

**JUDGMENT Johnstone DCJ.** New South Wales District Court. 7<sup>th</sup> December 2006

1. Royal Tiles Contractors Pty Limited and Park View Constructions Pty Limited entered into a construction contract on 20 May 2005.
2. On 15 August 2006 Royal Tiles Contractors sent a payment claim, within the meaning of s 13 of the *Building and Construction Industry Security of Payment Act 1999* (the "BCISP Act"), to fax number 8259 7377.
3. Fax number 8259 7377 was at that time situated at Lot 1, Pier 8/9, 23 Hickson Road, Walsh Bay. Park View Constructions Pty Limited conducted its business from that address, as did a sister company, Park View Developments Pty Limited.
4. Park View Constructions failed to serve a payment schedule on Royal Tiles Contractors within 10 days as required by s 14(4) of the BCISP Act. A payment schedule was not served until 15 September 2006.
5. Royal Tiles Contractors therefore claims an entitlement to the amount of the payment claim, namely, \$293,817.70 and moves for summary judgment.
6. Park View Constructions disputes the claim. It says that the payment claim was not served on 15 August 2006, rather it was served at some later date, such that the payment schedule was in fact served within the prescribed time.
7. Park View Constructions says that although the payment claim was faxed to number 8259 7377 on 15 August 2006, that was not effective service, within the meaning of s 31 of the BCISP Act, because:
  - (a) That fax number was not the fax number which Park View Constructions had notified Royal Tiles Contractors that notices should be sent to: s 31(1)(e)
  - (b) Park View Constructions did not receive the payment claim at its ordinary place of business: s31(2).
8. The issue for determination is whether the sending of the payment claim by fax to number 8259 7377 on 15 August 2006 constituted effective service within the meaning of s 31 of the BCISP Act, which provides:

*"(1) Any notice that by or under this Act is authorised or required to be served on a person maybe 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 maybe 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."*
9. It is to be noted that the section authorises service by any one of the means stipulated in (a),(b),(c),(d) or (e) of s 31(1).
10. Park View Constructions submits that s 31 is to be construed so as to require service in accordance with the contractual arrangements of the parties, or by reference to their prior conduct in respect of the service of notices.
11. It says that:
  - (a) *Royal Tiles Contractors was by notice given during a meeting on 24 February 2006, subsequently confirmed by correspondence, notified of a change in the fax number for the purpose of correspondence and;*
  - (b) *Subsequent correspondence, previous to 15 August 2006, between the parties had been sent to the new fax number.*
12. All that may well be so, however, the evidence is that the payment claim was faxed to a number which corresponds with other documents issued by Park View Constructions which thereby held out that fax number as being its ordinary fax number situated at its ordinary place of business. Subsection 31(1)(c) permits service in that way.
13. Park View Constructions Pty Limited says that was not its ordinary place of business, or that facsimile number was not at its ordinary place of business, because it had expressly informed Royal Tiles Contractors accordingly.
14. Nevertheless it continued to issue correspondence from and continued to receive correspondence at fax number 8259 7377.
15. It follows that Park View Constructions continued to hold out that fax number as a fax number at its ordinary place of business. I find therefore that service of the payment claim was effected on 15 August 2006 within the meaning of s 31 of the BCISP Act. I note further that Park View Constructions has not led any evidence to prove by way of response that it did not receive the payment claim on or about 15 August 2006. Royal Tiles Contractors is therefore entitled to payment of the amount stipulated in the payment claim, because a payment schedule in reply was not served within the prescribed time: s 15 of BCISP Act. There is, therefore, no genuine dispute raised by the Defence.
16. The test to be applied as to whether a party should be denied the opportunity to place a case before the Court at trial is that there must be a high degree of certainty about the outcome if the proceedings were to go to trial in the ordinary way: see *Thompson's Civil Practice and Procedure* at 14.4.120. Where it is apparent that a case (or a defence) is so "*so obviously untenable that it cannot possibly succeed*", it is appropriate for a Court to intervene

summarily: *General Steel Industries Inc v Commissioner for Railways* (NSW)(1994) 112 CLR 125 at [8] and [10]. It is not sufficient that a case (or defence) be weak, as prima facie a party is entitled to a trial. A party is to be deprived of that entitlement only in the clearest of cases where for example it is transparently clear that there is no reasonable cause of action (or defence): *Brinson v Rocla Concrete Pipes Limited* (1982) 2 NSWLR 937 at 946 F to G. In this context it is important to note that the determination of applications for summary disposal is not restricted to a consideration of the pleadings and questions of law and regard may be had to the available evidence: *Cox v Journeaux & Ors (No 2)* (1935) 52 CLR 713.

17. I am satisfied that there is no genuine factual dispute for decision. The resolution of this matter turns on a construction of s 31, and in my view that section is clear. The position of Park View Constructions is untenable having regard to the evidence of it having held out this fax number as being at its ordinary place of business and I therefore consider it is appropriate to enter summary judgment in favour of Royal Tiles Contractors.
18. I therefore enter judgment in favour of Royal Tiles Contractors Pty Limited for the sum of \$293,817.70 together with interest, at the rate prescribed by the Uniform Civil Procedure Rules, from 30 August 2006. I invite the parties to bring in short minutes with the appropriate calculations for the entry of final judgment.
19. I order the defendant to pay the plaintiff's costs of the motion and of the proceedings as agreed or as assessed on the ordinary basis.

Mr F Kalyk for Royal Tiles Constructions Pty Limited  
Ms V Culkoff for Park View Constructions Pty Limited