



# Supreme Court of New South Wales

---

## **Bauen Constructions Pty Ltd v Sky General Services Pty Ltd & Anor [2012] NSWSC 1123 (18 September 2012)**

Last Updated: 8 January 2013

Supreme Court

New South Wales

Case Title:	Bauen Constructions Pty Ltd v Sky General Services Pty Ltd & Anor
Medium Neutral Citation:	<a href="#">[2012] NSWSC 1123</a>
Hearing Date(s):	13 September 2012
Decision Date:	18 September 2012
Jurisdiction:	Equity Division
Before:	Sackar J
Decision:	Paragraphs 63, 79, 83
Catchwords:	Adjudication determinations, Building and Construction Industry Security of Payment Act, trade contract, time period prescribed, failure to address requirements, service of adjudication response, denial of natural justice
Legislation Cited:	<a href="#">Building and Construction Industry Security of Payment Act 1999</a> (NSW) <a href="#">Electronic Transactions Act 2000</a> (NSW) <a href="#">Supreme Court Act 1970</a> (NSW)
Cases Cited:	Austar Finance Group Pty Ltd v Campbell <a href="#">[2007] NSWSC 1493</a> ; <a href="#">(2007) 215 FLR 464</a>

Bergemann v Power [\[2011\] NSWSC 1039](#)  
 Brodyn Pty Ltd (t/as Time Cost and Quality) v  
 Davenport [\[2004\] NSWCA 394](#); [\[2004\] 61  
 NSWLR 421](#)  
 Chase Oyster Bar Pty Ltd v Hamo Industries Pty  
 Ltd [\[2010\] NSWCA 190](#); [\(2010\) 78 NSWLR 393](#)  
 Estate Property Holdings Pty Ltd v Barclay  
 Mowlem Construction Ltd [\[2004\] NSWCA  
 393](#); [\(2004\) 61 NSWLR 515](#)  
 Halkat Electrical Contractors Pty Ltd v Holmwood  
 Holdings Pty Ltd [\[2007\] NSWCA 32](#)  
 Hickory Developments Pty Ltd v Schiavello (Vic)  
 Pty Ltd [\(2009\) 26 VR 112](#)  
 Holmwood Holdings Pty Ltd v Halkat Electrical  
 Contractors Pty Ltd [\[2005\] NSWSC 1129](#)  
 Kirk v Industrial Relations Commission of New  
 South Wales (2010) 239 CLR 531  
 Musico v Davenport [\[2003\] NSWSC 977](#)  
 Pacific General Securities Ltd v Soliman and Sons  
 Pty Ltd [\[2006\] NSWSC 13](#)  
 The Minister for Commerce v Contrax Plumbing  
 (NSW) Pty Ltd [\[2005\] NSWCA 142](#)  
 Trysams Pty Ltd v Club Constructions (NSW) Pty  
 Ltd [\[2008\] NSWSC 399](#)

Texts Cited:

Oxford English Dictionary, Oxford University  
 Press (2nd ed, 2003)

Category:

Principal judgment

Parties:

Bauen Constructions Pty Ltd - plaintiff  
 Sky General Services Pty Ltd - first defendant  
 Gregory Purcell - second defendant

Representation

- Counsel:

Counsel:  
 D Weinberger - plaintiff  
 R McKeand SC - defendant

- Solicitors:

Solicitors:  
 Mccabes, lawyers - plaintiff  
 Lex Fori, lawyers - defendant`

File number(s):

2012/230241

Publication Restriction:

## JUDGMENT

### Proceedings

1. The plaintiff Bauen Constructions Pty Ltd, (Bauen) seeks relief on various bases in relation to two adjudication determinations, each of which raises identical issues for consideration.
2. Bauen seeks a declaration that each of the adjudication determinations is void or alternatively an order that they be quashed.
3. Briefly there are three issues. The first is whether Bauen is entitled to relief in circumstances where the payment claim underlying it was served outside the twelve month period prescribed by [section 13\(4\)\(b\)](#) of the *Building and Construction Industry Security of Payment Act 1999*(NSW) (the Act).
4. The second issue relates to the first and it is whether the adjudicator failed, bona fide to address the requirements of [section 22\(2\)\(a\)](#) by misconstruing [section 13\(4\)\(b\)](#) of the Act.
5. The third issue is whether Bauen was denied natural justice in circumstances where the adjudicator failed to consider Bauen's adjudication response.
6. The defendant Sky General Services Pty Ltd, (Sky General) denies that the plaintiff is entitled to any of the relief sought.

### The Legislation

7. [Section 13](#) relevantly of the Act is in the following terms:

(4) A payment claim may be served only within:

....

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied);

whichever is the later.

8. [Section 17](#) of the Act relevantly states:

Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an adjudication application) if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) an adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) an adjudication application:

(a) must be in writing, and

(b) must be made to an authorised nominating authority chosen by the claimant, and ...

9. [Section 20](#) of the Act relevantly states:

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the adjudication response) at any time within:

(a) 5 business days after receiving a copy of the application, or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

(2) the adjudication response:

(a) must be in writing, and

(b) must identify the adjudication application to which it relates, and

(c) may contain such submissions relevant to the response as the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in [section 14\(4\)](#) or [17\(2\)\(b\)](#).

10. [Section 22](#) relevantly provides:

22 Adjudicator's determination

(1) An adjudicator is to determine:

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount), and

(b) the date on which any such amount became or becomes payable; and



(c) the rate of interest payable on any such amount.

(2) In determining an adjudication application the adjudicator is to consider the following matters only:

(a) the provisions of this act,...

11. There are a number of definitions also relevant. [Section 4](#) defines a construction contract as follows:

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

12. The term "construction work" is defined in  [section 5](#) , relevantly as follows:

(f) the painting or decorating of the internal or external surfaces of any building, structure or works,...

13. The term "related goods and services" is defined relevantly in [section 6](#), as follows:

(1) In this Act, related goods and services, in relation to construction work, means any of the following goods and services:

(a) goods of the following kind:

(i) materials and components to form part of any building, structure or work arising from construction work,

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,

(b) services of the following kind:

(i) the provision of labour to carry out construction work,

(ii) architectural, design, surveying or quantity surveying services in relation to construction work,

(iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,

(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

## **Background Facts**

### **St Mary's Star of the Sea Primary School (Hurstville)**

14. Bauen and Sky General entered into a trade contract to carry out painting work. The contract is undated. It called for completion of stage 2 by 22 April 2010 and stage 3 "TBA". There was a defects liability period contained in clause 11.

15. On 4 May 2012 Sky General served a payment claim in the sum of \$72,744.47.

16. The payment claim stated that stage 3 had reached completion on 15 January 2011.

17. The last of the 5 tax invoices the subject of the payment claim is dated 2 February 2011.
18. It appears to be common ground that work was last carried out by no later than 2 February 2011. This is approximately 15 months prior to the issue of the payment claim.
19. On 11 May 2011 Bauen served a payment schedule. One of the reasons advanced by Bauen for withholding payment was [section 13\(4\)](#) of the Act. However other reasons were advanced.
20. On 25 May 2012 Sky General via its solicitors responded by two letters dated the same day. The first asserted that the payment schedule was served out of time. This is disputed. The second letter purported to constitute a notice under [section 17\(2\)](#) of the Act.
21. On 31 May 2012 a payment schedule was served by Bauen. The schedule amount was \$11,617.94 plus GST.
22. On 18 June 2010 Sky General made an adjudication application.
23. The adjudicator did not accept the adjudication application by causing notice of the acceptance to be served on Sky General and Bauen.
24. In any event, on 21 June 2012 Bauen served an adjudication response on the nominating authority and Sky General. It purported to raise a number of matters including [section 13\(4\)](#) of the Act.
25. The adjudicator did not consider the adjudication response, it emerges from the adjudication determination which was published on 4 July 2012. In particular, the adjudication determination states that there was no adjudication response.
26. The adjudicator appears to have been satisfied that the payment claim was valid under [section 13](#) because it was "made within twelve months of the end of the defects liability period set out in clause 11 of the trade contract".

### **Mater Dei K6 Primary School (Blakehurst)**

27. Bauen and Sky General entered into a trade contract to carry out painting work. The contract again is undated. It called for the completion of stage 2 by 17 March 2010 and stages 3 and 4 "TBA". Again clause 11 governed the defects liability period.
28. On 4 May 2012 Sky General served a payment claim in the sum of \$21,612.95. The payment claim stated that stages 3 and 4 had reached completion on 1 December 2010. The last of the 4 tax invoices the subject of the payment claim was dated 10 January 2011. It appears to be common ground again that work was last carried out by no later than 10

January 2011, approximately 16 months prior to the issue of the payment claim.

29. On 11 May 2011 Bauen served a payment schedule. One of the reasons advanced by Bauen for withholding payment was again [section 13\(4\)](#) of the Act. Other reasons however were advanced.

30. On 25 May 2012 Sky General via its solicitors again responded with two letters of the same date. The first asserted that the payment schedule was served out of time. This is disputed. The second constituted a notice under [section 17\(2\)](#) of the Act.

31. On 31 May 2012 a payment schedule was served by Bauen. The schedule amount was \$258.80 plus GST.

32. On 18 June 2010 Sky General made an adjudication application.

33. The evidence reveals that the adjudicator did not accept the adjudication application by causing notice of the acceptance to be served on Sky General and Bauen. In any event on 21 June 2012 Bauen served an adjudication response on the nominating authority Adjudicate Today Pty Ltd (Adjudicate Today) and Sky General. It raised, amongst other matters, [section 13\(4\)](#) of the Act.

34. The adjudicator it seems did not consider the adjudication response. This would appear from the adjudication determination published on 4 July 2012. In particular the adjudication determination states again that there was no adjudication response.

35. Again the adjudicator was satisfied that the payment claim was valid under [section 13](#) because it was "made within twelve months of the end of the defects liability period set out in clause 11 of the Trade Contract".

## Discussion

### The First Issue - [s 13\(4\)\(b\)](#)

36. It is contended by the plaintiff that [section 13\(4\)\(b\)](#) requires that some work for which payment is claimed in a payment claim be performed in the twelve month period: *Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd* [\[2004\] NSWCA 393](#); [\(2004\) 61 NSWLR 515](#) per Hodgson JA at [11] and [21].

Sky General accepts this proposition.

37. The plaintiff submits that the payment claims were issued outside the 12 month period prescribed by [section 13\(4\)\(b\)](#). None were in the period.

38. Bauen contends that compliance with [section 13\(4\)\(b\)](#) is one of the "other" basic and essential requirements in circumstances where the adjudicator effectively found that work was carried out outside the twelve month period. In the result Bauen contends the determinations are void: *Brodyn Pty Ltd (t/as Time Cost and Quality) v Davenport* [\[2004\] NSWCA 394](#); [\[2004\] 61 NSWLR 421](#) at [\[53\]](#).

39. Alternatively Bauen contends that the adjudicator misread the Act at least because he proceeded in the absence of a jurisdictional fact by disregarding something that the Act requires to be considered as a condition of the jurisdiction. He thereby misconceived his functions causing him to make a jurisdictional error: *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [\[2010\] NSWCA 190](#); [\(2010\) 78 NSWLR 393](#) per McDougall J at [\[158\]](#). In the result the determinations ought to be quashed.

40. Bauen contends that for the same reason the adjudicator has failed to carry out the tasks required by the Act and in a manner required by the Act. As a result he failed to exercise jurisdiction pursuant to the Act and comply with [section 22\(2\)\(a\)](#) of the Act by failing to consider [section 13\(4\)\(b\)](#) of the Act.

41. Sky General accepts that whilst service of a payment claim is a basic and essential requirement to a valid determination, precise compliance with [section 13\(4\)\(b\)](#) is not.

42. Notwithstanding the decision of the Court of Appeal in *Brodyn*, Sky General draws my attention to the decision of Brereton J in *Pacific General Securities Ltd v Soliman and Sons Pty Ltd* [\[2006\] NSWSC 13](#). In that decision his honour expressed the view, purporting to agree with the decisions of McDougall J and Campbell J, that the twelve month period was not a basic and essential requirement such that non-compliance results in invalidity, but was a matter within the jurisdiction of the adjudicator to determine rightly or wrongly.

43. In any event, Sky General submits that the adjudicator's finding was correct. It is contended that Bauen has the onus of proving that the finding was wrong on the facts. Again, I was referred to Brereton J in *Pacific General Securities* at [\[37\]](#).

44. Sky General further submits that the adjudicator did not apply the wrong test in finding that the payment claim was served within twelve months of the expiry of the defects liability period. On the contrary, the adjudicator, Sky General contends applied the correct test because part of the defendant's claim in each case was the payment of retention monies withheld by the plaintiff.

45. Sky General submits that as the retention monies were payable to the defendant only after the expiry of the defects liability period, the adjudicator was correct in his determination.
46. In any event Sky General asserts that the invoices show that work continued at least until December 2010 which, it contends, make it apparent that the payment claims were made within twelve months of the expiry of the defects liability period which commenced no earlier than December 2010.
47. Sky General submits that the contract had no time limit within which claims might be made but only a time of the month by which claims had to be submitted if they were to be paid within the month of submission of the claim.
48. Sky General also submits that where there are multiple invoices claimed in a payment claim, as long as the work for which payment is claimed in at least one of the invoices occurred within the twelve month period, the claim is within [section 13\(4\)\(b\)](#).
49. Sky General makes the point that the provision of labour continued until expiry of the defects liability period, as further rectification work could have been ordered up to the end of that period. The court ought to find that labour was "provided" during the period because the defendant had the contractual obligation to provide it on demand by the plaintiff of rectification work.
50. Bauen submits in response that, even accepting only some of the work need fall within the 12 month period, none in fact did. For the purposes of [section 13\(4\)\(b\)](#) the payment in respect of which a claim may be made may relate to construction work or to related goods and services. Bauen submits, clearly correctly, that these contracts were painting contracts and that the work was "construction work" and was not "related to goods and services", as defined. Again that appears to be correct. This is said to fortify the proposition that the adjudicator misread the Act and applied the wrong test because, as this was a construction contract, the defects liability is an irrelevant consideration. The adjudicator it is said made no finding of precisely what the work was and that partly explained his erroneous approach. Hence he misapplied the test in the Act.

## **Was There Jurisdictional Error**

51. In *Estate Property Holdings* the Court of Appeal (Hodgson JA) did express the view that for the purposes of [section 13](#) only some work

for which payment is claimed must be performed in the 12 months after the relevant work (here construction work) was last carried out.

52. In *Chase Oyster Bar* the Court of Appeal considered what would or would not amount to jurisdictional error in the context of this Act. As a prelude, the court decided that adjudicators under the Act were amenable to judicial review. Basten JA at p.772 expressed the view that the decision of a tribunal could not be arbitrary or capricious or irrational and must be an opinion open to a reasonable person correctly understanding the meaning of the law under which authority is conferred. Basten JA also considered that a miscalculation of the period under [section 17\(2\)\(a\)](#) of the Act or a misreading of it would both amount to jurisdictional error.

53. McDougall AJA discussed the court's previous decision in *Brodyn Pty Ltd v Davenport (CA)*. His honour said at [149]:

The decision in *Brodyn* appears to assume that there is a distinction between a basic and essential requirement for the existence of an adjudicator's determination and a jurisdictional condition, or jurisdictional fact. However, the decision does not analyse the relevant requirements of the Act in terms of jurisdiction; the framework of analysis was restricted by the search for basic and essential conditions of validity.

54. In referring to *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, McDougall J identified three categories of jurisdictional error. A mistaken denial or assertion of jurisdiction; entertaining a matter or making a decision of a kind that lies wholly or partly outside the limits on functions and powers identified in the relevant statute, and proceedings in the absence of a jurisdictional fact, by for example, misconstruing a statute or disregarding something a statute requires be considered.

55. Here Bauen says the adjudicator misconstrued the statute by being distracted by an irrelevant consideration, namely the defects liability period, and thereby erroneously considered [section 13\(4\)\(b\)](#) had been complied with. That caused him to ignore that this was a construction contract and the relevant work was performed in excess of 12 months after the construction work was last carried out, i.e. either 15 or 16 months after. By reason of the fact that the adjudicator did not turn his mind to the correct time frame, there is jurisdictional error. There was in effect a failure to exercise jurisdiction, in the relevant sense.

## **The Second Issue**

56. In the alternative it is submitted by Bauen that the adjudicator did not bona fide address the requirements of [section 22\(2\)\(a\)](#) in that he misdirected himself as to the correct test under [section 13\(4\)\(b\)](#) and for the same reason did not act in good faith thereby rendering the adjudication determinations void. Reliance is again placed on *Brodyn* at [56]. Further reliance is placed upon *The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [\[2005\] NSWCA 142](#) per Hodgson JA at [49].

57. For the same reasons Bauen submits it was denied natural justice and for that reason alone the determinations are void. *Brodyn* at [55] and [57].

58. Bauen also relies on the decision of Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [\[2005\] NSWSC 1129](#) at [61]. In that decision Brereton J expressed the view (which cannot be gainsaid) that good faith is a condition of the validity of the exercise of an adjudicator's power to make a determination. This is something which Brereton J said required more than honesty. It required faithfulness to the obligation and a conscientious effort to perform the obligation.

59. Bauen also relies upon the decision in the Court of Appeal in *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [\[2007\] NSWCA 32](#). I was referred to [26] and [27] where Giles JA said:

26. With respect to the trial judge, I consider that the fundamental vice in the adjudicator's determination can be shortly explained without embarking on an exegesis of the reference in *Brodyn Pty Ltd v Davenport* to a bona fide attempt to exercise the statutory power. [Section 22](#) of the Act required that the adjudicator determine an adjudicated amount ([s 22\(1\)](#)) by considering particular matters ([s 22\(2\)](#)). The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters. But that is what the adjudicator did...

27. On the face of the determination, the adjudicator simply did not perform the task required by the Act, and his purported determination was not given greater respectability by the reference to his inclination "to believe the claimant rather than the respondent": the unmeritorious challenges were not a basis for belief or disbelief, and in any event it was not correct to speak of believing a corporate body. The adjudicator did not comply with an essential precondition to the existence of a valid determination.

60. Bauen submits that an adjudicator's failure to consider one of the statutory functions entrusted to him results in jurisdictional error and a denial of natural justice. It is further submitted that acting in good faith requires an adjudicator to turn his or her mind to the statutory task at hand. Engagement intellectually with the dispute the parties have framed and dealing with the dispute in a reasoned not perverse, arbitrary or capricious way is vital: *Bergemann v Power* [2011] NSWSC 1039 McDougall at [64].

61. Is it submitted by Sky General that compliance with [section 13\(4\)\(b\)](#) is not a "jurisdictional fact" being a condition of the right to make an adjudication application. It is merely a question of fact to be decided by the adjudicator whose decision on the question is not subject to review. Sky General submits that the adjudicator properly considered and applied [section 13\(4\)\(b\)](#).

62. I do not agree.

63. I consider Bauen's arguments to be correct. In other words the adjudicator was distracted in my view by the defects liability and miscalculated the relevant time frame for the purposes of the Act. It follows the adjudicator committed a jurisdictional error and the adjudications should be quashed.

64. This should determine the issues, however in the alternative Bauen has a further argument. In the event I am wrong in my views expressed above I will also determine what has been called the third issue.

### **The Third Issue**

65. Bauen submits that the adjudicator failed to consider Bauen's adjudication response. In doing so he failed to address the requirements of [section 22\(2\)\(b\)](#) and Bauen was denied natural justice.

66. Sky General contends that no adjudication responses were "lodged" within the relevant time with the adjudicator and this issue simply does not arise.

67. There is no issue that Bauen sent its adjudication response on 21 June, within the relevant time by email to the designated email address of Adjudicate Today.

68. Sky General called some evidence from a Ms Lorraine Foster. She is employed by Adjudicate Today. The effect of her evidence was that the email(s) sent by Bauen and which comprised its adjudication response were not received by Adjudicate Today (on or about 21 June). That is what she had, at least originally thought, as set out in her

affidavit of 11 September 2012. However on 12 September having resorted to external IT consultants it was discovered that the emails and hence the adjudication response sent by Bauen on 21 June was received but caught by the spam filter of Adjudicate Today. The possible reason is that the email had attached a zip file and the emails were deemed unsafe hence they were caught by the spam filter. As a result they were not read or accessed by staff.

69. Ms Foster in cross examination accepted that it was highly common for documents to be sent to Adjudicate Today by email. Adjudicate Today routinely passes those onto adjudicators. She further conceded that the emails were sent to Adjudicate Today's place of business.

### **Was an Adjudication Response Lodged**

70. [Section 20](#) of the Act refers to an adjudication response being "lodged". Sky General says none was "lodged". It refers to dictionary meanings of the word and submits that in each of the definitions the emphasis is upon ensuring the arrival of the object. Sky General submits the word "lodge" should be distinguished from "serve". It submits that because the emails were not accessed (opened) and read they were not lodged.

71. I am by no means persuaded that what occurred here, does not conform with the meaning of the word "lodge". The primary meaning in the Oxford English Dictionary, (2nd ed., 2003), given to the word "lodge" is to "present, formally to proper authorities". In that sense I do not consider it carries with it a meaning of ensuring its arrival. There is no suggestion here that Bauen could have done any more than what it did, namely to send the materials by email to the appropriate email address.

72. In any event Sky General refers to two authorities by way of analogy. First a decision of Austin J in *Austar Finance Group Pty Ltd v Campbell* [\[2007\] NSWSC 1493](#); [\(2007\) 215 FLR 464](#). In that case the judge was considering the service of a statutory demand and he reviewed the authorities on service of documents. His conclusion at [55] was in effect service could be effected by email provided evidence was available which proved a document came to the notice of the person concerned and was in readable form.

73. The second authority was that of Justice Vickery in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [\(2009\) 26 VR 112](#) at [124] - [127]. There the judge considered when an adjudication

application was "received" if sent by email. In that case, Sky General submits, it was determined that an email that was notified by the server to the recipient's mail box was "not received" until it was opened.

74. Sky General submits by reason of those authorities, whilst email lodgement is permissible it should not be considered as "lodged" for the purposes of [section 22](#) until it is received on the server of Adjudicate Today and is opened.

75. The above propositions are somewhat unattractive in a situation such as this, however as I have already said it is in my mind arguable that the sending of the email to the email address of Adjudicate Today would conform with the meaning of "lodged" as in "presented".

76. However Bauen referred the court to the [Electronic Transactions Act 2000 section 13A](#) of the Act is in the following terms:

#### Time of receipt

(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication:

(a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee, or

(b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:

(i) the electronic communication has become capable of being retrieved by the addressee at that address, and

(ii) the addressee has become aware that the electronic communication has been sent to that address.

(2) For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.

(3) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under [section 13B](#).

77. Bauen says this Act applies and I should find that the words "becomes capable of being retrieved by the addressee at an electronic address..." aptly describes the position here. Clearly the email was received, albeit it was caught by the spam filter. The words "capable of being retrieved" are ample in their reach. They certainly do not require an email to be opened, let alone read. Again the Oxford dictionary defines "retrieve" in its primary sense as "to get or bring back from somewhere". In its secondary sense it is said to mean "to find or extract (information stored in a computer)". According to the evidence when an email is caught by the Adjudicate Today spam filter, it is nonetheless archived and accessible by Adjudicate Today via its external IT consultant.

78. In my opinion this Act enables Bauen to contend that if an email is sent, but not opened or read, but it is capable of being retrieved, it has been received by Adjudicate Today. Once received in my view it has been "lodged" on any view of that word.

79. It is accepted the response although "lodged" in time was not considered by Adjudicate Today and it follows that Bauen has been denied natural justice, the adjudication having proceeded in the absence of Bauen being heard. For this reason alone both adjudications should be set aside.

### **The Appropriate Order**

80. Sky General refers to *Musico v Davenport* [2003] NSWSC 977, to support the proposition that relief under [section 69](#) of the [Supreme Court Act 1970](#) (NSW) was available. Sky General submits on authority I could order mandamus: *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399.

81. Bauen submits mandamus is not appropriate. McDougall J in *Trysams* said at [81]

I appreciate that the adjudicator and the third defendant (the authorized nominating authority to whom the application was made) have submitted save as to costs. However, I would be loathe to impose an obligation on the adjudicator, involving at least in theory the usual consequences of non-compliance, without having some understanding of his readiness and, perhaps, willingness to undertake that obligation.

82. In this case the third defendant has filed a submitting appearance but has played no role in the proceedings. Bauen also refers to section 21(3) which imposes the limits on adjudicators.

83. In all the circumstances I am of the view that mandamus is inappropriate and I would therefore propose to make declarations and quash the determinations for the reasons set out above.

84. I would invite the parties to prepare short minutes reflecting my reasons.

85. I would reserve the question of costs and invite the parties to have the matter relisted so that question can be determined.

\*\*\*\*\*

---

**AustLII:** [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1123.html>