

VINCE SCHOKMAN & ANOR V XCEPTION CONSTRUCTION PTY LTD & ANOR

[2005] NSWSC 297

Supreme Court of New South Wales – 4 April 2005

FACTS

Xception Construction Pty Ltd ('Xception') entered into a construction contract with Vince Schokman ('Schokman') for the carrying out of construction work at Stotts Street, Bilambil Heights in New South Wales.

On 5 May 2004 Xception served on Schokman a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act'). Schokman did not respond with a Payment Schedule and the Superintendent failed to provide a progress certificate. Schokman contended that the amount became due and payable on 19 May 2004. On 6 July 2004 Xception then provided a section 17(2) Notice of Intention to Apply for Adjudication and the matter was determined.

Section 17(2) allows the submission of an Adjudication Application where a Payment Schedule has not been received if the Claimant has notified the Respondent within 20 business days immediately following the due date for payment, of the Claimant's intention to apply for adjudication of the Payment Claim and the Respondent has been given an opportunity to provide a payment schedule within 5 business days of receiving the notice.

Schokman then sought a declaration that the Adjudication Determination was void on the grounds that the payment claim, the section 17(2) notice was served outside the 20 business day period in breach of the Act and was otherwise not a proper and valid notice as it failed to make any reference to the Act.

Xception contended that the payment claim was due and payable on 9 June 2004, that is, 25 days after the progress claim, as expressly provided for in the Contract. Accordingly, the section 17(2) Notice was within the prescribed time.

ISSUE

Whether the section 17(2) Notice was sent outside the 20 statutory business days allowed.

FINDING

The Court found that Xception's section 17(2) notice was out of time.

QUOTE

At paragraph 12 and 14, Einstein J stated:

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[12] “The Contract between the parties to these proceedings is silent as to when an amount under the payment claim is due and payable where no progress certificate is issued. Accordingly, the Act steps in to fill the gaps: *Beckhaus Civil Pty Limited v Council of the Shire of Brewarrina* [2002] NSWSC 960 at [60].

[14] The correct analysis of what occurred is as follows: the payment claim was made on 5 May 2004; 10 business days thereafter took the material date when the payment claim became due and payable to 19 May 2004;

[Xception] out of time in notification of intent to apply for adjudication application. pursuant to s 17(2)(a) the statutory 20 business days allowed for [Xception] to notify [Schokman] of its adjudication application should have been served on or before 16 June 2004 under the Act.”

IMPACT

The option to apply for Adjudication when a Payment Schedule is not given, must be strictly within the statutory timeframe.

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