



Construction Alert January 2009

Security of Payment Claims & Schedules - Service by Fax: What You Really Need to Know

A recent case highlights the need to have a fully functioning fax machine and notification procedure in place for those who deliver service of payment claims and/or payment schedules by way of fax.

Section 31 of the New South Wales *Building and Construction Industry Security of Payment Act (Act)* and its Victorian equivalent, as well as the current South Australian bill, all permit service of documents by fax. Payment claims and payment schedules issued under the Act are increasingly being served by fax, but this can lack the certainty of physical service. Time is crucial under the Act, and legally ineffective service can have dire consequences, which only becomes apparent when a claimant seeks to obtain a summary judgment or enforce an adjudication determination.

The point which often leads to uncertainty, is whether a receiving party needs to physically receive the document by printing it or reading it, or whether it is enough that the document has been received into the memory of the intended party's fax machine.

The recent case of *Zebicon Pty Ltd v Remo Constructions Pty Ltd* provides guidance on this matter particularly in relation to service of payment claims under the Act.

The case emphasised to those in the construction industry four key conclusions:

- > a party is said to have received a notice, if that document has been received into the memory of the intended party's fax machine;
- > it is not necessary for the document to have been printed out;

- > it is not necessary that the document should have come to the attention of anyone at the receiving party's ordinary place of business; and
- > fax service can be effective even if it occurs out of business hours.

Background

In February 2008, Zebicon and Remo Constructions entered into a construction contract.

On 19 July 2008 (a Saturday, so not a "business day" under the Act), Zebicon served its payment claim no.11 by facsimile to Remo Constructions. Remo Constructions asserted that it did not receive any payment claim that day, or by facsimile, until Tuesday 22 July 2008 when they received a copy by post.

Zebicon, on the other hand, produced a fax transmission report indicating that a six page fax was sent to the Remo Constructions' fax number, and the report showed, under the heading of "Result", the code "OK".

His Honour found that Zebicon did send payment claim no.11 to Remo Constructions on 19 July 2008 and also accepted evidence that around the time of this transmission, Remo Constructions' fax machine was malfunctioning, even though there was no evidence as to the nature of the malfunction.



Does the notice need to come to the attention of anyone? Does it need to be printed out?

The short answer to both questions is “No”.

Remo Constructions submitted that even if payment claim no. 11 had been transmitted successfully, that did not permit a finding that Remo Constructions had received the document.

His Honour disagreed:

“it is not necessary that the document should have come to the attention of anyone at Remo’s ordinary place of business”.

His Honour stated at [25]:

“I do not think that it is necessary, in terms of receipt, for the document to have been printed out. If it were, a respondent could avoid facsimile service of a document by keeping its fax machine perpetually empty of paper.”

The Court was satisfied that it could be inferred from the “OK” result in the transmission report that the fax was delivered to Remo Constructions’ fax machine, and if communication had not been established, or the message not delivered, the result would not have been “OK”.

Normal business hours?

Remo Constructions also submitted that under s31(1)(c) of the Act, the fax must have been sent during normal business hours as specified in s31(1)(b).

His Honour followed the decision of Justice Einstein in *Taylor Project Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 who held [at 21] that the distinction in language between paragraphs (b) and (c) make it clear that the “normal office hours” referred to in (b) (relating to the physical lodgement to the registered office) do not apply to (c) (service by fax).

Final note

The payment claim was deemed to have been served by fax when it was received into the memory of the recipient’s machine.

Service will not be avoided by not printing a fax. If you use a fax for the service of payment claims and/or payment schedules, make sure that your fax is working effectively, there is always paper in the machine, and set up a protocol for notification when a fax arrives, so that it may be brought to your attention as soon as possible. The same follows where faxes are delivered by software to a computer rather than in paper form.

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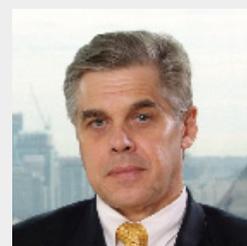
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