SUPREME COURT OF QUEENSLAND

CITATION:	*Melaleuca View Pty Ltd v Sutton Constructions Pty Ltd & Ors* [2019] QSC 226
PARTIES:	**Melaleuca View Pty Ltd (ACN 139 848 972)** (Applicant) **v** **Sutton Constructions Pty Ltd (ACN 124 512 125) as Trustee for the Mal Sutton Family Trust** (First Respondent) **Phillip Martin** (Second Respondent) **Adjudication Registrar, Queensland Building and Construction Commission** (Third Respondent)
FILE NO/S:	BS No 6132 of 2019
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2019
JUDGE:	Brown J
ORDER:	**The orders of the Court are:** **1. The application be dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant and first respondent entered into a contract for construction of townhouses - where the first respondent sent emails attaching invoices to the applicant on the 5th and 15th of February 2019 – where the applicant then sent an email to the

first respondent in response to matters raised in the email of 15 February 2019 – where the adjudicator on application of the first respondent subsequently determined the applicant had not provided a payment schedule pursuant to s 69 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) and the first respondent was entitled to payment of an adjudicated amount by the applicant - where the applicant seeks to challenge by way of certiorari the decision of the adjudicator - whether the adjudicator made a jurisdictional error in finding that the applicant had failed to provide a payment schedule – whether there was jurisdictional error because the two payment claims served by the first respondent were invalid

Building and Construction Industry Payments Act 2004 (Qld), s 17
Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 68, s 69, s 70, s 75

Barclay Mowlem v Tesrol Walsh Bay [2004] NSWSC 1232, distinguished
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393, applied
Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2013] QCA 386, applied
Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors [2007] QSC 333, applied
Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525, followed
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340, followed
Spankie v James Trowse Constructions Pty Ltd [2010] QCA 355, applied
Style Timber Floor Pty Ltd v Krivosudsky [2019] NSWCA 171, applied
T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd [2010] QCA 381, followed
Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd [2018] QSC 65, considered

COUNSEL: AJ Greinke for the applicant
RM De Luchi for the first respondent

SOLICITORS: K2 Law for the applicant
HWL Ebsworth for the first respondent

[1] Melaleuca View Pty Ltd (**Melaleuca)** seeks to challenge by way of *certiorari* the decision of the Second Respondent (**the Adjudicator**) made on 7 May 2019 that the First Respondent, Sutton Constructions Pty Ltd as Trustee for the Mal Sutton Family Trust

(**Sutton**), was entitled to payment from Melaleuca of the adjudicated amount of $214,751.07 (**the Decision**).

[2] Melaleuca and Sutton entered into a contract on 20 March 2018 for the construction of 16 townhouses.

[3] On 5 February 2019, Sutton sent an email to Melaleuca, which included an attached invoice INV-0480 in the amount of $208,300.49 (inc GST) (**invoice 480**). This tax invoice stated that it was the 'Tenth claim'.[1]

[4] On 15 February 2019, Sutton sent an email to Melaleuca, which included an attached invoice INV-0485 in the amount of $235,980.49 (inc GST) (**invoice 485**). This tax invoice also stated that it was the 'Tenth claim'. It attached a letter dated 15 February 2019 together with other documents. [2]

[5] On 19 February 2019, Melaleuca sent an email to Sutton, which in the email was stated to be a "response to your communication dated February 15, 2019". It attached a letter dated 19 February 2019, which responded to matters raised in the letter attached to Sutton's email sent on 15 February 2019.[3]

[6] On 1 April 2019, Sutton lodged an adjudication application.[4] In its application, Sutton submitted that Melaleuca had failed to serve a payment schedule.[5]

[7] On 26 April 2019, Melaleuca lodged an adjudication response.[6]

[8] On 6 May 2019, the Adjudicator issued his decision, determining an adjudicated amount of $214,751.07 (inc GST) and interest, with Melaleuca to pay 100 per cent of the adjudicator's fees.[7]

[9] The adjudicator determined that Melaleuca had not provided a payment schedule pursuant to s 69 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**the Act**).[8] In particular, he found that:

> "10. The Respondent's correspondence of 19 February 2019 identifies the payment claim but does not state the amount of payment that the Respondent proposes to make. The correspondence refers to a payment it proposes to make in relation to a different payment claim, invoice 0480, being a payment claim for a different amount made on 5 February 2019.
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> 11. The correspondence of 19 February 2019 is not a payment schedule as defined in the Act. The contents of the Respondent's correspondence are considered when making this decision as the correspondence forms

1 Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 134.
2 Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 60.
3 Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 79.
4 Affidavit of J R Williams sworn 10 June 2019 at [4].
5 Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, pp 23–24.
6 Affidavit of J R Williams sworn 10 June 2019 at [7], Exh JRW-4.
7 Affidavit of J R Williams sworn 10 June 2019 at [9], Exh JRW-5.
8 Affidavit of J R Williams sworn 10 June 2019, Exh JRW–5, p 267.

part of the submissions made by the Claimant with the adjudication application but it is not a payment schedule as defined in the Act."

[10] The adjudicator therefore did not consider the proposed adjudication response of Melaleuca by reason of s 82(2) of the Act in making his decision.

[11] An adjudicator's decision is not reviewable under the *Judicial Review Act 1991* (Qld) but may be declared void if it is affected by jurisdictional error.[9]

[12] Melaleuca contends there has been jurisdictional error on the following grounds:

(a) The Adjudicator erred in finding that Melaleuca had failed to provide a payment schedule because the email on 19 February 2019 constituted a payment schedule within the meaning of s 69 of the Act;

(b) Sutton served two payment claims in respect of the same reference date, namely on purported practical completion, contrary to s 75(4) of the Act, and both were invalid.

[13] An error in the determination of a jurisdictional fact is a jurisdictional error.[10]

[14] I will firstly deal with the contention that the two payment claims, which are first in time in the chronology of events, are invalid.

Payment Claims

[15] Pursuant to clause 22.1 of the General Conditions of Contract,[11] Sutton could submit progress claims to Melaleuca on the following reference dates:

(a) The times stated in item 19 of the Schedule, namely the 21st day of each month; and

(b) On the works reaching Practical Completion.

[16] A payment claim for a progress claim is defined in s 68 of the Act. Pursuant to s 70 of the Act, a person is entitled to a progress payment for work carried out from each reference date under a contract. The reference date in the present case is the date provided for in clause 22 of the Construction Contract as the date on which a claim for a progress payment may be made for construction work carried out.[12]

[17] Relevantly to the present claim, s 75 of the Act which applies to the making of the claim provides that:

"…

(4) The claimant cannot make more than 1 payment claim for each reference date under the construction contract.

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[9] *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.

[10] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [72].

[11] Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 50.

[12] *Building Industry Fairness (Security of Payment) Act 2017* (Qld), s 67.

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

[18] Provisions of similar effect were found in s 17 of the *Building and Construction Industry Payments Act 2004* (Qld) (**the 2004 Act**), which was repealed in December of 2018.

[19] In *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd,*[13] the High Court considered New South Wales legislation which was in similar terms to the Queensland Act. The High Court held in relation to the New South Wales legislation that the existence of a reference date is a precondition to the making of a valid payment claim and a jurisdictional fact.[14]

[20] In *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd,*[15] I considered that the aforementioned decision of the High Court applied to the 2004 Act, which preceded the present Act.[16] I consider that, given that s 70 of the present Act is of similar effect to the former s 17 and provides that the right to progress payments arises from each reference date which enlivens the jurisdiction of the adjudicator under the present Act, the existence of a reference date is a precondition to the making of a valid payment claim and is a jurisdictional fact under the Act.

[21] Melaleuca contends that the determination of whether the applicant has contravened s 75(4) of the Act is also a jurisdictional fact. Given that provision is integrally linked to the existence of a reference date in respect of a payment claim and the jurisdiction of the adjudicator, it is arguable that the presence of two claims for the one reference date was intended by the legislature to invalidate an action under the Act.[17] However, as I have found there is no error, in any event it is not a matter I have to finally determine.

[22] Melaleuca contends that by serving two payment claims relying on the same reference date, namely the achievement of practical completion, Sutton contravened s 75(4), with the effect that no valid payment claim was made.

[23] Sutton contends that there was no error in the determination by the adjudicator at [28] that:

> "The payment claim made on 5 February 2019, invoice 0480, is in relation to a reference date of 21 January 2019. The payment claim made on 15 February 2019 is made on practical completion of the works. The Claimant has not made a previous payment claim in relation to this reference date."

[24] Melaleuca contends that the payment claim for invoice 480 contained claims for works carried out after 21 January 2019 and therefore could not have been in respect of that reference date.

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13 (2016) 260 CLR 340.
14 At [47].
15 [2018] QSC 65 at [54].
16 [2018] QSC 65 at [54].
17 *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2013] 2 Qd R 75 at [96], referring to *Chase Oyster Bar Pty Ltd v Hamo Industries Pty* Ltd (2010) 78 NSWLR 393 at 427-429, per McDougall J.

[25] Sutton contends that:

(a) Firstly, invoice 480 served on 5 February 2019 could not have been a payment claim in relation to the works because it was delivered prior to the reference date. It contends that the agreed practical completion date following the exchange of correspondence was 15 February 2019. The only payment claim made on and from the practical completion reference date was invoice 485;

(b) The payment claim delivered on 5 February 2019 was made on and from the earlier reference date of 21 January 2019, even though a notice of practical completion had been issued on 24 January stating that it was estimated that practical completion would be achieved by 1 February 2019;

(c) Even if the payment claim by invoice 480 was not validly made from the reference date of 21 January 2019, the payment claim in respect of invoice 485 was validly made in respect of the date for practical completion.

[26] In my view the analysis of Sutton is correct. While there was a dispute between the parties as to when practical completion was achieved, practical completion ultimately appeared to be agreed by the parties as having been reached on 15 February 2015. On any view, however, it was not achieved prior to 5 February 2019.

[27] It may be that the payment claim for invoice 480 was invalid to the extent that it claimed for works after 21 January 2018. However, that is not the relevant question for the present case, as on any view practical completion was not achieved until after 5 February 2019 and therefore the date of practical completion was not a reference date for that payment claim. The fact that invoice 485 claimed for the same or similar work as invoice 480 and was carried out prior to invoice 480 does not invalidate the payment claim for invoice 480, as is made clear by s 75(5) of the Act. Further, the decision of *Spankie v James Trowse Constructions Pty Ltd,*[18] in which Fraser J[19] stated that no implication could be drawn from s 17(5) of the 2004 Act that the provision precluded a claimant from making a payment claim for an unpaid amount claimed in a previous claim, still has application. While decided with reference to the 2004 Act, the decision is still applicable to s 75 of the present Act. The two Acts have similar schemes, and s 75(5) is in similar terms to the former s 17(6), save that s 75(5) positively provides that a payment claim may include an amount that was included in a previous payment claim.

[28] Melaleuca's counsel placed some reliance on *Dualcorp Pty Ltd v Remo Constructions Pty Ltd.*[20] That case is distinguishable from the present case. It was a case where the payment claim had been adjudicated upon and the claimant sought to lodge a further payment claim with the same six invoices. The majority[21] held that issues relevant to the claimant's rights to progress payments had been adjudicated upon and the principles of issue estoppel applied. Melaleuca's counsel placed particular reliance upon comments of Allsop P,[22] who adopted a different approach to the majority. As was identified by Fraser JA in *Spankie*,[23] Allsop P's comments should be understood in the context of his

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18 [2010] QCA 355.
19 At [23], with whom Holmes and Chesterman J agreed.
20 (2009) 74 NSWLR 190.
21 MacFarlan JA, with whom Handley AJA agreed.
22 At [13]-[14].
23 At [27].

earlier statement that the legislation was not intended to permit the repetitious use of the adjudication process and enable a party to "re-ignite the adjudication process at will in order to have a second or third go at the process provided by the Act merely because it is dissatisfied with the result of the first adjudication".[24]

[29] Melaleuca contends that the first payment claim could not be referrable to the reference date of 21 January 2019 because it included work up to 1 February 2019. The onus falls on it in that regard. Sutton disputes that works were carried out after 21 January and directed the Court to a schedule attached to invoice 480 which, at least for variations, did not refer to work being carried out beyond 18 January 2019.[25] Counsel for Melaleuca relied on parts of Mr Sutton's affidavit where he referred to the anticipated works reaching completion on 1 February 2019,[26] as well as a reference in the letter of 15 February to practical completion not having been achieved by 1 February, but to all work having been completed by that date save for obtaining a plumbing and drainage compliance certificate.[27] Melaleuca further relied upon the fact that Sutton also referred in its submissions to the adjudicator to invoice 480 having been based on an understanding that it had achieved practical completion by 1 February 2019.[28] I would infer on the basis of the references relied upon by Melaleuca that works continued to 1 February 2019 in order to achieve practical completion and were the subject of the claim in invoice 480. However, in this case nothing turns upon that.

[30] Even if invoice 480 did contain work beyond 21 January and could not be a payment claim in respect of that reference date, that does not result in it being a payment claim with respect to the reference date under clause 22.1(a)(ii) of the General Conditions of Contract, which arose on the works reaching practical completion. Neither party ultimately contended that practical completion had been reached on 1 or 5 February 2019, the latter date being the date on which invoice 480 was delivered to Melaleuca. Invoice 480 may therefore have been an invalid payment claim, but it was not a payment claim in respect of the date the works achieved practical completion, which occurred after invoice 480 had been provided. The reference date with respect to practical completion did not arise until 15 February 2015.[29] Invoice 485, therefore, was made with respect to the reference date provided for practical completion. Invoice 480 was not. I find there were not two payment claims made by Sutton for the one reference date.

[31] Counsel for Melaleuca also sought to rely on the decision of *J.R. & L.M. Trackson Pty Ltd (ACN 088 333 831) v NCP Contracting Pty Ltd (ACN 121 915 017) & Or*s.[30] Ryan J found in that case that the first payment claim was valid and the second payment claim was invalid.[31] Counsel for Melaleuca contended that in the event the Court did not find both payment claims were invalid, as had been submitted by Melaleuca's counsel, the Court should find the first payment claim, invoice 480, was valid and the payment claim for invoice 485 was invalid. However, that case related to, amongst other things, a number of invoices being delivered as one payment claim and two adjudication

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24 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at [2].
25 Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 144-154.
26 Affidavit of M N Sutton sworn 12 August 2019 at [4].
27 Affidavit of M N Sutton sworn 12 August 2019, Exh MNS-9, p 22.
28 Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 22.
29 Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 60 at [2.3]; Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 79 at [1.1], [2.3] and [5.1].
30 [2019] QSC 201.
31 See [121]-[123].

applications being made in respect of one payment claim. That decision is not relevant to the situation in the present case.

[32] I find that whatever the position in respect of the payment claim for invoice 480, it was not made in respect of the reference date for practical completion. Invoice 485 was the only payment claim made in respect of that date. Section 75(4) of the Act was not contravened.

[33] Even if I had not reached this conclusion, I would have found that invoice 485 had replaced invoice 480,[32] given the correspondence that had been exchanged between the parties after invoice 480 had been provided as to disputes about whether practical completion had been achieved; the fact that invoice 485 was referred to as the tenth claim, with a further statutory declaration being provided in respect of claim 10 for the position as at 15 February 2019;[33] and that the letter of 15 February stated that practical completion had been achieved on 15 February 2019, contrary to the previously anticipated date of 1 February 2019. The only reasonable inference that could be drawn on the basis of those facts is that invoice 485 replaced invoice 480, albeit it was not stated that the previous invoice was formally withdrawn.

[34] I do not find any jurisdictional error as Sutton had not served two payment claims in respect of the same reference date, contrary to s 75(4) of the Act.

Payment Schedule

[35] Melaleuca responded to the letter of 15 February 2019 attaching invoice 485 and other material by way of a letter dated 19 February 2019, which relevantly stated that:

> "RE: Your correspondence dated 15 February 2019
>
> Dear Mal,
>
> I refer to your recent correspondence dated 15 February 2019 in relation to Stage 7 of the project at 312 Manly Road, Manly West and provide my response in accordance with your numerical outline.
>
> **1. Date for Practical Completion**
>
> 1.1 As previously communicated to you it is our position that the date for practical completion calculated under the contract was January 9, 2019. In light of your position we have sought further independent professional advice and as such are willing to amend our date to January 14, 2019.
>
> **2. Practical Completion**
>
> 2.1 You previously notified us that you anticipated the date of practical completion to be 1 February 2019 as per your requirements in accordance with clause 18.2 of the contract. You had not completed all work at that time to a satisfactory standard and as such I communicated this to you.

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32 Notwithstanding no credit note was issued for invoice 480 and it was not formally withdrawn.

33 Affidavit of J R Williams sworn 10 June 2019, JRW-3, p 64.

2.3 Your written notification as per your requirement under clause 18.3 of the contract is duly noted at this time.

…

5. Payment Under Claim

5.1 We hereby inform you that we will be pursuing liquidated damages as per Item 18 and in accordance with clause 19.1 of the contract. We will be seeking the sum of $16,000.00 (32 days * $500.00).

5.2 We dispute your claim for Variation 5 in the amount of $47,234.79. Special condition 5C4. Under Appendix Part E of the contract states *"No variations will be undertaken without a Confirmation of Variation/Instruction form executed by the Owner."*

5.3 Notwithstanding 5.2, we dispute this Variation claim in any event.

5.4 It is *my* understanding that Final clean has not been completed as at the time of formulation of this correspondence. According to the Excel spreadsheet provide [sic] by you titled "Claims Manly ex GST" the amount outstanding for this incomplete work is $9600.00 (GST inclusive).

5.5 In relation to Items 5.1 through 5.4 I have today authorised Latrobe to pay $123,150.65 against you claim in the form or Invoice INV-0480. Further to this, Melaleuca View Pty Ltd will remit the GST applicable to this amount of $12,315.06.

…"

[36] Melaleuca did not pay the amount of invoice 485 and the claimant applied for adjudication of the payment claim made by invoice 485.[34]

[37] Section 76 of the Act provides that a respondent must respond to the payment claim by giving the claimant a payment schedule within the prescribed time, unless they pay the amount claimed in the payment claim in full.[35]

[38] The consequence of determining that the letter of 19 February 2019 was not a payment schedule is threefold:

(a) The respondent to the payment claim 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 progress claim to which the payment claim relates: s 77(2) of the Act;

(b) The claimant may seek payment of the unpaid amount of the payment claim in a court of competent jurisdiction or apply for adjudication of the payment claim: s 78 of the Act;

(c) If the claimant seeks to apply for adjudication rather than seeking judgment for the amount of the progress claim where the progress claim is not paid, the respondent cannot give an adjudication response: s 82(2) of the Act.

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[34] Affidavit of J R Williams sworn 10 June 2019, Exh JRW-3, p 22.

[35] There is no issue that if the letter of 19 February 2019 did constitute a payment schedule it was responded to within the required time.

[39] Melaleuca contends that the finding that there was no payment schedule served by Melaleuca was a finding as to a jurisdictional fact.

Jurisdictional fact?

[40] Melaleuca submits that the principles outlined in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[36] support the contention that whether a payment schedule has been provided as required by the Act is a jurisdictional fact.

[41] A jurisdictional fact has been described as "in general terms, a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question".[37] Whether a statutory criterion is a jurisdictional fact is a matter of statutory construction.[38] If a matter is a jurisdictional fact, it is a matter for the Court to decide whether or not the fact exists, unless the statute provides otherwise.[39]

[42] In *Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd,*[40] Muir JA[41] considered whether an adjudicator who considered a document which was not a payment schedule and did not consider the actual payment schedule had made a jurisdictional error. Under s 26 of the 2004 Act, a payment schedule had to be taken into account by an adjudicator. His Honour found that that "[t]he adjudicator lacked authority to decide an adjudication application, where a payment schedule existed and was relied on by the respondent to the application, other than by reference to that payment schedule".[42] While decided with respect to the 2004 Act, the reasoning of Muir JA in *Heavy Plant* does lend some support to the contention that the determination of whether or not a document is a payment schedule is a jurisdictional fact.[43]

[43] Section 88(2) of the Act provides that the adjudicator is to consider, amongst other things, the payment schedule and an adjudication response, unless it is prohibited from being taken into account by the operation of s 82. The determination of whether or not there is a payment schedule as provided for under the Act determines the scope of the adjudicator's jurisdiction, since its existence or absence determines what the adjudicator may have regard to when making a determination.

[44] The language of s 88, which prescribes the "only" matters the adjudicator is to consider in making a decision and excludes consideration of an adjudication response in the absence of a payment schedule having been given in accordance with s 76, supports the contention that the determination of whether or not a document constitutes a "payment schedule" is a jurisdictional fact. That fact is one that must be determined prior to considering the matters provided under s 88(2) of the Act and the making of any decision. While an adjudication can still proceed in the absence of a payment schedule, the scope of the decision-making process that is undertaken by the adjudicator is determined by the presence or absence of a payment schedule. The effect of a finding that no payment

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36 (2010) 78 NSWLR 393.

37 *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2013] Qd R 75 at [96], referring to *Chase Oyster Bar Pty Ltd v Hamo Industries Pty* Ltd (2010) 78 NSWLR 393 at 427-429, per McDougall J.

38 *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319 at [11].

39 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty* Ltd (2010) 78 NSWLR 393 at [172].

40 [2013] QCA 386.

41 With whom Gotterson JA and Morrison JA agreed.

42 At [59].

43 Although the Court of Appeal found there was a jurisdictional error, it did not determine the matter was a jurisdictional fact.

schedule has been provided is that the respondent is precluded from making any response in opposition to the claimant before an adjudication is made. Unlike the 2004 Act, there is not a further opportunity to provide a payment schedule after notice has been given of the claimant's intention to apply for adjudication of the payment claim.[44] The language of s 88 and the legislative scheme whereby a party is precluded from having its adjudication response considered as part of the adjudication support the conclusion that the existence of a payment schedule is a jurisdictional fact. I find that the determination of whether the 19 February email constitutes a payment schedule is a jurisdictional fact.[45] The Court may therefore determine whether the jurisdictional fact exists or not.[46]

Was the 19 February 2019 email a payment schedule?

[45] Section 69 of the Act provides that a payment schedule is a written document that:

> "(a) identifies the payment claim to which it responds; and
>
> (b) states the amount of the payment, if any, that the respondent proposes to make; and
>
> (c) if the amount proposed to be paid is less than the amount stated in the payment claim—states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment; and
>
> (d) includes the other information prescribed by regulation."

[46] The Court should not adopt an overly technical approach in determining whether or not the 19 February email is a payment schedule, and should take into account the position of the parties and, if relevant, background facts of which they are aware which would inform their understanding.

[47] In *Barclay Mowlem Construction v Tesrol Walsh Bay,*[47] McDougall J stated by reference to the New South Wales legislation that:

> "In *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, Palmer J set out the approach that the court should take in considering whether documents purporting to be payment claims or payment schedules complied with the relevant mandatory requirements of the Act. He noted that they were exchanged between parties who, because of their experience in the building industry and with the particular contract, knew the history of the project and the issues in dispute, and that they would be likely to contain material in an abbreviated form unintelligible to the uninformed reader but comprehensible to the parties. He said:
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> > "[76] A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the

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44 *Building and Construction Industry Payments Act 2004* (Qld), s 21(2), cf *Building Industry Fairness (Security of Payment) Act 2017* (Qld), s 79.

45 See *Chase Oyster Bar Pty Ltd v Hamo Industries Pty* Ltd (2010) 78 NSWLR 393 particularly at [40], [42]-[43], [46]-[47], [167], [170], [180], [210]-[211] and [222]. There is a similar series of provisions under the 2017 Act, which are carefully calibrated to ensure the scope and resolution of a disputed payment.

46 The Act does not reflect any clear intention that it is a matter to be determined by the adjudicator to the exclusion of the Court. See *Chase Oyster Bar Pty Ltd v Hamo Industries Pty* Ltd (2010) 78 NSWLR 393 at [36] and [183].

47 [2004] NSWSC 716 at [8].

> building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.
>
> [77] A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.
>
> [78] Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication."

[48] The present Act uses the term "state" rather than "indicates", suggesting a greater level of detail in the reasons is required than under the New South Wales legislation.

[49] The decision of *Multiplex Constructions Pty Ltd v Luikens and Anor*[48] referred to by McDougall J was also referred to by Bell P in *Style Timber Floor Pty Ltd v Krivosudsky,*[49] where his Honour, while endorsing observations that the payment schedule need not be attended with the same degree of formality that might be required in other areas, stated

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48 [2003] NSWSC 1140.

49 [2019] NSWCA 171.

that "his Honour's judgment is not a licence for informality or an excuse for vague, generalised objections to payment".[50]

[50] Having considered the framework of the New South Wales legislation and having noted that the respondent's rights at law otherwise remain, notwithstanding the adjudication, Leeming JA[51] commented in *Style Timber Floor*:[52]

> "[44] Thirdly, whether or not a compliant "payment schedule" has been provided in response to a payment claim falls to be determined in the context of the statutory provisions consequent upon doing so. Whether or not a document is a payment schedule must be something which is capable of ascertainment readily, and (at least ordinarily) without the assistance of a lawyer. The large majority of the cases which have arisen under this Act have not involved dispute as to whether a response was or was not a compliant payment schedule.
>
> [45] Fourthly, and perhaps most importantly for present purposes, the payment schedule serves two important functions under the Act. The first is to inform the claimant as to the metes and bounds of its dispute with the respondent, so that it can make an informed choice as to whether to engage the expedited *pro tem* adjudication procedures under Division 2. The second is to articulate the respondent's case which will then be determined by the adjudicator. It will also enable adjudicators to assess whether to accept appointment as an adjudicator to a dispute. At the time an adjudication application is made, *all* that the claimant and the prospective adjudicator will know of the nature of the respondent's side of the case is what is contained in its payment schedule."

[51] Leeming JA also stated in relation to Palmer J's analysis in *Luikens*[53] that:[54]

> "When dealing with the requirements of a payment claim, Palmer J's analysis was endorsed by this Court in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391 at [31]. While it is clear that an abbreviated description, falling short of a pleading, will suffice, the passages emphasised indicate that the payment schedule must sufficiently describe the dispute so as to enable the claimant to determine whether to proceed in the knowledge of the nature of the case it will have to meet."

[52] In *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors,*[55] Chesterman J in considering the requirements of a payment schedule in the 2004 Act which mirror s 69 of the Act stated at [20]-[21]:

> "The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical

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50 At [2].
51 With whom Bell P and Simpson AJA materially agreed.
52 [2019] NSWCA 171.
53 *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140.
54 *Style Timber Floor Pty Ltd v Krivosudsky* [2019] NSWCA 171 at [47].
55 [2007] QSC 333.

viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description. To constitute a payment schedule the applicant's email of 14 December had to:

(i) identify the payment claim to which it related, and

(ii) state any amount which the recipient of the payment claim proposed to make in response to it.

(iii) Importantly, if that amount is less than the amount claimed the payment schedule it must state why it is less.

If these three criteria are satisfied the document will be a payment schedule. How they are expressed, with what formality or lack of it, and with what felicity or awkwardness, will not matter."

[53] However, his Honour determined in *Minimax Fire Fighting Systems Pty Ltd* that the email in that case did not satisfy the third requirement such that it would constitute a payment schedule. His Honour referred to the fact that the email responded to one part of the claim and not the other two and stated at [27]:[56]

> "If the applicant had no objection to paying those amounts the Act required it to say so in its payment schedule. The whole purpose of such a document is to identify what amounts are in dispute and why. The delivery of a payment claim and a payment schedule is meant to identify, at an early stage, the parameters of a dispute about payment for the quick and informal adjudication process for which the Act provides. If a builder wishes to take advantage of the Act to dispute the claim it must comply with its provisions and must, relevantly, take the trouble to respond to a payment claim in the manner required by the Act. The process is not difficult. The applicant was required to identify those parts of the claim which it objected to paying and to say what the grounds of its objection were"

[54] His Honour found that a payment schedule which complies with the Act will set out the amount it proposes to pay in response to a claim. If it did not do so, only taking issue with part of the claim and failing to state what it would pay in relation to the balance, the system established by the 2004 Act would break down, as a contractor could not enter judgment as provided under the Act.[57] His Honour therefore found the adjudicator was correct to determine no payment schedule had been provided.

[55] The purpose of the payment claim and the payment schedule remains the same under the present Act as under the 2004 Act.

[56] Counsel for Melaleuca submitted that the reasons for withholding payment do not need to be adequate or sufficient, by reference to the *Barclay Mowlem* case.[58] In that case, however, reasons had been outlined in relation to the two categories of variations and

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56 Referred to with approval by Leeming JA in *Style Timber Floor Pty Ltd v Krivosudsky* [2019] NSWCA 171.

57 At [29].

58 Applicant's Outline in Reply at [22], referring to *Barclay Mowlem v Tesrol Walsh Bay* [2004] NSWSC 1232 at [26].

specific variations were identified.[59] His Honour also found that it was plain from the relevant letter as a whole that the respondent was going to pay nothing. In *Timber Style Floor,* however, Leeming JA found that the reasons contained in an email did not refer to a specific invoice or a specific project and provided less by way of reasons than was provided in *Minimax Firefighting,* amongst other cases. His Honour concluded that the email did not sufficiently state reasons for the purpose of s 14(3) of the NSW Act and was not a payment schedule.[60]

[57] In *T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd,*[61] Philippides JA accepted that a payment claim serves a different function to a payment schedule, such that a payment schedule may be expected to provide sufficient detail to outline the scope of the dispute. Her Honour stated at [31] that:

> "… A payment schedule is required to identify the payment claim to which it relates, indicate the amount of the payment (if any) that is proposed to be made and why payment in full is withheld. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication ensues."

[58] Melaleuca contends that the 19 February email does satisfy the requirements of s 69 and is a payment schedule, particularly in the context of the email as a whole and the correspondence exchanged between 5 February and 19 February 2019.

[59] According to Sutton, the adjudicator's finding that the email and attached letter of 19 February 2019 was not a payment schedule was justified because:

(a) Melaleuca never identified invoice 485 as a claim to which they were providing a payment schedule or response;

(b) In relation to disputed items for which Melaleuca intended to withhold payment, the email responds to amounts that are specific to invoice 480;

(c) The email stated that a payment would be made in respect of invoice 480; and

(d) The email does not identify the amount of the payment it proposed to make in relation to invoice 485.

[60] Sutton also contends that the letter of 19 February 2019 was not a payment schedule, because the reasons provided in the letter were inadequate. This was not an argument raised with or considered by the adjudicator.

Does the 19 February 2019 email identify the payment claim?

[61] Melaleuca asserts that the 19 February email did identify the payment claim because it referred to the correspondence of 15 February, which attached invoice 485. It further contends that it referred to payment "in the form of invoice INV-0480", which is consistent with it responding to invoice 485 and not 480. It contends this is the logical inference, given the figures in invoice 485 refer to the figures in the accompanying schedule for claim nine, whereas invoice 485 does correlate to the figures for the tenth claim.

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59 *Barclay Mowlem v Tesrol Walsh Bay* [2004] NSWSC 1232 at [22]-[24] and [27].

60 Which is in largely the same terms as s 69, save it provides for reasons to be indicated rather than stated.

61 [2010] QCA 381.

[62] Sutton states that the aforementioned reference to the correspondence of 15 February is consistent with the contention that the 19 February email was responding to the four topics in the email of 15 February, in addition to the "Payment Under Claim", and therefore it should not be construed as also referring to the payment claim made by invoice 485. It contends that the references to Variation 5 and INV-0480 are inconsistent with it addressing invoice 485 and the only logical inference is that it is referring to invoice 480. I consider this is correct. The only reasonable inference is that the "Payment Under Claim" to which it was responding was invoice 480. I infer that the reference to INV-0480 was a deliberate choice, even if it was a mistake.

[63] The 19 February email does refer to the correspondence of 15 February 2019. However, the letter of 15 February dealt with a number of matters under the same headings used in the 19 February 2019 email to respond. The response in the 19 February email under the heading "Payment Under Claim" refers to "Variation 5 in the amount of $47,234.79", which is the amount that appears in invoice 480 and not in invoice 485. Invoice 485 states that Variation 5 is $42,940.72. The reference to a set off for liquidated damages and the final clean could be applicable to the claim under either invoice. The letter attached to the 19 February 2019 email further refers to "$123,150.65 against your claim in the form of invoice INV-0480". That payment is said to be by reference to the matters in 5.1 to 5.4, which include the reference to Variation 5. Invoice 480 states the amount due is $208,300.49, whereas invoice 485 states the amount due is $235,980.49.

[64] Accepting that one does not adopt an overly technical approach in interpreting a payment schedule, the 19 February email suffers from the fact that one cannot reasonably infer that it is referrable to the payment claim by invoice 485. While the 19 February email does refer to the 15 February correspondence, the matters in [1] to [4] address the matters in that correspondence. The reference to the amount of Variation 5 in invoice 480 supports the fact that the reference to payment "in the form of invoice 480" is referring to invoice 480. The figures do not reconcile with the figures in invoice 485.

[65] I do not consider s 69(a) is satisfied.

Does the 19 February 2019 email identify the proposed amount to be paid?

[66] Melaleuca submits that, given that both invoice 480 and invoice 485 are in respect of the tenth payment claim and the reference to payment of "$123,150.65 against your claim in the form of invoice INV-0480", Melaleuca did state the amount that it proposed to pay as required under s 69(b). Melaleuca's counsel states that informs the construction of "against your claim in the form of INV-0480" and, properly understood, the phrase should be taken to be asserting that invoice 485 is wrong and that payment was going to be made against invoice 480, because it has the right numbers.[62] Alternatively, it was submitted that a common sense interpretation of the response would be that Melaleuca was paying zero dollars for the invoice 485 claim.

[67] Melaleuca points out that the figures in invoice 485 were incorrect and it appears they wrongly used the figures for claim nine in the schedule,[63] rather than the tenth claim. It also asserts that the figures in invoice 485 with respect to variations 4 and 5 cannot be reconciled with the schedule. It further states that invoice 485, like invoice 480, seeks to

[62] The fact that the figures were in error was conceded before the adjudicator.
[63] Affidavit of J R Williams sworn 10 June 2019, JRW-3, p 78.

claim the balance of the contract sum and for variations 4 and 5. The email of 19 February, Melaleuca submits, addresses those same matters and states that the reasons for withholding payment are that there is a claim for liquidated damages for $16,000, rejection of Variation 5 for $47,234.79 and a deduction of incomplete work for the final clean.

[68] The difficulty in respect of Melaleuca's argument is that it does not identify that the figures in invoice 485 are incorrect such that it is adopting the figures in invoice 480. While it is accepted that both invoices are described as the tenth claim and seek payment for the balance of the contract price and the variations, the figures claimed in the two invoices are different.[64] There is no indication that the proposed payment is in respect of invoice 485. The use of the words "in the form of" simply serve to make the response more opaque, rather than supporting an inference that it is the proposed payment for invoice 485. One cannot infer from the terms of the 19 February email that the payment of $123,150.65 is in respect of the payment claim made by invoice 485.

[69] Section 69(b) is not satisfied.

Does the 19 February 2019 email state why the amount proposed to be paid is less and the reasons for withholding payment?

[70] Given that I have found that s 69(a) and (b) were not satisfied, I will not consider whether or not s 69(c) was satisfied.

Discretion

[71] Given my findings, I do not need to consider whether I would have withheld relief on the basis of an exercise of discretion had I otherwise found in favour of Melaleuca.

Conclusion

[72] I find that:

(a) The adjudicator did not err in determining that there was no payment schedule provided because the requirements in s 69 of the Act were not satisfied;

(b) Payment claim 485 was not invalid due to a contravention of s 75(4) of the Act as it was given in respect of the reference date for practical completion and payment claim 480 was not.

[73] While the conclusion that the payment schedule did not satisfy the requirements of s 69 of the Act may be seen to be harsh, given that both invoices 480 and 485 were with respect to substantially the same work, s 69 is clear in its requirements and easily satisfied, as it could have been in the present case. Given the consequences that flow from a failure to provide a payment schedule under the Act, the onus is on the respondent to ensure it has complied with the requirements of s 69 of the Act, just as a claimant must provide a payment claim that accords with the Act. However, it must be borne in mind that the Act is to facilitate progress payments and any progress payment determined to be payable is only paid on account, such that the respondent to a claim still maintains their rights at law to ultimately challenge the amounts paid.[65]

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[64] Albeit that the figures in the second invoice were incorrect as conceded by Sutton in the adjudication.

[65] *Building Industry Fairness (Security of Payment) Act 2017* (Qld), s 63.

Orders

[74] I order that the application be dismissed.

[75] I will hear the parties as to costs.