

Adjudicator's Mistake Upheld in Payment Claim Case

The recent Queensland Supreme Court case of *Nebmas Pty Ltd -v- Sub Divide Pty Ltd & Ors* demonstrates the importance of confirming key dates and timeframes in the building and construction sector to avoid penalty.

In this case, the Court upheld an adjudicator's decision in relation to notice timeframes under s21(2) of BCIPA (the Building & Construction Industry Payments Act 2004 (Qld)), despite the adjudicator having made a mistake of fact. As a result, the claimant (Sub Divide) was allowed to refer the dispute to adjudication despite having failed to comply with the notice requirements clearly stipulated in BCIPA.

The facts

Nebmas, the applicant, performed building works as a contractor and Sub Divide was a subcontractor to Nebmas. Sub Divide served a payment claim under BCIPA on Nebmas. No payment was made and no payment schedule was issued by Nebmas. Under BCIPA, Sub Divide served a notice referring the matter to adjudication in February 2009. The matter proceeded to adjudication and was determined in favour of Sub Divide for more than \$195,000.

Nebmas applied to the Court for a declaration that the decision was void on the basis that Sub Divide's notice of its adjudication application did not comply with the timeframes prescribed in BCIPA. Nebmas also sought an injunction to restrain Sub Divide from filing the adjudicator's certificate.

The Adjudicator determined that the notice was given within time. The Court considered whether the notice was out of time, and whether that would result in the Adjudicator's decision being void.

Timeframes under BCIPA

Under BCIPA, an adjudication application can't be made unless the claimant gives the respondent notice of its intention to apply, within 20 business days immediately following the due date for payment.

In this case, the Court determined that contrary to the Adjudicator's decision, the notice had, in fact, been given outside the prescribed period of 20 business days.

Arguments before the Court

Nebmas argued that non-compliance with timeframes under BCIPA resulted in the adjudication application and the adjudication decision having no legal effect. A previous decision in the case of *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd* was relied upon to support this argument because it had determined that an equivalent provision was a "mandatory condition" in the validity of the adjudication application.

Sub Divide, on the other hand, argued that the provision of the notice was not a pre-condition to a valid adjudication. It relied primarily on the case of *Brodyn Pty Ltd v Davenport* arguing that it was not the intention of BCIPA that exact compliance of these timeframe requirements was essential to the existence of a determination.

The adjudicator's power

In considering the adjudicator's power, in this case the Court deemed that technical elements required under BCIPA could be treated as dependant upon the satisfaction or opinion of the adjudicator if they related to a procedural step in the claim process, and allowed for "speedy and effective" dealing with the payment process "without undue formality or resort to the law".

The Court also held that "the overall purpose of the legislation would be better served by permitting an adjudicator to decide what will usually be the factual question of whether the step has been taken", which in this case was whether the notice had been given within time.

Was compliance with the timeframe an essential requirement?

With reference to the *Brodyn* case, and the purpose of BCIPA, the Court found that the timeframes prescribed were not an essential requirement and therefore non-compliance did not render the adjudicator's decision as having no legal effect. Accordingly, the application was not granted and the injunction was discharged.

The decision

This decision confirms an adjudicator's power to determine the factual compliance with a statutory provision and in this case, it meant that a notice given outside of the prescribed time was upheld because the adjudicator had determined it to be validly within time.

Recommendation

The Nebmas and Sub Divide case demonstrates the importance of timing and notification. The consequences of missing timeframes under BCIPA are well known and potentially disastrous.

Parties to a construction dispute under BCIPA should verify key dates and timeframes with the other party in writing to guard against uncertainty and outcomes that can otherwise be avoided.

If you're uncertain on how best to guard against the scenario recently experienced by Nebmas, contact HopgoodGanim's Construction, Infrastructure and Major Projects team to discuss BCIPA, and how your organisation can effectively manage payment claims and develop a strategy to do so.

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