Article Information

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Service: Construction Litigation, Projects Infrastructure & Construction

A Bad Weekend for Deemed Service: Roberts Co (NSW) Pty Ltd v Sharvain Facades Pty Ltd (Administrators Appointed)

Will a contractual deemed service of email provision ever provide a Respondent more than the statutory maximum 10 Business Days for service of a Payment Schedule? The Court of Appeal's short answer is 'no'.

Background

Under section 14(4) of the *Security of Payment Act 1999* (NSW) (**SoP Act**), a respondent must provide to the claimant a payment schedule within the shorter of the time required by the relevant construction contract or 10 business days after the payment claim has been served. If the respondent misses that window, then it is liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates, a liability that can be enforced by the claimant under s 15(2)(a)(i) debt recovery proceedings.

This powerful mechanism at the heart of the SoP Act has led to many arguments in regards to the time of service of a payment claim, including arguments in relation to whether contractual 'deeming' provisions as to the time of service (by email, after business hours) can be taken into account in determining the time of service. The decision in *Roberts Co (NSW) Pty Ltd v Sharvain Facades Pty Ltd (Administrators Appointed)* has stamped out such arguments in circumstances where the deeming provision would operate to extend the maximum 10 business day period from the date of actual receipt of the email.

The contract between the parties included a deeming provision which stipulated that service by email, if attempted after 5pm, is deemed to have been served on the following business day. The payment claim in issue (claiming $3.278M) had been served by email timestamped at 7:18pm on Friday 28 February 2025. The respondent, relying on deeming provision, did not put on a payment schedule until 17 March 2025, 10 business days after Monday 3 March 2025, the next business day following the email.

The first instance decision of Stevenson J decided in favour of the claimant, concluding that the deeming provision was void under s 34 of the Act as it purported to "*change the meaning of "business day*" and that service by email was effected on 28 February 2025 as alleged, per the *Electronic Transactions Act*. The respondent appealed, arguing that the primary judge erred in finding that the deeming clause was void for all purposes, and that if it was void at all, it is void only to the extent that its operation was inconsistent with the SoP Act.

Decision

Hammerschlag CJ in Eq, with Griffiths AJA agreeing, decided the matter without engaging in the dispute as to whether the deeming provision was void, concluding that as there was no dispute as to actual service (as opposed to deemed service) being effected on 28 February, the operation of s 14(4), by providing a maximum 10 business days from actual service, decided the matter – observing:

> *"The overall effect of s 14(4) and one consistent with the policy of the Act of quick resolution, is that the period for providing a payment schedule can be contractually shortened, but not lengthened.*[1]

The respondent could not escape that by relying on the deeming provision it was ultimately seeking an impermissible extension of this maximum 10 business day period.

All three members of the bench were hesitant to employ s 34 to read down the deeming provision, noting though that McHugh JA stated that s 34(1) backs the conclusion reached by Hammerschlag CJ.

Takeaways

The main takeaway is that the s 14(4) maximum 10 business day period from actual service of a payment claim is hard fixed and effectively unable to be shifted by any contractual provision or mechanism.

However, for train-spotting respondents there remains a slight glimmer of hope in that a deeming contractual provision extension argument might still 'have legs' if it operated to extend a contractual period for payment schedules shorter than 10 business days by a period capped at 10 business days from the date the payment claim was actually served. While first instance decisions might suggest that such deeming provisions are void, if the stakes are high enough, there may be life in such an argument yet!

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[1] [37].

[2] [52].