

Pacific General Securities Ltd & Finmore Holdings P/L v Soliman & Sons P/L, The Institute of Arbitrators and Mediators Australia & David Campbell-Williams

JUDGMENT : McDougall J : Supreme Court of New South Wales : 14th April 2005.

- 1 The plaintiffs (to whom I will refer individually as **Pacific General** and **Finmore**) and the first defendant (**Soliman**) are parties to a construction contract dated 7 June 2002. Under the contract, Soliman as contractor agreed to carry out work for the plaintiffs as owner. That work is, or includes, construction work as that term is defined in s5 of the *Building and Construction Industry Security of Payment Act 1999* (the Act).
- 2 The plaintiffs and Soliman fell into dispute over a payment claim made by the latter on about 1 February 2005 in the amount of \$440,189.98. The plaintiffs by their response said that the amount payable was nil. This led Soliman to make an adjudication application to the second defendant on 4 March 2005. The second defendant referred the application to the third defendant (the adjudicator).
- 3 The second defendant also gave, at least to Pacific General, notice of the nomination of the adjudicator, and said that he would serve a notice of acceptance in accordance with s19 of the Act.
- 4 Soliman, and the adjudicator, say that the adjudicator served notice of acceptance on the plaintiffs on 11 March 2005. I will come back later to the detail of how, it is said, this was done.
- 5 The plaintiffs say that they did not receive the notice of acceptance until 18 March 2005, and that they were not made aware of the claim that it had been served upon them earlier until 16 March 2005.
- 6 In these proceedings, the plaintiffs claim a declaration that the adjudicator's determination made on 31 March 2005 is void, and injunctive relief restraining the enforcement of that determination.
- 7 I have set out in brief the background. It is necessary to know that, after correspondence (including by email) passed between (at least) Pacific General and the adjudicator, the adjudicator on 22 March 2005, took, and expressed to Pacific General, the view that:
 - (1) the notice of acceptance had been served on 11 March 2005;
 - (2) the plaintiffs were therefore out of time to lodge an adjudication response (see s19(1) of the Act);
 - (3) he had no power to extend time for the lodgement of an adjudication response; and
 - (4) he could not consider a response given out of time (see s21(2) of the Act).
- 8 If the first point made by the adjudicator is correct, then the remaining points follow inevitably.
- 9 The issue, then, is whether notice of acceptance was served on 18 March 2005.
- 10 The notice of acceptance was dated, as I have said, 11 March 2005. Relevantly, it was addressed to the plaintiffs as follows:

To Pacific General: Level 1 Burns Philp House, 7 Bridge Street, Sydney NSW 2000.
To Finmore: Suite 430 Level 4, 5 Lime Street, King Street Wharf, Sydney NSW 2000.
- 11 In each case, the notice referred also to the facsimile numbers of the plaintiffs: that for Pacific General being stated, accurately, as 9241 6661; and that for Finmore being stated, apparently accurately, as 9299 5562.
- 12 It should be noted that, although the address of Pacific General stated in the notice was correct, the address given for Finmore was neither its address specified in the contract nor its current address.
- 13 The adjudicator gave evidence by affidavit dealing, among other things, with the way in which, he said, he served his notice of acceptance on the plaintiffs. So far as Pacific General is concerned, the adjudicator says that he sent it to Pacific General on 11 March 2005 by facsimile transmission. He annexes a copy of what he calls, "my fax log" (a record, apparently printed out from his fax machine, showing transmissions and receipts). That record shows (as job 868) that a transmission was sent at 13:56:41 on 11 March 2005 to the number 9241 6661; that it constituted three pages; and that the result was "OK". I interpose that the notice of acceptance comprised three pages.
- 14 The adjudicator said further that he sought to send the document to Finmore by fax. However, he says, because there was a difficulty in transmission, he posted it to Finmore at the address shown. The fax log shows that, immediately after the fax to Pacific General was recorded as sent, another fax was attempted to be sent to the number of Finmore that I have referred to, but that no pages were sent and that the result was "no answer".
- 15 At least one other fax was sent by the adjudicator on the same day, from the same machine, and a few minutes before the one to Pacific General. That fax was received. Other faxes sent by the adjudicator to Pacific General later (over the days 16 to 18 March 2005) were received and faxes sent by Pacific General to the adjudicator over that same time were received by him.
- 16 However, Pacific General and Finmore say that they did not receive the notice of acceptance until 18 March 2005, when, following enquiry, it was re-sent to them.
- 17 Mr Scott William James Heathwood, a director of Pacific General, gave evidence by affidavit. In his first affidavit, sworn 6 April 2005, he referred to receipt of the notice from the second defendant to which I have already referred and said, in substance, that he did not hear from the adjudicator until he received a fax on 16 March 2005. In that affidavit, Mr Heathwood said he had not seen the notice of acceptance prior to 18 March 2005 and that he had made inquiries with employees of Pacific General, none of whom had seen or received a copy of that document prior to that date.

- 18 In his second affidavit, sworn 13 April 2005, Mr Heathwood gave more detail. He explained the way in which the facsimile transmissions were received by Pacific General (by computer, using the Winfax application) and sent to the person who was required to deal with them. He said that, further, because there was an ongoing dispute between Pacific General and Soliman, he had made all staff of Pacific General aware that all correspondence received by Pacific General relating to the contract was to be referred to him. Further, Mr Heathwood said he had not seen the notice prior to 18 March 2005. He then said (in paragraph 15 of his affidavit): *"I have subsequently spoken with each member of staff of Pacific General, and each of them inform [sic] me that they did not receive a copy of the notice of acceptance prior to 18 March 2005. No staff member recalls seeing the facsimile from Mr Campbell-Williams prior to the receipt of a facsimile (of 18 March 2005)"*
- 19 None of the evidence to which I have referred was objected to; Mr Heathwood was not required for cross examination; and, accordingly, none of the evidence to which I have referred was challenged.
- 20 For Finmore, Mr Peter Howell Dixon, its sole director, gave evidence by affidavit. He said that Finmore's business address from 1 October 2004 to the present time was Level 1 Burns Philp House, 7 Bridge Street, Sydney and not the Lime Street address. He said he reviewed all of Finmore's incoming mail and facsimiles and did not receive any correspondence from the adjudicator prior to 21 March 2005 when he first saw a copy of the notice of acceptance. I should also interpose that Mr Dixon said that Finmore has no employees. Thus, Mr Dixon said, at no time prior to 21 March 2005 did Finmore receive a copy of the notice from the adjudicator. Again, that evidence was read without objection; and again, it was not challenged in cross examination.
- 21 The requirement for an adjudicator to serve a notice of acceptance arises under s19 of the Act:
"19 Appointment of adjudicator
(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent."
- 22 Service of the notice of acceptance is also relevant to the timetable under which adjudications are to be run. By s20(1) the time within which a respondent may lodge an adjudication response commences five business days after the respondent receives a copy of the adjudication application or two business days after the respondent receives notice of the adjudicator's acceptance of the application, whichever expires later.
- 23 Section 31 of the Act deals with service. It provides a number of alternatives:
"31 Service 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 the 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.
- 24 In these proceedings, no one placed any relevance on the provisions of any other law with respect to service: s31(3).
- 25 It will be seen that there is some distinction drawn between the concept of service and the concept of receipt, although for some purposes at least, the two will coincide. Thus, in s19, the operative concept is that of service, whilst in s20, the operative concept is that of receipt. Again, where s31(1)(c) is availed of, the operative concept, by virtue of subs(2), is receipt. It is receipt that both sets the clock running under s20 and following and that provides both the fact and the time of service, at least where s31(1)(c) is relied upon.
- 26 In the present case, therefore, the issue that I have stated maybe restated by saying that the critical question is whether, and if so when, the notice of acceptance was received by either Pacific General or Finmore.
- 27 The verb "receive" in its ordinary meaning denotes the taking of something into one's hand or possession, of something given or delivered, or having something delivered or brought to one. I see no reason why the word "receive", and its cognate forms in the Act, should not be given that ordinary English meaning. This does not mean, in the case of a corporation (at least absent any contractual stipulation to the contrary) a document must come to a particular person within a corporation before it can be received. It means that the document must come into the hand or possession of, or be delivered or brought to, someone on behalf of the corporation; or, perhaps, that otherwise somehow it comes into the hand or possession of, or is delivered or brought to, the corporation.
- 28 In the case of Pacific General, there are two significant aspects of Mr Heathwood's evidence that bear on the question of receipt. The first is his evidence of system, including the system established by his instruction that all documents relevant to the contract were to be brought to him. His evidence that no such document was brought to him, if accepted, would afford some evidence that the document was not in fact received by someone on behalf of the corporation: see **Connor v Blacktown District Hospital** [1971] 1 NSWLR 713.

- 29 The second significant aspect of Mr Heathwood's evidence is that, affirmatively, it shows that he made enquiries of all the employees at Pacific General and that none of those employees saw or received the notice of acceptance prior to 18 March 2005.
- 30 There may be some question as to how a document shown to have been faxed, with the fax log of the sending machine recording "OK" as the result, would not have been received on the addressee's fax system. But there was no evidence, expert or otherwise, that would enable me to address this question; and I do not think that I can take judicial or other notice of the workings of such machines.
- 31 In the absence of any challenge, I do not see how I can reject, or not act upon, the evidence of Mr Heathwood. I therefore conclude that the notice of acceptance was not received by Pacific General until 18 March 2005.
- 32 The position must be so *a fortiori* in the case of Finmore, given, firstly, that the attempt at faxing the transmission failed and secondly, that the evidence of post does not show posting to the current business address of Finmore.
- 33 Mr J Young of counsel, who appeared for Soliman, submitted in substance that I should infer that both companies were controlled by the same people, or that they operated together as one entity, so that a document given to, or received by, one company might be assumed to have been given to, or received by, the other. He referred to the fact that, as at March 2005, both had their address at Level 1, Burns Philp House. It does not follow that, because both were on the same floor, that they shared an office. It may be - I do not know - that there is more than one office on that floor of Burns Philp House. In any event, there seems to me to be two answers to the submission.
- 34 The first is that none of this was put to either Mr Heathwood or Mr Dixon, and in the absence of that having been done, I do not see why I should draw some inference.
- 35 The second is that, in any event, the submission does not avail Soliman if I accept (as I do) Mr Heathwood's evidence of non receipt.
- 36 Mr Young mounted an alternative argument based on clause 21 of the contract, and calling in aid s31(1)(c) of the Act.
- 37 Clause 21 provides:
"21 Notices
21.1 Any notice required to be given under this Agreement is deemed to have been given should any of the following events have occurred:
21.1.1 If the notice is delivered by hand to the other party;
21.1.2 If the notice is posted by ordinary pre-paid mail;
21.1.3 If the notice is sent by facsimile transmission to the party's address outlined in this Agreement OR the last known address of that party if the address has changed.
21.2 Any notice is deemed to have been received on the date it was delivered by hand OR the same day as it was faxed OR the day following the day it was posted."
- 38 I think that there are at least two answers to this argument. The first is that clause 21 on its face relates only to notices required to be given under the contract, and not (for example) to notices given, whether by requirement or otherwise, under any other source of power, including the Act.
- 39 The second is that, even if clause 21 is called up into the relevant means of service by operation of s31(1)(e), it can only be clause 21.1.3 that is applicable. To the extent that that is in conflict with the requirement of the Act that notice, to be served by facsimile transmission, must be received, then clearly the Act must prevail (see s34). The same applies to the argument based on clause 21.2, whereby a deeming is created. The deeming in this case might be fictitious (where the document was delivered after the date of facsimile transmission or after the date of posting) or factitious (where it was delivered on those days) - see the judgment of Windeyer J in **Hunter Douglas Australia Pty Ltd v Perma Blinds** (1968) 122 CLR 49 at 65-66. In the present case, the reliance on clause 21.2 must be relying upon the word "deemed" in its fictitious character (since I have found that the notice was not in fact received on the date it was faxed). That, again, appears to conflict with the evident policy of the Act (one that is entirely understandable in light of the timetable fixed) that, to start time running, there must be actual receipt. Again, if there is conflict, s34 would resolve it in favour of the Act.
- 40 I therefore conclude that the plaintiffs have made out their entitlement to relief. That is either because there has been a failure to comply with a basic and essential requirement of the Act - see **Brodyn Pty Limited v Davenport** [2004] NSWCA 394 and/or because there has been a subsequent denial of natural justice - see in particular **Brodyn** at [57]. In the latter case, of course, the denial arose when the adjudicator failed to extend to the plaintiffs an opportunity to file an adjudication response, and determined the application without giving them that opportunity.
- 41 Mr Young submitted that, on discretionary grounds, relief should be refused. He said in substance the adjudicator had given the plaintiffs the opportunity to put submissions to him on the question of service, and that they did not take that opportunity. However, it is clear that the plaintiffs did put to the adjudicator that they had not received the document and that he relied upon the evidence of his fax log without taking matters further. It follows that, with the chance having been offered and accepted, the subsequent denial of nature justice should not be excused on discretionary grounds.

- 42 The plaintiffs are entitled to a declaration in accordance with prayer 1 of the summons and to orders in accordance with prayers 2 and 3 and I make orders accordingly.
- 43 I will hear the parties on costs.
[Mr Kerr sought an order for costs]
- 44 I order the first defendant to pay the plaintiff's costs of the proceedings.
[Mr Kerr advised the Institute would file a submitting appearance]
- 45 I will suspend these orders until the submitting appearance is provided to me. The interlocutory orders made by the Court on 7 April 2005 and 11 April 2005 will continue until final orders are made.

P: SA Kerr instructed by P: Gadens Lawyers,
D1: JJ Young instructed by D1: Colin Biggers & Paisley, Sydney
D2: Submitting instructed by D2: Cowley Hearne, Sydney