SUPREME COURT OF QUEENSLAND

CITATION:	*McCarthy v TKM Builders Pty Ltd & Anor* [2020] QSC 301
PARTIES:	**PATRICK JOHN MCCARTHY TRADING AS PJ MCCARTHY COMMERCIAL AND RESIDENTIAL BUILDERS** **ABN 38 461 808 967** (applicant) **v** **TKM BUILDERS PTY LTD TRADING AS TKM CONSTRUCTION GROUP** **ACN 159 415 022** (first respondent) **JOHN WILLIAM FITZPATRICK (ADJUDICATOR No J118275)** (second respondent) **THE ADJUDICATION REGISTRAR QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (third respondent)
FILE NO:	BS No 8739 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2020
JUDGE:	Martin J
ORDER:	**The applicant is to bring in minutes of order reflecting these reasons.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant challenges an adjudicator's decision under the *Building Industry Fairness (Security of Payment) Act* 2017 – where some of the adjudication application was sent to the applicant as an email attachment – where other documents in the adjudication application were contained in a Dropbox file in the body of the email – whether the adjudication application was given to the applicant ADMINISTRATIVE LAW – JUDICIAL REVIEW –

GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the applicant was not given a copy of the adjudication application – where the second respondent, the adjudicator, made an adjudication decision – whether failure of the first respondent to give the adjudication application to the applicant deprived the adjudicator of jurisdiction

Acts Interpretation Act 1954
Building and Construction Industry Payments Act 2004
Building Industry Fairness (Security of Payment) Act 2017, s 79
Electronic Transactions (Queensland) Act 2001

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393, cited
Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd [2015] 1 Qd R 265, applied
Jones v Dunkel (1959) 101 CLR 298, cited
National Management Group Pty Ltd v Biriel Industries Pty Ltd [2019] QSC 219, applied
Niclin Constructions Pty Ltd v SHA Premier Constructions & Anor [2019] QSC 91, cited

COUNSEL: CJ Crawford for the applicant
APJ Collins for the first respondent

SOLICITORS: Spire Law for the applicant
Bathersby Legal for the first respondent

[1] The *Building Industry Fairness (Security of Payment) Act* 2017 ("the BIF Act") provides for, among other things, the adjudication of disputes over progress payments in building construction contracts. As part of the process of applying for an adjudication, the BIF Act requires that an applicant must give a copy of an adjudication application to the respondent. The question which arises in this case is whether the means used by the first respondent (TKM) satisfied that requirement.

[2] The second and third respondents are content to abide the order of the court.

The legislative requirements

[3] Part 4 of the BIF Act establishes a regime for the adjudication of disputed payment claims. Provision is made for the form of the application for adjudication and the times in which steps must be taken. So far as is relevant, s 79 requires that:

> "(2) An adjudication application—
>
> (a) must be in the approved form; and
>
> (b) must be made within—
>
> […] and
>
> (c) must identify the payment claim and the payment schedule, if any, to which it relates; and

(d) must be accompanied by the fee prescribed by regulation for the application; and

(e) may include the submissions relevant to the application the claimant chooses to include.

(3) A copy of an adjudication application must be given to the respondent."

[4] Section 102 of the BIF Act deals with the services of notices or documents:

"**102 Service of notices**

(1) A notice or other document that, under this chapter, is authorised or required to be given to a person may be given to the person in the way, if any, provided under the relevant construction contract.

Example—

A contract may allow for the service of notices by email.

(2) Subsection (1) is in addition to, and does not limit or exclude, the *Acts Interpretation Act* 1954, section 39 or the provisions of any other law about the giving of notices.

(3) To remove any doubt, it is declared that nothing in this Act—

(a) excludes the proper service of notices or documents by a person's agent; or

(b) requires a person's acknowledgement of a notice or document properly given to the person."

[5] The *Acts Interpretation Act* 1954 also provides for the service of documents in s 39:

"**39 Service of documents**

(1) If an Act requires or permits a document to be served on a person, the document may be served—

(a) on an individual—

(i) by delivering it to the person personally; or

(ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document; or

(b) on a body corporate—by leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate.

(2) Subsection (1) applies whether the expression 'deliver', 'give', 'notify', 'send' or 'serve' or another expression is used.

(3) Nothing in subsection (1)—

(a) affects the operation of another law that authorises the service of a document otherwise than as provided in the subsection; or

(b) affects the power of a court or tribunal to authorise service of a document otherwise than as provided in the subsection."

The adjudication application

[6] The applicant (Mr McCarthy) and TKM entered into a construction contract for a building project at Bells Creek.

[7] On 15 June 2020, TKM sent an email to Mr McCarthy in the following terms:

> "Please find below link to correspondence and attached adjudication claim lodged with the QBCC today.
>
> https://www.dropbox.com/sh/jt7427ejjhz70ik/AACVuiCVC1Ug2YG6X27CFBuca?dl=0"[1]

[8] The email attached the adjudication application form but not TKM's submissions. Those submissions could only be obtained by opening the Dropbox link.

[9] Mr McCarthy says that:

(a) he received the email,

(b) he did not open the Dropbox link,

(c) he did not otherwise receive the documents available at the Dropbox link, and

(d) he forwarded the email to his solicitors with instructions for them to respond.

[10] In accordance with his instructions, Mr McCarthy's solicitors prepared and submitted a response to the adjudication application. As a part of that submission, the solicitors argued that Mr McCarthy had not been given a copy of the adjudication application in accordance with s 79(3) of the BIF Act and, as a result, the adjudicator did not have jurisdiction to deal with the application.

[11] In his decision, the adjudicator held that he did have jurisdiction and said:

> "31. Section 79(3) of the BIF Act states that a copy of an adjudication application must be given to the respondent. It has been determined from submissions that on the 15th June 2020 the claimant sent an email to the respondent. Attached to this email was a copy of the adjudication application. This

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1 Dropbox is a proprietary file hosting service.

same email also contained a drop box link to the claimant's submissions made in support of their adjudication application.

32. Notwithstanding the statutory provisions in respect to the service of documents under the BIF Act and other legislation, the fact is that it has been demonstrated that the respondent was in possession of a copy of the adjudication application and its supporting submissions. If a document has been received by the other party, the manner in which it was served is unlikely to matter.

33. For the reasons outlined in paragraphs 31 and 32 immediately above I am satisfied that a copy of the adjudication application was given to the respondent."

[12] The adjudicator does not say how it was "demonstrated that the respondent was in possession of a copy of the adjudication application and its supporting submissions".

[13] The adjudicator found in favour of TKM on the payment claim. Mr McCarthy has paid the amount found to have been owing.

Was the application "given" to Mr McCarthy?

[14] The adjudication claim which was attached to the email of 15 June is in the required form. It does not, nor is it required to, set out the claim in detail. It is mostly concerned with the parties and the project. The schedule to the claim contains a number of questions. TKM answered "yes" to the question "Are any submissions attached to the application?" That answer is not correct given that the submissions were contained in a Dropbox file.

[15] I was not directed to any part of the adjudication response provided by Mr McCarthy which demonstrated that that document referred to the submissions apparently contained in the Dropbox link. The submissions said to have been available at the Dropbox link were not provided in evidence on this hearing.

[16] TKM argues that an inference should be drawn from the absence of any evidence from Mr McCarthy's solicitors to the effect that they did not obtain the documents in the Dropbox. The inference sought to be drawn is that Mr McCarthy's solicitors accessed the submissions contained in the Dropbox link. In a case like this, the highest that a *Jones v Dunkel*[2] inference could reach would be that the solicitors' evidence would not have assisted Mr McCarthy's case. But, even if an inference could be drawn that the solicitors did access those files earlier than they otherwise said, it does not assist because of the nature of the service required to be effected under s 39 of the *Acts Interpretation Act* 1954, that is, the submissions were not served personally nor were they left at, or sent by "post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document".

[17] Mr McCarthy was cross-examined about documents which he had seen at various times. These documents were exhibited to the affidavit of Amy Cairns, an employee

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2 (1959) 101 CLR 298.

of Mr McCarthy's solicitors. She deposes to having accessed the Dropbox link on 24 July 2020 and downloaded the files from that link, some three weeks after Mr McCarthy's solicitors provided the response to the adjudicator. Ms Cairns was not cross-examined and thus it could not be put to her that she or someone else at the firm had access to the Dropbox link at an earlier time. Mr McCarthy was cross-examined on the documents which had been obtained by Ms Cairns. He accepted that he had seen some of them at earlier times. He said that he had not seen some of them until he had conferred with his counsel shortly before this hearing.

[18] The applicant relies on the decision of McMurdo J in *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* ("Basetec").[3] That case concerned the provisions of the predecessor to the BIF Act, the *Building and Construction Industry Payments Act* 2004 ("the BCIP Act"). The relevant provision of the BCIP Act required that a copy of an adjudication application be "served on the respondent". Section 21 of the BCIP Act, like s 79 of the BIF Act, sets out certain essential elements of an adjudication application and also provides that it "may contain the submissions relevant to the application the claimant chooses to include". There is no relevant difference between s 21 of the BCIP Act and s 79 of the BIF Act. Thus, as McMurdo J held in *Basetec*, if a claimant chooses to include submissions relevant to the application, then they form part of the application and must be served as part of the application.[4]

[19] In *Basetec*, the respondent made an adjudication application in respect of a number of payment claims. The respondent sent the adjudication applications to the applicant attached to an email and the email also included links to two files stored on Dropbox. Those files constituted part of the adjudication application. Justice McMurdo gives detailed consideration to the provisions of the BCIP Act, the *Acts Interpretation Act* 1954 and the *Electronic Transactions (Queensland) Act* 2001 in paragraphs 21-37 of his Honour's reasons.

[20] In that analysis, his Honour referred to authorities to the effect that a document will be served if the efforts of a person who is required to serve it have resulted in the person to be served becoming aware of the contents of the document.

[21] The provisions of s 39 of the *Acts Interpretation Act* 1954, set out above, say how a document may be served on – or given to – an individual. It provides for personal service which did not occur in this case or by sending it by "post, telex, facsimile or similar facility to, the address of the place of residence or business of the person".

[22] Justice McMurdo said:

> "[37] Actual service does not require the recipient to read the document. But it does require something in the nature of a receipt of the document. A document can be served in this sense although it is in electronic form. But it was insufficient for the document and its whereabouts to be identified absent something in the nature of its receipt. The purported service by the use of the Dropbox facility may have been a practical and convenient way for CGE to be directed to and to use the

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3 [2015] 1 Qd R 265.

4 *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265 at 268 [22].

> documents. But at least until 2 September 2013 (when Mr How became aware of the contents of the Dropboxes), it did not result 'in the person to be served becoming aware of the contents of the document'."

[23] The same reasoning, with respect, applies in this case. Mr McCarthy did not become aware of the contents of the document merely by being referred to a link to a Dropbox file. It is not enough, if it can be shown, that the respondent's solicitors saw the submissions when Mr McCarthy forwarded the email. Service must be effected in accordance with s 39 of the *Acts Interpretation Act.* It follows, then, that he was not given the adjudication application as required by s 79 of the BIF Act.

Is service necessary for the adjudicator to have jurisdiction?

[24] In *National Management Group Pty Ltd v Biriel Industries Pty Ltd*,[5] Wilson J considered the competing views on the question of whether service of an adjudication application was necessary to confer jurisdiction on an adjudicator. In the majority of cases in which it was necessary to decide the point, it was concluded that service was required before an adjudication may be validly undertaken.[6]

[25] There is no reason to depart from the decision in *Biriel.* The strict timetable established under the BIF Act for the resolution of an adjudication requires that the adjudicator must decide a matter no later than a certain number of days after the "response date". The "response date" is determined by the date on which the adjudicator is given an "adjudication response", or the last day on which the respondent could have given the adjudicator an "adjudication response". That, in turn is determined by the later of two dates: one of those being determined by reference to the day on which the respondent receives a copy of the adjudication application. If the respondent is not given the adjudication application then time does not begin to run and, therefore, the period during which an application may be decided does not commence. If that were to occur, then the adjudicator would not have the capacity to make a decision.

Conclusion

[26] Mr McCarthy was not given a copy of the adjudication application. As a result, the adjudicator did not have the necessary jurisdiction to make the decision.

[27] The applicant is to bring in minutes of order. I will hear the parties on costs.

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5 [2019] QSC 219.

6 See, eg, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; *Niclin Constructions Pty Ltd v SHA Premier Constructions & Anor* [2019] QSC 91.