SUPREME COURT OF QUEENSLAND

CITATION:	*CMF Projects Pty Ltd v Masic Pty Ltd & Ors* [2014] QSC 209
PARTIES:	**CMF PROJECTS PTY LTD** **ACN 114 539 212** (applicant) **v** **MASIC PTY LTD** **ACN 152 116 679** (first respondent) and **SCOTT PETTERSSON** (second respondent) and **AJUDICATE TODAY PTY LTD** **ABN 39 109 605 021** (third respondent)
FILE NO:	1972 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2014
JUDGE:	Daubney J
ORDERS:	**1. There be a declaration that the adjudication decision made by the second respondent and dated 29 January 2014 is void.** **2. I will hear the parties as to costs.**
CATCHWORDS:	COMMUNICATIONS LAW – POSTAL SERVICES – NON-DELIVERY OR ERRONEOUS DELIVERY – where the applicant seeks a declaration that the adjudicator's decision is void – where the adjudicator did not consider the applicant's "adjudication response" – where the adjudicator excluded the "adjudication response" from consideration as it was not received within the required time limits of s 24 of the *Building and Construction Industry Payments Act* 2004 (Qld) – where the applicant contends that its "adjudication

response" was in time, due to the way in which the "notice of an adjudicator's acceptance of the application" was served on the applicant – whether the "adjudication response" conformed with the requirements of s 24 and consequently the adjudicator's decision is void for not taking the "adjudication response" into consideration

Acts Interpretation Act 1954 (Qld), s 39
Corporations Act 2001 (Cth), s 109X
Building and Construction Industry Payments Act 2004 (Qld), ss 21, 23, 24, 25 and 103

Brodyn Pty Ltd v *Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394, cited
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259, cited
Firedam Civil Engineering Pty Ltd v KGP Construction [2007] NSWSC 1162, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, cited
Polstar v Agnew (2007) 208 FLR 226; [2007] NSWSC 114, followed
Scope Data Systems Pty Ltd v Goman (2007) 70 NSWLR 176; [2007] NSWSC 278, cited

COUNSEL: G Coveney for the applicant
A Lonergan for the first respondent
No appearance for the second respondent
No appearance for the third respondent

SOLICITORS: Arrow Law for the applicant
Usher Levi Lawyers for the first respondent
No appearance for the second respondent
No appearance for the third respondent

[1] The applicant ("CMF") seeks a declaration that an adjudication decision made on 29 January 2014 by the second respondent under the *Building and Construction Industry Payments Act* 2004 ("*BCIPA*") is void.

[2] In August 2013, CMF and the first respondent ("Masic") entered into a construction contract for the performance of certain concrete works by Masic. This work was subsequently completed. On 5 December 2013, Masic served on CMF a payment claim under s 17 of *BCIPA* by which it claimed $48,993.60 (inclusive of GST) for contract works, variations, and retention monies.

[3] On 17 December 2013, CMF delivered a payment schedule to Masic pursuant to s 18 of *BCIPA*. The amount of the payment schedule was the negative sum of $40,445.95 (inclusive of GST), thus allowing for no payment to Masic. On 7 January 2014, Masic made an adjudication application to the third respondent, which is an "authorised nominating authority" under *BCIPA*. The third respondent referred the adjudication application to the second respondent ("the adjudicator").

[4] On 7 January 2014, Masic made an adjudication application to the third respondent, which is an "authorised nominating authority" under *BCIPA*. The third respondent referred the adjudication application to the second respondent ("the adjudicator"). On that same day, 14 January 2014, a notice of the adjudicator's appointment was mailed by "express post" to CMF. This letter was addressed not to CMF's registered office, but to its post office box at the Mansfield Post Office.

[5] On 21 January 2014, CMF, by its solicitors, gave its adjudication response to the adjudicator. Later that day, the adjudicator sought further submissions from Masic and CMF regarding the timeliness of CMF's adjudication response. CMF responded with submissions on 22 January 2014. On 23 January 2014, the adjudicator sought further submissions, and provided a copy of an "express post" envelope and an Australia Post "tracking record" in respect of the posting of the notice of appointment. CMF, by its solicitors, made further submissions later on 23 January 2014.

[6] On 29 January 2014, the adjudicator gave notice of his decision, and his reasons for decision were subsequently provided to the parties. As part of his decision, the adjudicator determined that the notice of his appointment as adjudicator had been served on CMF on 15 January 2014, that the last date for CMF to give its adjudication response was 17 January 2014[1] and that he therefore excluded the adjudication response given by CMF on 21 January 2014 from consideration in his adjudication. In that regard, s 25(2) of *BCIPA* provides:

> "(2) An adjudicator must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator."

[7] CMF's primary argument on the present application is that the adjudicator was wrong in concluding that CMF's adjudication response had been given out of time, that the adjudicator consequently erred in disregarding the adjudication response, and that the adjudicator's decision is therefore void for failing to take CMF's adjudication response into consideration.

[8] It is clear from the adjudicator's reasons that his decision on this point was based on information he had received from the parties and also from his own investigations with the third respondent. It is necessary to set out in full the relevant part of the adjudicator's reasons:

> "Adjudication Response
>
> 13. There is no question that having issued a Payment Schedule the Respondent accrued a right to provide an Adjudication Response (see section 24(3) of the Act). That right is not unfettered. Clearly the Adjudication Response must develop reasons already stated in the Payment Schedule (section 24(4) of the Act) and must be issued within the times detailed in section 24(1) of the Act. Section 24(1) provides:
>
> *24 Adjudication responses*
>
> *(1) Subject to subsection (3), the respondent may give the adjudicator a response to the claimant's*

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1 *Building and Construction Industry Payments Act* 2004 ("*BCIPA*"), s 24(1)(b).

adjudication application (the adjudication response) at any time within the later of the following to end -

(a) 5 business days after receiving a copy of the application;

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application.

14. As noted above the ANA issued a notice of my acceptance to the parties on 14 January 2014. It is common ground between the parties that the Adjudication Application was issued to the Respondent on 7 January 2014. It follows that the five business days following service of the application ran until 14 January 2014. The only date in dispute is the date of service of the notice of my appointment. The Act allows a Respondent two Business Days following the service of that document for the provision of a valid Adjudication Response. A caused an enquiry directly to the ANA as to the express post tracking number its records disclosed was relevant to the issue of the notice of my appointment to the Respondent. The ANA provided that number and I undertook a query of the online records held by Australia Post. The information provided was:

- *The Claimant -* *60404963793092*
- *The Respondent -* *60404963789095*

15. The online query indicated the notice had been delivered to the Respondent on 15 January 2014. I also note that in the material provided to me by the ANA is a copy of correspondence issued by the Respondent's legal adviser to the ANA dated 9 January 2014. That correspondence evidenced the following matters to my satisfaction:

15.1 Arrow Law acted for the Respondent,

15.2 The Payment Claim had been served on the Respondent on 5 December 2013,

15.3 The Payment Schedule had been served on 17 December 2014,

15.4 The Respondent's adviser believed that 10 Business Days had expired following the service of the Payment Schedule before service of the Application on 7 January 2014,[2]

15.5 The Adjudication Application had been served on the Respondent on 7 January 2014, and

15.6 All correspondence regarding the matter should be directed to the legal representative.

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[2] This is not correct. The definition of a Business Day in the Act provides "business day has the meaning given in the *Acts Interpretation Act* 1954, section 36 but does not include 27, 28, 29, 30 or 31 December". It follows that service of the application on the ANA (service on the Respondent being irrelevant for current purposes) was required on or before 8 January 2014.

RFFS 1

16. I issued a series of questions to the parties and an extract of the online report. That document was titled Request For Further Submissions and was issued on 21 January 2014. A copy of that document is at **Annex A**. I posed three questions and now summarise the positions of the Respondent and Claimant.

Question A

17. The Respondent provided an initial response which raised several bases on which the Adjudication Response could be said to be issued within time. The Claimant provided no response at first instance. The Respondent's reasons as I understood them are:

    17.1 Section 103 of the Act allows service of documents should, or could, be served in accordance with the contract. Clause 26 of the Contract[3] establishes a regime for service of notices and the current service process is not compliant with that contractual provision. By application of that logic the Notice has not been validly served on the Respondent.

    17.2 Clause 26(a)(ii) of the contract would deem service took place two business days following post and therefore the earliest date is 16 January 2014.

    17.3 The Notice is dated 14 January 2014, but the envelope and face of the document displays no date stamp or the like.

Question B

18. The Respondent provided an initial response which pressed the following issues regarding the validity of the Adjudication Response if it was established that service of the Notice of appointment occurred on 15 January 2014.

    18.1 Section 25(5) of the Act states the time runs from when the Notice is received and factually that occurred when collected from the Post Office box on 20 January 2014.

    18.2 Received has a different meaning from served and the word received is used in section 25 and that is the deadline or trigger date.

    18.3 A copy of the envelope which enclosed the information is at Annex A displays no delivery time information.

    18.4 If the delivery is found to be 16 January 2014, it is requested the Adjudicator 'reviews this matter with leniency'.

Question C

19. The Respondent distinguishes the referenced judgment of the High Court in Fancourt v Mercantile Credits Ltd [1983] HCA 25.

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[3] The Respondent has identified clause 25, however it is clear it has quoted from clause 26 which appropriate deals with NOTICES under the contract.

Conclusion RFFS 1

20. Having reviewed the responses provided by the Respondent, I made a further enquiry of the ANA as to what explanation if any it had for the envelope provided as an Annex to the Respondent's submissions. The ANA responded by providing a scanned image of the actual Express Post envelope issued and a facsimile tracking record. I caused both of these to be issued to the parties with further questions. Those further questions became RFFS 2 and is attached as **Annex B**. Before moving to consideration of that document I note the following regarding RFFS 1:

20.1 The Claimant provided no submissions.

20.2 Question A -

20.2.1 Service by the ANA in accordance with the contract, may be useful, but it is not mandatory. The service of notices under the Act is directed by section 103. That section allows service in accordance with the contract and compliance with the Acts Interpretation Act (AIA) or any other law regarding service. Section 39 and 39A of the AIA operate together and I am satisfied that service on the Respondent by way of the Post Office Box is valid. The Post Office Box is prominent as being an address of the Respondent on documents such as the Payment Schedule. I am satisfied that the Respondent has held this out as a valid address for service[4] and in effect as an ordinary place of business.[5]

20.2.2 Deemed date of Service - I am further satisfied that the deemed date of service in the AIA and the contract can be displaced by suitable evidence of service. In effect the postal rule (as section 39 of the AIA is commonly known is a presumption (see for example Peter Boyd Enterprises Pty Ltd v QR Concrete Pty Ltd [2012] QDC 324). In this regard the records of the express post service clearly evidence service on 15 January 2014.

20.2.3 No date stamp - on envelope or face of document - It is clear that the envelope attached to the Respondent's document does not include any date stamps and none would ordinarily be expected in my view where it was conveyed by post. As noted below the envelope provided as evidence by the Respondent does not accord with the evidence of the ANA. I am not preliminarily persuaded that envelope or the absence of a date/time stamp is evidence of anything.

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4 See for example discussions in Royal Tiles Constructions Pty Limited v park View Constructions Pty Limited [2006] NSWDC 182.

5 See for example Parsons Brinckerhoff Australia Pty Ltd v Downer EDI Works Pty Ltd [2010] NSWSC 1295.

20.3 Question B -

20.3.1 The Respondent observes that calculation of the date for service of an Adjudication Response in section 24(1)(b) uses the term 'receiving' not served. This is an interesting inconsistency where the comparable section creating the obligation (section 23(1)) provides an obligation to serve. It is illogical to interpret the legislation to create lacunae where a party has served a document, however it is not received because the other party has not attended the letter box or a particular recipient is on leave. To suggest a divergence between the meaning of service and receipt without a very clear statutory or contractual basis would render the service of documents a technical impediment to the intent of parliament in passing the Act. The second issue is that given a raft of judicial pronouncements regarding service by email and electronic means it appears that a document is validly received when it enters the electronic means it appears that a document is validly received when it enters the electronic system of the other party (see Electronic Transactions Act). Finally in this regard, the Respondent has done no more than highlight a difference in language in the legislation. I am not persuaded that difference was intended to have the effect alleged.

20.3.2 The envelope attached to the Respondent's document is clearly not an express post envelope. The scan appears to display in the upper left corner part of a senders address. That address is not the address of the ANA, it is additionally an address in NSW. I accept the document discloses no time of service. I also note that the Australia Post system uses bar code scanning and the bar codes are not present on the face of that document. I am not persuaded that the envelope is definitive of anything.

20.3.3 I am not persuaded and the Respondent did not direct me to any provision in the Act or judicial statement that afforded an adjudicator a discretion to consider the validity of documents on any basis that was more lenient than the statutory timelines.

20.4 Question C - While I accept the decision of the High Court in Fancourt v Mercantile Credits Ltd [1983] HCA 25, it can be distinguished. I accept that judgment accepts that service is affected when the document is delivered to the Post Office in certain circumstances.

21. In RFFS 2 I attached to scans of the documents provided by the ANA. Those documents included a scan of the express post envelope displaying the address and the express post tracking number. Additionally that document provided a scan of the successful transmission of the Notice to the Respondent's legal team. That transmission was to the fax number shown on the letterhead of the Respondent's legal advisers and was date stamped as having occurred on 14 January at 14:31 hours[6].

22. I sought a response from the parties if there was any basis that could be provided that would displace the evidence provided by the ANA of valid service.

23. The Respondent advised it had issued a request to Australia Post, and a 'priority investigation' would be commenced and results would be expected within 24 hours[7]. The other basis suggested that would support the Respondent's position are:

    23.1 The document was sorted into a different PO Box, opened inadvertently and then placed in a different envelope, addressed to the correct address and posted using ordinary post.

    23.2 Australia Post was not able to confirm when an item was placed in a post box or that it was placed in the correct post box.

    23.3 The Respondent relied on its submissions provided in response to RFFS 1.

Conclusion RFFS 2

24. As I have noted above the concept of service by post creates a rebuttable presumption. That presumption is that service will be effected in the ordinary course of post. The ordinary course of post for Express Post between the two relevant postcodes is that it will be delivered the next Business Day. While the Respondent has evidenced documents and asserted that investigations have commenced and declarations could be provided this has not occurred. As noted above the Act does not grant to adjudicators a discretion to adjust times or allow material on some basis similar to equity or the like. There are several matters which give me some comfort in being satisfied that the Notice of my Appointment in regular form was served on the Respondent on 15 January 2014. Those matters are:

    24.1 Australia Post tracking system shows it was at the correct post office and marked as delivered on that day,

    24.2 There is no evidence beyond assertions suggesting it is not correct[8],

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6 While it is not decisive this is probably Eastern Summer Time as the ANA office is situated in Sydney.

7 As at the date of the release of this decision no advice has been provided on the outcome of the investigation.

8 See Court regarding onus in Kittu Randhawa v Monica Benavides Serrato [2009] NSWSC 170.

24.3 No investigation report providing a credible explanation for taking receipt, changing envelopes and reposting of the Notice has been provided, and

24.4 The courts have generally found that express post tracking is an acceptable standard of proof absent very clear evidence to displace the evidence of service (see generally Steel v Beks [2010] NSWSC 1405).

25. Were it required, and in my view it is not, I would also note that there is no contest that the document was served on the Respondent's legal advisers by facsimile on 14 January 2014. While there could be an issue of the capacity of the Respondent's legal advisers to accept service[9], it is highly likely that the advisers would have notified or forwarded the notice to the Respondent thus effecting service on either the 14th or 15th of January 2014 in any event (see for the applicable principle Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119 at paragraph 31)

Conclusion Date of Service of Notice of Appointment

26. I am satisfied that the Notice of my Appointment was served on 15 January 2014. I am further satisfied and it is common ground between the parties that the Adjudication Application was provided to the Respondent on 7 January 2014. The consequence is that the Act requires for a valid Adjudication Response to be issued it must comply with section 24(1) which provides:

> *24 Adjudication responses*
>
> *(1) Subject to subsection (3), the respondent may give the adjudicator a response to the claimant's adjudication application (the adjudication response) at any time within the later of the following to end -*
>
> *(a) 5 business days after receiving a copy of the application;*
>
> *(b) 2 business days after receiving notice of an adjudicator's acceptance of the application.*

27. Calculating the dates for provision of a valid Adjudication Response is:

27.1 Following Section 24(1)(a) is 14 January 2014

27.2 Following Section 24(1)(b) is 17 January 2014

It follows that by providing a document on 21 January 2014, that document is outside the statutory period for the provision of a valid Adjudication Response and cannot be considered. In the terms of section 26(2)(d) of the Act it is not a document properly made by

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[9] See Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited [2003] NSWSC 903, however unlike in that matter, the legal adviser in this matter did expressly enquire as to service of the acceptance and requested (see letter of 9 January 2014):
'Please direct all correspondence in this matter to our office.'

> the Respondent in support of the Payment Schedule. The document and my ability to consider the document must reflect the clear statutory direction provided in section 25(2) of the Act which provides:
>
> > *(2) An adjudicator must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator.*
>
> 28. It is relevant to record that I have read the Adjudication Response to ascertain if there were any allegations of fraud or the like present. However, I am satisfied that I cannot have the content weigh upon my decision in this matter. The effect exclusion of the Adjudication Response does not preclude the full application of the Payment Schedule, which as noted above is reasonably extensive document.
>
> 29. Finally, even if I was incorrect regarding the exclusion of the Adjudication Response, and I do not believe I am, I have read the Adjudication Response and the content does not establish on the balance of probability the deductions pressed beyond those recorded below."

[9] Underpinning the adjudicator's ruling were the following propositions:

(a) That posting the notice of appointment to CMF's post office box was good and effective service of the notice of appointment, and

(b) The deposit of the letter containing the notice of appointment in CMF's post office box on 15 January 2014 meant that this was the day on which the notice of appointment was 'received' by CMF.

[10] The information provided to the adjudicator, and the uncontradicted evidence before me, was that the adjudication notice was not, in fact, 'received' in CMF's office until 20 January 2014.

[11] For the reasons which follow, it seems to me that the adjudicator was in error in respect of both of these propositions.

[12] One matter which is not fully explained in the adjudicator's reasons is why the adjudication notice was addressed to the post office box address at all. All that was said by the adjudicator was that the post office box was '…prominent as being an address of [CMF] on documents such as the Payment Schedule', and that he was therefore satisfied that CMF had held this out as a valid address for service and in effect as an ordinary place of business.[10] As against this, however:

(a) the address of CMF specified on the face of the relevant contract was its street address (61 Don Young Road, Nathan, Qld 4111); and

(b) the Payment Schedule in fact listed both the post office box and the street address.

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[10] Adjudicator's Decision, dated 29 January 2014, at [20.2.1].

[13] Section 24(1)(b) of *BCIPA* relevantly prescribes the time for a respondent to give an adjudication response as being within 'two business days after receiving notice of an adjudicator's acceptance of the application'. That time limit is premised on an adjudicator having accepted the adjudication application 'by serving notice of the acceptance on the claimant and the respondent'.[11]

[14] In dealing with the propositions which were central to the adjudicator's ruling on this point, it is necessary to ask 'whether the mailing of the notice of appointment to CMF's post office box address was, of itself, good and effective service?' Section 23(1) of *BCIPA* prescribes that the adjudicator 'may accept the adjudication application by serving notice of the acceptance on the claimant and the respondent'.

[15] In relation to the means by which service of the adjudicator's notice may be effected, s 103 of *BCIPA* provides:

> "103 Service of notices
>
> (1) A notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned.
>
> (2) Subsection (1) is in addition to, and does not limit or exclude, the *Acts Interpretation Act 1954*, section 39 or the provision of any other law about the service of notices."

[16] The means of service contemplated by s 103(1) was not utilised in this case. The contract between the parties relevantly provided[12] for notices to be given by being left at the respondent company's registered office or principal place of business or by being sent by mail to the address of the party stated in the contract. As I have already noted, the address specified for CMF in the contract was its street address. It could not be said, therefore, that mailing the adjudicator's notice of acceptance to the post office box was a means of service provided for under the contract.

[17] But, as is preserved by s 103(2) of *BCIPA*, the contractual provisions do not exhaust the permissible means of service.

[18] Section 39(1)(b) of the *Acts Interpretation Act* 1954 (Qld) ("*Acts Interpretation Act*") relevantly provides that, if an Act requires a document to be served on a body corporate, the document may be served "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".

[19] Further, s 109X(1) of the *Corporations Act* 2001 (Cth) ("*Corporations Act*") relevantly provides:

> "For the purposes of any law, a document may be served on a company by ... leaving it at, or posting it to, the company's registered office; ..."

[20] Whilst these provisions are clearly facilitative, and provide for the post to be used as a means of service, as can be seen from the above provisions, service is only efficacious under the *Acts Interpretation Act* if the mailing is to "the head office, a registered office or a principal office" or, under the *Corporations Act*, if the mailing

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11 *BCIPA*, s 23(1).

12 Clause 26.

is to "the company's registered office". In the present case, the document was sent in the mail to a post office box.

[21] In *Polstar v Agnew* (2007) 208 FLR 226, Barrett J had to consider the validity of service of a statutory demand made under the *Corporations Act* which was purportedly served by it being sent to the company's sole director at a post office box address. After referring to s 109X of the *Corporations Act* 2001 (Cth) and the equivalent *Acts Interpretation Act* provision, Barrett J said:

> "17 The *Corporations Act* provision contemplates posting to "the company's registered office". The *Acts Interpretation Act* provision also refers to "a registered office", as well as "the head office" and "a principal office". The common theme is "office". Provisions of the *Corporations Act* imposing requirements with respect to a company's "registered office" elucidate the meaning of "office" in the expression "registered office". Those provisions make it clear that such an office may only be at a location capable of being "open to the public": see s 145(1). It must also be a location at which it is possible to display prominently the company's name (s 144(1)) and the words "Registered Office" (s 144(2)). Furthermore, it is contemplated that there will be "premises at the address of" the registered office (see s 143(1)) and that "premises" will be used "as the address of the company's registered office" (s 143(2)(a)).
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> 18 **In short, the *Corporation Act's* concept of "office", in the references to "registered office", is one centred on a physical location in the nature of premises (that is, a building or a room in or section of a building) to which persons may go and which can be identified by prominent display as a company's registered office. I am of the opinion that the *Acts Interpretation Act* reflects a similar concept of "office" in its reference to "registered office", "head office" and "principal office".**
>
> 19 **On this basis, a post office box cannot be a company's "office" – any more than it can be a place at which documents may be left by way of service** (*Sarikaya v Victorian Workcover Authority* (1997) 80 FCR 262; *Croker v Ewen* [2000] NSWCA 186) or an address for service (*Quitstar Pty Ltd v Cooline Pacific Pty Ltd* (2002) 168 FLR 213)."[13] (emphasis added)

[22] Reference may also be made to the decision of *Scope Data Systems Pty Ltd v Goman* (2007) 70 NSWLR 176 in which White J expressed the view that "delivery to the post office box cannot be equated with delivery to a company's registered office".[14]

[23] Accordingly, in the present case I am of the view that mailing the adjudicator's notice of acceptance to the post office box address was not service in accordance with either s 109X of the *Corporations Act* or s 39 of the *Acts Interpretation Act*.

[24] That is not to say, obviously, that the notice of acceptance was not ultimately served on, and received by, CMF. What it does mean, however, is that the adjudicator's premise that service of the notice of acceptance had been effected on 15 January

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13 (2007) 208 FLR 226, at [17] – [19].

14 At [86].

2014, when the letter was apparently deposited into the post office box, was erroneous.

[25] Notwithstanding the observations by the adjudicator at paragraph 20.3.1 of his reasons, there is a distinction in *BCIPA* between the notions of "service" and "receipt" of documents. The word "receive" in the *Building Construction Industry Security of Payment Act* 1999 (NSW) has been considered on numerous occasions, particularly in the context of s 17(3)(c) of that Act, which is the equivalent of s 21(3)(c) of *BCIPA*. That subsection relevantly provides that an adjudication application must be made "within 10 business days after the claimant receives the payment schedule". It seems now to be clear enough on the authorities that the word "receive" connotes that, whilst the document in question need not come to the attention of a particular person within the relevant office, it nevertheless does actually need to have arrived at, and thereby been received', at the recipient's registered office, or place of business, and be there during normal office hours.[15]

[26] For completeness, I should note that it was properly conceded by counsel for Masic that the means by which CMF received the adjudicator's notice of acceptance are immaterial, and that what was relevant was the date that the acceptance notice was actually received by the applicant.[16]

[27] The adjudicator was in error in equating the deposit of the letter into the post office box on 15 January 2014 with receipt of the notice by CMF. As I have already said, the information before the adjudicator, and the uncontradicted evidence before me, was that the notice of acceptance was not actually received in CMF's office until 20 January 2014. That, then, was the day relevant for the calculation of the time limit within which the adjudication response had to be given, as calculated under s 24(1)(b) of *BCIPA*.

[28] The adjudicator also referred to, but in fairness did not base his decision on, an assertion that the notice of acceptance had also been sent by facsimile to CMF's solicitor. As to this, however, there are a couple of things that could be said. First, there was no suggestion that service on CMF's solicitor was a valid means of service on CMF. Secondly, whilst it was asserted that the facsimile had been sent, the information given to the adjudicator, and the uncontroverted evidence before me, was that no such facsimile had in fact been received. In particular, there was no evidence that, even if the transmission had been made, the documents were actually received in a readable form by the solicitors' office.[17] It is unnecessary to say anything more on this aspect because the adjudicator's ruling clearly did not turn on this point.

[29] It follows from what I have said that I have concluded that the adjudicator erred in not considering in his adjudication, CMF's adjudication response. On the information before the adjudicator, and on the evidence before me, the adjudicator's notice of acceptance was received by CMF on 20 January 2014, and accordingly the adjudication response given on 21 January 2014 was within time.

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15 *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259 at [63]; *Firedam Civil Engineering v KJP Construction* [2007] NSWSC 1162 at [64] – [65].

16 First respondent's written outline of submissions, filed by leave on 28 March 2014, at [37].

17 *Austar Finance Group Pty Ltd v Campbell* (2007) 215 FLR 464.

[30] By s 26(2)(d) of *BCIPA*, the adjudicator was required to consider CMF's adjudication response when deciding the adjudication application. The adjudicator's failure to consider CMF's adjudication response amounted to a failure to comply with one of the essential statutory requirements for a valid adjudication. It is now well-settled that adjudications which do not comply with the essential statutory requirements are void.[18]

[31] My conclusion on this point means it is unnecessary to consider an alternative argument that the adjudicator's failure to consider the adjudication response was a denial of procedural fairness. Nor is it necessary for me to undertake, as was sought by counsel for the respondent, a review as to whether consideration of the adjudication response would have made any difference to the decision reached by the adjudicator. The adjudicator's decision was, for the reasons I have set out above, void, and a declaration to that effect should follow.

[32] Accordingly, it will be ordered:

1. There be a declaration that the adjudication decision made by the second respondent and dated 29 January 2014 is void.

2. I will hear the parties as to costs.

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[18] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.