

SUPREME COURT OF QUEENSLAND

CITATION: *Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd & Anor* [2023] QSC 290

PARTIES: **IRIS BROADBEACH BUSINESS PTY LTD AS TRUSTEE FOR THE IRIS BROADBEACH BUSINESS TRUST**
(ACN 651 719 603)
(applicant)
v
DESCON GROUP AUSTRALIA PTY LTD
(ACN 625 771 075)
(first respondent)
TRACEY WOOD (ADJUDICATION REGISTRATION NO. J15008724)
(second respondent)

FILE NO/S: BS No 7004 of 2023

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 December 2023

DELIVERED AT: Brisbane

HEARING DATE: 30 & 31 August 2023

JUDGE: Williams J

ORDER:

- Pursuant to section 10 of the *Civil Proceedings Act 2011 (Qld)*, THE COURT DECLARES THAT adjudication decision number 2246773 purportedly made by the Second Respondent on 9 June 2023 pursuant to the *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* is void and is set aside.**
- THE COURT DIRECTS THAT the parties file and serve submissions of no more than 4 pages on whether any further orders are appropriate and costs by 29 January 2024.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the first respondent lodged an adjudication application (**application**) in respect of a payment claim it served on the applicant pursuant

to the *Building Industry Fairness (Security of Payment) Act 2017 (Qld) (BIF Act)* scheme – where the application was lodged with the QBCC registry online and a copy of the completed electronic form (**form**) was issued to the first respondent – where the first respondent purported to serve the application, including a copy of the form, on the offices of the applicant’s superintendent – where the second respondent accepted appointment as an adjudicator and issued an adjudication decision – where the applicant denies that a copy of the form was included in the application purportedly served on it – whether the copy of the form the first respondent contends it delivered to the superintendent is an “approved form” for the purposes of s 79(2)(a) of the BIF Act – whether the first respondent satisfied s 79(3) of the BIF Act when it gave a copy of the form to the superintendent – whether the first respondent gave the applicant a copy of the form on 20 February 2023 and therefore as soon as possible – whether the payment claim identified the construction work to which it related as required by s 68(1)(a) of the BIF Act and therefore was a valid claim – whether the second respondent had jurisdiction to decide the adjudication application – whether the severance power in s 101(4) of the BIF Act can apply to sever from the adjudication decision the parts (if any) of the payment claim that are invalid

Acts Interpretation Act 1954 (Qld) s 4, s 48, s 48A
Building Industry Fairness (Security of Payment) Act 2017 (Qld) s 3, s 68, s 76, s 79, s 81, s 83, ss 84-97, s 101, s 198, s 198A

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd (2020) 4 QR 410
Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport and Anor (2004) 61 NSWLR 421
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393
Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229
EHome Construction Pty Ltd v GCB Constructions Pty Ltd [2020] QSC 291
Equa Building Services Pty Ltd v KLG Trading Pty Ltd [2021] NSWSC 1674
Kangaroo Point Developments MP Property Pty Ltd v RHG Construction Fitout and Maintenance Pty Ltd & Ors [2021] QSC 30
Karam Group Pty Ltd as Trustee for Karam (No. 1) Family Trust v HCA Queensland Pty Ltd & Ors [2022] QSC 290
KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors [2019] QSC 178
McCarthy v TKM Builders Pty Ltd (2020) 5 QR 722
National Management Group Pty Ltd v Birieli Industries Pty Ltd trading as Master Steel & Ors [2019] QSC 219

Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd
[2011] 1 Qd R 17

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor (2019) 2 QR 190

Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd (t/as Total Concept Group) [2017] NSWSC 194

Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd [2010] QSC 162

Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd [2005] NSWSC 439

COUNSEL: M D Ambrose KC & B A Reading for the applicant
H Clift for the respondent

SOLICITORS: McCullough Robertson for the applicant
Irish Bentley Lawyers for the respondent

- [1] The applicant (the **Principal**) seeks a declaration that a decision of the second respondent (the **Adjudicator**) purportedly made under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) is void and that the decision be set aside, and an order that the first respondent (the **Contractor**) be permanently restrained from enforcing or seeking to enforce adjudication decision number 2246773 (the **Purported Decision**).
- [2] The originating application sought interlocutory orders and orders were made by consent on 27 June 2023. Order 1 was as follows:
- “Upon the applicant giving the usual undertaking as to damages, until further order, the first respondent be restrained from enforcing adjudication decision number 2246773 made by the second respondent on 9 June 2023, including enforcement by way of any adjudication certificate obtained by the first respondent in respect of the adjudication decision.”
- [3] The amount of \$1,351,457.57 was not paid into Court as originally sought but was paid into a solicitor’s trust account to be held pending the outcome of these proceedings.
- [4] The Adjudicator adopted the usual course and did not appear at the hearing and will abide by the order of the Court.

Issues

- [5] There are a number of issues and facts which are contentious between the parties.
- [6] As these proceedings were commenced by way of originating application, the parties filed affidavit material and written submissions. Consequently, there are no pleadings which clearly traverse the issues and material facts in dispute.
- [7] Nor are there any points of claim and points of defence or a statement of facts, issues and contentions to assist in identifying the real issues in dispute.

- [8] On the first day of the hearing, the parties were requested to prepare and agree the issues to be determined by the Court. This exercise was also to identify, as far as possible, the factual issues that were not in dispute and those that required determination.
- [9] A draft agreed list of questions and other agreed matters was prepared and marked “MFI D”. After the hearing had concluded, a final version of the agreed list of questions and other agreed matters was provided and marked Exhibit 3 in chambers. There were no changes between the draft and the final.
- [10] **Annexure A** sets out in full Exhibit 3 being the document headed “The Applicant’s and First Respondent’s agreed definitions, agreed list of questions and other agreed matters”.
- [11] These reasons adopt the definitions of **Manual Form, Electronic Form, QBCC PDF Form** and **Payment Claim No 6** as set out in Annexure A.
- [12] Further, these reasons follow the proposed structure to the issues to be determined and consider the agreed questions in the order identified by the parties.
- [13] The ‘agreed consequences of the answers to the questions for the Court’s determination’ identified in paragraphs 2, 3 and 4 are consistent with the authorities and are not controversial.
- [14] Further consideration may need to be given to paragraphs 1 and 5 of the ‘agreed questions for the Court’s determination’ as the consequences of the answers to those paragraphs are not agreed. However, these consequences ultimately may not need to be determined depending on the answers to paragraphs 2, 3 and 4 of the ‘agreed questions for the Court’s determination’ and the consequences that flow from those answers.
- [15] Before considering each of the agreed questions in turn, it is convenient at this stage to consider some of the relevant provisions of the BIF Act.

Relevant BIF Act provisions

- [16] The main purpose of the BIF Act is set out at s 3 as follows:

“3 The main purpose of Act

- (1) The main purpose of this Act is to help people working in the building and construction industry in being paid for the work they do.
- (2) The main purpose of this Act is to be achieved primarily by—
 - (a) requiring the use of statutory trusts for particular contracts related to the building and construction industry; and
 - (b) granting an entitlement to progress payments, whether or not the relevant contract makes provision for progress payments; and

- (c) establishing a procedure for—
 - (i) making payment claims; and
 - (ii) responding to payment claims; and
 - (iii) the adjudication of disputed payment claims; and
 - (iv) the recovery of amounts claimed; and
- (d) enabling the use of a statutory charge in favour of subcontractors for payment of the work they do.”

[17] Chapter 3 deals with progress payments.

[18] Under Part 2 of Chapter 3, a procedure is outlined for progress payments in relation to work done under a construction contract. Section 70 of the BIF Act provides a right to progress payments as follows:

“From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract.”

[19] Part 3 provides a procedure for claiming progress payments by way of a payment claim and payment schedule.

[20] Part 4 then provides a mechanism for the adjudication of disputed progress payments.

[21] Section 79 of the BIF Act governs an application by a claimant to the registrar for an adjudication of a payment claim where there has been a failure to pay the amount owed or there is a dispute about the amount payable as indicated in the payment schedule.

[22] Section 79 in respect of an application for adjudication states as follows:

“79 Application for adjudication

- (1) A claimant may apply to the registrar for adjudication of a payment claim (an *adjudication application*) if—
 - (a) the claimant is entitled to apply for adjudication under section 78(2)(b) because of a failure by the respondent to pay an amount owed to the claimant by the due date for the payment; or
 - (b) the amount stated in the payment schedule, given in response to the payment claim, is less than the amount stated in the payment claim.
- (2) An adjudication application—
 - (a) must be in the approved form; and
 - (b) must be made within—

- (i) for an application relating to a failure to give a payment schedule and pay the full amount stated in the payment claim—30 business days after the later of the following days—
 - (A) the day of the due date for the progress payment to which the claim relates;
 - (B) the last day the respondent could have given the payment schedule under section 76; or
 - (ii) for an application relating to a failure to pay the full amount stated in the payment schedule—20 business days after the due date for the progress payment to which the claim relates; or
 - (iii) for an application relating to the amount stated in the payment schedule being less than the amount stated in the payment claim—30 business days after the claimant receives the payment schedule; and
- (c) must identify the payment claim and the payment schedule, if any, to which it relates; and
 - (d) must be accompanied by the fee prescribed by regulation for the application; and
 - (e) may include the submissions relevant to the application the claimant chooses to include.
- (3) A copy of an adjudication application must be given to the respondent.
 - (4) The registrar must, within 4 business days after the application is received, refer the application to a person eligible to be an adjudicator under section 80.”

[23] Pursuant to s 81, the registrar refers an adjudication application to an adjudicator “for a decision”.

[24] An adjudication response may be provided if there has been a previous payment scheduled pursuant to s 76. The reasons permitted to be included in the adjudication response are limited to those included in the payment schedule.¹

[25] Pursuant to s 84, a procedure is set out for the process to be followed. The provisions setting out the procedure in respect of an adjudication application are then contained in ss 84 to 97 of the BIF Act.

¹ BIF Act s 82(4).

- [26] Pursuant to s 84(2), an adjudicator must decide whether he or she has jurisdiction to adjudicate the application.
- [27] Section 83 is also a relevant provision which provides the time for making an adjudication response. Section 83 states as follows:

“83 Time for making adjudication response

- (1) If responding to a standard payment claim, the respondent must give the adjudicator the adjudication response within the later of the following periods to end—
 - (a) 10 business days after receiving a copy of the adjudication application;
 - (b) 7 business days after receiving notice of the adjudicator’s acceptance of the adjudication application.
- (2) If responding to a complex payment claim, the respondent must give the adjudicator the adjudication response within the later of the following to end—
 - (a) 15 business days after receiving a copy of the adjudication application;
 - (b) 12 business days after receiving notice of the adjudicator’s acceptance of the adjudication application.
- (3) However, if responding to a complex payment claim, the respondent may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the adjudication response to the adjudicator.
- (4) The application must—
 - (a) be in writing; and
 - (b) be made within the later of the following periods to end—
 - (i) 5 business days after receiving a copy of the adjudication application;
 - (ii) 2 business days after receiving notice of the adjudicator’s acceptance of the adjudication application; and
 - (c) include the reasons for requiring the extension of time.
- (5) If the application is granted, the respondent may give the adjudicator the adjudication response no later than the end of the extension of time granted by the adjudicator.
- (6) If the respondent gives the adjudicator an adjudication response under this section, the respondent must give a

copy of the response to the claimant not more than 2 business days after giving the response to the adjudicator.”

[28] Here, the Adjudicator accepted the referral and gave notice to the Contractor and the Principal. The Adjudicator decided that she had jurisdiction to adjudicate the application and proceeded to give the adjudication decision on 9 June 2023.

[29] Section 88 deals with the adjudicator’s decision and sets out the statutory requirements. No issue arises on the current facts as to the requirements of the decision. The parties by virtue of the consent orders have stayed the operation of the BIF Act provisions dealing with payment of the adjudicated amount and the filing of the adjudication certificate as a judgment debt.

[30] It is now necessary to consider each of the questions.

Question 1: Is the QBCC PDF Form an “approved form” for the purposes of s 79(2)(a) of the BIF Act?

[31] Section 79(2)(a) of the BIF Act provides that an adjudication application “must be in the approved form”.

[32] The Contractor contends that a copy of the QBCC PDF Form was served on the Principal and it was in *an* approved form. The Principal contends that the QBCC PDF Form was not an approved form for the purposes of s 79(2)(a) of the BIF Act.

[33] Leaving aside at this stage the factual dispute as to when the QBCC PDF Form was in fact served, the first issue that arises is: what is an approved form for the purposes of s 79(2)(a) of the BIF Act?

[34] Section 198 of the BIF Act provides:

“198 Approved forms

- (1) The chief executive or commissioner may approve forms for use under this Act.
- (2) Information in an approved form must, if the approved form requires, be verified by a statutory declaration.
- (3) An approved form has no effect if information in the form must be verified by a statutory declaration and it is not.”

[35] Further, s 198A provides:

“198A Approved ways to give particular documents to commissioner or registrar

- (1) This section applies if, under a provision of this Act—
 - (a) a person may or must give a document to the commissioner or registrar using an approved way; or

- (b) a person may apply to the commissioner using an approved way.
- (2) The person may give the document to the commissioner or registrar, or make the application, in 1 of the ways approved by the commissioner for that purpose.
- (3) If the commissioner approves a way for giving a document or making an application under this Act, the commissioner must publish the details of the approved way on the commission’s website.”
- [36] The work done by these two provisions is different. Section 198 deals with the forms or documents themselves and s 198A deals with the process of “giving” or “lodging” a document, including making an application.
- [37] Section 198A of the BIF Act was inserted by clause 79 of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020* and commenced on 1 July 2020.
- [38] The Explanatory Notes relevantly states:
- “... a new section 198A which provides for particular documents to be given to the commissioner or the registrar in the approved way. The approved way in which the information can be given will be published on the commission’s website. This allows for flexibility in how information can be provided, for example in a form electronically or through an information portal.”
- [39] The *Acts Interpretation Act 1954 (Qld) (AI Act)* is also relevant. Part 12A deals with Forms. Sections 48 and 48A provide as follows:
- “48 Forms—notification and availability**
- (1) This section applies if under an Act (the *authorising law*) forms are to be approved or made available by an entity.
- (2) A form under the authorising law must have a heading stating the name of the authorising law and briefly indicating the form’s purpose.
- (3) All forms under the authorising law must be numbered using a system that gives each form a unique number.
- ...
- (4) All versions of a form under the authorising law must be numbered consecutively using a system that gives each version of the form a unique number.
- (5) The approval or availability under the authorising law of a form, or a new version of a form, must be notified in the gazette or on a relevant website.
- ...

(9) In this section—

relevant department, in relation to an entity that approves or makes available forms under an authorising law, means the department in which the authorising law is administered.

relevant website means—

- (a) for publication in relation to a form, or a new version of a form, approved or made available by a local government—the local government’s website; or
- (b) for publication in relation to a form, or a new version of a form, approved or made available by another entity—
 - (i) the whole-of-government website; or
 - (ii) the entity’s website; or
 - (iii) if the entity does not have a website—
 - (A) the relevant department’s website; or
 - (B) a website identified on the relevant department’s website as a website for this purpose.

...

48A Compliance with forms

- (1) If a form is prescribed or approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient.
- (2) If a form prescribed or approved under an Act requires—
 - (a) the form to be completed in a specified way; or
 - (b) specified information or documents to be included in, attached to or given with the form; or
 - (c) the form, or information or documents included in, attached to or given with the form, to be verified in a specified way;

the form is not properly completed unless the requirement is complied with.

...”

[40] It is also relevant to consider s 4 of the AI Act which states:

“4 Displacement of Act by contrary intention

The application of this Act may be displaced, wholly or partly, by a contrary intention appearing in any Act.”

[41] There are no gazetted forms under the BIF Act. There were gazetted forms under previous Acts dealing with a similar security for payments process, but the transitional provisions do not result in the previous gazetted forms being relevant to the current considerations.

[42] It is necessary to consider the various possible forms and the evidence about them.

[43] The Manual Form is available on the QBCC website to be downloaded and completed. The copy of the Manual Form in evidence is a seven-page document and has the footer “00058_s79_BIFOLA v13_06/23”.²

[44] The Electronic Form is also available on the QBCC website in that it is to be completed and submitted electronically. The copy of the Electronic Form in evidence was produced by a PDF being created for each page of the Electronic Form during the process of completing the form.³ Given the form of the PDF being screen shots, often going over a single page, the copy of the Electronic Form up to the end of the declaration is contained in 26 pages.

[45] The Manual Form and the Electronic Form are substantially the same, with some minor differences. These differences are discussed further in respect of Question 2 below.

[46] The QBCC PDF Form is not available on the QBCC website and is made available to an applicant by an email from the QBCC after the completed Electronic Form has been lodged with the QBCC via the electronic portal facility referred to as “myQBCC”.⁴

[47] The QBCC PDF Form is a 4-page document containing the matter specific data from the completed Electronic Form (with a few exceptions) in table format. It does not, however, include the generic instructions or narrative contained in the Manual Form or the Electronic Form other than the general heading descriptions.

[48] It can be inferred that the QBCC PDF Form is generated by the QBCC from the data provided in a submitted Electronic Form.

[49] Further, the QBCC PDF Form is only available as completed for a particular application and is not otherwise available on the website in a generic format. In the

² TB 897; page 8 to 14 of Exhibit “BJF-101” of the affidavit of Benjamin Forshaw affirmed 11 August 2023.

³ TB 1058; Exhibit “JRA-23” and [22] of the affidavit of James Arklay affirmed 30 June 2023.

⁴ myQBCC is accessed by registering and logging on via the QBCC website. See also affidavit of Benjamin Forshaw affirmed 11 August 2023.

current case, the QBC PDF Form was emailed by the QBCC to the Contractor following the online submission of the application, with the covering email stating:

“... ”

You recently submitted a BIF Adjudication Application at QBCC.

Your case number is: 2246773

Please see attached PDF for a copy of your form submission.

...”⁵

- [50] The QBCC PDF Form:
- (a) Is marked “Version 1”.
 - (b) Refers to s 79 and s 198, which can be inferred is a reference to ss 79 and 198 of the BIF Act.
- [51] The Contractor contends that the QBCC PDF Form is in an approved form as that is what was returned from the QBCC as a copy of the “form submission”. It is also what was given to the Adjudicator by the QBCC for the referral of the adjudication application.
- [52] The submissions in relation to whether the QBCC PDF Form is a copy of the Electronic Form are not relevant to determining the first question as to whether the QBCC PDF Form is in an approved form. This is considered further in relation to Question 2.
- [53] Question 1 requires the proper construction of s 79(2)(a) as to the meaning of “must be in the approved form”. By the way the questions have been broken up, there is a risk that the term “approved form” may become disconnected from the context in which it arises.
- [54] Section 79(1) defines “an adjudication application” to be a claimant’s application to the registrar for adjudication of a payment claim. It is the process of “applying” and the context includes it being “to” the registrar.
- [55] This is then picked up in s 79(2) where further prescription is given to what is required for “an adjudication application”. Sub-section (a) states it must be in *the* approved form.
- [56] Dalton J, as her Honour then was, in *Kangaroo Point Developments MP Property Pty Ltd v RHG Construction Fitout and Maintenance Pty Ltd & Ors*⁶ considered s 79 of the BIF Act and observed:

“[10] Section 79(2)(a) provides that an adjudication application ‘must’ be in the approved form and s 79(2)(c) says that the adjudication application ‘must identify the payment claim and the payment schedule, if any, to which it relates’. In *Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd*⁷ I

⁵ TB 879; page 760 of Exhibit “TBS-101” of the affidavit of Timothy Smith affirmed 7 July 2023.

⁶ [2021] QSC 30.

⁷ [2020] QSC 51, [22] ff; see [2021] QCA 10, [25] ff on appeal.

analysed the provision of Chapter 3, Part 4 of the BIFA and concluded that the use of mandatory and permissive language in relation to time limits was nuanced and deliberate. In my view, the use of mandatory and permissive language in relation to the obligations at s 79 of the BIFA is consistent with this. The word ‘must’ in each of s 79(2)(a) and 79(2)(c) denotes a mandatory requirement of the Act whereas, in contrast, the word ‘may’ in s 79(2)(e) is used when the applicant for adjudication in fact has a choice as to whether or not to provide submissions.

[11] The mandatory nature of the requirements at ss 79(2)(a) and (c) is not just evident from the language used, but also from the substantive meaning of these provisions. ...”

[57] Construing “the approved form” in context, it is the form approved for the purpose of the claimant applying to the registrar for an adjudication of a payment claim. Therefore, it is the document which the claimant lodges, either electronically or in hardcopy, with the QBCC to commence the process which is required to be in the approved form.

[58] Logically, this cannot be what is provided back from the QBCC registry following submission of an adjudication application. It is the adjudication application itself which is to be in the approved form.

[59] The two forms available on the QBCC website, namely the Electronic Form and the Manual Form, are for the purposes of s 79(2)(a) the “approved form”.

[60] The answer to Question 1 is no. Accordingly, for the purposes of s 79(2)(a) of the BIF Act, the QBCC PDF Form is not “the approved form” for an adjudication application.

[61] There are no agreed or direct consequences of answering Question 1 in the negative. It is a step in the reasoning, and it is necessary to go on to consider the second question.

Question 2: Did the Contractor satisfy s 79(3) of the BIF Act when it gave a copy of the QBCC PDF Form to Eastview⁸ (either on 20 February 2023 or 28 February 2023)?

[62] Section 79(3) of the BIF Act provides that a “copy of an adjudication application must be given to the respondent”. Here, it is uncontroversial that the Principal was only served with a copy of the QBCC PDF Form.⁹

[63] Question 2 therefore requires construction of s 79(3) of the BIF Act in accordance with the settled principles. The language, context, purpose and policy of the BIF Act are to be considered in the construction exercise.

⁸ Eastview Pty Ltd was superintendent appointed pursuant to the general conditions of the design and construct contract between the applicant and first respondent.

⁹ There is a dispute as to whether the QBCC PDF Form was served on 20 or 28 February 2023. This dispute is considered further in respect of Question 3.

- [64] The Principal contends that it was not given a copy of the adjudication application actually lodged by the Contractor on 17 February 2023 but rather it was given some other document. The Principal submits that s 79(3) of the BIF Act requires that a copy of the document actually lodged is provided.
- [65] The Principal submits that ‘copy’ is to be construed in accordance with its ordinary meaning to be a reproduction of the adjudication application lodged with the QBCC to initiate the adjudication process.
- [66] Reliance is also placed on the various decisions which highlight that the adjudication process under the BIF Act has been interpreted to require strict compliance. In this regard, reference is made to the reasons of Applegarth J, with whom Gotterson and Philippides JJA agreed, in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor*,¹⁰ which comment on the decision of McDougall J in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*.¹¹
- [67] Applegarth J quoted the statement of McDougall J that the legislation gives valuable advantages in relation to the enforcement of the statutory rights to progress payments but that the “availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation”.¹²
- [68] Reliance is also placed on the comments of Hammerschlag J in *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd (t/as Total Concept Group)*¹³ where his Honour observed that “[p]unctilious compliance with provisions of the Act upon which the effectiveness of the decision making process under it depends is required ...”.¹⁴
- [69] As was recognised in *Karam Group Pty Ltd as Trustee for Karam (No. 1) Family Trust v HCA Queensland Pty Ltd & Ors*,¹⁵ both the time limits and the statutory requirements are to be construed strictly, consistent with the purposes of s 3 of the BIF Act.
- [70] Consistent with these authorities, the Principal submits that the special statutory rights given to the claimant under the BIF Act require the claimant’s strict compliance with the procedures under the Act and that this is an essential feature of the regime.
- [71] Reference is also made to authorities in support of the contention that a “rigid” approach is required to the consequences of non-compliance.¹⁶ This is particularly so in relation to the requirement to give a copy of the adjudication application under s 79(3) of the BIF Act, where it has the function of informing the recipient so the recipient knows precisely where it stands at that point in time.¹⁷

¹⁰ (2019) 2 QR 190 at [12].

¹¹ (2010) 78 NSWLR 393 at [209].

¹² At [21], quoting (2010) 78 NSWLR 393 at [209].

¹³ [2017] NSWSC 194.

¹⁴ At [51].

¹⁵ [2022] QSC 290 at [45].

¹⁶ *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd* [2010] QSC 162 and *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 at [49].

¹⁷ *National Management Group Pty Ltd v Birieli Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [83].

[72] The Principal submits that on the proper construction of s 79(3) of the BIF Act, the section requires:

- (a) Compliance with the requirement to give a copy of the completed adjudication application, given this activates the statutory mechanism to determine the matters in dispute.
- (b) The document given must be a copy of the adjudication application lodged with the QBCC registry.

[73] It is submitted that a “copy” in the context of the statutory regime is not a subset or a summary of the adjudication application, nor is it part of the document lodged. This is consistent with comments in authorities including:

- (a) Ryan J in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor*,¹⁸ where the documents served dealt with the substance of the adjudication application but did not include the approved form. Her Honour concluded that in “the absence of service of the adjudication application in the approved form, the adjudicator lacked jurisdiction”.
- (b) *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd (t/as Total Concept Group)*,¹⁹ where Hammerschlag J relevantly commented:

“The use of the word *copy* in s 17(5) makes it clear that the written words which constitute the adjudication application are to be communicated to the respondent.

...

The Act contemplates that it is the same written words which are to be copied to the respondent and, for that matter, to be referred by the authorised nominating authority to an adjudicator. Compliance with this requirement is an essential preliminary for the decision making process for which the Act provides”.²⁰ (emphasis in original)

[74] Further, it is recognised in the authorities that for an adjudication to be validly undertaken, service of an adjudication application is a mandatory requirement pursuant to s 79(3) of the BIF Act.²¹

[75] Ultimately, the Principal submits that the QBCC PDF Form is not a copy of the Electronic Form²² and therefore serving the QBCC PDF Form did not comply with s 79(3) of the BIF Act.

¹⁸ [2019] QSC 91.

¹⁹ [2017] NSWSC 194.

²⁰ At [57] and [59].

²¹ *National Management Group Pty Ltd v Biriell Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 at [77] and *McCarthy v TKM Builders Pty Ltd* (2020) 5 QR 722 at [25].

²² On the facts in this case, the contractor completed the Electronic Form, not a Manual Form.

- [76] The Principal points to a number of differences between the Electronic Form and the QBCC PDF Form, including:
- (a) The QBCC Form does not identify the supporting documentation relied upon in support of the adjudication application. This information is included in a completed Electronic Form.²³
 - (b) The QBCC PDF Form does not include the information in respect of “Adjudicator Fees”, including the fees that may be payable to the nominated adjudicator. This information is included in the Electronic Form.
 - (c) The QBCC PDF Form does not include the declaration that is required to be completed by the person lodging the adjudication application. The declaration requires the person lodging the adjudication application to declare they have read and understood the application form and the attachments, that the application must be made within the prescribed timeframes and that they “must give a *full copy of this application* to the respondent” (emphasis added). The declaration is included in the Electronic Form.
- [77] The principal contends that these differences are not “trivial”, but substantive. The requirements are consistent with the purpose of the statutory scheme. In particular:
- (a) Identifying the material relied upon is critical to ensure that the recipient knows precisely where it stands at any point in time (consistent with the authorities). The Contractor relies on numerous supporting documents but these are not identifiable from the QBCC PDF Form and the Principal has no way of verifying that it has all the documents relied upon.
 - (b) As the claimant and the respondent are jointly and severally liable to pay the adjudicator’s fees and expenses pursuant to s 95(4) of the BIF Act, this is important information for a recipient to know to appreciate the potential cost liability and to make a commercial decision as to whether to pay the amount claimed or not.
 - (c) The content of the declaration serves a purpose in the statutory scheme of drawing attention to these matters at the time the adjudication application is lodged. This includes the express reference to the mandatory requirement of service of the form being completed and lodged: namely, “a full copy of this application”.
- [78] The Principal also points to some evidentiary matters in support of its contention:
- (a) The Contractor has not led evidence from the person who lodged the adjudication application.
 - (b) It can be inferred that the Contractor was able to give a copy of the Electronic Form in respect of adjudication 2246773 but did not do so.
 - (c) This can be inferred from the evidence in relation to another adjudication the Contractor commenced against the Principal, being adjudication application

²³ There is not a copy of the Electronic Form lodged by the Contractor in respect of adjudication 2246773. It can be implied from Exhibit “JRA-23” and Exhibit “RH4” that this information would appear in the completed Electronic Form.

number 2285814, where the Electronic Form and the QBCC PDF Form were served.

- [79] In these circumstances, the Principal submits that the Contractor did not comply with s 79(3) of the BIF Act and accordingly the Adjudicator did not have jurisdiction. Accordingly, it is submitted, the Purported Decision is void and liable to be set aside.
- [80] The Contractor contends that the Principal was served with a copy of the QBCC PDF Form received back from the QBCC registry and this was the same as what the adjudicator received. Further, it is submitted that the differences between the QBCC PDF Form and the Electronic Form are trivial and the QBCC PDF Form was substantially a copy of the completed lodged Electronic Form.²⁴
- [81] The Contractor also relies on several factors in support of this position:
- (a) The QBCC PDF Form was provided after completion of the Electronic Form by an email from the QBCC describing it as “a copy of your form submission”.
 - (b) The QBCC PDF Form complies with the mandated matters in s 79(2) of the BIF Act.²⁵
 - (c) If a form is not strictly complied with but otherwise satisfies what Parliament stipulated as mandatory, that is sufficient.
 - (d) The QBCC PDF Form is materially the same as the Electronic Form and the Manual Form.
 - (e) The declaration not being included is immaterial as it is not mandated by s 79 of the BIF Act and is in any event made when an application is submitted online.²⁶
- [82] The Contractor relies upon ss 48 and 48A of the AI Act in support of its submission. In particular, the Contractor submits that the deeming provision in s 48A in respect of substantial compliance is not displaced by the language of the BIF Act, when regard is had to the purpose of the BIF Act. This is so when the statutory requirements of s 79(2) are otherwise met.
- [83] Given the earlier finding in respect of Question 1, the Contractor’s submission can only be practically understood as being that if the QBCC PDF Form is not “*the* approved form”, it is nevertheless “*an* approved form”, and thereby complies with s 79(2)(a) of the BIF Act.
- [84] The difficulty with the Contractor’s approach is that it results in there potentially being multiple “approved” forms in existence at the same time. The Manual Form and the Electronic Form are in materially identical terms. In contrast, the QBCC PDF Form is in a materially different format and is missing significant portions but is said to serve the same purpose despite being created after an adjudication application is lodged. The QBCC PDF Form being an “approved form” results in a lack of precision

²⁴ *Equa Building Services Pty Ltd v KLG Trading Pty Ltd* [2021] NSWSC 1674 at [33].

²⁵ Contrary to the conclusion in respect of Question 1, the Contractor contends that the QBCC PDF Form is an approved form as it refers to s 198 of the BIF Act.

²⁶ The Contractor relies on evidence filed by the Principal in this respect: see affidavit of James Arklay affirmed 30 June 2023, Exhibit “JRA-23” at page 123.

in a statutory regime which is founded on the need for precision as to the existence of preconditions which found jurisdiction.

- [85] The Contractor’s approach also requires some of the wording of the Electronic Form²⁷ to be ignored. Page 1 of the Electronic Form states:

“...

Section 79 of the [BIF Act] requires this form to be used for lodging an adjudication application for a payment claim.

...

Also ensure that you have completed the declaration at page 7 of this form.

...

Upon lodgement of this application form you will receive a PDF version of this Adjudication Application to your nominated email address. A copy of this approved application form and all accompanying submissions MUST be given to the respondent. You may be required to provide evidence of this to the adjudicator.” (bold and uppercase in original, underline added)

- [86] The reference to “this” application and “this” application form understood in the context of s 79(2)(a) is properly construed as being the form lodged with the QBCC registry. This is confirmed by a consideration of the corresponding language in the Manual Form.

- [87] The instructions in the Manual Form are the same except there is some variation in respect of the description of what is to be given to the respondent, namely:

“A copy of this approved form and all accompanying submissions MUST be given to the respondent. The approved application form includes all seven (7) pages. You may be required to provide evidence of this to the adjudicator.” (bold and uppercase in original, underline added)

- [88] It is a copy of the completed adjudication application that must be given to the respondent. That is consistent with the construction of s 79(2)(a) of the BIF Act considered in Question 1 above.

- [89] Further, the Electronic Form refers to being emailed a “PDF version of this Adjudication Application”.²⁸ It does not describe that document as “a copy” of the adjudication application consistent with the statutory language in s 79(3) of the BIF Act. The language is consistent with the QBCC PDF Form being a different document from “this approved application form” which must be served together with all accompanying submissions.

²⁷ And the Manual Form.

²⁸ The Manual Form does not include the sentence with respect to receiving a copy of a PDF version of the adjudication application.

- [90] This is further highlighted by the language used in the declaration in both the Electronic Form and the Manual Form, namely:
- (a) The Electronic Form states:
- “I understand that I must give a **full** copy of this application to the respondent”. (emphasis added)
- (b) The Manual Form states:
- “I understand that I must give a **full** copy of this application to the respondent.
- I understand that the approved application for constitutes **all seven (7) pages of this document.**” (emphasis added)
- [91] The Electronic Form does not specify the number of pages that constitute the “full copy”. This is understandable as the data entered into the Electronic Form is likely to increase the length of the document. Further, it is also possible that printer settings may further affect the number of printed pages for the completed Electronic Form.
- [92] However, the reference to the “full copy of this application” is consistent with the application form as lodged with the QBCC registry being what is required to be served and also that substantial compliance is not sufficient.
- [93] The Contractor’s submission that substantial compliance is not inconsistent with the mandatory requirements of s 79 of the BIF Act does not give proper consideration to the term “adjudication application” in s 79(3) which builds on the definition in s 79(1) and the specific requirements in s 79(2) of the BIF Act.
- [94] “A copy of an adjudication application” in s 79(3) can only be understood to be:
- (a) the application for adjudication of a payment claim made, here by the Contractor to the QBCC registrar under s 79(1); and
- (b) in the approved form pursuant to s 79(2)(a), namely the approved form for lodgement, here the Electronic Form;²⁹ and
- (c) a “full copy” of the Electronic Form as specified in the approved form, being all completed pages of the approved form.
- [95] Giving a copy of the QBCC PDF Form does not fulfill those requirements. Specifically:
- (a) The QBCC PDF Form is not an approved form for lodging an adjudication application. If it can be described as an approved form, it is only an approved form for the “PDF version” of the adjudication application, being what was received back from the QBCC registry. That is not sufficient for s 79(2)(a). Giving a copy of the QBCC PDF Form is, in effect, giving a copy of another document, not the “adjudication application”.
- (b) The QBCC PDF Form is not a copy of the lodged application for adjudication: it is a partial copy of the document lodged with the QBCC registry.

²⁹ Or the Manual Form.

- [96] Consistent with the authorities identified above, strict compliance is required to gain the benefits of the statutory process. This is especially so at the initiation of the process. The clear purpose is to give the recipient of the adjudication application all relevant information to know precisely where it stands and to make a decision whether to maintain the dispute or to make the payment claimed.
- [97] The statutory regime in the BIF Act displaces s 48A(1) of the AI Act and substantial compliance is not sufficient. This is especially so as the adjudication application establishes jurisdiction.
- [98] Here, a copy of the same adjudication application lodged by the Contractor with the QBCC registry needed to be given to the Principal.³⁰ That was not done.
- [99] The differences between the Electronic Form and the QBCC PDF Form identified above are not trivial and the differences are such as to result in the copy of the QBCC PDF Form not being a “copy” of the Electronic Form.
- [100] The requirement of giving a full copy of the Electronic Form is possible and there is no evidence to suggest its production is onerous or time-consuming such as to make it inconsistent with the timeframes in the statutory regime.
- [101] Accordingly, the answer to Question 2 is no. The Contractor did not satisfy s 79(3) of the BIF Act when it gave a copy of the QBCC PDF Form to Eastview.
- [102] The parties have agreed that if the answer to Question 2 is no, then the Adjudicator did not have jurisdiction to decide Adjudication Application No 2246773.
- [103] It is still necessary to go on to briefly consider the balance of the questions, in case this conclusion is incorrect.

Question 3: Did the Contractor give the Principal a copy of the QBCC PDF Form on 20 February 2023?

- [104] It is not contentious that even if the QBCC PDF Form satisfies s 79(3) of the BIF Act,³¹ if the QBCC PDF Form was only given to the Principal on 28 February 2023³² then it was not served “as soon as reasonably practicable”.³³ In that case, the Adjudicator did not have jurisdiction to decide Adjudication Application No 2246773.
- [105] However, it is contentious as to whether the QBCC PDF Form was given on 20 February 2023. If the QBCC PDF Form satisfies s 79(3) of the BIF Act and a copy was given to the Principal³⁴ on 20 February 2023, the Adjudicator had jurisdiction to

³⁰ Hammerschlag J in *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd (t/as Total Concept Group)* [2017] NSWSC 194.

³¹ Contrary to the finding in respect of Question 2 above.

³² It is not contentious that the Contractor gave a copy of the QBCC PDF Form on 28 February 2023.

³³ This is the language adopted by the parties in the ‘agreed consequences of the answers to the questions for the Court’s determination’. The relevant authorities refer to ‘as soon as possible’. There is no practical difference between those terms in the circumstances where the parties agree that if the Contractor did not give the Principal a copy of the QBCC PDF Form on 20 February 2023 but on 28 February 2023 instead, then the purported adjudication application was served out of time.

³⁴ By delivering a copy to Eastview.

decide Adjudication Application No 2246773 (subject to the issue raised in Question 4).

- [106] The issue as to whether a copy of the QBCC PDF Form was given on 20 February 2023 is purely factual. The Claimant says a copy was in the box of documents served on 20 February 2023 and the Principal says it was not.
- [107] The onus of proving a jurisdictional fact is on the Principal as the applicant.³⁵ Practically, the onus is on the Principal to prove on the balance of probabilities that the QBCC PDF Form was not included in the box of documents served on 20 February 2023.
- [108] The onus becomes particularly relevant if the evidence is so finely balanced that it is impossible to decide whether it is more probably than not that the QBCC PDF Form was in the box of documents served.
- [109] The Principal contends that the QBCC PDF Form was not included in the box of documents served in respect of Adjudication Application No 2246773.³⁶ The Principal relies on evidence of employees of Eastview, Mr Goldman, Ms Gossner and Mr Coleman, as well as an affidavit from James Arklay, solicitor for the Principal.
- [110] The Contractor contends that the QBCC PDF Form was included in the box of documents served and relies on evidence of Mr Smith, commercial director (Queensland), who printed documents and placed them in a box and then served the box on Eastview.
- [111] The Adjudicator had received evidence and submissions in respect of this issue. The Adjudicator had determined that the QBCC PDF Form was given on 20 February 2023,³⁷ but that was on the basis of the limited evidence not tested by cross-examination.
- [112] There are a number of facts which are not in dispute, namely:
- (a) On 20 February 2023, the Contractor purported to serve two adjudication applications on Eastview's offices in two separate boxes, being:
 - (i) Adjudication Application No 2246773 (the subject of this application); and
 - (ii) Adjudication Application No 2246875.
 - (b) The box in relation to Adjudication Application No 2246773 contained approximately 730 loose pages, being a cover page, submissions and a paginated bundle compiled in the order of the pagination.³⁸ The paginated bundle contained a copy of the documents relied upon by the Contractor in respect of Adjudication Application No 2246773.

³⁵ *SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307 at [39] (Bond J, as his Honour then was). See also *National Management Group Pty Ltd v Birieli Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219 (Wilson J).

³⁶ On the same day a second box was also served in respect of another adjudication application.

³⁷ See paragraphs commencing at [33] of the Adjudicator's reasons for the Purported Decision at Exhibit "JRA-22" of the affidavit of James Arklay affirmed 30 June 2023.

³⁸ Exhibit "KG-4" to affidavit of Karen Gossner affirmed 30 June 2023, pages 274-1005.

- [113] The issue to be determined is whether a copy of the QBCC PDF Form was included in the box, together with the paginated bundle.
- [114] The evidence relied upon by the Principal includes:
- (a) Mr Goldman's evidence, which included:
- (i) He is the managing director of Eastview and has been in that role for 20 years.
 - (ii) On 20 February 2023, he was at the Eastview office and Ms Gossner told him that Mr Smith was there to see him. He went out to reception to meet Mr Smith.
 - (iii) Two boxes were on the reception desk and after some small talk with Mr Smith, Mr Smith asked him to sign a letter acknowledging receipt of the boxes. He signed two copies of the letter, giving one to Mr Smith and keeping one copy.
 - (iv) That occasion was the first time that Eastview had received a copy of an adjudication application.
 - (v) Mr Smith lifted the lids on the boxes to show the contents and Mr Goldman glanced at the first page only. Mr Goldman did not look through the boxes at reception.
 - (vi) Mr Smith left and Mr Goldman and Mr Coleman carried the boxes to a spare table which was about four metres away from Ms Gossner's desk.
 - (vii) Mr Goldman briefly looked at the documents and saw that it was a "claim against No 6" and it had "all of their documents with it", including the building contract. He checked the numbers and letters on the lid.
 - (viii) He did not get the documents out of the box. He rifled through the box to see the extent of it. He did not read the documents at the time.
 - (ix) He asked Ms Gossner to scan the documents and send them to Mr Hawkins, the general counsel of the Principal. Ms Gossner was not to send the whole bundle as the contract was too big to scan.
 - (x) He denied "fanning" the documents out for Ms Gossner on the table. Rather, he simply said to scan everything except the building contract, as Mr Hawkins had a copy of that.
 - (xi) Ms Gossner scanned the parts of the bundles she was asked to scan and sent them to Mr Hawkins. Further, Ms Gossner scanned all the documents and saved them to the server. She then couriered the boxes to McCullough Robertson.
 - (xii) After asking Ms Gossner to scan the documents, he left the area and did not take part in the scanning of the documents.
- (b) Mr Coleman's evidence, which included:
- (i) He is a project manager for Eastview.
 - (ii) On 20 February 2023, boxes were delivered to the Eastview reception.

- (iii) He walked out and met Mr Smith, who had placed the boxes on the reception desk. There was writing on an A4 page on the lids of the boxes.
 - (iv) He does not recall the boxes being opened while they were on the reception desk.
 - (v) Mr Smith gave Mr Goldman a letter to sign, which Mr Goldman signed. He cannot recall how many copies there were. Mr Goldman gave a copy to Mr Smith.
 - (vi) He and Mr Goldman carried the boxes inside to a spare desk.
 - (vii) He opened the box in front of him, being the box he had carried, and checked the numbers on the top of the lid matched the page on the top of the pages inside the box. He did not lift the pages out of the box. He put the lid back on.
 - (viii) Mr Goldman asked Ms Gossner to come over to the table and while she was on her way over, Mr Coleman then moved back to his workstation which was around the corner.
- (c) Ms Gossner's evidence, which included:
- (i) She is the office manager for Eastview.
 - (ii) On 20 February 2023, she met Mr Smith in the reception area and Mr Smith asked for Mr Goldman or Mr Coleman. She went and got them and did not go back to reception at that stage.
 - (iii) She has worked at Eastview for 16 years. She had never seen an adjudication application before then and did not know what an adjudication application looked like.
 - (iv) She saw Mr Goldman and Mr Coleman go out to reception.
 - (v) A bit later, Mr Goldman and Mr Coleman carried two boxes to a spare desk in the office area near Ms Gossner's desk.
 - (vi) The spare desk was approximately four meters from her desk and there was a photocopier two metres in front of her desk. There was a partition between her desk and the spare desk.
 - (vii) Ms Gossner did not see Mr Goldman and Mr Coleman look through the bundles because of the partition. The partition meant that Ms Gossner could see them but could not see what they were doing, so she did not know if they looked through the boxes at that stage.
 - (viii) Mr Goldman asked Ms Gossner to come over to the table and she was asked to scan the documents in the boxes. Mr Goldman did not want her to scan the whole bundle because of the size limitations and because they were to be emailed to Mr Hawkins, the general counsel of the Principal.
 - (ix) Mr Goldman took the documents from the boxes and identified the parts for her to scan by "fanning", but not separating, the documents out so she knew what not to scan. It was "like an overlapping fan of sections". The parts she was not to scan was the building contract, because Mr Hawkins already had a copy of that.

- (x) She scanned the bundles, taking approximately 100 pages at a time from the table to the photocopier and returning the part once it had been scanned.
 - (xi) After she had scanned the documents, she then recompiled the bundles.
 - (xii) She emailed the scanned documents to Mr Hawkins at about 10.13 am, noting that the contracts were not included.
 - (xiii) At 10.32 am, Mr Hawkins emailed to ask: "... was there an adjudication application form also included?"
 - (xiv) She replied: "No, just the covering letter" approximately one minute later. Her response was based on her knowing she had sent him everything apart from the contract. The only thing she did not send to him was the construction contract.
 - (xv) Later that day, Mr Hawkins asked her to courier the two boxes to McCullough Robertson, which she arranged.
 - (xvi) Prior to the two boxes being collected by the courier, she scanned a full copy of everything in the two boxes, including the contracts, and saved them as two single PDFs on Eastview's server.
 - (xvii) The two boxes were collected to be delivered to McCullough Robertson.
 - (xviii) She scanned everything apart from the contract the first time and the second time she scanned everything. She did not see how the application forms could have been misplaced in the course of the process. She took a bundle at a time to the copier, which was not far from the spare desk, scanned the particular section, put it back on the table which had nothing on it apart from the documents she was scanning, and would return the bundle so that everything stayed in the same order.
- (d) Mr Arklay's evidence³⁹ included:
- (i) On the morning of 20 February 2023, Mr Hawkins of the Principal informed him that two adjudication applications had been served on Eastman's offices.
 - (ii) He requested that the boxes of documents be delivered by courier to McCullough Robertson's offices in Brisbane.
 - (iii) In the afternoon of 20 February 2023, two boxes containing documents were delivered to McCullough Robertson's offices.
 - (iv) He inspected the documents in the two boxes and could not locate an adjudication application form in either of the two boxes.⁴⁰
 - (v) He arranged for all documents in the two boxes to be scanned. The scanned copy of the documents in the two boxes does not contain an adjudication application form for either Adjudication Application No

³⁹ Affidavit only. Mr Arklay was not cross-examined.

⁴⁰ That is, no copy of a Manual Form, an Electronic Form or a QBCC PDF Form was located in either of the two boxes.

2246773 (the subject of this application) or Adjudication Application No 2246875.

- [115] The Principal submits that for the Contractor's evidence to be accepted the Court has to find that:
- (a) Ms Gossner misplaced or removed the four-page QBCC PDF Form from each of the two boxes delivered, being eight pages in total; and
 - (b) Those eight pages ended up somewhere out of the sight of Ms Gossner, Mr Goldman and Mr Coleman.
- [116] The Principal submits that this is inherently unlikely.
- [117] The Contractor relies upon Mr Smith's evidence, including:
- (a) He had been involved in seven adjudications under the BIF Act and previous versions of the legislation.
 - (b) He has an interest in the adjudication process and regularly reads published decisions.
 - (c) He had written an internal email a few days earlier that care needed to be taken with uploading documents through the portal and what is sent to the Principal.
 - (d) He did not upload the adjudication application or the supporting submissions and attachments online at the QBCC portal. That was done by Greg Sneedon.
 - (e) Mr Sneedon uploaded attachments in about six parts. He knew this as he was sitting next to Mr Sneedon when he did this.
 - (f) On 20 February 2023, he went to the contractor's office at Southport to print the following documents for each adjudication application:
 - (i) a covering letter;
 - (ii) a covering page;
 - (iii) the QBCC application form; and
 - (iv) the supporting documents, being submissions and material in about six parts.
 - (g) There were over 1000 pages for the two adjudication applications.
 - (h) He sent two documents to the printer at a time and then collated them.
 - (i) There was no one else at the office as he was there "first up". It took him no more than half an hour to print all the documents for the two adjudication applications.
 - (j) The documents for Payment Claim 6 were all in one spot. The same folder that was uploaded by Mr Sneedon was what was printed out. There were about six PDF attachments all in order in the one folder.
 - (k) The covering letter was also printed out. It was a standalone document.
 - (l) There was also a covering page that had the application number on it and he printed two copies: one for the lid of the box and one for the top of the file.

- (m) The application form that he received from Mr Sneedon was saved in the same folder.
- (n) He placed the bundle of documents for each adjudication application in two separate cardboard boxes and affixed the A4 cover page to each box with the relevant adjudication number.
- (o) The documents were not bound or clipped. The pages were loose but collated in order of the pagination. The pagination was done as part of the PDF process and the six parts were paginated as one document. The pagination was done by external legal counsel who were in the office at the time, prior to the documents being uploaded to the adjudication portal.
- (p) The supporting documents lodged with the QBCC came from the same folder that he printed from: they were dragged and dropped into the QBCC portal.
- (q) He printed the paginated supporting documents from the native folder, not from what was submitted to the QBCC.
- (r) He carried the two boxes to his vehicle and drove to Eastview's office at Broadbeach.
- (s) He carried the two boxes to the Eastview reception area and placed the boxes on the front desk and rang the bell.
- (t) Ms Gossner greeted him and he told her that he had some adjudication for Mr Goldman. Ms Gossner left to get Mr Goldman.
- (u) Mr Goldman and Mr Coleman met Mr Smith in the reception area. Mr Smith lifted the lids of the two boxes to show there was paper inside. Mr Smith asked for a confirmation of delivery letter to be signed, which Mr Goldman did.
- (v) He did not show Mr Goldman or Mr Coleman the four-page adjudication application.
- (w) Mr Smith then left the Eastview office.
- (x) He denied forgetting to collect the four-page adjudication application from the printer and also denied forgetting to print it and include it.

[118] The Contractor contends that on the Principal's evidence, the chain of custody of the boxes and their contents demonstrates that the application forms could have been misplaced. In contrast, Mr Smith knew the importance of proper service on the Principal and was the sole person responsible for printing, collating and serving the boxes.

[119] Further, the Contractor submits that the resolution of Question 3 does not require a detailed analysis of the credit of the witnesses. That is, they are all most likely telling the truth but the answer lies in "human frailty". Ultimately, the Contractor contends that it is more likely than not that the copies of the two QBCC PDF Forms were misplaced in the handling of the documents by the Eastview employees, rather than Mr Smith.

- [120] The Principal ultimately submits that:
- (a) The Contractor did not put it to the Principal's witnesses that the QBCC PDF Form was on top of the bundle of documents in the boxes. Nor did Mr Smith give evidence of where in the boxes the QBCC Forms were located.
 - (b) If the QBCC PDF Forms had been in the boxes, Ms Gossner's recollection was that she had scanned approximately 100 pages at a time and no documents were misplaced on the table where she was working during the scanning process.
 - (c) To conclude that the pages were misplaced, it requires the conclusion to be reached that the same four pages were misplaced from the two boxes. That is, eight pages out of approximately 1100 pages.
 - (d) Mr Smith located documents on a computer, sent them to a printer, collected documents from the printer and then placed them in the two boxes.
 - (e) It is significantly less likely that the same four pages from each box were misplaced, than a failure to include the four pages in each box in the first place.
- [121] All of the witnesses gave evidence to the best of their recollections. Ms Gossner's and Mr Smith's evidence was the most relevant.
- [122] Ms Gossner was a believable witness. Her evidence was credible and methodical. While she no doubt appreciated that it was important whether the four-page adjudication applications were in the box, she did a procedural task and her evidence went to how she completed that task.
- [123] The effect of Ms Gossner's evidence can be understood simply as: she was given a bundle of pages and she scanned all the bundle except for one part. Then she scanned the entire bundle. If the four-page QBCC PDF Form had been provided, it would have been in either the first or the second scan. It was not.
- [124] Ms Gossner's evidence was she could not see how any pages were misplaced in the process she undertook.
- [125] In contrast, the evidence of Mr Smith is that he printed for each of the two applications the paginated bundles of supporting documents which were in about six parts and which comprised over one thousand pages and were saved in a folder⁴¹ on the server. He also printed multiple copies of the covering letters and the covering pages for the lid of the box and top page of each box.
- [126] Mr Smith's evidence was that the QBCC PDF Forms that had been emailed to Mr Sneedon were also saved in the electronic folder. He printed each of these four-page documents and put them into the boxes. Mr Smith denies printing but not collecting the two four-page documents from the printer.
- [127] While Mr Smith understood the importance of the documents being included, that alone does not satisfactorily answer the likelihood of those pages being included in the boxes.

⁴¹ It is not clear on the evidence whether there were two electronic folders (one for each adjudication application) or whether the documents for both adjudication applications were saved into the one electronic folder.

- [128] The supporting documents were prepared in advance and paginated for the purpose of uploading to the QBCC portal. The QBCC PDF Forms were emailed to Mr Sneedon and Mr Smith says they were saved into the electronic folder. There was no verifying evidence of this, such as a screen shot of what was in the folders of documents he printed. Mr Smith's evidence was also not clear on who had saved the QBCC PDF Forms into the relevant folder.
- [129] The question comes down to what is more likely than not on the evidence.
- [130] Given that the only pages missing from the two boxes are the two four-page QBCC PDF Forms, I find that it is very unlikely that those eight pages were misplaced as part of the scanning process undertaken by Ms Gossner. It is too coincidental that out of the approximately 1100 pages that were in the two boxes, those precise eight pages are missing.
- [131] If the scanning process was flawed, then equally, pages from the paginated bundle should be missing, particularly as this was done in parts excluding the contract in the first scanning process.
- [132] Given that the two QBCC PDF Forms were each separate four-page documents and given the volume of printing being done by Mr Smith, it is more likely that the QBCC PDF Forms were either not printed or were misplaced in the printing process.
- [133] The paginated bundles were in about six parts and needed to be assembled into the paginated order once printed. Mr Smith's evidence is that he was printing two parts at a time. Even if the QBCC PDF Forms were saved into the electronic folder or folders, they would need to be separately "clicked on" and printed. If they were not in fact saved into the folder or folders with the paginated supporting documents, the emails that Mr Sneedon received from the QBCC registry would need to be located and the attachments printed.
- [134] The fact that both QBCC PDF Forms are missing and are the only pages missing, is more consistent with those documents not being included in the boxes that were served on Eastview.
- [135] In these circumstances, I find that it is more probable than not that the two QBCC PDF Forms were either not printed or were misplaced as part of the printing process and consequently, the respective QBCC PDF Forms were not in the two boxes when they were served on 20 February 2023.
- [136] To the extent necessary to support these findings, I prefer the evidence of Ms Gossner over that of Mr Smith.
- [137] Accordingly, the answer to Question 3 is no. The Contractor did not give the Principal a copy of the QBCC Form on 20 February 2023.
- [138] The agreed consequence is that Adjudicator did not have jurisdiction to decide Adjudication application No 2246773 because the Adjudication Application was not served "as soon as reasonably practicable".⁴²

⁴² This is the language adopted by the parties in the 'agreed consequences of the answers to the questions for the Court's determination'. The relevant authorities refer to 'as soon as possible'. There is no practical difference between those terms in the circumstances where the parties agree that if the

[139] It is necessary to go on to briefly consider the balance of the questions, in case I am wrong in this conclusion.

Question 4: Was Payment Claim No 6 a valid payment claim, having regard to s 68(1)(a) of the BIF Act?

[140] Question 4 relates to an alternative basis relied upon by the Principal to establish that the Adjudicator did not have jurisdiction. It is entirely separate from the subject matter of Questions 1, 2 and 3.

[141] Section 68 of the BIF Act provides:

68 Meaning of payment claim

“(1) A *payment claim*, for a progress payment, is a written document that—

- (a) identifies the construction work or related goods and services to which the progress payment relates; and

...” (emphasis in original)

[142] In *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors*⁴³ Brown J considered whether the adjudicator’s decision was void because the payment claim failed to identify the construction work for which the progress claim related with sufficient particularity to satisfy the requirement in s 17(2) of the *Building and Construction Industry Payments Act 2004 (Qld) (BCIP Act)*.⁴⁴

[143] In that case the payment claim was a one-page document with six columns, listing the categories of work and a corresponding percentage of each category of work claimed to have been completed. No further particulars were provided to describe the works carried out, nor any supporting documentation.

[144] Brown J concluded in respect of the particular format of the payment claim that providing the percentage of work carried out in total was not sufficient to reasonably identify the construction work in respect of the claim.⁴⁵

[145] Further, her Honour commented:

“[50] ... An applicant is not required to explain in every detail the means by which a particular item has been calculated.⁴⁶ Whatever the approach used, the payment claim must reasonably purport to identify the work done.

[51] The Task required is not an onerous one that requires particularity or precision, but it does require some description which identifies the work done.

Contractor did not give the Principal a copy of the QBCC PDF Form on 20 February 2023 but on 28 February 2023 instead, then the purported adjudication application was served out of time.

⁴³ [2019] QSC 178.

⁴⁴ The equivalent section to s 68(1) of the BIF Act.

⁴⁵ At [37].

⁴⁶ *T & M Buckley P/L v 57 Moss Road P/L* [2010] QCA 381 at [38].

[52] To be a valid claim, a payment claim must reasonably identify the construction work to which it relates, such that the basis of the claim is reasonably comprehensible to the applicant,⁴⁷ or to ‘enable the recipient to understand the basis of the claim’.⁴⁸ The reason this is so was succinctly identified by Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*⁴⁹ in relation to the similar legislation in Victoria, where he stated:

‘...a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. ...’.”

[146] Brown J concluded that the principal could not ascertain with sufficient certainty the work to which the claim related and it had not been identified in a reasonable way. In respect of the comprehensibility of the payment claim, her Honour stated:⁵⁰

“... There is no description of the work which is the subject of the claim. References to the total percentages of work claimed to date and the amount the subject of the claim does not sufficiently identify the work done. It is possible that [the principal] may have been able to determine what part of the work is being claimed out of the percentage by engaging in a process of reconstruction based on previous claims and amounts paid. However, as White J said in *Neumann Contractors*, a payment claim which requires such an exercise would be contrary to the Payments Act, in circumstances where the payment schedule is required to be provided within 10 days of receipt of the payment claim under s 18. In that case, her Honour found a payment claim ... was not a valid payment claim, because it required the principal to engage in a careful analysis of the schedule exhibited to the summary setting out the work which was undertaken and marry that work with the amounts payable on the progress certificates to arrive at the outstanding items.⁵¹”

[147] Further, Brown J observed at [64]:

“... Whatever form of claim a claimant chooses to adopt, it must identify in a reasonable way the construction work to which the claim relates. While the purpose of the scheme is to permit the quick resolution of payment claims, the claimant must at least be reasonably comprehensible, to permit the respondent to respond within the time frame provided under the Act. ...”

⁴⁷ *T & M Buckley P/L v 57 Moss Road P/L* [2010] QCA 381 at [38].

⁴⁸ *T & M Buckley P/L v 57 Moss Road P/L* [2010] QCA 381 at [36], referring to Santow JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462 at [47]-[48], referring to Hodgson JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364 at [25].

⁴⁹ [2008] FCA 1248 at [12], referred to in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17 at [28].

⁵⁰ At [63].

⁵¹ Citing *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17 at [29].

- [148] In that case, the payment claim did not satisfy s 17(2)(a) of the BCIP Act and consequently, jurisdiction error was established.
- [149] In this case, the Principal submits that Payment Claim 6 is similar in a number of respects to the payment claim considered by Brown J in *KDV Sport*, including:
- (a) The “Progress Claim Breakdown” identifies the total claimed for Payment Claim 6. The tables which follow include the percentage of work performed in respect of the categories of work.
 - (b) The actual work performed is not described.
 - (c) Payment is sought for the percentage of the category of work said to have been performed in the period.
 - (d) Payment Claim No 6 relates to a period when demolition work was being carried out on site.
 - (e) There is no way for the Principal to know by inspecting the site the work claimed to have been performed by consultants in the preceding month, for example, by the architect.
 - (f) Another example is the item “*AI. Windows/Shopfronts/Glazing/Louvre Screens*” where 0 per cent is recorded against the item but \$80,000.00 is claimed. No supporting documentation was provided. Further, given the relevant stage was demolition works, windows would not be required for delivery for two years.
 - (g) The payment claim has to satisfy the requirements of s 68 of the BIF Act when it is served and cannot be saved by the subsequent provision of information. This is consistent with the need for commercial certainty and the parties knowing where they stand at any given point in time.
 - (h) Payment Claim 6 also includes preliminaries and it is not clear how they arise.
- [150] The Contractor in response submits:
- (a) The question is to be determined objectively.⁵²
 - (b) The background knowledge of each of the parties is to be taken into account, derived from their past dealings and exchanges of documentation.⁵³
 - (c) Errors or inaccuracies in the payment claim, will rarely if ever, provide a basis for not meeting the statutory requirement.⁵⁴
 - (d) The exercise does not involve a “full investigation of all the facts and circumstances” in hindsight, which results in some work not being identified. Rather, the test is whether the claim in a reasonable way identifies the work in respect of which the claim is made.⁵⁵

⁵² *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17 at [25]; *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178 at [15]-[18].

⁵³ *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17 at [25], referring to *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in Liq)* (2005) 64 NSWLR 462 at [48].

⁵⁴ *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178 at [17].

⁵⁵ *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178 at [17].

[151] The Contractor’s response includes:

- (a) In payment schedule 6, Eastview assessed the amount payable in respect of the architect item and the “*AI. Windows/Shopfronts/Glazing/Louvre Screens*” item as nil on the basis that the costs were not substantiated or ‘no entitlement as works not undertaken’. The Contractor relies on this response as indicating that the items were objectively understood.
- (b) The background knowledge of the parties derived from past dealings and exchanges of information provides a foundation for concluding that s 68 is satisfied.
- (c) In respect of the Architect item:
 - (i) An invoice was provided following a request on 2 February 2023. Previous payment claims had included similar amounts for this item and no concerns were raised.
 - (ii) The PCG Reports for November and December 2022 set out the architectural work undertaken in those months. The design meeting minutes for 23 January 2023 record a discussion about architectural issues.
 - (iii) Annexure Part P to the contract between the parties contains a total amount in respect of this item, which is included in the payment claim.
- (d) In respect of item “*AI. Windows/Shopfronts/Glazing/Louvre Screens*”:
 - (i) An invoice was included from a façade design and construction subcontractor.
 - (ii) The PCG Report for November 2022 includes that Façade meeting and engineering were continuing. Further, a representative of the subcontractor attended the meeting on 23 January 2023 and the minutes show that relevant issues were discussed.

[152] The contentions of the parties in respect of Question 4 further evolved at the hearing. Ultimately, after the conclusion of the hearing the Principal provided a schedule of the items identified as not being sufficiently identified for the purposes of s 68(1)(a) of the BIF Act. This was marked Exhibit 4 in chambers. The schedule of items identified by the Principal is as follows:

	Item	Amount Claimed	
Consultants			
	Architect	\$40,000	
	Structural Engineer		
	• Building Permit	\$40,656.25	
	• Basement Propping Design	\$10,000	
	• Construction Phase	\$5,000	
	Geotechnical Engineering		
	• Piling Platform Design	\$5,400	
	• Design Responses	\$4,000	
	General Consultants		
	• Vibration Monitoring	\$3,600	

Trade Works			
4	Basements Retention System		
	<i>Contract Works</i>		
	• Offsite Material Payment – Steel Beams	\$780,000	
	• Preliminaries	\$220,000	
	• Design	\$150,000	
12	AI. Windows / Shopfronts / Glazing / Louvre Screens		
	<i>Contract Works</i>		
	• Façade – Phase # 1 Early Design	\$80,000	

[153] The first issue is whether regard can be had to information provided after the payment claim. The Principal contends that information provided after the payment claim should not be considered. The Contractor contends that where there is a practice between the parties of provision of information after the payment claim, as in this case, then that position should be departed from and regard can be had to that information.

[154] The decision of Basten JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*⁵⁶ is relevant to this issue. At [42] his Honour stated:

“... the claim, to be valid, must be reasonably comprehensible to the other party. **If the entitlement does not arise absent the supply of supporting documentation, then the claim must be accompanied by that documentation, unless it has already been provided.** ... the claim should assert, in full, the factual basis upon which it is made, **including the provision of documents where necessary**, whereas the reliance on a relevant contractual provision may be dealt with by way of submissions, if the matter comes before an adjudicator. ...”
(emphasis added)

[155] Consistent with this decision, additional information provided after the delivery of Payment Claim 6 should not be considered. Accordingly, documents or information provided after delivery of Payment Claim 6 are excluded from consideration, whether provided in person, electronically by email or added to a Dropbox.

[156] This is relevant here, as some relevant documents were provided after the delivery of Payment Claim 6. However, if they cannot be objectively shown to have been provided before the delivery of Payment Claim 6, they are not to be considered.

[157] The Contractor also relies on previous practice as a basis for information supplied after the delivery of Payment Claim 6 to be considered. This contention is not put on the basis of an estoppel and really can only be understood as being a submission that it was accepted in the past without complaint, so it should happen again. But that does not address whether there is a principled basis for consideration of the information. It is not an answer that it simply occurred before.

⁵⁶ [2005] NSWCA 229.

- [158] I do not accept the submission that previous practice⁵⁷ is sufficient to found a basis to consider additional information provided after the delivery of Payment Claim 6. It is contrary to the reasoning in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* and may lead to commercial uncertainty, contrary to the purpose of the statutory scheme.
- [159] Accordingly, whether s 68(1)(a) of the BIF Act is complied with is to be considered in light of information and material provided at the time of delivery of Payment Claim 6.
- [160] A second issue is whether substantial compliance with s 68(1)(a) of the BIF Act is sufficient for validity. This includes consideration of the amounts involved in respect of the identified items. If “big ticket items” are adequately described, on this approach the payment claim would be valid in its entirety. However, if the items that are not sufficiently described add up to a substantial amount of the total claimed in the payment claim, then the payment claim would be invalid.⁵⁸
- [161] The Contractor contends that substantial compliance is open based on the decisions of Bond J, as his Honour then was, in *EHome Construction Pty Ltd v GCB Constructions Pty Ltd*⁵⁹ and Hodgson JA, with whom Mason P and Giles JA agreed, in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport and Anor*.⁶⁰
- [162] Bond J in *EHome Construction Pty Ltd v GCB Constructions Pty Ltd* commented on alternative arguments not determinative of that proceeding as follows:

“... even if there were a flaw in a payment claim in that it claimed something that could not be advanced as part of the payment claim, because the majority of the payment claim was for things that plainly could be claimed for in a valid payment claim, the payment claim still could be appropriately characterised as such. I think that proposition is correct.

Acceptance of that proposition means that even if I am wrong in the hypothesis that the claim for retention monies can be regarded as a valid payment claim, I would still reach the conclusion that the payment claim should be properly characterised as a valid payment claim because the claim for retentions represented only a relatively small proportion of the payment claim.”⁶¹

- [163] Hodgson JA in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport and Anor* starts the consideration by identifying the basis and essential requirements for an adjudicator’s determination.⁶² This includes service of a payment claim. His Honour then identifies some more detailed requirements, including as to the content of payment claims.

⁵⁷ Without more.

⁵⁸ For example, if the basements retention system is not sufficiently particularised then the Payment Claim would be invalid as it is a substantial component of the total amount claimed.

⁵⁹ [2020] QSC 291.

⁶⁰ (2004) 61 NSWLR 421.

⁶¹ At page 7.

⁶² At [53].

[164] Relevantly, Hodgson JA then observes at [54]:

“... A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator’s determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination.”

[165] His Honour concluded that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination. That is, “[w]hat was intended to be essential was compliance with the basic requirements...”.⁶³

[166] As was ultimately submitted by the Contractor at the hearing, this issue comes down to a matter of degree. There are a wide range of possible contents of payment claims and where on the spectrum Payment Claim 6 sits is relevant. Factually, Payment Claim 6 contains more details than the payment claim considered by Brown J in *KDV Sport*. The Principal has identified a number of items where it is alleged the particulars are insufficient. But are these deficiencies such as to result in the entire Payment Claim 6 losing its characterisation as a payment claim?

[167] In the particular factual circumstances of this case, the items identified by the Principal as being insufficiently particularised as required by s 68(1)(a) of the BIF Act fall within one or more of the following categories:

- (a) No description or identification of the actual work undertaken.
- (b) Not supported by information or material provided at or prior to the delivery of Payment Claim 6.
- (c) Not supported by background knowledge of the parties through past dealings and exchange of information.

[168] While there is objectively some information in respect of these items, it falls short of what is required to comply with s 68(1)(a) of the BIF Act. The recipient could look through a multitude of documents and the construction program and various minutes to try to piece together the information relevant to the claimed amount and the work undertaken in the relevant period. However, that is inconsistent with the purpose and intent of the statutory regime.

⁶³ At [55].

[169] White J, as her Honour then was, had to consider a similar outcome in *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Limited*⁶⁴ and referred to the observations of Daubney J in *Baxbex Pty Ltd v Bickle*⁶⁵ that:

“... precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute”.⁶⁶

[170] White J went on to conclude:

“In order ... to decide whether it should respond it would need to engage in a careful analysis of the schedules exhibited to the summary set out the work which was undertaken under the contract over some 25 pages and marry the work with the amounts paid on the progress certificates and arrive at the outstanding items. Requiring a respondent to a payment claim to undertake that kind of research which would be subject to error and within the time constraint of 10 days under the *Payments Act*⁶⁷ leads me to conclude that the payment claim does not identify the construction work to which that claim relates and does not fulfil the requirements of s 17(2) of the *Payments Act*.”

[171] Those comments equally apply here. It is evident that a significant degree of analysis would be required in respect of the identified items, including piecing together information from multiple sources. A payment claim is part of a process for quick determination and payment of claims. The regime requires the Principal to be able to understand the payment claim and respond to it promptly. The level required is not onerous but does require a level of precision and particularity. Both are lacking here in respect of the identified items.

[172] Given the monetary amounts involved in respect of the identified items, the issue of substantial compliance does not need to be definitively determined. As a result of the identified items not being sufficiently particularised, Payment Claim 6 is substantially non-compliant with the requirements of s 68(1)(a) of the BIF Act. Accordingly, Payment Claim 6 was not a valid payment claim.

[173] In the circumstances, the answer to Question 4 is no. Payment Claim 6 was not a valid payment claim having regard to s 68(1)(a) of the BIF Act.

[174] The agreed consequence is, subject to the answer to Question 5 below, the Adjudicator did not have jurisdiction to decide the Adjudication Application No 2246773.

[175] Accordingly, it is also necessary to consider Question 5 below.

⁶⁴ (2011) 1 Qd R 17.

⁶⁵ [2009] QSC 194.

⁶⁶ Quoting McDougall J in *Isis Projects v Clarence Street* [2004] NSWSC 714 at [36] and Palmer J in *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140 at [76].

⁶⁷ BCIP Act, s 18(4)(ii).

Question 5: If the answer to 4 is no, can the severance power contained in s 101(4) of the BIF Act apply to sever from the adjudication decision the parts of Payment Claim 6 which do not satisfy s 68(1)(a) of the BIF Act?

[176] Section 101(4) of the BIF Act states as follows:

- “(4) If, in any proceedings before a court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator’s decision under this chapter is affected by jurisdictional error, the court may—
- (a) identify the part affected by the error; and
 - (b) allow the part of the decision not affected by the error to remain binding on the parties to the proceeding.”

[177] The Contractor contends that if Payment Claim 6 did not sufficiently identify the construction work or related goods and services in respect of the identified items, then the Court should sever those items from the Purported Decision and allow the balance to remain binding on the parties.

[178] The Contractor relies upon the reasoning of Bond J in *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd*⁶⁸ at [82] to [85] in support of this submission. Part of this reasoning includes the following comments:

“[83] ... Section 101(4) is not materially different in form to its statutory predecessor, s 100(4) BCIPA. The power there expressed was first introduced to the BCIPA in 2014. Prior to such a power being conferred on the Court, the identification of jurisdictional error resulted in the invalidity of the entire decision. The conferral of power on the Court was a response by the legislature to the perceived injustice of that outcome. In my view, s 101(4) of the Payment Act should be construed beneficially to ensure that the mischief to which it was directed is remedied.

[84] The result of the foregoing is that s 101(4) should be construed as impliedly conferring on the Court the power to make such orders as are reasonably required or legally necessary to achieve the outcome of allowing the part of an adjudicator’s decision not affected by jurisdictional error to remain binding on the parties to the proceeding. The remedial nature of the power suggests that a beneficial approach should be taken to the determination of what is reasonably required or legally necessary in order to allow a relevant part of an adjudicator’s decision to remain binding.”

[179] In that case, specific parts of the adjudicator’s decision affected by jurisdictional error by the adjudicator were severed, with the balance of the adjudicator’s decision remaining binding on the parties.

⁶⁸ (2020) 4 QR 410.

- [180] Counsel on behalf of the Contractor acknowledges that Bond J did not agree with the contention that s 101(4) applied in *EHome Construction Pty Ltd v GCB Construction Pty Ltd*⁶⁹ but submits that the comments can be distinguished from the current case.
- [181] It is submitted that *EHome Construction Pty Ltd v GCB Construction Pty Ltd* concerned whether the inclusion of retention moneys in a payment claim meant that it was not, in truth, a payment claim. The Contractor submits that is different from what is being considered here, where a payment claim claims for construction work but insufficiently describes aspects of that construction work.
- [182] The Principal submits that s 101(4) of the BIF Act cannot be deployed in the way contended for by the Contractor. That is, the section only permits the Court to sever that part of the adjudication decision not affected by jurisdictional error. Where there is no payment claim which complies with the BIF Act, then the adjudicator did not have jurisdiction to make a determination at all. The Principal contends that is the case here and there is nothing that can be severed.
- [183] Further, the Principal submits that the decision in *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* is an example of where jurisdictional error arose as a result of the adjudicator's reasoning. That is fundamentally different to what is being considered here.
- [184] The Principal also points to the other decision of Bond J in *EHome Construction Pty Ltd v GCB Construction Pty Ltd*⁷⁰ as supporting the conclusion that s 101(4) cannot assist where the jurisdictional error is based on an invalid payment claim.
- [185] In *EHome Construction Pty Ltd v GCB Construction Pty Ltd*, his Honour considered an alternative argument in respect of s 101(4) after finding that the inclusion of a retention amount did not make the payment claim invalid. His Honour commented:⁷¹

“There was another alternative argument advanced by counsel for the respondent as a fallback (that I would not accept), and that was the reliance on s 101(4) of BIFA ...

The proposition was that if there was error, only a part of the adjudicator's decision was affected by error. But logically, if – and this is a proposition I reject – the inclusion of a claim for something that cannot be the subject of a payment claim did mean that **the payment claim could not be validly regarded as a payment claim, then that error would infect the entirety of the adjudicator's decision and no part of it could be resurrected by operation of s 101(4).**” (emphasis added)

- [186] Applying this reasoning to the current facts, the finding that Payment Claim 6 does not satisfy the requirements of s 68(1)(a) of the BIF Act means that there is no payment claim to enliven the adjudicator's jurisdiction, such that the entirety of the adjudication decision is infected and there can be no severance.

⁶⁹ [2020] QSC 291.

⁷⁰ [2020] QSC 291.

⁷¹ At page 7.

- [187] Section 101(4) of the BIF Act has application where an adjudicator makes a jurisdictional error as part of the process of undertaking the adjudication. However, that is fundamentally different from where the precondition for jurisdiction of a valid payment claim is not met.
- [188] The Contractor's basis for submitting that *EHome Construction Pty Ltd v GCB Construction Pty Ltd* can be distinguished on the characterisation of the payment claim is not maintainable in light of the reasons expressed in respect of Question 4 above. It is not merely that there is a "payment claim which validly claims for construction work but which insufficiently describes aspects of that construction work."⁷² In the current case, it goes to the validity of the payment claim and consequently to the jurisdiction of the adjudicator in its entirety.
- [189] Accordingly, the comments of Bond J in *EHome Construction Pty Ltd v GCB Construction Pty Ltd* do apply here and severance under s 101(4) of the BIF Act cannot be deployed to salvage part of the Purported Decision of the Adjudicator.
- [190] The answer to Question 5 is, therefore, no. The severance power in s 101(4) of the BIF Act does not apply in the circumstances to sever from the Purported Decision the parts of Payment Claim 6 which do not satisfy s 68(1)(a) of the BIF Act.

Orders

- [191] In the Originating Application, the Principal sought orders including:
- (a) Pursuant to s 10 of the *Civil Proceedings Act* 2011 (Qld), or in the inherent jurisdiction of the Court, Adjudication Decision number 2246773 made by the Second Respondent on 9 June 2023 be set aside or declared void for want of jurisdiction.
 - (b) The First Respondent be permanently restrained from enforcing or seeking to enforce Adjudication Decision number 2246773.
- [192] The submissions of the parties did not address whether permanent injunctive relief was necessary or appropriate where a purported decision is void for jurisdictional error.
- [193] In the circumstances, in light of the above reasons, it is appropriate to make the declaration sought in the Originating Application and to hear further from the parties in respect of whether any further orders are appropriate in the circumstances and as to costs.
- [194] Accordingly:
1. Pursuant to section 10 of the *Civil Proceedings Act* 2011 (Qld), THE COURT DECLARES THAT adjudication decision number 2246773 purportedly made by

⁷² As contended by the Contractor.

the Second Respondent on 9 June 2023 pursuant to the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) is void and is set aside.

2. THE COURT DIRECTS THAT the parties file and serve submissions of no more than 4 pages on whether any further orders are appropriate and costs by 29 January 2024.

ANNEXURE A

SUPREME COURT OF QUEENSLAND

REGISTRY: **BRISBANE**NUMBER: **7004/23**

Applicant: **IRIS BROADBEACH BUSINESS PTY LTD AS TRUSTEE
FOR THE IRIS BROADBEACH BUSINESS TRUST
(ACN 651 719 603)**

AND

First Respondent: **DESCON GROUP AUSTRALIA PTY LTD
(ACN 625 771 075)**

AND

Second Respondent: **TRACEY WOOD (ADJUDICATION REGISTRATION NO.
J15008724)**

**The Applicant's and First Respondent's agreed definitions, agreed list of questions
and other agreed matters**

Agreed definitions

1. "Manual Form" means the form that is exhibit "BJF-101" (pages 8 to 14) to the affidavit of Benjamin James Forshaw (Court Document No. 32). The parties agree that the Manual Form was not purported to be served by the First Respondent on 20 February 2023.
2. "Electronic Form" means the form that a claimant completes when lodging an adjudication application online, via the QBCC website, as appears at exhibit "JRA-23" (pages 99 to 124) to the affidavit of James Raymond Arklay (Court Document No. 14), a completed version of which (in respect of payment claim 7) appears as exhibit "RH4", pages 14 to 40 to the affidavit of Rod Hawkins (Court Document 17). The parties agree that the Electronic Form was not purported to be served by the First Respondent on 20 February 2023.
3. "QBCC PDF Form" means the form that the First Respondent contends that it delivered to Eastview on 20 February 2023, as appears at exhibit "GG-11" (pages 78 to 81) to the affidavit of Graham Goldman (Court Document No. 15).
4. "Payment Claim No. 6" means the document which appears as exhibit "AR-2" (pages 4 to 14) to the first affidavit of Andrew Robinson (Court Document No. 18).

Agreed questions for the Court's determination

1. Is the QBCC PDF Form an "approved form" for the purposes of s 79(2)(a) *Building Industry Fairness (Security of Payment) Act 2017* (Qld)?

2. Did the First Respondent satisfy s 79(3) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) when it gave a copy of the QBCC PDF Form to Eastview (either on 20 February 2023 or 28 February 2023)?
3. Did the First Respondent give the Applicant a copy of the QBCC PDF Form on 20 February 2023?
4. Was Payment Claim No. 6 a valid payment claim, having regard to s 68(1)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)?
5. If the answer to question 4 is no, can the severance power contained in s 101(4) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) apply to sever from the adjudication decision the parts of Payment Claim 6 which do not satisfy s 68(1)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)?

Agreed consequences of the answers to the questions for the Court’s determination

1. The parties disagree about the consequences of the answer to this question.
2. If the answer to question 2 is “no”, then the Second Respondent did not have jurisdiction to decide Adjudication Application No. 2246773.
3. If the answer to question 3 is “no”, then the Second Respondent did not have jurisdiction to decide Adjudication Application No. 2246773 because the Adjudication Application was not served “*as soon as reasonably practicable*”.⁷³
4. In respect of question 4, if the answer to the question is “no”, then subject to the answer to question 5, the Second Respondent did not have jurisdiction to decide Adjudication Application No. 2246773.
5. The parties disagree about the consequences of the answer to this question.

Questions which are not agreed but in respect of which the parties made submissions

1. Was the QBCC PDF Form the “adjudication application” which was submitted by way of application to the Registrar under s.79(1) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) by the First Respondent on 17 February 2023?

⁷³ This is the language adopted by the parties in the ‘agreed consequences of the answers to the questions for the Court’s determination’. The relevant authorities refer to ‘as soon as possible’. There is no practical difference between those terms in the circumstances where the parties agree that if the Contractor did not give the Principal a copy of the QBCC PDF Form on 20 February 2023 but on 28 February 2023 instead, then the purported adjudication application was served out of time.