

Construction Alert

Providing further materials in adjudication responses under the *Building and Construction Industry Payments Act 2004* (Qld)

February 2012

The recent Supreme Court of Queensland decision of *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd & Ors* [2011] QSC 293 considered the effect of an adjudicator's decision to exclude from his consideration spreadsheets that the applicant, Syntech, had provided in its adjudication response but which had not been included in its payment schedule.

The case illustrates the importance to respondents of including all relevant submissions, where possible, in its payment schedule and to claimants, of carefully scrutinising new materials that may have been included in an adjudication response.

The Decision

The adjudicator had decided to exclude spreadsheets contained in Syntech's adjudication response on the basis that they had not been submitted in its payment schedule. He reasoned that to include them would deny Peter Campbell Earthmoving (Aust) Pty Ltd & Ors (**PCE**) the opportunity to challenge the information provided in the spreadsheets and thus potentially deny PCE natural justice. The Court held that the adjudicator's decision was void on the following grounds:

- The adjudicator committed a jurisdictional error by failing to consider the spreadsheets attached to the adjudication response as they formed part of Syntech's submissions.
- Syntech was denied natural justice because the adjudicator failed to inform the parties that the matter was being determined without reference to the spreadsheets leaving Syntech with no opportunity to explain the reason for their omission from the payment schedule.

Jurisdictional error

The first argument advanced for Syntech was that the adjudicator's decision in this case was void for jurisdictional error because the adjudicator, in rejecting the spreadsheets, did not comply with the essential statutory requirements for adjudication under the BCIPA. Justice Daubney found that section 26(2)(d) of the BCIPA

required the adjudicator to consider submissions duly made, that the word “submissions” was not to be construed narrowly, and that submissions may include relevant documentation in support.

Justice Daubney held that in rejecting the spreadsheets, as submissions duly made, and in determining the matter without reference to them, the adjudicator failed to comply with an essential legislative requirement for the determination and thereby committed a jurisdictional error rendering the determination void.

His Honour noted that section 24(4) of the BCIPA precludes a respondent from including any reasons for withholding payment in its adjudication response unless those reasons have already been included in the payment schedule. PCE however conceded that the spreadsheets did not raise any new grounds for withholding payment and were provided as explanatory material to reasons already included in Syntech’s payment schedule and thus were not liable for exclusion on this ground.

Natural justice

Justice Daubney referred to the decision of *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 in which it was recognised that an adjudication is void if there has been a substantial denial of natural justice to a party.

Justice Daubney then turned to section 25(4) of the BCIPA, which provides that an adjudicator may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions. Justice Daubney noted that one of the intended purposes of that subsection was for the adjudicator to “*give the parties notice of an intention that the adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended*” (at paragraph [37]).

Justice Daubney noted that PCE had not objected to the adjudicator receiving the spreadsheets, the adjudicator did not call for any further submissions from the parties on the spreadsheets nor tell them of his intention to decide the matter without reference to them. Accordingly, Justice Daubney found that the adjudicator’s unilateral decision to disregard the spreadsheets meant that Syntech was denied the opportunity to advance any argument for their inclusion and the decision was therefore infected by a substantial breach of natural justice.

Tips for Respondents

This case serves as a reminder to respondents that all relevant submissions should be included in the payment schedule to ensure that they are not prevented from relying upon them during the adjudication process. Whilst a respondent is permitted to submit in its adjudication response further materials in support of a reason for withholding payment which has already been advanced in the payment schedule, there can sometimes be a fine line. Accordingly, if in doubt, respondents should err on the side of caution and include all supporting materials with its payment schedule.

Tips for Claimants

Claimants should carefully scrutinise adjudication responses to determine if further materials provided by the respondent introduce new reasons for withholding payment as these materials should be struck out by the adjudicator.

Tips for Adjudicators

Adjudicators should understand that the purpose of section 25(4) of the BCIPA is that requests for submissions from the parties on particular points should be made when an adjudicator resolves to make a decision on a ground not previously advanced by either of the parties. Conversely, in the absence of any request for further submissions or comment, adjudicators’ decisions should be based on the contentions of the parties alone.

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