

Strictly Served: Unread Emails and Premature Service

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Date: 01/08/2025

*Can a payment claim sent by email be validly served if the respondent never reads it? And if the claimant's follow-up notice of intention to adjudicate is sent before the statutory clock has run, can a good faith attempt by the adjudicator fix the problem? In *Rewais v BPB Earthmoving Pty Ltd*, the Court of Appeal gave a clear answer to both questions and thereby tightened the screws on compliance.*

Facts

The Rewais family lived on a 103-acre property which they intended to renovate. They engaged BRB Earthmoving (**BRB**). As work progressed, invoices were disputed and payments withheld. Correspondence occurred over email and also via text messages. BRB eventually issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* (**Act**) by email, followed by a s 17(2) notice of intention to apply for adjudication – again by email, and also by registered post.

The Rewais family did not read the emails and later said they were unaware of the claim and the notice until their solicitors were contacted. Despite this, the adjudicator determined in BRB's favour and made an award in the amount of \$277,007.16. The Rewais family challenged the validity of both the email service and the timing of the adjudication process.

Issues

Section 31(1)(d) of the Act permits service of a payment claim by email only if the recipient has "specified" that email address for the purpose of receiving such documents. Dr Rewais argued he had never done so. Was the email service valid? In the Supreme Court of NSW, McGarth J answered that question in the negative.

Section 17(2) of the SoP Act requires a claimant to serve the respondent with a notice of the claimant's intention to adjudicate within 20 business days immediately following the due date for payment (in this case, 15 business days after the payment claim was made). Thus, if the email service was not valid and instead (as McGarth J had determined) service was affected when Dr Rewais first became aware of the payment claim, then that would result in the payment claim and the s 17(2) notice having been served on the same day!

Therefore, the s 17(2) notice was quite premature, as it would not have been served 20 days after the due date for payment.

Notwithstanding that somewhat surprisingly, McGarth J found that, if the adjudicator nonetheless proceeds to determine the adjudication, a bona fide attempt by the adjudicator to exercise the adjudicator's power to make a determination resolves this procedural irregularity. Less surprisingly, the Rewais family appealed.

Decision

The Court of Appeal reached the same overall conclusion as McGarth J, albeit through a very different route:

- It held that a bona fide attempt to exercise power to make a determination does not cure premature service. Rather, strict compliance with the timing requirements in s 17(2) is required. The Court of Appeal applied its previous decision in *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* being authority for the proposition that the 20 day window in s 17(2) is a "first category" jurisdictional fact, also known as an essential precondition to the exercise of the relevant powers. If this precondition is not satisfied, i.e. the claimant did not comply with the 20 day window, then the adjudicator does not have jurisdiction under the Act to hear the adjudication.
- However, it held that the email service was valid, as Dr Rewais had impliedly specified to BRB that the Rewais email address was an email address for the purpose for the service of documents like payment claims and s 17(2) notices. This was because that BRB and the Rewais family had used that email address for project-related correspondence, including discussions of invoices.
- This meant that neither the s 17(2) notice nor the adjudication application were premature.
- The Court also relied on s 13A(1)(b) of the *Electronic Transactions Act 2000* (NSW), which deems an email received when it becomes capable of being retrieved, regardless of whether in fact opened or read.

Takeaways

Email Service – What does Implied Specification look like?

It was enough that BRB and the Rewais family had used that email address for project-related correspondence, including discussions of invoices. Even if the address was first provided for another reason (such as requesting a quote), the subsequent course of dealing may establish the requisite specification to satisfy s 31(1)(d) of the SoP Act. This aligns with modern commercial expectations.

Premature Service – No Room for Flexibility

The timing requirements in s 17(2) are strict. Even minor departures, like sending a notice a day too early, will deprive an adjudicator of jurisdiction.

This is a common mistake by claimants and claim preparers. Determining the due date for payment can involve consideration of confusing contract clauses and a statutory overlay of maximum payment terms. The input of someone very experienced in SOP law can avoid much pain, cost and perhaps embarrassment later.