



## Steel v Beks [2010] NSWSC 1404 New South Wales Supreme Court 6 December 2010

### FACTS:

Steel (“the Plaintiff”) is a supplier of temporary building structures and Beks (“the Defendant”) is a building contractor. The Defendant erected a structure for the Plaintiff at various sites around Australia.

The Defendant served by facsimile a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (“the Act”) however the transmission was not successful. It then located on the internet another fax number for the Plaintiff and purported to serve the payment claim by faxing it to that second number. No payment schedule was received by the Plaintiff.

The Defendant then proceeded to serve by fax a notice to proceed to adjudication pursuant to section 17(2)(b) of the Act. The Plaintiff then claimed that it did not receive either the payment claims or the section 17(2)(b) notice.

### ISSUES:

What is the effect on an adjudicator’s decision if a payment claim and/or subsequent section 17(2)(b) notices are not served in accordance with the Act?

### FINDING:

The Court found that the adjudicator’s finding that the payment claims had been served properly was incorrect and that its determination was void and applied *Chase Oyster Bar*.

### QUOTE:

Macready AsJ [at 33 and 34]...

*“33 The adjudicator’s finding was not correct. On the evidence before me the payment claim and the notices required by section 17(2)(a) were not served on the plaintiff. Accordingly, the plaintiff was not given an opportunity to provide a payment schedule to the claimant pursuant to section 17(2)(b) of the Act. Following the Court of Appeal’s reasoning in Chase Oyster Bar the Court is not bound by the adjudicator’s decision (apparently in paragraph 9 of the decision) that the requirements of s 17(2)(a) had been met.*

*34 Accordingly, I am satisfied that the application was not properly made in accordance with the Act. As the parties have not addressed the details necessary to apply McDougall J’s reasoning in Chase Oyster Bar at [241], I will not consider the adjudicator’s consideration of the claimant’s evidence as to the service of documents and the reasons of the adjudicator in that regard.”*

### IMPACT:

The case illustrates the continued importance to ensure that a claimant’s payment claim is properly served and that evidence of that service is also kept to ensure that the requirements for service under the Act are shown to be satisfied.

If a payment claim is served by fax, then the parties should, in their contract, provide contact details for the service of notices or claims under the Act. Further transmission receipts should be retained. Alternatively the payment claims should be served in person on the respondent’s ordinary place of business or at its registered office.

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Jim Doyle

1800 888 783

[jdoyle@doylesconstructionlawyers.com](mailto:jdoyle@doylesconstructionlawyers.com)

[www.doylesconstructionlawyers.com](http://www.doylesconstructionlawyers.com)