SUPREME COURT OF QUEENSLAND

CITATION:	*The Trust Company (Australia) Ltd atf the WH Buranda Trust v Icon Co (Qld) Pty Ltd & Anor* [2019] QSC 87
PARTIES:	**THE TRUST COMPANY (AUSTRALIA) LTD (ACN 000 000 993) AS TRUSTEE FOR THE WH BURANDA TRUST (ABN 12 725 439 303)** (applicant) **v** **ICON CO (QLD) PTY LTD (ACN 169 394 058)** (first respondent) and **EDWARD SMITHIES (ADJUDICATION REGISTRATION NO. J1179573)** (second respondent)
FILE NO:	2775 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	4 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2019
JUDGE:	Applegarth J
ORDERS:	**1. The application is dismissed.** **2. The applicant pay the first respondent's costs of and incidental to the proceeding to be assessed on the standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant challenges an adjudicator's decision under the *Building and Construction Industry Payments Act* 2004 (Qld) on the ground that the payment claim was not properly served – where the contract provided for a progress claim to be given to the Principal's Representative – where a progress claim that constituted a payment claim under the Act was served on the applicant's representative via an electronic document control and management system – where the contract required a 'notice' under the Act to be served to the

applicant's physical address – whether the payment claim was properly served on the applicant.

Building and Construction Industry Payments Act 2004 (Qld) ss 17, 103

CKP Constructions Pty Ltd v Gabba Holdings Pty Ltd [2016] QDC 356 cited
Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd [2015] 1 Qd R 265; [2014] QSC 30 discussed
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd (2007) BCL 292; [2006] NSWCA 259 cited
Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542 cited
Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd (2010) 30 VR 141; [2010] VSC 199 cited
Taylor Projects Group Pty Ltd v Brick Department Pty Ltd [2005] NSWSC 439 cited
The Owners Strata Plan 56587 v Consolidated Quality Projects Pty Ltd [2009] NSWSC 1476 cited
Queensland Building Services Authority v JM Kelly (Project Builders) Pty Ltd [2015] 1 Qd R 532; [2013] QCA 320 cited

COUNSEL: B A Reading for the applicant
D Williams for the first respondent

SOLICITORS: ClarkeKann for the applicant
Batch Mewing Lawyers for the first respondent

[1] The applicant is the principal under a design and construction contract with the respondent.[1] The respondent has the benefit of an adjudication decision made under the *Building and Construction Industry Payments Act* 2004 (Qld) ("*BCIPA*") in respect of a payment claim made by it on 13 December 2018. The payment claim was received by the Principal's Representative via the Aconex software system. The parties used that form of electronic document control and management system for the contract, and it was used for the previous 36 progress claims, 23 of which were endorsed as payment claims pursuant to *BCIPA*.

[2] The applicant applies to set aside the adjudication decision on the ground that the payment claim was not properly served and so was not a valid payment claim under Part 3 of *BCIPA*.

[3] The applicant's principal argument in this Court is that the payment claim was not validly served because cl 7A of the contract required it to be served to the applicant's "physical address" (being the applicant's solicitor's office). The respondent's principal argument in reply is that cl 37 governed the mode of delivery of progress claims and *BCIPA* payment claims (as distinct from other notices under *BCIPA*), and required them to be given in writing to the Principal's Representative. The issue is essentially one of

[1] The second respondent, an adjudicator, abides the Court's decision. Therefore, I will refer to the first respondent as "the respondent".

contractual construction: was service of a payment claim on the Principal's Representative authorised by cl 37 or was the respondent required to serve it on the applicant's physical address in accordance with cl 7A?

Background

[4] On or about 14 December 2015, the respondent contractor and Wee Hur (Buranda 1) Pty Ltd executed a contract in the form of an amended AS4902-2000 general conditions of contract for the design and construction of the Buranda Student Accommodation project for the contract sum of $175,000,000 plus GST. On 30 June 2017, the contract was novated from Wee Hur (Buranda 1) Pty Ltd to the applicant.

[5] The contract provided for a Principal's Representative. AECOM Cost Consulting Pty Ltd ("AECOM") was appointed.

[6] The contract established an electronic form of document control called Aconex. Aconex is a project information and management service in which project documents are uploaded to a "cloud" system. They can then be retrieved by the receiving parties by logging in to the Aconex portal with a user name and password. Aconex allows many parties to have access to the system, and allows parties to share documents and send and receive correspondence. When a new document is uploaded to Aconex, it will be accessible by the individuals who are authorised to access the project data, and when new correspondence is sent, the person to whom the correspondence is directed receives an email notifying them of the existence of the correspondence. The email will contain a link which, if clicked on, will prompt the user to log in to the Aconex website in order to download or access the relevant document.

[7] During the project, Aconex has been used for the circulation and sharing of documents relating to it. Every progress claim (including those incorporating a payment claim under *BCIPA*) has been submitted via the Aconex system.

[8] In accordance with cl 37 of the contract, after a progress claim is made the Principal's Representative issues to the applicant and the respondent a progress certificate. The progress certificate must identify the progress claim to which it relates, state the amount of the payment, if any, that the principal proposes to make ("the scheduled amount") and, if the scheduled amount is less than the claimed amount, state why the scheduled amount is less. By virtue of cl 45.3 of the contract, a progress certificate which is compliant with cl 45 is deemed to be a payment schedule for the purposes of *BCIPA* and is deemed to be issued by the Principal's Representative under its authority as agent of the applicant.

PC 37

[9] On 13 December 2018, being a date after the reference date in the contract, the respondent submitted progress claim 37 ("PC 37"). PC 37 was endorsed as a payment claim pursuant to *BCIPA*. The claimed amount was $510,243.51 plus GST. PC 37 was submitted through Aconex. As a result, the intended recipients, including the Principal's Representative under the contract and executives and managers associated with the applicant, received an email which notified them that PC 37, being the November 2018 progress claim, had been received. The relevant employee of AECOM, who had been assigned to the contract and who was engaged for the purpose of receiving and reviewing progress payment claims and issuing payment certificates, received the notification from

Aconex of PC 37 on 13 December 2018. He accessed the Aconex system that day and downloaded PC 37. He commenced the claim assessment and on 11 January 2019 he issued a payment certificate in response to PC 37. The payment certificate certified that the sum of $89,761 was payable.

[10] On 25 January 2019 the respondent made an adjudication application under *BCIPA*. *BCIPA* processes were then followed and on 28 February 2019 the second respondent delivered his adjudication decision which concluded that the amount due to the respondent was $561,267.86 (including GST).

[11] By its amended application for review, the applicant seeks an order in the Court's inherent jurisdiction that the adjudication decision be declared void on the ground that it was made in the absence of jurisdiction. Its argument is that the adjudicator did not have jurisdiction because the payment claim was not served in the manner required, namely at the applicant's "physical address", and therefore it was not served on the applicant.

Legislative context

[12] Service of a payment claim under s 17 of *BCIPA* is an essential precondition to the taking of subsequent steps in the procedure set out in Part 3 of the Act. Section 17(1) states that the claimant "may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment". Section 17(2) provides that a payment claim must identify the construction work to which the progress payment relates, state the amount of the progress payment that the claimant claims to be payable and must state that it is made under the Act. Section 17A imposes time requirements for payment claims.

[13] A progress claim contemplated by the contract can be relied upon as a payment claim for the purposes of *BCIPA*. However, if a party intends to rely upon a progress claim as a payment claim for the purposes of s 17 of *BCIPA*, then it must comply with the requirements of s 17, including the requirement that it be served.

[14] *BCIPA* provides for the service of a variety of notices and other documents. These include adjudication applications and adjudication responses.

[15] Section 103 of *BCIPA* states:

> "**103 Service of notices**
>
> (1) A notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned.
>
> (2) Subsection (1) is in addition to, and does not limit or exclude, the *Acts Interpretation Act 1954*, section 39 or the provisions of any other law about the service of notices."

Relevant contractual provisions

[16] Clause 37 of the contract is central to the issue to be decided. It is headed "Payment" and, consistent with the proposition that a progress claim under the contract can be relied upon as a payment claim under *BCIPA*, deals with both matters.

[17] Clause 37.0 begins:

> "**37.0 Precondition to progress claim and payment claim**
>
> It is a precondition to a reference date arising under BCIPA, the Contractor being entitled to make a payment claim under BCIPA and to the Contractor becoming entitled to make a progress claim under subclause 37.1, that the Contractor submits the 'Payment Claim Documentation', which is as follows: …"

The clause then goes on to identify the "Payment Claim Documentation" and reference dates under *BCIPA.*

[18] Clause 37.1 requires the contractor to claim payment progressively in accordance with Item 33 while work is being carried out, at practical completion and at the final payment claim under cl 37.4. For the avoidance of doubt, it states the reference date under *BCIPA* shall not arise during the period following the end of the month in which practical completion is reached until the time for making the final payment claim under cl 37.4. Clause 37.1 goes on to provide:

> "**Each progress claim shall be given in writing to the Principal's Representative**, and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract. Each progress claim shall also be in a form required by the Principal or Principal's Representative and include a trade breakdown, percentage complete by trade, cost complete by trade, previous approved cost by trade and a variation schedule." (emphasis added)

[19] As noted, cl 37.2 requires the Principal's Representative within a certain specified time after receiving such a progress claim to issue a progress certificate identifying several matters, including the progress claim to which it relates, the amount of payment, if any, the principal proposes to make and why that amount is less than the amount of the claim.

[20] Clause 45 is significant in the present context in dealing with *BCIPA.* Clause 45.2 states that for *BCIPA*, the "reference date" in respect of the contract means, for payment claims, the date referred to in cl 37.1 for the making of progress claims. Clause 45.3 states:

> "**45.3 Payment schedules**
>
> A progress certificate which complies with the requirements of this clause shall be deemed to be a payment schedule for the purposes of BCIPA, and shall be deemed to be issued by the Principal's Representative under its authority as agent of the Principal."

[21] Clauses 7 and 7A of the contract also assume importance in this proceeding. They state:

> "**7 Service of notices**
>
> Subject to clause 7A, a notice (and other documents) shall be deemed to have been given and received:

(a) if addressed or delivered to the relevant address in the Contract or last communicated in writing to the person giving the notice; and

(b) on the earliest date of:

(i) actual receipt;

(ii) confirmation of correct transmission of fax; or

(iii) 3 days after posting.

The Principal, the Contractor and the Principal's Representative shall each promptly notify the other in writing of any change of notice details.

Subject to clause 7A and subclause 37.2, a notice sent by email is not a valid notice for the purposes of the Contract. Where service by email is permitted elsewhere in this Contract, a notice by email shall be deemed to have been given and received;

(a) if addressed to the email address in Items 2 or 4 as applicable; and

(b) on the date of confirmation of transmission of the email;

(c) if after 5pm then is deemed received on the next business day.

7A BCIPA and QBCC Act Notices

Any notice served by the Contractor under the QBCC Act or BCIPA shall be served to the Principal's physical address.

The Principal may serve a payment schedule under BCIPA by email to the email address stated in Item 4."

The applicant's submissions

[22] The applicant observes that a progress claim that is also relied upon as a payment claim for the purposes of *BCIPA* must be served in accordance with *BCIPA* in order to enliven the procedure prescribed by Part 3. Its primary argument concerns the mode of service provided under the contract. As noted, s 103(1) of the Act allows a notice or other document that is required to be served on a person to be served "in the way, if any, provided under the construction contract". The applicant submits that insofar as PC 37 was relied upon as being a payment claim for the purposes of *BCIPA*, it is a "notice" for the purposes of cl 7A, and cl 7A required it to be served on the applicant's physical address. PC 37 was not served at the applicant's physical address. Instead, it was given and received through the Aconex system.

[23] The essential issue of contractual interpretation is whether a progress claim which also constitutes a payment claim under *BCIPA* falls within the definition of a "notice served by the Contractor under the *QBCC Act* or *BCIPA* …" for the purposes of cl 7A of the contract. The applicant contends that it does because a payment claim, which identifies

construction work, indicates the amount claimed and states it is made under the Act, is amply described as a "notice" within the meaning of s 17(1) of *BCIPA*.[2]

[24] If cl 7A does not provide for service of a payment claim under *BCIPA*, the applicant's alternative argument is that the only other provision of the contract which is relevant is cl 7. It relies upon the fact that, subject to certain irrelevant exceptions, a notice sent by email is not a valid notice for the purposes of the contract. It argues that service of PC 37 as a payment claim could not be achieved by emailing the applicant via Aconex, and, in any event, even if the contract permitted service of a payment claim via email, it required the email to be addressed to the email address in Item 2, which was the applicant's solicitor's email.

[25] The applicant's final argument is that, if the conclusion is reached that the contract did not provide a way for effecting service of a payment claim, then service in accordance with one of the modes of service contemplated by s 103(2) *BCIPA* was not achieved. Reliance is placed upon an analogy with *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd*[3] in which the relevant document (an adjudication application) was served by emailing a link from Dropbox to the respondent where the respondent could download copies of the application for itself. McMurdo J (as his Honour then was) concluded that emailing a link from Dropbox did not constitute valid service. McMurdo J concluded that the documents in the Dropbox file could not be said to have been "left" at or "sent" to the relevant office, at least until the applicant went to the Dropbox site and opened the file, and probably not until its contents had been downloaded to a computer at its office.

[26] In this matter, the applicant relies upon the fact that although executives associated with it received the notification email via the Aconex system, they did not download the documents comprising PC 37 that day or at any relevant time thereafter.

[27] In anticipation of the respondent's argument that the applicant's representative, AECOM, downloaded the documents comprising PC 37, the applicant argues that this would not be sufficient service of PC 37 as a payment claim for the purposes of *BCIPA* because:

(a) section 17(1) requires a payment claim to be served "on the person who, under the construction contract concerned, is or may be liable to make the payment" and this was the applicant, rather than its representative;

(b) the contract did not authorise AECOM to accept service of documents on behalf of the applicant, and clauses 7 and 7A of the contract made it plain that the applicant (rather than its representative) was to receive service of notices.

The respondent's submissions in response

[28] The respondent's principal argument is that service of progress claims containing a *BCIPA*-compliant payment claim is governed entirely by cl 37.1 of the contract which requires it to be "given in writing to the Principal's Representative".

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[2] Reliance is placed upon the decision of Einstein J in *Taylor Projects Group Pty Ltd v Brick Department Pty Ltd* [2005] NSWSC 439 at [16] in relation to the meaning of "notice" in s 31(1) of the New South Wales equivalent of *BCIPA*. That section referred only to a "notice", whereas s 103(1) of the Queensland Act refers to a "notice or other document". Still, the decision supports the applicant's submission.

[3] [2015] 1 Qd R 265; [2014] QSC 30.

[29] The contract is said to have expressly contemplated that progress claims and responsive payment schedules might, if compliant, carry the statutory force of *BCIPA*. Accordingly, on a proper construction of the contract, cl 7A does not apply to a payment claim served under cover of a progress claim made pursuant to cl 37. Clause 37 governs to whom such a document was to be given. On this argument, cl 7A applies to other notices under *BCIPA*, such as an adjudication application, and does not govern to whom a payment claim is to be served. Next, the respondent submits that PC 37 was not served by email (so as to encounter the general prohibition in cl 7 that a notice sent by email is not a valid notice for the purposes of the contract). Instead, it was given to the Principal's Representative in accordance with the agreed Aconex system. In any event, PC 37 was actually downloaded and read by the Principal's Representative to whom cl 37 required it to be given and who, by virtue of the contract, was authorised by the applicant to receive it on its behalf.

Was a progress claim which incorporated a payment claim governed by cl 37?

[30] The answer to this question is clearly "yes". The terms of cl 37 in context, including cl 45.3, contemplate that a progress claim which the respondent was required to make under cl 37 might also constitute a payment claim for the purposes of *BCIPA* and that, if it did, a compliant progress certificate would be deemed to be a payment schedule for the purposes of *BCIPA* and to have been issued by the Principal's Representative under its authority as agent of the applicant.

[31] The applicant accepts that a progress claim can be relied upon as a payment claim under *BCIPA*. Its point is that such a payment claim must be served. This directs attention (in the context of the facilitative provisions of s 103(1)) to the way, if any, provided under the construction contract by which a notice or other document under *BCIPA* is authorised or required to be served, or, in the absence of such a contractual provision, to other modes of service. In that regard, s 103(2) contemplates the operation of the provisions of the *Acts Interpretation Act* 1954 and the provisions of any other law about the service of notices.

Upon the proper construction of the contract, is a progress claim which is also a payment claim a "notice" to which s 7A applies?

[32] The applicant's first argument concerns the proper interpretation of "notice" in cl 7A. The essential issue is whether service of a payment claim on the Principal's Representative is authorised by cl 37, which governs the service of such a document, so that such a document is not a "notice" within the meaning of cl 7A.

[33] This is a different question to whether such a document is a "notice" as defined by *BCIPA*.[4] Ordinarily, a payment claim would be regarded as a "notice" as that term is generally used. The fact that *BCIPA* provides for notice of a variety of matters does not alter this conclusion. I accept that a payment claim may be aptly described as a "notice". However, this conclusion simply leads one to s 103. In the context of s 103(1), the issue is whether the construction contract provides a way for the notice (or other document) to be served. The issue is the proper construction of the contract, not the meaning of "notice" in the Act.

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[4] The dictionary to *BCIPA*, Schedule 2, simply defines "notice" to mean written notice.

[34] In the context of this contract, cl 37, not cl 7A, governs to whom and how a progress claim which incorporates a payment claim is to be given. Clause 37 creates a regime for the giving and receipt of a progress claim which also constitutes a payment claim under *BCIPA*. Such a document "shall be given in writing to the Principal's Representative". Clause 37 governs the form of the payment claim and requires the contractor to submit the "Payment Claim Documentation". After receiving the document the Principal's Representative must issue a progress certificate. A compliant progress certificate is deemed to be a payment schedule for the purposes of *BCIPA*.

[35] The subject matter and terms of cl 37, in conjunction with the commercial context of the making of progress claims to the Principal's Representative and their assessment and certification by the Principal's Representative, supports the conclusion that the service of a progress claim which contains a *BCIPA*-compliant payment claim is governed by cl 37.1, and that clause 7A is concerned with other kinds of notice.

[36] The applicant argues that because of the consequences under *BCIPA* of the service of a payment claim, one can appreciate why the principal would want such a document to be served to its physical address, which in this case happens to be the address of its solicitors. This is a reasonable argument, however, I am not persuaded by it. First, it is not obvious why the principal would wish to burden, in the first instance, its solicitors with a host of construction documents. Next, the documents in question were the subject of the agreed Aconex system. The applicant had notice of the payment claim and its representative, AECOM, had the task of reviewing the claims. If the applicant wished to engage its lawyers in the process, including receiving their input into the contents of any payment schedule for the purposes of *BCIPA*, it was free to do so. In those circumstances, it is not apparent why, viewed objectively, the respondent would be taken to agree to service of the same documents to the principal's physical address.

[37] Whilst one might readily infer a mutual contractual intent for adjudication applications and some other notices under *BCIPA* to be served to the principal's physical address, such an intent cannot be readily inferred in relation to a progress claim which incorporates a payment claim under *BCIPA*. The existence of cl 37 which requires the documents to be given to the Principal's Representative, the agreed use of the Aconex system for the lodgement and processing of payment claims, the email notification of the payment claims to the applicant and the applicant's ability to engage its lawyers, if required, favour the conclusion that cl 37, not cl 7A, governs a progress claim which includes a payment claim under *BCIPA*. This construction does not deprive cl 7A of a meaningful operation. It has work to do in relation to adjudication applications and other documents which are authorised or required to be served under *BCIPA*.

[38] The second sentence in cl 7A permits the applicant to serve a payment schedule under *BCIPA* by email to the respondent's email address stated in Item 4. This does not incline me to conclude that a progress claim like PC 37 is a "notice" within the meaning of cl 7A. The second sentence of cl 7A is permissive. Whilst the respondent is not authorised by the contract to serve a notice in the form of a payment claim under *BCIPA* by email, cl 7A envisages service of a payment schedule under *BCIPA* by email as a valid mode of service. The inclusion of such a provision is understandable. Whilst cl 37.2, in conjunction with cl 45.3, deems a compliant progress certificate to be a payment schedule for the purposes of *BCIPA*, circumstances may arise in which the Principal's Representative will not issue a progress certificate in time. A failure or inability to do so would leave the principal open to the hazard of having not responded to a payment claim

under *BCIPA* through a deemed payment schedule. The second sentence of cl 7A allows a principal to protect itself by serving a payment schedule under *BCIPA* or by having its authorised agent, such as a solicitor, do so and to use an email to do so. Such a course avoids any delay associated with service of the document by one of the means envisaged by cl 7 and any delay associated with actual receipt or posting.

[39] The text and context of cl 37.1, including its express reference to *BCIPA*, supports the conclusion that cl 37 governs the service of a progress claim that constitutes a *BCIPA* payment claim. This interpretation is also supported by the need to give the contract a business-like operation. I respectfully adopt and adapt what was said by McDougall J in *The Owners Strata Plan 56587 v Consolidated Quality Projects Pty Ltd*[5]:

> The parties should not be taken to have contracted unaware of the provisions of the Act. Accordingly, it seems to me, if one looks at the matter objectively, the intention of [cl 37][6] of the contract should be taken to be that it deals with claims to progress payments not only having regard to their contractual character but also having regard to their statutory character. Looking at the matter objectively, it seems to me that the parties could not have intended that there should be a dual track mechanism whereby contractual claims were provided and assessed in one way and statutory claims were provided and assessed in quite a different way. That would be a most unbusiness-like way to go about the administration of their contract."

In circumstances in which a progress claim under cl 37 may be a payment claim under the Act[7], the applicant's preferred construction would bifurcate the service and handling of a single document.

[40] Clause 37 should be read as contemplating that such a document would be given to the Principal's Representative. Clause 37 thereby specified upon whom such a document was to be served.

[41] The applicant notes that *The Owners Strata Plan 56587 v Consolidated Quality Projects Pty Ltd* did not include a provision like cl 7A, and submits that the interpretation of the contract urged by the respondent subverts cl 7A. However, this subversion argument assumes the issue to be decided, namely that cl 7A applies to a claim like PC 37. The interpretive task is to reconcile the operation of cl 7A and cl 37. When regard is had to its text and commercial context, cl 37 governs the service of a progress claim that incorporates a payment claim under the Act. Such an interpretation gives the contract a business-like operation.[8] Clause 7A can be sensibly interpreted in the light of cl 37 as addressing other kinds of notices under *BCIPA*, including notices like an adjudication application to which one would expect the applicant, with the assistance of its lawyers and other representatives, to respond. In circumstances in which the parties, by cl 37, contemplated that a progress claim might also constitute a payment claim for the purposes of *BCIPA*, the mode of service in cl 37 should be understood to apply to a payment claim like PC 37.

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5 [2009] NSWSC 1476 at [29].

6 The reference in parentheses in the original is to cl 23 which, like cl 37 of the subject contract, dealt with payment, progress claims and payment certificates.

7 McDougall J referred in *The Owners Strata Plan 56587 v Consolidated Quality Projects Pty Ltd* at [28] to the "dual character" of the document.

8 The observations of McDougall J quoted above are apposite.

[42] On the related issue of agency, to be discussed later, this interpretation produces the convenient result that the Principal's Representative is the authorised agent for the purpose of receiving progress claims which include compliant payment claims under *BCIPA*, whilst the service of adjudication applications and other notices under *BCIPA* is governed by cl 7A, with the appointment of agents for the purpose of receiving and responding to such a notice being a matter for the applicant.

Conclusion on the issue of contractual interpretation

[43] The contract authorised a document such as PC 37 to be given in writing to the Principal's Representative. Upon a proper construction of the contract, cl 7A did not apply to PC 37. As a result, the respondent was not required by cl 7A to serve PC 37 to the applicant's physical address.

Conduct of the parties

[44] This conclusion is reached on the basis of the proper interpretation of the contract in its commercial context. I have not relied upon the fact that the applicant accepted a course of conduct whereby 36 previous progress claims, 23 of which were endorsed as payment claims pursuant to *BCIPA*, were processed through the agreed Aconex system without the applicant ever raising the point that the payment claims under *BCIPA* should have been served to its physical address. In my view, this evidence does not assist the issue of contractual interpretation. If admissible on the question of contractual interpretation, it seems to me equivocal. The acceptance of payment claims by that form of service was not a clear admission that this was the form of service agreed under the contract. The position might have been different had the applicant challenged a payment claim and accepted its mode of service for the purposes of an adjudication under *BCIPA*.[9]

[45] Equally equivocal on the point of contractual interpretation is the fact that the applicant did not, until this proceeding it seems, regard cl 7A as relevant. I note that its adjudication response denied that PC 37 was served upon it, but did not specifically rely upon cl 7A in that regard. That might be said to be some evidence of the applicant's understanding of the contract. However, any belief at that stage that s 7A did not apply to service of a payment claim is not probative of the proper construction of the provision.

[46] Therefore, I do not rely upon the applicant's course of conduct in accepting previous payment claims served in accordance with cl 37, and not raising any issue about the application of cl 7A in its adjudication response, as relevant to the issue of contractual interpretation.

The applicant's alternative argument about service by email

[47] The applicant submits that, if cl 7A does not provide for service of PC 37, then the only other provision of the contract which is relevant is cl 7. In that regard, subject to certain exceptions, cl 7 does not provide for valid notice by email for the purposes of the contract. Therefore, the applicant submits that the respondent did not serve PC 37 in accordance with cl 7 of the contract.

[48] In response, the respondent argues that PC 37 was not served by email. It was served in accordance with cl 37 by using the Aconex system through which the Principal's

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[9] Cf *The Owners Strata Plan 56587 v Consolidated Quality Projects Pty Ltd* [2009] NSWSC 1476 at [35].

Representative received the document. It relies upon the fact that the parties to the contract agreed to the use of the Aconex system and that neither cl 7 nor cl 7A preclude such a means of service. The parties nominated that system for document control and cl 37.1 only requires a progress claim (including one which incorporates a *BCIPA* payment claim) to be "given in writing". To the extent that cl 7 deems when a notice or other document shall have been given and received, it envisages the document being addressed or delivered to "the relevant address in the contract or last communicated in writing to the person giving the notice". In this case, the Principal's Representative's address included both a physical and email address and the relevant notification from Aconex was received by the Principal's Representative via email.

[49] The respondent submits that progress claims, with their BCIPA endorsements, are not precluded "notices" (for email purposes) under cl 7 because Aconex is a stand-alone system for document control, agreed to by the parties, and is not "service by email per se". Progress claims are governed by cl 37, are to be "given in writing to the Principal's Representative" and may be given via the Aconex system.

[50] The present case is different to one in which a notice is simply sent by email, either in the body of an email or as an attachment to it. It relates to a different mode chosen by the parties for the control and communication of documents. The general prohibition on a notice sent by email being a valid notice for the purposes of the contract is consistent with the parties' nominating the Aconex system and preferring it over emails for document control. The parties also made specific provision in cl 7A in respect of a notice served by the contractor under the *QBCC Act* or *BCIPA*. In the present contractual and commercial context, it makes sense for progress claims (including those with *BCIPA* endorsements) to be dealt with in accordance with cl 37 and by the use of the Aconex system to facilitate the review and processing of progress claims.

[51] If a document is not governed by cl 37 and constitutes a "notice", then, subject to cl 7A and subclause 37.2, it is not a valid notice for the purposes of the contract if sent by email. Accordingly, a document such as an adjudication application sent by email will not be a validly served notice for the purposes of the contract. However, its service by email may be effective for the purposes of *BCIPA* if service is effected in accordance with a law about the service of notices.[10] That said, notification by email of the whereabouts of a document may not constitute service of that document.[11]

[52] The better view, it seems to me, is that the applicant's use of Aconex to give PC 37 to the Principal's Representative complied with the contractual mode for the delivery of a progress claim with a *BCIPA* endorsement and did not involve a "notice sent by email" as that term is used in cl 7. This is so even if the giving of the document under the agreed Aconex system included a notification email of that fact to the Principal's Representative and to others. This view is supported by the apparent purpose of cl 7 in discouraging resort to emails and attachments, and a resultant haphazard management of progress claims, rather than by use of the Aconex system for their management and control.

[53] I recognise, however, the applicant's argument that an email notification under the Aconex system is nevertheless a notice sent by email, and is not dissimilar to a case like *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* in which an email

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[10] *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265; [2014] QSC 30.
[11] Ibid at 272 [37].

was sent advising that documents could be found via a link from Dropbox. I incline to the view that the authorised mode of service in cl 37 ("given in writing to the Principal's Representative") is broad enough to engage the use of Aconex, including its system for notification emails, and is not precluded by cl 7 of the contract. However, I am prepared to assume, in accordance with the applicant's alternative argument, that email notification to it, without more, of a payment claim such as PC 37, is not a valid notice under the contract.

Was PC 37 validly served in a way not provided for in the contract?

[54] Section 103(1), in permitting a notice or other document that under *BCIPA* is authorised or required to be served "in the way, if any, provided under the construction contract", is facilitative of service of a document like a payment claim. As s 103(2) makes clear, s 103(1) is an addition to, and does not limit or exclude, the provisions of any other law about the service of notices. In the (assumed) absence of a contractual mechanism for effecting service, consideration must be given to whether service was effected by some other means, such as a manner of service permitted by the *Acts Interpretation Act* 1954, s 39.

[55] Understandably, the applicant did not argue that the general prohibition in cl 7 upon a notice sent by email being a valid notice for the purposes of the contract precluded the respondent from relying upon one of the provisions contemplated by s 103(2) of *BCIPA* in respect of service by email for the purpose of *BCIPA*. Such an argument would have confronted a number of difficulties. It is therefore unnecessary to decide if the contractual preclusion on emails being a valid notice for the purposes of the contract would be ineffective to exclude the effect of s 103(2) by virtue of the "no contracting out" provisions of s 99 of *BCIPA*.

[56] Also, the issue of whether cl 7 is effective to preclude, for the purposes of the contract, notice sent by email does not arise in the present context. This is because the respondent relies, not on email notification of the receipt of PC 37, but on the Principal's Representative's actual receipt of the document when downloaded from the Aconex system on 13 December 2018. Incidentally, PC 37 was read by the Principal's Representative at the time. However, actual service does not require the recipient to read the document. Instead, it requires something in the nature of a receipt of the document.[12]

[57] In many contexts, a document is regarded as having been "served" when it is brought to the notice of the person required to be served.[13] The means by which the person obtains the document are usually immaterial.[14] As Hodgson JA said in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*[15]:

> "… it is clear that if a document has actually been received and come to the attention of a person to be served or provided with a document, or of a person with authority to deal with such a document on behalf of a person or

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[12] *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265; [2014] QSC 30 at 272 [37].

[13] *Queensland Building Services Authority v JM Kelly (Project Builders) Pty Ltd* [2015] 1 Qd R 532; [2013] QCA 320 at 537 [14].

[14] *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542 at 544.

[15] (2007) BCL 292; [2006] NSWCA 259 at [58], cited with approval in *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265; [2014] QSC 30 at 271-272 [35].

> corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with… In such a case, there has been service, provision and receipt".

[58] The applicant relies on *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd*, which concerned service of an adjudication application. The respondent in that case sent an email which attached three documents, including a copy of an email which included Dropbox links to two adjudication applications. Whilst the email and its attachments, when opened, were then served and informed the addressee that there were relevant documents to be found in a certain Dropbox file, some of the documentation comprising the adjudication application was not itself within the email. That put paid to the possibility that the adjudication application could be regarded as duly served.[16] It was insufficient for the document and its whereabouts to be identified absent something in the nature of its receipt.[17]

[59] The present situation is different. The respondent does not rely upon the email notification as itself constituting service because it reported the fact of PC 37 and that it could be found on the Aconex system. The respondent relies upon the actual receipt by the Principal's Representative of PC 37.

[60] In response, the applicant submits that AECOM's receipt of PC 37 is not sufficient service of it as a payment claim for the purposes of *BCIPA* because s 17(1) of the Act requires a payment claim to be served "on the person who, under the construction contract, is or may be liable to make the payment". The argument is that it was the applicant (rather than its representative) who was the person liable to make the payment to the respondent under the contract. Next, it argues that there is no provision in the contract which authorised AECOM to accept service of documents on behalf of the applicant, and that while AECOM was the applicant's representative for the purposes of the contract, cl 7 and cl 7A make it plain that the applicant (rather than its representative) was to receive service of notices.

[61] The first part of the applicant's argument is met by the proposition that a provision such as s 17 of *BCIPA*:

> "… picks up the principles of the general law, that one way to give a document to a company is to give it to a person who is the agent of the company for the purpose of receiving communications on behalf of the company. Such a person is, for that purpose, the company."[18]

As Vickery J stated in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* in the context of the Victorian equivalent to s 17 of the Queensland Act:

> "[141] Section 14(1) of the Act provides that a payment claim is to be served 'on the person who, under the construction contract concerned, is or may be liable to make the payment'. This provision does not operate in a commercial vacuum. It needs to be read in the practical context

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[16] *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265; [2014] QSC 30 at 272 [30].

[17] Ibid at 270 [30] – 272 [37].

[18] *CKP Constructions Pty Ltd v Gabba Holdings Pty Ltd* [2016] QDC 356 at [54] citing *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141; [2010] VSC 199 at [142] – [143].

> of the building industry. Builders, more often than not, whether they are incorporated or unincorporated, act through their servants or agents.
>
> [142] Section 14(1) does not seek to remove the service of a payment claim from this reality. Accordingly, a payment claim may be served upon any person who, under the construction contract concerned, is or may be liable to make the payment, or has the actual or ostensible authority of such a person to accept service.
>
> [143] Receipt of a payment claim by a respondent or its servant or agent with actual or ostensible authority to receive it, for the purposes of s 14(1) of the Act, constitutes service."

[62] In this matter, cl 37 confers express authority upon the Principal's Representative to receive a progress claim that incorporates a payment claim. Service on the Principal's Representative constitutes service on the applicant.

[63] As a matter of construction of the contract, and contrary to the applicant's primary argument, cl 7A did not provide for service of such a document on the applicant at its physical address. To the extent that cl 7 arises for consideration in determining whether AECOM was authorised to receive a progress claim that included a *BCIPA* endorsement, PC 37 was addressed or delivered to the address last communicated in writing to the respondent. The respondent does not rely simply on notice being sent by email. It relies on actual receipt by the Principal's Representative of PC 37 at its given address.

[64] Clause 7 provides for deemed service ("deemed to have been given and received") if actual service is not effected. Clause 7 leaves open actual service. It also creates a general rule that service by email is not a valid notice for the purposes of the contract. It did not affect, however, the use of email under a statutory provision about the service of notices as a means of deemed service or the fact of actual service for the purposes of a provision like s 17 of *BCIPA*. Clauses 7 and 37 can be seen to work harmoniously in the case of a notice or other document that is to be given to the Principal's Representative. Contrary to the applicant's argument, cl 7 does not make it plain that the applicant (rather than its representative) was to receive service of notices.

[65] Therefore, neither cl 7 nor cl 7A affect the express authority conferred by cl 37 for a progress claim containing a compliant payment claim to be given to the Principal's Representative.

[66] My conclusion that AECOM had actual authority to receive PC 37 makes it unnecessary to decide the issue of ostensible authority. It is sufficient to observe that the substantial history of submitting progress claims which incorporated payment claims under *BCIPA* to AECOM supports the respondent's argument that AECOM also had ostensible authority to receive PC 37.[19]

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[19] *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141; [2010] VSC 199 at [150] – [156].

Other arguments

[67] My conclusion in relation to the issues concerning valid service makes it unnecessary to address other arguments, including the respondent's argument that the applicant failed to put on any evidence as to non-receipt of PC 37. Had I been required to decide the point I would have found that the evidence of Mr Ping and Mr Fai was some evidence that the applicant itself did not download PC 37 at the relevant time, but merely received email notification of its receipt. Their affidavits were nicely worded to prove that they did not download from Aconex all of the documents which relate to PC 37. Other evidence, particularly the correspondence exhibited to Mr Burgman's affidavit filed 28 March 2019 at pp 69-94 and paragraph 10(c) of Mr Kurucz's affidavit filed 28 March 2019, suggests that officers or employees of the applicant were parties to communications in December 2018 and January 2019 in relation to PC 37. This leaves open the inference that they in fact received PC 37 and discussed it with the Principal's Representative in the course of the assessment and certification process.

Conclusion

[68] The applicant has not established that PC 37 was not served on it so as to deprive the second respondent of jurisdiction to make the adjudication decision. PC 37 was served on the Principal's Representative, as envisaged by cl 37 in the case of a progress claim which incorporates a payment claim under *BCIPA*. It was served when PC 37 was received by the Principal's Representative on 13 December 2018.

[69] Because cl 37 governed the service of the document, the respondent was not required to serve it to the applicant's physical address. Upon the proper construction of the contract, PC 37 was not a "notice" within the meaning of cl 7A of the contract, even if, in general, a payment claim under *BCIPA* would be considered to be a notice as that term is commonly understood.

[70] The respondent did not rely simply upon email notification of PC 37 to the applicant or to AECOM. This is not a case involving purported service by email in which an email informs its recipient about the whereabouts of a document which is required to be served. This is a case in which the actual document to be served was received by the authorised agent of the principal who was expressly authorised by cl 37 to receive such a document. Receipt of PC 37 by the Principal's Representative therefore constituted valid service for the purposes of s 17 of *BCIPA*.

[71] The adjudicator had jurisdiction to consider the adjudication application. I decline the application that the adjudication decision be declared void. There seems no reason as to why costs should not follow the event. The second respondent has not actively participated in the proceeding. Accordingly, the orders will be:

1. The application is dismissed.

2. The applicant pay the first respondent's costs of and incidental to the proceeding to be assessed on the standard basis.