



Zebicon Pty Ltd v Remo Constructions Pty Ltd [2008] NSWSC 1408

FACTS:

Zebicon Pty Ltd ("Plaintiff") served a statutory payment claim by fax on 19 July 2008 (a Saturday). Remo Constructions Pty Ltd ("Defendant") denied receipt of the payment claim on that day by fax, claiming receipt on 22 July 2008 when the payment claim was received by post, which the Plaintiff had posted earlier.

The Plaintiff sought to enter judgment against the Defendant. The Defendant by relying on the payment claim being received by post on 22 July 2008, served its payment schedule on 4 August 2008. The Plaintiff brought an action against the Defendant alleging that the service of payment schedule was due on 1 August 2008 (ie. 10 business days from the date the fax was sent, 19 July 2008) and accordingly the payment schedule was served out of time.

The Defendant in its defence said that its fax machine was malfunctioning during that period. The Plaintiff says that because the fax transmission was successful, the date of service of the payment claim should be read as 19 July 2008 and not 22 July 2008.

ISSUE:

Whether a failure of receiving a payment claim due to a malfunction of the Defendant's fax machine invalidates the service of a payment claim; whether service of a payment claim by fax out of normal office hours should be regarded as to be served on the next business day?

FINDING:

The Court found that by looking at the successful fax transmission record provided by the Plaintiff, the payment claim is to be regarded as served on 19 July 2008 by fax; The Court distinguished s 31 (1)(c) of the Act with s 31(1)(b) of the Act and allowed fax transmission out of normal office hours as effective service.

QUOTE:

McDougall J at 26 and 28:

[at 26]

"... it can be inferred from the "OK" result indicated by Zebicon's transmission report that communication was established between Zebicon's fax machine and Remo's fax machine on 19 July 2008..."

[at 28]

"...because I think the evidence of Mr Zerilli, coupled with the transmission report, leads to an unrebutted inference that the document was transmitted to and received into the memory of Remo's fax machine on that day."

IMPACT:

This case demonstrates that where a document is served by fax, both the sender and receiver should ensure that the transmission is successful and the fax machine is in working condition able to receive facsimiles.

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