

## Article Information

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## Patience is a virtue, but time is of the essence

**The Queensland Court of Appeal case of Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QCA 177 stresses the importance of serving an adjudication application on your opponent ‘as soon as possible’ after lodgement with the adjudication registry.**

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The Queensland Court of Appeal has upheld a decision of an adjudicator and the Judge at first instance finding that service of an adjudication application on a respondent 12 business days after the application was lodged with the adjudication registry was not serving the application ‘as soon as possible’ as required by section 21(5) of the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA).

### **Adjudication applications**

SHA Premier Constructions Pty Ltd (SHA) engaged Niclin Constructions Pty Ltd (Niclin) to design and construct four petrol stations at Nanango, Tinana, Charleville and Southbrook. On 28 November 2018, after the parties had exchanged payment claims and payment schedules under the BCIPA (now repealed with the *Building Industry Fairness (Security of Payment) Act 2017* having replaced it), Niclin lodged four adjudication applications with the Queensland Building and Construction Commission (QBCC).

Pursuant to section 21(3) of the BCIPA, a copy of an adjudication application *must* be in the approved form and *may* contain the submissions relevant to the application. Furthermore, section 21(5) of the BCIPA required “*a copy of any adjudication application must be served on the respondent*”.

Niclin failed to serve the adjudication applications shortly after they had been lodged, instead delivering 10 files which contained the documents in support of its applications to SHA simultaneously with the applications being lodged. The documents delivered mistakenly failed to include the adjudication application in the approved form.

In response to the adjudication application, SHA submitted that three of the adjudication applications were invalid in circumstances where they did not contain the adjudication application in the approved form. At that point, Niclin realised its error and served the adjudication applications on SHA with the approved form on 14 December 2018, some 12 business days after they were lodged with the QBCC.

Having received submissions from the parties as to the effect of section 21(5) of the BCIPA, the adjudicator held that there had not been valid service of the adjudication applications for the Nanango, Tinana, and Charleville petrol stations relying upon section 38(4) of the *Acts Interpretation Act* (Qld) (AIA) that it was to be served ‘*as soon as possible*’. As such, the adjudicator had no jurisdiction to decide the issues the subject of those three applications.

### **Appeal to the Supreme Court of Queensland**

Dissatisfied with that outcome, Niclin appealed to the Supreme Court of Queensland seeking, amongst other things, a declaration that the decisions of the adjudicator in relation to the three adjudication applications was void and that they be remitted on the basis that the adjudication applications had been validly served.

Judge Ryan held as follows:

1. Whilst section 21(5) of the BCIPA does not provide a specific timeframe for service of an adjudication application, it

is appropriate to rely upon the AIA in requiring service to be '*as soon as possible*' after the adjudication application was lodged;

2. Given the BCIPA imposes "*brutally fast timeframes*", the service of an adjudication application 12 business days after it was lodged does not render it being served '*as soon as possible*'; and
3. Service of an adjudication application is a precondition to enlivening an adjudicator's jurisdiction to determine the application.

Niclin also appealed this decision.

### **Appeal to the Queensland Court of Appeal**

The Court of Appeal upheld the decision of the Supreme Court of Queensland determining that service of the complete copy of an adjudication application 12 business days after lodgement with the adjudication registry was not '*as soon as possible*'. In circumstances where the BCIPA "*provides for the expeditious resolution of disputes over payments*", the Court of Appeal found that the primary judge had properly concluded that a requirement to serve the adjudication application on the respondent '*as soon as possible*' was applicable.

The Court of Appeal also held that failure by to comply with legislative form and time requirements regarding the service of adjudication applications will prevent an adjudicator from having jurisdiction to decide such applications.

Claimants ought to serve an adjudication application '*as soon as possible*' after having lodged it with the adjudication registry. Whilst there is no determinative timeframe for what would constitute service '*as soon as possible*', we would expect an adjudication application to be served within 2 business days of its lodgement. Any failure to do so will render the adjudicator unable to determine the claim due to jurisdictional issues.