

SUPREME COURT OF QUEENSLAND

CITATION: *Karam Group Pty Ltd as Trustee for Karam (No. 1) Family Trust v HCA Queensland Pty Ltd & Ors* [2022] QSC 290

PARTIES: **KARAM GROUP PTY LTD AS TRUSTEE FOR
KARAM (NO. 1) FAMILY TRUST**
ABN 47 512 325 943
(applicant)
v
HCA QUEENSLAND PTY LTD
ACN 629 849 814
(first respondent)
**ADJUDICATION REGISTRAR (QUEENSLAND
BUILDING AND CONSTRUCTION COMMISSION)**
(second respondent)
GABRIEL GALLO
ADJUDICATOR REGISTRATION NO. J1061234
(third respondent)

FILE NO/S: BS No 11883 of 2022

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 16 December 2022

DELIVERED AT: Brisbane

HEARING DATE: 31 October 2022; 1 November 2022

JUDGE: Williams J

ORDER: **1. Pursuant to section 10 of the *Civil Proceedings Act* 2011 (Qld), THE COURT DECLARES THAT:**

- a. The adjudication decision dated 25 August 2022 and issued 26 August 2022 (First Decision); and**
- b. The amended adjudication decision dated and issued 30 August 2022 (Second Decision),**

purportedly made by the Third Respondent (registered adjudicator J1061234) pursuant to the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) in Adjudication Application QBCC 1305793 are void and are set aside.

2. **THE COURT ORDERS THAT the First Respondent pay to the Applicant the sum of \$1,821,891.26 that being the amount determined as due and payable pursuant to the Second Decision, paid by the Applicant to the First Respondent as a result of the Second Decision plus interest in the amount of \$35,213.09.**
3. **THE COURT DIRECTS THAT the parties file and serve submissions on costs of no more than 3 pages by 3 February 2023.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the principal entered a construction contract with the Contractor for the construction of a residential building – where the Contractor served a payment claim in the amount of \$7,838,688.92 – where the Superintendent (on behalf of the Principal) issued a payment schedule in the amount \$1,554,407.04 – where the Contractor lodged an adjudication application – where the Principal challenges the adjudicator’s decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – FAILURE TO OBSERVE A STATUTORY PROCEDURE – where the adjudicator decided an adjudication application on 25 August 2022 – where the adjudicator did not notify the parties that they had reached a decision until 26 August 2022 – where the time for making a decision under the BIF Act was midnight on 25 August 2022 – whether the purported decision of the adjudicator is made out of time and therefore void and should be set aside

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – APPROPRIATE FORM OF RELIEF – DISCRETION OF COURT – OTHER CASES – where an adjudicator’s decision under the BIF Act is void – whether the Court has discretion to grant relief – whether the Principal is, in the circumstances, entitled to restitution of money paid pursuant to the adjudication decision

Acts Interpretation Act 1954 (Qld), s 14, s 14B

Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 3, s 70, s 79, s 84, s 85, s 86, s 87, s 88, s 89, s 90, s 91, s 92, s 93, s 94, s 95, s 98

Building Industry Fairness (Security for Payment) Bill 2017

Civil Proceedings Act 2011 (Qld), s 10, s 59

Construction Contract Act 2004 (WA), s 39

Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] 2 Qd R 495
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2015] 1 Qd R 228; [2013] QCA 394
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393
Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd (2021) 7 QR 34; [2021] QCA 10
CMF Projects Pty Ltd v Masic Pty Ltd & Ors [2014] QSC 209
Cranbrook School v JA Bradshaw Civil Contracting [2013] NSWSC 430
Go Electrical Pty Ltd v Class Electrical Services Pty Ltd [2013] NSWSC 517
J Hutchison Pty Ltd v CADA Formwork Pty Ltd [2014] QSC 63
John Holland Pty Ltd v Chidambara [2017] WASC 179
John Holland Pty Ltd v Roads and Traffic Authority of New South Wales (2006) 66 NSWLR 624
John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd [2010] QSC 159
Lansen v Minister for Environment and Heritage (2008) 174 FCR 14
McCarthy v TKM Builders Pty Ltd & Anor (2020) 5 QR 722
Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QSC 91
Production Spray Painting & Panel Beating Pty Ltd v Newnham (No 2) (1992) 27 NSWLR 659
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389
St Hilliers Property Pty Ltd v ACT Projects Pty Ltd [2017] ACTSC 177
White v Tomasel [2004] 2 Qd R 438

COUNSEL: T Sullivan KC with A Stumer for the applicant
D Clothier KC with D Hume for the first respondent
S E Seefeld for the second respondent

SOLICITORS: HopgoodGanim Lawyers for the applicant
Gilbert and Tobin Lawyers for the first respondent
Queensland Building and Construction Commission for the second respondent

- [1] The applicant (the **Principal**) seeks a declaration that a decision and an amended decision of the third respondent (the **Adjudicator**) purportedly made under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) are void and an order that those decisions be set aside.
- [2] Further, the Principal also seeks an order that the first respondent (the **Contractor**) pay an amount of \$1,821,891.26 to the Principal plus interest, being the payment made by the Principal to the Contractor as a result of the purported decisions.

- [3] The parties have filed points of claim, points of defence and points of reply. The facts are largely uncontentious. However, the construction and application of the BIF Act and whether there is an obligation to repay the money in the circumstances are contentious between the parties.

Relevant facts

- [4] The following key facts are not disputed:
- (a) On 26 August 2022, the decision of the Adjudicator purportedly made under the BIF Act dated 25 August 2022 (**First Decision**) was provided to the parties.
 - (b) On 30 August 2022, the First Decision was amended using the “slip rule” in s 89 of the BIF Act and that amended decision (**Second Decision**) was provided to the parties.
 - (c) The Principal made payments to the Contractor in respect of the Second Decision, including accrued interest and an amount representing 90 per cent of the Adjudicator’s fees as follows:
 - (i) \$1,656,348.40 on 5 September 2022;
 - (ii) \$154,038.28 on 5 September 2022;
 - (iii) \$11,504.58 on 7 September 2022.
- [5] The following further facts are also relevant:
- (a) The Principal entered into a construction contract dated 21 July 2020 (**Contract**) with the Contractor, for the construction of a residential building in Coorparoo described as “Maasra Apartments”.
 - (b) The Contractor served Payment Claim Number 19 in the amount of \$7,838,688.92 (excluding GST) effectively on 1 March 2022.
 - (c) On 15 March 2022 the Superintendent, on behalf of the Principal, issued a payment schedule in the amount of \$1,554,407.04 (excluding GST).
 - (d) On 13 April 2022 the Contractor lodged an adjudication application in respect of Payment Claim Number 19.
 - (e) On 3 May 2022 the Adjudicator was appointed.
 - (f) On 6 June 2022 the Principal filed an adjudication response.
 - (g) The time for the Adjudicator to decide the adjudication application was extended four times pursuant to s 86 of the BIF Act and the final date for the Adjudicator to decide the adjudication application was 25 August 2022.
 - (h) On 25 August 2022 the Adjudicator completed the First Decision. That is, the Adjudicator had determined the matters in s 88(1) of the BIF Act and the adjudicator’s decision was in writing and included reasons as required by s 88(5) of the BIF Act.
 - (i) On 26 August 2022, the Adjudicator, via his agent, informed the Principal and the Contractor by email at 11:50 am that the Adjudicator had completed the First Decision and the Adjudicator informed the parties that he refused to

“release” the First Decision until the Adjudicator’s fees and expenses were paid.

- (j) The Adjudicator’s invoice was paid on 26 August 2022.
- (k) By an email sent at 4:07 pm on 26 August 2022, the Adjudicator, via his agent, “released” the First Decision to the Principal and the Contractor by communicating a copy of the First Decision.
- (l) The Second Decision resulted from the Adjudicator amending the First Decision following the Contractor seeking an amendment by application of the “slip rule” contained in s 89 of the BIF Act.

Issues

- [6] If this Court finds that the Adjudicator failed to make the First Decision within the time fixed by s 85(1), as extended by s 86, of the BIF Act, it is accepted that:
 - (a) This Court is bound by the Court of Appeal decision in *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd*¹ that an adjudicator’s decision out of time is void as the obligation in s 85(1) is jurisdictional and a breach invalidates the decision.²
 - (b) The First and Second Decisions are invalid.
- [7] The first issue for determination is whether the requirement that an “adjudicator must decide an adjudication application” in s 85(1) of the BIF Act is satisfied by the written document complying with s 88(1) and (5) being finalised before the expiry of the time period³ in circumstances where:
 - (a) a copy of the adjudicator’s decision was not given to the registrar (s 88(6)) and the parties (s 88(7)) before the expiry of the time period; and
 - (b) the adjudicator had not communicated that the adjudicator would not communicate the adjudicator’s decision until the adjudicator’s fees and expenses were paid before the expiry of the time period (s 95(7)(d)).⁴
- [8] The Principal contends that in the circumstances of (a) and (b), there is a failure by the adjudicator to make a decision within the prescribed time and the First Decision is void (and the Second Decision must also be void).
- [9] The Contractor contends that the First Decision was made within the prescribed time as the Adjudicator completed the written document complying with s 88(1) and (5) before midnight on 25 August 2022 and nothing more was required. The fact that the refusal to communicate the First Decision was notified on 26 August 2022 does not affect the First Decision being in time and valid.
- [10] This issue turns on the proper construction of the relevant provisions of the BIF Act.

¹ (2021) 7 QR 34; [2021] QCA 10.

² The Contractor reserves the right to contest this authority in any appellate proceedings. See footnote 1 of the First Respondent’s Outline of Submissions dated 21 October 2022.

³ Here midnight on 25 August 2022.

⁴ There was no communication of that position to the agent, the parties, or the registrar prior to midnight on 25 August 2022, regardless of whether the Adjudicator had formed the view personally, prior to midnight on 25 August 2022.

- [11] If this Court finds that the First and Second Decisions are void, the second issue arises.
- [12] The second issue for determination is whether in circumstances where an adjudicator's decision is void for jurisdictional error, the adjudicated amount paid pursuant to the purported adjudicator's decision is to be repaid on the basis that:
- (a) it is within a recognised category of restitution (that is, as part of the category, or a sub-category, of when a judgment of a court is reversed on appeal);
 - (b) the payment was made by compulsion of law; or
 - (c) there was a total failure of consideration.
- [13] The Principal contends that the adjudicated amount and the Principal's share of the Adjudicator's fees and expenses should be repaid by the Contractor as:
- (a) In respect of (a) above, this Court is bound by the decision of the Court of Appeal in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*⁵ and should also follow the decision of *J Hutchison Pty Ltd v CADA Formwork Pty Ltd*⁶ being a carefully reasoned decision of a single judge⁷ (as the decision is not obviously wrong).
 - (b) Further and alternatively, the current circumstances establish (b) and (c) above.
- [14] The Contractor contends that no obligation to repay the monies arises as:
- (a) There is no established category which includes an adjudicator's decision being void. The category of reversal of a judgment of a superior court of record does not apply.
 - (b) The decisions of *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*⁸ and *J Hutchison Pty Ltd v CADA Formwork Pty Ltd*⁹ did not decide the issue that arises here and this Court is free to decide the second issue from first principles.
 - (c) Alternatively, the decisions of *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*¹⁰ and *J Hutchison Pty Ltd v CADA Formwork Pty Ltd*¹¹ are no more than where there was an uncontested right of restitution in the particular circumstances of those cases.
 - (d) Alternatively, if the decisions of *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*¹² and *J Hutchison Pty Ltd v CADA Formwork Pty Ltd*¹³ are authority for a general principle that the mere payment of monies in respect of an invalid determination automatically gives rise to a prima facie right to restitution, they should not be followed as they are plainly wrong.

⁵ [2015] 1 Qd R 228; [2013] QCA 394.

⁶ [2014] QSC 63.

⁷ P Lyons J.

⁸ [2015] 1 Qd R 228; [2013] QCA 394.

⁹ [2014] QSC 63.

¹⁰ [2015] 1 Qd R 228; [2013] QCA 394.

¹¹ [2014] QSC 63.

¹² [2015] 1 Qd R 228; [2013] QCA 394.

¹³ [2014] QSC 63.

- (e) Any entitlement to recover the amounts paid depends on the law of restitution and the Contractor relies on the defences of consideration and the benefit is not “unjust”.

[15] The second issue requires consideration of the identified authorities as the starting point and then, depending on the conclusion on the scope and status of those authorities, more generally the law of restitution and available defences.

BIF Act

[16] The proper construction of s 85(1) requires a consideration of the statutory scheme contained in the BIF Act.

[17] Section 3 of the BIF Act sets out the purpose of the Act 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.”

[18] Chapter 3 deals with progress payments. Division 2 sets out various definitions for use in the Chapter but relevantly, there is no definition of “decide” or “decision”.

[19] Under Part 2 of Chapter 3, a procedure is outlined in respect of progress payments in relation to work done under a construction contract. In particular, s 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.”

- [20] Part 3 expands the procedure to provide for claiming progress payments by way of a payment claim and payment schedule.
- [21] Part 4 then provides a mechanism for the adjudication of disputed progress payments.
- [22] Section 79 of the BIF Act governs an application by a claimant to the registrar for 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.
- [23] Pursuant to s 81, the registrar refers an adjudication application to an adjudicator “for a decision”. The adjudicator may accept or reject the referral.
- [24] The procedure then follows that an adjudication response may be provided if there has been a previous payment schedule pursuant to s 76. The reasons permitted to be included in the adjudication response are limited to those included in the payment schedule.
- [25] Section 83 sets out the time for an adjudication response. The BIF Act provides two time regimes: one for complex payment claims requiring additional time and one for a standard payment claim. A complex payment claim is defined in s 64 as being a payment claim for an amount more than \$750,000, or if a greater amount is prescribed by regulation, the amount prescribed.
- [26] The provisions setting out the procedure in respect of an adjudication application are then contained in ss 84 to 97 of the BIF Act.
- [27] Section 84 of the BIF Act states as follows:

“84 Adjudication procedures

- (1) Subject to the time requirements under section 85, an adjudicator must decide the following as quickly as possible—
 - (a) an adjudication application;
 - (b) applications for extensions of time under section 83.
- (2) For a proceeding conducted to decide an adjudication application, an adjudicator—
 - (a) must decide—
 - (i) whether he or she has jurisdiction to adjudicate the application; and
 - (ii) whether the application is frivolous or vexatious; and
 - (b) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and

- (c) may set deadlines for further submissions and comments by the parties; and
 - (d) may call a conference of the parties; and
 - (e) may carry out an inspection of any matter to which the claim relates.
- (3) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation unless allowed by the adjudicator.
 - (4) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties." (emphasis added)

[28] Section 85 of the BIF Act deals with the time for deciding an adjudication application and states as follows:

“85 Time for deciding adjudication application

- (1) Subject to section 86, an adjudicator must decide an adjudication application no later than—
 - (a) for a standard payment claim—10 business days after the response date; or
 - (b) for a complex payment claim—15 business days after the response date.
- (2) The **response date** is—
 - (a) if the adjudicator is given an adjudication response under section 83—the day on which the adjudicator receives the response; or
 - (b) if the respondent is prevented from giving the adjudicator an adjudication response under section 82(2)—the last day on which the respondent could have given the adjudicator an adjudication response under section 83 had it not been prevented from doing so under section 82(2); or
 - (c) otherwise—the last day on which the respondent could give the adjudicator an adjudication response under section 83.
- (3) An adjudicator must not decide an adjudication application before the end of the period that the respondent may give an adjudication response to the adjudicator under section 83, unless—
 - (a) the adjudicator decides he or she does not have jurisdiction to adjudicate the application; or

- (b) the adjudicator decides the application is frivolous or vexatious.” (emphasis added)

[29] Section 86 of the BIF Act provides a mechanism for extending time for deciding an adjudication application and states as follows:

“86 Extending time for deciding adjudication application

- (1) The claimant and respondent for an adjudication application may, before or after the end of the maximum period for deciding the application under section 85(1), agree in writing that the adjudicator has additional time to decide the application.
- (2) Despite section 85(1), an adjudicator may decide an adjudication application within a longer period if—
 - (a) the claimant and respondent have informed the adjudicator that they have agreed under subsection (1) that the adjudicator has additional time to decide the application; or
 - (b) the application relates to a complex payment claim and, in the opinion of the adjudicator, the claimant and respondent have failed to reach an agreement mentioned in subsection (1).
- (3) The *longer period* is—
 - (a) if subsection (2)(a) applies—the additional time agreed to by the claimant and respondent under subsection (1); or
 - (b) if subsection (2)(b) applies—5 business days after the time the adjudicator would otherwise have to decide the application under section 85(1).
- (4) If the adjudicator has additional time to decide an adjudication application under this section, the adjudicator must notify the registrar of the additional time to decide the application within 4 business days after—
 - (a) if subsection (2)(a) applies—the day the claimant and respondent agreed under subsection (1); or
 - (b) if subsection (2)(b) applies—the day the adjudicator decided he or she had additional time under subsection (2)(b).”

[30] Section 87 of the BIF Act deals with the valuation of work in a later adjudication application. Subsection (2) refers to “the same value as that previously decided by the adjudicator”.

[31] Section 88 of the BIF Act states as follows:

“88 Adjudicator’s decision

- (1) An adjudicator is to decide—
 - (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the **adjudicated amount**); and
 - (b) the date on which any amount became or becomes payable; and
 - (c) the rate of interest payable on any amount.
- (2) In deciding an adjudication application, the adjudicator is to consider the following matters only—
 - (a) the provisions of this chapter and, to the extent they are relevant, the provisions of the *Queensland Building and Construction Commission Act 1991*, part 4A;
 - (b) the provisions of the relevant construction contract;
 - (c) the payment claim to which the application relates, together with all submissions, including relevant documents, that have been properly made by the claimant in support of the claim;
 - (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documents, that have been properly made by the respondent in support of the schedule;
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) However, the adjudicator must not consider any of the following—
 - (a) an adjudication response, to which the adjudication application relates, that was not given to the adjudicator within the time required under section 83;
 - (b) a reason included in an adjudication response to the adjudication application, if the reason is prohibited from being included in the response under section 82.
- (4) Also, the adjudicator may disregard an adjudication application or adjudication response to the extent that the submissions or accompanying documents contravene any limitations relating to submissions or accompanying documents prescribed by regulation.

- (5) The adjudicator’s decision must—
 - (a) be in writing; and
 - (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.
- (6) The adjudicator must give the registrar—
 - (a) a copy of the decision; and
 - (b) notice of all fees and expenses paid, and to be paid, to the adjudicator for the decision.

Maximum penalty—40 penalty units.
- (7) The adjudicator must give the registrar the information mentioned in subsection (6) at the same time the adjudicator gives a copy of the decision to the claimant and the respondent.” (emphasis added)

[32] Section 89 of the BIF Act contains what is often referred to as the “slip rule” and states as follows:

“89 Adjudicator may correct clerical mistakes etc.

- (1) This section applies if the adjudicator’s decision includes—
 - (a) a clerical mistake; or
 - (b) an error arising from an accidental slip or omission; or
 - (c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter mentioned in the decision; or
 - (d) a defect of form.
- (2) The adjudicator may, on the adjudicator’s own initiative or on the application of the claimant or respondent, correct the decision.
- (3) The adjudicator may, if requested by the registrar, correct the decision.”

[33] Section 90 of the BIF Act provides an obligation to pay the adjudicated amount, being the amount that was decided pursuant to s 88(1)(a). Section 90 states as follows:

“90 Respondent required to pay adjudicated amount

- (1) This section applies if an adjudicator decides that a respondent is required to pay an adjudicated amount.
- (2) The respondent must pay the amount to the claimant on or before—

- (a) the day that is 5 business days after the day on which the adjudicator gives a copy of the adjudicator's decision to the respondent; or
- (b) if the adjudicator decides a later date for payment under section 88(1)(b)—the later date.

Maximum penalty—200 penalty units.

- (3) If the respondent pays the amount to the claimant, the respondent must—
 - (a) notify the registrar, using an approved way, within 5 business days after making the payment; and
 - (b) provide the registrar with evidence the payment was made.

Maximum penalty—20 penalty units.” (emphasis added)

[34] Section 91 of the BIF Act provides for an adjudication certificate to be given by the registrar stating the adjudicated amount and other prescribed information. Section 91 states as follows:

“91 Adjudication certificate

- (1) As soon as practicable after being given a copy of a decision by an adjudicator, but no later than 5 business days after being given the decision, the registrar must give the claimant a certificate (an ***adjudication certificate***) of the decision stating the following matters—
 - (a) the name of the claimant;
 - (b) the name of the respondent who is liable to pay the adjudicated amount;
 - (c) the adjudicated amount;
 - (d) the date on which payment of the adjudicated amount was required to be paid to the claimant;
 - (e) the rate of interest payable on the adjudicated amount;
 - (f) the fees, identified in the decision, that the respondent is to pay;
 - (g) that the certificate is made under this Act.
- (2) However, the registrar does not have to give the claimant an adjudication certificate if—
 - (a) the respondent is not required to pay an amount under the decision; or

- (b) the adjudicator decided he or she does not have jurisdiction to decide the application; or
- (c) the adjudicator decided the adjudication application is frivolous or vexatious.” (emphasis added)

[35] The BIF Act then sets out consequences in addition to the offence created by s 90 for non-payment of an adjudicated amount.

[36] Section 92 of the BIF Act provides a mechanism whereby the claimant may suspend the carrying out of construction work or supplying related goods and services under the construction contract. Relevantly, s 92 states as follows:

“92 Consequences of not paying adjudicated amount

- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant as required under section 90, the claimant may give the respondent written notice of the claimant’s intention to suspend carrying out construction work, or supplying related goods and services, under the construction contract under section 98.
- (2) The notice about suspending work must state that it is made under this Act.”

[37] Section 93 of the BIF Act provides a further mechanism for filing the adjudication certificate as a judgment for a debt to enable enforcement steps through the courts. Section 93 states as follows:

“93 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction.
- (2) An adjudication certificate can not be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or a part of the adjudicated amount has not been paid to the claimant at the time the certificate is filed.
- (3) If the affidavit states that part of the adjudicated amount has been paid, the judgment is for the unpaid part of the amount only.
- (4) If the respondent commences proceedings to have the judgment set aside—
 - (a) the respondent is not, in those proceedings, entitled—
 - (i) to bring any counterclaim against the claimant; or

- (ii) to raise any defence in relation to matters arising under the construction contract to which the adjudication certificate relates; or
- (iii) to challenge the adjudicator's decision; and
- (b) the respondent is required to pay into the court, as security, the unpaid portion of the adjudicated amount pending the final decision in those proceedings."

[38] There are two other sections in this division which are also relevant to the current considerations. Section 94 of the BIF Act outlines that in certain circumstances, a claimant may make a new application. This applies where the adjudicator does not decide the application within the prescribed period required under s 85 (as extended by s 86). Section 94 states as follows:

"94 Claimant may make new application in certain circumstances

- (1) Subsection (2) applies if an adjudicator, who accepts a referral to decide an adjudication application (the **original application**), does not decide the application within the period required under section 85.
- (2) The claimant may do either of the following within 5 business days after the period mentioned in subsection (1)—
 - (a) request the registrar refer the original application to another adjudicator; or
 - (b) make a new adjudication application (the **new application**) under section 79.
- (3) If the claimant requests the registrar refer the original application to another adjudicator—
 - (a) the registrar must refer the application to another adjudicator within 4 business days after the request is made; and
 - (b) no fee is payable for referring the original application to another adjudicator.
- (4) Also, if another adjudicator accepts the referral, this division applies for the original application with the following changes—
 - (a) the claimant must give the adjudicator a copy of his or her submissions included in the original application within 5 business days after the adjudicator accepts the referral;
 - (b) the respondent must give the adjudicator a copy of his or her submissions included in an adjudication

response, if any, for the original application within 5 business days after the adjudicator accepts the referral;

- (c) the response date for the application under section 85(2) is the day—
 - (i) the adjudicator receives the copy of the submission from the respondent; or
 - (ii) if the respondent does not give the adjudicator the copy of the submission within the period mentioned in paragraph (b)—immediately after the end of the period;
- (d) in deciding the adjudication application, the adjudicator must not consider any submissions other than—
 - (i) the submissions mentioned in paragraph (a) or (b); or
 - (ii) further written submissions asked for by the adjudicator under section 84(2)(b).
- (5) This division applies to the new application in the same way it applies to any other adjudication application made under section 79.
- (6) However, the claimant may, despite section 79(2)(b), make the new application within 5 business days after the claimant becomes entitled to act under subsection (2)."

[39] Section 95 of the BIF Act deals with adjudicator's fees and the entitlement of the adjudicator to be paid for "adjudicating an adjudication application". Pursuant to s 95(4), the claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses and pursuant to s 95(5), that is in equal proportions unless the adjudicator decides otherwise.

[40] Relevant to the making of a decision, s 95(6) and (7) state as follows:

- "(6) An adjudicator is not entitled to be paid any fees or expenses for adjudicating an adjudication application if the adjudicator fails to make a decision on the application.
- (7) An adjudicator does not fail to make a decision only because—
 - (a) the adjudication application is withdrawn; or
 - (b) the adjudicator decided he or she did not have jurisdiction to adjudicate the application; or
 - (c) the adjudicator decided the application was frivolous or vexatious; or

(d) the adjudicator refuses to communicate the adjudicator's decision on an adjudication application until the adjudicator's fees and expenses are paid.

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

[41] Section 95 refers to the concept of “adjudicating” an adjudication application. In s 95(9), this is defined as including “accepting, considering and deciding the application”.

Construction of the statutory scheme and application to current facts

[42] The approach to statutory construction is not contentious. The Court is to construe the statute by looking at the statutory text, the context and purpose in accordance with the accepted authorities.

[43] The parties provided supplementary submissions following the conclusion of the hearing focussed on the construction of the relevant sections, in particular the phrase the “adjudicator must decide an adjudication application” in s 85(1) of the BIF Act. The supplementary submissions were requested as towards the conclusion of the hearing, it appeared that there was some misunderstanding between the parties as to what constructions were being contended for and the earlier submissions had not fully engaged with the differences between the parties.

[44] Part 4 of Chapter 3 of the BIF Act creates a statutory alternative dispute resolution (**ADR**) process for the determination of disputes as to the amount payable under a payment claim. The process provides for the referral of the dispute as defined by the adjudication application and the adjudication response (the latter limited to what was previously raised in the payment schedule) to an adjudicator to determine the amount to be paid (if any), the date the amount is payable, and interest.

[45] The ADR process is contained within the wider payment claim process in Chapter 3. Consistent with the purposes stated in s 3 of the BIF Act, the procedures are expedited with definite and prescribed time limits for the various steps to be undertaken. Time limits are very important to achieving the purpose and both time limits and the statutory requirements of the scheme have been interpreted strictly even if that results in a potentially harsh outcome.¹⁴

[46] Section 85(1) of the BIF Act provides, subject to s 86, that the adjudicator must decide an application no later than the prescribed time in respect of either a standard payment claim or a complex payment claim. It does not deal with what the adjudicator is required to do to decide the adjudication application. Section 88 is expressly directed at that issue.

¹⁴ *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd* (2021) 7 QR 34; [2021] QCA 10. See also for example *McCarthy v TKM Builders Pty Ltd & Anor* (2020) 5 QR 722; [2021] QSC 301; *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91; *CMF Projects Pty Ltd v Masic Pty Ltd & Ors* [2014] QSC 209.

- [47] The heading of s 88 of the BIF Act is “adjudicator’s decision”¹⁵ and this also tends to support a construction that the matters in sub-paragraphs (1) to (7) are all part of that statutory task of the adjudicator deciding. Each sub-paragraph is relevant to what the adjudicator is to do in deciding an adjudication application:
- (a) Sub-paragraph (1) requires the adjudicator to determine three matters: the amount of the payment claim, if any, to be paid by the respondent, the date the amount becomes payable, and interest.
 - (b) Sub-paragraph (2) identifies matters to be taken into account in deciding an adjudication application.
 - (c) Sub-paragraphs (3) and (4) identifies matters not to be considered in deciding an adjudication application or which may be disregarded.
 - (d) Sub-paragraph (5) requires the adjudicator’s decision to be in writing and to include reasons (unless the parties request otherwise). This requires a written document which includes the matters in s 88(1) and reasons under s 88(5)(b). It does not provide that the reasons are separate from the decision. The adjudicator’s decision is constituted by the matters in s 88(1) and the reasons being articulated in writing. It is not sufficient for the adjudicator to reach a settled view in his or her mind and for it not to be reduced to writing or even that the s 88(1) matters be reduced to writing in the absence of reasons.¹⁶
 - (e) Sub-paragraph (6) requires a copy of the “decision” to be given to the registrar together with notice of fees and expenses paid or to be paid to the adjudicator. This is an offence provision. The use of the word “decision” here can only be understood to be the adjudicator’s decision in writing prescribed in s 88(5) immediately preceding this sub-paragraph, which would include the s 88(1) components and reasons as required by s 88(5)(b).
 - (f) Sub-paragraph (7) requires the adjudicator to give the registrar what is required in s 88(6) at the same time the adjudicator gives a copy of the decision to the parties. Again, the use of the word “decision” can only be understood to be the adjudicator’s decision in writing prescribed in s 88(5), which would include the s 88(1) components and reasons as required by s 88(5)(b).
- [48] It is consistent with the purpose in s 3 that the adjudicator’s task of “deciding” the adjudication application is the completion of all aspects contained in s 88 within the time prescribed in s 85(1) (as extended by s 86). To conclude otherwise would in effect frustrate the purpose of ensuring payment for work in the building and construction industry and the utility of the statutory ADR procedure. Communication of the adjudicator’s decision, being the s 88(1) components and the reasons contained in a written document, is essential to the operation of the scheme as a whole and in particular, to give rise to the obligation for payment of the adjudicated amount.
- [49] The objective of compliance with the prescribed time limits is supported by the BIF Act creating offences in respect of non-compliance with key obligations. Relevantly, offences are created in respect of:

¹⁵ Section 14 *Acts Interpretation Act* 1954 (Qld).

¹⁶ Unless the parties agree that reasons need not be provided.

- (a) The adjudicator failing to give a copy of the adjudicator's decision to the registrar together with a notice of all fees and expenses paid or to be paid (s 88(6)).¹⁷
 - (b) The respondent failing to pay the adjudicated amount within 5 business days after the day on which the adjudicator gives a copy of the adjudicator's decision to the respondent or the date the adjudicator decides for payment (s 90(2)).
 - (c) The respondent failing to notify the registrar within 5 days after making payment and providing evidence of payment (s 90(3)).
- [50] These offences highlight that the key focus of the statutory scheme is to facilitate the prompt payment of the adjudicated amount following the adjudicator's decision. This is dependent on the communication of the adjudicator's decision. The expeditious communication of the adjudicator's decision is therefore central to achieving the objectives of the statutory scheme.
- [51] The recognition of the importance of this aspect is also reflected in the Explanatory Notes¹⁸ to the *Building Industry Fairness (Security for Payment) Bill* 2017.¹⁹ Relevantly, the Explanatory Notes state:
- (a) In respect of clause 88:

“The clause also requires an adjudicator to provide a copy of their decision to the registrar at the same time it is provided to the claimant and the respondent. This allows the registrar to proceed with issuing an adjudication certificate under clause 91 of the Bill, which can then be used by the claimant to seek payment in court should the respondent not comply with the adjudicator's decision. Failing to provide the registrar with a copy of the decision attracts a maximum penalty of 40 penalty units. The offence reflects the importance of this requirement in supporting the effective operation of the registry as well as a claimant's ability to get paid.” (emphasis added)
 - (b) In respect of clause 90:

“Clause 90 essentially replicates section 29 of the repealed BCIPA. It provides that if an adjudicator decides that the respondent must pay to the claimant an adjudicated amount, the respondent must pay the amount within 5 business days after being given the adjudicator's decision, or a later date determined by the adjudicator. A failure to pay an adjudicated amount is an offence and also grounds for disciplinary action if the respondent is licensed under the QBCC Act. A strong deterrent is needed for respondents who would otherwise ignore an adjudicator's decision, forcing claimants to seek court judgment and further protracting payment.” (emphasis added)
- [52] The suggestion that the purpose of the statutory scheme is met by the adjudicator deciding the items in s 88(1) and preparing a written adjudication decision including

¹⁷ Pursuant to s 88(7) this is to be given at the same time as the copy of the adjudication decision being given to the parties, although this section does not create an offence.

¹⁸ Section 14B *Acts Interpretation Act* 1954 (Qld).

¹⁹ The Principal refers to the Explanatory Note in respect of s 95 as replicating the previous provision.

reasons as required by s 88(5) but not communicating it to the parties and the registrar is not supported by the creation of these offences. The objective is to communicate the adjudicated amount (being part of the s 88(1) requirements of an adjudication decision) as expeditiously as possible to give rise to the liability to pay the amount and the subsequent rights to incentivise or enforce payment (ss 92 and 93).

- [53] The statutory scheme operates to determine the amount payable expeditiously and to provide mechanisms to help payment being made consistently with the main purpose expressed in s 3(1).
- [54] Sections 94 and 95(7) are also consistent with an interpretation that all of the components of s 88, including communicating the adjudicator's decision by provision of a copy of the written adjudication decision, are to be completed within the prescribed time limit.
- [55] Section 95(7) expressly says that "an adjudicator does not fail to make a decision only" because of the identified matters, which is consistent with there otherwise being a failure to make a decision in those circumstances. The use of the word "refuses" conveys some communication that the adjudicator is not otherwise communicating (or providing) a copy of the adjudication decision until the fees and expenses are paid.
- [56] This section requires some notification to the parties that at least informs them that the adjudication decision has been made, advises the amount of the fees and expenses and indicates that the adjudication decision will be provided once the fees and expenses have been paid to be operative. An adjudicator reaching that conclusion but keeping it to themselves would not be sufficient to come within s 95(7) of the BIF Act.
- [57] The Contractor contends that the provision is an "avoidance of doubt provision". I do not agree. The section confers a right on the adjudicator to notify non-compliance with the requirements in s 85(1) read together with s 88 until the fees and expenses are paid with the result that the non-compliance does not trigger a failure to make a decision. That is, in those limited circumstances, a non-compliance with the communication under s 88(6) and (7) of the copy of written document containing the determination of the s 88(1) components and the s 88(5)(b) reasons does not result in there being a failure to decide within the time period.
- [58] Where s 95(7)(d) operates there is a decision which is in effect "on hold" until the fees and expenses are paid. The section would have no operation if s 88(1) and (5) had otherwise not been complied with.
- [59] This is also consistent with the comments of the Court of Appeal in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd*²⁰ where Fraser JA commented that to construe the statute to require the release of an adjudication decision would "frustrate the adjudicator's right under [the equivalent of s 95(7)] to withhold release of the decision until the adjudicator was paid".²¹

²⁰ [2008] 2 Qd R 495. Fraser JA, with whom McMurdo P and Keane J agreed.

²¹ At [40].

- [60] The dispensation in s 97(5) is available if the adjudicator exercises that right by communicating a refusal to communicate the adjudication decision.²² Construed in context and consistently with the purpose, this would be required to be done before the expiry of the prescribed time period.
- [61] If communication was not required within the prescribed time period it could effectively frustrate the right in s 94, which would also be inconsistent with the purpose of the BIF Act and the ADR process in Part 4 in particular.
- [62] Section 94 provides a right which arises where an adjudicator does not decide an adjudication application within the period required under s 85 (as extended by s 86). The claimant has the right in those circumstances to do one of two things within 5 business days after the time period in s 85 (as extended by s 86). The claimant can request the adjudication decision be referred to a new adjudicator or make a new adjudication application.
- [63] Section 94 was considered by the Court of Appeal in *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd*.²³ At [36], McMurdo JA stated:
- “Where a claimant acts under s 94(2), its action does not displace the power of the original adjudicator. Instead, a claimant acts under s 94(2) only after that power is spent. As the primary judge observed, ss 94(2) and 94(3) do not require notice to the original adjudicator that a new reference has been initiated. The text of s 94 is therefore another strong indication of the limit of an adjudicator’s power to decide the application.”
- [64] The text of s 94 is also a strong indication that all aspects of “deciding” the adjudication application have to be completed prior to the adjudicator’s “power being spent”, subject to the right in s 95(7)(d) being exercised.
- [65] The parties in submissions refer to several more general authorities as to what constitutes a decision. Cases in respect of other circumstances or statutes are of no real assistance in undertaking the construction exercise of the relevant provisions of the BIF Act.
- [66] The Contractor does refer to two authorities in respect of legislative schemes analogous with the BIF Act in the Australian Capital Territory and New South Wales. It is contended that these cases are consistent with a construction that the adjudicator’s decision does not need to be communicated within the prescribed time limit where the decision was made within time.
- [67] Further, the Contractor submits that consistency of interpretation means that these authorities should be followed unless there is a high degree of persuasion that the construction should not be followed.²⁴

²² As was done on the facts in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495.

²³ (2021) 7 QR 34; [2021] QCA 10.

²⁴ The principle was stated by Applegarth J in *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159 at [35].

- [68] In *St Hilliers Property Pty Ltd v ACT Projects Pty Ltd*,²⁵ the ACT Supreme Court considered a provision that the “adjudicator must decide an adjudication application as soon as possible but not later than ...”.²⁶ The Court held that the obligation was “to decide, not necessarily to make the adjudication available to the parties.”²⁷ The fact that the adjudication was not made available to the parties until several days later was not a breach of the Act. Further, the Court held that s 23(3) “which imposes the time limit, is concerned to ensure the decision is *made* in time, not that the parties are *notified* of it in time”.²⁸ (emphasis in original decision)
- [69] The Principal contends that to the extent that *St Hilliers Property Pty Ltd v ACT Projects Pty Ltd* is authority for the proposition that there can be a decision based purely on a private internal act, it is plainly wrong and ought not to be followed. Further, it is submitted that there was no consideration of whether a decision could be made only when the parties were at least informed that a decision existed and accordingly, the issue relevant in the current case did not arise.
- [70] The reasons in *St Hilliers Property Pty Ltd v ACT Projects Pty Ltd* do not grapple with the operation of s 36(5)(b) which is similar to s 95(7)(d) of the BIF Act. There is no consideration of “refusal” and whether the exercise of the right needs to be communicated prior to the expiry of the time period in circumstances where the parties were not notified until 26 July of the refusal, with the determination having been completed on 22 July with only minor edits after that date.
- [71] The key reasoning appears to be that there can be a decision based purely on a private act of completing the determination and no notification of any extent is required. In this regard, I have formed the view that the decision is plainly wrong and ought not to be followed.
- [72] Further, there is no consideration of any equivalent of ss 88 or 94 of the BIF Act. In any event, the legislative scheme is sufficiently different to require the construction task to be undertaken in respect of the BIF Act and a different conclusion may be reached as a result of that construction exercise.
- [73] The contractor also refers to the decision of McDougall J in *Cranbrook School v JA Bradshaw Civil Contracting*.²⁹ In that case, the time for the decision expired on 2 November 2012 and the decision was completed on that day but not communicated to the parties until 5 December 2012. Minor amendments were made to correct typographical errors in the intervening period. In the circumstances, it was held that the decision was made on 2 November.³⁰
- [74] Similarly, the Principal contends that McDougall J did not consider whether a decision required some communication, only whether a decision required provision of written reasons.³¹

²⁵ [2017] ACTSC 177.

²⁶ Section 23(3) of the *Building and Construction Industry (Security of Payment) Act 2009* (ACT).

²⁷ [192]-[193].

²⁸ At [207].

²⁹ [2013] NSWSC 430.

³⁰ At [60].

³¹ At [63]-[65].

- [75] The decision also appears to be inconsistent with binding Queensland Court of Appeal authority. McDougall J's reasoning includes that the statutory requirements for the decision to be made within the time limit is not jurisdictional.³² This is contrary to the Queensland Court of Appeal decision in *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd*³³ that an adjudicator's decision out of time is void as the obligation in s 85(1) is jurisdictional and a breach invalidates the decision.
- [76] Again, the key reasoning also appears to be that there can be a decision based purely on a private act of completing the determination and no notification of any extent is required. In this regard, I have formed the view that the decision is plainly wrong and ought not to be followed.
- [77] Further, there does not appear to have been any consideration of any equivalent of s 88, s 94 or s 97(5)(d) of the BIF Act. In any event, the legislative scheme is sufficiently different to require the construction task to be undertaken in respect of the BIF Act and a different conclusion may be reached as a result of that construction exercise.
- [78] The proper construction of s 85(1), s 86 and s 88 is that the adjudicator decides the adjudication application by completing all aspects constituting the adjudicator's decision in s 88 prior to the expiry of the time period in s 85(1) (as extended pursuant to s 86), unless the adjudicator has exercised the right to refuse to communicate the adjudicator's decision until the fees and expenses have been paid.³⁴
- [79] Consequently, where the adjudicator has finalised a written document complying with s 88(1) and (5) before the expiry of the time period³⁵ but:
- (a) failed to give a copy of the adjudicator's decision to the registrar (s 88(6)) and the parties (s 88(7)) before the expiry of the time period; and
 - (b) failed to exercise the right to refuse to communicate the adjudicator's decision until the adjudicator's fees and expenses are paid by giving notice to the parties before the expiry of the time period (s 95(7)(d)),
- the adjudicator has not decided the adjudication application within time.
- [80] The Adjudicator did not, prior to midnight on 25 August 2022, provide a copy of the First Decision to the parties and the registrar or exercise the right under s 95(7)(d) refusing to communicate the First Decision until the fees and expenses were paid. The next day, on 26 August 2022, the Adjudicator purported to exercise the right under s 95(7)(d) by giving notice to the parties.
- [81] Accordingly, the First Decision and the Second Decision were not decided within time and are therefore invalid and void in accordance with the Court of Appeal decision in *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd*.³⁶

³² The statement at [61] in this regard appears wider than the discussion at [63] which may be narrower at least in respect of the provision of reasons when a determination has been made.

³³ (2021) 7 QR 34; [2021] QCA 10.

³⁴ Subject to a decision being made pursuant to s 84(2)(a)(i) and (ii) that the adjudicator did not have jurisdiction or the application was frivolous or vexatious.

³⁵ Here midnight on 25 August 2022.

³⁶ (2021) 7 QR 34; [2021] QCA 10.

Issue 2 – is there an obligation to repay money paid pursuant to a void adjudication decision?

- [82] The second issue then arises as to whether the Contractor is obliged to repay the monies paid by the Principal.
- [83] Central to this issue is whether this Court is bound by the decision of the Court of appeal in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*.³⁷ The Principal relies on that case as authority for the principle that where an adjudication decision is void the amount paid pursuant to the purported adjudicator's decision is to be repaid on the basis that it is akin to a judgment being reversed on appeal. As summarised at [14] above, the Contractor disagrees and contends that no obligation to repay the monies arises.
- [84] Accordingly, the starting point is a consideration of *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*.³⁸
- [85] The primary judge in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors*³⁹ found that the adjudicator's decision was void for jurisdictional error but declined to make a declaration that the decision was void on the basis that BGC undertook to repay the portion of the adjudicated amount in respect of which the adjudicator had made a jurisdictional error.
- [86] The Court of Appeal, Muir JA with Holmes JA and Ann Lyons J agreeing, allowed the appeal. A number of grounds of appeal were argued, including relevantly that the primary judge had erred in:
- (a) holding that the adjudication decision retained effect unless and until a declaration was granted or an order quashing or setting aside the decision; and
 - (b) dismissing the application on the undertaking to repay the affected portion on the basis it was a more convenient and satisfactory remedy than a declaration that void and consequential orders.
- [87] Muir J concluded:
- “[76] As previously discussed, there is nothing in the Act which would support the denial to a respondent to a payment claim of its right and entitlements under the Act except to the extent that the Act expressly or implicitly so provided. Nor is there any principle identified which would authorise a court to deny a litigant a legal right or remedy on the grounds that the policy of an Act would thereby be advanced. In this case the matters discussed in respect of the latent conditions claim indicate that a failure to permit BMA to enjoy the normal benefits of its success in the proceeding were unlikely to assist in advancing the policy of the Act but were likely to cause injustice. It is also relevant that the primary judge's refusal to grant appropriate

³⁷ [2015] 1 Qd R 228; [2013] QCA 394.

³⁸ [2015] 1 Qd R 228; [2013] QCA 394.

³⁹ See [2012] QSC 346 and (No. 2) [2013] QSC 67.

declaratory relief may well have left it open to BMA to bring other proceedings to recover the monies paid by it to BGC.⁴⁰

- [77] The adjudication decision gave BGC no entitlement to payment of any part of the adjudication amount as BMA had no obligation to pay it. BMA, having paid it, had a right to recover it. The primary judge erred in law in withholding the relief sought by BMA. His Honour also erred in finding in his 22 March 2013 reasons that the adjudication decision, which he held to be affected by jurisdictional error, retained effect until he exercised his discretion to grant a declaration or make an order quashing or setting aside the decision.”
- [88] The Contractor makes a number of submissions about the Court of Appeal decision including that there was no argument on appeal about the obligation to repay issue. The Principal rebuts this argument by pointing to the hearing on relief at first instance going for a full day in respect of the appropriate relief⁴¹ and the reasons of Muir J record extensive argument by experienced counsel for both parties.
- [89] It is recorded at [51] of the Court of Appeal reasons that BMA had sought at first instance an order that BGC repay the full amount of \$26,135,709.37 paid by BMA together with interest and GST.
- [90] At [73] to [75] of the Court of Appeal reasons it is stated:
- “[73] There was no suggestion at first instance or on appeal that BMA did not have a legally enforceable right to the repayment of the sum of \$26,135,709.37. The primary judge’s 22 March 2013 orders effectively defeated that right, except in respect of the \$4,345,377.42 and interest, relating to the termination costs claim.
- [74] In order to justify the revocation of the 13 November 2012 declaration and the making of the 22 March 2013 orders, the primary judge relied on the existence of a discretion as to whether to grant declaratory relief even though a legal basis for the making of the subject declaration existed. His Honour identified as a relevant circumstance the existence of ‘alternative and adequate remedies for the wrong of complaint is made’.⁴²
- [75] The primary judge then, with respect, proceeded to deny BMA the remedy dictated by the finding of jurisdictional error. In doing so, the primary judge was motivated by a desire to allow BGC to retain the amounts which the adjudicator had allowed and to which BGC would have been entitled had there been no jurisdictional error. In his Honour’s view, ‘[s]uch a course

⁴⁰ See e.g. *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 49 [166].

⁴¹ [2013] QSC 67 at [62].

⁴² *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 449 [284]; see also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

advances the policy of the Act'.⁴³ It is not clear what connection, if any, existed between this rationale and the existence of an alternative and adequate remedy."

- [91] Whilst it does appear that the existence of a "legally enforceable right to repayment" was not the subject of a multi-faceted challenge as in this case, the appropriate and adequate remedy where an adjudicator's decision was void was clearly the subject of argument and consideration by the Court of Appeal.
- [92] In these circumstances, I consider that the Court of Appeal did decide the issue that arises here as to the appropriate and adequate remedy in circumstances where a claim is made for repayment of monies paid pursuant to an adjudicator's decision which is subsequently found to be void. Accordingly, the decision is binding on this Court.
- [93] The Contractor also contends that the decision of *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*⁴⁴ is no more than a decision involving the uncontested right of restitution on the particular facts. That ignores the Court of Appeal's reasoning that the primary judge was wrong to withhold the remedy of repayment and ordered that BGC repay the amount paid under the adjudication decision.
- [94] Further, the Contractor contends that if the Court of Appeal decision is authority for a general principle that the mere payment of monies in respect of an invalid determination automatically gives rise to a prima facie right to restitution, it is plainly wrong and should not be followed.
- [95] The Court of Appeal's reasons are consistent with such a general principle, particularly the statement at [77] that:
- "The adjudication decision gave [the contractor] no entitlement to payment of any part of the adjudication amount as [the principal] had no obligation to pay it. [The principal] having paid it, had a right to recover it".
- [96] For the reasons discussed further below, I do not consider that the Court of Appeal's decision is plainly wrong and I am bound by the decision of the Court of Appeal in any event.
- [97] The parties in submissions also address the decision of P Lyons J in *J Hutchison Pty Ltd v CADA Formwork Pty Ltd*⁴⁵ in which a declaration was made that the adjudicator's decision was void and an order was made that the CADA repay money paid to it by Hutchison pursuant to the adjudication determination.⁴⁶ His Honour reasoned at [83]:

"When a judgment of a court is reversed on appeal, or when a superior court quashes the order of an inferior court, the successful party is entitled to restitution of any monies paid pursuant to the order which

⁴³ *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QSC 67 at [48].

⁴⁴ [2015] 1 Qd R 228; [2013] QCA 394.

⁴⁵ [2014] QSC 63.

⁴⁶ [2014] QSC 63.

has been reversed or quashed.⁴⁷ This approach has been held to be applicable when money has been paid pursuant to an adjudication determination, subsequently held to be invalid.⁴⁸ On that basis, it would be appropriate to order [the respondent] to refund the money paid to it pursuant to the adjudication certificate. Again, the correctness of that approach has been confirmed in *BM Alliance*.⁴⁹

[98] The Contractor contends that the decision of *J Hutchison Pty Ltd v CADA Formwork Pty Ltd* should not be followed and points to:

- (a) There does not appear to have been any argument about the repayment issue.
- (b) The reasons at [83] footnote two New South Wales decisions which do not support the proposition made: namely *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2006) 66 NSWLR 624, 633-634; *Go Electrical Pty Ltd v Class Electrical Services Pty Ltd* [2013] NSWSC 517.
- (c) The judge drew comfort from *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*⁵⁰ which was misplaced as that decision did not appear to have any argument about the issue and was deciding a different point.⁵¹

[99] The reasons do not record the various submissions made in respect of this issue, so it is impossible to reach a conclusion as to the extent of the argument in respect of the issue. However, it appears from the information recorded in the reasons that the applicant was represented by counsel and solicitors, but the respondent was not.

[100] P Lyons J appears to have applied the Court of Appeal decision in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*⁵² on the basis that it was good authority on the point in issue consistent with my previous finding.

[101] The Contractor submits that the two New South Wales authorities do not support the conclusion reached. It is submitted:

- (a) *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* concerned the issue of repayment of monies paid where the adjudicator's determinations were challenged as being wrong on the merits (as opposed to invalid).
- (b) *Go Electrical Pty Ltd v Class Electrical Services Pty Ltd* concerned the setting aside of a judgment and enforcement process where the adjudication determination had been registered as a judgment.

[102] The Principal submits in response that the decision of *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* is:

⁴⁷ *Production Spray Painting & Panel Beating Pty Ltd v Newnham (No 2)* (1992) 27 NSWLR 659, 661-662.

⁴⁸ *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2006) 66 NSWLR 624, 633-634; *Go Electrical Pty Ltd v Class Electrical Services Pty Ltd* [2013] NSWSC 517.

⁴⁹ At [77].

⁵⁰ [2015] 1 Qd R 228; [2013] QCA 394.

⁵¹ The Contractor contends that the Court of Appeal determined the narrow point as to whether an undisputed entitlement could be defeated by the exercise of a discretion purportedly informed by the policy of statute.

⁵² [2015] 1 Qd R 228; [2013] QCA 394.

- (a) as the Contractor identifies, concerned with a right to restitution of money paid pursuant to an adjudication later found to be wrong on the merits. However, the Contractor relies upon the principle identified by McDougall J that the right to repayment was analogous to that existing when a court decision was overturned⁵³ and that the right was a restitutionary claim;⁵⁴
- (b) authority for the proposition that the principles applicable to the repayment of money paid pursuant to a court order are applicable to the case of money paid pursuant to an adjudication.

[103] Further, in respect of the decision of *Go Electrical Pty Ltd v Class Electrical Services Pty Ltd*, the Principal acknowledges that as the Contractor identifies, the decision concerned where the claimant had registered the adjudication determination as a judgment and the principles applicable to monies paid under a judgment were directly applicable.

[104] However, the Principal contends that there is no relevant ground for distinction here as an adjudication certificate under the BIF Act is capable of being filed as a judgment debt and enforced.

[105] The Principal also refers to the decision of *John Holland Pty Ltd v Chidambara*⁵⁵ as another decision applying the principle in respect of payments made pursuant to an adjudication determination.

[106] Chaney J in that case set aside an adjudication determination under the Western Australian *Construction Contract Act 2004* and then considered whether it was appropriate to make an order for repayment of the money previously paid pursuant to the adjudication determination. The reasons for decision record:

- (a) At [70], that the respondent accepted that it was open for the court to order repayment but opposed the order being made.
- (b) At [74], that the decisions in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales*, *Go Electrical Pty Ltd v Class Electrical Services Pty Ltd*, *J Hutchison Pty Ltd v CADA Formwork Pty Ltd* and the Court of Appeal decision in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* held that where a court quashes an adjudication determination and monies have been paid pursuant to that determination, the successful party is entitled to restitution of the monies so paid.
- (c) At [75], it was sought to distinguish those decisions on the basis that the adjudication determination would be enforced as an order of the court without leave, whereas the Western Australian Act could only be enforced with leave. Chaney J did not consider that distinction was material to the general proposition that where a determination is quashed, the successful party is entitled to restitution of any monies paid pursuant to that determination.
- (d) At [77] and [78], it was argued that an order for repayment of the monies amounted to summary judgment on a claim for restitution. Chaney J recognised that the process preserves the right to litigate and arbitrate areas of

⁵³ At [34].

⁵⁴ At [36].

⁵⁵ [2017] WASC 179.

dispute and that includes an account of monies paid pursuant to adjudicator's determinations. The Act:

“... simply has the effect of determining who should hold the funds pending the final resolution of the parties' dispute by whatever means will result in a final binding determination of entitlements.”

[107] Chaney J concluded:

“[79] There seems to me to be no reason in principle why any order for repayment consequent upon the quashing of a determination under the CC Act should not be approached on the same basis. I am satisfied that John Holland would not have made the payment of \$6,131,962.27 if not for the adjudicator's determination and his direction for payment of that amount by the stipulated date. Clearly, John Holland maintained that it was not liable to pay any amount ...”

[108] The reasons go on to make findings that the payments were made under the compulsion of s 39 of the CC Act which provided that a party liable to pay an amount under a determination must do so on or before the date specified in the determination, it would be unjust for the sub-contractor to retain the funds pending final resolution of the dispute between the parties and “the position should be restored to that which would have subsisted had the determination not been made”.⁵⁶

[109] Whilst this decision does rely in part on the previously discussed authorities, the reasoning assists in understanding the approach and the applicable principles and is in itself a carefully reasoned decision.

[110] The decision of P Lyons J in *J Hutchison Pty Ltd v CADA Formwork Pty Ltd* is a carefully reasoned decision of a single judge of this Court. I do not consider it is plainly wrong.

[111] The Contractor submits that decisions of an adjudicator are not decisions of a court. That is correct. The Contractor submits that accordingly, the principles applicable when a decision of a court is overturned on appeal do not apply. This submission misses the point. The principle does not apply because the adjudicator's decision is a decision of a court, but rather that it is closely analogous to the payment of money pursuant to an order of the court which is later overturned.

[112] The BIF Act includes a number of provisions which make the amount owing under an adjudicator's decision closely analogous to a court order, including:

- (a) Section 88(1): the adjudicator is to decide the amount of the progress payment, if any, to be paid (being the adjudicated amount).
- (b) Section 90(1): the respondent must pay the adjudicated amount within 5 business days after the adjudicator gives a copy of the decision to the respondent or the later date decided by the adjudicator. This is an offence provision with a maximum penalty of 200 penalty units.

⁵⁶ At [79]-[80].

- (c) Section 90(2): the respondent must notify the registrar within 5 business days of making payment and provide evidence of the payment. This is also an offence with a maximum penalty of 20 penalty units.
 - (d) Section 92: if the respondent fails to pay the whole or any part of the adjudicated amount required to be paid under s 90, the claimant may give written notice of the claimant's intention to suspend carrying out construction work or supplying related goods and services, under the construction contract under s 98.
 - (e) Section 93(1): an adjudication certificate (given by the registrar under s 91) may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction.
 - (f) Section 93(4): in any proceedings to set aside the judgment, the respondent is not entitled to challenge the adjudicator's decision, bring a counterclaim or raise a defence arising under the relevant construction contract. Further, the unpaid portion of the adjudicated amount is required to be paid into court pending the final decision.
- [113] The Principal contends that the monies paid pursuant to an adjudicator's decision under the BIF Act are subject to "practical compulsion". This was also recognised by the reasoning of Chaney J in *John Holland Pty Ltd v Chidambara*.⁵⁷
- [114] The process under the BIF Act is an alternative dispute resolution procedure which creates an obligation to pay the adjudicated amount. The importance of the obligation to pay the adjudicated amount is reflected in s 90(2) creating an offence for non-compliance. Further, the amount can be enforced as a judgment debt through the courts on the basis of the adjudication certificate.
- [115] I consider that the decisions are correctly decided on the basis that the payment of money pursuant to an adjudicator's decision subsequently found to be invalid is sufficiently analogous to the payment of money pursuant to a court order later overturned to give rise to an obligation to repay the money. Whether this is in the same category of restitution, or in effect a sub-category, the same principle applies entitling the Principal here to the repayment of the monies paid pursuant to the Second Decision.
- [116] If I am wrong about the Court of Appeal decision in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*⁵⁸ being binding:
- (a) The decisions of *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* and *J Hutchison Pty Ltd v CADA Formwork Pty Ltd* are not obviously wrong and should be followed. This is consistent with the decision of Chaney J in *John Holland Pty Ltd v Chidambara*.⁵⁹
 - (b) Those decisions are authority for the proposition that there is an obligation to repay monies paid pursuant to an adjudicator's decision found to be invalid and void as a category of restitution analogous with a right of restitution of a sum paid under a judgment subsequently overturned.

⁵⁷ [2017] WASC 179.

⁵⁸ [2015] 1 Qd R 228; [2013] QCA 394.

⁵⁹ [2017] WASC 179.

- (c) Where a case falls within a recognised category the focus is not on establishing “unjust enrichment”. *McMurdo J* (as his Honour then was) in *White v Tomasel*⁶⁰ stated:

“[68] The right to restitution in this context, as in many others, has been explained by the concept of unjust enrichment ... whilst the concept ‘explains why the law recognises an obligation to make restitution in particular contexts’,⁶¹ in certain types of case the existence of the restitutionary obligation is so well recognised that a focus upon unjust enrichment is both unnecessary and unhelpful. The right to restitution in the present context has its basis in the court’s concern to restore to the appellant the property of which he was involuntarily divested by the erroneous exercise of judicial power. It is unnecessary for the appellant to establish an unjust enrichment, at least in the sense that the property transferred is worth more than the consideration paid by the respondents. And to the extent that enrichment is relevant, the respondents have what should be still the appellant’s property.”

- (d) In any event, the Principal’s points of claim do raise the elements of a cause of action in restitution: namely, payment of the amounts in respect of the impugned decision and the circumstances of the invalid decision.
- (e) The circumstances of the present case establish that the payment was made by compulsion of law and/or there was a total failure of consideration in respect of the payment.
- (f) The email dated 5 September 2022⁶² stated that the Principal paid without prejudice to the Principal’s rights in regard to the adjudication decision and to “avoid a scenario under the BIF Act where for example, [the Contractor] may suspend works pending payment of an adjudicated amount”. The Principal further stated it “intends to recover amounts paid pursuant to the adjudicator’s decision by appeal”.⁶³ The Principal in effect, despite the payment, maintained that it was not liable to pay any amount.
- (g) Section 90(2) of the BIF Act compels payment, otherwise an offence is committed. Without more, the inference of compulsion in the circumstances is established.
- (h) The Contractor’s argument that the payment was not made under mistake of law or fact as the Principal always maintained that the adjudicator’s decision was invalid but paid anyway is not persuasive. The effect of s 90(2), s 92 combined with s 98, and s 93 of the BIF Act separately or together amounted to practical, if not actual, compulsion.

⁶⁰ [2004] 2 Qd R 438.

⁶¹ Gummow J, at 543 citing Finn “Equitable Doctrine and Discretion in Remedies”, in Cornish et al (eds), *Restitution: Past, Present and Future*, (1998) 251.

⁶² Exhibit “AKM-2” to the affidavit of Allanda McConnell affirmed 6 October 2022, Hearing Bundle page 692.

⁶³ The email was admitted on the basis that the statement was made, but not the truth of its contents. See T2-3, line 41 to T2-4, line 35.

- (i) The Contractor's reliance on the defences of consideration and that the Contractor retaining the money is not unjust is unfounded.
 - (j) The reasoning of Chaney J in *John Holland Pty Ltd v Chidambara*⁶⁴ highlights the injustice in the context of the statutory scheme. In the current circumstances, it would be unjust for the Contractor to retain the funds pending final resolution of the dispute between the parties.
 - (k) The subsequent payment certificates reflect that the superintendent proceeded on the assumption that the adjudicator's decision correctly determined the amounts. Upon the finding that the adjudicator's decision is void, the superintendent has the ability to revisit the assessment of the subsequent payment claims and re-assess any amounts payable.
 - (l) The Contractor has the ability to bring a further adjudication application under Part 4 of the BIF Act or seek an assessment by the superintendent under clause 42.3 of the Contract in respect of the same subject matter.
- [117] For the reasons identified above, in circumstances where the First Decision and the Second Decision are void for jurisdictional error, the Contractor is obliged to repay the monies paid by the Principal pursuant to the purported adjudicator's decision.
- [118] Accordingly, I am satisfied that it is appropriate to order that the Contractor repay the amount of \$1,821,891.26, being the amount determined as due and payable pursuant to the Second Decision, paid by the Principal to the Contractor as a result of the Second Decision.
- [119] The Principal claims interest on the monies at the Supreme Court rate from the date of payment to the date of judgment by this Court consistent with the approach taken by the Court of Appeal in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*⁶⁵ and P Lyons J in *J Hutchison Pty Ltd v CADA Formwork Pty Ltd*.⁶⁶
- [120] The affidavit of Sally-Anne Linda Crane sworn 27 October 2022 calculates the amount of interest up until 1 November 2022 pursuant to s 59(3) of the *Civil Proceedings Act 2011 (Qld)* and *Supreme Court Practice Direction 7 of 2013* using the default rate for interest on money orders plus the cash rate.
- [121] Using the same methodology, the interest has been calculated up to the date of judgment of 16 December 2022.
- [122] Accordingly, interest is awarded in the amount of \$24,933.26, being:
- (a) In respect of the sum of \$1,656,348.40 paid on 5 September 2022 interest in the amount of \$32,017.44 for 103 days.
 - (b) In respect of the sum of \$154,038.28 paid on 5 September 2022 interest in the amount of \$2,977.58 for 103 days.
 - (c) In respect of the sum of \$11,504.58 paid on 7 September 2022 interest in the amount of \$218.07 for 101 days.

⁶⁴ [2017] WASC 179.

⁶⁵ [2015] 1 Qd R 228; [2013] QCA 394 at [76]-[77].

⁶⁶ [2014] QSC 63 at [79]-[81].

Orders

[123] It is appropriate to make the orders sought in the amended originating application and hear further from the parties in respect of costs.

[124] Accordingly:

1. Pursuant to section 10 of the *Civil Proceedings Act* 2011 (Qld), THE COURT DECLARES THAT:

a. The adjudication decision dated 25 August 2022 and issued 26 August 2022 (**First Decision**); and

b. The amended adjudication decision dated and issued 30 August 2022 (**Second Decision**),

purportedly made by the Third Respondent (registered adjudicator J1061234) pursuant to the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) in Adjudication Application QBCC 1305793 are void and are set aside.

2. THE COURT ORDERS THAT the First Respondent pay to the Applicant the sum of \$1,821,891.26 that being the amount determined as due and payable pursuant to the Second Decision, paid by the Applicant to the First Respondent as a result of the Second Decision plus interest in the amount of \$35,213.09.

3. THE COURT DIRECTS THAT the parties file and serve submissions on costs of no more than 3 pages by 3 February 2023.