

Court of Appeal
Supreme Court
New South Wales

Case Name: Roberts Co (NSW) Pty Ltd v Sharvain Facades Pty Ltd
(Administrators Appointed)

Medium Neutral Citation: [2025] NSWCA 161

Hearing Date(s): 9 July 2025

Date of Orders: 23 July 2025

Decision Date: 23 July 2025

Before: Hammerschlag CJ in Eq at [1]
McHugh JA at [47]
Griffiths AJA at [54]

Decision: Appeal dismissed with costs.

Catchwords: BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act) ss 13, 14 and 31 — a written construction contract between the parties provides that if a payment claim under s 13 is made by email after 5:00pm on a business day it is deemed to have been received at 9:00am on the next business day (the Deeming Clause) — s 14 of the Act provides that if a payment schedule in response to service of a payment claim is not provided by the respondent to the claimant within the time provided by the relevant construction contract or within 10 business days of the time it is served, whichever time expires earlier, the respondent is liable to pay the amount claimed — the payment claim was served after business hours on Friday 28 February 2025 and the payment schedule was provided on 17 March 2025 — if the Deeming Clause operated to deem service of the payment claim to have been on the next business day ie. 3 March 2025, the payment schedule was within 10 business days of that day, but if

service took place on 28 February 2025 it was out of time — HELD — service of the payment claim took place on Friday 28 February 2025 — the Deeming Clause did not operate to change that time for service to 3 March 2025 because on its proper construction s 14 of the Act permits the parties to agree a shorter period for service of a payment schedule than 10 business days from service of the payment claim but not a longer period — the payment schedule provided was out of time and the respondent became liable to pay the amount of the payment claim

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW) ss 3, 4, 11, 13, 14, 15, 31 and 34
Electronic Transactions Act 2000 (NSW) s 13A

Cases Cited: All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd [2017] NSWCA 289
Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd [2025] NSWCA 103
Demex Pty Ltd v John Holland (2022) 12 QR 438; [2022] QSC 259
Parkview Constructions v Total Lifestyle Windows Pty Ltd [2017] NSWSC 194
Prowse v McIntyre (1961) 111 CLR 264; [1961] HCA 79
Sharvain Facades Pty Ltd (Administrators Appointed) v Roberts Co (NSW) Pty Ltd [2025] NSWSC 606

Category: Principal judgment

Parties: Roberts Co (NSW) Pty Ltd (Appellant)
Sharvain Facades Pty Ltd (Administrators Appointed) (Respondent)

Representation: Counsel:
TJ Breakspear SC / M Sheldon (Appellant)
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Solicitors:
Baker McKenzie (Appellant)
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File Number(s): 2025/00251282

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Supreme Court of New South Wales
Jurisdiction: Equity Division
Citation: [2025] NSWSC 606
Date of Decision: 12 June 2025
Before: Stevenson J
File Number(s): 2025/00122342

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant (**Roberts**) and respondent (**Sharvain**) entered into a written construction contract which included a clause which deemed a payment claim under s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) made by email after 5:00pm on a business day to have been received at 9:00am on the next business day (**the Deeming Clause**).

Section 14 of the Act provides that if a payment claim is served by a claimant on a respondent, but the respondent does not provide a payment schedule in response within the time required under the relevant construction contract or 10 business days, whichever time expires earlier, the respondent becomes liable to pay the amount claimed to the claimant.

On Friday 28 February 2025 at 7:18pm, Sharvain emailed a payment claim to Roberts for \$3,207,999.03 by uploading the claim to Payapps, a computer communication and payment system.

On 17 March 2025, Roberts provided a payment schedule to Sharvain.

If the Deeming Clause operated to deem service of the payment claim for the purposes of s 14 to have been on the next business day ie. 3 March 2025, the payment schedule was within 10 business days of that day, but if service took place on 28 February 2025, it was out of time.

Sharvain sued Roberts in the Equity Division for judgment in respect of a payment claim made pursuant to ss 14(4) and 15(2) of the Act.

The primary judge held that the payment claim was served on 28 February 2025 because the Deeming Clause purported to modify the operation of the Act and was therefore void for all purposes.

Section 15 of the Act provides that where no payment schedule is served by the respondent the claimant may recover the unpaid portion of the claimed amount as a debt due in a court of competent jurisdiction.

The primary judge held that the payment schedule was out of time and entered judgment for Sharvain, accordingly.

The key issue before the Court of Appeal was whether the payment claim was served on 28 February 2025 or 3 March 2025.

Hammerschlag CJ in Eq and Griffiths AJA, dismissing the appeal, held:

The primary judge was correct in finding that the payment claim was served on 28 February 2025 because the document sent by Sharvain was capable of being retrieved by Roberts on 28 February 2025. The Deeming Clause did not operate to change that time for service to 3 March 2025. On its proper construction s 14 permits the parties to agree a shorter period for service of a payment schedule than 10 business days from service of the payment claim but not a longer period. The payment schedule provided was out of time and Roberts became liable to pay the amount of the payment claim.

Per McHugh JA agreeing:

By the Deeming Clause, the parties “otherwise agreed” within the meaning of s 13A(1) of the *Electronic Transactions Act 2000* (NSW). The consequence is not that that section gives statutory force to the parties’ agreement, but rather that s 13A(1) does not apply. The effect of s 14 of the Act is that the 10

business day period from service of a payment claim within which to provide a payment schedule can be shortened but not lengthened and the parties' agreement deeming the time of service of the payment claim to be a time later than 28 February 2025 could not change that effect.

JUDGMENT

INTRODUCTION

- 1 **Hammerschlag CJ in Eq:** This is an expedited appeal from a judgment of the Commercial, Technology and Construction List judge, Stevenson J (**the Primary Judge**) determining that the respondent (**Sharvain**) is entitled to judgment against the appellant (**Roberts**) for \$3,207,999.03 (including interest, \$3,278,043.27) by dint of the operation of ss 14(4) and 15(2)(a)(i) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**): *Sharvain Facades Pty Ltd (Administrators Appointed) v Roberts Co (NSW) Pty Ltd* [2025] NSWSC 606.
- 2 Unless otherwise stated or the context indicates differently, references to:
 - (1) sections are to sections of the Act; and
 - (2) clauses are to clauses in the construction contract between the parties dated 1 February 2023 under which Roberts engaged Sharvain to carry out design, construction and façade works for the paediatric services building at Westmead Hospital (**the Contract**).

THE ACT

- 3 At the outset, a brief synopsis of the objects and operation of the Act might be useful.
- 4 Section 3 states the objects of the Act, which is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services. The Act provides an expeditious procedure for the resolution of contested claims.
- 5 Section 4 provides, relevantly, that a *business day* means any day other than a Saturday, Sunday or public holiday, or 27, 28, 29, 30 or 31 December.

- 6 Section 11 provides that a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract.
- 7 Section 13 provides for a claimant to make a payment claim for a progress payment on the person who, under a construction contract, is or may be liable to make the payment.
- 8 Section 14 provides that the respondent to a claim may reply by providing a payment schedule, which must indicate the amount of the payment (if any) that the respondent proposes to make.
- 9 Section 14(4) provides:

(4) If—

- (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant—
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served, whichever time expires earlier,
- the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

- 10 Section 15 provides that, where no payment schedule is served, the claimant may recover the unpaid portion of the claimed amount as a debt due in a court of competent jurisdiction, or make an adjudication application in relation to the claim.
- 11 Division 2 of the Act provides a regime for the adjudication of disputes.
- 12 Section 31 provides:

(1) Any document that by or under this Act is authorised or required to be served on a person may be served on the person—

...

(d) by email to an email address specified by the person for the service of documents of that kind, or

...

(e) in the case of service by a party to a construction contract on another party to the construction contract—in the manner that may be provided under the construction contract.

(2) Service of a document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the document is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of documents.

(4) In this section—

document includes written notice or determination.

serve includes give, send or otherwise provide.

13 Section 34 provides:

34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not)—

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void.

ELECTRONIC TRANSACTIONS ACT

14 Section 13A of the *Electronic Transactions Act 2000* (NSW) (**ET Act**) is also pertinent, it provides:

13A 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.

...

THE CONTRACT

- 15 The parties entered into the Contract on 1 February 2023.
- 16 The Contract contains the following provisions relating to the service of documents.
- 17 Clause 1.1(4) provides:
- (4) **Business Day** has the meaning given to it under the Security of Payment Act;
- 18 Clause 1.1(23) provides:
- (23) **EPC System** means the electronic system for making and assessing progress claims and providing payment schedules, as approved by the Contractor from time to time, with Payapps (previously known as progressclaim.com (<https://au.payapps.com/>)) being initially approved;
- 19 Clause 23.2(1) provides:

23.2 Timing of progress claims

(1) The Subcontractor may submit a progress claim to the Contractor's Representative through the EPC System at monthly intervals on the day of the month stated in Item 26, in respect of work performed, or to be performed, by the Subcontractor up to the end of the relevant month. Each progress claim must be accompanied with the material set out in Item 27. Only one progress claim may be submitted in any particular month.

- 20 Clause 29.2(2) provides:

29.2 How to give a Notice and when Notice is received

...

(2) Subject to clause 29.2(4), a Notice will be treated as having been given to and received by the addressee at the time set out in the table below. However, if that time is after 5pm on a Business Day or is not on a Business Day, then the Notice will be treated as having been given to and received by the addressee at 9am on the next Business Day.

Method of giving Notice	When Notice will be treated as having been given and received
By the Communication Platform or, where applicable, the EPC System.	At the time the Communication Platform or EPC System confirms delivery has been effected to the addressee.
By hand at the address of the addressee set out in this Subcontract or last notified in writing.	Upon delivery.
By prepaid priority post from an address in Australia to the address of the addressee set out in this Subcontract or last notified in writing.	On the third Business Day (at the address to which it is posted) after posting.
By email to the email address of the addressee set out in this Subcontract or last notified in writing.	On the day it is sent.

21 Clause 29.2(2) was referred to by the Primary Judge and the parties as the “Deeming Clause”. I will use the same definition.

WHAT HAPPENED

- 22 The facts are not in issue.
- 23 At 7:18pm on Friday evening, 28 February 2025, Sharvain emailed a payment claim to Roberts for \$3,207,999.03 (**the claim**) by uploading it on a computer communication and payment system (or **EPC**) called Payapps, which amongst others, facilitates the submission and assessment of progress claims for construction projects.
- 24 Roberts had nominated Mr Thomas Chiu as its representative on Payapps and given his email address. The claim was sent to that address.
- 25 Payapps generated an almost immediate response confirming that the claim had been submitted. It is not disputed that by means of the system the claim had then been made and received, nor is it disputed that no person from Roberts actually became aware of the claim before 3 March 2025.
- 26 Under s 14(4)(b)(ii), Roberts had 10 business days from service of the claim to provide a payment schedule.
- 27 Roberts provided a payment schedule on 17 March 2025 (the payment schedule is in a negative number because Roberts claims it has a cross claim exceeding any claim of Sharvain).
- 28 If the 10 day period started to run on 28 February 2025 the payment schedule was out of time and Sharvain is entitled to judgment under s 15.

- 29 But if time started to run on 3 March 2025 (the next business day) the payment schedule was in time.
- 30 Before the Primary Judge, Roberts argued that the Deeming Clause operated to deem the claim to have been served at 9:00am on 3 March 2025, and the 10 business day period commenced on that day.
- 31 Sharvain's response included that the Deeming Clause is void under s 34 because it modifies or purports to modify the operation of the Act.
- 32 The Primary Judge's succinct dispositive reasoning on the effect of the Deeming Clause and its validity or otherwise was:

What is the effect of the Deeming Clause?

45 As between the Principal and the Contractor, and leaving aside the operation of the Act, the Deeming Clause has effect in accordance with its terms.

46 The effect of the observations of the Court of Appeal in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd*, to which I have referred, appears to me to be that there is nothing in the Act that itself operates to give effect to the Deeming Clause.

47 However, the Court of Appeal also observed, in obiter, that the clause in that case equivalent to the Deeming Clause might well have been void by reason of s 34 of the Act by reason of, in the particular circumstances in that case, having the effect of modifying the operation of the Act.

48 In this case, I agree with the submission of Dr Greinke that the purported effect of the Deeming Clause is to modify the operation of the Act.

49 It does so by purporting to change the meaning of "business day".

50 "Business day" is defined in the Act to be "any day" other than a number of nominated exceptions.

51 Thus, under the Act, a document can be served at any time during those days. Time begins to run, for example under s 14(4)(b)(ii) for the service of a payment schedule, on the next business day.

52 The purported effect of the Deeming Clause, as it applies here, is that time begins to run one day later because a business day is deemed to conclude at 5pm.

53 The purported effect of the Deeming Clause is to postpone the date on which, adopting the definition of "business day" in the Act, the payment claim was taken to be served.

54 Were the Deeming Clause in this case not to be seen as purporting to modify the operation of the Act, there would be no reason why the parties could not agree that if a document is served after 5pm, it should be taken to have been served any number of days later, thus leaving it to the parties to decide with what speed the processes under the Act should operate.

55 For those reasons, my conclusion is that the Deeming Clause purports to modify the operation of the Act and is void.

56 The Deeming Clause must, in those circumstances, be void for all purposes.

57 Thus, the *Electronic Transactions Act* operates in the manner I have set out.

(footnotes omitted)

ROBERTS' CONTENTIONS ON APPEAL

33 Roberts argues that s 31 is concerned with the manner of service not the time of it and that the parties were free to contract with respect to the time at which service is deemed to have occurred. As to email service, Roberts refers to s 13A of the ET Act which makes provision for parties otherwise agreeing which, it argues, adds force to the contention that parties are free to contract with respect to the time at which electronic communications are received.

34 Roberts argues that the Primary Judge erred in finding that the Deeming Clause is void for all purposes and that if it is void at all, it is void only to the extent that its operation is inconsistent with the Act. Roberts invites the Court to deal with the question because of the importance of it to the building industry.

DISPOSITION

35 It seems to me that the application of s 14(4) to the facts of this case is dispositive of it.

36 The claim was sent by Sharvain and capable of being retrieved by Roberts on 28 February 2025. The document was accordingly given, sent or otherwise provided and therefore served at that time within the plain English meaning of the words of s 31(4). There is no requirement that the recipient party must be aware of the receipt of the emailed payment claim: see *Demex Pty Ltd v John Holland* (2022) 12 QR 438; [2022] QSC 259 at [70] (Crowley J). That it was sent after business hours does not matter because it has long been established that, *fractionem diei non recipit lex*, the law does not recognise fractions of a day and treats a day to be twenty-four hours: *Prowse v McIntyre* (1961) 111 CLR 264 at 270–271 (Dixon CJ), 275–276 (Taylor J), 277–281 (Windeyer J); [1961] HCA 79.

- 37 Where s 14(4)(b)(ii) refers to “10 business days after the payment claim is served” this plainly means served within the terms of the Act within a period specified in the Act unaffected by some *inter partes* contractual variation such as that contemplated by s 14(4)(b)(i). The overall effect of s 14(4) and one consistent with the policy of the Act of quick resolution, is that the period for providing a payment schedule can be contractually shortened, but not lengthened.
- 38 Under s 14(4), the time required by the relevant construction contract for the provision of the payment schedule (if the Deeming Clause is effective) commenced on 3 March 2025 and expired 17 March 2025.
- 39 The time of service was 28 February 2025, 10 business days after that date expired on 14 March 2025.
- 40 The 10 business day period after service, expired earlier than the time required by the Contract. Under s 14(4) the earlier time prevails.
- 41 Hence, the payment schedule was out of time and Sharvain was entitled to judgment.
- 42 Thus, even if the Deeming Clause worked, the conclusion of the Primary Judge was correct.
- 43 It follows that it is not necessary to deal with whether the Deeming Clause is valid or void, or the extent of any voidness. The resolution of this question should await a case in which it needs to be answered.
- 44 It is also not necessary to deal with Sharvain’s Notice of Contention.
- 45 The appeal must be dismissed.

CONCLUSION

- 46 The appeal is dismissed with costs.
- 47 **MCHUGH JA:** I have had the advantage of reading in draft the reasons for judgment of the Chief Judge in Equity. Gratefully adopting the terms used by his Honour, I can state in summary form my reasons, which I consider are substantially consistent with his Honour’s, for agreeing that the appeal should be dismissed with costs.

- 48 By cl 29.2 of the Contract, the parties “otherwise agreed” within the meaning of s 13A(1) of the ET Act. The consequence is not that s 13A(1) gives statutory force to the parties’ agreement, but rather that s 13A(1) does not apply. The ET Act may thus be put to one side.
- 49 The appellant specified Mr Chiu’s email address for service for the purposes of s 31(1)(d) of the Act: J[24]. The section was accordingly engaged. The section provides that “[a]ny document that by or under this Act is authorised or required to be served on a person may be served on the person— ... (d) by email to an email address specified by the person ...” It was not disputed in this case that, subject to the effect if any of the parties’ Contract (discussed below), in circumstances in which the ET Act does not apply, service “by email to an email address” within the meaning of s 31(1)(d) occurs when the email is capable of being retrieved by the person to whom it is sent: Tcpt, 9 July 2025, p 25(23-35) and 28(32-46). See *Demex Pty Ltd v John Holland Pty Ltd* (2022) 12 QR 438; [2022] QSC 259 at [70], [91]-[100] per Crowley J and the cases there cited; *Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd* [2025] NSWCA 103 at [129] (referring to *Demex*); cf. *Parkview Constructions v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194 at [76].
- 50 The primary judge found that an email attaching the payment claim was sent to Mr Chiu’s email address and was capable of being retrieved by him on Friday 28 February 2025: J[26], J[42]. That constituted service by email to the specified email address within the meaning of s 31(1)(d). Therefore, for the purposes of the Act, service occurred on 28 February 2025.
- 51 By s 14(4)(b)(ii) of the Act, the appellant had a maximum of 10 business days after the payment claim was served on 28 February 2025 in which to provide a payment schedule. As Hammerschlag CJ in *Eq* points out, s 14(4) contemplates that the parties may by their contract shorten, but not lengthen, that 10 day period. Since the appellant failed to provide a payment schedule within the 10 day period, by force of s 14 it became liable to pay the claimed amount to the respondent.

52 That was the effect of the statute. The parties' agreement in cl 29.2 deeming the time of service of the payment claim to be a time later than 28 February 2025 could not change that effect. That is confirmed by s 34(1), which provides that the provisions of the Act "have effect" despite any provision to the contrary in any contract. The effect of ss 14(4) and 31(1)(d) was that any payment schedule had to be served within 10 business days of 28 February 2025. In particular, although s 31(1) is directed to the manner of service, rather than the time at which service is to be effected (see *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 at [37(2)]), nevertheless, the effect of s 31(1)(d) was that, for the purposes of the Act, the payment claim was served on the appellant on 28 February 2025. That is because s 31(1)(d) authorised service of the payment claim by email to Mr Chiu's email address (which would occur when an email attaching the payment claim was sent to Mr Chiu's email address and became capable of being retrieved by him); service was in fact effected by that means; and the day on which that occurred was 28 February 2025.

53 Accordingly, whatever the effect of cl 29.2 for other purposes, that clause could not have the effect that, for purposes of s 14(4), the payment claim was served later than 28 February 2025. It is unnecessary in those circumstances to determine whether any provision of the Contract should be read down or severed pursuant to cl 32.5; whether s 34(2) operates to render void any provision of the Contract; and, if so, whether the provision is void for all purposes or only, as the appellant submitted, to the extent that the provision would otherwise exclude, modify or restrict the operation of the Act. The resolution of such questions should await a case in which they need to be resolved.

54 **GRIFFITHS AJA:** I agree with Hammerschlag CJ in Eq.

Amendments

23 July 2025 - 23 July 2025 - Headnote amended.