SUPREME COURT OF QUEENSLAND

CITATION:	*CGC Qld Pty Ltd v Ziegel Co Pty Ltd* [2026] QSC 224
PARTIES:	**CGC QLD PTY LTD ACN 658 638 006** (applicant) **v** **ZIEGEL CO PTY LTD ATF NORCOTT FAMILY TRUST ABN 40 301 550 142** (first respondent) **DALE MORRELL** (second respondent) **THE ADJUDICATION REGISTRAR (QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION)** (third respondent)
FILE NO:	BS 5501 of 2025
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 September 2026
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2026
JUDGE:	Hindman J
ORDER:	**1. The originating application is dismissed.** **2. Unless any party advises the associate to Hindman J in writing before 4pm on 30 September 2026 that they wish to be heard about the balance of the orders to be made, the further orders are:** **(a) The first respondent is released from its undertaking recorded in the order of Crow J of 1 December 2025 (CDI 6).** **(b) The monies paid into court by the applicant in the amount of $79,531.87, including all accretions thereon, are to be paid forthwith to the first respondent.** **(c) The applicant is to pay the first respondent's costs of the proceeding on the standard basis.** **(d) Otherwise no order as to costs.**

(e) Liberty to apply in respect of the applicant's usual undertaking as to damages recorded in the order of Crow J of 1 December 2025 (CDI 6).

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where applicant principal contractor had a subcontract with a subcontractor – where the subcontractor was restructured and first respondent established to perform the subcontract – where no consent to novation to first respondent was provided – where first respondent performed works for the applicant – where first respondent provided a schedule of rates to the applicant – where first respondent submitted payment claims and associated documents which the applicant paid or partly paid – where the relevant payment claim was not paid, was referred to adjudication and an adjudication decision made in favour of the first respondent – where adjudicator requested further submissions by a particular time but first respondent submitted them 24 minutes late and adjudicator nevertheless considered them – where the applicant alleges the adjudication decision is affected by jurisdictional error and seeks to have the decision declared void on various grounds – whether there was a "construction contract" under s. 64 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) – whether the payment claim was invalid because it was issued before the relevant reference date under s. 67 of the BIF Act – whether in considering the further submissions of first respondent delivered out of time the adjudicator considered submissions that were not "properly made" under s. 84(2) of the BIF Act

Building Industry Fairness (Security of Payment) Act 2017 (Qld), s. 64, s. 67, s. 84, s. 88(2)(c), s. 88(2)(d)

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd (2020) 4 QR 410; [2020] QSC 133, cited
Builtcom Construction Pty Ltd v VSD Investments Pty Ltd [2025] NSWSC 250, cited
Ceerose Pty Ltd v A-Civil Aust Pty Ltd (2023) 112 NSWLR 225; [2023] NSWCA 215, cited
Crown Green Square Pty Ltd v Transport for NSW [2021] NSWSC 1557, cited
Downer Construction (Australia) Pty Ltd v Energy Australia (2007) 69 NSWLR 72; [2007] NSWCA 49, cited
GCB Constructions Pty Ltd v SEQ Formwork Pty Ltd (2023) 15 QR 1; [2023] QSC 71, considered
HA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd [2020] QSC 307, cited

Husain v O & S Holdings (Vic) Pty Ltd [2005] VSCA 269, cited
Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd [2018] NSWCA 339, cited
Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd [2024] QSC 16, cited
J Hutchinson Pty Ltd v Cada Formwork Pty Ltd [2014] QSC 63, cited
Machkevitch v Australia Building Constructions [2012] NSWSC 546, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, cited
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 34, cited
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA 52, cited
Total Lifestyle Windows Pty Ltd v Aniko Constructions Pty Ltd [2021] QSC 92, cited

COUNSEL: LJ Tassell for the applicant
CH Matthews for the first respondent
Submitting appearances for the second and third respondents

SOLICITORS: Romans & Romans for the applicant
Shannon Clark Tuhtan for the first respondent
Submitting appearance for the second respondent
Crown Law for the third respondent

Synopsis

[1] The applicant (**CGC**) seeks to have the adjudication decision dated 25 November 2025 (**Decision**) made by the second respondent (**adjudicator**) pursuant to the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) in the sum of $79,531.87[1] in favour of the first respondent (**Ziegel**) declared void, in whole or part, as a consequence of alleged jurisdictional error. Related relief is also sought. CGC has paid into Court, pursuant to orders dated 1 December 2025, the adjudicated amount.

[2] CGC submits the Decision is void for jurisdictional error because:

(a) there was no "construction contract" between CGC and Ziegel;

(b) the payment claim was invalid because it was issued before the relevant reference date;

(c) the adjudicator committed jurisdictional error by considering and having regard to submissions of Ziegel that were not "properly made".

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1 Including GST but excluding interest and adjudication fees.

[3] Ziegel responds to those complaints by contending that:

(a) there was a "construction contract" between CGC and Ziegel;

(b) the payment claim was valid because it was issued in respect of either:

(i) a valid reference date worked out by the parties (namely, the 25th of the month);

(ii) the default reference date of the end of the month,

(c) the submissions of Ziegel alleged to be not "properly made" were submitted to the adjudicator only 24 minutes after the time set by the adjudicator and were accepted by the adjudicator as being properly made (being a matter within his jurisdiction). Alternatively, even if the submissions were not properly made but were considered by the adjudicator, the error is not material as the adjudicator had already formed a preliminary view favourable to Ziegel on the submissions Ziegel had properly made.

[4] In the result, I am not satisfied that the Decision is affected by jurisdictional error because:

(a) there was a construction contract between CGC and Ziegel;

(b) the payment claim was made in relation to the reference date of the 25th of the month;

(c) it was for the adjudicator to determine if the further submissions delivered by Ziegel at the request of the adjudicator but after the time limit set by him were "properly made" and in considering those submissions he (implicitly) so determined the submissions were properly made.

[5] The originating application will be dismissed.

General principles about jurisdictional error in the context of the BIF Act

[6] An adjudicator's decision can be reviewed for jurisdictional error and the Court may declare an adjudication decision void, in whole or in part, for jurisdictional error.[2]

[7] The purpose and operation of the BIF Act must be borne in mind in any application for such relief (and in construing the BIF Act), which include that:

(a) the object of the BIF Act is to ensure cashflow to construction contractors in recognition of the fact that, without cash flow, such contractors may not survive;

(b) the procedure of adjudication is subject to strict, fast timeframes;

(c) s. 101 of the BIF Act preserves the parties' ultimate rights that may be pursued by litigation in the ordinary course;

(d) the procedure of adjudication has been described as "pay now, argue later".[3]

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2 *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at 550-556 [67]-[80].

3 *Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd* [2024] QSC 16 at [14]-[16].

[8] The purpose and operation of such legislation has been commented on by the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*,[4] including why an adjudication decision is not subject to judicial review for non-jurisdictional errors of law.

[9] The analysis by Bond J (as he then was) in *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* (***Acciona***)[5] remains a good summary of most of the principles (it is not exhaustive) relating to jurisdictional error in the context of the BIF Act, and has been regularly adopted by other judges of this Court.[6] I accept those general principles as there articulated.

Summary of the relevant factual background

[10] On 24 July 2024, CGC entered into a written subcontract with Brizmasonry Pty Ltd (**Brizmasonry**) for Brizmasonry to perform construction works for CGC. The Brizmasonry subcontract is not in evidence.

[11] Brizmasonry commenced works under the Brizmasonry subcontract. Brizmasonary claimed and was paid for works.

[12] Some months later, on 26 November 2024, Brizmasonry informed CGC that it was undertaking a restructure and that Ziegel was a related entity established to do the work Brizmasonry had been performing. Brizmasonry sought CGC's consent to the Brizmasonry subcontract being novated to Ziegel.

[13] CGC did not execute the deed of novation proposed by Brizmasonry and Ziegel. Brizmasonry subsequently entered external administration and its building licence was cancelled. Shortly thereafter, Ziegel obtained its building licence.

[14] There was apparently a call between a Mr Dean of CGC and Mr Kirch (at least previously of Brizmasonry) on about 28 January 2025. That call was followed up by an email from Mr Dean to Mr Kirch (at a Brizmasonry email address) copied to two persons with Ziegel email addresses in the following terms:

> Hi Jake,
>
> Thanks for the call and for the agreement of 10 Blockies + 4 Labourers being on site tomorrow and all blocks laid by Friday COB.

[15] It can be inferred that Ziegel commenced works thereafter.

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4 (2018) 264 CLR 1.

5 (2020) 4 QR 410 at 422-428 [32]-[42].

6 See, for example, *Total Lifestyle Windows Pty Ltd v Aniko Constructions Pty Ltd* [2021] QSC 92 at [12]-[14]; *SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307 at [10], [31].

[16] On 7 February 2025, Ziegel provided a schedule of rates to CGC and requested the provision of a work order from CGC. No reply was received from CGC. The rates breakdown provided was:

RATES BREAKDOWN	
Lay rate for block (incl sand and cement)	$9/block
Drill and epoxy starter bar (excl supply of starter bar & epoxy)	$9/bar
Retrofit Fire door frame	$500/frame
Labour	$125/hr
Subcontractor delays work rate	$500/ day

[17] Ziegel issued its payment claim PC01 (INV-0019) to CGC on 8 February 2025 for $35,910 (excluding GST). The claim summary sheet is dated 25 January 2025 and it can be inferred only contains works completed up to that date. Only "original contract works" are claimed (no variations). The original contract works are listed in 14 lines, not all of which are claimed in this claim. The completed works are claimed consistently with the schedule of rates provided the previous day (the vast majority of the work being grey blockwork at $9/block excluding GST).[7]

[18] Brizmasonry had a liquidator appointed on 10 March 2025.

[19] CGC paid Ziegel's PC01 on 17 March 2025. Ziegel alleges payment was only made after CGC required Ziegel to sign variations in a computer system used by CGC.

[20] Ziegel continued to perform construction works for CGC.

[21] On 25 March 2025, Ziegel issued PC02 (INV-0036) to CGC for $50,820 (excluding GST). The claim summary sheet is dated 25 March 2025 and it can be inferred only contains works completed up to that date. It is in the same form as the earlier claim summary sheet and updates the total works completed. In this claim, further "original contract works" are claimed as well as variations numbered V01-V08. Again, the original contract works are listed in the same 14 lines, not all of which are claimed in this claim. The completed works and the variations are claimed consistently with the schedule of rates provided in February 2025.[8] Most of the variation works are claimed at the schedule of rates amount for labour – $125/hour excluding GST.

[22] PC02 was substantially paid by CGC on 9 May 2025.

[23] On 23 April 2025, Ziegel issued PC03 (INV-0046) to CGC for $65,004 (excluding GST). The claim summary sheet is post-dated 25 April 2025. It followed the same format as the earlier claim summary sheets. Variations V01-V09 are included but now record that labour amounts have been reduced to $100/hour excluding GST "as

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7 The only line item that does not appear in the schedule of rates is item 12, installation of door frames, which is charged at the equivalent of 30 blocks.

8 As before, the only line item that does not appear in the schedule of rates is item 12, installation of door frames, which is charged at the equivalent of 30 blocks.

agreed". No other details of the agreement to reduce the labour rate have been given in evidence.

[24] PC03 was part paid by CGC on 28 May 2025. There was a subcontract payment certificate delivered in respect of the claim on 1 May 2025 that referenced subcontract "23MAI-06". It referred to Ziegel as the subcontractor, an original subcontract amount and approved variations. It noted that no signed subcontract existed in a table dealing with "status of compliance".

[25] Ziegel claims that CGC directed and required it to carry out variation works as set out in V10, V11 and V12 between 25 May 2025 and 24 August 2025.

[26] Ziegel issued PC04 (INV-0067) to CGC on 28 May 2025, and included a claim for the unpaid part of PC03 – a total of $69,003.55 (excluding GST). It attempted to claim PC04 through the computer system used by CGC but expressed concerns that CGC had the works recorded therein as a lump sum rather than as a schedule of rates. PC04 was part paid by CGC on 2 July 2025.

[27] Again, there was a subcontract payment certificate delivered in respect of that claim on 1 July 2025 that referenced subcontract "23MAI-06". It again referred to Ziegel as the subcontractor, an original subcontract amount and approved variations. It again noted that no signed subcontract existed in a table dealing with "status of compliance".

[28] On 29 August 2025, Ziegel issued a payment claim – PC05 (INV-0112) – to CGC for $81,666.97 (excluding GST) (**payment claim**). It attached a claim summary sheet (in the same general format as earlier claims), tax invoice and various dayworks sheets.

[29] Of the amount claimed, $68,553.74 was described as contract works and $5,688.96 as variation works. Insofar as the contract works were concerned, it substantially comprised the installation and certification of grey blockwork at a rate of $9/block (excluding GST), consistent with the earlier schedule of rates and claims. Insofar as the variations are concerned, most appear charged consistently with the earlier schedule of rates save the reference to the labour rate of $125/hour having been reduced by agreement to $100/hour (both excluding GST).

[30] On 1 September 2025, Ziegel issued a statutory declaration attesting to the payment of Ziegel's subcontractors to CGC. A copy of the payment claim was included.

[31] The same day there was some back and forward between the parties about some of the details of the variation claims made, including in respect of V10 for $1,638 (excluding GST) (182 x $9/block).

[32] Ziegel chased up CGC for a payment schedule in response to PC05 by email on 9 September 2025.

[33] The same day, 9 September 2025, the parties signed a subcontract variation, referred to as variation 5, which corresponds to V10 for the $1,638 mentioned above. That document refers to Ziegel as the subcontractor, refers to an original subcontract amount, approves the variation consistent with the schedule of rates provided in February 2025 by Ziegel, and refers to "All terms remain as per Subcontract".

[34] In response to Ziegel chasing up a payment schedule, CGC responded on 11 September 2025 requesting:

> Can you please advise which scope items on the approved subcontract attached you are claiming what amounts against.

[35] In response to CGC on 11 September 2025, Ziegel reissued the correspondence of 1 September 2025 - the statutory declaration and the payment claim - stating:

> As per PC05, which was attached when we submitted the invoice.
>
> Reattached the original claim for your reference.

[36] By 29 September 2025, the parties seem to have fallen out regarding payment and threats of action were being made. That prompted correspondence from CGC's operations manager to Ziegel in the following terms, inter alia:

> We refer to your invoice dated 29 August 2025, which clearly stated a due date of 28 September 2025. The invoice is scheduled for payment on 1 October 2025 – two days later than the stated date. We do not consider that such a minor delay warrants the threats you have raised regarding suspension or legal proceedings.
>
> It is also noted that you have failed to attend site for over a month, despite repeated follow-ups from our site manager. This ongoing failure to perform is a breach of your subcontract obligations and has caused unnecessary delays to the project with financial implications.

[37] PC05 was not paid as foreshadowed. On 24 October 2025, Ziegel made an adjudication application in respect of PC05, and the adjudicator was subsequently appointed.

[38] On 11 November 2025, CGC provided its adjudication response, including attachments.

[39] The same day, the adjudicator requested from the parties further submissions as follows:

(a) from Ziegel by "noon AEST on Thursday, 13/11/25" as to jurisdictional issues raised in the adjudication response;

(b) from CGC by 5pm on 13 November 2025 in reply.

[40] Neither party complied with the adjudicator's request.

[41] On 14 November 2025 the adjudicator again requested from the parties further submissions stating as follows:

> Based on the material before me, I am of the preliminary view that there is a contract between the parties and that work under it was carried out on or after 29 January 2025. Based on the Respondent's email of 28 January 2025, 11:38 AM, I am of the preliminary view that the contract was entered into during "the call" referred to therein.

> The parties are invited to make submissions on:
>
> 1. The time and date of "the call".
> 2. Whether the contract was entered into before "the call".
> 3. The earliest date on which the Claimant undertook work, if it was before 29 January 2025.
>
> Submissions may be made by noon AEST, Monday, 17 October 2025. Each party may comment on the other's submissions by 3pm AEST, Monday, 17 October 2025.

[42] CGC provided submissions to the adjudicator as requested. Ziegel provided submissions to the adjudicator but not until 12.24pm on 17 October 2025 – 24 minutes after the time limit imposed by the adjudicator.

[43] The Decision was issued on 25 November 2025.

[44] On 28 November 2025, CGC filed the originating application in this proceeding.

Ground 1: No 'construction contract'

[45] There is no dispute between the parties that the existence of a construction contract as defined in the BIF Act is a basic and essential requirement of a valid adjudication decision under the BIF Act such that if this Court determines that there was no construction contract between the parties then the Decision is void. I agree.

[46] Construction contract is defined in s. 64 of the BIF Act to mean:

> a contract, agreement or other arrangement under which 1 party undertakes to carry out construction work for, or to supply related goods and services to, another party.

[47] The construction contract found by the adjudicator was said to be entered into on 23 January 2025, and the scope of the contract was to complete the work that Brizmasonry had originally been contracted to do.

[48] It ought be noted at the outset that the Decision will not be void (at least on the ground presently alleged) if the Court determines that there was a construction contract in respect of which the payment claim on which the Decision is based was made, even if the true scope of the construction contract is not as found by the adjudicator. That is, the Court can decide the existence of the jurisdictional fact for itself and is not bound by the adjudicator's decision.

[49] The BIF Act definition of construction contract is wide – encompassing an "other arrangement"; no particular formality is required. But what cases have held the definition requires at a minimum is a sufficiently concluded state of affairs which is

bilateral. I agree. Burns J (as he then was) in *GCB Constructions Pty Ltd v SEQ Formwork Pty Ltd* (***GCB Constructions***) put it this way:[9]

> One of the essential jurisdictional requirements for a valid adjudication is the existence of a "construction contract" within the meaning of the Act.
>
> …
>
> But that is as far as it goes. It is important to appreciate that to qualify as an "other arrangement" for the purposes of the legislation, there must at least be a "concluded state of affairs, which is bilateral".[10] There must also be a sufficient degree of mutuality to serve the purposes for which the arrangement is required under the Act including, of particular resonance to this case, enough settled detail to enable the work and/or materials to be claimed with precision and then valued to the same standard.[11]
>
> To my mind, the material before the adjudicator could not justify the conclusion that there was an "other arrangement" within the meaning of the Act, any more than it could justify the conclusion that was in fact reached to the effect that a "contract" or "agreement" of the kind found amounted to a "construction contract" as defined.

[50] I say **sufficiently** concluded state of affairs deliberately. Not every aspect has to be concluded between the parties; just key aspects. For example, there may not need to be exact precision in the identification of the work to be completed (including the materials to be used).

[51] *GCB Constructions* was a case in which it was ultimately concluded that there was no construction contract (as defined) between the parties and so the BIF Act adjudication processes were not available. The facts of the case are different to those here but do provide a useful example of some of the factors a Court will consider in deciding whether there is the requisite mutual concluded state of affairs.

[52] In a brief way, in *GCB Constructions*:

(a) there was no dispute that the subcontractor, SEQ, performed construction work and supplied materials in connection with that work at the site of the head contractor, GCB;

(b) SEQ had quoted for the work; a letter of award was issued by GCB to SEQ – it expressed the award was subject to the terms and conditions in a subcontract agreement;

(c) the terms and conditions of the subcontract agreement were negotiated at length but never agreed;

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9 (2023) 15 QR 1 at [15], [18]-[19].

10 See *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546, [28]; *Seabreeze Manly v Toposu* [2014] NSWSC 1097 at [26].

11 As to the requirement for mutuality, see *Crown Green Square Pty Ltd v Transport for NSW* [2021] NSWSC 1557 at [165]-[170].

(d) regardless, SEQ commenced works – including some works as preliminary works and other works (to be paid at hour/day rates) outside of the quoted works that SEQ was requested to complete – there had been a discussion on site about some of those works commencing;

(e) SEQ rendered invoices to GCB that were paid;

(f) there was a dispute; SEQ left the site; GCB did not permit SEQ to remove certain formwork;

(g) SEQ rendered a further invoice for materials (including the formwork left on site) and labour;

(h) the invoice was adjudicated, the adjudicator finding a construction contract as defined (specifically a contract, but at least an other arrangement) between the parties.

[53] The main factors that pointed away from there being the sufficiently concluded state of affairs were set out at [20]-[24] of the decision and included:

(a) the bulk of the claim was concerned with the supply of materials, and nothing had ever been agreed about the supply of those materials or payment for them – that claim was entirely unilateral;

(b) the conversation pointed to did not deal with all of the works claimed, only part of them;

(c) thus there were works performed that were not the subject of any agreement;

(d) there was no specification of rates to be charged for labour; the claims previously made and paid were not consistent in that respect; there was no suggestion GCB had agreed to pay "reasonable" rates;

(e) several important matters were not the subject of any agreement/conversation – including time for performance, making of claims, time for payment, retention money and transfer of ownership of materials.

[54] In *GCB Constructions*, Burns J concluded at [24]-[25] as follows:

> … In the end, the evidence before the adjudicator did not rise any higher than establishing that GCB requested SEQ to provide labour for capping beam works and that SEQ agreed to do that without, at the same time, agreeing the hourly or daily rates that would be charged for that work.
>
> It follows that an agreement of the kind found by the adjudicator could not in my opinion amount to a "construction contract" within the meaning of the Act and so, without more, it cannot be said that the adjudicator's jurisdiction was enlivened. SEQ may very well have a strong claim based on a *quantum meruit*, but an agreement of the kind found by the adjudicator does not represent a contract, agreement or other arrangement sufficient to supply one of the essential jurisdictional facts that is necessary to engage the security processes under the Act.

[55] The relevant factors may pull towards different conclusions about the existence of a construction contract as defined; and it ought be recalled that cases have confirmed that parties "may drift into a contractual relationship" (I would add: or other arrangement satisfying the definition of construction contract). *Husain v O & S Holdings (Vic) Pty Ltd*[12] provides an example of that albeit in a different context.

[56] In this case, it is correct to consider the course of conduct between the parties all the way up to the service of the relevant payment claim seeking to invoke the BIF Act. It would not be fatal to the application of the BIF Act if at the time Ziegel commenced performing work for CGC there was not a construction contract as defined – the parties may have drifted into the required type of relationship by the time of the relevant payment claim being served.

Was there a sufficiently concluded state of affairs which was bilateral?

[57] I find that, as at the time of the making of PC05, it was a claim properly made pursuant to a construction contract as defined in the BIF Act. At the least, there was an "other arrangement" in place between the parties that displayed the necessary qualities of a sufficiently concluded state of affairs which was bilateral.

[58] I emphasise in that respect from the summary of facts set out above:

(a) there is no doubt that Ziegel performed the works claimed in PC05 at the request of CGC;

(b) the breakdown of charges for the works to be performed had been set out in the schedule of rates provided by Ziegel to CGC in February 2025;

(c) whilst CGC did not directly respond to same (nor Ziegel's request for a work order), it paid for "contract" works and "variation" works, consistent with that schedule of rates claimed in each of PC01 - PC04;[13]

(d) the same type of works, at the same rates, formed the vast majority of the works claimed in PC05.

[59] The facts demand a different result to that which occurred in *GCB Constructions*.

Other arguments

[60] Finally in respect of ground 1, I express my conclusions about some other submissions made by the parties.

[61] First, I accept that a construction contract as defined is not required to be legally enforceable to satisfy the definition in the BIF Act. There is a great deal of authority to that effect.[14] It might be that legal enforceability in a particular case will be a relevant factor to consider in working out whether there is a construction contract as defined, but this is not that type of case; here that factor has little weight and no impact on the outcome.

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12 [2005] VSCA 269 at [51].

13 Save a later agreed reduction in the labour rate.

14 *Machkevitch v Australia Building Constructions* [2012] NSWSC 546 at [27]-[28]; *Crown Green Square Pty Ltd v Transport for NSW* [2021] NSWSC 1557 at [165].

[62] Second, insofar as it was submitted on behalf of Ziegel that an "other arrangement" that gives rise to an entitlement to restitution on a quantum meruit basis would be a legally enforceable other arrangement, that submission would be too broad to be able to be accepted. The submission is then somewhat narrowed to contend: "[t]he BIF Act thereby allows for a statutory remedy in restitution so long as there was a bilateral state of affairs for a party to undertake construction work for the other". Still I consider that submission too broad.

[63] As expressed above, what I consider is required is a sufficiently concluded state of affairs which is bilateral. If there is no agreement about the valuation of the work to be completed, I would find it difficult to see how that is a sufficiently concluded state of affairs which is bilateral. It might be that it can be concluded that the parties' agreed valuation methodology was to value on a quasi-quantum meruit basis, that is, by reference to reasonable rates – there would be no difficulty with that. But if the right to payment rests only on a restitutionary basis, I cannot see how there could exist a construction contract as defined in the BIF Act. Regardless, again, that does not seem to be this case where I have concluded the agreement about valuation of work to be completed is sufficiently clear by the time of the relevant payment claim – it was in accordance with the schedule of rates supplied, with the labour rate reduced as agreed to $100/hour rather than $125/hour (excluding GST).

Conclusion on ground 1

[64] The ground 1 challenge to the Decision fails.

Ground 2: Payment claim issued before reference date

[65] The meaning of reference date is set out in section 67 of the BIF Act. Generally, absent an agreement about a reference date in a construction contract, the default reference date is the end of the month.

[66] Section 67(1) of the BIF Act provides:

> **67 Meaning of reference date**
>
> (1) A reference date, for a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out, or related goods and services supplied, under the contract; or
>
> (b) if the contract does not provide for the matter—
>
> (i) the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later month.

[67] I find that, by the time of the making of the relevant payment claim (PC05 on 29 August 2025), there was an agreement (partly express, partly through conduct) about reference dates in the construction contract, namely that the reference dates were the 25th day of each month.

[68] The prior payment claims were made as follows:

PC01	8 February 2025 (noting that the claim summary attached was dated 25 January 2025)
PC02	25 March 2025
PC03	23 April 2025 (noting that the claim summary attached was post-dated 25 April 2025)
PC04	28 May 2025

[69] Correspondence from CGC dated 22 April 2025 had provided:

> Hi Accounts,
>
> This is an automatic reminder to submit your claims, if any, before Apr 25, 2025.
>
> Please click here to submit your claim.
>
> If there is no claim requiring submission for this month, please ignore this message.

[70] Similar correspondence was also sent by CGC on 24 August 2025.

[71] The proper construction of the above correspondence is that a reference date of the 25th of each month was being set. Each month a payment claim could be made for work completed up to the 25th of the relevant month. That is also consistent with the course of conduct of the parties. True it is then that the PC03 claim was submitted early, but that is not necessarily fatal (noting that it did not claim for any work completed after 25 April, and the claim summary provided was dated 25 April) and does not change the conclusion I have reached.

[72] PC05 was properly made in respect of the reference date of 25 August 2025.

[73] The ground 2 challenge to the Decision fails.

Ground 3: Submissions not properly made

[74] Section 84 of the BIF Act provides a procedure by which an adjudicator in an adjudication may call for further submissions from the parties 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.

[75] Section 88(2) of the BIF Act limits the matters that an adjudicator can consider in determining an adjudication application, which includes "submissions … that have been properly made" (subsections (c) and (d)).[15]

[76] Properly made submissions will include those called for by the adjudicator and the reliance by an adjudicator upon not properly made submissions can amount to jurisdictional error.[16]

[77] CGC submits in this case that further submissions delivered by Ziegel, that were called for by the adjudicator and relied upon by the adjudicator, were not properly made, leading to the Decision being void because the time limit set by the adjudicator for the delivery of those submissions was 12pm on 17 November 2025, and the submissions were in fact not delivered until 12.24pm that day.

[78] What requirements of the BIF Act are jurisdictional (with non-compliance resulting in an adjudication decision being invalid) involves a process of statutory construction.[17] Whilst I can readily accept that certain time limits under the BIF Act are important to the operation of the BIF Act, can be a jurisdictional requirement and non-compliance can result in an adjudication decision being invalid, time limits set by an adjudicator for the receipt of further submissions are not of that type. Such time limits are in the discretion of the adjudicator and not otherwise governed by the terms of the BIF Act. Just as the adjudicator would have been at liberty to expressly extend a time limit set by him, either of his own accord or on a party's or parties'

15 Emphasis added.

16 *J Hutchinson Pty Ltd v Cada Formwork Pty Ltd* [2014] QSC 63 at [59]-[63].

17 *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, particularly at 357 [47]. See also *Acciona* at [34].

request, so too was he at liberty to treat further submissions received by him at his request as properly made despite having been received outside the time frame set by him. That fell squarely within his jurisdiction. It is implicit in this case that, in taking Ziegel's further submissions into account despite the slight lateness of same, the adjudicator was prepared to, and exercised his discretion to, have regard to the further submissions as properly made.

[79] There might be a circumstance in which an adjudicator taking late submissions called for into account denies the other party natural justice, but this is not a case of that type.

[80] I find that a party's compliance with a time limit set by an adjudicator for further submissions is not a basic and essential requirement of the BIF Act such that non-compliance and a considering of the further submissions by the adjudicator would render the decision invalid.

[81] It is for the adjudicator to decide for themselves if the further submissions are properly made and are to be considered despite any non-compliance with a time limit imposed by the adjudicator. This is akin to how what are sometimes referred to as category 2 matters are to be considered.[18]

[82] Further, relevant to my conclusion on the proper statutory construction expressed above are that:

(a) adjudicators are expressly required to consider their own jurisdiction under the BIF Act (s. 84(2)(a)(i));

(b) the time limit is one set by the adjudicator – that is suggestive of the consequences of non-compliance being a matter left to the determination of the adjudicator;[19]

(c) to conclude otherwise might lead in different cases to undesirable arguments about when time be extended, only at a parties' request or on the adjudicator's own volition, can time be extended *nunc pro tunc*, can parties complain about the time permitted by an adjudicator for further submissions, etc;

(d) time for further submissions is not one of the "detailed requirements" of the BIF Act scheme; whilst time is important under the scheme, it is far less so in this respect – the real objects of the Act concerning time would not be undermined by not treating the time limit imposed by an adjudicator for further submissions as essential;

(e) the express terms of s. 84(4) of the BIF Act.

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18 The terminology of category 1 and category 2 matters comes from the New South Wales Court of Appeal decision in *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 and particularly at [13]-[15] of that decision. In that decision, the Court stated that jurisdiction may depend either on an "*identified state of affairs*" (the first category) or a "*state of satisfaction of the decision maker as to an identified state of affairs*" (the second category). The first category jurisdiction depends on a finding of a Court as to whether or not the required state of affairs existed; for the second, the Court is only concerned with whether the relevant opinion has been lawfully formed.

19 *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72 at 96 [87]-[88].

[83] My conclusion is consistent with the well settled position that it is for an adjudicator to decide whether submissions more generally are properly made; the issue is not jurisdictional. For example, in *Ceerose Pty Ltd v A-Civil Aust Pty Ltd*, Payne JA held that it is:[20]

> … now well settled that whether a submission referred to in s 22(2)(c) or (d) has been "duly made" is a matter within the jurisdiction of an adjudicator and error in identifying a submission as having been "duly made" is not jurisdictional.

[84] Given my conclusion that the late delivery of Ziegel' further submissions which were then considered by the adjudicator was a matter left to the determination of the adjudicator as to whether the submissions were properly made, I do not intend to enter upon a discussion as to whether an adjudicator's considering of submissions not properly made must always result in the invalidity of the adjudication decision.

[85] The ground 3 challenge to the Decision fails.

Outcome

[86] The Decision is not affected by jurisdictional error as alleged. The application will be dismissed and consequential orders made. I will hear from the parties as to the precise form of relief and as to costs if requested.

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20 (2023) 112 NSWLR 225 at [31]. See also *Builtcom Construction Pty Ltd v VSD Investments Pty Ltd* [2025] NSWSC 250 at [19]-[25] and the several cases there cited.