SUPREME COURT OF QUEENSLAND

CITATION:	*Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor* [2014] QSC 30
PARTIES:	**CONVEYOR & GENERAL ENGINEERING PTY LTD ACN 091 865 235** (Applicant) v **BASETEC SERVICES PTY LTD ACN 086 798 361** (First Respondent) and **JOHN SAVAGE (ADJUDICATION REGISTRATION NO J1057073)** (Second Respondent)
FILE NO/S:	BS 9535 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2013
JUDGE:	Philip McMurdo J
ORDER:	**It is declared that the decision of the second respondent, dated 10 September 2013 from an adjudication between the applicant and the first respondent is of no effect.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – RENUMERATION – 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 and Construction Industry Payments Act 2004* (Qld) – where some of the adjudication application was served on the applicant by way of email – where other documents in the adjudication application were contained in a Dropbox file - whether the adjudication application was properly served on the applicant.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicant challenges an adjudicator's decision under the *Building and Construction Industry Payments Act 2004* (Qld) – whether the adjudicator erred in concluding that the applicant was out of time to provide an adjudication response – whether the refusal to permit an adjudication response deprived the adjudicator of jurisdiction.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicant challenges an adjudicator's decision under the *Building and Construction Industry Payments Act 2004 (Qld)* – whether the adjudicator erred in concluding that the applicant was out of time to provide an adjudication response – whether the refusal to permit an adjudication response was a denial of natural justice.

Acts Interpretation Act 1954 (Qld), s 39
Acts Interpretation Act 1901 (Cth), s 28A
Building and Construction Industry Payments Act 2004 (Qld), s 17, s 18, s 21(3), s 21(5), s 24(1), s 103
Corporations Act 2001 (Cth), s 459G
Electronic Transactions (Queensland) Act 2001 (Qld), s 11, s 24

Austar Finance Group Pty Ltd v Campbell (2007) 215 FLR 464
Bauen Constructions Pty Ltd v Sky General Services Pty Ltd & Anor [2012] NSWSC 1123
Capper v Thorpe (1998) 194 CLR 342
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259
Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542
Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd (2010) 30 VR 141
Penfolds Projects Pty Ltd v Securcorp Limited [2011] QDC 77

COUNSEL: P D Tucker for the applicant

P A Heywood-Smith QC for the first respondent

No appearance for the second respondent

SOLICITORS: Porter Davies Lawyers on behalf of the applicant

Amanda Forsyth as in-house counsel for the first respondent

[1] This is a challenge to an adjudication decision made by the second respondent under the *Building and Construction Industry Payments Act 2004* (Qld) ("BCIPA"), whereby the applicant ("CGE") was required to pay to the first respondent ("Basetec") the sum of $121,472.02.

[2] In essence, CGE says that the adjudication application was not duly served upon it, so that the adjudicator had no jurisdiction. Alternatively, CGE says that the adjudicator denied procedural fairness to it, by refusing to permit it to make certain submissions about the merits of the claim. As will be seen, that argument is related to the service point.

[3] In 2012, CGE and Basetec negotiated what became two contracts for the supply of pre-assembled pipe rack units for water treatment facilities at, respectively, Condabri and Reedy Creek. CGE required those units for its performance of a (single) contract with Leighton Contractors Pty Limited. It appears that at an early stage of the negotiations, it was proposed that there would be a single subcontract between CGE and Basetec before there were the two subcontracts, one for each facility, which were made between the parties.

[4] The subcontract for the Condabri facility has been performed but the subcontract for the Reedy Creek facility was terminated before much of the relevant product had been supplied by Basetec.

[5] On 30 July 2013, Basetec delivered payment claims under s 17 of BCIPA for each subcontract. For the Condabri contract it claimed $403,680.20. For the Reedy Creek contract it claimed $938,509.20.

[6] On 12 August 2013, Porter Davies Lawyers, acting for CGE, submitted payment schedules pursuant to s 18 of BCIPA. In each case, CGE disputed the entirety of the payment claim.

[7] On 23 August 2013, Basetec made an adjudication application for each payment claim. The outcome of the Reedy Creek adjudication does not appear from the evidence. This proceeding concerns the Condabri adjudication.

[8] On 8 August 2013, CGE paid an amount of $238,233.04 towards the Condabri contract. It was common ground that this amount had to be deducted from the payment claim. It was also apparently common ground that a further amount of $43,975.14 should be deducted, being an agreed retention sum. Those deductions resulted in the net amount of $121,472.02 which CGE was required to pay by this adjudication.

[9] In its payment schedule, CGE disputed its liability for this sum upon the basis that it represented the amount by which, CGE contended, Basetec had been overpaid for the Reedy Creek contract. CGE said that this amount should be set off against what was owing under the Condabri contract. The alleged overpayment for the Reedy Creek job was put as follows. The true agreement between the parties, CGE contended, was that there would be, across the two subcontracts, but one deposit which would be paid by CGE to Basetec, in an amount of $270,000. But as things happened, Basetec received distinct deposits, each of $270,000, on the two subcontracts. CGE made no complaint about that deposit for the Condabri job because, of course, CGE thereby had the benefit of that amount as a part payment. But on the Reedy Creek job, where the contract had not been fully performed, CGE

argued that Basetec had been entitled to receive only one-half of the deposit of $270,000. Allowing an amount for retention, CGE contended that one-half of the (net) deposit had been overpaid and was an amount which it was entitled to set off against what might otherwise be due for the Condabri contract.

[10] Because it was set out in the payment schedule, that argument was considered by the adjudicator who rejected it. But CGE now says that it was denied the opportunity to present evidence and perhaps some further submissions in support of this argument.

[11] On 23 August 2013, Ms Forsyth from Basetec sent an email to Ms Scott of Porter Davies which attached three documents, being the two adjudication applications and a letter to the Institute of Arbitrators and Mediators Australia. But within the email itself was also a copy of the email which Ms Forsyth had sent to the Institute on that day. That email to the Institute began:

> "Please find attached letter, Adjudication Application Forms as well as Dropbox links below for the two Adjudication Applications …"

below which there appeared two Dropbox links.

[12] According to the undisputed evidence, on 23 August Ms Scott read the email and its attachments but did not seek to look at the documents which were within those Dropbox files.

[13] On Monday, 26 August 2013, Ms Forsyth sent to Mr How of CGE an email which was relevantly identical to that which had been sent to Ms Scott on 23 August. Again the Dropbox links were specified in the copy of the email which had been sent to the Institute. According to the undisputed evidence of Mr How, on 26 August he read only the email to him and the attachments and did not seek to look at the documents which were within the Dropbox files.

[14] Neither Mr How nor Ms Scott became aware of the contents of the Dropbox files until Monday, 2 September 2013. The Dropbox file for the Condabri application contained, amongst other things, Basetec's submissions to the adjudicator and some documentation which was described as "evidence of contract". But the submissions for CGE do not identify any part of that material which it could not have anticipated.

[15] It was that use of the Dropbox facility which gives rise to the controversy as to whether, by either of those emails, Basetec duly served the adjudication application. The Dropbox facility is a service by which an electronic file is stored by a third party remotely so that any computer (with the relevant authority) can view the file. The important point here is that the file within the Dropbox was not part of the data which was contained in the email and its attachments.

[16] The adjudicator concluded that the adjudication application had been served by the email sent to Porter Davies on 23 August. He had advised the parties of his acceptance of the adjudication application on 28 August. Therefore the deadline for an adjudication response, according to s 24(1) of BCIPA, he held was 30 August 2013.

[17] No document which purported to be an adjudication response was provided until 2 September 2013. On that day, Ms Forsyth sent an email, which had been copied to

the adjudicator and to Ms Scott, which contained submissions about the service of the adjudication application. Ms Scott sent to the adjudicator and Ms Forsyth a submission in response on the service question, before receiving a further submission (by email) from Ms Forsyth on that question. The adjudicator considered all of these submissions.

[18] Again on 2 September, Ms Scott emailed to the adjudicator and Ms Forsyth an adjudication response which included submissions and a statutory declaration by Mr How on the substantial question. But the adjudicator determined that he was precluded from considering any submission from CGE which was received after 30 August, except on the service question.

[19] The parties exchanged further submissions on the service question on 3 September before the adjudicator delivered his decision on 10 September 2013.

[20] The essential complaint of CGE is that is was denied the opportunity to provide an adjudication response because the adjudicator erred in concluding that the time for that response started running on 23 August, being the date on which, the adjudicator concluded, Basetec's application was served.

[21] This case turns then on that question of when the application was served. Relevant to that question are several statutes, namely BCIPA, the *Acts Interpretation Act 1954* (Qld) and the *Electronic Transactions (Queensland) Act 2001* (Qld) ("the ETA").

[22] Section 21(5) of BCIPA requires a copy of an adjudication application to be "served on the respondent". Section 21(3) of BCIPA 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".[1] If a claimant is to make submissions to an adjudicator, those submissions are to be included within the application and by s 21(5) they must be served as part of the application.

[23] Section 103 of BCIPA is as follows:

> "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 provisions of any other law about the service of notices."

It is not suggested that the relevant contract between the parties made provision for the service of a document. Nor was it argued by Basetec that the parties had agreed that the adjudication application could be served as it purportedly was, notwithstanding that the parties had used Dropbox in earlier correspondence.

[24] Section 39 of the *Acts Interpretation Act* provides:

[1] s 21(3)(f).

> "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."

[25] Section 39 makes no specific reference to the sending of a document by email. CGE's submissions appear to accept that, in general, a document required to be served under the BCIPA can be served by email. Irwin DCJ so held in *Penfolds Projects Pty Ltd v Securcorp Limited*,[2] upon the basis that email is a "similar facility" within s 39(1) of the *Acts Interpretation Act*. With respect, that interpretation is open to doubt. The various means of service which are specified in s 39(1) are each described as a means of conveying a document to a particular place, such as a place of residence or business or a certain office of a body corporate. That is not a characteristic of an email transmission. As Austin J observed in *Austar Finance Group Pty Ltd v Campbell*,[3] when comparing an email with a facsimile transmission, "an email is transmitted to and electronically stored by a server which is normally not located in the receiver's premises, and positive action is needed on the part of the receiver to read the email (by accessing it through his or her

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2 [2011] QDC 77 at [232].

3 (2007) 215 FLR 464.

computer) and to obtain a hard copy (by directing the computer to send the email to the receiver's printer)".[4]

[26] In many contexts, the provision of information by an electronic communication is facilitated by the ETA, s 11 of which is as follows:

> "11 Requirement to give information in writing
>
> (1) If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).
>
> (2) The circumstances are that—
>
> (a) at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and
>
> (b) the person to whom the information is required to be given consents to the information being given by an electronic communication."

Assuming that s 21(5) of the BCIPA is a State law by which a person (the party applying for an adjudication) is "required to give information in writing" (by serving a copy of the adjudication application), still the circumstances stated in s 11(2) would have to exist for that provision to authorise service by an email. One of those circumstances is the consent of the recipient to the information being given by an electronic communication. In some cases, that consent will have been given by a term of a construction contract, so that irrespective of the ETA, the document could be electronically served under s 103(1) of BCIPA. Where there is a consent by the adjudication respondent to service by email, which is not contained in the construction contract, s 11 of the ETA would appear to permit service to occur by what is defined for the ETA as an electronic communication.

[27] Schedule 2 to the ETA defines "electronic communication" to mean:

> "(a) a communication of information in the form of data, text or images by guided or unguided electromagnetic energy; or
>
> (b) a communication of information in the form of sound by guided or unguided electromagnetic energy, if the sound is processed at its destination by an automated voice recognition system."

[28] In the present case, s 11 of the ETA did not authorise the service of the adjudication application, *inclusive of the material within the Dropbox*, for two reasons. The first is that the present applicant had not agreed to be electronically served. The second is that the material within the Dropbox was not part of an electronic communication as defined. None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in other words communicated "by guided

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[4] (2007) 215 FLR 464 at 473.

or unguided electromagnetic energy". Rather, there was an electronic communication of the *means* by which other information in electronic form could be found, read and downloaded at and from the Dropbox website.

[29] It is perhaps necessary to discuss s 24 of the ETA which provides that unless otherwise agreed between the parties, an electronic communication is received when it "becomes capable of being retrieved by the addressee at an electronic address designated by the addressee".[5] If the whole of the adjudication application had been in the email and if such a document could be served by email,[6] then s 24 would deem that service to have occurred when that email was capable of retrieval: see *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd & Anor*.[7] But again, the use of the Dropbox meant that the whole of the application was not within an "electronic communication", thereby precluding the operation of s 24.

[30] In the present case, each of the emails of 23 and 26 August was itself read on the day on which it was sent. But of course some of the documentation comprising the adjudication application was not itself within the email. In my conclusion, that puts paid to the possibility that this adjudication application could be regarded as duly served pursuant to s 39 of the *Acts Interpretation Act*. Assuming that an email is a "similar facility" to "post, telex [or] facsimile", in terms of s 39(1), nevertheless the service must involve something which could be described as the "sending" of the entire adjudication application to a relevant office of CGE. Only part of the adjudication application was in any way "sent" to that office. CGE was told where the balance was located. There is no evidence suggesting that in this instance, the Dropbox file was not immediately accessible. But that is not to say that it was sent to CGE's office in the sense which is facilitated by s 39.

[31] In *Austar Finance Group Pty Ltd v Campbell*, Austin J considered the operation of s 28A of the *Acts Interpretation Act 1901* (Cth) in relation to a purported service by email of an application under s 459G of the *Corporations Act 2001* (Cth). Section 28A relevantly provides:

> "(1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression 'serve', 'give' or 'send' or any other expression is used, then the document may be served:
>
> (a) on a natural person:
>
> (i) by delivering it to the person personally; or
>
> (ii) by leaving it at, or by sending it by pre-paid post 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 pre-paid post to, the head office, a registered office or a principal office of the body corporate. …"

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5 s 24(1)(a).

6 Such as by s 39 of the *Acts Interpretation Act*.

7 [2012] NSWSC 1123 at [70] to [79].

Austin J considered whether an email sent to a natural person's (relevant) address could be said to involve a "leaving" of the document at that address. He concluded:

> "… In the case of an email transmission, where the electronic message is received and held by a remote third-party server rather than in the receiver's computer, and there is no hard copy document unless the receiver accesses the email and transmits it to a printer, nothing can be said to have been 'left' at the receiver's premises, at least until the email is accessed."[8]

[32] Applying that reasoning here, it cannot be said that the documents in the Dropbox file were "left" at or "sent" to CGE's office, at least until CGE went to the Dropbox site and opened the file and probably not until its contents had been downloaded to a computer at CGE's relevant office.

[33] It follows that the adjudication application was not served in any way which was specifically permitted by s 39 and in turn by s 103 of BCIPA. But there is a further question whether, apart from service as permitted by s 39, the adjudication application was in fact served.

[34] In *Capper v Thorpe*,[9] it was said that a document will be served "if the efforts of the person who is required to serve the document have resulted in the person to be served becoming aware of the contents of the document".[10] Similarly, in *Howship Holdings Pty Ltd v Leslie*,[11] Young J (as he then was) held that although service of an application for an order under s 459G was not effected by the deposit of the document in a document exchange box, the proof of actual receipt of the document from that box would suffice. Young J said:[12]

> "The ordinary meaning of 'service' is personal service, and personal service merely means that the document in question must come to the notice of the person for whom it is intended. The means by which that person obtains the document are usually immaterial. …
>
> Accordingly, one gets back to the ordinary principle, has there been personal service, that is has the document come to the notice of the respondent? …
>
> The ultimate issue is whether the document was received by the addressee … If it is, then in my view no matter how it got to the addressee the addressee has been served. …"

[35] In *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*,[13] Hodgson JA said:

> "[I]n my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or

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8 (2007) 215 FLR 464 at 475.
9 (1998) 194 CLR 342.
10 (1998) 194 CLR 342 at 352.
11 (1996) 41 NSWLR 542.
12 (1996) 41 NSWLR 542 at 544, 545.
13 [2006] NSWCA 259 at [58].

> not any facultative regime has been complied with … In such a case, there has been service, provision and receipt."

[36] Therefore, quite apart from s 39 of the *Acts Interpretation Act*, it would be consistent with these authorities that at least the email and its attachments, when opened by the addressees on 23 and 26 August, were then served. And the email and its attachments informed the addressee that there were relevant documents to be found in a certain Dropbox file. One of the attachments to the email, which was the adjudication application form, told the recipient that in addition to that document there were "the claimant's submissions and supporting documents" which were "provided with and forming part of this Adjudication Application". So the documents which were read by the addressees on 23 and 26 August unambiguously informed them that there were other documents which were part of the application and of their location.

[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 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".[14]

[38] The result is that the adjudication application was not served on 23 or 26 August. On the best view for Basetec, it was served no earlier than 2 September. The adjudicator erred in concluding that CGE was out of time to provide an adjudication response. Consequently, he erred in depriving CGE of the opportunity to present submissions and any relevant evidence.

[39] The question then is whether this should result in a determination that the adjudication decision is of no effect. CGE argues that the adjudicator's refusal to permit an adjudication response deprived him of jurisdiction, an argument which relies in particular on the discussion by Vickery J in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd*.[15] Alternatively, it is said that this was a denial of natural justice which warrants the same relief unless it can be demonstrated that the provision of natural justice could have made no difference.

[40] Basetec argues that no relief should be granted, for essentially two reasons. One is that CGE did not press the adjudicator to grant some extension of time for its adjudication response. The other is that the case which CGE would have put to the adjudicator was that which he did consider (because it was expressed in the payment schedule) and which the adjudicator (it is said) correctly rejected.

[41] This court is not in a position to fairly determine the merit of CGE's case to be credited with half of the deposit paid on the Reedy Creek subcontract. It can be said, in Basetec's favour, that CGE's case is inconsistent with the express terms of the subcontracts and, at least on one view, with the email exchange between the parties on 4 December 2012. But CGE's case involves a factual question of

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14 *Capper v Thorpe* (supra).

15 (2010) 30 VR 141 at 195-198.

whether in the course of relevant conversations between representatives of the parties, the true agreement reached was that there would be but one deposit. Whilst CGE's case does not seem to have apparent force, in this proceeding it could not be dismissed as hopeless.

[42] Mr How says that he was denied the opportunity of presenting evidence in the form of an extensive statutory declaration by himself in relation to relevant meetings and correspondence and the circumstances in which the deposit was, inadvertently he says, paid by CGE on the Reedy Creek contract. He also says that CGE would have provided evidence from a Mr Flounders as to what took place at a critical meeting. In my conclusion, it cannot be said that the provision of this evidence and any submission about it could have had no impact upon the outcome of the adjudication.

[43] As for the argument that CGE should have sought an extension of time for its adjudication response, it is telling that the adjudicator declined to consider even the limited response which was provided on 2 September 2013. CGE should not be denied relief by speculation that the adjudicator might have granted an extension.

[44] It will be declared that the decision of the second respondent, dated 10 September 2013 from an adjudication between the applicant and the first respondent is of no effect. I will hear the parties as to further orders including costs.