

TQM DESIGN & CONSTRUCT PTY LTD V DASEIN CONSTRUCTIONS PTY LTD

Supreme Court of New South Wales – 3 December 2004

FACTS

TQM Design & Construct Pty Ltd ('TQM') and Dasein Constructions Pty Ltd ("Dasein') entered into a construction contract.

Dasein served a Payment Claim pursuant to section 13 of the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act'). TQM did not accept the claim. Accordingly, Dasein referred the matter to Adjudication.

Dasein said that an Adjudication Application was given to TQM by a courier who delivered a package to TQM's principal place of business. The courier knocked on the front door and, having received no response, went to the rear of the house. The courier did not see anyone and then left the envelope at the rear door as he was told this would be all right. TQM tendered evidence stating that a member of the household was present all day who went out the back door several times on the day in question and did not see a package. TQM says that the package was received the next day on the front porch. Dasein then put submissions to the Adjudicator to the effect that he could not consider TQM's adjudication response because it was out of time. These submissions were not copied to TQM or its solicitors.

When the Adjudicator came to consider the matter, he referred to the problem that the Adjudication Response was out of time and found that the Adjudication Application had been served within time and noted that, accordingly, the Adjudication Response was out of time. Thus, the Adjudicator did not consider TQM's Adjudication Response.

ISSUE

Whether the Adjudication Application was served on or received by TQM and whether the Adjudicator denied TQM natural justice by failing to consider its Adjudication Response.

FINDING

On the balance of probabilities, the Court found that the Adjudication Application was received by TQM on the later day.

Further, the Court found that there appeared to be a significant denial of natural justice on two counts. Firstly, that the Adjudicator was given material both fact and content of which were withheld from TQM. It is clear that the Adjudicator found that at least some of that material was of extreme significance on the question that he considered. Secondly, and accordingly, the Adjudicator did not consider the Adjudication Response provided by TQM. By doing so, the Adjudicator failed to have regard to a matter that, by section 22(2) of the Act, is one of the things to which he is required to have regard.

QUOTE

McDougall J at paragraph 5 stated:

“It was submitted that I should construe the word “receiving” in s 20(1)(a) as having its ordinary English meaning, namely, taking into one’s possession and not as equivalent to “being served” or “having been served”. On the view to which I have come it is not necessary to answer that question, but, in particular having regard to the consequences that follow if an adjudication response is not lodged within time, I incline to the view that the distinction between the concept of service and concept of receipt is deliberate and that in s 20(1) the word “receiving” should be given its ordinary English meaning.”

IMPACT

This case stands for the proposition that “receipt” is defined as “taking into one’s possession and is not the equivalent to “being served” or “having been served”” and care should be taken to ensure that the Adjudication Application is actually received.

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