



TSOUKATOS V MUSTAFA [2007] NSWSC 614 Supreme Court of New South Wales 15 June 2007

FACTS:

Mr Tsoukatos (“Tsoukatos”) and Mr Mustafa (“Mustafa”) entered into an agreement for renovation works. Various parts of the renovation works had been completed, however Tsoukatos ceased to make payments due to dissatisfaction with the standard of work being carried out.

Before the total amount of money was paid for the renovations, Mustafa served Tsoukatos with a payment claim under the Building and Construction Industry Security of Payments Act 1999 (“Act”).

Mustafa was successful in obtaining an adjudication certificate, and proceeded to apply and obtain judgment from Burwood Local Court, which he enforced by way of garnishee order. Tsoukatos sought to have the garnishee order reversed and monies returned on the basis that he was not given sufficient notice because the letters were addressed to the building number and not the particular shop which Tsoukatos occupied.

ISSUES:

Whether there has been compliance with the service requirements set out in the Act, that is whether or not the Tsoukatos had received had received effective notice with respect to the adjudication application, where the notices did not specify the precise address of Tsoukatos?

FINDING:

The Court found that the notices had been served in accordance with the provisions of the Act. The Court went on to articulate that Tsoukatos had not discharge his onus of proof to show that he had not received the correspondence from Mustafa [at 56].

QUOTE:

Hall J [at 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 Plaintiffs business address.

IMPACT:

The case illustrates that service of document under the Act is satisfied by service of the documents at the business address of the other party. If a party was to argue that they had not received the documents by way of service there is a burden of proof which has to be overcome to demonstrate that service has not been effected. Similarly there is an onus of proof on the person serving under the Act to prove that service was effected in accordance with the Act, and the Courts will weigh up the conflicting evidence where there is a dispute.

Parties should ensure that where possible, personal service is effected, but where not practicable, service by facsimile and generation of delivery report to evidence successful delivery would be prudent.

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Jim Doyle

1800 888 783

jdoyle@doylesconstructionlawyers.com

www.doylesconstructionlawyers.com