

### **SUPREME COURT OF NSW QUASHES ADJUDICATION DETERMINATION IN *BAUEN CONSTRUCTIONS V SKY GENERAL SERVICES***

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### **ADJUDICATOR HELD TO HAVE COMMITTED JURISDICTIONAL ERRORS**

The NSW Supreme Court has quashed adjudication determinations in *Bauen Constructions Pty Limited v Sky General Services Limited & Anor* [2012] NSWSC 1123 on the basis that the adjudicator misconstrued the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act).

### **PAYMENT CLAIMS FOR PAINTING SERVICES REFERRED TO ADJUDICATION**

Bauen Constructions Pty Ltd entered into two separate trade contracts with Sky General Services Pty Limited to carry out painting work at two primary schools.

Sky General served two purported payment claims on Bauen under the SOP Act. Bauen responded by serving two payment schedules on Sky General. One of the stated reasons for withholding payment was that the payment claims were served outside the 12 month period prescribed by section 13(4)(b) of the SOP Act. Sky General subsequently referred the payment claims to adjudication.

Bauen served adjudication responses on the nominating authority 'Adjudicate Today' by email, raising a number of matters, including that the payment claims were made out of time.

The adjudicator, Mr Gregory Purcell of Adjudicate Today, determined the applications. He determined that the payment claims were validly made within the time prescribed under section 13(4)(b) of the SOP Act. He did not consider Bauen's adjudication responses as they were caught by Adjudicate Today's email spam filter.

Bauen commenced proceedings in the NSW Supreme Court seeking declarations that the adjudication determinations were void, or alternatively, an order that they be quashed.

### **LEGISLATIVE PROVISIONS RELEVANT TO THE DISPUTE BETWEEN BAUEN AND SKY GENERAL**

Section 13(4)(b) of the SOP Act provides that 'a payment claim may be served only within (a) the period determined by or in accordance with the terms of the construction contract, or (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later'.

Section 22(2) of the SOP Act provides that in determining an adjudication application, the adjudicator is to consider ... only ...

- (a) the provisions of this Act;
- (b) the provisions of the construction contract from which the application arose ...
- (c) the payment claim to which the application relates, together with all submissions ... duly made ...; and
- (d) the payment schedule (if any) to which the application relates, together with all submissions ... duly made.

Section 5 of the SOP Act defines 'construction work' as including 'the painting or decorating of the internal or external surfaces of any building, structure or works'.

Section 8(1) of the *Electronic Transactions Act 2000* (NSW) provides that 'if ... a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication, where:

... held that the adjudicator misconstrued the SOP Act by being distracted by an irrelevant consideration, namely the defects liability period, and thereby erroneously considered section 13(4)(b) of the SOP Act had been complied with.

(a) at the time the information was given, it was reasonable to expect that the information would be readily accessible ...; and

(b) the person to whom the information is required to be given consents to the information being given by means of an electronic communication'.

Section 13A of the *Electronic Transactions Act 2000* (NSW) provides that:

(1)(a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee, or

(b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:

(i) the electronic communication has become capable of being retrieved by the addressee at that address, and

(ii) the address has become aware that the electronic communication has been sent to that address.

(2) For purposes of subsection (1), unless otherwise agreed ... it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.

## QUESTIONS CONSIDERED BY COURT

The Court considered three questions:

(1) Whether Bauen was entitled to relief in circumstances where the payment claims underlying the adjudication determination were served outside the 12 month period prescribed by section 13(4) (b) of the SOP Act.

(2) Whether the adjudicator failed, bona fide, to address the requirements of section 22(2)(a) by misconstruing 13(4)(b) of the SOP Act.

(3) Whether Bauen was denied natural justice in circumstances where the adjudicator failed to consider its adjudication responses.

## ARGUMENTS PRESENTED BY SKY GENERAL

- Whilst service of a payment claim is a basic and essential requirement to a valid determination, precise compliance with section 13(4)(b) of the SOP Act is not.

- The adjudicator applied the correct test in finding that the payment claims were served within the 12 months of the expiry of the defects liability period because part of the defendant's claim in each case was the payment of retention monies withheld by Bauen. As the retention monies were payable to Sky General only after the expiry of the defects liability period, the adjudicator was correct in his determination.

- Payment claims were made within 12 months of the expiry of the defects liability period.

- The trade contracts had no time limits within which payment claims might be made, save for a time of the month by which claims had to be submitted if they were to be paid within the month of submission of the claim.

- Provision of labour continued until the expiry of the defects liability period, as it was a condition of the trade contracts that Sky General would provide labour 'on demand' for any rectification works required during the defects liability period.



## ARGUMENTS PRESENTED BY BAUEN

- Compliance with section 13(4)(b) of the SOP Act is one of the 'other' basic and essential requirements in circumstances where the adjudicator effectively found that work was carried out outside the 12 month period prescribed by the SOP Act.

- The adjudicator misconstrued the SOP Act as he proceeded in the absence of a jurisdictional fact by disregarding something that the SOP Act required to be considered as a condition of the jurisdiction. The adjudicator thereby made a jurisdictional error.

- The adjudicator failed to carry out the requisite tasks under the SOP Act, in the manner required by the SOP Act.

## COURT FINDS THAT ADJUDICATOR COMMITTED JURISDICTIONAL ERROR

His Honour Justice Sackar held that the adjudicator misconstrued the SOP Act by being distracted by an irrelevant consideration, namely the defects liability period, and thereby erroneously considered section 13(4)(b) of the SOP Act had been complied with. This caused him to miscalculate the relevant time frame for service of payment claims under the SOP Act. This was a jurisdictional error.

His Honour also found that the adjudicator did not bona fide address the requirements of section 22(2)(a) of the SOP Act in that he misdirected himself as to the correct test under section 13(4)(b) of the SOP Act. His Honour held that the adjudicator committed a jurisdictional error and the adjudications should be quashed.

## BAUEN DENIED NATURAL JUSTICE AND ADJUDICATIONS SET ASIDE

In any event and regardless of the findings above, the Court held, by reference to section 13A of the *Electronic Transactions Act*, that Bauen's adjudication response was lodged in time, despite being caught by Adjudicate Today's email spam filter.

The Court was satisfied that as the email was sent, although it was not opened or read, it was 'capable of being retrieved' and therefore was effectively lodged for the purposes of the SOP Act.

It would appear that neither the parties nor the court turned their mind to section 8(b) of the *Electronic Transactions Act*, that is, whether Adjudicate Today had given its consent to receive the payment schedule via email (a precondition to the application of that legislation).

The adjudicator did not consider Bauen's adjudication response and therefore failed to address the requirements under section 22(2) of the SOP Act. As a result, Bauen was denied natural justice and for this reason, the adjudication determinations were to be set aside.

## IMPLICATIONS FOR FUTURE CONSTRUCTION DISPUTES

- A claimant must ensure that at least some of the construction work the subject of the payment claim has been carried out within 12 months of service of the payment claim (unless the contract provides a later date for service of a progress claim).

- Where payment claims are submitted outside the 12 month time period prescribed in section 13(4)(b) of the SOP Act, respondents should raise this issue

in any relevant payment schedule and adjudication response.

- Parties must check their emails and email spam filters carefully for all email communications relating to notices (payment claims, payment schedules etc.) under the SOP Act, whether or not they have provided consent to electronic service of documents under the contract.

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