedestrian laneways come to mind.

The appeal by Mr Jones

[63] In the primary judgment, it was ordered that Mr Jones was not entitled to be paid any fees or expenses for or in relation to the adjudication. It was further ordered that he refund to CCA all monies paid to him by CCA in connection with the adjudication. By his appeal, he seeks to have those orders set aside.

[64] It is necessary to discuss his participation in this proceeding. The originating application, by which the proceeding was commenced, named Mr Jones as the second respondent. That application sought, amongst other relief, a declaration that he was not entitled to be paid for the adjudication and an order that he refund all fees and expenses which CCA had paid to him. Galaxy's case was not pleaded, and there was no indication, from the application or otherwise, of an allegation of the absence of good faith on the part of the adjudicator.

[65] The registrar then wrote to Galaxy, advising that because no order for costs was being sought against Mr Jones, he did not intend to take part in the proceeding, apart from formally appearing. Thereafter, he took no active role in the proceeding before these orders were made.

[66] Subsequently, and prior to the hearing, Galaxy filed written submissions which included the following:

> "The Adjudicator knew he had not decided the application, as he and his agent continued with that task over the next four days. On 28 October 2019 they represented (incorrectly) to the parties that the decision had been made on 24 October 2019. The Adjudicator's repeated requests for extensions demonstrate he was acutely aware of his obligation to make his decision within the required time."

[67] The submissions made no specific reference to s 95(8) of the Act, which states:

> "Also, if a court finds that the adjudicator's decision is void and unenforceable, the adjudicator is still entitled to be paid any fees or expenses for adjudicating the application if the adjudicator acted in good faith in adjudicating the application."

[68] In this Court, counsel for Galaxy said that the contention for his client had not been that there had been an absence of good faith, in the terms of s 95(8), but that this was a case where the adjudicator should not have his fees or expenses, because of s 95(6) which provides:

> "An adjudicator is not entitled to be paid any fees for adjudicating an adjudication application if the adjudicator fails to make a decision on the application."

Section 95(7) provides for circumstances in which an adjudicator will not have failed to make a decision. But they do not include a case of the present kind, namely where the adjudicator has failed to make a decision because a purported decision is void for having been given beyond the required time.

[69] Mr Jones says that he received those written submissions from Galaxy, but did not read them beyond the first or second pages, and did not read that part which I have set out.

[70] Again prior to the hearing, CCA filed written submissions, in which this was said:

> "[CCA] does not contend a different application of s 95(6) but submits that the Adjudicator has not failed to make a decision. It is accepted that the Decision was delivered to the parties late, but for the reasons given above, this was not fatal."

[71] The relevant reasoning of her Honour was in this paragraph of the primary judgment:

> "[57] Having regard to s 95(6), I do not think the adjudicator is entitled to be paid any fees. I see the provision at s 95(8) (above). I accept that it applies here because the circumstances are within the introductory words – ie, I have found that the adjudicator's decision is void. However, I must say that the

> language of the remainder of that subsection is more suited to a situation where an adjudicator delivers a decision in time but the decision is void because he or she has made some other jurisdictional error, for example, taking into account an irrelevant consideration – see the repeated phrase, "adjudicating the application". However, in my view here the adjudicator cannot be said to have acted "in good faith", as required by the subsection, in relation to the very matter which rendered the purported decision void. The adjudicator was well aware of the time limit for his determining the adjudication. I accept the applicant's submission that on 28 November 2019 the second respondent represented that he had made a decision within time, namely 24 October 2019, when that was not in fact the case."

[72] The primary judge thereby applied s 95(8). Her Honour found that the adjudicator's decision was void, and that the adjudicator could not be said to have acted in good faith, because he was well aware of the time limit for his determining the adjudication. And, her Honour added, the adjudicator had made a misrepresentation, by falsely representing that he had decided the matter by 24 October 2019, when that was not the fact.

[73] In my opinion, her Honour's findings of bad faith and misrepresentation ought not to have been made without providing the adjudicator with an opportunity to be heard on those subjects.

[74] The adjudicator must have understood that his decision was being given beyond the required date, 24 October 2019. But it is another thing to find that he understood that in consequence, his decision was void. It is of some concern that his decision represented, on its face, that it was made on 24 October 2019. However it was not clear that he had attempted to mislead the parties that he had made a decision within time. The necessary implication from her Honour's judgment was that this was a misrepresentation which he knew was false. Moreover, that was not a finding which the submissions for Galaxy had sought. It ought to have been clear to the primary judge that such a finding should not be made without hearing from him.

[75] Similarly, Galaxy's submission did not seek a finding of the absence of good faith, in the terms of s 95(8). Its case, as CCA understood it, was that the adjudicator was disentitled to fees and expenses because he had failed to make a decision which had any effect: s 95(6).

[76] Although the judge was wrong to make the findings which she did in paragraph [57] of the primary judgment, nevertheless this was a case where Mr Jones was not entitled to be paid any fees or expenses, because he failed to make a decision on the application. It is no answer to say that he made a decision, although one which was of no effect because it was outside the required time and therefore beyond his jurisdiction. Mr Jones may have thought that his decision, although late, would be an effective decision. However, on the correct interpretation of s 95(6), that does not matter. Nor does it matter that it was open to the parties, after the required date for the decision, to agree to an extension of time. Absent such an agreement, the purported decision was void and was not a decision for the purposes of s 95(6).

[77] Having read the primary judgment, Mr Jones sought the consent of Galaxy and CCA to have the orders against him set aside. That consent was not forthcoming. Mr Jones then sought an urgent hearing before the primary judge, and filed an application to have those orders set aside. His application was listed for hearing on 13 May 2020. He filed his notice of appeal on 24 April 2020, and on 27 April 2020, CCA filed its notice of appeal. Nevertheless, he maintained his application before the primary judge. On the eve of the scheduled hearing of that application, Galaxy filed written submissions which stated that no allegation of fraud was made by it, and nor, it was suggested, was any finding of fraud made by the Court. Mr Jones then discontinued his application to the primary judge.

[78] In this Court, Mr Jones made submissions on the principal jurisdictional question, which were supportive of CCA's argument. Those submissions need not be discussed. There are several complaints made on Mr Jones's behalf, as to an absence of procedural fairness or a basis for the findings which her Honour made against him. What I have said already should explain why his complaints in that respect have force.

[79] However, he has now had a full hearing in this Court, and it is clear that the orders which were made against him must stand, by the operation of s 95(6). His appeal should be dismissed.

Conclusion and orders

[80] In appeal number 4543 of 2020, I would order as follows:

1. Appeal dismissed.
2. The appellant to pay the first respondent's costs of the appeal.

[81] In appeal number 4449 of 2020, I would order as follows:

1. Appeal dismissed.
2. The appellant to pay the first respondent's costs of the appeal.

[82] **JACKSON J:** In my view, the principal appeals should be dismissed. Except in one respect, I agree with McMurdo JA's reasons. But, in any event, and because I respectfully disagree with two conclusions reached in the learned primary judge's reasons, I add some observations of my own.

[83] The first basis for the learned primary judge's decision was that the adjudication application was not decided within the time required by ss 85 and 86 of the *Building Industry Fairness (Security of Payments) Act* 2017 (Qld) ("BIFA"), and the purported decision made after that time was invalid and void. I agree with the reasons of the learned primary judge and those of McMurdo JA with respect to this basis. Accordingly, I need add only a few brief observations.

[84] In my view, the learned primary judge correctly posed the question for decision by her as being whether because the adjudicator's decision was delivered after the maximum period by the BIFA for it to be made, it was void.[35] In considering that

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35 *Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow & Ors* [2020] QSC 51, ("Reasons"), [1] and [20].

question, her Honour first set out the relevant statutory provisions,[36] then carefully analysed the text of the central time limiting provision, s 85(1),[37] followed by the immediate context of s 86, to which s 85 was subject, for extending that time in two limited ways.[38] Second, her Honour considered the context of s 94(2), that expressly provided for the consequences of an adjudicator not deciding an adjudication application within the period required under s 85 and the inconsistency of result that would follow if an applicant had the rights not only to elect to refer the original application to another adjudicator or to make a new adjudication application, but also to wait to see whether the original adjudicator decided the original application out of time.[39] The learned primary judge then considered the further context of s 97 and compared the operation of s 94 and s 97.[40] Her Honour then turned from the specific text and context to the purpose of the legislation.[41] Then, her Honour considered the case law dealing with interstate legislation, observing that it was sufficiently different from the BIFA to make the reasoning and results of those cases distinguishable.[42] In particular, her Honour observed that the text of the Victorian Act did not compare with s 94 of the BIFA.[43]

[85] Civil Contractors (Aust) Pty Ltd submitted that the learned primary judge erred in failing to consider whether an adjudicator who purports to decide an adjudication decision after the required time makes a jurisdictional error. In my view, if the learned primary judge's reasoning is accepted, there is jurisdictional error. If the BIFA, properly construed, only authorises an adjudicator to decide an adjudication application within the time required by ss 85 and 86, that requirement constitutes a jurisdictional fact, the absence of which means a purported decision made later is subject to jurisdictional error and is void.[44] An adjudicator falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist".[45]

[86] In my view, an important factor in the learned primary judge's reasoning was that s 94 of the BIFA expressly provides for the consequences of an adjudicator not deciding an adjudication application within the time required under ss 85 and 86. Section 94 does not have a direct comparator in the legislation of the other jurisdictions. Section 94 replaced s 32(1)(b) and (2) of the repealed *Building and Construction Industry Payments Act* 2004 (Qld). Under those provisions, where an adjudicator did not decide an application within the time allowed by ss 25A or 25B of the repealed Act, a claimant had the right to withdraw the application and make a new adjudication application, but had no right to refer the existing adjudication application to another adjudicator as is now provided by s 94(2)(a).

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36 Reasons, [9] – [18].
37 Reasons, [21] – [22].
38 Reasons, [23].
39 Reasons, [24](b).
40 Reasons, [27].
41 Reasons, [29] – [32].
42 Reasons, [35].
43 Reasons, [43].
44 *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd & Ors* (2016) 260 CLR 340, 345 [1] – [2], 360 – 361 [1]; *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611, 618 – 621 [16] – [24]; *Kirk v Industrial Court of New South Wales & Anor* (2010) 239 CLR 531, 569 – 574 [66] – [73].
45 *Kirk v Industrial Court of New South Wales & Anor* (2010) 239 CLR 531, 573 – 574 [72].

[87] As the learned primary judge reasoned, if an adjudicator's power to decide an adjudication application continues after not deciding an adjudication application within the time required under ss 85 and 86, two unlikely consequences would follow. One of them is that under s 94 the claimant may still elect to refer the adjudication application to another adjudicator or make a new adjudication application. If, as in this case, the adjudication decision were made within a few of days of expiry of the time required by ss 85 and 86, the claimant would then be able to decide whether or not it was satisfied with the late decision and, if not, still elect to refer the adjudication application to a new adjudicator or make a new adjudication application. In my view, that construction of the Act is one that should not be accepted lightly as being the intention of the legislature.

[88] The other is that although the tightly limited time for deciding an adjudication application has expired, there would be no other limit in time that would apply to deciding the adjudication application. Civil Contractors submitted that an indirect limit would remain in the requirement that the decision must be made in good faith. In my view, that is not a time limitation.

[89] As both the learned primary judge and McMurdo JA reason, *Ian Street Developer Pty Ltd v Arrow International Pty Ltd & Anor*[46] is clearly distinguishable. In my view, also, it is not persuasively reasoned. As McMurdo JA's reasons show, it is distinguishable because the BIFA contains no equivalent of s 23(2B) of the Victorian *Building and Construction Industry Security of Payment Act* 2002 (Vic) and because s 94 of the BIFA contains no equivalent of the power to withdraw an adjudication application as provided for in s 28(2)(a) the Victorian Act.

[90] Once it is accepted that there are relevant differences between the BIFA and the Victorian Act, *Ian Street Developer* is only of persuasive authority in accordance with the persuasiveness of the reasoning. In my view, there are other reasons why it is not persuasive. As McMurdo JA reasons, one of them is the importance of certainty in this commercial context.

[91] *Project Blue Sky Inc v Australian Broadcasting Authority*[47] is so often referred to that it would be otiose to deal with it generally in these reasons. But it is particularly relevant in the present case because it was concerned with whether breach of a statutory requirement as to making a decision had the effect as a matter of construction of invalidating a tribunal decision. The plurality said on that question:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a

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46 [2018] VSCA 294.

47 (1998) 194 CLR 355.

> ranking of relevant factors or categories to give guidance on the issue."[48]

[92] *Project Blue Sky* is also authority rejecting the previous elusive technique in statutory interpretation of characterising the contravened provision as directory or mandatory and assessing whether there had been substantial compliance of a directory provision.[49] But even if regard is had to earlier cases where that technique was followed, the applicable approach to questions of construction raised the same or similar considerations. In *Clayton v Heffron*[50] the plurality judgment stated:

> "But commonly no express declaration is to be found in a statutory power as to the effect on validity of departures from the procedure laid down. The question is then determined by reference to the nature of the power conferred, the consequences which flow from its exercise, the character and purpose of the procedure prescribed."[51]

[93] Because of those conclusions, it is unnecessary for me to consider whether the alternative basis for the learned primary judge's decision was correct, namely that Civil Contractors was not entitled to any payment under the contract because it agreed to carry out building work for which it did not hold a contractor's licence of the appropriate class.

[94] However, I agree with McMurdo JA that the relevant items of work in the present case were excluded from the definition of "building work" as the erection of a structure on a road. The contrary view, preferred by the learned primary judge, that they were not because they were structures on a footpath, turns on whether the text in item 15 of Schedule 1 to the QBCC Regulation "[c]construction … of a footpath…" extracts work consisting of construction of structures within a road reserve from the scope of the text of "construction… of a road" within item 14 of the schedule. That view of the relevant provisions, might be said to give them a more clearly defined structure of separate operation. So it is only with some diffidence that I differ from the primary judge's decision accepting it. But, on balance, I agree with McMurdo JA that there is no reason or purpose of the relevant provisions that would be furthered by adopting it.

[95] Last, as to Mr Jones' appeal, I disagree with McMurdo JA's reasons in one respect although I agree with the orders his Honour proposes and the reasoning for those orders.

[96] I do not agree with McMurdo JA that it ought to have been clear to the learned primary judge that no finding should have been made that Mr Jones falsely represented that his decision was made on 24 October 2019 without hearing from him because that was not a finding that Galaxy Developments had sought.

[97] Paragraph 68 of Galaxy Developments submissions to the learned primary judge provided:

> "The Adjudicator knew he had not decided the application, as he and his agent continued with that task over the next four days. On 28 October 2019 they represented (incorrectly) to the parties that the

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48 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388-389 [91].
49 (1998) 194 CLR 355, 389-390, [92]-[93].
50 (1960) 105 CLR 214.
51 (1960) 105 CLR 214, 246.

> decision had been made on 24 October 2019. The Adjudicator's repeated requests for extensions demonstrate he was acutely aware of his obligation to make his decision within the required time."

[98] However, I agree that Galaxy Developments did not seek a finding of the absence of good faith by Mr Jones. The relevance of that finding is that s 95(8) provides that:

> "(8) Also, if a court finds that the adjudicator's decision is void and unenforceable, the adjudicator is still entitled to be paid any fees or expenses for adjudicating the application if the adjudicator acted in good faith in adjudicating the application."

[99] Section 95(8) was raised in the proceeding by the learned primary judge.[52] No notice of its relevance or that a finding under it might be made on the question of repayment of any fees or expenses paid to Mr Jones for adjudicating the application was given to Mr Jones before that finding was made. In my view, because a finding of absence of good faith is a serious adverse finding, notice that it was sought or might be made should have been given to Mr Jones before it was made.[53]

[100] However, that conclusion does not matter, because I agree with McMurdo JA that s 95(8) does not cover a case where an adjudicator fails to make a decision because the time has expired under ss 85 and 86. That case is covered by s 95(6). Accordingly, a finding of lack of good faith was not necessary for the order that was made by the learned primary judge that Mr Jones repay the fees and expenses of adjudicating the application.

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52 Reasons, [57].

53 *Sullivan and Others v Trilogy Funds Management Ltd* (2017) 255 FCR 503, 505-507 [4], [13]-[14].