

Michael Tsoukatos t/a Xtreme Enterprises Australia P/L v Peter Mustafa t/a Peter Mustafa Constructions

JUDGMENT : HALL J: Supreme Court, New South Wales, Common Law Division. 15th June 2007

- 1 These proceedings are brought by Summons filed in this Court on 27 December 2006 by the plaintiff, Michael Tsoukatos trading as Xtreme Enterprises Australia Pty Limited, ACN 106 049 094 ("*Xtreme*") who seeks orders that the garnishee order and writ for levy of property obtained against him in Burwood Local Court by the defendant, Peter Mustafa trading as Peter Mustafa Constructions, ABN 183 813 22 715 ("*Mustafa Constructions*"), be set aside and that the monies debited against a bank account in Xtreme's name in execution of the garnishee order be returned.
- 2 The garnishee order and writ for levy of property were issued by Burwood Local Court following the filing by the defendant of an adjudication certificate obtained pursuant to the Building and Construction Industry Security of Payment Act 1999 (NSW) ("*the Act*"). The defendant had made an adjudication application under the Act, which had been determined in his favour with respect to the unpaid balance under a Deed of Release entered into between the plaintiff and the defendant. The Deed of Release had been entered into in satisfaction of an earlier agreement between the parties for renovation work to be performed by Mustafa Constructions.

The primary issue

- 3 The primary issue for determination in these proceedings is whether or not there has been compliance with the service requirements of the Act, that is, whether or not there had been valid service upon the plaintiff of notice with respect to the adjudication application pursuant to the service provisions of the Act or pursuant to procedures referred to therein.

History

(a) The construction contract and deed

- 4 Mr Tsoukatos and Mr Mustafa, as principal of Mustafa Constructions, entered into an agreement in December 2005 regarding "*renovation works*" to premises identified in the tender letter from Mustafa Constructions dated 7 December 2005 as "*Re: 75-81 Darlinghurst Road Kings Cross Sydney NSW*". A copy of the tender letter appears as an attachment (handwritten "*A*") to the affidavit of the plaintiff sworn on 3 January 2007. The initial agreement between the plaintiff and the defendant was executed on 14 December 2005. Subsequently, various renovation works were completed by the defendant and payments made by the plaintiff. In about March 2006, the plaintiff ceased making payments as a result of dissatisfaction with the standard of work being carried out by the defendant.
- 5 A Deed of Release (Exhibit "*A*" in these proceedings) was entered into between Michael Tsoukatos and Xtreme and Peter Mustafa and Mustafa Constructions on 30 March 2006. The Deed states that as at 30 March 2006 Mr Tsoukatos had paid Mustafa Constructions a total sum of \$67,891 for works and materials supplied under the initial agreement. The Deed included an agreement between the parties that the plaintiff would pay the defendant the further sum of \$25,000 for completion of the renovation works.
- 6 According to the defendant, the plaintiff had paid \$14,000 to Mustafa Constructions under the Deed of Release before ceasing to make further payment. The defendant pursued payment of the outstanding balance of \$11,000 from the plaintiff.

(b) Proceedings for recovery of monies

- 7 The affidavit of Jason Hanna sworn on 6 February 2007 annexes a letter from Mustafa Constructions dated 9 June 2006 to Michael Tsoukatos (as Annexure "*A*") in which the defendant stated "*On or about 20 May we served on you a payment claim number 70 under s.13 of [the Act] for the amount of \$12,100*" and gave notice of his intention to make an adjudication application pursuant to s.17 of the Act. There was no reply by the plaintiff to this letter.
- 8 The defendant proceeded to make an adjudication application to recover the outstanding monies. The application was received by the Australian Solutions Centre ("*ASC*") on 6 July 2006. Subsequently, on three separate occasions various letters of correspondence as required under the Act were sent by Express Post addressed to "*Michael Tsoukatos/Xtreme Enterprises Aust Pty/Ltd (Respondent), 75-81 Darlinghurst Road, Kings Cross NSW 2011*" regarding the adjudication application. No reply was received from the plaintiff to any of these letters.
- 9 The adjudicator, Mr Scott Pettersson, issued a certificate on 9 August finding in favour of the defendant in the amount of \$13,269.09. A copy of the adjudication certificate executed 28 August 2006 is annexed to the defendant's affidavit sworn 23 January 2007 (as Annexure "*A*").
- 10 The defendant filed the adjudication certificate in Burwood Local Court on 1 September 2006 together with a Notice of Motion to obtain a writ for levy of property for the sum of \$13,395.09 being the amount of judgment including costs against the judgment debtor (Annexure "*B*" to the affidavit of the defendant sworn 23 January 2007). The writ of execution against Michael Tsoukatos was initiated with regard to 77 Darlinghurst Street Potts Point, however, by letter dated 6 November 2006 from the Sheriff's office, the defendant was notified that that address was the defendant's place of employment and that therefore no seizure of goods could take place.
- 11 On about 6 November 2006, the plaintiff attempted to bring a Notice of Motion to stay proceedings in relation to the above judgment but was unsuccessful (Annexure "*E*" to the affidavit of the defendant sworn 23 January 2007).

- 12 According to the affidavit of the defendant sworn 23 January 2007, a Notice of Examination was served by registered post on both Michael Tsoukatos at 77 Darlinghurst Street Potts Point and Xtreme at its registered business address of Suite 1, 360 Norton Street Leichhardt. No reply correspondence was received.
- 13 On 15 December 2006, the defendant to the present proceedings filed a Notice of Motion moving the Local Court to issue a garnishee order (Annexure "F" to the defendant's affidavit sworn 23 January 2007). The garnishee order was granted (Annexure "G" to the defendant's affidavit sworn 23 January 2007).
- 14 On 19 December 2006, the garnishee orders were executed. The amount of \$13,668.09 was debited from the bank account of Xtreme.
- 15 The plaintiff ventilated his complaint that monies had been withdrawn from Xtreme's bank account in execution of the garnishee order before Simpson J as duty judge on 27 December 2006 and filed the summons in these proceedings in Court. The plaintiff submitted to her Honour that he had not received a copy of the garnishee order issued by Burwood Local Court (transcript, 27 December 2006 at 3.28-40) nor had he received notice of the proceedings before that Court at all. The plaintiff stated that he received the writ for levy of property on 18 December 2006 when a Sheriff presented at the plaintiff's door. Simpson J made orders staying any further execution of the garnishee order.

The Act

- 16 The statutory process for recovery of payment under the Act is summarised by Bergin J in **Paynter Dixon Constructions Pty Limited v JF & CG Tilston Pty Limited** [2003] NSWSC 869 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).
8. 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)."

Adjudication applications

- 17 Section 17 of the Act provides as follows:-

"Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if:-

(a) the respondent provides a payment schedule under Division 1 but:-

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

- (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless:-
- (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
- (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within five business days after receiving the claimant's notice.
- (3) An adjudication application:-
- (a) must be in writing, and
- (b) must be made to an authorised nominating authority chosen by the claimant, and
- (c) in the case of an application under subsection (1)(a)(i) – must be made within 10 business days after the claimant receives the payment schedule, and
- (d) in the case of an application under subsection (1)(a)(ii) - must be made within 20 business days after the due date for payment, and
- (e) in the case of an application under subsection (1)(b) - must be made within 10 business days after the end of the five day period referred to in subsection (2)(b), and
- (f) must identify the payment claim and the payment schedule (if any) to which it relates, and
- (g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
- (h) may contain such submissions relevant to the application as the claimant chooses to include.
- (4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.
- (5) A copy of an adjudication application must be served on the respondent concerned.
- (6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable."
- 18 An essential parameter forming part of Part 3, Division 2 "Adjudication of disputes" is the requirement to be found in s.17(5) that "a copy of an adjudication application must be served on the respondent concerned".

Service of Notices

- 19 Section 31 of the Act provides as follows:-
- "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."
- 20 The phrase "the person's ordinary place of business" is not defined in s.4 of the Act.
- 21 The Court of Appeal in *Falgat Constructions Pty Limited v Equity Australia Corporation Pty Limited* [2006] NSWCA 259 held that s.31 of the Act, dealing with service of notices, also applies to provision of notices. The Court of Appeal adopted an approach to s.31(3) of the Act as making 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. It is therefore important to consider the following provisions:-

s.109X(1) and (7) of the Corporations Act 2001 (Cth)

"Service of documents

- (1) For the purposes of any law, a document may be served on a company by:-
- (a) leaving it at, or posting it to, the company's registered office; or
- (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
- (c) if a liquidator of the company has been appointed - leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
- (d) if an administrator of the company has been appointed - leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC. ...
- (7) This section applies to provisions of a law dealing with service whether it uses the expression 'serve' or uses any other similar expression such as 'give' or 'send'."

s.29 of the Acts Interpretation Act 1901 (Cth)

"Meaning of service by post

- (1) Where an Act authorizes or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used, then unless the contrary intention appears the service

shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

(2) This section does not affect the operation of s.160 of the Evidence Act 1995.

s 160 of the Evidence Act 1995 (NSW)

“Postal articles

(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted.

(2) This section does not apply if:-

(a) the proceeding relates to a contract, and

(b) all the parties to the proceeding are parties to the contract, and

(c) subsection (1) is inconsistent with a term of the contract.

(3) In this section:-

working day means a day that is not:-

(a) a Saturday or a Sunday, or

(b) a public holiday or a bank holiday in the place to which the postal article was addressed.”

22 The Court of Appeal in **Falgat** (supra), per Hodgson JA at paragraphs 58-63, held that:-

“In the first place, in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see **Howship Holdings Pty Limited v Leslie** (1996) 41 NSWLR 542; **Mohamed v Farah** [2004] NSWSC 482 at [42]-[44]. In such a case, there has been service, provision and receipt.

Next, I agree with the view expressed by Einstein J in **Taylor** at [16] that payment claims are notices within s.31 of the Act; and in my opinion also, a payment schedule is also such a notice. Accordingly, s.31 of the Act plainly applies in relation to service of payment claims. The question then is whether it also applies to provision of payment schedules.

One relevant factor in approaching this question is that it seems to me highly unlikely that it was the intention of the legislature that provision of a payment schedule only occurs if the document actually comes into the hands of some person on behalf of the claimant. If that were the case, a claimant could acquire a cause of action under ss.14 and 15 of the Act by serving a payment claim, and then ensuring that no-one was at the claimant’s address or registered office until expiry of the time for provision of a payment schedule.

The use of the word ‘provide’ rather than the word ‘serve’ does carry a suggestion that a different meaning is intended, and that accordingly s.31 does not apply in the case of the word ‘provide’. Against this, however, I do not think the legislature would have (1) used a problematic word like ‘provide’ with the intention that it have a different meaning from “serve”, (2) given useful instructions as to how service may be effected, yet (3) given no instructions whatsoever as to how provision may be effected. When this consideration is combined with the consideration raised in the previous paragraph, in my opinion this justifies the conclusion, reached by the primary judge in this case, that ‘provide’ does not mean anything different from ‘serve’, and that s.31 applies to ‘provision’ as well as to ‘service’.

There remains the question of whether the time at which service or provision has taken effect is also the time at which a document is received, for the purposes of s.17(3)(b) (and see also s.17(2)(b) and s.21). I note that the word ‘receive’ is also used in s.31(2), but used in the context of ‘received at that place’. In my opinion, mail delivered to a registered office or place of business is received at that place when it is put into the mail box of that registered office or place of business, without the necessity of anyone actually seeing it.

In my opinion, the word ‘receive’ in s.17(3)(c) does not necessarily require that the document come to the notice of a person authorised to deal with the document on behalf of the claimant. In general, in my opinion, it would be satisfied once the document has arrived at the claimant’s registered office or place of business and is there during normal office hours. There may be circumstances in which service or provision has been effected within s.109X of the Corporations Act or s.31 of the Act, but the document has not been received, but I find it difficult to identify any such circumstances.”

23 In **Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors** [2005] NSWSC 378, McDougall J at paragraphs 28-31, found two significant aspects of evidence that may bear on the question of receipt, as follows:-

“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.

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.

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.

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."

The present proceedings

- 24 The plaintiff, who was unrepresented, sought to initiate the proceedings by an affidavit entitled "Affidavit in Support of Supreme Court of New South Wales case # 16347 of 2006" to set aside writ for property Burwood Local Court 767/06. The plaintiff annexed a copy of a letter dated 2 January 2007 and a number of documents were attached identified by numbers 1 to 9 in the letter. These documents related to the tender for the renovations, proceedings in the Local Court and documents relating to the stay ordered by this Court on 27 December 2006 by the duty judge.
- 25 In a further affidavit sworn on 7 February 2007, Mr Tsoukatos stated that he was the managing director of Xtreme Enterprises Australia Pty Limited. He claimed that he had not seen any correspondence or documents from ASC. In that affidavit, he stated that to the best of his knowledge, the envelopes identified therein had not been delivered to his place of business.
- 26 The proceedings were listed in the duty judge list on 6 February 2007. On that occasion, Mr J Hanna, solicitor, appeared for the defendant. He tendered a copy of the deed of release referred to above dated 30 March 2006 and read the affidavit of Peter Mustafa sworn on 23 January 2007.
- 27 The proceedings were stood over to 7 February 2007. On that occasion, Mr Hanna sought leave, and was granted leave, to file in Court affidavits sworn by himself on 7 February 2007, Ms Treuic sworn on 7 February 2007 and Mr Hanna sworn on 6 February 2007. The plaintiff did not object to those affidavits.
- 28 Mr Tsoukatos read his affidavits sworn on 27 December 2006, 3 February 2007 and an earlier affidavit sworn on 7 February 2006.
- 29 Mr Tsoukatos made a number of observations. It was pointed out to him (transcript, 7 February 2007, p.2) that if he wished to give any evidence about any matter, it would be necessary for him to provide sworn evidence as to any factual matters. He did not give any further evidence additional to his abovementioned affidavits.
- 30 Mr Tsoukatos confirmed the nature of the building which he occupies consists of a licensed bar in the basement level of 77 Darlinghurst Road. The building itself, he said, consists of five different businesses and shops. He said "mine is a strip club. It is has been there for 25 years. I purchased it one year ago, and asked Mr Mustafa to renovate it ... The building above me is a gentlemen's club, there is a money shop, a therapy shop and above that, there are two other shops". Mr Tsoukatos confirmed that the address 75-81 embraces one building. He stated that the buildings were once old terraces that had been united into one lot (transcript 7 February 2007, p.8).
- 31 He stated (at p.9) that the business known as "Porky's" is not a business which he conducts. His business went by the name "Xtreme". He stated that "Porky's" "... is a brothel. My place of business is not that".

Plaintiff's submissions

- 32 The plaintiff submits that on the evidence the Court should find that no service had been affected and that therefore the requirements of the Act have not been complied with. It is submitted that he received no notice that either Mr Mustafa or Mustafa Constructions had applied for adjudication pursuant to the Act with respect to the outstanding amount under the Deed of Release.
- 33 The plaintiff argues that each of the five pieces of correspondence purported to have been sent to him from the defendant or ACS was addressed incorrectly. The plaintiff submits that the address of his ordinary place of business has always been "Basement Level, 77 Darlinghurst Road, Kings Cross NSW" and not "75-81 Darlinghurst Road, Kings Cross NSW". He submits that the two pieces of correspondence sent to him addressed to "Basement Level, 77 Darlinghurst Road, Kings Cross NSW" from Burwood Local Court were received without problem.
- 34 In the respective affidavits of Frank Amante and Joseph Gerbec both sworn 7 February 2007, both of whom are employed in another part of the building complex at 75-81 Darlinghurst Road, Kings Cross NSW, which is stated to be directly above the plaintiff's place of business at Basement Level, 77 Darlinghurst Road, Kings Cross NSW, it is stated that Express Post envelopes from ASC with serial numbers CN6629235 and CN2345820 were not received at their place of employment.
- 35 The plaintiff also makes several complaints in relation to the adjudication certificate issued, as set out in a letter dated 2 January 2007 addressed to the Supreme Court and annexed to his affidavit sworn 3 January 2007 (as Annexure "A"). The plaintiff submits that the adjudication certificate was erroneously issued in two names – Michael Tsoukatos and Xtreme. The plaintiff takes issue with the fact that the writ for levy of property was issued against him personally but the garnishee order was issued and executed against the account of Xtreme.

Defendant's submissions

- 36 The defendant submits that effective notice was served upon the plaintiff and that the service requirements of the Act have been met. The defendant submits that there were five pieces of correspondence regarding the adjudication application sent by Express Post to the plaintiff. The details of each piece of correspondence are set out in the affidavit of Jason Hanna sworn 6 February 2007 and the affidavit of Krystele Treuil sworn 7 February 2007:-

- (a) Letter dated 9 June 2006 from Mustafa Constructions, Express Post serial number CN2345820, notifying plaintiff of defendant's intention to make an adjudication application.
 - (b) Letter dated 11 July 2006 from ASC, Express Post serial number CN6629235, advising of the receipt of the adjudication application by ASC.
 - (c) Letter dated 11 July 2006 from ASC, Express Post serial number CN6629235 (included in same envelope as above), including the Notice of the acceptance of application by the Adjudicator.
 - (d) Letter dated 13 July 2006 from ASC, Express Post serial number CN6879407, outlining responses sought from the parties by the Adjudicator.
 - (e) Letter dated 9 August 2006 from ASC, Express Post serial number BN7190995, enclosing the Adjudicator's determination.
- 37 The items of correspondence from ASC were all addressed to "Michael Tsoukatos/Xtreme Enterprises Aust P/L (Respondent), 75-81 Darlinghurst Road, Kings Cross NSW 2011". It is submitted by the defendant that it is highly unlikely that of all of the letters sent at least one would not have been received by the plaintiff, each having been delivered to at the very least the building complex within which the plaintiff operated his business, 75-81 Darlinghurst Road, Kings Cross NSW. If the plaintiff received just one of the letters, this would have placed him on notice of the adjudication application being brought against him. However, it should be noted that the Act requires that each of the discrete pieces of correspondence with regard to the adjudication application be effectively served upon the plaintiff. Evidence that at least one of the letters had been received by the plaintiff would indicate that the plaintiff was on notice as to the application against him, however, in order for this Court to determine that that all of the requirements in the Act as to service have been met regarding the plaintiff, this Court would need to be satisfied on the balance of probabilities that each of the letters was received by the plaintiff.
- 38 The defendant also submits that Xtreme was one of the parties to the Deed of Release dated 30 March 2006 and that the monies garnisheed from the company's personal account were garnisheed from the same account from which cheques were drawn in favour of Mustafa Constructions in relation to the initial agreement dated 14 December 2005. Therefore the monies were drawn from the company's personal account and not a trust account.

Onus of proof

- 39 The evidence relied upon by the defendant establishes that documents were sent by express post by ASC as well as letters dated 11 July 2006 (two letters) a letter of 13 July 2006 and a letter dated 25 July 2006. Additionally, the evidence establishes that a letter of 9 August 2006 together with a copy of the Adjudication Determination dated 25 July 2006 was also sent by express post. The evidence further establishes that the abovementioned documents were served in accordance with the provisions of s.31 of the *Building and Construction Industry Security of Payment Act 1999*.
- 40 The evidence relied upon by the defendant in these various respects was not challenged by the plaintiff. He simply contends that he never received any of the documentation. In those circumstances, the onus lies upon him as plaintiff to adduce evidence sufficient to establish a cogent explanation which would discharge the onus in establishing that none of the correspondence or other documents was received by him.
- 41 Apart from the plaintiff's own evidence in the form of his affidavits in which he asserts that he did not receive the documents, the only other evidence adduced by the plaintiff was the evidence of Mr Amante and Mr Grebec to which I have earlier referred.
- 42 In the circumstances in which there was a multiplicity of correspondence and documents being sent on various dates to the address 75-81 Darlinghurst Road, Kings Cross, the evidence of Mr Amante and Mr Grebec does not, in my opinion, constitute sufficient evidence which cogently establishes or suggests an explanation for the plaintiff not having received any of the documents.

The issues

- 43 The primary issue for determination in these proceedings is whether or not there has been compliance with the service requirements set out in the Act, that is, whether or not the plaintiff had received effective notice with respect to the adjudication application.
- 44 In accordance with legal principles discussed above, it would fall within the requirements set out in the Act for the plaintiff in this matter to be deemed to have received effective service of notice via the postage of the relevant items of correspondence to the plaintiff's ordinary place of business via Express Post.
- 45 Therefore the question is whether or not it was sufficient for the relevant correspondence to be addressed to "Michael Tsoukatos/Xtreme Enterprises Aust P/L (Respondent), 75-81 Darlinghurst Road, Kings Cross NSW 2011". The plaintiff maintains that the correct address of his ordinary place of business is "Basement Level, 77 Darlinghurst Road, Kings Cross NSW 2011". Neither of the above addresses is the registered business address for Xtreme, which is according to the affidavit of the defendant sworn 23 January 2007 in fact "Suite 1, 360 Norton Street, Leichhardt NSW".
- 46 There is no evidence before the Court of any positive confirmation that the plaintiff or any other party at 75-81 Darlinghurst Road received the items of correspondence. A lack of notification from Australia Post regarding delivery failure may be taken to imply that each of the five Express Post items of correspondence addressed to Michael Tsoukatos and Xtreme were delivered to a location within 75-81 Darlinghurst Road.

- 47 However, there is no evidence as to precisely which of the businesses within the building at 75-81 Darlinghurst Road actually received the correspondence.

Analysis

- 48 It is noted that the initial letter providing a tender by Peter Mustafa Constructions by letter dated 7 December 2005 was addressed to "Michael" and the address given was 75-81 Darlinghurst Road, Kings Cross.
- 49 According to the affidavit relied upon of Frank Amante sworn on 7 February 2007 which the plaintiff relies upon in the present proceedings, Mr Amante worked as a shift caretaker and an office administrator at "Porky's Nightspot" in what he states is the building located at 75-81 Darlinghurst Road, Kings Cross.
- 50 Mr Amante stated in his affidavit that his place of employment "... is directly above the 'Xtreme' address known as Basement Level, 77 Darlinghurst Road, Kings Cross, NSW 2011".
- 51 Mr Amante stated that mail addressed to "Xtreme" sometimes is delivered to his place of employment and he has re-directed such mail, usually by hand.
- 52 Mr Amante stated that he has not sighted any express post envelope from ASC (Australian Solution Centre). To the best of his knowledge, the envelopes identified by him had not been delivered to his place of employment. As stated earlier, Mr Gerbec gave evidence to the same effect as Mr Amante.
- 53 The defendant relied upon the affidavit of Ms Krystele Treuil sworn on 7 February 2007. Ms Treuil gave evidence of the following matters:-
- (a) That in relation to the intended service of the Adjudication Application Form, she noted on the form that the project address was the same address as the respondent's contact details. She then stated that she looked up "Porky's" via the Telstra Connect and they gave her a telephone number and a facsimile number which she recorded in her affidavit. She stated that she had then telephoned the number of "Porky's" which Telstra Connect had provided to her and she spoke to the plaintiff, Mr Michael Tsoukatos. That evidence suggests that there is some link between Mr Tsoukatos and the entity named Porky's.
 - (b) That she physically mailed out by express post the relevant documents to which reference has previously been made (paragraphs [8] to [12] of her affidavit).
 - (c) That when something was not delivered, Ms Treuil stated that "... it is always returned back to our office by Australia Post. At no stage was anything ever returned back to our office by Australia Post as undelivered in this matter" (paragraph [13]).
- 54 By way of further background to the proceedings, the affidavit of Jason Hanna, solicitor, sworn on 7 February 2007 refers to the fact that Mr Tsoukatos had, on that occasion, earlier denied, in similar fashion to the present matter, receiving correspondence concerning a request for further and better particulars from Mr Hanna's office. Mr Hanna stated that that assertion was made even though all correspondence sent to Mr Tsoukatos was via registered mail of which written confirmation of delivery was sent to Mr Hanna's firm by Australia Post. Evidence of such confirmation is referred to in his affidavit sworn on 15 December 2006 (Annexure B to his affidavit sworn on 7 February 2007). It is noted that the letter of particulars dated 6 December 2006 sent by Patricia White & Associates was addressed to Xtreme Enterprises Australia Pty Limited, Basement Level, 77 Darlinghurst Road, Potts Point. That is the description of the address which Mr Tsoukatos said he employed.
- 55 There is no evidence from Mr Amante and/or Mr Tsoukatos concerning the letter of particulars of 6 December 2006 not having been received or apparently delivered to the wrong location within the building in which the plaintiff operated and there is, accordingly, no explanation as to why he allegedly did not receive the letter of particulars of 6 December 2006. That is a matter which needs to be taken into account in evaluating Mr Tsoukatos' claim that he did not receive any of the correspondence or documents sent by ASC in the present proceedings.

Conclusions

- 56 All notices, including the Adjudication Certificate dated 9 August 2006, were served in accordance with the provisions of the Building and Construction Industry Security of Payment Act 1999 (NSW).
- 57 The plaintiff has not discharged the onus of establishing copies of documents referred to in [56] were not received by him. His denial of receiving them comes against a previous history of denying receipt of the letter of particulars of 6 December 2006 in relation to which there was affirmative evidence of delivery having been effected.
- 58 The evidence, absent any cogent explanation or circumstances which supports or tends to support the plaintiff's denials of having received the documents, is heavily in favour of the conclusion that the documents referred to in [56] were delivered to the plaintiff's business address.
- 59 Accordingly, the appropriate orders are as follows:-
- (a) The order made by this Court on 27 December 2006 staying the garnishee order numbered 2379 made by the Burwood Local Court on an unspecified date in 2006 is discharged. The summons is otherwise dismissed.
 - (b) That, subject to any written submissions by the parties, the plaintiff is to pay the defendant's costs in accordance with s.98 of the *Civil Procedure Act 2005 (NSW)*.

P: In person

D: J. Hanna (Solicitor) instructed by Patricia White & Associates