And section 84 Adjudication Decision: 547655

(Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator	:	Chris Lenz (J622914)
Application Details		
Claimant		
Name	:	Jackson Semler Pty Ltd
ACN/ABN	:	ABN 20 093 846 925
Address	:	122 Walker Street, TOWNSVILLE CITY 4810
Respondent		
Name	:	Roman Catholic Trust Corporation for the Diocese of Townsville
ACN/ABN	:	ABN 87 601 738 685
Address	:	2 Gardenia Avenue, KIRWAN QLD 4817
Project		
Type	:	Building Upgrade
Location	:	Southern Cross Catholic College in Annandale in QLD
Payment Claim		
Date	:	8 May 2019
Amount	:	$1,292,971.58 (exc GST)
Nature of claim	:	Complex
Payment Schedule		
Date	:	None given
Amount	:	
	:	
Application Detail		
Application Date	:	10 July 2019
Acceptance Date	:	19 July 2019
Response Date	:	5 August 2019
Claimants reply:	:	
Extension of Time	:	5 September 2019

Adjudicator's Decision		
Jurisdiction	:	NO
Adjudicated Amount	:	
Due Date for Payment	:	
Rate of Interest	:	
Claimant Fee Proportion (%)	:	50
Respondent Fee Proportion (%)	:	50
Decision Date	:	23 August 2019

Contents

A. DECISION

I have decided under the *Building and Construction Industry Payments Act 2004* ("BCIPA"), and in respect of the claimant's payment claim, that:

- I do not have jurisdiction to decide the dispute;
- the parties are liable to pay the adjudication fees in the proportions,

as shown on the first page of this decision.

B. REASONS

I. Background

1) Jackson Semler Pty Ltd (referred to in this adjudication as the "claimant") was engaged by the Roman Catholic Trust Corporation for the Diocese of Townsville (referred to in this adjudication as the "respondent"), to carry out a major upgrade to the Southern Cross Catholic College including construction of new buildings, extension and upgrade of other buildings constituting the "work".
2) The parties entered into a contract on or about 21 May 2018 (the "contract").
3) On 8 May 2019 the claimant submitted its payment claim for $1,422,268.74 including GST to the respondent.
4) The respondent did not provide a payment schedule.
5) The claimant lodged its adjudication application on 10 July 2019 for $1,422,268.74 including GST.
6) I was appointed as the adjudicator by the QBCC and accepted the appointment on 19 July 2019.
7) On 5 August 2019, I received the respondent's response to the adjudication application in which it challenged my jurisdiction to adjudicate the matter on the following three bases:
   a) a valid payment claim had not been given (the "payment claim objection");
   b) the adjudication application was invalid because it was not accompanied by the fee prescribed by regulation (the "fee objection");
   c) if I found jurisdiction, some of the claims remained without jurisdiction because they were claims for damages (the "damages objection").
8) On 8 August 2019, after having considered the respondent's jurisdictional submissions, I decided that as a matter of natural justice, the claimant be given the opportunity to make submissions, so in accordance with s84(2)(b) of the *Building Industry Fairness (Security of Payment) Act 2017* (BIF):
   a) I requested submissions from the claimant in response by 13 August 2019; with
   b) submissions in response from the respondent by 16 August 2019.
9) Both parties provided submissions within the time requested.
10) Given that I had lost adjudication time whilst waiting for the submissions, I requested an extension of time of 7 business days to make the decision, which was granted by both parties.
11) This allowed me until 5 September 2019 to decide the matter.

II. Material considered regarding jurisdiction

12) I received 13 electronic folders in the *adjudication application* from the Registrar.
13) The respondent provided 29 pages of submissions dealing with jurisdiction on 5 August 2019.
14) In response at my request, on 13 August 2019 the claimant's solicitors provided me with 12 pages in reply addressing the respondent's jurisdictional objections as well as providing two attachments regarding authority about variations.
15) In reply, on 16 August 2019 the respondent provided me with five pages of submissions.

III. Consideration of the jurisdictional submissions

16) As I have already stated, there were 3 jurisdictional submissions raised by the respondent.
17) I did not consider it appropriate to have regard to the damages objection because such an objection could only be considered once I had jurisdiction. I therefore did not consider that objection any further.
18) I then reviewed the two other objections. I listed the key points regarding the payment claim objection but decided that the fee objection required closer evaluation before delving further into the merits of the payment claim objection, because it appeared prima facie to involve a jurisdictional fact.
19) The fee objection required interpretation of the operation of BIF and its Regulations, which meant the application of statutory interpretation principles.
20) I considered that this statutory interpretation question needed to be considered first, because if I upheld the fee objection, then there was no utility in also considering the validity of the payment claim objection.
21) Nevertheless, I identify the payment claim objection in summary first.

A. Payment claim objection

22) This was the first objection raised by the respondent and initially turned on whether the *payment claim* which was submitted was:
    a) a "claim for progress payment"; or
    b) a "claim for progress payment" and a "payment claim to the owner".
23) The respondent asserted that it was the former, this meant a *payment claim* to the owner had never been made.
24) Its alternative argument was that if I considered it to be the latter, then the relevant *reference date* for the *payment claim* had not yet arisen.
25) The respondent also identified another objection, which was that the payment claim did not identify the construction work.
26) The payment claim objection was deferred until consideration of the fee objection.

B. Fee objection

Key facts

27) This objection focused on the following facts:
    a) The claimant's adjudication application was for $1,422,268.74 including GST.
    b) The claimant paid an adjudication fee of $995.58 through the electronic lodgement process at the QBCC.
    c) The QBCC electronic lodgement form automatically calculated the fee at .07% of the amount claimed because it was above the amount of $1,065,600, which was the threshold where the last of the fixed fees applied.
    d) Schedule 2 of the current *Building Industry Fairness (Security of Payment Regulation 2018* (the "Regulations") identifies the fees for an application over $1,065,600 as .7% of the progress payment amount up to a maximum of $5866.70 (which is the published Regulation in force from 1 July 2019).

Legal issues

Summary of the respondent's submissions

28) In short compass, the respondent argued that the claimant had not paid the fees as prescribed by Regulation in breach of s79 of BIF which provided:

"s79(2) An adjudication application –
(a) must be in the approved form; and…
(d) must be accompanied by the fee prescribed by regulation for the application…"

29) At paragraph 71 of the respondent's jurisdictional objections, it argued that given that the quantum of the claim is $1,422,268.74 including GST, the requisite fee was .7% of the payment claim amount up to a maximum of $5866.70. It added that the maximum fee was then the prevailing fee, and given that amount had not been paid, the adjudication application was invalid, and I was therefore without jurisdiction to proceed under section 88 of BIF.
30) Before delving further into the details of the respondent's submissions which follows below, it was useful to identify the claimant's submissions in reply so that the precise issue in contest could be identified.

The claimant submissions in reply

Threshold objection to the respondent being entitled to make any jurisdictional submissions

31) The claimant firstly argued that the respondent was not entitled to make submissions about jurisdiction at all because s82(2) of BIF expressly prohibited an adjudication response if the respondent had not provided a payment schedule.
32) It argued that the case of *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 65 relied upon by the respondent was not good authority because there was no equivalent of s82 of BIF in the previous legislation. It added that explanatory notes provided in the second and third reading of the Bill supported the claimant's position.
33) It went further and said that the respondent's failure to provide a payment schedule and then follow up with submissions ostensibly relating to jurisdiction, but going further into the merits of the dispute, was contrary to the quick and efficient resolution of disputes.
34) It's final argument in relation to the threshold question was that *Watkins* (which had been decided before the introduction of BIF) which was authority regarding the question of whether an adjudicator could consider "new reasons" and was not whether they had jurisdiction. In *Watkins* the respondent had put in a payment schedule which had broadly raised the issue of jurisdiction, whereas in this adjudication the respondent had not done so.

Submissions in response to the fee objection

35) In response to these submissions, the claimant identified the points that had been conceded by the respondent in its submissions being:
    a) the fee of $995.58 had been accepted by the Registry with the application;
    b) the fee was .07% of the amount of the progress claim sought in the payment claim;
    c) the fee was consistent with the scale of fees shown in the form S79 – Adjudication Application as well as with the fee calculated by the electronic adjudication application form which is automatically populated;
    d) the fee is consistent with that the fee prescribed by the predecessor Regulations under the *Building and Construction Industry Payments Act 2004* (QLD);
    e) the Regulations prescribed the fee for a progress claim amount of more than $1,065,600 as .7% of the payment claim amount up to a maximum of $5866.70;
    f) the prescribed fee was anomalous in that a payment claim for progress payment of more than $1,065,600 was $7459.20, that is the prescribed rate will always exceed the maximum fee and therefore served no purpose.
36) The claimant then went on to say that there was no material before me to support the respondent's reliance on various policy documents supporting the assertion that it was the deliberate intention of Parliament to apply a rate that served no purpose.
37) The claimant then made the following additional submissions:
    a) it was patently apparent the prescribed fee did not serve any purpose, and that the Regulations should be read and interpreted in the correct form; that is by applying a rate of .07%, to best achieve the purpose of BIF;
    b) if the Regulations were interpreted in the manner suggested by the respondent, it resulted in an inconsistency between the Approved Form and the Regulations; which resulted in
    c) an inconsistency between s79(2)(a) and s79(2)(d);

d) the electronic adjudication application form automatically populated the amount and was unable to be amended, which meant that for payment claims above $1,065,600 there could not be compliance with s79(2)(a) and s79(2)(d) of BIF unless .07% of the value of the payment claim was equal to or more than $5866.70;
e) the rate included as part of prescribed fee did not further the purpose of BIF, or serve any purpose at all, and created an inconsistency between the Regulations and the prescribed form and BIF itself;
f) therefore, the Regulation should be read and interpreted in the correct form by applying a rate of .07%;
g) it was within my jurisdiction to form a conclusion of my obligations under S 84(2)(a) and with the prescribed matters under section 88(1) and 88(2) of BIF;
h) the claimant should not be disadvantaged by an error in the calculation of the prescribed fee in the online prescribed form administered by the Adjudication Registrar, because unless the fee was paid as demanded by the Registry in the online form, the claimant would have been denied the opportunity to lodge any application at all which could not be the intent of BIF or the Regulation.

The issues to be decided

38) Whilst it is necessary to delve further into the submissions made by the respondent to decide this matter, it appears that the contest is that:
a) the QBCC's approved application form and the online calculator both prescribed a fee of .07% for an adjudication application amount of more than $1,065,600, which is not to exceed $5866.70;
b) this fee identified by the QBCC Registry on its approved application form and the online calculator is not in accordance with the fee prescribed by regulation which is .7% of the adjudication application amount of more than $1,065,600.

39) **Accordingly, the issue that I have to decide is whether by applying the principles of statutory interpretation, I may lawfully decide that the regulation amount for the fees of .7% in all of the circumstances is incorrect and that its rate should be .07%.**

IV. Decision on jurisdiction

May I consider the respondent's submissions to jurisdiction at all?

40) With respect to this threshold submission, I have considered the respondent's submissions that I am obliged to consider submissions in relation to jurisdiction and those of the claimant opposing such an approach.
41) The claimant stated at paragraph 1.3 of its submissions that there was no equivalent provision to section 82 of BIF in the previous legislation, and s82 expressly prohibits the respondent from giving an adjudication response.
42) Whilst this is strictly correct, the previous legislation, section 24 of the *Building and Construction Industry Payments Act 2004* (BCIPA) referred to an entitlement of a respondent to give an adjudication response, if it had served a payment schedule within the time required.
43) In that sense, the issue of the inability to provide reasons, unless expressly provided in the previous legislation, has always been a live one, but it is not really material to me making a decision.
44) The claimant did not engage with the respondent's assertion that my jurisdiction arises under s84(2)(a)(i) and not under s88(2) of BIF, which was the point identified by Brown J at paragraph [77] of *Watkins*. Bearing in mind it was dealing with BCIPA, it is useful to extract what His Honour said at this paragraph:

> *"The question of jurisdiction is different from the decision required to be made pursuant to s 26 of the Act, which is predicated on jurisdiction already having been determined. The demarcation between a decision as to jurisdiction and the adjudication decision itself is apparent in s 35 of the Act. A decision as to jurisdiction is not confined to the matters in s 26(2) of the Act."*

45) With the greatest respect, it appears to me that His Honour meant s25 of BCIPA, not s35, which dealt with adjudicator's fees, but the point is clear. Adjudication procedures as to jurisdiction are different from the adjudicator's decision, and that remains the case with BIF.
46) I characterise the respondent's submissions as those going to my jurisdiction under s84 of BIF and not as an adjudication response under s82. Clearly the respondent is prevented from providing an adjudication response under s82 because of its failure to provide a payment schedule. The respondent does not deny such prohibition.
47) It is not clear from the claimant's submissions how the operation of s82 influences the procedures in s84. s82 refers to an *adjudication response*, which strictly is not even referred to under s84.
48) s84 requires me to decide an *adjudication application* [s84(1)(a) of BIF] and then sets out in s84(2)(a) that I must decide jurisdiction and whether the application is frivolous or vexatious.
49) To my mind in having to consider jurisdiction, it is a standalone provision that only refers to the adjudication application. In deciding about jurisdiction to decide on an adjudication application, it may can be convenient if submissions were contained in an adjudication response, however, I find there is no express requirement for a respondent to do so.
50) It is useful to return to *Watkins* because at paragraph [75] His Honour said this, and I emphasise the critical sentence:

> *Although the detailed argument as to the terms of the contract and the termination of the contract were not raised until the payment schedule, the payment schedule had stated that the contract had been terminated and that there was no "reference date" to support the payment claim made by Hyatt. The "new reasons" were in fact an elaboration of those matters already raised.* ***In any event the "new reasons" were submissions directed at jurisdiction and even if they had not been raised in the payment schedule, I consider that section 24(4) of the Act did not apply and the adjudicator was required to consider them***.

51) s24(4) of BCIPA provided that, "*If the adjudication application is about a standard payment claim, the adjudication response cannot include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant*."
52) Therefore, under the old legislation, this case is authority that such jurisdictional submissions, which may not have been raised in the payment schedule, and therefore prohibited in a response, had to be considered by an adjudicator.
53) I therefore find I'm obliged to consider the respondent's jurisdictional objections and turn to the fee objection.

Fee objection

54) This is a most unfortunate position for the claimant, because on the evidence, and as conceded by the respondent, the claimant has complied in every respect with the QBCC Registry requirements.
55) It was entitled to lodge its adjudication application electronically, and the adjudication fee was automatically calculated by the online calculator, and it was calculated at .07%, and the claimant paid the amount of $995.58.
56) s3(2) of BIF deals with one of the main purposes of the Act by:

> *"(c) establishing a procedure for—*
>
> *(i) making payment claims; and*
>
> *(ii) responding to payment claims; and*
>
> ***(iii) the adjudication of disputed payment claims;*** (my emphasis) *and*
>
> *(iv) the recovery of amounts claimed"*

57) The essence of this argument is that if the correct fee rate is .7%, then compliance with the online prescribed form precluded the claimant from being able to make an adjudication application at all. The claimant argued this could not be the intent of BIF or the Regulation.
58) The claimant submitted that it was within my jurisdiction and my obligations under s84(2)(a) and s88(1) & (2) of BIF to interpret the Regulation as applying the rate of .07% because that best serves the purposes of BIF.

59) Whilst this argument is superficially compelling, an adjudicator's functions, which are administrative in nature, are confined by BIF. s84(2)(a) requires adjudicators to consider whether they have jurisdiction, but in doing so, an adjudicator must follow the applicable principles in law to do so.
60) In this context, the fact that a claimant may be denied the right to make an adjudication application if it follows the approved form, because that form incorrectly calculates the fee, cannot be the starting point of the statutory interpretation journey.
61) It is a most unfortunate outcome and may be a factor for consideration at some point, but before doing so, it is necessary to objectively apply statutory interpretation.
62) s79(2)(a) and (d) of BIF identify the key requirements for an adjudication application which is in contest in this case.
63) s79(2) states that the adjudication application:
    a) **must be** in the approved form; and
    d) **must be** accompanied by the fee prescribed by regulation for the application.
64) The claimant has complied with (a), but not (d), if I find that the Regulation provides a fee rate of .7%.
65) The upshot of the respondent's argument in a contest between these two subsections is that the Regulation must prevail over the approved form. The key submissions in this matter are now extracted.
66) At paragraphs 99 to 101 of its submissions the respondent submitted:

> *"[99] The issue cannot be decided on the facts of the Approved Form having been used, the fee as calculated therein having been paid, the application having been accepted, and then it being referred by the Registrar to the Adjudicator. It must be considered and decided in terms of the difference between the Approved Form published by the QBCC and the Regulations Schedule 2 as to the relevant fee payable, and the fact that the fee actually paid is less than that which should have been paid as prescribed by the Regulations. As previously noted, in the case of an inconsistency, the Regulations must prevail.*
> *[100] In turn that leads to a consideration of that which is required as part of the procedure of applying for adjudication of a payment claim under s79 of BIFA, and in particular the relevance of s79(2)(d) wherein it is stated in mandatory language that the application must be accompanied by the fee prescribed by regulation for the application. That is the relevant question to be answered is - 'What happens if an amount less than the prescribed fee has been paid'.*
> *101. In considering this question and finding the answer to it, the difference between mandatory and directory provisions and the rules of statutory interpretation arising from Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 must be considered. The Adjudicator must not decide the question of jurisdiction on what he considers the legislature intended Schedule 2 to be.* ***He must apply the legislation, and in turn the Regulations, strictly.*** (My emphasis)

67) The respondent then referred to *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91, where Ryan J was considering an adjudicator's jurisdiction under the previous legislation, and Her Honour held that *Project Blue Sky*[1] and *Chase*[2] were to be followed.
68) The claimant did not directly engage with these submissions which went directly to the appropriate authorities to follow in considering this important statutory interpretation question. I find that I am obliged to accept those submissions and am required to consider the principles in *Project Blue Sky* and *Chase* to properly interpret BIF in the Regulation.
69) The fact that *Niclin* was considering a jurisdictional question under s79(3) and not s79(2) of BIF, does not detract from it being authority binding an adjudicator in considering their jurisdiction.
70) *Project Blue Sky* which was considering a protocol between Australia and New Zealand to allow the New Zealand film and television industry to compete equally with Australia's industry. The dispute was whether an Australian standard was inconsistent with that protocol and this

[1] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355
[2] *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190.*

required statutory interpretation. McHugh, Gummow, Kirby and Hayne JJ, after explaining that the earlier statutory interpretation approach about consideration of whether a provision was *mandatory* or *directory*, held at paragraph [93] that:

> *"A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".*

71) At paragraph 107 of the respondent's submissions, despite extracting this portion of the judgement as being the correct test, the respondent then went back to refer to the mandatory versus directory distinction and explained that the fee prescribed by regulation was mandatory and then extracted what the Court had said at [92] that "***Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition.***"
72) A return to the mandatory versus directory distinction was precisely what the High Court was saying earlier in [93] as having outlived its usefulness, but it remains useful.
73) The test to be applied, according to the High Court, is discerning the *purpose of the legislation* as a whole and then enquiring whether an act done in breach of that requirement is invalid.
74) s14A(1) of the *Act's Interpretation Act 1954* requires one to consider what best serves the *purpose*?
75) This is not an easy question because by following the approved form, the claimant has not paid the prescribed fee. Essentially, there is a contest between the approved form and the Regulation.
76) In grappling with this question, I considered whether, having regard to the statute as a whole, which better serves the purpose of BIF:
    a) an act done in breach of the approved form; or
    b) an act done in breach of the Regulation?
77) This appears to bring one to a contest as to which instrument is superior?
78) Schedule 2 of BIF defines ***"approved form*** as a form approved by the chief executive or the commissioner under section 198.
79) s198 of BIF provides:

    "198 Approved forms

    (1) The chief executive or commissioner may approve forms for use under this Act."
80) I referred to [93] of the respondent's submissions that the *approved form* is not an instrument under the *Statutory Instruments Act 1922*.
81) I reviewed this legislation and s7, the definition of statutory instrument, and I could not find that the form fell within the definition. The closest appeared to be a rule and in my view that is not a form.
82) The claimant did not engage with the respondent on this important point. I am obliged therefore to accept the respondent's argument [94 of the submissions] that if there is an inconsistency between the approved form and the Regulation, the Regulation must prevail.
83) At paragraph 3.2(f) of its submissions, the claimant echoed the respondent's submissions at paragraph [83] that the .7% identified in the Regulation served no purpose because .7% of a progress claim of more than $1,065,600 is $7459.20, such that the maximum fee of $5866.70 would always be exceeded.
84) In the circumstances it would appear that the Regulation rate of .7% is incorrect and that the rate of 0.07% on the approved form is correct.
85) The significant difficulty with which I am confronted is that in order to allow the adjudication process to proceed, I would have to find that a form which has no legislative power can prevail over a Regulation that is quite specific about the percentage fee payable.
86) The difference between the two percentages is one order of magnitude, that is between .07% and .7% which is significant.
87) The reason why one provision must prevail over the other is that in the current application, it is only possible for both provisions to be satisfied if the s79(2)(d) Regulation fee requirement is found to be .07% instead of .7%. to comply with the approved form.
88) It is not possible to satisfy s79(2)(d) because the fee below the Regulation fee has already been paid and the application lodged.

89) I find that s79(2)(a) and (d) of BIF are both procedural requirements which was the case in *Chase*.
90) Whilst the High Court has preferred the moving away from the mandatory versus directory distinction in analysing the meaning of the statute, it is fair to say that both s79(2)(a) & (d) of BIF use the word *must*, which I find in context is mandatory.
91) The reason why I consider that it is mandatory is that it is the foundation of an entire adjudication process, which is the final step in the path of having a third-party decide an interim payment dispute. It is certainly not the end of the parties' rights to go elsewhere to have their dispute determined finally, but in this limited jurisdiction, the adjudication process, once activated, provides a decision about jurisdiction and merits.
92) The purpose for s79 is it to "get the show on the road" or "start the journey".
93) As I said, s79(2)(a) and (d) of BIF are both procedural requirements to start the adjudication journey. That is their purpose, which the High Court now prefers.
94) Turning to paragraph [113] of the respondent's objections, the respondent refers to *Chase,* and Spigelman CJ's very useful analysis [40] to [48], which refers to not only *Project Blue Sky*, but another decision of *Woolworths,* [3] and His Honour firstly focused on the *first textual indicator* that is always of significance in statutory interpretation being the mode of expression of the element directly in issue, and the particular "element under consideration". It is necessary to extract precisely what His Honour said because it assists in the decision on jurisdiction.
95) In *Chase* the element under consideration was "*cannot be made unless*," and it is useful to analyse the two elements under consideration in this adjudication of the two subsections as follows:
    a) s79(2)(a) "must be in the approved form"
    b) s79(2)(d) "must be accompanied by the fee prescribed by regulation for the application".
96) At paragraph [42], Spigelman CJ then referred to the *second aspect* which must be taken into account, in addition to the text, is the structure of the legislative scheme. He went on to say there were two particularly relevant considerations in that case:
    a) *first*, the point in time in the decision-making process at which the element under consideration occurs;
    b) *secondly*, the treatment of time limits in the scheme as a whole, and went on to say [43]: *"With respect to the first aspect, it is particularly relevant that the element occurs at the application stage of the decision-making process. It does not involve consideration of matters which can arise during the course of the decision-making process itself. A traditional formulation of the relevant distinction is whether the relevant element is "a fact to be adjudicated upon in the course of inquiry" as distinct from an "essential preliminary to the decision -making process".*
97) At [44] His Honour added:

> *"As I pointed out in Woolworths v Pallas Newco:*
>
> > *"[47] The word 'preliminary' does not, in this context, refer to a chronological sequence of events, but to matter that is legally antecedent to the decision-making process … [48] The extrinsic or ancillary or preliminary nature of the relevant fact makes it more likely that the fact is jurisdictional."*

98) The claimant did not directly engage with the respondent's submissions on this point, and this appears to be the nub of the issue regarding jurisdiction.
99) The "horse has bolted" in that the approved form which did not allow for the prescribed fee to be paid has been sent to an adjudicator. In order to facilitate the adjudication process which is clearly one of the main purposes of BIF [s3(2)(c)(iii)], there is a temptation for an adjudicator to read down the statute and, incorrectly in my view, to classify the procedural requirements as directory, even though the High Court does not like this mandatory versus directory distinction to colour the analysis.
100) To do so, in my view would be contrary to the overwhelming authority provided by the respondent. I consider that the incorrect fee is a fact essentially a fact that is essentially preliminary to the decision-making process, or antecedent to it, as Spigelman held.

[3] *Woolworths Limited v Pallas Newco Pty Ltd* [2004] NSWCA 422; (2004) 61 NSWLR 707 at [46]-[49].)

101) The non-compliance with s79(2)(d) is a fact legally antecedent to the decision-making process and also a fact of an extrinsic, ancillary or preliminary nature *because it occurred before the adjudication process engaged*.

102) I am persuaded by [118 and 119] of the respondent's submissions, without any contrary submissions from the claimant on this aspect, that non-compliance with s79(2)(d) is *a jurisdictional fact*.

103) The submissions [119] referred to McDougall J's observations in Chase about a *jurisdictional fact* at paragraph [164]:

> *"164 A "jurisdictional fact" is, in general terms, "a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question" (Gedeon v Commissioner of the New South Wales Crime Commission (2008) 236 CLR 120 at 139[43])."*

104) Returning to *Niclin*,[4] Her Honour found McDougall J's [209] statement of the law in *Chase* of assistance and persuasive which said:

> *"The Security of Payment Act gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payment, the Security of Payment Act lays down clear specifications of time* ***and other requirements to be observed****.* (my emphasis) *It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation."*

105) When McDougall J [214 & 215] in *Chase* weighed up the competing submissions regarding whether to allow the adjudicator's decision to stand on the basis that jurisdiction was established against setting it aside, His Honour identified the two competing consequences, which are summarised, as follows:

a) a respondent would be exposed to substantial adverse consequences where notice was not given of an adjudication application; as against
b) where work was continuing, the claimant may include the amount of the payment claim in the next payment claim, and the right to payment of the claimant amount is not lost but postponed for a short while, which is not too high a price for a claimant pay to have access to the benefits of the legislation.

106) In carrying out this balancing exercise, I appreciate that the absence of a jurisdictional fact has not been caused by any failure of the claimant, and in that sense, it has been exposed to a jurisdictional objection about which it had no control. In Chase, the claimant had control over service of the adjudication application.

107) I have found in paragraph 2.3 of the applicant's adjudication application submissions that work is continuing on the project, which *Chase* found compelling and persuasive.

108) Although it was no fault of the claimant, as a matter of fact, the appropriate fee had not been paid, and an adjudicator with limited statutory administrative powers, does not in my mind have jurisdiction to engage with the material and find jurisdiction where none exists.

109) To find jurisdiction would just expose the parties to unnecessary expense in having a decision overturned in the Supreme Court, in circumstances where after very careful deliberation and canvassing of the authorities and the competing submissions, I consider that no jurisdiction can exist for me to proceed any further.

110) There is no utility for me, and I indeed have no power to, consider the payment claim objection.

111) Accordingly, under section 84(2)(a) of BIF, I find I do not have jurisdiction to adjudicate the matter.

112) I will ensure that the Registrar is advised of the inconsistency between the approved form in the Regulation, so that this anomaly can be remedied so that these drastic consequences arising out of this situation is corrected as soon as possible.

V. Adjudicator's fees

113) The default provision contained in s95(5) of BIF makes the parties liable for the adjudicator's fees in equal proportions, unless I decide otherwise.

114) I have found no jurisdiction to adjudicate this matter.

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[4] *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91 page 15, line 37

115) However, this finding emerged through no fault of the applicant which had submitted its application online to the QBCC Registry. The online calculator had incorrectly calculated the fee prescribed by regulation, which the applicant paid, and the application was filed.
116) The respondent had not provided a payment schedule. I did not consider the issue whether the payment claim was valid, so I did not make a finding whether or not the respondent's submission was correct that a payment schedule was not necessary because the payment claim was invalid.
117) Nevertheless, the jurisdictional point upon which the respondent succeeded was a technical matter that it was able to raise because of the error in the QBCC Registry calculator.
118) Having regard to section 96(vii) of BIF, where I can consider any other matter relevant, I consider the claimant's conduct was quite proper and it is been a technicality arising out of something through no fault of its own that has enabled the respondent to succeed in its jurisdictional objection.
119) On balance, in my view, there is no need to exercise my discretion to alter the default position that each party share 50% in my fees and that is my finding.

Chris Lenz

Adjudicator

Date: 23 August 2019