Emag Constructions P/L v Highrise Concrete Contractors (Aust) P/L [2003] Adj.L.R. 09/23

JUDGMENT : Einstein J : Supreme Court New South Wales : 26th September 2003

The Proceedings

1 These proceedings are brought by the plaintiff, Emag Constructions Pty Limited ["Emag"] which was a party to a construction contract entered into with the defendant, Highrise Concrete Contractors (Aust) Pty Limited ["Highrise"] on or about August 2001.

2 Questions which arise include the validity of an adjudication purported to be made by an adjudicator said to be appointed under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ["the Act"], and who purported on 19 June 2003 to make a determination.

3 The issues include whether or not the Adjudicator, Mr Hillman, had jurisdiction in the particular circumstances to make that adjudication. An important issue concerns whether or not, and if so when, proper service of the adjudication application pursuant to the service provisions of the Act, or pursuant to procedures which may be referred to in those service provisions took place.

The Act

4 A recent judgment by Bergin J *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2003] NSWSC 869 summarised the salient features of the Act in the following terms:

The Act

25. The Act came into force on 26 March 2000 and was amended by the Building and Construction Industry Security of Payment Amendment Act 2002 (the amending Act), which commenced on 3 March 2003. The Act deals with transitional provisions the effect of which is that the Act, as amended, is applicable in this case because the Payment Claim was served after the commencement of the amending Act.

26. The object of the Act is to provide a means by which any person who has undertaken to carry out "construction work" (a term defined in the Act) under a "construction contract" may recover a "progress payment" (terms also defined in the Act) without limiting other entitlements under such a contract (s. 3). The statutory process for recovery is as follows:

1. A person (the claimant) who undertakes to carry out construction work under a construction contract or to supply "related goods and services" (a term defined in the Act) is entitled to a "progress payment" on each "reference date" (terms that are also defined in the Act) (ss. 6 & 8).

2. The claimant may serve a payment claim on the person who is or may be liable to make the payment. Such payment claim must identify the construction work or related goods and services to which the payment relates and the amount due and must state that the claim is made under the Act (s. 8).

*3. The recipient of the payment claim (the respondent) **may** reply to the claim by providing a payment schedule to the claimant which must identify the claim to which it relates and the amount of the payment, if any, that the respondent proposes to make. If the amount to be paid is less than that claimed, the schedule must indicate why the amount is less (s. 14). If the respondent does not provide a payment schedule to the claimant within a certain time frame, the respondent becomes liable to pay the progress payment to which the payment claim relates (s. 14(4)).*

4. If the respondent provides a payment schedule and the scheduled amount is less than that in the payment claim, the claimant is entitled to apply to an authorised nominating authority for adjudication of the payment claim. Other circumstances in which such an entitlement arises are set out in the Act. There are prerequisites in relation to notification to the respondent and specific requirements in relation to the content of the application and service on the respondent (s. 17).

5. An authorised nominating authority that receives an adjudication application is obliged to refer the application to an adjudicator as soon as practicable (s. 17(6)). The adjudicator may accept the application by causing notice of acceptance to be served on the claimant and the respondent and is thereby taken to have been appointed to determine the application (s. 19).

6. There is a regime for the filing of a response and submissions with the adjudicator who is obliged to determine the application "as expeditiously as possible" and, in any event, within a specified time frame (s. 20-21). The adjudicator is obliged to determine the amount, if any, to be paid by the respondent, the date on which the amount became or becomes due and the rate of interest on the amount (s. 22(1)). In determining the application the adjudicator is permitted to consider only those matters set out in s. 22(2). The determination must be in writing and include reasons unless both parties have requested the adjudicator not to include reasons in the determination (s. 22(3)).

7. The respondent is required to pay the adjudicated amount and if it is not paid, the claimant may request the authorised nominating authority to issue an adjudication certificate which may be filed as a judgment for a debt in any court of competent jurisdiction and enforced accordingly (ss. 23-25).

The claims, responses and adjudication process under the Act do not affect any rights that a party to a construction contract may have under the contract and do not affect any civil proceedings arising under such a contract; except that a court or tribunal must allow for any amount paid pursuant to a claim or an adjudication determination under the Act and may make orders for restitution of any amount so paid or any other orders considered to be appropriate (s. 32).

The evidence

5 The convenient course is to set out the Court's findings in relation to the evidence which was in relatively short compass. The evidence apparently discloses the following events:

August 2001

6 Highrise and Emag entered into a construction contract on or about August 2001.

April 2003

7 On 2 April 2003 Highrise served on Emag a section 13 payment claim (progress claim No 8) for the amount of $124,536.70, excluding GST, for works said to have been completed under the contract. Emag failed to provide a payment schedule under section 14 of the Act.

May 2003

8 On 12 May 2003 Highrise sent a section 17(2)(b) notification to Emag giving it another five business days in which to provide such a payment schedule.

9 On 22 May 2003 Emag apparently provided Highrise with a payment schedule reducing the amount claimed to $Nil.

10 By letter dated 22 May 2003, and headed "*Re: Emag Constructions Pty Ltd – Quay Street Ultimo Project*", Gray & Perkins Lawyers ("Gray & Perkins") advised Highrise that Gray & Perkins "*act for Emag Constructions in relation to the above matter*". The letter stated: "*we now enclose by way of service our client's payment schedule in response to progress claim No. 8*".

2 June 2003

11 On 2 June 2003 Mr Lorimer of Highrise had a telephone conversation with Mr Hillman enquiring about acceptable service of the adjudication application. Mr Hillman advised Mr Lorimer to speak with the plaintiff's agent to confirm that they would accept service of the application.

12 Following this discussion with Mr Hillman, Mr Lorimer spoke with Mr Hodges of Gray & Perkins. This discussion is the subject of a closely contested factual issue in relation to which both Mr Lorimer and Mr Hodges were cross-examined. Mr Lorimer's evidence is set out in paragraph 7 of his affidavit of 21 August 2003: *"Late in the afternoon on 2 June 2003, Peter Hodges of Gray & Perkins returned my telephone call. We had a conversation in words to the following effect:*

Mr Hodges: "*Returning your call with regard to the EMAG matter. Are you their solicitor?"*

Me: "*No, I work for them, and all I want to do is to confirm that you will accept service of the Application. "*

Mr Hodges: "*Of course we can, we have sent you a letter to that effect"*

Me: "*Which letter is that? "*

Mr Hodges: "*The letter attached to the payment schedule "*

Me: "*The one dated 22 May 2002, saying that you act for EMAG and you enclose by way of service your client's Payment Schedule in response to Progress Claim 8? "*

Mr Hodges: "*Yes, that one. "*

Me: "*Well, just to keep matters neat, will you confirm by fax that you will accept service of the Application? "*

Mr Hodges: "*There is no need to, it is quite clear in the letter that we can accept service.*"

[Affidavit of Mr Lorimer, 21 August 2003, para 7]

13 Mr Hodges, whose version and recollection of telephone conversation differs from Mr Lorimer, deposed as follows in his affidavit of 3 July 2003: "*On 2 June 2003 I had a telephone conversation with a male to the following effect:*

He said: "*My name is Wal Lorimer and I am from Highrise Concrete. We've got your payment schedule but I want to know whether we can serve you with documents. "*

I said: "*My letter to you advised you that this firm acts on behalf of Emag Constructions Pty Limited with regard to this matter however we do not have any instructions to accept service or otherwise. "*

He said: "*I want you to send me a facsimile telling me that you'll accept service of letters and documents. "*

I said: "*I am not able to do that. "*

At no time did I receive from Wal Lorimer or Highrise Concrete any facsimile or letter concerning the above telephone conversation."

[Affidavit of Mr Hodges, 3 July 2003, para 7]

14 The next relevant event was that on the same day, Mr Lorimer sent a facsimile to Gray & Perkins reading:*"Regarding the subject matter, the Quay Street, Ultimo, project.*

This will serve to confirm that you act on behalf of EMAG and as such will accept notices served on this matter.

If you believe to the contrary, please advise by close of business 3 June 2003 by fax to Highrise Concrete Contractors (Aust) Pty Ltd".

[and the address was given]

15 A question arose on the evidence in relation to whether or not this facsimile was received by Gray & Perkins lawyers. Albeit that some expert evidence in relation to the issue was sought to be relied upon by the defendant, the plaintiff has accepted that what is not disputed is that the facsimile, which apparently has never been able to be located within the offices of Gray & Perkins, was in fact received on 2 June. What is disputed is the suggestion that any solicitor within Gray &Perkins ever sighted that document.

4 June 2003

16 The adjudication application dated 3 June 2003 and accompanying documentation, was delivered to Gray & Perkins on 4 June 2003. The evidence includes a document entitled "Receipt Confirmation Record" where at the end of the document, in handwriting, next to the section for reading "Received" and "Date", there is a signature followed by a handwritten section reading "By Gray and Perkins – Lawyers for Emag Constructions Pty Limited". A letter from Gray & Perkins of 16 June 2003 to Mr Hillman advised that the wording "By Gray Perkins - Lawyers for Emag Constructions Pty Limited" was "not inserted by this office and may have been inserted after the receipt was signed". No challenge to this proposition was put to Mr Hodges in cross-examination.

10 June 2003

17 By letter dated 10 June 2003, Mr Hillman informed Highrise and Emag that he had accepted the nomination by National Electrical and Communications Association ("NECA") as adjudicator under section 19 of the Act, and enclosed a copy of an adjudication response form for use by the respondent if required. There is no evidence that this letter was hand delivered or courier delivered on *the same date*. It is likely that the correct inference for the Court to draw is that it was posted in the usual course of events and would have been received on 11 June.

11 June 2003

18 Mr Dwyer gave evidence that he had located within his office an adjudication application apparently served on his office without a covering letter during the week ended 6 June 2003. The wording of paragraphs 1 and 2 of Mr Dwyer's affidavit of 2 July 2003 indicates that it was on 11 June that he so located the application. He was not cross-examined to have a possible contrary reading of his affidavit exposed. It follows that Mr Dwyer could not have sent that document to Mr Ghosn, a director and principal of Emag, before that date, namely 11 June 2003.

12 June 2003

19 On 12 June Mr Dwyer had a discussion with Mr Ghosn. Mr Ghosn indicated that he would try to get details of Emag's claim against Highrise to Mr Dwyer by the following day. He also stated that the adjudication application was not served on Emag Constructions Pty Limited "and this is the first time that I have seen it" or words to that effect. [See paragraph 3 of Mr Dwyer's affidavit of 2 July 2003 and paragraph 3 of Mr Ghosn's affidavit of 19 August 2003].

20 Mr Ghosn's further evidence was that at no time did he provide instructions to the plaintiff's solicitors to accept service of those documents on its behalf and further that those instructions were not requested of him by the plaintiff's solicitors.

13 June 2003

21 On 13 June 2003 Mr Dwyer had a telephone conversation with Mr Ghosn, Mr Ghosn indicated that the application was definitely not served on Emag. In the light of that Mr Dwyer stated that he would write to the adjudicator and to Highrise to inform them that the application had not been served in accordance with the Act.

22 Mr Dwyer's letter of the same date to Mr Hillman read as follows: "*We act on behalf of Emag Constructions Pty Limited and have received your letter addressed to it of 10 June 2003.*

We advise that a copy of the Adjudication Application has not been served on our client in accordance with section 31 of the Building and Construction Industry Security of Payment Act. Accordingly time is not presently running under section 20(1)(a) for our client to serve its Response."

14 June 2003

23 On 14 June 2003 Mr Lorimer sent a facsimile to Mr Hillman which was in the following terms:

"Ian,

Further to our recent telephone conversation regarding the advice received from the Respondent in the subject matter saying that they had NOT received a copy of the Adjudication Application.

On the contrary, the Adjudication Application WAS served on the Respondent (EMAG) on 4 June 2003 at the offices of Gray Perkins Lawyers by Mr Tony Bassill (Director) for the Claimant (Highrise Concrete)

The chronology of the service of documents is as follows:

1. *Documents were received from Gray Perkins lawyers which enclosed a letter advising that they were acting for EMAG Constructions in this matter. (see copy attached)*
2. *On 2 June 2003, I called you good self with regard to the service of the Adjudication Application to the Respondant's agents.*
3. *You advised me to speak to the Respondent's agents to confirm that they will accept such service of the Adjudication Application.*
4. *On 2 June 2003, I spoke to Mr Peter Hodges of Gray Perkins who confirmed this and referred me to their letter dated 22 May 2003 which evidenced that they are acting for the Respondent.*
5. *Immediately after my conversation with Mr Hodges, I faxed him confirmation of our discussions, and further offered him the opportunity to advise Highrise if any different by COB 3rd June 2003.*

6. The Adjudication Application with its accompanying documents were served to Gray Perkins 4.6.03 and executed as being received. (see attached confirmation record)
We trust this clarifies this matter.
Wal Lorimer for the Claimant."

16 June 2003

24 On 16 June 2003, Mr Dwyer received a facsimile from Emag attaching a copy of documentation sent to it by Mr Hillman. [Annexure B to Mr Dwyer's affidavit of 2 July 2003] The letter from Mr Hillman stated: *"We acknowledge receipt of your representative Gray & Perkins letter dated 13th June 2003 (copy attached).*

Please find attached a copy of the Claimant's response fax dated 14th June 2003 providing evidence that an Adjudication Application was served on your representative on 4th June 2003.

If you can provide any evidence to support that you or your representative did not receive a copy of the Adjudication Application please do so by close of business this date (being 16th June 2003).

If no satisfactory evidence can be produced I must find that you have failed to provide an Adjudication Response in accordance with Section 20(1) of the Building and Construction Industry Security of Payment Act 1999 (Act). As such the Adjudication Application will be determination based on the documentation received up to and including 12th June 2003.

If you have any questions please contact the undersigned."

25 On 16 June 2003, Mr Dwyer sent a letter to Mr Hillman informing him of Emag's position, a copy of the letter also going to Highrise. Emag maintained that the adjudication notice had not been properly served. The letter read as follows: *"We refer to your letter and the telephone discussion with you on 16 June 2003.*

In respect to the receipt dated 4 June 2003 we note that this is nothing more than an acknowledgment of receipt. The wording "by Gray Perkins – Lawyers for Emag Constructions Pty Limited" was not inserted by this office and may have been inserted after the receipt was signed.

In this instance Mr Hodges of this office was contacted Mr Lorimer of the Claimant. Mr Lorimer asked Mr Hodges if he had instructions to accept service of the Adjudication Notice. Mr Hodges advised that we were acting in the matter on behalf of Emag Constructions Pty Limited but did not have instructions to accept service. Mr Lorimer asked Mr Hodges to provide a facsimile confirming that we would accept service of the Adjudication Notice. Mr Hodges declined to do so. It is clear from those discussions that at no time did Mr Hodges advise Mr Lorimer that this firm had instructions to accept service of the Adjudication Notice on behalf of Emag Constructions Pty Limited.

Under Section 17(5) of the Building and Construction Industry Security of Payment Act 1999 an Adjudication Application must be served on the Respondent concerned. Section 31 of that Act specifies that Notices required to be served may be served as set out in that Section. In each case service is to be effected on the Respondent. There is no provision in the Section for service to be effected on the solicitor for the Respondent. There is nothing prescribed by the Regulations, contained in the Construction Contract or contained in any other laws with respect to service of Notices, which obviates the necessity to serve the Adjudication Notice on the Respondent.

If you proceed with the Adjudication notwithstanding the fact that the Adjudication Notice has not been properly served then in our view the Adjudication is invalid. We note that the problem can easily be rectified by Highrise Concrete Contractors (Aust) Pty Limited serving the Adjudication Notice in accordance with Section 31 of the Act. In this regard it is noted that whilst Section 17 of the Act specifies the time in which an Adjudication Application must be made there is not time limit for service of the Adjudication Application on the Respondent. Under Section 20 of the Act, however, the Respondent's response does not commence to run until it is served with the Adjudication Application.

If you proceed with the Adjudication without proper service of the Adjudication Notice our instructions are to apply to set aside any Adjudication in the matter."

17 June 2003

26 On 17 June 2003 Mr Dwyer received a facsimile from Emag attaching a letter and enclosures which Mr Hillman had sent to Emag dated 16 June 2003. The letter and enclosure comprised a finding by the Adjudicator. *"We confirm discussions with the Respondent's representative Mr Ian Dwyer of Gray & Perkins (G&P) and acknowledge receipt of G&P letter dated 16th June 2003.*

Mr Ian Dwyer acknowledges receipt of the Adjudication Application on 4th June 2003 a fact confirmed by a signature of an employee of G&P. Mr Ian Dwyer also confirmed that Mr Peter Hodges of G&P (the original contact) was away at the time.

Mr Ian Dwyer asserts that G&P was not authorised by the Respondent to accept service of the Adjudication Application therefore the Adjudication Application is not yet served and the time bar provided in Section 20(1) of the Building and Construction Industry Security of Payment Act 1999 (Act) is yet to commence.

The following points are raised:
- *G&P letter dated 22nd May 2003 advises that G&P act for the Respondent and it is noted that G&P was authorised to serve the Respondent's Payment Schedule on the Claimant.*
- *The content of the discussion between Mr Lorimer (Claimant) and Mr Hodges (G&P) appears to be in conflict however the Claimant produced a fax dated 2nd June 2003 addressed to Mr Hodges confirming that G&P act on*

behalf of the Respondent and will accept service of notices. The fax invited G&P comment by close of business 3rd June 2003. G&P failed comment or dispute the content of the fax.

- *G&P acknowledged receipt of the Adjudication Application on 4th June 2003.*
- *On receipt of the Adjudication Application G&P failed to formally advise the Claimant that they had no instructions to accept service.*

Based on the above I find that an Adjudication Application was properly served in accordance with Section 17 of the Act.

As such I find that the Respondent has failed to provide an Adjudication Response in accordance with Section 20(1) of the Act.

If you have any questions please contact the undersigned."

27 The effect of the letter, as it seems to me, that the Adjudicator found service of the adjudication application to have been duly effected by service on Gray & Perkins on 4 June.

28 On 17 June 2003 Mr Dwyer wrote to Mr Hillman, replying to the Mr Hillman's letter, copying it to Highrise. The letter read: "*We refer to your letter to Emag Constructions Pty Limited of 16 June 2003, a copy of which has been forwarded to us.*

With respect, it is simple contract law which has been confirmed in numerous Court decisions that a failure to comply with a demand that a party agree by a certain time to some condition is not an agreement to that condition. Contract law requires that a party positively agree to a condition before it is bound by that condition.

The failure of this office to respond to the facsimile of 2 June 2003 (which this office has no evidence of having received) cannot be an agreement on behalf of Emag Constructions Pty Ltd for this office to accept Notices under the Building and Construction Industry Security of Payment Act 1999. We suggest that you reconsider your position. This letter will be used in any Application to set aside any adjudication that might be made by you without proper service of the Adjudication Notice having been given."

19 June 2003

29 On 19 June 2003, Mr Dywer sent a follow up facsimile to Mr Hillman and Highrise requesting an urgent reply to his facsimile dated 17 June.

30 A document purporting to be an adjudication determination dated 19 June 2003 issued from Mr Hillman.

31 It is appropriate to next refer to the relevant provisions of the Act.

The relevant provisions of the Act

32 Section 31 provides as follows:

"Services of notices

(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business, or

(d) in such other manner as may be prescribed by the regulations for purposes of this section, or

(e) in such other manner as may be provided under the construction contract concerned.

(2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1) (c), is taken to have been effected when the notice is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices."

[Section 31 of the Building and Construction Industry Security of Payment Act 1999 No 46]

33 Save for (1) such provision for the purposes of the section as the regulations may prescribe or (2) particular provisions under the relevant construction contract or (3) the application of any other legislation with respect to the service of notices, it appears clear that in essence, service must be personal (s.31(1)(a)) or by being lodged during normal office hours at or sent by post or facsimile addressed to the ordinary place of business of the person to be served. There is no dispensation for service upon a solicitor: cf Part 9 Rule 7, *Supreme Court Rules*.

34 The words "the person's ordinary place of business" is not defined in section 4.

35 Plainly enough the whole of the rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard. Time limits under the Act are strict. The consequences of not complying with the stipulated time limits can be significant. Counsel for the plaintiff has given an example in ***Walter Construction Group Pty Ltd v CPL (Surry Hills) Pty Ltd*** [2003] NSWSC 266 , 9 April 2003, where a failure to comply with a time limitation under the Act resulted in successful $13 million summary judgment application.

36 An essential parameter forming part of Part 3, Division 2 "Adjudication of disputes" is the requirement to be found in section 17 (5) that "a copy of an adjudication application "*must*" be served on the respondent concerned". The following stepped procedure requires:

- *that the adjudicator accept the application by causing a notice of acceptance to be served on the claimant and the respondent [section 19];*

- *that the respondent lodge with the adjudicator a response to the adjudication application within a specified time frame set out in section 20;*
- *the adjudicator himself adhere to strict time frames. [Section 21 of the Act prevents the adjudicator from determining the adjudication until after the expiry of the period designated in section 20 for the lodgement by the respondent of its response in answer to the application];*
- *in the event that the time frame for lodging an adjudication response has expired the adjudicator has no jurisdiction to extend the section 20 time frame.*

Curial process

37 In relation to situations involving the curial process, under the general law the existence of the jurisdiction of a court is, of course, dependent on service of its process: ***John Russell & Co Limited v Cayzer*** (1916) 2 Appeal Cases 298 at 302. In curial process circumstances, service, apart from being fundamental to the jurisdiction of the court, is also an essential requirement of natural justice.

The Act

38 Service being effected in accordance with the Act is critical as it governs the commencement of the time limitations following such service. The consequence of non-compliance with the time limitation periods is harsh. As was submitted to the court by counsel for the plaintiff, the Act exhibits "zero tolerance" for delay. To borrow a phrase from the world of contract, and in particular conveyancing, in a real sense *time is of the essence*.

39 Although the Act does not expressly provide for this, it seems to me that, in the absence of having received an adjudication response from a respondent, in order to determine whether an adjudicator has jurisdiction to determine an adjudication application, the adjudicator must be satisfied as to when and how service of the adjudication application has taken place. This must surely be inherent as part of the obviously highly significant need for any tribunal to be satisfied with the formal requirements laid down by the relevant legislation as necessary to be complied with as a condition precedent to the tribunal being permitted to proceed to exercise a jurisdiction or power conferred upon the tribunal by relevant legislation.

Dealing with the issue

40 The submissions before the Court covered a number of areas. The first concerned questions going to the compliance with service requirements of the Act.

41 The submission of the plaintiff was that strict compliance in that regard was necessary and that the Court should find that on the evidence, no service had been effected here, either personally or by being lodged during normal office hours, at or sent by post or facsimile addressed to the ordinary place of business.

42 The submission went the distance of asserting that Gray & Perkins had had no instructions to accept service and had expressly made that known to Highrise. So much represents an important factual finding which is made.

43 The submission stressed the need for strict compliance with the time provisions in respect of service laid down by what was put as an obviously important set of codified procedures.

44 The second area concerned Emag's contention that even if it be the case that service took place at the date when the adjudication application came into the possession of Emag, the particular dates and times here in focus show that the Emag was effectively shut out by the adjudicator from exercising its right to lodge an adjudication response (section 21 (1) and 20 (1) (a) and (b)).

***Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542**

45 Untutored by authority it seems to me that there is likely a strong case in support of the proposition that the use in the Act of the word "may" in section 31 should be read as "must". The significance of certainty in terms of the precise point in time when a notice under the Act is served upon a particular person is obvious from the general scheme of what this legislation permits in terms of its mechanics.

46 The Court has, however, been referred to a decision by Young J, in ***Howship Holdings Pty Limited v Leslie*** (1996) 41 NSWLR 542, which essentially concerned an issue as to whether service of a summons at a document exchange box was good service. The defendants had sought a declaration under Part 11 (8) (c) of the *Supreme Court Rules 1970* that the summons filed had not been duly served on the defendants. The summons sought an order pursuant to section 459 G of *the Corporations Law* setting aside a statutory demand posted on 4 June 1996 and which would have been deemed to have been served a day or so later. The summons was issued out of the Supreme Court on 21 June 1996. The defendants had filed an application for winding up the plaintiff consequent upon the alleged non-compliance with the statutory demand and did that in the Federal Court by an application filed on 1 July 1996.

47 In the course of the judgment Young J pointed out that section 459 G (3) of the *Corporations Law* provides that an application to set aside a statutory demand may only be made if the copy of the application and a copy of the supporting affidavit was served on the person making the demand within 21 days.

48 As his Honour also pointed out, section 459 G itself does not deal with what is service. The ordinary meaning of "service" being personal service, this his Honour held, merely means that the document in question must come to the notice of the person for whom it was intended. His Honour referred to authorities supporting the proposition that the means by which the person obtained the document were usually immaterial.

49 His Honour then referred to section 109 X of the *Corporations Law*. The submission for the defendants was that that section, which deals with service, was a code and that there had been no service within the meaning of

section 109 X, nor in accordance with the personal service provisions of the Supreme Court Rules, there had been no service at all. His Honour held as follows: *"However, section 109 X is facultative, it is not mandatory. It will be noted that the words used in subsection (1) are "may be served". Indeed, the Drinkwater rule [**Re Drinkwater** (1929) 46 WN (NSW) 202] shows that section 109 X could not constitute a code for service. The document could have been served under section 109 X but the mere fact that it has not been does not disqualify it from service if the document came into possession of the addressee."*

50 His Honour did not follow Lander J in *Players Pty Limited v Interior Projects* (1996) 20 ACSR 189, in so far as Lander J had held that section 109 X had provided a code.

The evidence

51 I return to deal with certain parameters of the evidence of significance. Insofar as the evidence threw up an issue, as between the evidence given by Mr Lorimer and Mr Hodges, concerning the telephone call of 2 June 2003, the Court accepts as reliable the version of the conversation given by Mr Hodges in his affidavit of 3 July 2003 at paragraph 7.

52 To a certain extent this finding is supported in the second sentence of the facsimile from Mr Lorimer sent late on the same day. The first sentence had read "This will serve to confirm that you act on behalf of Emag and as such will accept notices served on this matter". The second sentence had read "If you believe to the contrary, please advise by close of business 3 June 2003 [giving the facsimile detail]". Although Gray & Perkins have no record of receiving this facsimile, but the case has proceeded upon the assumption that it was received, and although there is no evidence that any solicitor had read it, it seems to me to give some corroboration *in its terms* to the version of the conversation given by Mr Hodges. This is particularly so in use of the words "if you believe to the contrary" which are simply inconsistent with there having been an acceptance during the conversation that the solicitors would accept service of the application. Had the second sentence not been included the matter would be clearer in favour of Mr Lorimer's recollection. It is appropriate to comment on the particularly unsatisfactory situation which arises where a facsimile appears to have been lost in the offices of Gray & Perkins. No doubt human error will always results in some difficulties in any busy legal practitioner's offices. The present is an example of just how important it is to concentrate on procedures. But also throws up the high significance in terms of the Act in a claimant that service within the meaning of the Act can be strictly proved to have taken place. The whole of the stepped procedures being dependent upon compliance with rigid timelines, each of the formal requirements stipulated for by the Act must be complied with to the letter.

53 Further, the Court was impressed by the demeanour of Mr Hodges. Albeit that he was away from the office for some period thereafter, he gave clear evidence that he was assisted in his recollection because it had become necessary, while he was away, for him to communicate the content of the conversation to Mr Dwyer.

54 There were a number of aspects of Mr Lorimer's recollection which it seems to me made it difficult to accept his version of what had occurred. He accepted that the second sentence in the facsimile represented his '*view*' that Gray & Perkins would accept service *because they acted on behalf of Emag*. He accepted that in his facsimile sent on the same day he invited Mr Hodges to indicate to the contrary. This, it seems to me, was curious in terms of his recollection of what he stated had been said.

55 I return next to examine the matter of particular dates and the adjudicator's approach and this descends into a matter of some detail. I approach the matter upon the assumption that the proper approach to the question of service of the claimant's adjudication application on the facts is to look to when the document *came into the possession* of the plaintiff.

56 Ultimately the matter rests in very small compass:

- the Adjudicator in his finding of 16 June 2003 determined that the adjudication application had been properly served on 4 June 2003. The same finding was made in the Determination of 19 June 2003 [paragraph 4 (ii)];
- the Court's holding is that this determination was incorrect and that the earliest day when it could be said that notice of the adjudication application was received by Emag was 12 June 2003;
- in those terms Emag then had five business days within which to lodge its response. The last such day was 19 June 2003;
- the date of service upon Emag of the adjudicator's Notice of Acceptance [11 June 2003] falls away as of no significance because the later of the times to expire as between:
  (1) 5 business days following a copy of the application being received; and
  (2) 2 business days following notice of the adjudicator's acceptance of the application being received,
  was 19 June 2003;
- the adjudicator plainly approached the matter upon the basis that by 16 June 2003 Emag was out of time in providing an adjudication response in accordance with section 17 of the Act. He foreshadowed such a finding in his letter of 16 June 2003 when he stated that in the absence of satisfactory evidence being produced to him, there would be a determination based on the documentation received "*up to and including 12 June 2003*". This analysis could only have been correct if:
  (1) the adjudication application was served on 4 June 2003; and
  (2) the adjudicator's acceptance of the application had been received by Emag on 10 June 2003;

- this analysis was twice misconceived. In fact the evidence now establishes that the correct focus ought to have been on the date (12 June 2003) when the adjudication application was *received by Emag*. That was when time would begin to run. Further the evidence now establishes that the Adjudicator's acceptance was received on 11 June and not on 10 June;
- Emag was entitled to provide its relevant response on or before 19 June 2003;
- notwithstanding that entitlement the effect of the Adjudicator's communication of 16 June 2003 in the finding that Emag had failed by then to provide an adjudication response in accordance with section 20 (1) of the Act, was to effectively mislead and impede Emag in terms of its proper entitlement up to including 19 June 2003 to provide and adjudication response;
- in any event Section 21 (1) of the Act expressly prohibited the adjudicator from determining the adjudication application until after the end of the period within which Emag might lodge an adjudication response. But the adjudicator actually determined the adjudication application on the last of the days upon which that adjudication response might have been lodged; and
- this vitiates the validity of the adjudicator's determination.

57 At the end of the day the matter is capable of being determined in accordance with the approach taken by Young J in *Howship*. Of course section 31 (3) makes plain that the service provisions under the Act are in addition to and do not limit or exclude the provisions of any other law with respect of the service of notices: C*orporations Act* section 109 X is such a provision.

58 None of the other submissions put by the defendant are of substance. There was neither actual authority in the plaintiff's solicitors to receive a copy of the adjudication application nor ostensible authority in that regard. And in relation to the submission that the solicitors for Emag are presumed to have acted in the usual way by passing on the adjudication application to Emag, this is not now a circumstance in which such a presumption is available to be relied upon by the defendant. The presumption/inference for which the defendant contended which may in some circumstances be drawn, has now been resoundingly rebutted having been the subject of strict proof.

59 In my view the character of the subject legislation is such that general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms. Prudence dictates that those responsible for complying with the service provisions take steps to be in a position to strictly prove service in the usual way. One only example of the difficulties which may arise is where a solicitor who may have been instructed to act in relation to an adjudication application has his/her instructions withdrawn. There are no provisions similar to those to be found in the *Supreme Court Rules 1970* for notices of ceasing to act and the like. The Act here under consideration simply proceeds by requiring particular steps to be taken by the parties and by the adjudicator and proof of strict compliance with the Act is necessary for the achievement of the quick and efficient recovery of progress payments and resolution of disputes in that regard.

60 The parties are to bring in short minutes of order.

Mr GA Sirtes (Plaintiff) instructed by Gray & Perkins
Mr M Christie (Defendant) instructed Deacons