

**TAYLOR PROJECTS GROUP PTY LIMITED v BRICK DEPT. PTY LIMITED & ORS
[2005] NSWSC 439**

Supreme Court of New South Wales – 5 May 2005

FACTS

Taylor Project Group Pty Ltd ('Taylor') entered into a construction contract with Brick Dept. Pty Limited ('Brick') for the carrying out of brick and block laying work at a site in Holden Street, Ashfield. Brick faxed a Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') on 5 January 2005 at 10:41pm for \$158,490.82. However, Taylor did not receive the Payment Claim until 10 January 2005 when the office re-opened after the Christmas vacation. Taylor delivered a Payment Schedule under the Act stating the amount payable as \$NIL on 20 January 2005, that is, 10 business days from 6 January 2005. The matter proceeded to Adjudication, the Adjudicator determining that Taylor should pay \$101,459.31 and that the Payment Schedule was out of time.

Taylor says that the earliest that time under section 14 of the Act could have begun to run was 6 January 2005, or alternatively, on 10 January when the Payment Claim came to its attention. In particular, Taylor submitted that service under section 13(1) of the Act should be construed to mean "*brought to the attention of the person served*". Accordingly, Taylor submitted that the Adjudicator had failed to satisfy an essential requirement of the Act and the determination should be declared void.

ISSUE

What is the meaning of "serve" within section 13(1) of the Act?

FINDING

The Court referred to *Mohamed v Farrah* [2004] NSWSC 482 at 52-53 as authority for the proposition that in the absence of a specific limitation in the service provision relied upon, service which takes place at any time of the day, whether within or without business hours, is regarded as service on that day. Consequently, the Court found that Taylor's Payment Schedule was required to be provided by 19 January 2005.

QUOTE

[18] The legislature was careful to distinguish between the concepts when it wished to do so. Sections 17(2)(b), 20(1) and s31(2) depend upon "receipt". Each is instructive. The first two relate to the entitlement of a respondent to provide an answer to a claimant's claim – a payment schedule and an adjudication response respectively – for the purpose of foreshadowed or actual adjudication. In contradistinction to s13(1), the legislature has been careful to ensure that a respondent is not shut out from providing those responses until a particular time has expired after receipt of the triggering document. In that sense, receipt gives the respondent a greater level of protection than "mere" service under s13(1). Similarly, s31(2), which deals with service by post or facsimile addressed to the person's ordinary place of business under s31(1)(c), provides that "service" is taken to have been effected when the notice is "received" at that place.

[19] Hence the legislature plainly considered "service" under the provisions of s31(1) did not incorporate "receipt" as the critical element, absent an express statement to that effect.

[20] ... Service outside business hours does not turn the 10 business day limit ... into a 9 business day limit. The day of service is not counted so that the respondent has 10 full days thereafter to provide a payment schedule [to be precise the respondent has 10 business days, plus the number of hours left in the day of service after being served, plus any non business days during the 10 business day period].

IMPACT

A payment claim sent by facsimile, whether within or outside normal office hours on a business day, is regarded as being served on that day.

© Doyles Construction Lawyers 2005

This publication is intended to be a topical report on recent cases in the construction, development and project industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted. This publication may be reproduced with full acknowledgement.

NSW

Jim Doyle
P: 02 9283 5388

E: jdoyle@doylesconstructionlawyers.com

QLD

Frank Nardone
P: 07 3221 2970

E: fnardone@doylesconstructionlawyers.com

VIC

Vinodhini Krisnan
P: 03 9620 0322

E: vkrisnan@doylesconstructionlawyers.com