SUPREME COURT OF QUEENSLAND

CITATION:	*Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd & Ors* [2011] QSC 293
PARTIES:	**SYNTECH RESOURCES PTY LTD** **ACN 095 102 971** (applicant) **v** **PETER CAMPBELL EARTHMOVING (AUST) PTY LTD** **ACN 092 194 744** (first respondent) and **ADJUDICATE TODAY PTY LTD** **ACN 109 605 021** (second respondent) and **MAX TONKIN** (third respondent)
FILE NO:	BS 2740 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2011
JUDGE:	Daubney J
ORDER:	[1] **It will be declared that the adjudicator's decision made by the third respondent dated 25 March 2011 in respect of adjudication application no. 1057877-1737 is void.** [2] **I will hear the parties as to any further or consequential orders, and as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS - where the applicant seeks a declaration that the adjudication is void – where the applicant Syntech delivered its "adjudication response", in accordance with s 24 of *Building and Construction Industry Payments Act* 2004 (Qld) – where a number of documents were attached to, and delivered with, Syntech's adjudication response, including spreadsheets that had not been included in or supplied with the payment schedule – where the

question is not whether the spreadsheets would or might have been admissible under the procedural and evidentiary rules applicable to Supreme Court litigation; the question is whether the adjudicator in this case failed to meet the statutory conditions which were essential for a valid decision to be made – where s 26(2)(d) required the adjudicator, in the circumstances, to consider the spreadsheets because they were part of submissions duly made – whether the adjudicator committed jurisdictional error

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS - where the applicant seeks a declaration that the adjudication is void – where the applicant Syntech delivered its "adjudication response", in accordance with s 24 of *Building and Construction Industry Payments Act* 2004 (Qld) - where a number of documents were attached to, and delivered with, Syntech's adjudication response, including spreadsheets that had not been included in or supplied with the payment schedule – where the adjudicator's decision to exclude those spreadsheets from his consideration was based on the fact that PCE had not previously been supplied with those spreadsheets, had not had the opportunity to challenge Syntech's position in reliance on those spreadsheets, and had thereby been denied natural justice – where in unilaterally discarding the spreadsheets without giving the parties notice of his intention of doing so, the adjudicator did commit a substantial breach of natural justice – whether the adjudicator's decision was infected by a substantial breach of natural justice

Building and Construction Industry Payments Act 2004 (Qld), s 17, s 18, s 21, s 24, s 25, s 26

Austruc Constructions Ltd v ACA Developments Pty Ltd [2004] NSWSC 131, cited
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421, cited
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302, cited
Kirk v Industrial Court (NSW) (2010) 239 CLR 531, cited
Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140, cited
Musico v Davenport [2003] NSWSC 977, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2011] QCA 22, considered
Reiby Street Apartments v Winterton Constructions [2006] NSWSC 375, cited
Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC 941, considered

COUNSEL: G D Beacham for the applicant
G J Radcliff for the first respondent

SOLICITORS: Clayton Utz for the applicant
Robinson & Robinson for the first respondent

[1] On 2 September 2009, the applicant ("Syntech") and the first respondent ("PCE") entered into a written contract for the "wet hire" of heavy earthmoving equipment by PCE to Syntech at the Cameby Downs Project mining site near Dysart in Central Queensland. It was a "construction contract", within the meaning of that term in the *Building and Construction Industry Payments Act* 2004 (Qld) ("*BCIPA*"). The contract provided for PCE to supply equipment and operators for earthworks which were to be performed in accordance with scope of works documents that were to be agreed in writing between the parties. Payment was to be made on a "per hour" basis, at either an "operating wet rate" or at a "standby rate".

[2] Under cover of a letter dated 7 February 2011, PCE delivered to Syntech a payment claim in accordance with s 17 of *BCIPA*. It was expressed to be a "final claim", which resulted from PCE having audited its previously submitted claims to ensure that matters were "contractually completed", and was "submitted in order to close the Contract". The payment claim covered three groups of claims, summarised as follows:

> "Claim Summary:
>
> This final claim is broken down as follows:
>
> Section 1: Invoice and Claim with signed time sheets attached. This has been broken down into swings as per the original claims submitted by PCE.
>
> Section 2: Invoice and Claim with unsigned time sheets attached. This has also been broken down into swings as per the original claims. Pre-Start meeting sign-on sheets and Civil Pacific Invoices have been used to validate these claims.
>
> Section 3: Claim for disputed reductions from earlier claims."

[3] Attached to the covering letter were formal claims for each of these sections together with copies of the invoices relied on by PCE for those claims.

[4] The total claimed by PCE under this payment claim was $813,672.14 (excluding GST).

[5] On 21 February 2011, Syntech delivered its "payment schedule" pursuant to s 18 of *BCIPA*. The payment schedule contended that the amount Syntech proposed to pay in response to the payment claim was "nil". Syntech gave twelve reasons for disputing the payment claim. Two of those reasons are relevant for present purposes, namely Reason # 6 and Reason # 12. In the introduction to the payment schedule, those reasons were summarised as follows:

> "Reason # 6
>
> The first section of the submission is partially for the additional man hours unrelated to the "wet hire" of plant and equipment to undertake construction work under a schedule of rates contract.
>
> ...
>
> Reason # 12

> The respondent has overpaid the claimant."

[6] The payment schedule gave further detail about each of the reasons. The further elaboration of Reason # 6 was as follows:

> "Reason # 6
> The first section of the submission is partially for the additional man-hours unrelated to the so called "wet hire" of equipment to undertake construction work under a schedule of rates.
>
> The respondent contends that wet hire is a term adopted in the hire industry.
>
> The common meaning of wet hire is
> - the hire of nominated plant or equipment;
> - with fuel and other operational consumable;
> - in a fully serviceable condition;
> - capable of doing work;
> - **with a licensed, trained, experienced operator;**
> - **able to operate that piece of plant or equipment;**
> - **reasonably efficiently;**
> - **to complete the work;**
> - **as directed by the hirer.**
>
> The respondent contends that payment for plant and equipment under "wet hire" is for the plant or equipment with the operator for the hours recorded by the plant and equipment operational clock.
>
> The respondent contends that as the provider of the plant and equipment is obliged to provide plant and equipment in serviceable condition, then the hirer is not responsible for planned or unplanned maintenance down time.
>
> The respondent has attempted to value the relevant man-hours indicated on the dockets and found that the quantum to be deducted form the purported payment should be $142,134.25."

[7] In respect of Reason # 12, the further detail provided in the payment schedule commenced:

> "Reason # 12
> The respondent has overpaid the claimant.
>
> As a direct consequence of the multiple payment claims served by the claimant, the respondent has undertaken a detailed review of the terms of the contract, the entitlements to the claimant for payment, and then reconciled all previous payments made to the claimant."

[8] The commentary on Reason # 12 went on to address more specific topics under the headings "Signed Dockets", "Payment on Account", "Meal Break", "Man-Hours in addition to the 'wet hire' of plant and equipment", and "claims for work undertaken without any dockets". This part of the payment schedule concluded:

> "The respondent has undertaken a detailed review of all previous payments to the claimant and has valued the overpayment at $127,618.40.
>
> The details are available on request."

[9] On 3 March 2011, and in accordance with s 21 of *BCIPA*, PCE applied for adjudication of its payment claim. As permitted by s 21(3)(f), the adjudication

application included PCE's submissions relevant to its application. Those submissions addressed, amongst other things, each of the reasons which had been referred to in Syntech's payment schedule. In particular, the submissions addressed each of Reason # 6 and Reason # 12. In respect of Reason # 6, PCE advanced an argument concerning the construction of the term "wet hire", but also submitted:

> "79. Further, the Respondent has not particularised how the sum of $142,134.25 has been calculated and therefore a complete response is not possible."

[10] PCE's submission concerning Reason # 12 was:

> "106. If the adjudicator should agree with the Claimant's response to reasons 1-11 of the Respondent's withholding of payment, reason 12 cannot be substantiated."

[11] The second respondent, which is an "authorised nominating authority" under *BCIPA*, referred the application to the third respondent for adjudication. I should note that each of the second and third respondents indicated their preparedness to be bound by the determination of the Court in this matter, and neither took any part in the hearing.

[12] On 11 March 2011, Syntech delivered its "adjudication response", in accordance with s 24 of *BCIPA*. In its adjudication response, Syntech again advanced the reasons it had previously advertised in its payment schedule. It specifically addressed argument under each of Reason # 6 and Reason # 12.

[13] A number of documents were attached to, and delivered with, Syntech's adjudication response. Behind Tab 7 of those attached documents was a spreadsheet entitled "Analysis of PCE's last payment claim – example of Reason # 6". Behind Tab 11 of the attached documents was a further spreadsheet entitled "Analysis of PCE's previous payment claims – example of Reason # 12". These spreadsheets had not been included in or supplied with the payment schedule. It is clear on the face of each of those schedules, however, that they set out the basis and calculation of the deductions proposed by Syntech under each of Reason # 6 and Reason # 12 respectively. In the course of argument before me, counsel for PCE conceded that these schedules did not constitute the expression of any reasons for withholding payment which had not already been included in the payment schedule served by Syntech.

[14] On 28 March 2011, the third respondent published his adjudication. He decided that the amount of the progress payment to be made by Syntech to PCE was the "adjudicated amount" of $456,293.60 (including GST). In the course of his adjudication reasons, the third respondent considered each of the twelve reasons which had been advanced by Syntech. In relation to Reason # 6, the adjudicator said:

> "72. The documents behind Tab 7, in volume 2 of the adjudication response, are headed "Example of Reason # 6". The documents consist of a spreadsheet covering four pages and listing the following details against a large number of docket numbers pertaining to specific items of equipment or for labour:
>
> a. hours recorded on the docket,
> b. hours previously paid by the Respondent against the docket,

c. difference between hours paid by Respondent and hours on docket,
d. net adjustment hours for each docket claimed by Claimant in present payment claim,
e. difference between Claimant's net adjustment hours and the difference between hours paid by Respondent and hours on docket.

73. The spreadsheet indicates that the Claimant has claimed 1,728.50 hours more than it is entitled to claim and that this equates to an over claim of $142,134.25."

[15] The adjudicator's decision on Reason # 6 was then expressed as follows:

"Analysis/Decision

74. I acknowledge that in the payment schedule, the Respondent indicated to the Claimant that it claimed to be entitled to deduct $142,134.25, however, I have a number of concerns about the details in the spreadsheet behind Tab 7 supporting the proposed deduction.

75. I checked the first 15 dockets and several further dockets in the spreadsheet and found each one of these is also listed in the spreadsheet behind Tab 5. This indicates that all of the dockets in the Tab 7 spreadsheet are also in the Tab 5 Spreadsheet, as are the proposed deductions claimed against each docket.

76. The comment against each docket is 'Meal time is not payable', however Reason # 6 is based on the proposition that the Respondent is not obliged to pay for plant undergoing maintenance or is unserviceable. The comment related to meal time seems to me to be more consistent with Reason # 7 than with Reason # 6.

77. In respect of some dockets, the proposed deduction is based on an overpayment claimed of 0.5 hours which may equate to a meal time, however, a large proportion is for many more than 0.5 hours. The greater number of hours seems to be related to another issue other than to meal times. Thus the claim for a deduction of $142,134.25 seems to be based on multiple causes, rather than meal times or maintenance or unserviceable times.

78. **It seems to me that the Respondent must have prepared the spreadsheet or something similar before issuing the payment schedule in order to have determined the quantum that it proposed to deduct. Having gone through the exercise of preparing the spreadsheet, which I assume was prepared from the dockets referenced and other payment claim documents, it seems to me that the Respondent could have provided it with the payment schedule to the Claimant, to give the Claimant the opportunity to find and examine the dockets referenced. It seems that the Respondent did not do this.**

79. **As a consequence the Claimant has been denied the opportunity of replying to the detail making up the proposed deduction. In my opinion, the Claimant should have been given the opportunity to challenge the Respondent's position on a docket by docket basis if necessary. In my view denying the Claimant this opportunity amounts to a substantial denial of natural justice.**

80. The failure of the Respondent to provide the details of how it determined the proposed deduction stands in contrast with the Claimant's approach of including the relevant docket numbers with the payment claim.

81. **Given my concerns about the Claimant potentially being denied natural justice, I am not prepared to allow the deduction." (emphasis added)**

[16] In relation to Syntech's Reason # 12, the adjudicator relevantly decided as follows:

"Decision/Analysis

134. The documents being Tab 11 of Volume 2 of the adjudication response is headed "Example of Reason # 12". The documents consist of a three page spreadsheet listing the following details pertaining to specific items of equipment or for labour:

a. claim date and swing number;
b. hourly rate;
c. docket date;
d. hours previously paid by Respondent;
e. extended claim based on hours paid times hourly rate.

135. The spreadsheet indicates that the total paid by the Respondent and now claimed back is $127,618.40.

136. There is a note on the spreadsheet to the effect that $127,618.40 represents the value of hours that the Claimant has previously claimed without providing a docket number. The note states "The provision of a docket number is compulsory as it represents the approval of Syntech for the specific job. Syntech has already paid these hours without a docket."

137. **Having gone through the exercise of preparing the spreadsheet, which I assume was prepared from "Claim Forms" and invoices under previous payment claims, in my opinion, it would have been a reasonably straight forward exercise for the Respondent to have assembled these documents and enclosed them with the payment schedule. The Respondent did not do this.**

138. **As a consequence the Claimant has been denied the opportunity of replying in a detailed and meaningful way. In my opinion, the Claimant should have been given the opportunity of challenging the Respondent's position. In my view denying the Claimant this opportunity amounts to a substantial denial of natural justice.**

139. The failure of the Respondent to provide the details of the make up of proposed deduction stands in contrast with the Claimant's approach of including the relevant claim forms and dockets with the payment claim so that the Respondent was given the opportunity to respond.

140. **With these concerns, and because of my concerns about the Claimant potentially being denied natural justice, I am not prepared to allow the deduction related to alleged lack of documents.**

141. The documents behind Tab 12 of Volume 2 of the adjudication response is headed "Example of Reason # 12". The documents

consist of a sixty one page spreadsheet listing the following details against dockets pertaining to specific items of equipment:

a. date and docket number;
b. dervice meter readings: start and finish;
c. operator hours;
d. machine ID code;
e. name of person;
f. labour hourly rate;
g. lunch break hours;
h. incurred cost.

142. There is a note on the spreadsheet to the effect that the Respondent has paid for 2,603.25 "meal break hours" at a cost of $170,589.75.

143. I indicated earlier, in relation to reason # 7, that I accept the Respondent's contention that the Claimant is not allowed to claim for meal breaks.

144. I also accept the Respondent's contention that progress payments were made on account of the final contract price and these have not signified acceptance or approval of the Claimant's entitlements during the contract..

145. I am concerned that the Respondent has not provided the dockets, nor indicated how many hours were paid for the item of equipment on the docket, and how much was paid at the labour rate.

146. In the payment schedule, the Respondent disclosed the quantum of this claim, so I assume the Respondent had gone through the exercise of preparing the details as set out in the sixty one page spreadsheet behind Tab 12, prior to issuing the payment schedule. I am concerned that the Respondent did not provide the details in the spreadsheet to the Claimant, nor the relevant day dockets so that the Claimant would have had the opportunity to review whether it had in fact been paid for these lunch breaks.

147. On the other hand, the Claimant has lodged a claim for lunch breaks that it has not been paid for so as a matter of logic, unless the dockets cited in the Respondent's spreadsheet do not actually exist, this indicates the Claimant actually claimed for dayworks throughout. In fact, in paragraphs 85 to 87 in response to reason @ 7, the Claimant admitted that it had claimed for lunch breaks throughout.

148. Because of this admission, I have decided that it is appropriate to allow the Respondent's claimed deduction of $170,598.00 paid for lunch breaks." (emphasis added)

[17] Syntech has now applied for a declaration that the adjudication decision is void. It submits that the adjudication decision is void because:

(a) the third respondent was required to consider the spreadsheets by reason of s 26(2) of *BCIPA*, and was not entitled to exclude them on the grounds expressed in his reasons. The failure of the adjudicator to consider these spreadsheets was a jurisdictional error;

(b) the third respondent denied Syntech natural justice because he decided that he would exclude the spreadsheets when PCE had not contended for that course,

and the third respondent did not otherwise give Syntech an opportunity to make submissions about it.

[18] The making of payment claims and the adjudication of disputed payment claims are governed by Part 3 of *BCIPA*. In *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*,[1] White JA comprehensively explained[2] the legislative background to and effect of the relevant provisions in Part 3. I respectfully adopt all that was said by her Honour without repeating it here at length. It is convenient, however, to quote the following:

> "[59] Part 3 Div 2, which is now excluded from the purview of the *Judicial Review Act*, deals with the adjudication of disputes about a payment claim by an adjudicator. A claimant may apply for adjudication of a payment claim if the respondent serves a payment schedule and the amount is less than the claimed amount or the respondent fails to pay the whole or any part of the amount identified for payment in the payment schedule, or, if the respondent fails to serve a payment schedule or fails to pay the whole or any part of the claimed amount by the due date. An adjudication application must be made to an authorised nominating authority chosen by the claimant and within quite limited time frames, for example, where a payment schedule has been received, within 10 business days. Apart from administrative matters, the adjudication application may contain the submissions relevant to the application which the claimant chooses to include. A copy must be served on the respondent. The authorised nominating authority must refer the application as soon as practicable to a person eligible to be an adjudicator under the provisions in the *Payments Act*. If the respondent has given a payment schedule, the respondent may give to the adjudicator a response to the claimant's adjudication application within either five business days after receiving a copy of the application or two business days after receiving notice of an adjudicator's acceptance of the application. A respondent cannot include in the response any reasons for withholding payment unless those reasons had already been included in the payment schedule served on the claimant." (citations omitted)

[19] The Court of Appeal in *Northbuild Construction* also applied to decisions made under *BCIPA* the proposition drawn from *Kirk v Industrial Court (NSW)*[3] that the legislature cannot exclude the power of a State Supreme Court to exercise its supervisory jurisdiction as to jurisdictional error in executive and judicial decision making. McMurdo P further observed[4] that:

> "There is no doubt that an adjudicator's decision under the *Payments Act* is an administrative decision over which the Supreme Court of Queensland has a supervisory jurisdiction, despite s 18(2) *Judicial Review Act* ..."

[20] Chesterman JA[5] considered that the judgment of Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*[6] in relation to the equivalent New South

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1 [2011] QCA 22.
2 At [52] – [66].
3 (2010) 239 CLR 531.
4 At [6].
5 At [32].
6 (2004) 61 NSWLR 421.

Wales scheme remained authority for the proposition that adjudications which do not comply with the essential statutory requirements are void and the Court may, when non-compliance has been demonstrated, make declarations and/or grant injunctions to prevent a void adjudication being acted on.

[21] White JA said:

> "[78] In these proceedings Northbuild sought and continues to seek declaratory and injunctive relief. Although the legislature clearly seeks a "fast track" investigation into an entitlement, on an interim basis, to a progress payment, there is nothing in the language of the *Payments Act* in the nature of a privative clause attempting to exclude the supervisory role of the Supreme Court and s 31(4)(a) does not do so. It is a reference only to proceedings to have a judgment based on an adjudication certificate set aside and that must be in respect of an adjudication reached in conformity with the *Payments Act*. After *Kirk v Industrial Court (NSW)*, the exclusion of Pt 3 Div 2 from the *Judicial Review Act* is limited to review of decisions not infected by jurisdictional error. Even before *Kirk* (and *Craig*) longstanding authority demonstrates that a prohibition against challenging an administrative decision would be interpreted to mean a decision not infected by jurisdictional error.
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> [79] The "only" matters which an adjudicator may consider in reaching a decision are the provisions of the *Payments Act*, the terms of the construction contract, the payment claim and response and all submissions properly made so that if the arbitrator departed from that list and considered, for example, what he regarded as a "fair thing" he would have made a decision without authority and, if he truly disregarded a claimant's submissions, his decision would not be one envisaged by the *Payments Act*.
>
> [80] Accepting the criticisms which have been levelled at *Brodyn* on the question of the availability of prerogative review for jurisdictional error, Hodgson JA's observation that an adjudicator's purported decision would be void if it did not meet the statutory conditions essential for a valid decision are unexceptional. So, too, where the necessary level of procedural fairness had not been accorded to a party. By quoting extensively from and relying on passages in *Brodyn* the primary Judge did not fall into error, since he considered whether the adjudicator had performed the task assigned to him by s 26 which did not require, in this case, any articulation of the distinction between adherence to "basic requirements" and jurisdictional error." (citations omitted)

[22] 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 an adjudication under *BCIPA*.

[23] An adjudication under *BCIPA* is governed by the provisions in Part 3 Division 2. Section 26(2) prescribes the matters which an adjudicator may consider by providing:

> "(2) In deciding an adjudication application, the adjudicator is to consider the following matters only –

> (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
>
> (b) the provisions of the construction contract from which the application arose;
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> (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
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> (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, 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."

[24] Counsel for Syntech placed emphasis on s 26(2)(d) and the expression "... all submissions, including relevant documentation ...". It was submitted that, even though the spreadsheets had not been provided as part of the payment schedule, they clearly formed part of the submissions to the adjudicator in support of the payment schedule, or, at the very least, constituted documentation which was relevant to the submissions made to the adjudicator.

[25] I observe in passing that s 24(4) of *BCIPA* precludes a respondent to an adjudication claim from including in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant. It is clear in this case, as was properly conceded by counsel for PCE, that the spreadsheets did not raise any new reasons for withholding payments; they were explanatory of Reason # 6 and Reason # 12 respectively.

[26] Counsel for PCE emphasised that the spreadsheets did not form part of the payment schedule, but arose as part of the submissions. PCE sought to draw an analogy between the procedure provided for under *BCIPA* and the progress of proceedings in Court. It was suggested that a payment claim is akin to a statement of claim and a payment schedule is effectively a defence. In furthering this analogy, it was said that the payment claim and the payment schedule "also include all of the evidence to be considered by the adjudicator" and that those documents comprise the "trial of the proceeding".[7] It was submitted that, by including additional "evidence" in the form of the spreadsheets with its adjudication submission, Syntech was effectively seeking to lead evidence for consideration by the adjudicator at a stage when this would be unfair to PCE. It was contended that the adjudicator acted appropriately in excluding the spreadsheets from consideration.

[27] I do not think that the analogy sought to be drawn on behalf of PCE was particularly apt. The conduct of civil litigation in this Court, governed as it is by complex rules and procedures, is quite a different adversarial engagement from the adjudication process prescribed under Part 3 of *BCIPA*. The question is not whether the spreadsheets would or might have been admissible under the procedural and evidentiary rules applicable to Supreme Court litigation; the question is whether the

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[7] Submissions of the first respondent at [3.7].

adjudicator in this case failed to meet the statutory conditions which were essential for a valid decision to be made.

[28] I accept the submission by counsel for Syntech that the present case is similar to that considered by Hammerschlag J in *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*.[8] In that case, the claimant had made a payment claim for some $690,000. The respondent served a payment schedule which identified a negative amount (i.e. an amount which it contended was payable by the claimant) of some $83,000. The negative amount was the result of credits claimed for defects and for liquidated damages. The most substantial of the defects asserted in the payment schedule related to defective tiles, for which a credit of $140,000 was claimed. The claimant then made an adjudication application. When the respondent lodged its adjudication response, it included with that response a copy of a report by an expert concerning the defective tiles.

[29] The adjudicator, in the adjudication, noted that this report had been delivered with the adjudication response and said:

> "There is no indication that the Claimant has been given the opportunity to evaluate the report at the time of the adjudication application and as such I have not included its finding when making this determination."

[30] Hammerschlag J concluded that the report did not represent any shift from the respondent's contention that the tiles were defective. Indeed, his Honour expressly noted[9] that the report "was provided in support of" the position concerning defective tiles. His Honour then said:

> "57 It was put on behalf of the first defendant that in saying that there was no indication that the claimant had been given the opportunity to evaluate the report at the time of the adjudication application and "as such" the adjudicator had not included its finding was in effect (because there was no reasonable alternative construction) a determination that the report was a submission or relevant documentation in support of it which had not been duly made. This, it was put, followed from the fact that s 20(2B) was intended to protect a claimant against a respondent relying on reasons for non-payment which had not been provided in the schedule. Accordingly, the adjudicator could only have had in mind that the submission was not duly made because s 20(2B) had been infringed in that the claimant had not had an opportunity to evaluate the report.
>
> 58 It does not seem to me that it is fairly open to conclude or infer that the adjudicator determined that the report was not part of a submission or material in support of it "duly made", for a number of reasons.
>
> 59 Firstly, the adjudicator dealt with the submission that the tiles were defective including by reference to the statutory declaration and 8 May 2006 facsimile which clearly raised the PoPE requirements. The adjudicator was doing nothing more than rejecting material in support of the conclusion that the reason being relied on should be accepted. Secondly, nothing in the words used by the adjudicator suggests that he was excluding the report on the basis that it was not duly made. Thirdly, the Act makes no provision (other than where further submissions are called for by the adjudicator or a conference held) for the claimant to

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8 [2007] NSWSC 941.

9 At [56].

> respond to the response. The position would have been no different if the report had been attached to the schedule.
>
> 60 The report contained information of critical importance to the plaintiff in establishing its reasons for withholding payment.
>
> 61 **Despite the interim nature of an adjudication, natural justice nevertheless clearly required the adjudicator to consider the report unless (even if erroneously) he determined that it was, or was part of, a submission not duly made. In this case, he made no such determination. This amounted to a substantial failure to afford natural justice which worked practical injustice on the plaintiff and rendered the whole adjudication void.**
>
> 62 **Section 22(2)(d) [Qld: s 26(2)(d)] required the adjudicator, in the circumstances, to consider the report because it was part of submissions duly made. In so far as a failure to do so was jurisdictional error in the sense that a legislative requirement essential to the existence of a determination was not met, he made such an error."** (emphasis added)

[31] In the present case, the adjudicator did not say that the spreadsheets were outside the payment schedule or advanced reasons not articulated in the payment schedule. Nor did he determine, or purport to determine, that the spreadsheets were part of a submission which had not been duly made. In view of the matters to which I have referred above, he clearly could not have done so. The only bases for the adjudicator excluding the spreadsheets were those which appear on the face of the adjudication, as quoted above.

[32] In the present case, adapting the words of Hammerschlag J, s 26(2)(d) required the adjudicator, in the circumstances, to consider the spreadsheets because they were part of submissions duly made. The word "submissions" in s 26(2)(d) is not to be construed narrowly; indeed, the words of the section show specifically that the submissions may include relevant documentation in support.[10]

[33] In rejecting the spreadsheets and in determining the matter without reference to the spreadsheets, the adjudicator in the present case failed to comply with an essential legislative requirement for the determination he was to make, and thereby committed a jurisdictional error.

[34] Syntech's second argument was that, by excluding the spreadsheets and deciding the matter without reference to the spreadsheets, in circumstances where the adjudicator did not give notice to the parties that he was proposed to determine the matter on that basis, the adjudicator denied natural justice to Syntech.

[35] In *John Holland Pty Ltd v TAC Pacific Pty Ltd*,[11] Applegarth J said:[12]

> "[18] The courts have recognised that an adjudication decision is void if:
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> 1. it fails to comply with the basic requirements of the Act or;

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10 *Austruc Constructions Ltd v ACA Developments Pty Ltd* [2004] NSWSC 131 at [68].

11 [2010] 1 Qd R 302.

12 At [18].

2. it is not a bona fide attempt by the adjudicator to exercise the relevant power; or

3. **there has been a substantial denial of natural justice to a party**;

and only a declaration regarding its invalidity (and perhaps injunctive relief, if necessary) is needed to give it its *quietus*." (emphasis added)

[36] If an adjudicator determines a matter on a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have a reasonable opportunity of learning what is alleged against it and of putting forward an answer to that case.[13] It is necessary for there to be a "substantial" denial of natural justice. This means that "the opportunity denied was material, namely that the matter about which the adjudicator did not provide an opportunity to be heard was a point upon which the adjudicator based his or her decision and was significant to the actual determination".[14] Even if the Court is satisfied that there has been a denial of natural justice, relief may be denied if it can be shown that compliance with the requirements of natural justice could have made no difference to the outcome.[15] As Applegarth J said:[16]

> "It is probably sufficient in this regard for the applicant for relief to show that there were substantial submissions that, as a matter of reality and not mere speculation, might have persuaded the adjudicator to change his or her mind."

[37] In respect of each of the spreadsheets in the present case, the adjudicator's decision to exclude those spreadsheets from his consideration was based on the fact that PCE had not previously been supplied with those spreadsheets, had not had the opportunity to challenge Syntech's position in reliance on those spreadsheets, and had thereby been denied natural justice. PCE did not object to the adjudicator receiving the spreadsheets. The adjudicator did not call for any further submissions from the parties on the spreadsheets, nor inform them of his intention to determine the matter without reference to the spreadsheets. By s 25(4) of *BCIPA*, an adjudicator "may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions". One of the purposes intended to be served by that subsection is for the adjudicator to give 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.[17]

[38] Syntech submitted that the practical consequence of the adjudicator's actions was that Syntech was not on notice that the adjudicator proposed determining the matter without reference to the spreadsheets, and had no opportunity to make submissions. It was submitted that if Syntech had been given notice by the adjudicator then it could have made the following substantial submissions:

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13 *Musico v Davenport* [2003] NSWSC 977.
14 *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at [40].
15 Ibid.
16 Ibid.
17 *Musico v Davenport* [2003] NSWSC 977.

(a) That the spreadsheets were documents in support of the payment schedule, and were required to be considered pursuant to s 26(2)(d);

(b) That the proper course for the adjudicator was not to exclude the spreadsheets, but to ask for further submissions from PCE pursuant to s 25(4)(a);

(c) Syntech could have offered an explanation for the fact that the spreadsheets had not previously been included in the payment schedule. This was a matter which the adjudicator clearly considered relevant, but was a matter on which evidence could and should have been put before the adjudicator before he made the determination to exclude the spreadsheets.

[39] Syntech further submitted that the denial of natural justice was substantial because these submissions, as a matter of reality, might have persuaded the adjudicator to change his mind.

[40] Counsel for PCE acknowledged that the adjudicator could have acted by asking for further submissions under s 25(4) (or, indeed, by convening an informal conference of the parties under s 25(5)), but contended that the adjudicator "for his own reasons chose not to do so, presumably to give recognition to the fact that swift justice was required".[18] It was submitted that the adjudicator committed no error in that approach, and proceeded to determine the matter on the material which had been relied on by the parties in their payment claim and payment schedule respectively.

[41] It is clear enough that one of the hallmarks of the process provided for under Part 3 of *BCIPA* is rapid adjudication of payment claims for the purpose of maintaining cash flow between contesting parties in the context of the building industry. This policy has been emphasised on many occasions in the authorities. That objective cannot, however, displace the overriding obligation on an adjudicator to observe the principles of natural justice in the course of the adjudication process provided for under Part 3. The adjudication must be both swift and fair.

[42] It seems to me that, in unilaterally discarding the spreadsheets without giving the parties notice of his intention of doing so, the adjudicator did commit a substantial breach of natural justice. It is clear enough from the terms of the adjudication that the matters contained in the spreadsheets went to issues which were directly germane or material to the adjudicator's decision in respect of the matters raised under each of Reason # 6 and Reason # 12. At the very least, Syntech had a substantial argument that the spreadsheets were properly receivable under s 26(2)(d), but it was denied the opportunity to advance that argument. It is not, in my view, a matter of mere speculation that if it had been able to advance that argument, this might have persuaded the adjudicator not to exclude consideration of the spreadsheets.

[43] I would therefore find that the adjudicator's decision was infected by a substantial breach of natural justice.

[44] It is apparent from the foregoing that the jurisdictional error and the substantial denial of natural justice directly affect only those parts of the adjudicator's decision concerned with Reason # 6 and Reason # 12. Nevertheless, these errors render the

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[18] Submissions of the first respondent at [3.10].

adjudicator's entire decision void, or liable to be set aside – as was said by Palmer J in *Multiplex Constructions Pty Ltd v Luikens*:[19]

> "... if the adjudicator's decision as to any component part of the adjudicated amount is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations, the whole of the determination must be quashed if jurisdictional error infects any part of the process whereby the adjudication amount has been produced".

See also *Reiby Street Apartments v Winterton Constructions*.[20]

[45] Accordingly, it will be declared that the adjudicator's decision made by the third respondent dated 25 March 2011 in respect of adjudication application no. 1057877-1737 is void.

[46] I will hear the parties as to any further or consequential orders, and as to costs.

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19 [2003] NSWSC 1140 at [92].

20 [2006] NSWSC 375 at [73].